No. 03-23-00531-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

THE STATE OF TEXAS,
Appellant,

v.

THE CITY OF HOUSTON, THE CITY OF SAN ANTONIO, AND THE CITY OF EL PASO,
Appellees.

On Appeal from the
345th Judicial District Court, Travis County

BRIEF FOR APPELLANT

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Statement of the Case

Nature of the Case: The Texas Regulatory Consistency Act ("TRCA") amended several statutory codes to preempt certain municipal and county regulations. Texas Regulatory Consistency Act, 88th Leg., R.S., ch. 899, 2023 Tex. Sess. Law Serv. 2873 (eff. Sept. 1, 2023). The City of Houston sued the State of Texas under the Uniform Declaratory Judgments Act for declarations that the TRCA unconstitutionally abrogates its powers as a home-rule city under a variety of theories. CR.63-114; Tex. Civ. Prac. & Rem. Code §§ 37.001-37.011. The Cities of San Antonio and El Paso intervened to assert similar claims. CR.199-224, 239-44.

Course of Proceedings: The State filed a motion to dismiss all claims for lack of subject-matter jurisdiction. CR.303-17; Tex. R. Civ. P. 91a. Houston filed a traditional motion for summary judgment. CR.122-90; Tex. R. Civ. P. 166a(c). The trial court held a non-evidentiary hearing on both motions. RR.5-102.

Trial Court: 345th Judicial District Court, Travis County
The Honorable Maya Guerra Gamble

Trial Court Disposition: The trial court rendered a final judgment that (1) denied the State's motion to dismiss, (2) granted Houston's motion for summary judgment, (3) declared that the TRCA is unconstitutional both facially and as applied to Houston and to its local laws that were not already preempted, and (4) ordered that those declarations also resolved San Antonio and El Paso's claims. CR.528-30.

Statement Regarding Oral Argument

In this appeal, the Court will have to address several jurisdictional challenges to the Cities' suit, including standing, ripeness, sovereign immunity, and the facial validity of a constitutional challenge to a preemption statute, which applies with greater or lesser specificity across a number of different codes. Because the TRCA is a recently enacted law that has not yet been addressed by any appellate court, the facial validity and merits of the Cities' claims present issues of first impression. For these reasons, the State respectfully requests oral argument and suggests that such argument will assist the Court in its decisional process.

Issues Presented

1. Whether the Cities established the trial court's subject-matter jurisdiction over their claims.
2. Whether the Cities established that they are entitled to judgment as a matter of law that the TRCA is unconstitutional on the grounds that it violates:
   a. article XI, section 5 by imposing "field preemption";
   b. article XI, section 5 by shifting the burden of proof to local governments to show their laws are *not* preempted;
   c. article XVII, section 1 by amending article XI, section 5 without following the constitutional amendment process;
   d. article I, section 19; article II, section 1; or article XI, section 5 because it is vague;
   e. article II, section 1 because it violates the nondelegation doctrine; or
   f. the limitations on the Legislature's authority under article III.
3. Whether any invalid provisions or applications of the TRCA may be severed from the remaining provisions and applications.

Introduction

Although Texas's home-rule cities have considerable autonomy, they remain subordinate to general laws enacted by Texas's Legislature. Tex. Const. art. XI, § 5 (App. E). When the Legislature speaks as to the preemptive effect of its law, courts must listen and give that provision its full effect under ordinary rules of statutory construction. *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7-8 (Tex. 2016). And even when the Legislature does not speak, any ordinance that is repugnant to state law "must fail." *City of Beaumont v. Fall*, 291 S.W. 202, 206 (Tex. [Comm'n Op.] 1927).

Earlier this year, the Legislature spoke about the need for increased uniformity in certain key areas of public policy by passing the Texas Regulatory Consistency Act ("TRCA"). App. B. The only difference between this act and any other that the Texas Supreme Court has found to preempt local law is that the TRCA is not limited to a specific issue or preexisting provision. Instead, it preempts local laws regarding several topic areas where the Legislature has set out what it considers to be comprehensive regulations. Although unusual in Texas law, such a policy is neither unique nor unconstitutional.

The trial court's contrary judgment declaring the TRCA unconstitutional cannot stand. Indeed, the court should not have even reached a decision on the merits because it lacked subject-matter jurisdiction. In their haste to oppose the TRCA before its effective date, the Cities of Houston, San Antonio, and El Paso sued the wrong defendant at the wrong time. Because the State of Texas does not enforce the TRCA and has not threatened to do so, the Cities have no standing to sue the State,

there is no ripe controversy between the Cities and the State, and the State's immunity is not waived for their constitutional challenges. The Court should render judgment dismissing this case or, if it reaches the merits, reverse the trial court's erroneous judgment.

Statement of Facts

I. The Limited Authority of Texas Home-Rule Cities

The Home Rule Amendment of the Texas Constitution permits a city with over 5,000 residents to adopt a charter to govern that city's affairs. Tex. Const. art. XI, § 5(a). Texas now has over 350 such "home-rule cities," which "possess the power of self-government and look to the Legislature not for grants of authority, but only for limitations on their authority." *BCCA*, 496 S.W.3d at 7.

One such limitation is prescribed by the Home Rule Amendment itself. "[N]o charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5(a). In other words, "a home-rule city's ordinance is unenforceable to the extent that it is inconsistent with the state statute preempting that particular subject matter." *BCCA*, 496 S.W.3d at 7. Thus, the Legislature may "withdraw a particular subject from a home rule city's domain" "by general law." *Tyra v. City of Houston*, 822 S.W.2d 626, 628 (Tex. 1991).

II. The Texas Regulatory Consistency Act

In 2023, the Legislature heard complaints that home-rule cities had "begun to regulate far beyond the bounds of their historical roles," creating "a confusing and

complex patchwork of requirements" across a variety of areas. House Rsch. Org., Bill Analysis 5-6, Tex. H.B. 2127, 88th Leg., R.S. (2023). The resulting "lack of consistency," businesses and trade groups lamented, is "especially burdensome for [entities] that operate in multiple jurisdictions and must navigate compliance with potentially contradictory regulatory schemes." *Id.* That burden can "impede economic growth and job creation, especially for small businesses." *Id.* at 6.

In response, the 88th Legislature passed the TRCA, also known as House Bill 2127. TRCA, 88th Leg., R.S., ch. 899, 2023 Tex. Sess. Law Serv. 2873 (eff. Sept. 1, 2023). Although the State "has historically been the exclusive regulator of many aspects of commerce and trade" in Texas, the TRCA found that "in recent years, several local jurisdictions have sought to establish their own regulations of commerce" that differ from state law, "le[ading] to a patchwork of regulations that apply inconsistently across this state." *Id.* § 2.

A. Preemption of local regulation

The TRCA "provide[s] statewide consistency by returning sovereign regulatory powers to the [S]tate," *id.* § 3, amending eight codes—Agriculture, Business and Commerce, Finance, Insurance, Labor, Natural Resources, Occupations, and Property—to state:

> PREEMPTION. Unless expressly authorized by another statute, a municipality or county may not adopt, enforce, or maintain an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of this code. An ordinance, order, or rule that violates this section is void, unenforceable, and inconsistent with this code.

Id. §§ 5-6, 8-10, 13-15 (codified at Tex. Agric. Code § 1.004; Tex. Bus. & Com. Code § 1.109; Tex. Fin. Code § 1.004; Tex. Ins. Code § 30.005; Tex. Lab. Code § 1.005; Tex. Nat. Res. Code § 1.003; Tex. Occ. Code § 1.004; Tex. Prop. Code § 1.004).

In some codes, the TRCA supplements this preemption language. In the Labor Code, for example, the TRCA elaborates that the occupied fields "include[] employment leave, hiring practices, breaks, employment benefits, scheduling practices, and any other terms of employment that exceed or conflict with federal or state law" for private employers. *Id.* § 10 (codified at Tex. Lab. Code § 1.005(b)). Similarly, the Property Code now preempts any "ordinance, order, or rule regulating evictions or otherwise prohibiting, restricting, or delaying delivery of a notice to vacate or filing a suit to recover possession of the premises under Chapter 24." *Id.* § 15. And for the Finance and Occupation Codes, the TRCA carves out narrow exceptions to preemption for conduct related to credit services organizations or credit access businesses, *id.* § 8(b) (codified at Tex. Fin. Code § 1.004(b)); and massage establishments, *id.* § 14(b) (codified at Tex. Occ. Code § 1.004(b)). The TRCA also adds new language to the Local Government Code to preempt certain local regulation of animal businesses. *Id.* § 12 (codified at Tex. Loc. Gov't Code § 229.901).

The TRCA also codifies the preemption rule already prescribed by the Home Rule Amendment. Existing law permits a municipality to adopt an ordinance or rule that is both "for the good government, peace, . . . trade [or] commerce of the municipality" and "necessary or proper for carrying out a power" of the municipality. Tex. Loc. Gov't Code § 51.001. The TRCA reiterates that a municipality may exercise that authority "only if the ordinance or rule is consistent with the laws of this

[S]tate." TRCA § 11 (codified at Tex. Loc. Gov't Code § 51.002); *accord* Tex. Const. art. XI, § 5(a).

B. Enforcement actions by injured parties

Finally, the TRCA creates a new cause of action for any person who suffers an actual or threatened injury from a municipal or county ordinance that was adopted or enforced in violation of any of the TRCA's preemption provisions. *Id.* § 7 (codified at Tex. Civ. Prac. & Rem. Code §§ 102A.002-.003(a)). The TRCA waives governmental immunity for such actions, *id.* (codified at Tex. Civ. Prac. & Rem. Code § 102A.004), for claims that accrue on or after September 1, 2023, *id.* §§ 16-17. The claimant must, however, give the municipality or county notice of the claim at least three months before filing suit. *Id.* § 7 (codified at Tex. Civ. Prac. & Rem. Code § 102A.005).

III. Procedural History

Before the TRCA could take effect, Houston sued the State of Texas under the Uniform Declaratory Judgments Act ("UDJA"), Tex. Civ. Prac. & Rem. Code §§ 37.001-.011, asserting that the TRCA is unconstitutional both on its face and as applied to Houston and to any as-yet-un-preempted regulations. CR.5-62. In its live pleading, Houston alleges that the TRCA:

- Violates the Home Rule Amendment in article XI, section 5 by imposing "field preemption" rather than mere conflict preemption, and by requiring local governments to prove the absence of a preemptive conflict, CR.88-91;

- Improperly amended the Home Rule Amendment without following the procedure for amending the Constitution set out in article XVII, section 1 (App. F), CR.91-93;
- Is unconstitutionally vague in violation of article I, section 19 (due course of law) (App. C) and article II, section 1 (separation of powers) (App. D), CR.93-104;
- Unconstitutionally delegates power to the courts to determine what laws are preempted in violation of article II, section 1, CR.107-09; and
- Exceeds the Legislature's authority because neither the Texas Constitution nor the police power allow the Legislature to limit by statute the power of home-rule cities to adopt local laws that do not conflict with existing state law, CR.109–10.[1]

Houston further asserted that if the TRCA's preemption and enforcement provisions are declared invalid, none of its remaining provisions can be severed and upheld. CR.110-11.

San Antonio intervened and asserted its own UDJA claim against the State, CR.199-224; El Paso later joined in San Antonio's petition, CR.239-44. Unlike Houston, these cities sought only a declaration that the TRCA facially violates the Home Rule Amendment and due-process guarantees by not preempting local law with "unmistakable clarity." CR.206-10.

[1] Houston's live pleading also asserts violations of the Constitution's ban on local or special laws. Tex. Const. art. III, § 56. CR.104-07. But that claim has been expressly abandoned. CR.455 n.1.

The State moved to dismiss the Cities' claims under Texas Rule of Civil Procedure 91a for lack of subject-matter jurisdiction for at least five different reasons. CR.303-17. *First*, the UDJA does not waive the "State's" immunity because it is not the state agency with authority to enforce the TRCA. CR.307-08. *Second*, the Cities lacked standing because their alleged injuries were not traceable to the State and would not be redressed by a judgment against the State. CR.308-10. *Third*, the Cities' challenges were unripe because no one had attempted to enforce the TRCA against the Cities. CR.310-11. *Fourth*, because cities do not have due-process rights, any due-process claim is facially invalid and fails for lack of standing. CR.311-12. *Fifth*, the Cities' claims were otherwise facially invalid and thus insufficient to invoke the UDJA's immunity waiver. CR.312-14.

Houston filed a traditional summary-judgment motion under Rule 166a(c), CR.122-90, on every ground discussed above, CR.140-81. The only evidence attached to the motion was a copy of the TRCA, CR.185-89, which Houston described as the only "facts" material to its motion, CR.131.

Following a hearing, RR.5-102, the trial court rendered a final judgment denying the State's motion to dismiss and granting Houston's motion for summary judgment, CR.528-30 (App. A). The judgment declared that the TRCA "in its entirety is unconstitutional—facially, and as applied to Houston as a constitutional home rule city and to local laws that are not already preempted under article XI, section 5 of the Texas Constitution." CR.528-29. Although not the model of clarity, that declaration, the judgment further ordered, granted the relief requested by San Antonio and El Paso and resolved their claims. CR.529.

Summary of the Argument

I. The judgment must be vacated at the outset because the Cities failed to establish the trial court's jurisdiction over their constitutional challenges to the TRCA for three reasons.

First, the Cities' claims, which were brought before the TRCA's effective date, are unripe because they failed to show any actual injury from its application. Indeed, even now that the TRCA has been in effect for months, they cannot demonstrate a past or likely future injury inflicted by the State that gives rise to a ripe controversy.

Second, the Cities failed to demonstrate standing. Apart from a general lack of a ripe injury, the Cities—which do not even implement the TRCA—also cannot show the injury element of standing as to their vagueness challenge. Properly pleaded, that claim sounds in due process, and political subdivisions do not possess due-process rights. The Cities cannot avoid that limitation by purporting to plead the same claim under the wrong constitutional provision. Moreover, the Cities failed to satisfy the traceability and redressability elements of standing for any of their claims because they sued only the State of Texas. The State is not a proper defendant because the "State" does not enforce the TRCA. Private parties do when they sue under the TRCA to challenge preempted local laws. So do courts when they apply the TRCA in disputes involving statutes that are preempted.

Third, for many of the same reasons, the Cities failed to establish a valid waiver of the State's sovereign immunity from this suit. The UDJA waives immunity for a constitutional challenge to a statute only as to the "relevant governmental entity," and only to facially valid claims. The Cities satisfied neither requirement. The State

is not the proper defendant because, again, it has no enforcement connection to the TRCA. And the Cities' constitutional challenges are "facially invalid" because they are premised on their incorrect interpretations of the Texas Constitution, the TRCA, and relevant precedent.

II. The facial invalidity of the Cities' constitutional challenges should have led to dismissal, but at minimum, it establishes that the Cities were not entitled to judgment as a matter of law on any of their claims.

First, the Home Rule Amendment permits "field preemption" of the type imposed by the TRCA. That Amendment expressly provides that a home-rule city's regulations cannot be inconsistent with state general law. The Texas Supreme Court has construed that limitation to empower the Legislature to withdraw an entire subject from home-rule cities' purview, even if the State does not regulate that subject itself. That is all the TRCA does.

Second, for similar reasons, the TRCA does nothing to amend the Home Rule Amendment—by constitutionally impermissible means or otherwise. Because the Amendment always contained the limitation that the State can withdraw home-rule authority by general law, the TRCA does not exceed the Legislature's authority to enact laws affecting home-rule cities or change anything about the Amendment.

Third, the TRCA says nothing about the burden of proof in a preemption dispute except to the extent that it codifies the rule that a local ordinance must be consistent with state law. Moreover, even if it somehow did require a home-rule city to show local law is not preempted, that would not violate the Constitution.

Fourth, the TRCA's preemption provisions are not unconstitutionally vague under any theory the Cities have advanced. Each term in the Act that the Cities challenged is sufficiently definite and well within the range of other preemption provisions that have been upheld. The TRCA meets the requirement that the Legislature's intent to preempt home-rule cities' laws be "unmistakably clear." And the TRCA is not remotely like one of the sparingly few statutes that has been deemed so broad as to constitute an unconstitutional delegation of legislative power to the courts.

Finally, Houston's putative "as-applied" challenge is merely a facial challenge by another name. Because the statute had never been applied to anyone at the time of judgment, Houston could not bring an as-applied challenge to the TRCA's preemption of one of its programs. It could only challenge the law "as applied" to Houston. Given the limits of Houston's standing, however, such a claim is entirely duplicative of the facial challenge *by* Houston.

III. Because the TRCA is constitutional in its entirety, the Court need not reach the question of whether if any TRCA provision is held invalid, the remainder is not severable and must fall as well. If it does, Houston has failed to preserve any argument beyond its assertion that the TRCA's uncodified provisions cannot be given effect if its codified provisions are struck. That may be true if *all* the codified sections are held unconstitutional, which is exceedingly unlikely given that, as discussed above (at pp. 3-4), the preemption provisions vary in specificity. Given the heavy presumption in favor of severability, at least those specific provisions of the TRCA must stand.

Standard of Review

This Court reviews de novo a trial court's rulings on both a plea to the jurisdiction, *Grossman v. Wolfe*, 578 S.W.3d 250, 255 (Tex. App.—Austin 2019, pet. denied), and a traditional motion for summary judgment, *Sci. Mach. & Welding, Inc. v. Flash-Parking, Inc.*, 641 S.W.3d 454, 461 (Tex. App.—Austin 2021, pet. denied). Because the trial court did not specify which ground in Houston's motion it relied on for its ruling, the Court reviews all grounds asserted in the motion and preserved for review to determine whether any has merit. *Id.* A ground has merit if there are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law on that ground. *Id.*; Tex. R. Civ. P. 166a(c). Because the Cities' claims involve the construction and constitutionality of a statute, they turn on questions of law that the Court reviews de novo. *In re G.P.*, 665 S.W.3d 127, 131 (Tex. App.—Austin 2023, orig. proceeding); *TABC v. Live Oak Brewing Co.*, 537 S.W.3d 647, 654 (Tex. App.—Austin 2017, pet. denied).

Argument

I. The Cities Failed to Establish the Trial Court's Subject-Matter Jurisdiction over Their Claims.

This Court should reverse the trial court's judgment and render judgment dismissing the Cities' suit because the Cities failed to establish subject-matter jurisdiction over any of their claims. It is the plaintiff's burden to affirmatively establish the trial court's subject-matter jurisdiction over each claim. *Cascos v. Tarrant Cnty. Democratic Party*, 473 S.W.3d 780, 784 (Tex. 2015) (per curiam). Because subject-matter jurisdiction is essential to a court's authority to decide a case, *Tex. Ass'n of Bus. v.*

Tex. Air Control Bd., 852 S.W.2d 440, 443 (Tex. 1993), failure to satisfy that burden will result in dismissal of the claim, *see Rattray v. City of Brownsville*, 662 S.W.3d 860, 865 (Tex. 2023).

The Cities failed to meet that burden thrice over. *First*, they failed to establish their pre-enforcement claims were ripe. *Second*, they failed to establish standing either as to their claims generally or as to their vagueness challenges specifically. And, *third*, they failed to establish a route around the sovereign immunity of the only defendant they sued: the State of Texas. Any one of these faults is fatal, and the Court may resolve them in whatever order it chooses. *Id.* at 868.

A. The Cities' claims are not ripe.

The simplest way to resolve this case is to hold that all of the Cities' claims suffer from a common jurisdictional defect: they are not ripe. Ripeness "is a threshold issue that implicates subject matter jurisdiction," *Patterson v. Planned Parenthood of Hous. & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998), which as the party invoking the jurisdiction of the courts, the plaintiff must prove, *see Waco ISD v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000) (assessing whether the plaintiffs could show ripeness).

1. "[L]ike standing, [ripeness] emphasizes the need for a concrete injury for a justiciable claim to be presented." *Patterson*, 971 S.W.2d at 442. But "[w]hile standing focuses on the issue of *who* may bring an action, ripeness focuses on *when* that action may be brought." *Gibson*, 22 S.W.3d at 851 (footnotes omitted). Specifically, in evaluating ripeness, the Court must consider "whether, at the time a lawsuit is filed, the facts are sufficiently developed so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Point Energy Partners Permian, LLC*

v. MRC Permian Co., 669 S.W.3d 796, 812 (Tex. 2023) (cleaned up). "If the plaintiff's claimed injury is based on 'hypothetical facts, or upon events that have not yet come to pass,' then the case is not ripe, and the court lacks subject matter jurisdiction." *Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 683 (Tex. 2020) (quoting *Gibson*, 22 S.W.3d at 852).

Houston's alleged injuries are that it must review its ordinances to determine which ones the TRCA preempts; refrain from maintaining or enforcing ordinances that are or might be preempted and, perhaps, repeal them; find ways to replace services or protections provided under preempted laws; endure uncertainty about which ordinances are preempted; and defend litigation in which parties challenge local laws as preempted. CR.69-74. San Antonio's and El Paso's alleged injuries are simply that the TRCA preempts some of their ordinances. CR.200, 239.

At the time this suit was filed and when the trial court issued its final judgment, the TRCA was not even in effect, so necessarily none of the Cities' claimed injuries had occurred. *Compare* CR.6 (filing date of July 3, 2023) *and* CR.559-60 (final judgment signed August 30, 2023) *with* TRCA § 17 (setting effective date of September 1, 2023). But even now that the TRCA is in effect, the Cities still cannot show that a relevant injury "has occurred or is likely to occur." *Point Energy*, 669 S.W.3d at 812.

2. In the trial court, the Cities suggested that their claims were ripe for seven reasons. None is correct.

First, Houston argued that its claims were ripe because they "presented purely legal issues." CR.358. While it may be true that "[a] case is generally ripe if any *remaining* questions are purely legal ones," *Monk v. Huston*, 340 F.3d 279, 282 (5th

Cir.2003) (emphasis added), that rule of thumb does not obviate the plaintiff's obligation to allege "a past injury or a likely future injury," *Perez v. Turner*, 653 S.W.3d 191, 197 (Tex. 2022); *see also, e.g.*, *Cent. & S.W. Servs., Inc. v. U.S. Env't Prot. Agency*, 220 F.3d 683, 690 (5th Cir. 2000) ("[E]ven where an issue presents purely legal questions, the plaintiff must show some hardship.").[2]

Second, the Cities argued the State would likely qualify as a "person" who could sue to challenge local law under the TRCA, CR.361-62, 437-39, or at least could enforce the TRCA through other causes of action, CR.362. Even if accurate (which is doubtful given that the Legislature specified that the TRCA was to be privately enforceable), such enforcement suits are "'hypothetical'" and "'have not yet come to pass,'" making this case "'not ripe.'" *Lynch*, 595 S.W.3d at 683 (quoting *Gibson*, 22 S.W.3d at 852).

Third, San Antonio tried to bolster this point by noting that, in another suit, it had been served with an amended pleading urging that the TRCA preempted a San Antonio ordinance. CR.438. But that suit involves different parties and does not mean *this* suit is ripe. At most, that shows that there may be a ripening controversy between San Antonio and *that* plaintiff over the TRCA's application.

[2] Because justiciability principles of ripeness and standing are "constitutional prerequisite[s] to maintaining a suit under both federal and Texas law," Texas courts may "look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

Fourth, Houston tried to show that the State is likely to sue because the State intervened in a 2018 suit involving preemption of Austin's paid-sick-leave ordinance. CR.362 (citing *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 433 (Tex. App.—Austin 2018, pet. denied)). That strained effort fails. The Fifth Circuit has considered and rejected that precise argument as insufficient to show a likelihood of enforcement (and, by extension, a ripe injury). *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019). In that case, the City of Austin had sued the Attorney General to challenge a state statute that preempted one of its housing ordinances. *Id.* at 996. The city argued that it had a ripe injury because in "several recent lawsuits" the Attorney General had "intervened in matters related to municipal ordinances." *Id.* at 1000. The court disagreed, explaining that the fact that the Attorney General had "chosen to intervene to defend *different* statutes under *different* circumstances does not show that he is likely to do the same here." *Id.* at 1002. Although that holding appeared in the court's discussion of immunity, the court explained that the same principle applied to other justiciability issues turning on whether there is a current threat of enforcement. *Id.*

Fifth, Houston pointed to the State's acknowledgment that the Attorney General would intervene to defend the TRCA if a city challenged the Act's constitutionality as a defense in a future suit. CR.362 (citing CR.305). On its face, however, that comment described the sort of "contingent" action that has been held not to demonstrate a ripe controversy. *Point Energy*, 669 S.W.3d at 812. Moreover, potential future actions by the *Attorney General* do not show likely enforcement by *the State* because the two are "not interchangeable." *State v. Volkswagen Aktiengesellschaft*, Nos. 21-

0130 & 21-0133, 2022 WL 17072342, at *4 (Tex. Nov. 18, 2022) (per curiam). Nor is *defending* the TRCA's constitutionality interchangeable with *enforcing* the TRCA to invalidate a local law. "Enforcement" is "typically" defined to "involv[e] compulsion or constraint." *City of Austin*, 943 F.3d at 1000. Defending the constitutionality of a statute does nothing to compel Houston (or anyone else) to do, or constrain it from doing, anything at all.

Sixth, the Cities argued that they faced imminent injury because the TRCA's prohibition on "enforcing" and "maintaining" preempted local laws requires them to affirmatively identify such laws and take steps to alter or repeal them. CR.358-60, 438-39. The Cities reached that conclusion based on the putatively "self-enforcing" nature of the TRCA. CR.174, 435. That sort of "reference to the self-enforcing nature" of the TRCA "is inapposite to the analysis of whether the plaintiffs have any controversy with *th[is] defendant[].*" *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001) (en banc) (emphasis added). Because the Cities have not shown that *the State* is likely to enforce any restriction in the TRCA on enforcing or maintaining local laws, they have not demonstrated that *this* suit presents a ripe controversy. *Id.*; *see also infra* pp. 23-28.

Finally, Houston suggested it should be subject to a relaxed ripeness standard as a governmental plaintiff. CR.360-61. For that proposition, Houston relied primarily on the *absence* of a ripeness discussion in *City of El Cenizo v. Texas*, 890 F.3d 164 (5th Cir. 2018), which involved challenges to a state law forbidding "sanctuary city" policies. CR.360-61. But under federal law, that silence is irrelevant: "When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision

does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011).[3] Even more problematic for Houston is that both the Texas Supreme Court and this Court have applied the general ripeness standard to claims brought by governmental plaintiffs. *E.g.*, *Morath v. Tex. Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 848 (Tex. 2016); *State v. City of Austin*, No. 03-20-00619-CV, 2021 WL 1313349, at *8-9 (Tex. App.—Austin Apr. 8, 2021, no pet.) (mem. op.); *City of Waco v. Tex. Nat. Res. Conservation Comm'n*, 83 S.W.3d 169, 175 (Tex. App.—Austin 2002, pet. denied). It should do so again here and hold that the Cities' claims are not yet ripe.

B. The Cities lack standing to bring this suit.

The Cities' constitutional challenges to the TRCA all suffer from a second, common justiciability defect: "[a] court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it." *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012). Standing is a vital element of a plaintiff's burden of proof. *See Abbott v. Mex. Am. Legis. Caucus, Tex. House of Representatives*, 647 S.W.3d 681, 693 (Tex. 2022) ("*MALC*"). To establish standing at this point, the Cities must do more than make allegations; they "must show (1) an 'injury in fact' that is (2) 'fairly traceable' to the defendant's challenged action and (3) redressable by a favorable decision." *Id.*

[3] Houston also relied on *Jacko v. State*, 353 P.3d 337, 341 (Alaska 2015), which held under Alaska law that *local* infringement on the *State's* "sovereign power" was a sufficiently ripe injury. CR.361. But under Texas law, "a city is not a freestanding sovereign," *Wasson Ints., Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 433 (Tex. 2016), and thus has "no sovereignty distinct from the state" to be injured, *Payne v. Massey*, 196 S.W.2d 493, 495 (Tex. 1946).

at 690. That showing "ensures the existence of 'a real controversy between the parties' that 'will be actually determined by the judicial declaration sought.'" *Id.* (quoting *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001)). The Cities failed to show a cognizable injury for the same reasons their claims are not yet ripe. *See supra* Part I.A. They *cannot* show an injury as to their vagueness claims because such claims sound in due process, and the Cities lack due-process rights to be injured. Moreover, the Cities also failed to show that any injuries they hypothetically could have suffered are traceable to or redressable by the State of Texas—the only party they sued—because the State does not enforce the TRCA.

1. The Cities lack any injury to support their vagueness challenges.

In addition to the Cities' general difficulties in establishing a cognizable injury, their vagueness challenges face an additional hurdle: properly pleaded, the claims sound in due-process rights that municipalities do not have. The Cities cannot avoid the problem by pleading the claim under the wrong constitutional provision.

a. "A municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights" because municipalities have no such rights to assert against the State. *Honors Acad., Inc. v. TEA*, 555 S.W.3d 54, 67 (Tex. 2018) (cleaned up). That principle precludes the Cities' vagueness claims. "The vagueness doctrine is a component of the . . . due process guarantee" in article I, section 19 of the Texas Constitution, *Comm'n for Law. Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998), and the Fourteenth Amendment of the U.S. Constitution, *United States v. Williams*, 553 U.S. 285, 304 (2008). Article I, section 19 protects the due-

course rights of a Texas "citizen," and the Fourteenth Amendment protects the due-process rights of a "person," so a municipality is not protected by those provisions against state action. *Honors Acad.*, 555 S.W.3d at 67-68; *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 72 (Tex. 2000); *Tex. Workers' Comp. Comm'n v. City of Bridge City*, 900 S.W.2d 411, 414 (Tex. App.—Austin 1995, writ denied).

Because the Cities' vagueness challenges to the TRCA sound in due-process and due-course-of-law rights that they do not possess, they lack standing to bring those claims. *See, e.g.*, *El Paso County v. El Paso Cnty. Emergency Servs. Dist. No. 1.*, 622 S.W.3d 25, 41 (Tex. App.—El Paso 2020, no pet.).

b. Houston asserted that cities do have standing to bring due-process vagueness challenges under the reasoning of *Wilson v. Andrews*, 10 S.W.3d 663 (Tex. 1999). CR.352. But *Wilson* does not support Houston's standing and it has been overtaken by later Texas Supreme Court precedent.

In *Wilson*, the City of Lubbock argued that a statute "violates due process because it is unconstitutionally vague." 10 S.W.3d at 668. In analyzing the City's standing, the Supreme Court noted that the question of whether a city has standing to bring a due-process challenge remained open notwithstanding dicta in *Proctor v. Andrews*, 972 S.W.2d 729 (Tex. 1998). And the Court *left* the question open by "assum[ing] without deciding that government entities can raise due process and equal protection challenges," 10 S.W.3d at 669, before ultimately rejecting the claim on the merits, *id.* at 671. Although unusual, it is entirely permissible for a state court to *deny* relief on the merits without first resolving every jurisdictional issue in a case. *In re Abbott*, 628 S.W.3d 288, 294 n.8 (Tex. 2021) (orig. proceeding).

Since *Wilson*, the Supreme Court *has* decided that issue and repeatedly confirmed that governmental entities *cannot* raise due-process or due-course challenges. *Honors Acad.*, 555 S.W.3d at 67-68; *Zimlich*, 29 S.W.3d at 72. It has also approved this Court's pre-*Wilson* holding that "governmental entities cannot use Article I rights to invalidate the laws that govern them." *Honors Acad.*, 555 S.W.3d at 68 (citing *City of Bridge City*, 900 S.W.2d at 414). In the light of that more recent precedent, *Wilson* provides no basis for Houston's standing to bring a vagueness challenge.

c. The Cities have also asserted standing to bring their vagueness challenges because they "implement" the TRCA. CR.351-54, 440-41. A political subdivision has limited standing to challenge a statute's constitutionality when (1) "'it is charged with implementing'" that statute, and (2) the challenge is "based on a provision outside the bill of rights and its guarantees to 'persons' and 'citizens.'" *Proctor*, 972 S.W.2d at 734 (quoting *Nootsie, Ltd. v. Williamson Cnty. Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996)). But the Cities' vagueness challenges do not meet either condition.

First, the Cities do not "implement" the TRCA as that term is used in this context because the Legislature has not charged them with "giving practical effect to or ensuring actual fulfillment" of the Act "by concrete measures." *City of Austin v. Travis Cent. Appraisal Dist.*, 506 S.W.3d 607, 617 (Tex. App.—Austin 2016, no pet.) (cleaned up). For example, school districts have standing to challenge the constitutionality of laws governing public education because they are charged with "'the primary responsibility for implementing the state's system of public education.'" *Neeley v. W. Orange-Cove Consol. ISD*, 176 S.W.3d 746, 773-74 (Tex. 2005) (quoting

Tex. Educ. Code § 11.002). Similarly, a city had standing to challenge a statute that required the city to request a private arbitrator to resolve a civil-service dispute. *Proctor*, 972 S.W.2d at 732, 734. And an appraisal district had standing to challenge a statute designating certain land eligible for "productive capacity taxation" because the district was responsible for approving applications for that taxation. *Nootsie*, 925 S.W.2d at 661-62.

By contrast, the TRCA does not require municipalities and counties to do anything to give the Act practical effect or ensure its fulfillment. *City of Austin*, 506 S.W.3d at 617. Indeed, the Cities have conceded the TRCA is "self-enforcing," CR.71, 174, 435, because it "void[s]" existing preempted local laws and prohibits the enactment of new ones, TRCA §§ 5-6, 8-10, 13-15. Because the TRCA does not charge the Cities with taking any affirmative action to implement it, they lack standing to challenge its constitutionality. *Proctor*, 972 S.W.2d at 734.

Second, even if the Cities in some way "implement" the TRCA, they still would not have standing because their claims sound in provisions of article I of the Texas Constitution. *Id.*; *Nootsie*, 925 S.W.2d at 662; *City of Austin*, 506 S.W.3d at 616. Both the Texas Supreme Court and this Court have recognized that to have standing, a political subdivision's constitutional challenge to a statute must rest on "some express constitutional provision outside Article I," which protects individual rights. *City of Bridge City*, 900 S.W.2d at 414; *see, e.g.*, *Neeley*, 176 S.W.3d at 773-74 (article VII, section 1 and article VIII, section 1-e); *Proctor*, 972 S.W.2d at 734 (article III, section 1); *Nootsie*, 925 S.W.2d at 661-62 (article VIII, section 1-d-1(a)). The Cities squarely violate this rule by invoking article I, section 19 or "due process" as the

constitutional basis for their vagueness challenges. CR.93, 104 (Houston); CR.207, 239-40 (San Antonio and El Paso). To that extent, they have pleaded themselves out of standing to bring those claims. *Honors Acad.*, 555 S.W.3d at 68; *City of Bridge City*, 900 S.W.2d at 414.

d. The cities cannot bypass this problem by pleading their vagueness claim under some other provision. Houston tried to do that by insisting that its vagueness challenge was also based on the separation-of-powers principle embodied in article II, section 1. CR.93, 354-55. Not so. A claim that a statute is unconstitutionally vague turns on whether it is so vague that "persons of common intelligence are compelled to guess [its] meaning and applicability" such that it cannot be enforced consistent with federal due-process and state due-course-of-law guarantees. *King St. Patriots v. Tex. Democratic Party*, 521 S.W.3d 729, 743 (Tex. 2017); *Machete's Chop Shop, Inc. v. Tex. Film Comm'n*, 483 S.W.3d 272, 284-85 (Tex. App.—Austin 2016, no pet.). By contrast, in the separation-of-powers context, a plaintiff must show that the statute fails to provide "'reasonably clear'" standards for courts to apply and thereby improperly delegates legislative power to the judiciary. *City of Houston v. Hous. Pro. Fire Fighters' Ass'n, Loc. 341*, 664 S.W.3d 790, 799 (Tex. 2023) (quoting *Edgewood ISD v. Meno*, 917 S.W.2d 717, 741 (Tex. 1995)). The gravamen of Houston's complaint is not that it would not be "reasonably clear" to a judge which laws are preempted—only that the scope of the preemption is too broad. CR.97, 108. Such a claim does not sound in the "nondelegation doctrine," which permits "'standards which are quite broad'" and does not require the Legislature to "detail every rule." *Id.* at 799-800

(quoting *R.R. Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992)).

San Antonio and El Paso likewise tried to salvage their standing by recasting their vagueness claim as violating the Home Rule Amendment because it "fails to preempt local enactments with unmistakable clarity." CR.441. Again, this conflates two issues: under the Home Rule Amendment, "the Legislature must demonstrate *its intent to preempt local law* 'with unmistakable clarity.'" *Hous. Pro. Fire Fighters' Ass'n*, 664 S.W.3d at 804 (quoting *Dall. Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993)) (emphasis added). So, the constitutional issue is the clarity of the Legislature's *intent to preempt*, not the clarity with which a city's ordinance is preempted. *Id.*; *see also Washington v. Associated Builders & Contractors of S. Tex., Inc.*, 621 S.W.3d 305, 313-14 (Tex. App.—San Antonio 2021, no pet). This argument thus collapses with their preemption claim, *City of Laredo v. Laredo Merch.'s Ass'n*, 550 S.W.3d 586, 593-94 (Tex. 2018), for which any injury is not yet ripe, *see supra* Part I.A.

2. Any injuries the Cities may face are not traceable to or redressable by the State.

Assuming that the Cities have established some form of injury, they cannot show that any such injury is traceable to or redressable by the only named defendant—the State of Texas. Indeed, by suing the State, which has no role in enforcing the TRCA, the Cities have apparently "confuse[d] the *statute's* immediate coercive effect on the plaintiffs with any coercive effect that might be applied by the *defendant[].*" *Okpalobi*, 244 F.3d at 426; *see also Heckman*, 369 S.W.3d at 155.

i. As to traceability, the Texas Supreme Court has unequivocally stated that "the State is *not* automatically a proper defendant in a suit challenging the constitutionality of a statute merely because the Legislature enacted it." *MALC*, 647 S.W.3d at 697 (citing *Holt v. Tex. Dep't of Ins.–Div. of Workers' Comp.*, No. 03-17-00758-CV, 2018 WL 6695725, at *5 (Tex. App.—Austin Dec. 20. 2018, pet. denied) (mem. op.)) (emphasis added). Instead, "challenges to the constitutionality of a statute are not properly brought against the State in the absence of an 'enforcement connection' between the challenged provisions and the State itself." *Id.* at 696-97 (citing with approval *Paxton v. Simmons*, 640 S.W.3d 588, 602-03 (Tex. App.—Dallas 2022, no pet.); *Ector Cnty. All. of Bus. v. Abbott*, No. 11-20-00206-CV, 2021 WL 4097106, at *10 (Tex. App.—Eastland Sept. 9, 2021, no pet.); *Holt*, 2018 WL 6695725, at *5).

Here, "the State itself has no enforcement authority" with respect to the challenged statute. *MALC*, 647 S.W.3d at 698. Rather, the TRCA provides that it will be enforced through a private right of action by persons who have been injured by the application of a preempted statute. TRCA § 7 (codified at Tex. Civ. Prac. & Rem. Code §§ 102A.002-.003).[4] Because the State itself has no "enforcement connection" to the TRCA, and "the State is the only defendant," the plaintiff "fail[s] to

[4] In some sense, the TRCA can also be enforced by courts in other litigation in which a party argues that a local law at issue cannot control because it is preempted by the TRCA. *Cf. Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015). But courts are not proper defendants in a pre-enforcement challenge because they are not adverse to litigants appearing before them. *Whole Woman's Health v. Jackson*, 595 U.S. 30, 39-40 (2021).

meet the traceability element of standing." *MALC*, 647 S.W.3d at 697-98; *see also Holt*, 2018 WL 6695725, at *5.

ii. For related reasons, the Cities' alleged injuries are also not redressable by the declaratory judgment against the State. A judgment under the UDJA "does not prejudice the rights of a person not a party to the proceeding." Tex. Civ. Prac. & Rem. Code § 37.006(a). As a result, "the outcome of [this] suit does not affect the[] ability" of any individual, business, or entity other than the State of Texas to seek declaratory or injunctive relief under the TRCA or to invoke its preemptive effect in another case. *In re Kappmeyer*, 668 S.W.3d 651, 655 (Tex. 2023) (orig. proceeding); *see also, e.g.*, *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163 (Tex. 2004). At most, the trial court's judgment could prevent the State from challenging the Cities' ordinances under the TRCA, but the State does not enforce the TRCA. *See supra* pp. 24-25. And stopping the State from doing that which it already does not do would not redress any of the Cities' injuries because, under Houston's theory, it would still need to (among other things) review its laws to determine which ones the TRCA preempts and refrain from maintaining or enforcing such laws lest it be sued by any private party from a small business owner to the Chamber of Commerce to the City of Conroe. *Cf.* CR.69-74. Because the declaratory relief that the Cities sought (and received) cannot redress their alleged injuries, the Cities lacked standing to seek it.

iii. In the trial court, the Cities defended their standing to sue the State on three grounds. None is availing.

First, the Cities argued that because the TRCA includes "agency or instrumentality" and "legal entity" among those "persons" who can sue to enforce the

TRCA, TRCA § 7, that means "state agencies," "the Texas attorney general," or "the State" can sue, CR.70, 346-50, 435-36. Under that theory, however, the Cities could have sued *any* individual, business, or governmental entity in Texas, regardless of whether that party has any intention of suing them under the TRCA. That is plainly wrong. But even if those readings of the definition are correct, they do not support the Cities' standing.

As a threshold matter, Houston gets nowhere by arguing that a TRCA plaintiff may include a state agency or the Attorney General, CR.70, 346—because it sued neither. And the distinction is critical because to show standing to sue the *State*, there must be an enforcement connection between the challenged statute and "the State itself." *MALC*, 647 S.W.3d at 696-98; *see supra* pp. 23-25.

Even if the TRCA's definition of "person" includes the State itself (which is dubious), that would just mean it is theoretically possible that *if* the State were injured by one of the Cities' preempted ordinances in the future, it *could* sue under the TRCA. That is not enough: "[t]o establish standing," a "'threatened injury must be certainly impending to constitute injury in fact'; mere '[a]llegations of possible future injury' are not sufficient." *In re Abbott*, 601 S.W.3d 802, 812 (Tex. 2020) (orig. proceeding) (per curiam) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). Absent any allegation that the State *will* sue the Cities under the TRCA, any injury possibly traceable to the State is "hypothetical," not "actual or imminent," and cannot support standing here. *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008).

Second, Houston argued below that the State can also enforce the TRCA by suing Houston under the UDJA or bringing *ultra vires* claims against Houston officials. CR.347-49. If anything, such an argument is even more speculative than the last because it requires the State to ignore that its own Legislature decided to have this law enforceable by private parties. That the State *might* try to enforce the TRCA through future UDJA or *ultra vires* suits is equally "hypothetical" and insufficiently "actual or imminent" to demonstrate an injury traceable to the State that can support standing. *DaimlerChrysler*, 252 S.W.3d at 304-05.

Houston tried to bridge that gap by citing previous litigation between the State and local governments and officials. For example, it pointed out that, five years ago, the State intervened in a suit involving preemption of Austin's paid-sick-leave ordinance. CR.347-48 (citing *Tex. Ass'n of Bus.*, 565 S.W.3d at 433). And it observed that more recently the State has brought *ultra vires* claims against local officials based on the preemptive effect of state laws. CR.348 (citing *State v. Hollins*, 620 S.W.3d 400 (Tex. 2020); *State v. San Antonio ISD*, No. 04-21-00419-CV, 2022 WL 3045756 (Tex. App.—San Antonio July 27, 2022), *vacated*, No. 22-0775 (Tex. Oct. 27, 2023)). As noted above (at p. 15), the Fifth Circuit has considered and rejected precisely that argument because it is fallacious to assume that because a state official has sued before under a different law, he must intend to do so under this law. *City of Austin*, 943 F.3d at 1002.

Third, San Antonio and El Paso urged that they had sufficiently demonstrated standing because (1) upon the TRCA's effective date, they were "subject[] to notice and litigation by any 'person' claiming a purported preemption"; and (2) "the

mechanism and source of this injury—the Legislature's adoption of [the TRCA]—has already happened." CR.441-42. Perhaps so, but our Supreme Court has already said that "the Legislature's adoption" of the TRCA does not make the State a proper defendant to the Cities' constitutional challenges. *MALC*, 647 S.W.3d at 697. And allegations that the TRCA itself, or unidentified "persons" suing under it, will impair the Cities' rights do not establish a justiciable controversy because they do not show injuries traceable to "the defendant's conduct." *Heckman*, 369 S.W.3d at 155. Nor does declaratory relief against the State redress those alleged injuries because the risk that nonparty "persons" will sue the Cities under the TRCA remains notwithstanding the trial court's judgment. Tex. Civ. Prac. & Rem. Code § 37.006(a); *Kappmeyer*, 668 S.W.3d at 655; *Brooks*, 141 S.W.3d at 163. Because the Cities have failed to show that any putative injury is traceable to or redressable by *this defendant*, they have failed to establish jurisdiction.

C. The UDJA does not waive the State's immunity from this suit.

Even if the Cities could show a justiciable controversy, the trial court still lacked jurisdiction over their claims because the State is immune from suit. The State of Texas enjoys sovereign immunity from suit, *Univ. of Tex. at Austin v. Hayes*, 327 S.W.3d 113, 115 (Tex. 2010) (per curiam), "unless the Legislature clearly and unambiguously waives it," *Christ v. TxDOT*, 664 S.W.3d 82, 86 (Tex. 2023). That immunity implicates a trial court's subject-matter jurisdiction. *Id.* When the State validly asserts its immunity from suit against a pending claim, it deprives the trial court of jurisdiction over that claim, *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex.

2012), unless the plaintiff can affirmatively establish a waiver of or exception to that immunity, *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019).

The Cities relied exclusively on the UDJA for a waiver of the State's immunity from suit for their claims. CR.72 & n.15 (Houston); CR.201, 239-40 (San Antonio and El Paso). The UDJA contains a "limited waiver of immunity for claims challenging the validity of statutes." *MALC*, 647 S.W.3d at 697 n.7. But that waiver only "extends to 'the *relevant* governmental entities'" for facially valid claims. *Id.* (quoting *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (Tex. 2009)) (emphasis added); *id.* at 698. Neither condition exists here.

1. The State is not the proper defendant under the UDJA.

In the trial court, Houston made the blanket assertion that the UDJA waives "the State's" immunity for any claim challenging "the constitutionality of a state statute." CR.342. Houston is wrong: even in a UDJA case, "[t]he identity of the relevant governmental entity for waiver purposes necessarily depends on the statute being challenged." *MALC*, 647 S.W.3d at 697 n.7. Again, under this statute-specific inquiry, "the State is not automatically a proper defendant in a suit challenging the constitutionality of a statute merely because the Legislature enacted it." *Id.* at 697 (citing *Holt*, 2018 WL 6695725, at *5). Moreover, because the State is "not interchangeable" with other state governmental actors, the State is not a general catchall defendant for complaints about state government. *Volkswagen*, 2022 WL 17072342, at *4. Instead, as in the traceability analysis, there must be an "'enforcement connection' between the challenged provisions and the State itself." *MALC*, 647

S.W.3d at 697-98. As the State just demonstrated, it lacks the necessary "enforcement connection" to the TRCA to be a "relevant governmental entity" whose immunity is waived by the UDJA for a constitutional challenge to that act. *See supra* pp. 23-28. Accordingly, the State retains its immunity from suit for all of the Cities' challenges to the TRCA. *MALC*, 647 S.W.3d at 697-98.

The authorities cited by Houston in the trial court are not to the contrary. *First*, it relied on cases involving UDJA claims against specific state *agencies*. CR.342 & n.8 (citing *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69 (Tex. 2015); *TEA v. Leeper*, 893 S.W.2d 432 (Tex. 1994)). That those agencies were the "relevant governmental entity" in those cases says nothing about whether the State is here. *Volkswagen*, 2022 WL 17072342, at *4. *Second*, Houston cited *Heinrich*, CR.342 & n.8, but the footnote upon which it relied merely "requires that the *relevant governmental entities* be made parties." *Heinrich*, 284 S.W.3d at 373 n.6 (emphasis added). It says nothing about which entity that might be. *Third*, Houston cited section 37.006(b) of the UDJA, which requires that the Attorney General be served when a state statute's constitutionality is challenged. CR.342 & n.8. But as the Supreme Court has explained, that service requirement does *not* mean that "the State is re-

quired to be made a party to the proceeding" and is thus "consistent with the conclusion that the State is not automatically a proper defendant in a suit challenging the constitutionality of a statute." *MALC*, 647 S.W.3d at 697.[5]

2. The Cities' constitutional challenges to the TRCA are all facially invalid.

The UDJA does not waive the State's immunity from this suit for a second reason: the Cities' constitutional challenges to the TRCA are all facially invalid. "Although the UDJA generally waives immunity for declaratory-judgment claims challenging the validity of statutes," the relevant governmental entity's "'immunity from suit is not waived if the constitutional claims are facially invalid.'" *MALC*, 647 S.W.3d at 698 (quoting *Klumb v. Hous. Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 13 (Tex. 2015)). That jurisdictional inquiry "hinges on [the Court's] interpretation of the provisions at issue" and necessarily "touches the merits" of the constitutional claims. *Id.* at 698-99; *see, e.g.*, *TEA v. Devereux Tex. League City*, No. 03-22-00172-CV, 2023 WL 3325932, at *3-4 (Tex. App.—Austin May 10, 2023, no pet.).

In the trial court, Houston emphasized the Supreme Court's comment that assessing a claim's facial validity is not necessarily co-extensive with resolving the claim's merits. CR.364-65 (citing *MALC*, 647 S.W.3d at 698-99). That is a distinction without a difference here. Though the trial court also "grant[ed] the relief that [San Antonio and El Paso] sought," its judgment is based entirely on the court's

[5] Beyond Houston's incorrect reading of the UDJA, the Cities have relied on the same arguments to establish an "enforcement connection" for standing and sovereign-immunity purposes. CR.345-49, 434-36. Those arguments fail for the same reasons. *See supra* pp. 23-28.

grant of Houston's summary-judgment motion. CR.528-29 (stating that the court declares the TRCA unconstitutional "[f]or the reasons stated in Houston's MSJ"). Because Houston insisted that no evidence was required to consider its claims, CR.131, the question of whether those claims are facially invalid or fail as a matter of law collapses. And, as will be discussed next, because the Cities' claims are all based on their misunderstanding of the constitutional provisions on which they rely, each claim is facially invalid. As a result, the Cities are not entitled to judgment as a matter of law on their claims, *and* the trial court lacked jurisdiction because the UDJA does not waive the State's immunity for those claims. *MALC*, 647 S.W.3d at 698.

II. The Cities Do Not Have Facially Valid Claims That the TRCA Is Unconstitutional, Let Alone a Right to Judgment as a Matter of Law.

If this Court reaches the merits, it should reverse the trial court's final judgment. Under Texas law, there is a strong presumption that the TRCA is constitutional. *Hous. Pro. Fire Fighters' Ass'n*, 664 S.W.3d at 798. "In line with this presumption, if a statute is susceptible to two interpretations—one constitutional and the other unconstitutional—then the constitutional interpretation will prevail." *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 754 (Tex. 2020). Moreover, because the Cities have brought facial challenges, they must show that the TRCA "always operates unconstitutionally." *Tenet Hosps. Ltd. v. Rivera*, 445 S.W.3d 698, 702 (Tex. 2014).

The Cities' constitutional challenges to the TRCA fail to carry the "'high burden to show unconstitutionality.'" *EBS Sols.*, 601 S.W.3d at 754 (quoting *Patel*, 469 S.W.3d at 87). *First*, nothing in the Home Rule Amendment requires the Legislature to preempt one local law at a time by enacting a conflicting state counterpart. *Second*,

the TRCA falls squarely within the Legislature's power, expressly reserved by the Home Rule Amendment, to preempt local law. *Third*, the TRCA does not address, let alone change, the burden of proof to show a preemptive conflict under the Home Rule Amendment. *Fourth*, the TRCA is neither unconstitutionally vague nor an improper delegation of authority. To the contrary, it is entirely in line with other preemption language the Texas Supreme Court has construed and upheld. *Fifth*, Houston's putative "as-applied" challenges are entirely duplicative of its facial challenges and add nothing to its claims.

A. Houston's claims based on the Home Rule Amendment fail.

Although pleaded under three (or possibly four) nominally different theories, Houston's primary claim is that the TRCA violates the Home Rule Amendment by preempting "fields" of regulation rather than by preempting existing local laws individually through the enactment of state statutes that directly conflict with a local counterpart. CR.81-88. Each of these claims falters at the outset because the TRCA also applies to counties, TRCA §§ 5-10, 13-15, which are not covered by the Home Rule Amendment, *see City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 807-08 (Tex. 1984) (describing counties as "non-home rule entities"). Because the TRCA cannot "operate[] unconstitutionally" as to those entities under Houston's theories, a facial challenge cannot stand. *Tenet Hosps.*, 445 S.W.3d at 702. Leaving that issue aside, these claims are facially invalid because they read a limitation into the Home Rule Amendment that does not exist.

1. The TRCA falls within the Legislature's broad power under the Home Rule Amendment to preempt local laws.

a. Houston's primary theory is that the TRCA exceeds the power of the Legislature under article III, violates the Home Rule Amendment, or both, simply by putatively creating a theory of field preemption not recognized by state law. CR.81-88. Under the Home Rule Amendment, "no [home-rule] charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5(a). That prohibition renders a home-rule city's ordinance "unenforceable to the extent that it is inconsistent with the state statute preempting that particular subject matter." *BCCA*, 496 S.W.3d at 7.

The Legislature can wield that preemption principle proactively, "withdraw[ing] a particular subject from a home rule city's domain" "by general law." *Tyra*, 822 S.W.2d at 628; *see also Glass v. Smith*, 244 S.W.2d 645, 649 (Tex. 1951). Indeed, "[d]eciding whether uniform statewide regulation or nonregulation is preferable to a patchwork of local regulations is the Legislature's prerogative." *City of Laredo*, 550 S.W.3d at 592-93. As a result, "[t]he question is not whether the Legislature *can* preempt a local regulation . . . but whether it *has*." *Id.* at 593.

Neither the Home Rule Amendment's text nor the Texas Supreme Court's authoritative constructions of it preclude the preemption effected by the TRCA. The Legislature has defined certain "field[s] of regulation" by reference to existing state law. TRCA §§ 5-6, 8-10, 13-15. And it has determined that, in those fields, existing state law should be made comprehensive by prohibiting local regulation in the same

field. *Id.* In that way, the Legislature has "withdraw[n]" those "particular subject[s] from a home rule city's domain," *Tyra*, 822 S.W.2d at 628, and decided that beyond what state law already prescribes, "nonregulation is preferable," *City of Laredo*, 550 S.W.3d at 593. Local laws that regulate in those fields are necessarily "inconsistent" with the TRCA and are thereby preempted. Tex. Const. art. XI, § 5(a); *BCCA*, 496 S.W.3d at 7.

b. Houston has made three arguments for why the Legislature cannot preempt more than one local laws by a time by defining topics in which those home-rule cities may not regulate. CR.153-63. Each misunderstands the Home Rule Amendment and the precedent construing it.

First, Houston contended that, by using the term "field," the TRCA imposes *federal-law* field preemption on home-rule cities. CR.154. That cannot happen, Houston urged, because Texas law has no analog and, regardless, the TRCA does not satisfy the federal test for finding field preemption. CR.154-59. Houston is wrong on all counts.

To begin, the TRCA does *not* impose federal-law field preemption. Under federal law, as Houston concedes (at CR.156), field preemption is a form of implied preemption. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376-77 (2015). In the absence of an "express preemption provision," a federal court will "infer[]" that Congress decided that federal law will exclusively govern a "field"—and thereby preclude state regulation—from an unusually "pervasive" regulatory framework or from "a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Arizona v. United States*, 567 U.S.

387, 399 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). By contrast, as Houston also concedes (at CR.156), the TRCA is a form of *express* preemption over specifically (if broadly) defined regulatory areas. TRCA §§ 5-6, 8-10, 13-15. Merely labeling those areas "fields" does not mean that the Legislature imported federal law on a type of implied preemption into a Texas express-preemption statute. And the express preemption at issue in this case does not become implied field preemption simply because the TRCA expressly preempts multiple local laws.

That distinction also answers Houston's remaining arguments. Houston is correct that the Texas Supreme Court has held that "[t]he mere 'entry of the state into a field of legislation . . . does not automatically preempt that field from city regulation'" in the federal sense. *City of Laredo*, 550 S.W.3d at 593 (quoting *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982)). But the TRCA does not "merely enter" into regulatory fields; it expressly preempts any local laws in those fields, which Texas law allows. *Id.* at 592-93; *Tyra*, 822 S.W.2d at 628. And because there is no need to "infer" whether the Legislature intended to preempt a regulatory field, *Arizona*, 567 U.S. at 399, there is no need to examine whether the TRCA achieved the "total displacement" of a given field—or any other aspect of the federal field-preemption test for that matter, *contra* CR.158-59. The only question is whether a law falls within the scope of the express preemption provision—which the Legislature can define however it wants, including any exception it so chooses. *E.g.*, *Dall. Merch.'s*, 852 S.W.2d at 491-92.

Second, Houston argued that the Home Rule Amendment requires a "direct conflict" between a state statute and an analogous local law. CR.159-61. Not so. The Home Rule Amendment's text prohibits local charters and ordinances that are "inconsistent" with state general law, Tex. Const. art. XI, § 5(a), which the Texas Supreme Court has repeatedly affirmed to mean that the Legislature can prohibit "home-rule cities from regulating that subject matter." *City of Laredo*, 550 S.W.3d at 598; *accord BCCA*, 496 S.W.3d at 7; *Tyra*, 822 S.W.2d at 628; *Glass*, 244 S.W.2d at 649; *see also, e.g.*, *Dall. Merch.'s*, 852 S.W.2d at 491 (upholding preemption of local "regulation of alcoholic beverages").

Houston has tried to dismiss that consistent line of decisions as "loose language." CR.161. Tellingly, the only counter it offered was a *dissent* from one of those decisions. CR.161 (citing *BCCA*, 496 S.W.3d at 30 n.1 (Boyd, J., dissenting in part)). Even that dissent does not help Houston. Justice Boyd observed only that "legislative intent" to preempt alone does not render a local law unenforceable; that local law also must be "inconsistent with state law." 496 S.W.3d at 30 n.1. This case does not concern nebulous questions of intent. *Contra* CR.161. The *text* of the TRCA preempts local regulations. TRCA §§ 5-6, 8-10, 12-15. As a result, even under Justice Boyd's view, the question is whether there is "any statutory provision" reflecting "that the Legislature favored 'statewide uniformity of enforcement.'" *BCCA*, 496 S.W.3d at 29. There is. TRCA §§ 2(1), 3.

Third, Houston relatedly urged that preemption can occur only when a local law clashes with a "state regulatory counterpart" that affirmatively regulates "the same

items." CR.162. Again, that is inconsistent with the Texas Supreme Court's repeated statements that the Legislature may "withdraw" subjects from local regulation regardless of the existence of corresponding state regulation. *City of Laredo*, 550 S.W.3d at 592; *Tyra*, 822 S.W.2d at 628; *Glass*, 244 S.W.2d at 649. Indeed, that Court has even held that the Legislature may decide that "*nonregulation* is preferable to a patchwork of local regulations." *City of Laredo*, 550 S.W.3d at 593 (emphasis added).

Apart from repeating the same inapposite cases declining to adopt federal-style field preemption and irrelevant factors about whether the federal test is satisfied, *e.g.*, CR.162 & n.84, Houston's only counter is to observe that local regulation "'in harmony'" with state law is "'acceptable,'" CR.162 (quoting *City of Laredo*, 550 S.W.3d at 593). This ignores that if the Legislature "withdraw[s]" a subject from local rule in favor of "nonregulation," local regulation of that subject is by definition *not* "in harmony" with state law. *City of Laredo*, 550 S.W.3d at 592-93. Because the TRCA has withdrawn the subject matters it covers from local rule in favor of comprehensive statewide regulation, any effort by the Cities to depart from state law is similarly inconsistent within the meaning of the Home Rule Amendment and thereby preempted.

2. The TRCA does not amend the Home Rule Amendment or exceed the Legislature's authority.

a. For similar reasons, Houston's related claim that the TRCA violates article XVII, section 1 of the Texas Constitution by "amend[ing]" (or partially repealing) the Home Rule Amendment outside the constitutional-amendment process, CR.91-

93, is facially invalid. Specifically, Houston has urged that the TRCA effectively amends the Home Rule Amendment by attempting to: (1) "regain for the Texas Legislature the sovereign power given by the Texas people to home rule cities"; (2) "relegate constitutional home[-]rule cities to the status of general[-]law cities"; and (3) remove "home[-]rule cities' authority to regulate in a host of areas." CR.167-68.[6] Because properly understood, the Home Rule Amendment permits precisely what the TRCA did, *see supra* Part II.A.1, the TRCA can hardly be said to have amended the Home Rule Amendment—through unconstitutional means or otherwise.

Put another way, Houston's arguments fail. The State, acting through its Legislature, can always exercise its broad police powers within constitutional limits. *Travelers' Ins. Co. v. Marshall*, 76 S.W.2d 1007, 1011 (Tex. 1934). *Contra* CR.179-80 (asserting that the TRCA exceeds the scope of the Legislature's power). The Home Rule Amendment does not impose a stand-alone limit on the Legislature's power because the regulatory power granted to home-rule cities has always been subject to being "withdraw[n]" by the Legislature by general law. *City of Laredo*, 550 S.W.3d at 592; *Tyra*, 822 S.W.2d at 628; *Glass*, 244 S.W.2d at 649. As a result, there is no need for the Legislature to "regain" power over a regulatory field; it always had such

[6] Houston also argued that the TRCA amends the Home Rule Amendment by purporting to create a special law, CR.167, and "shifting the burden of proof" to home-rule cities "to show that none of their local laws or regulations are preempted," CR.168. Because Houston has withdrawn any assertion that the TRCA is a "special law," CR.455 n.1, this brief does not address the first. It addresses the second in Part II.A.3, *infra*, when the State explains why Houston's separate burden-shifting claim is facially invalid.

power. Tex. Const. art. XI, § 5. And if exercising that power places a home-rule city on the same footing as a general-law municipality in that field, that is likewise legitimate. As the Supreme Court has described it, "[g]eneral-law municipalities lack the power of self-government and must look to the Legislature for express grants of power. So too must a home-rule city whose self-governance has been legislatively abrogated." *City of Laredo*, 550 S.W.3d at 598 (footnote omitted).

b. Houston cannot avoid that conclusion by arguing that three of the TRCA's provisions evince a "goal" to "repeal constitutional home rule." CR.168, 170. As Houston's own authority establishes, "[t]he focus of [the] preemption analysis is . . . not on whether the Legislature had a goal" in mind, but on the effect of the statute. *BCCA*, 496 S.W.3d at 30 (Boyd, J. dissenting). None of the provisions invoked by Houston are inconsistent with the Legislature's authority under the Home Rule Amendment.

First, Houston complained (at CR.168) that the TRCA's description of the State's historical role as "exclusive regulator of many aspects of commerce or trade" clashes with section 51.001(1) of the Local Government Code, which authorizes municipalities to adopt regulations "for the trade and commerce of the municipality." Section 51.001(1)'s authorization to regulate certain types of "trade and commerce" actually does not refute the TRCA's description that "many aspects of commerce or trade" remained in the hands of the State. And, in any event, that *statutory* authority has always been subject to legislative revision. The TRCA makes that clear by reiterating that any exercise of that authority must be "consistent" with other

state law, as required by the Home Rule Amendment. TRCA § 11 (codified at Tex. Loc. Gov't Code § 51.002).

Second, Houston quarreled (at CR.168) with the TRCA's statement that its purpose is to "return[] sovereign regulatory powers to the state where those powers belong." TRCA § 3. That argument again ignored the text, which reflects a purpose of returning that power to the State "in accordance with" the Home Rule Amendment. *Id.* Moreover, as it merely restates Houston's complaint that the State is attempting to "regain" sovereign power from home-rule cities, CR.167, it fails for the reasons already discussed, *see supra* pp. 38-39.

Third, Houston found it "damning" that the TRCA declares that home-rule cities can still exercise the powers that general-law municipalities may have. CR.168 (citing TRCA § 4). Again, however, it is settled that the Legislature may "abrogate[]" a home-rule city's self-governance in an area and thereby subject it to the same constraints as general-law municipalities. *City of Laredo*, 550 S.W.3d at 598.

3. The TRCA does not unconstitutionally change the burden of proof for a preemption dispute.

Houston also claims that the TRCA violates (or amends) the Home Rule Amendment by shifting the burden of proof from a person claiming preemption to a home-rule city defending a local law as not preempted. CR.88-91, 163-66, 168. This claim focuses on section 11 of the TRCA, which provides that "a municipality may adopt, enforce, or maintain an ordinance or rule only if the ordinance or rule is consistent with the laws of this state." TRCA § 11 (codified at Tex. Loc. Gov't Code

§ 51.002). According to Houston, CR.163-66, this provision improperly flips the ordinary rule that "[t]he party seeking to avoid enforcement of a local law bears the burden of establishing that state law preempts it." *Hous. Pro. Fire Fighters' Ass'n*, 664 S.W.3d at 804.

This claim suffers from the same problem as all of Houston's claims under the Home Rule Amendment: it does not establish a facial claim because the TRCA also applies to counties, TRCA §§ 5-10, 13-15, which are "non-home rule entities," *City of College Station*, 680 S.W.2d at 807-08. It also fails as a matter of law for two additional reasons.

First, section 11 of the TRCA does *not* shift the burden of proof in preemption cases, as Houston surmised. Instead, it merely restates the rule prescribed by the Home Rule Amendment in different words. *Compare* Tex. Const. art. XI, § 5(a) (mandating that no ordinance "shall contain any provision inconsistent with . . . the general laws enacted by the Legislature of this State"), *with* TRCA § 11 (stating that a municipality "may adopt, enforce, or maintain an ordinance or rule only if the ordinance or rule is consistent with the laws of this state"). Because section 11 only restates a pre-existing rule, it does not purport to supersede the allocation of burdens in a preemption case.

Second, even if section 11 could be construed to shift a burden of proof, it is well within the Legislature's prerogative to do so. As a general rule, "[t]he power and authority of a state legislature is plenary and its extent is limited only by the express or implied restrictions thereon contained in or necessarily arising from the Constitution itself." *Gov't Servs. Ins. Underwriters v. Jones*, 368 S.W.2d 560, 563 (Tex. 1963).

"It has never been doubted that" this power extends to burdens of proof or that "Legislatures can establish presumptions either of fact and rebuttable, or of law and irrebuttable." *Amerada Petroleum Corp. v. 1010.61 Acres of Land*, 146 F.2d 99, 102 (5th Cir. 1944).

Houston can cite nothing in the Home Rule Amendment's text or the cases interpreting it that changes that general rule by assigning that burden to anyone. To the contrary, when the Texas Supreme Court described the burden of proof in preemption cases, it cited a *federal* preemption case. *Hous. Pro. Fire Fighters' Ass'n*, 664 S.W.3d at 804 & n.85 (citing *Mo. Pac. R.R. v. Limmer*, 299 S.W.3d 78, 84 & n.30 (Tex. 2009)). Under federal law, the party claiming preemption shoulders that burden because there is a presumption against preemption of state law, *Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 529 (5th Cir. 2012), which is rooted in federalism concerns that arise from our system of dual sovereignty, *see Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001). But cities are not sovereigns. *Wasson*, 489 S.W.3d at 433. When the Texas Supreme Court nonetheless decided the same burden should apply in state preemption cases, it described the burden as applying to anyone seeking to avoid "local law." *Hous. Pro. Fire Fighters' Ass'n*, 664 S.W.3d at 804. Because that category includes regulations by counties and general-law municipalities that are not covered by the Home Rule Amendment, the associated burden of proof can in no way be derived from the Amendment. And because nothing in the Home Rule Amendment addresses the burden of proof in state

preemption cases, the Legislature may change that burden at any time without violating the Amendment. *Cf. Gov't Servs. Ins.*, 368 S.W.2d at 563. Any claim to the contrary is facially invalid and should be dismissed.

B. The TRCA is not unconstitutionally vague under any theory the Cities have pursued.

Equally invalid are the Cities' claims that the TRCA is unconstitutionally vague. CR.93-104, 107-09 (Houston); CR.207-10, 239-40 (San Antonio and El Paso). Rather than splitting the same theory across three constitutional provisions, however, the Cities' vagueness challenges assert three distinct claims. *First*, the Cities claimed that the TRCA is void for vagueness in violation of article I, section 19's guarantee of "due course of law" or due process. CR.97, 207-08. *Second*, the Cities claimed that the TRCA violates the Home Rule Amendment because it does not preempt local laws with "unmistakable clarity." CR.98, 207-08. *Third*, Houston claimed that the TRCA's alleged vagueness violates article II, section 1—the separation-of-powers provision—because it "impermissibly delegate[s] responsibility for defining a law's meaning and scope to those who enforce it and the courts that interpret it." CR.97; *see also* CR.107-09. In addition to repeatedly conflating issues, these claims are invalid because the TRCA is sufficiently clear to satisfy either the due-course-of-law provision or the relevant preemption standard, and it does not delegate improper power to the courts, which are always charged with enforcing preemption.

1. The TRCA provides sufficient guidance to satisfy due process.

Assuming the Cities can assert a due-process vagueness claim (and they cannot, *see supra* Part I.B.1), the TRCA is not unconstitutionally vague. "To survive a vagueness challenge, a statute need not spell out with perfect precision what conduct it forbids." *Benton*, 980 S.W.2d at 437. To the contrary, "[a] civil statute that is not concerned with the First Amendment is only unconstitutionally vague if it is so vague and indefinite as really to be no rule at all or if it is substantially incomprehensible." *Chavez v. Hous. Auth. of City of El Paso*, 973 F.2d 1245, 1249 (5th Cir. 1992) (cleaned up).[7] A provision is not unconstitutionally vague just because "it requires a person to conform his conduct to an imprecise but comprehensible normative standard." *Smith v. Goguen*, 415 U.S. 566, 578 (1974). And "a broad term is not the same thing as a 'vague' one." *Sackett v. EPA*, 143 S. Ct. 1322, 1361 (2023) (Kagan, J., concurring); *Rose v. Locke*, 423 U.S. 48, 50-51 (1975). None of the aspects of the TRCA identified by the Cities fail this "deferential standard." *Chavez*, 973 F.2d at 1249.

First, the Cities contended that the term "field" is impermissibly vague because the TRCA does not define the scope of any field of regulation or describe how a field is "occupied" by a code "provision." CR.142-46, 208-09. Not so. These terms implement the Legislature's authority to "withdraw a particular subject"—or, in the words of the TRCA, "field"—from local regulation. *Tyra*, 822 S.W.2d at 628; *Glass*, 244 S.W.2d at 649. Indeed, by defining a preempted subject by reference to individual code provisions, the TRCA is *more* precise than the broad preemption of local

[7] As with standing, Texas courts look to federal law for guidance in assessing vagueness challenges. *See, e.g., King St. Patriots*, 521 S.W.3d at 743-44.

regulation of "air pollution" or "alcoholic beverages," both of which have been upheld as sufficiently clear. *BCCA*, 496 S.W.3d at 12-13; *Dall. Merch.'s*, 852 S.W.2d at 491-92. Some provisions may not yield fields defined "with perfect precision," but that is not required. *Benton*, 980 S.W.2d at 437.

The Cities suggested that the term "field" is also vague because the TRCA does not align with *federal* field-preemption principles. CR.142-43, 209. That is incorrect. As discussed above, as a form of express preemption, the TRCA does not and need not adhere to federal law of implied field preemption. *See supra* pp. 35-36.

Second, the Cities urged that the TRCA is untenably vague because it excepts from preemption any local regulation "expressly authorized" by another statute. CR.146-50, 209. But this provision makes the TRCA clearer by telling the courts that will apply the TRCA that where another statute explicitly grants local entities authority to regulate, the TRCA does not rescind that authority. Absent such an instruction, the courts would have to deal with tricky issues of implied repeal. *E.g.*, *Hotze v. Turner*, 672 S.W.3d 380, 390 & n.41 (Tex. 2023). In doing so, the Legislature has also resolved the Cities' asserted confusion over the interaction between preempted "fields" and "expressly authorized" exceptions: an "expressly authorized" local regulation remains valid even if it falls within a preempted field. CR.148-49, 209.

The Cities complained that to take advantage of the "expressly authorized" exception, they will have to examine the TRCA *and* other statutes to determine what is preempted. CR.147, 209. Houston also noted that many Texas statutes do not expressly authorize local regulation because home-rule cities historically have not

needed it. CR.148. Maybe so, but those are not vagueness problems. Starting with the latter: if there is no express authority for local law, the TRCA exceptions do not apply by their terms, and the Cities may not regulate. Moreover, the need to look at other laws to see if the Cities retain the power to regulate does not distinguish the TRCA from other preemption provisions that have been found to pass constitutional muster. *E.g.*, *BCCA*, 496 S.W.3d at 13, 21 (upholding preemption of ordinances inconsistent with "the [Clean Air] Act or with a TCEQ rule or order"); *Dall. Merch.'s*, 852 S.W.2d at 491-92 (upholding preemption of local regulation "[e]xcept as expressly authorized by this code").

Third, Houston argued that the TRCA is unconstitutionally vague because it shifts the burden of proof. CR.150-52. But as discussed above, the Home Rule Amendment is not the source of the preemption burden of proof, and the TRCA does *not* shift that burden. *See supra* Part II.A.3. Instead, section 11 merely restates the Amendment's preemption principle. *See supra* Part II.A.3. As no one claims that Amendment is vague when it prohibits local regulation "inconsistent" with general law, Houston can hardly be heard to complain that section 11's mirror-image statement that local regulation must be "consistent" with state law is vague.

Fourth, Houston asserted that because the TRCA "does not define" the term "maintain," it is impermissibly vague to prohibit a city from "maintaining" a preempted ordinance. CR.152. But "[a] statute that contains an undefined term is not unconstitutionally vague if the term is an ordinary term in common use." *Sabine Consol., Inc. v. State*, 816 S.W.2d 784, 789 (Tex. App.—Austin 1991, pet. ref'd). "Maintain" is a commonly used term meaning "[t]o keep in an existing state."

Maintain, The American Heritage Dictionary (5th ed. 2016). Read in context, that term makes clear that cities may need to modify existing regulations that will no longer be enforceable going forward. It does not mean, as Houston urged (at CR.152), that the TRCA requires cities to peruse their charters and ordinances and repeal any preempted rules.

Fifth, Houston claimed that the TRCA's provision for "notice" of a suit challenging a preempted local law is impermissibly vague. CR.152-53. Houston speculated that its *own* ordinance specifying the place to serve notice in a *Tort Claims Act* suit against it may be overridden or not apply to a TRCA suit, leaving the place of serving notice of such a suit unspecified. CR.153. But the TRCA's notice requirement does not override Houston's ordinance because the TRCA does not add a preemption provision to the Civil Practice and Remedies Code, where that notice requirement is located. TRCA § 7 (codified at Tex. Civ. Prac. & Rem. Code § 102A.005). Moreover, statutes requiring notice of a claim against a governmental entity do not always specify the entity's office or official that must receive the notice. *E.g.*, Tex. Civ. Prac. & Rem. Code §§ 101.101 (Tort Claims Act), 110.006 (TRFRA); Tex. Gov't Code § 2260.051 (contract claims). Leaving such detail to each covered governmental entity does not make those statutes vague. *See Hous. Pro. Fire Fighters' Ass'n*, 664 S.W.3d at 800. Nor does the fact that Houston has not updated its *own* notice ordinance to cover TRCA suits.

2. To the extent the Home Rule Amendment imposes a clarity requirement, the TRCA satisfies it.

The Cities' vagueness claims under the Home Rule Amendment likewise founder. As discussed above, to be sufficiently clear for preemption (as opposed to due-process) purposes, "the Legislature must demonstrate *its intent to preempt local law* 'with unmistakable clarity.'" *Id.* at 804 (quoting *Dall. Merch.'s*, 852 S.W.2d at 491) (emphasis added); *see supra* p. 23. Thus, the constitutional issue is the clarity of the Legislature's *intent to preempt*, not the clarity with which an ordinance is preempted. *Hous. Pro. Fire Fighters' Ass'n*, 664 S.W.3d at 804. The latter issue is a question of ordinary statutory construction to be performed by courts in an appropriate case. *City of Laredo*, 550 S.W.3d at 593-94.

Houston argued below that the scope of preemption also must meet the "unmistakable clarity" standard. CR.141-42. But its sole authority for that assertion was a comment in *City of Laredo* that the preempting statute in that case was "narrow and specific." CR.142 n.47 (citing *City of Laredo*, 550 S.W.3d at 594). That mere observation does not support Houston's point. To the contrary, *City of Laredo* reaffirmed that "*the Legislature's intent* to impose the limitation must appear with unmistakable clarity." 550 S.W.3d at 593 (cleaned up, emphasis added).

The Cities did not dispute that the Legislature clearly expressed its intent to preempt local law in the TRCA, nor could they. Instead, they argued only that the preemption *itself* is not unmistakably clear. *E.g.*, CR.142 (contending that preemption must be "accomplished with 'unmistakable clarity'"), 207 (urging that the TRCA "fails to identify, *with unmistakable clarity*, which City enactments are

preempted"). Because that is not a constitutional claim, these challenges are facially invalid.

3. The TRCA does not violate the nondelegation doctrine.

a. Houston also failed to state a facially valid constitutional claim that the TRCA violates article II, section 1 of the Texas Constitution because the TRCA delegates to courts the tasks of identifying preempted local laws and the scope of preempted "fields of regulation." CR.107-09. Article II, section 1 requires the separation of governmental powers among the legislative, judicial, and executive departments and prohibits one department from *improperly* delegating its powers to another. *See Hous. Pro. Fire Fighters' Ass'n*, 664 S.W.3d at 798. But the Legislature does not violate that nondelegation doctrine "'merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors.'" *Id.* (quoting *Touby v. United States*, 500 U.S. 160, 165 (1991)). Indeed, "broad standards may be appropriate when the Legislature cannot conveniently investigate that which it seeks to regulate, or 'cannot itself practically and efficiently exercise' its power to prescribe the details." *Id.* at 800 (footnote omitted) (quoting *Trimmier v. Carlton*, 296 S.W. 1070, 1079 (Tex. 1927)).

To be sufficiently clear in this (as opposed to the due-process) context, the Legislature need only "provide standards that are 'reasonably clear and hence acceptable as a standard of measurement,'" and it need not "detail every rule for implementing that authority." *Id.* at 799-800 (quoting *Edgewood ISD*, 917 S.W.2d at 741). And "[b]ecause declaring a state law unconstitutional nullifies the Legislature's

choices, courts find constitutional infirmity under the nondelegation doctrine 'sparingly, when there is, in Justice Cardozo's memorable phrase, "delegation running riot."'" *Id.* at 800 (quoting *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 475 (Tex. 1997) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring))).

For the reasons already discussed, the TRCA is more than adequately clear to survive the extremely deferential standard imposed by the nondelegation doctrine. *See supra* pp. 45-48. Houston's contrary claim is facially invalid under binding precedent—including *Houston Professional Fire Fighters' Association*, in which Houston made *and* lost a strikingly similar claim.

b. Houston argued below that the TRCA violates the nondelegation doctrine because the Legislature cannot "delegate *to the courts* the legislative authority to determine on a case-by-case basis what specific local laws are preempted or to define the scope and nature of any fields allegedly preempted." CR.172. That argument reflects a fundamental misunderstanding of what preemption *is*.

It is a bedrock principle that "if two laws conflict with each other, the *courts* must decide on the operation of each." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added). Preemption doctrines—whether derived from the Supremacy Clause, the Home Rule Amendment, or somewhere else—"create[] a rule of decision" that by its nature is applied in a court. *Armstrong*, 575 U.S. at 324; *see also Hous. Pro. Fire Fighters' Ass'n*, 664 S.W.3d at 805. And courts apply those rules of decision every day. *See, e.g.*, *Horton v. Kansas City S. Ry. Co.*, No. 21-0769, 2023 WL 4278230, at *2-14 (Tex. June 30, 2023); *Tex. Ass'n of Bus.*, 565 S.W.3d at 438-

41. Thus, far from delegating to the courts an improper power, "[i]t is emphatically the province and duty of the judicial department to say what the law is" where there is such a conflict of rules. *Marbury*, 5 U.S. (1 Cranch) at 177.

Indeed, Houston's argument is particularly ill-founded because the problem already exists. After all, the TRCA comes into play only if the State and a city or county have regulated on topics within the same "field." As a result, if a case implicates both, a court is already going to have to decide which applies. *Compare, e.g.*, TRCA § 10 (creating a preemption provision for the Labor Code), *with Tex. Ass'n of Bus.*, 565 S.W.3d at 440 (examining whether a local ordinance was preempted by a provision of the Labor Code). The TRCA simply makes it easier by standardizing the rule across codes and as among counties, general-law municipalities, and home-rule cities. Such a rule is not facially unconstitutional under the nondelegation doctrine.

c. Houston also urged that the TRCA's broad standards are not appropriate under the nondelegation doctrine because the Legislature could have "easily" preempted "specific [local] laws." CR.172. That misses the point: that the Legislature *can* do something, does not mean that it constitutionally *must* do so. Moreover, it ignores that the purpose of the TRCA was to make state laws and state-authorized local laws the exclusive regulation of several areas of trade and commerce covered by eight subject-matter codes. *See* TRCA §§ 2-3. It would have been decidedly impractical and inefficient for the Legislature to try to catalogue every local law in Texas that exists or may exist in the future that is inconsistent with that policy. Under those circumstances, the TRCA's broad preemption standards are appropriate

and do not run afoul of the nondelegation doctrine. *Hous. Pro. Fire Fighters' Ass'n*, 664 S.W.3d at 800.

C. Houston's "as applied" grounds do not support its claims.

Finally, though Houston's summary-judgment motion purported to assert "specific grounds" for its as-applied constitutional challenges, they add nothing to its facial challenges. CR.173-79. "In an as-applied challenge . . . the statute may be generally constitutional but the party challenging it claims that it operates unconstitutionally as to it specifically because of its particular circumstances." *EBS Sols.*, 601 S.W.3d at 753. Any such claims that Houston theoretically asserted add nothing to this case for at least two reasons.

First, because the TRCA had never been applied to Houston at the time of judgment, an as-applied challenge was (by definition) unripe. "For an as-applied constitutional challenge to be ripe for review, a record of the particular facts and circumstances of the case must be developed to determine whether the statute has been applied to the defendant in an unconstitutional manner." *Boas v. State*, 604 S.W.3d 488, 493 (Tex. App.—Houston [14th Dist.] 2020, no pet.). No such record has been or could have been developed because Houston sued before the TRCA ever became effective.

Second, Houston's putative "as applied" grounds mostly discussed how *Houston* purportedly "is and will be injured" by application of the TRCA. CR.174. But the only difference between its as-applied and facial challenges appears to be that Houston is challenging the law as applied to Houston. As Houston would have not standing to challenge the law as applied to anyone else, *see supra* p. 18, such a claim is

merely a facial challenge by another name. So too with Houston's assertion that the TRCA cannot constitutionally be applied to its local laws that were not already preempted, CR.178, and its gripe that it "should not have to paint a target on any of its programs, labelling them as potentially preempted," CR.176. Because programs that were already preempted are unaffected by the TRCA, by definition the only challenge Houston can make (facial or otherwise) is to the TRCA's application to as-yet-to-be-preempted programs. Because Houston has no facially valid challenge to the TRCA—let alone a right to judgment as a matter of law—the judgment below should be reversed.

III. Houston Failed to Establish That the TRCA's Provisions Are Not Severable.

Because the TRCA is constitutional in its entirety, the Court need not reach Houston's argument below (at CR.180-81) that the absence of a severability clause in the TRCA means that the entire act is void. But if the Court were to reach the issue, Houston is wrong. The Code Construction Act prescribes a severability rule for statutes without any severability clause. Tex. Gov't Code § 311.032(c). Houston concedes that this rule governs the TRCA. CR.180.

Houston's primary argument for nonseverability was that, if sections 5-15 of the TRCA are invalidated, all that remains are the act's title, legislative findings, purpose, statements of what the act does not do, and effective dates. CR.180-81 (discussing TRCA §§ 1-4, 16-17). But other than the effective date those provisions do not really impose an "effect" as it is.

Houston also asserted that, "[a]lternatively, if only some of [the TRCA's] provisions are held void and unenforceable, then the remainder cannot be given effect." CR.181. But Houston never explained why that would generally be true, and the lone example it offered was demonstrably false. It claimed that if the TRCA's "field preemption provisions are invalidated," then "Section 7, which provides a cause of action for their enforcement, cannot be given effect." CR.181. But that cause of action also applies to violations of the TRCA's animal-business preemption provisions. TRCA § 7 (codified at Tex. Civ. Prac. & Rem. Code § 102A.002(6)). By failing to explain how the invalidation of any single provision of the TRCA precludes giving effect to the remainder, Houston failed to preserve this argument.

Prayer

The Court should reverse the trial court's final judgment and render judgment for the State dismissing this case for lack of jurisdiction or remand for further proceedings.

Respectfully submitted.

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Certificate of Service

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Certificate of Compliance

Microsoft Word reports that this brief contains 14,997 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Lanora C. Pettit
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No. 03-23-00531-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

THE STATE OF TEXAS,
Appellant,

v.

THE CITY OF HOUSTON, THE CITY OF SAN ANTONIO, AND THE CITY OF EL PASO,
Appellees.

On Appeal from the
345th Judicial District Court, Travis County

APPENDIX

Tab A: Final Judgment (CR.528-30)

CAUSE NO. D-1-GN-23-003474

THE CITY OF HOUSTON, *Plaintiff*, and	§	IN THE DISTRICT COURT OF
THE CITY OF SAN ANTONIO AND THE CITY OF EL PASO, *Intervenors*	§	TRAVIS COUNTY, TEXAS
v.	§	
THE STATE OF TEXAS, *Defendant*	§	345th JUDICIAL DISTRICT

FINAL JUDGMENT

On August 30, 2023, the Court held a hearing on: (1) the City of Houston's Traditional Motion for Summary Judgment ("Houston's MSJ"); and (2) Defendant's Motion to Dismiss Based on Lack of Subject Matter Jurisdiction ("State's Motion"). The Court heard argument from counsel for Plaintiff the City of Houston, Intervenors the City of San Antonio and the City of El Paso, and Defendant the State of Texas. The Court considered the pleadings on file, the motions, responses, and replies, and the amicus filings. The Court ORDERS as follows:

The Court finds that it has jurisdiction over the claims and the parties. The State's Motion is therefore DENIED.

IT IS FURTHER ORDERED that Houston's MSJ is GRANTED.

For the reasons stated in Houston's MSJ, the Court DECLARES House Bill 2127 in its entirety is unconstitutional—facially, and as applied to Houston as a constitutional home-rule city and to local laws that are not already preempted under article XI, section 5

of the Texas Constitution—because, in the absence of a severability clause, no provision can be given effect without the invalid provisions and application.

IT IS FURTHER ORDERED that the Court's declaration regarding House Bill 2127 grants the relief that Intervenors sought through their petition. This Final Judgment therefore resolves the claims of Intervenors.

IT IS FURTHER ORDERED that the Court grants Intervenors' non-suit of their claim for attorney's fees pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code.

IT IS FURTHER ORDERED that any claim by Barney Donalson, to the extent that he appeared as a party to this action, is DISMISSED.

This Final Judgment resolves all parties and all claims in this action. It is final and appealable.

IT IS SO ORDERED.

Signed August 30, 2023.

Hon. Maya Guerra Gamble

DISTRICT COURT OF TRAVIS COUNTY TEXAS

4861-0078-8859

APPROVED AS TO FORM AND SUBSTANCE:

_____

Counsel for Plaintiff the City of Houston

_____

Counsel for Intervenors the City of San Antonio and the City of El Paso

APPROVED AS TO FORM ONLY:

_____

Counsel for Defendant the State of Texas

I, VELVA L. PRICE, District Clerk, Travis County, Texas, do hereby certify that this is a true and correct copy as same appears of record in my office. Witness my hand and seal of office
On 09/13/2023 11:14:19

VELVA L. PRICE
DISTRICT CLERK
By Deputy: SH

4861-0078-8859

TAB B: TEXAS REGULATORY CONSISTENCY ACT,
88TH LEG., R.S., CH. 899,
2023 TEX. SESS. LAW SERV. 2873

AN ACT

relating to state preemption of and the effect of certain state or federal law on certain municipal and county regulation.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act shall be known as the Texas Regulatory Consistency Act.

SECTION 2. The legislature finds that:

(1) the state has historically been the exclusive regulator of many aspects of commerce and trade in this state;

(2) in recent years, several local jurisdictions have sought to establish their own regulations of commerce that are different than the state's regulations; and

(3) the local regulations have led to a patchwork of regulations that apply inconsistently across this state.

SECTION 3. The purpose of this Act is to provide statewide consistency by returning sovereign regulatory powers to the state where those powers belong in accordance with Section 5, Article XI, Texas Constitution.

SECTION 4. This Act:

(1) may not be construed to prohibit a municipality or county from building or maintaining a road, imposing a tax, or carrying out any authority expressly authorized by statute;

(2) may not be construed to prohibit a home-rule municipality from providing the same services and imposing the same

regulations that a general-law municipality is authorized to provide or impose;

(3) does not, except as expressly provided by this Act, affect the authority of a municipality to adopt, enforce, or maintain an ordinance or rule that relates to the control, care, management, welfare, or health and safety of animals;

(4) does not affect the authority of a municipality or county to conduct a public awareness campaign;

(5) does not affect the authority of a municipality or county to:

(A) enter into or negotiate terms of a collective bargaining agreement with its employees; or

(B) adopt a policy related to its employees; and

(6) does not affect the authority of a municipality or county to repeal or amend an existing ordinance, order, or rule that violates the provisions of this Act for the limited purpose of bringing that ordinance, order, or rule in compliance with this Act.

SECTION 5. Chapter 1, Agriculture Code, is amended by adding Section 1.004 to read as follows:

Sec. 1.004. PREEMPTION. Unless expressly authorized by another statute, a municipality or county may not adopt, enforce, or maintain an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of this code. An ordinance, order, or rule that violates this section is void, unenforceable, and inconsistent with this code.

SECTION 6. Subchapter A, Chapter 1, Business & Commerce

Code, is amended by adding Section 1.109 to read as follows:

Sec. 1.109. PREEMPTION. Unless expressly authorized by another statute, a municipality or county may not adopt, enforce, or maintain an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of this code. An ordinance, order, or rule that violates this section is void, unenforceable, and inconsistent with this code.

SECTION 7. Title 5, Civil Practice and Remedies Code, is amended by adding Chapter 102A to read as follows:

CHAPTER 102A. MUNICIPAL AND COUNTY LIABILITY FOR CERTAIN REGULATION

Sec. 102A.001. DEFINITION. In this chapter, "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, agency or instrumentality, public corporation, any legal or commercial entity, or protected or registered series of a for-profit entity.

Sec. 102A.002. LIABILITY FOR CERTAIN REGULATION. Any person who has sustained an injury in fact, actual or threatened, from a municipal or county ordinance, order, or rule adopted or enforced by a municipality or county in violation of any of the following provisions or a trade association representing the person has standing to bring and may bring an action against the municipality or county:

(1) Section 1.004, Agriculture Code;

(2) Section 1.109, Business & Commerce Code;

(3) Section 1.004, Finance Code;

(4) Section 30.005, Insurance Code;

(5) Section 1.005, Labor Code;

(6) Section 229.901, Local Government Code;

(7) Section 1.003, Natural Resources Code;

(8) Section 1.004, Occupations Code; or

(9) Section 1.004, Property Code.

Sec. 102A.003. REMEDIES. (a) A claimant is entitled to recover in an action brought under this chapter:

(1) declaratory and injunctive relief; and

(2) costs and reasonable attorney's fees.

(b) A municipality or county is entitled to recover in an action brought under this chapter costs and reasonable attorney's fees if the court finds the action to be frivolous.

Sec. 102A.004. IMMUNITY WAIVER. Governmental immunity of a municipality or county to suit and from liability is waived to the extent of liability created by this chapter.

Sec. 102A.005. NOTICE. A municipality or county is entitled to receive notice of a claim against it under this chapter not later than three months before the date a claimant files an action under this chapter. The notice must reasonably describe:

(1) the injury claimed; and

(2) the ordinance, order, or rule that is the cause of the injury.

Sec. 102A.006. VENUE. (a) Notwithstanding any other law, including Chapter 15, a claimant may bring an action under this chapter in:

(1) the county in which all or a substantial part of

the events giving rise to the cause of action occurred; or

(2) if the defendant is a municipality, a county in which the municipality is located.

(b) If the action is brought in a venue authorized by this section, the action may not be transferred to a different venue without the written consent of all parties.

SECTION 8. Chapter 1, Finance Code, is amended by adding Section 1.004 to read as follows:

Sec. 1.004. PREEMPTION. (a) Unless expressly authorized by another statute and except as provided by Subsection (b), a municipality or county may not adopt, enforce, or maintain an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of this code. An ordinance, order, or rule that violates this section is void, unenforceable, and inconsistent with this code.

(b) A municipality or county may enforce or maintain an ordinance, order, or rule regulating any conduct under Chapter 393 and any conduct related to a credit services organization, as defined by Section 393.001 or by any other provision of this code, or a credit access business, as defined by Section 393.601 or by any other provision of this code, if:

(1) the municipality or county adopted the ordinance, order, or rule before January 1, 2023; and

(2) the ordinance, order, or rule would have been valid under the law as it existed before the date this section was enacted.

SECTION 9. Chapter 30, Insurance Code, is amended by adding

Section 30.005 to read as follows:

Sec. 30.005. PREEMPTION. Unless expressly authorized by another statute, a municipality or county may not adopt, enforce, or maintain an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of this code. An ordinance, order, or rule that violates this section is void, unenforceable, and inconsistent with this code.

SECTION 10. Chapter 1, Labor Code, is amended by adding Section 1.005 to read as follows:

Sec. 1.005. PREEMPTION. (a) Unless expressly authorized by another statute, a municipality or county may not adopt, enforce, or maintain an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of this code. An ordinance, order, or rule that violates this section is void, unenforceable, and inconsistent with this code.

(b) For purposes of Subsection (a), a field occupied by a provision of this code includes employment leave, hiring practices, breaks, employment benefits, scheduling practices, and any other terms of employment that exceed or conflict with federal or state law for employers other than a municipality or county.

SECTION 11. Subchapter A, Chapter 51, Local Government Code, is amended by adding Section 51.002 to read as follows:

Sec. 51.002. ORDINANCE OR RULES INCONSISTENT WITH STATE LAW PROHIBITED. Notwithstanding Section 51.001, the governing body of a municipality may adopt, enforce, or maintain an ordinance or rule only if the ordinance or rule is consistent with the laws of this state.

SECTION 12. Chapter 229, Local Government Code, is amended by adding Subchapter Z to read as follows:

SUBCHAPTER Z. MISCELLANEOUS PROVISIONS

Sec. 229.901. AUTHORITY TO REGULATE ANIMAL BUSINESSES. (a) A municipality may not adopt, enforce, or maintain an ordinance or rule that restricts, regulates, limits, or otherwise impedes a business involving the breeding, care, treatment, or sale of animals or animal products, including a veterinary practice, or the business's transactions if the person operating that business holds a license for the business that is issued by the federal government or a state.

(b) Except as provided by this subsection, a municipality may not adopt, enforce, or maintain an ordinance or rule that restricts, regulates, limits, or otherwise impedes the retail sale of dogs or cats. A municipality may enforce or maintain an ordinance or rule adopted before April 1, 2023, that restricts, regulates, limits, or otherwise impedes the retail sale of dogs or cats until the state adopts statewide regulation for the retail sale of dogs or cats, as applicable.

SECTION 13. Chapter 1, Natural Resources Code, is amended by adding Section 1.003 to read as follows:

Sec. 1.003. PREEMPTION. Unless expressly authorized by another statute, a municipality or county may not adopt, enforce, or maintain an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of this code. An ordinance, order, or rule that violates this section is void, unenforceable, and inconsistent with this code.

SECTION 14. Chapter 1, Occupations Code, is amended by adding Section 1.004 to read as follows:

Sec. 1.004. PREEMPTION. (a) Unless expressly authorized by another statute, a municipality or county may not adopt, enforce, or maintain an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of this code. An ordinance, order, or rule that violates this section is void, unenforceable, and inconsistent with this code.

(b) Subsection (a) may not be construed to affect municipal or county authority to regulate a massage establishment in accordance with Section 455.005.

SECTION 15. Chapter 1, Property Code, is amended by adding Section 1.004 to read as follows:

Sec. 1.004. PREEMPTION. (a) Unless expressly authorized by another statute, a municipality or county may not adopt, enforce, or maintain an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of this code. An ordinance, order, or rule that violates this section is void, unenforceable, and inconsistent with this code.

(b) For purposes of Subsection (a), a field occupied by a provision of this code includes an ordinance, order, or rule regulating evictions or otherwise prohibiting, restricting, or delaying delivery of a notice to vacate or filing a suit to recover possession of the premises under Chapter 24.

SECTION 16. Chapter 102A, Civil Practice and Remedies Code, as added by this Act, applies only to a cause of action that accrues on or after the effective date of this Act.

SECTION 17. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2023.

President of the Senate

Speaker of the House

I certify that H.B. No. 2127 was passed by the House on April 19, 2023, by the following vote: Yeas 92, Nays 55, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 2127 on May 19, 2023, by the following vote: Yeas 84, Nays 58, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 2127 was passed by the Senate, with amendments, on May 16, 2023, by the following vote: Yeas 18, Nays 13.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor

Tab C: Tex. Const. art. I, § 19

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article I. Bill of Rights (Refs & Annos)

Vernon's Ann.Texas Const. Art. 1, § 19

§ 19. Deprivation of life, liberty, property, etc. by due course of law

Currentness

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Credits
Adopted Feb. 15, 1876.

TAB D: TEX. CONST. ART. II, § 1

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article II. The Powers of Government

Vernon's Ann.Texas Const. Art. 2, § 1

§ 1. Separation of powers of government among three departments

Currentness

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Credits
Adopted Feb. 15, 1876.

Vernon's Ann. Texas Const. Art. 2, § 1, TX CONST Art. 2, § 1
Current through the end of the 2023 Regular and Second Called Sessions of the 88th Legislature.

End of Document

Tab E: Tex. Const. art. XI, § 5

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article XI. Municipal Corporations

Vernon's Ann.Texas Const. Art. 11, § 5

§ 5. Cities of more than 5,000 population: adoption or amendment of charters; taxes; debt restrictions

Effective: December 5, 2011
Currentness

(a) Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters. If the number of inhabitants of cities that have adopted or amended their charters under this section is reduced to five thousand (5000) or fewer, the cities still may amend their charters by a majority vote of the qualified voters of said city at an election held for that purpose. The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State. Said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent. thereon, except as provided by Subsection (b). Furthermore, no city charter shall be altered, amended or repealed oftener than every two years.

(b) To increase efficiency and effectiveness to the greatest extent possible, the legislature may by general law authorize cities to enter into interlocal contracts with other cities or counties without meeting the assessment and sinking fund requirements under Subsection (a).

Credits
Adopted Feb. 15, 1876. Amended Aug. 3, 1909, proclamation Sept. 24, 1909; Nov. 5, 1912, proclamation Dec. 30, 1912; Nov. 5, 1991; Nov. 8, 2011, eff. Dec. 5, 2011.

Vernon's Ann. Texas Const. Art. 11, § 5, TX CONST Art. 11, § 5
Current through the end of the 2023 Regular and Second Called Sessions of the 88th Legislature.

End of Document

Tab F: Tex. Const. art. XVII, § 1

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Constitution of the State of Texas 1876 (Refs & Annos)
Article XVII. Mode of Amending the Constitution of this State

Vernon's Ann.Texas Const. Art. 17, § 1

§ 1. Proposed amendments; publication; submission to voters; adoption

Currentness

(a) The Legislature, at any regular session, or at any special session when the matter is included within the purposes for which the session is convened, may propose amendments revising the Constitution, to be voted upon by the qualified voters for statewide offices and propositions, as defined in the Constitution and statutes of this State. The date of the elections shall be specified by the Legislature. The proposal for submission must be approved by a vote of two-thirds of all the members elected to each House, entered by yeas and nays on the journals.

(b) A brief explanatory statement of the nature of a proposed amendment, together with the date of the election and the wording of the proposition as it is to appear on the ballot, shall be published twice in each newspaper in the State which meets requirements set by the Legislature for the publication of official notices of officers and departments of the state government. The explanatory statement shall be prepared by the Secretary of State and shall be approved by the Attorney General. The Secretary of State shall send a full and complete copy of the proposed amendment or amendments to each county clerk who shall post the same in a public place in the courthouse at least 30 days prior to the election on said amendment. The first notice shall be published not more than 60 days nor less than 50 days before the date of the election, and the second notice shall be published on the same day in the succeeding week. The Legislature shall fix the standards for the rate of charge for the publication, which may not be higher than the newspaper's published national rate for advertising per column inch.

(c) The election shall be held in accordance with procedures prescribed by the Legislature, and the returning officer in each county shall make returns to the Secretary of State of the number of legal votes cast at the election for and against each amendment. If it appears from the returns that a majority of the votes cast have been cast in favor of an amendment, it shall become a part of this Constitution, and proclamation thereof shall be made by the Governor.

Credits
Amended Nov. 7, 1972; Nov. 2, 1999.

Vernon's Ann. Texas Const. Art. 17, § 1, TX CONST Art. 17, § 1
Current through the end of the 2023 Regular and Second Called Sessions of the 88th Legislature.

End of Document

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Associated Case Party: State of Texas

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Associated Case Party: The City of El Paso

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Maria Mendoza-Williamson on behalf of Lanora Pettit
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Envelope ID: 81864325
Filing Code Description: Brief Requesting Oral Argument
Filing Description: 20231121 HB 2127 State Appellants Brief_Final
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Associated Case Party: The City of El Paso

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