WRITTEN TESTIMONY OF COLLYN A. PEDDIE, ON BEHALF OF THE CITY OF HOUSTON, IN OPPOSITION TO C.S. SENATE BILL 814[1]

Senate Business and Commerce Committee, April 4, 2023, 8:30 A.M.

EXECUTIVE SUMMARY

This testimony is submitted on behalf of the City of Houston in opposition to Senate Bill 814 and the Committee Substitute (collectively "SB 814") and HB 2127 (collectively "the bills") because the bills are unnecessary, unconstitutional, unworkable, legally unsound, misleading, and will spur ruinous amounts of litigation for cities like Houston. As one scholar explained, bills like these "***are aimed not at determining which level of government should control a field but at simply denying local power to act. That is inconsistent with home rule's authorization of local action unless inconsistent with state policy***."[2]

In addition to the other reasons set forth below, Houston opposes the bills because their passage and implementation will result in significant harm to millions of Texans and hundreds of thousands of Houstonians, including the loss of essential services and protections local governments now provide or facilitate but that the State may be unable or unwilling to provide itself or timely authorize. Equally important, SB 814 will be terrible for Texas businesses and the Texas economy they drive because they not only create extraordinary amounts of business uncertainty but needlessly prolong the period of uncertainty created.

This testimony explains first the often confusing and almost universally misunderstood legal principles essential to analyzing the bills, which purport to preempt all local regulation, except that "explicitly" authorized by the Legislature, under Texas' Agriculture, Finance, Insurance, Labor, Natural Resources, Property, Business and Commerce, and Occupations Codes ("the covered codes"). Indeed, the bills expressly attempt to convert home-rule into general law cities for matters associated with these codes. Worse, ***Section 11 of the SB 814 substitute attempts to effectively repeal home-rule for all local regulation***.

Building on an accurate legal foundation, the testimony then describes how the bills cannot be implemented constitutionally or practicably and why they are unnecessary because of conflict preemption provisions already present in Texas Constitution, Article XI, Section 5. The testimony then explains the bills' many other principal flaws, which include:

[1] Collyn Peddie is a 40-year attorney with the City of Houston, focusing on appeals. She has been responsible for all of Houston's numerous state/local preemption appeals for the last seven years, including two that are pending before the Texas Supreme Court. Before that, in private practice, she spent 14 years focusing preemption issues on both the defense and plaintiffs' sides. She chaired the American Association of Justice's national Preemption Litigation Group for several years and has written amicus briefs and assisted in the preparation for several of the U.S. Supreme Court's landmark preemption cases. In addition, she also obtained a *writ of certiorari* for her clients and was on brief in another preemption appeal involving the Vaccine Act. Ms. Peddie has written and spoken extensively on preemption issues for more than twenty years, including testifying on preemption issues before the U.S. Senate Judiciary Committee.

[2] Richard Briffault, *The Challenge of the New Preemption*, 70 Stan. L. Rev. 1995, 2024 (2018) (emphasis supplied).

- Creating an unconstitutional conflict between the bills' purported "field" preemption and the Texas Constitution's home-rule provision's [art. XI, § 5] requirement of a preemptive conflict and purpose of authorizing local innovation;

- Misapplying Texas preemption jurisprudence and federal preemption doctrines that are inapplicable to it;

- Attempting improperly to repeal the Texas Constitution's home rule provision and convert home-rule cities into general law cities *by statute*, without utilizing a required constitutional amendment and public vote;

- Unconstitutionally shifting the burden to cities to show "consistency" with even non-existent state law and arguably creating an improper and unprecedented presumption ***in favor of*** preemption;

- Including unconstitutionally vague language that renders the statute unworkable and unenforceable and creates a substantial chilling effect on even permissible local regulation;

- Exponentially increasing business uncertainty. Because SB 814 barely attempts to define the fields it purports to preempt, home rule cities will not know what laws to enforce and, more important, businesses will not know what laws to obey. That is why the Texas Supreme Court has repeatedly reaffirmed that state law can preempt local law only when the intent to preempt a particular law is "unmistakably clear;"

- Needlessly including expansive standing, waiver of immunity, and attorneys' fee provisions that would chill and punish even permissible local regulation by actively encouraging almost anyone to file lawsuits against cities alleging preemption, even awarding fees when a city itself has sought clarification of SB 814's preemptive scope in good faith;

- Abdicating the Legislature's responsibility for determining the scope of its preemption to the courts. The bill thus ensures that uncertainty as to what laws must be enforced or obeyed will continue for the longest possible time;

- Imposing such a heavy litigation burden on Texas's smaller home-rule cities that it threatens to bankrupt them, endangering the businesses who have previously thrived there;

- By attempting to create the country's first and only one-size-fits-all state-run regulatory regime, the SB 814 substitute will unconstitutionally stifle the very local innovation and carefully tailored service and protection the framers of the Texas Constitution codified by adopting home rule in Article XI, Section 5, which grants home-rule cities "the full power of self-government."

- Creating gaps in existing programs and funding. Because it does not provide additional state funds, personnel, or protocols to enable the State to assume or immediately delegate the thousands of essentially, individual tasks, programs, and decisions undertaken in every Texas city, every day, but that SB 814 would immediately displace. Consequently, local services and protections critical to businesses' daily functioning will either be lost or seriously disrupted if SB 814 goes into effect;

- Unnecessarily duplicating the Texas Constitution's preemption provision which ***already*** provides the means to displace conflicting local laws;

- Ignoring the fact that the bills themselves would be partially preempted by *federal* law authorizing local co-regulation, leading to more confusion and litigation; and

- Ignoring the fact that, if the Texas Legislature adopts, embraces, and defends the vague, over-reaching preemption principles set forth in the bills, it must be prepared to accept and have the same unworkable restrictions the Legislature seeks to impose on local governments ***imposed upon Texas*** by Congress and the federal government.

The long-standing, carefully constructed, constitutional balance between the regulatory authority of the State of Texas and that of home-rules cities is not "broken" simply because some State elected officials disagree with what some cities are doing with their constitutionally delegated home-rule authority. That is precisely the democratic tension the framers of Texas' Constitution understood was required for true liberty and representative democracy to flourish. Had they wished for the State to control local activities, the framers would not have adopted home-rule and would, instead, have included a Supremacy Clause in the Texas Constitution.

Because they did not and the State already has the means to displace conflicting local law under Article XI, Section 5 of the Texas Constitution, there is no need for the unconstitutional, unworkable, and radical "fix" the SB 814 substitute represent or economic trainwreck it will cause for Houstonians. Houston, therefore, respectfully request that both House and Senate bills and any other bills or amendments seeking the same ends be withdrawn from or defeated in the Texas Legislature.

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DISCUSSION

I. SB 814 IS PATENTLY UNCONSTITUTIONAL BECAUSE IT VIOLATES THE TEXAS CONSTITUTION'S HOME-RULE PROVISION AND LONG-STANDING PREEMPTION JURISPRUDENCE

A. Article XI, Section 5, Texas' Home Rule Amendment, has more in common with the Tenth Amendment than with the U.S. Constitution's Supremacy Clause in its express *reservation* of local authority and express *limitation* on State preemptive power.

SB 814 and the rhetoric used to support it is based upon a fundamental misunderstanding of the Texas Constitution and Article XI, Section 5 that dooms the bill to unconstitutionality. Unlike the federal constitution, the Texas Constitution *does not* contain a supremacy clause making Texas law supreme over local law in most circumstances. Instead, Article XI, Section 5 "bestow[s] upon the *cities* coming under the ... Amendment *'full power of local-self government*'" but allows state law to take precedence over a home-rule city's law only when there is a *direct conflict* with "general" state laws or the Texas Constitution.[3] Article XI, Section 5(a) provides in relevant part:

> 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*** … 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***.[4]

The amendment was intended "to obviate the necessity of [home-rule] cities coming to the Legislature whenever any change was desired in their charters, and in order to facilitate self government...."[5] The amendment, therefore, eliminated the then-longstanding practice of having the Legislature grant and amend special charters and instead allowed qualifying municipalities to adopt and to amend their charters without legislative approval, so long as the charter did not infringe upon the state Constitution or general laws passed by the Legislature.[6]

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[3] *City of Houston v. City of Magnolia Park,* 115 Tex. 101, 276 S.W. 685, 689 (1925) (citation omitted) (emphasis supplied). "It was the [constitutional drafter's] intention ... to give to cities the right to determine for themselves what kind of charter they should live under." *Id.,* 689; *City of Houston v. State ex rel. City of W. Univ. Place,* 142 Tex. 190, 176 S.W.2d 928, 929 (1943) (quoting *Magnolia Park*).

[4] *Id. Compare* Tex. Const. art. XI, § 5 *with* U.S. Const. art. VI, cl. 2 (the Supremacy Clause): "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[5] *Anderson v. Brandon,* 121 Tex. 188, 47 S.W.2d 261, 262 (1932) (emphasis supplied); *see City of Wichita Falls v. Cont'l Oil Co.,* 117 Tex. 256, 1 S.W.2d 596, 597 (1928) (noting that "primary purpose" of amendment was "convenience and directness of this method of city government").

[6] *See* Tex. Loc. Gov't Code Ann. § 51.072 (Vernon 1999); *City of San Antonio v. City of Boerne,* 111 S.W.3d 22, 26 & 26 n. 5 (Tex. 2003); *Anderson,* 47 S.W.2d at 262; Brooks § 1.17.

B. SB 814, in purporting to seek state-wide regulatory *uniformity*, directly contradicts the specific intentions of the framers of the Texas Constitution's home-rule provision, *which expressly authorizes local innovation*.

As far back as Alexis de Tocqueville, political and legal scholars have touted the benefits provided by meaningful *local* government.[7] Local government fosters policy innovation that would never occur if all policymaking took place only on the state and federal levels. Even when a city's new policy is of no instructive use to the rest of the state, it can nevertheless provide a level of regulation or government service more finely tailored to a particular city's needs, values, and political preferences. ***This was the clear intention of the Texas Constitution's framers in embracing home-rule.***

Home rule also provides unique educational benefits and heightened civic participation that only local governments can provide and foster.[8] De Tocqueville explained: "***municipal institutions are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it.***"[9] Citizens are likely to be more interested in local politics than they are in state or national affairs, and better able to access and influence their local officials.[10] The geographical proximity of local government is thus essential to the establishment and strengthening of community ties.[11] These two trains of thought reinforce each other. Cities may be incubators of new and innovative policies precisely because of heightened citizen involvement that only local government allows. ***This is why Texas embraced home rule***.

Simply because current state leaders disagree with actions cities are taking under their constitutionally-delegated home-rule authority, even when local regulations do not conflict with state law, is no excuse for the Legislature to violate the Texas Constitution as the bills flagrantly do. ***By eliminating local governments' ability not just to innovate but to regulate at all in certain areas, even when the State itself does not regulate heavily or at all and there is no regulatory conflict, the bills expressly and unconstitutionally thwart the framers' designs for local governments and the pro-democratic values they foster***.

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[7] Paul Diller, *Intrastate Preemption*, 87 B.U.L. Rev. 1113, 1127 (2007) (citing Alexis de Tocqueville, *Democracy In America* 66-70 (8th ed. 1848); John Stuart Mill, *Considerations on Representative Government* (1890), *reprinted in On Liberty and Other Essays* 205, 411-12 (John Gray ed., 1991)). *These arguments on the value of local government are taken or paraphrased from Diller's article*.

[8] Diller, *supra* note 7, at 1176. He continues: "Indeed, theorists like de Tocqueville and John Stuart Mill have argued that local government can serve as an essential 'school' for preparing persons to be citizens in a democracy. *See* Mill, *supra* note 7, at 413 (explaining how local government can serve the function of "political education" to those likely to occupy positions in it).

[9] *See de Tocqueville*, *supra* note 7, at 60 (emphasis supplied).

[10] *Id.,* 66-70.

[11] *See* Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 Harv. L. Rev. 2009, 2027 (2000)).

C. The Texas Constitution and statutes *already* provide for preemption of local regulations that conflict *with state law*; therefore, there is no need for the bills' passage to eliminate such conflicts.

The authors of SB 814 improperly and unconstitutionally confuse conflict between local and state law and conflicts between local laws of different cities. Article XI, Section 5 speaks only to the former.

What should be clear from the preceding discussion is that Article XI, Section 5 of the Texas Constitution ***already*** provides all the authority needed to preempt local regulations that ***actually conflict*** with ***existing*** state laws. Consequently, ***its sponsors' and the SB 814's substitute's Section 2(2)'s rationale for the bill does not exist.*** These bills, however, exceed the Legislature's permissible authority under the Texas Constitution because ***they mandate preemption when there is no conflict with any state law but may be conflict between local regulations in different cities.*** In fact, the bills concede the absence of a conflict with state law ***by empowering the Legislature to allow local governments to enact the same regulations that would otherwise be preempted if they obtain the explicit authorization of the Legislature to do so***.[12]

In addition to the Texas Constitution's conflict provisions, individual provisions in all covered codes expressly preempt local regulation over discrete topics where local regulation would almost inevitably conflict with such existing state regulation of those topics. For example, Tex. Labor Code § 62.0515(a) ***already*** provides: "Except as otherwise provided by this section, the minimum wage provided by this chapter supersedes a wage established in an ordinance, order, or charter provision governing wages in private employment, other than wages under a public contract."[13]

Consequently, there is no need to for the broad, general deregulation–under–the–guise–of–preemption the bills mandate. Moreover, as demonstrated below, Article XI, Section 5 thus provides the Legislature with no authorization for making local regulations that conflict only with other local regulations uniform.

D. The SB 814 Substitute Unconstitutionally Shifts the Burden of Proof on Preemption *to Cities* to Show *Consistency* With State Law *That May Not Exist* and Effectively Repeals Home Rule Without a Required Constitutional Amendment

Section 3 of the substitute provides: "the purpose of this Act is to provide statewide consistency by returning sovereign regulatory powers to the state where those powers belong in accordance

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[12] *See, e.g.*, SB 814, § 4 (§ 1.004).

[13] *See also* Tex. Agric. Code § 63.007 (chapter preempts local regulation of commercial fertilizer); Tex. Fin. Code §§ 352.008 ("this chapter preempts a local ordinance or rule regulating refund anticipation loans"); 6002.003 (chapter preempting local regulation of fire alarm and detection systems).

with Section 5, Article XI, Texas Constitution." As demonstrated above, nothing in Section 5 authorizes, let alone mandates, statewide uniformity nor makes state law supreme simply because the Legislature says it is. Instead, Article XI, Section 5 provides for local innovation tempered only by ***direct conflict*** with ***existing*** state law. ***Home-rule cities are, therefore, expressly, constitutionally empowered to regulate when and where the State does not***.

The SB 814 substitute, however, contains a novel, misleading, and ***patently unconstitutional*** provision it would add as Section 51.002 of the Local Government Code. That amendment provides that: "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."

First, arguably allows only local, parallel versions of *existing* state law, an extraordinarily limited authorization completely at odds with Article XI, Section 5's grant to home-rule cities of the full power of self-government. One arguably cannot show a local law is "consistent" with state law if the State does not regulate in the area it covers. Consequently, the provision could be interpreted to prohibit anything but local, parallel versions of ***existing*** state law. Put another way, this provision would essentially require state authorization or existing state regulation for cities to regulate even outside the covered codes. ***This is impermissible and unconstitutional "super-preemption" on steroids***.

Second, to the extent it applies to all local law beyond the covered codes, ***it is unconstitutionally overbroad.***

Third, the provision would arguably and unconstitutionally impose an improper and unprecedented ***presumption in favor of preemption*** that cities would have to overcome. It would, therefore, shift the burden to cities to show consistency with state law. ***That would unconstitutionally turn Article XI, Section 5 on its head***.

Fourth, if the provision is not interpreted to prevent all regulation in areas in which the State does not already regulate, then ***the provision is unconstitutionally vague*** as it does not explain how a city would show a regulation with no state counterpart is consistent with State law.

Finally, and most important, ***what is effectively repeal of home-rule can only be accomplished by constitutional amendment, not a simple statute like SB 814. Proposed Section 51.002 arguably repeals home-rule and turns home-rule cities into general law cities in direct violation of Article XI, Section 5.*** Even the original versions of SB 814 and HB 2127 make clear that they do not preempt local laws in unidentified fields so much as subject them to possible preemption or authorization at the option of the Legislature. Indeed, the House bill and House State Affairs Committee substitute expressly grant home-rule cities the powers of general law cities as some

kind of consolation prize. This broad, intentional usurpation of home-rule cities' power in the name of uniformity, without any pretense of a conflict with state law, and attempt to convert home-rule cities into general law cities is unconstitutional. Period. ***If the State wishes to repeal partially home-rule, however, it has a ready vehicle: a constitutional amendment, which requires a state-wide vote.*** It cannot amend the Texas Constitution so nakedly by a simple piece of legislation. ***Consequently, SB 814 cannot have any preemptive effect. As an unratified constitutional amendment, it is neither a general law nor part of the Texas Constitution.*** *See* Tex. Const. art. XI, § 5.

E. The SB 814 Substitute does not and cannot constitutionally impose field preemption.

The bills purport to establish or recognize field preemption. ***They do not and cannot.*** First, the bills ***expressly*** remove home-rule authority to regulate under the covered codes.[14] At best, that constitutes ***express*** preemption. The same is essentially true for the language in proposed Local Government Code Section 51.002. Field preemption, by contrast, is a type of *implied* preemption.[15]

Second, ***field preemption occurs only in the very rare circumstance in which Congress has legislated so comprehensively as to occupy an entire field of regulation, leaving no room for the State to supplement federal law***.[16] The U.S. Supreme Court thus recognizes field preemption, ***under the Supremacy Clause,*** only when "(1) 'the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation,' or (2) 'where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'"[17]

Field preemption of local laws by state law, however, has not been recognized or adopted in Texas.[18] ***It would be unconstitutional to do so***. Because the Texas Constitution contains only a primacy clause based upon conflicts between state and local law, Article XI, Section 5, and *not* a supremacy clause, as the federal Constitution does, the Texas Supreme Court has repeatedly reaffirmed that "the entry of the state into a field of legislation ... *does not* automatically preempt

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[14] *See* HB 2127, §§ 5 (§ 1.004); 6 (§ 1.109); 9 (§ 1.004); 9 (§ 30.005); 10 (§ 1.005); 11 (§ 51.002); 13 (§ 1.003); 14 (§ 1.004); 15 (§ 1.004).

[15] *Great Dane Trailers, Inc. v. Estate of Wells,* 52 S.W.3d 737, 743 (Tex. 2001).

[16] *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 357 (1986) (citing *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

[17] *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc*., 471 U.S. 707, 713 (1985) (quoting *Rice*, 331 U.S. at 230)). This includes things like foreign policy, in which the federal interest is truly paramount.

[18] *See BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 25 (Tex. 2016) (Boyd, J., dissenting) ("city ordinances are not subject to state-law 'field preemption'"). *See also Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 9 (Tex. 1998) (recognizing that *federal* field preemption of *state* law may occur when "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id*. (quoting *Rice,* 331 U.S. at 230). It may also occur when "the Act of Congress ... touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice,* 331 U.S. at 230.

that field from city regulation; local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable."[19] Instead, *local law is preempted only to the extent of any direct conflict between the two*.[20]

Accordingly, Texas courts ***will not hold*** a state law and a city charter provision repugnant to each other if they can reach a reasonable construction leaving both in effect.[21] As Justice Boyd explained: "*City of Weslaco* confirms that ***field-preemption does not permit a state statute to render a city ordinance unenforceable; instead, even if the statute expresses an intent to preempt the field, a city ordinance is enforceable except to the extent it conflicts with the statute."[22] The Texas Constitution, and Article XI, Section 5 in particular, are, therefore, fundamentally inconsistent with the concept of field preemption****.*

Third, even if field preemption were possible in Texas, ***the bills' authors make no pretense that there exists sufficiently comprehensive state regulation, sufficient state interest, or even conflicts with local law in the areas ostensibly preempted by this legislation to warrant field preemption***. Instead, the only requirements the bills impose for preemption is that the State merely regulate ***something*** in the area to be preempted. ***That is insufficient under any recognized test for field preemption****.* This test cannot be ignored simply by purporting to accomplish field preemption expressly, as the bills do.

The bills, therefore, fall victim to the common misunderstanding that pervades the Texas Legislature's recent efforts to preempt local laws: that preemption is somehow a doctrine of ***control*****,** not of ***displacement***. ***It isn't.*** As discussed, ***federal field preemption cannot exist unless federal regulations leave no room for state co-regulation***.[23] Nevertheless, SB 814, Section 5 [§ 1.004] attempts to implement a legal oxymoron: field preemption that also *authorizes* local co-regulation. It provides: "The provisions of this code preclude municipalities or counties from adopting or enforcing an ordinance, order, rule, or policy ***in a field occupied by a provision of this code unless explicitly authorized by statute***." (emphasis supplied). As discussed above, if

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[19] *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982).

[20] *See City of Laredo v. Laredo Merchants Ass'n,* 550 S.W.3d 586, 594, n. 40 (Tex. 2018*)* (quoting *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002), *as supplemented on denial of reh'g* (Aug. 29, 2002) (stating that an ordinance is preempted only "to the extent it conflicts with the state statute")); *Dallas Merch.s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491, 492 (Tex. 1993)). Although the Texas Supreme Court has sometimes included loose language in its opinions to the effect that the Legislature may remove areas from local regulation, Justice Boyd has correctly observed that it has never done so without also finding a preemptive conflict. *See BCCA Appeal Group*, 496 S.W.3d at 30, n.1 (Boyd, J., dissenting in part). Justice Boyd explained: "*City of Weslaco* establishes that, at a minimum, the Court must provide a statutory basis for finding a 'legislative goal of statewide authority.' And even if the Court is able to do so, *such legislative intent does not render the Prosecution Provisions unenforceable. The Prosecution Provisions are unenforceable only if they are inconsistent with state law*." *Id*., (citing *In re Sanchez*, 81 S.W.3d at 796) (emphasis supplied).

[21] *Dallas Merchant's and Concessionaire's Ass'n*, 852 S.W.2d at 491.

[22] *BCCA Appeal Group*, 496 S.W.3d at 30 (Boyd, J., dissenting in part) (citing *City of Weslaco v. Melton*, 158 Tex. 61, 308 S.W.2d 18, 19–20 (1957)) (emphasis supplied).

[23] *See supra* note 18.

there remains room for local regulation, as there expressly does here, the field referenced is not, by definition, "field" preempted. ***SB 814's own self-defeating text, therefore, demonstrates conclusively that what the bills provide is <u>not</u> field preemption***.

Finally, ***there is no conflict requirement in the bills***. That is constitutionally fatal because Article XI, Section 5 requires a conflict for any preemption. ***The Legislature cannot effectively amend the Constitution to eliminate conflict requirements by declaring that it is preempting a field***.

F. Although presented as field preemption, SB 814 amounts to little more than sweeping, unconstitutional local *deregulation* in areas in which the State barely regulates or relies primarily on local co-enforcement.

Although the bills claim that their goal is statewide, regulatory uniformity, they do not actually require that there <u>be any state regulation at all</u> before all local regulations in a prohibited arena are invalidated. Under the bills, if the State regulates *anything* in an area, local regulation is arguably entirely precluded. This arguably includes any co-regulation or monitoring activities local governments in coordination with the state or federal governments. That is not preemption under Texas law. It is wholesale deregulation on a staggering scale.[24]

Preemption allegedly for uniformity is a typical ploy interests groups use when what they really seek is total deregulation at the local level. As one scholar explained: "The state legislature's program is not uniform statewide regulation instead of varying local rules *but often no regulation at all*."[25] There can be no preemption under such circumstances because the Texas Constitution requires an actual conflict between state and local laws. Lack of state regulation does not create preemptive conflicts; under the Texas Constitution, it creates opportunities for home-rule.

Moreover, the U.S. Supreme Court has affirmed that "[t]his interest [in uniformity] is not unyielding…"[26] Both state and federal law provide for local co-regulation in a host of areas. Consequently, federal law would undermine the very uniformity the State ostensibly seeks. Moreover, where, as here, the bills themselves clearly authorize exceptions to preemption, *"[t]he concern with uniformity does not justify the displacement of" local laws* that serves the ends of particular state and federal laws.[27]

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[24] *See* Briffault, *supra* note 2, at 2024 (quoted in the executive summary here).

[25] *See* Richard Briffault, *Preemption: The Continuing Challenge*, 36 J. Land Use & Envtl. L. 251, 260 (2021) (emphasis supplied).

[26] *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp*., 537 U.S. 51, 70 (2002).

[27] *Id.,* 70.

II. THE HB 2127 SUBSTITUTE AND SB 814 ARE INHERENTLY UNWORKABLE AND UNCONSTITUIONAL

A. The bills are too unconstitutionally vague to determine the field allegedly preempted or its scope.

A statute that prohibits conduct that is not sufficiently defined is void for unconstitutional vagueness.[28] The vagueness doctrine is a component of both the Texas and U.S. Constitutions' due process guarantees. *See id*. Due process is satisfied if the prohibition is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with."[29]

"The vagueness doctrine requires different levels of clarity depending on the nature of the law in question." *Id.* When, as here, "the statute's language threatens to inhibit the exercise of constitutional rights, a stricter vagueness standard applies than when the statute regulates unprotected conduct."[30] In Texas, however, a home-rule city's laws are preempted only when the Legislature has spoken with "*unmistakable clarity*."[31] Consequently, *the scope of purported preemption must be particularly well defined so that local governments and those subject to their laws will know with great certainty what laws may be enforced*.

Nothing about HB 2127 and SB 814 provides any clarity at all. In addition to the self-defeating "field preemption" language discussed above; the bills employ vague jargon in the various, identical "field preemption" provisions addressing the covered codes. Neither the terms "field" nor "occupied" are defined for any code covered. Indeed, the bills make no attempt to define precisely *any* field. This failure is fatal to the bills because both the Texas and U.S. Supreme Courts determine federal field preemption based upon a very precise definitions of the field allegedly preempted.[32] Moreover, identifying a rare, preempted field is possible only because it may be implied from the pervasiveness of the federal regulation of it. There may be few or no such regulations in connection with the covered codes.

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[28] *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998) (citing *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972)).

[29] *Id.* (citing *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers,* 413 U.S. 548, 579 (1973)).

[30] *Id.*, 438 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 497 (1982)).

[31] *City of Laredo*, 550 S.W.3d at 593.

[32] *See, e.g.*, *Oneok, Inc. v. Learjet, Inc.,* 575 U.S. 373, 385 (2015) ("[w]e must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the pre-empted field as defined by our precedents"); *Kurns v. R.R. Friction Products Corp*., 565 U.S. 625, 628 (2012) ("the United States Court of Appeals for the Third Circuit determined that petitioners' claims fall within the field pre-empted by that Act, as that field was defined by this Court's decision *in Napier* …"); *English v. Gen. Elec. Co*., 496 U.S. 72, 73 (1990) ("English's action, however, does not fall within the boundaries of the pre-empted field as so defined…"); *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 10 (Tex. 1998) ("thus, to the extent Standard 208 defines the preemptive reach of the Safety Act, it 'is not a comprehensive regulation that occupies the entire field'").

Instead, the bills here attempt to define a "field" as "occupied" *by a single regulation*.[33] While Article XI, Section 5 of the Texas Constitution *already* allows a single regulation to preempt a corresponding, *conflicting* local one, HB 2127 and SB 814 apparently seek to preempt something more than merely conflicting local regulations. Yet, the bills provide no guidance as to how to circumscribe the larger "field" thus "occupied."

Because the bills' provisions are too vague to pass constitutional muster and identify the field allegedly preempted, because the purported "field" preemption here is not based upon comprehensive state regulation, and because the bills do not require a conflict with existing law for preemption, it is simply not possible for cities and counties to know what local laws are preempted by HB 2127 and SB 814. The bills are, therefore, far too vague to give the cities and counties fair notice of what conduct may be punished, forcing them to guess at the statute's meaning.[34] They also invite arbitrary and discriminatory enforcement by failing to establish guidelines for those charged with enforcing the law, "allow[ing] policemen, prosecutors, and juries to pursue their personal predilections."[35] These considerations determine a statute's constitutionality. *Moreover, the failure, at minimum, to specify what local laws are intended to be preempted completely undercuts any suggestion that the bills can meet the Texas Supreme Court's stringent test for preemption with unmistakably clarity.*

B. Even if it were possible to define the fields allegedly preempted by the bills, the bills are still too vague to let cities know what local laws they are still authorized to enforce.

The bills purport to bar local regulation in the preempted fields "unless *explicitly* authorized by statute."[36] This language was presumably included to ensure continuity of essential local services and authority. It does not accomplish that task for home-rule cities.

Although not defined in the bills, the term "explicit" is ordinarily defined as something stated clearly and in detail, leaving no room for confusion or doubt.[37] Consequently, it appears that the bills require express or detailed authorization for particular local regulations. Current co-regulation statutes, however, do not ordinarily provide any express, detailed authorization for local co-regulation ***because home-rule cities, by definition, have not needed it*.** Instead, the Legislature has historically recognized independent home-rule authority in such instances. For

[33] *See, e.g.*, SB 814, § 5 [§ 1.004].

[34] *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

[35] *See Smith v. Goguen*, 415 U.S. 566, 575 (1974).

[36] *See* SB 814, § 5 [§ 1.004] (emphasis supplied).

[37] *See, e.g., Brazos Contractors Dev., Inc. v. Jefferson*, 596 S.W.3d 291, 315 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (Christopher, J., dissenting) ("Black's Law Dictionary defines 'explicit' as, '[c]lear, open, direct, or exact' or '[e]xpressed without ambiguity or vagueness; leaving no doubt.'" Explicit, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* NEW OXFORD AMERICAN DICTIONARY 610 (Angus Stevenson & Christine Lindberg, eds., 3d ed. 2010) (defining explicit as "stated clearly and in detail, leaving no room for confusion or doubt")); *Allen v. State*, 849 S.W.2d 838, 841 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd) ("Black's Law Dictionary (5th ed.) defines 'explicit' as not obscure or ambiguous; having no disguised meaning or reservation; clear in understanding").

example, Texas Local Government Code § 552.054 is part of a state statutory scheme that allows general law cities to create local drainage utilities and impose drainage charges. It provides, however: "This subchapter does not: 1) enhance or diminish the authority of a home-rule municipality to establish a drainage utility under Article XI, Section 5, of the Texas Constitution." There are similar provisions in the covered codes. Because of the bills' vague language, cities will simply not know whether such language is impliedly repealed or sufficient to qualify as "explicit authorization" to co-regulate. Worse, the State's prior acknowledgement of cities' constitutional home-rule authority, as acknowledged by such statutes, only illustrates the unconstitutionality of removing such home-rule constitutional powers.

C. The bills will require expensive litigation to determine the scope of their vague express preemption language if cities are not chilled completely in the exercise of their constitutional home-rule authority.

If these unconstitutionally vague bills are adopted and allowed to go into effect, home-rule cities will face a Hobbesian choice: endless, expensive litigation to determine if cities may regulate to continue to provide specific, existing essential services and protections or new ones; or *not* providing such services or protections because the bills' vagueness and draconian waiver of immunity, defenses, and fee provisions will chill the exercise of their constitutionally-delegated home-rule authority.

For the reasons discussed in the preceding subsections on vagueness, cities all over Texas will have to turn to their local trial and appellate courts to determine whether the bills prevent them from regulating in areas in which there is no existing conflict with state law. While resolution of such vagueness questions alone would inundate the Texas courts, that burden on the courts, cities, and counties will be exponentially magnified by the bills' removal of traditional protections that allow cities to operate efficiently and to prevent them from drowning in unnecessary and abusive litigation.

In addition to its purported field preemption provisions, the bills amend the Texas Civil Practices and Remedies Code to create a new cause of action making cities liable "for certain preempted regulation," that is, for allegedly violating the preemption provisions the bills impose.[38] Worse, it provides statutory standing to *anyone* "adversely affected," including state government officials, to bring such an action. In doing so, claimants may recover their fees, but cities can recover nothing even for frivolous or abusive claims.[39]

Worse still, the bills waive cities' governmental immunity against such claims,[40] and strip local officials of their official and qualified immunity, grounded in good faith. *Id. In other words, the bills intentionally make cities "sitting ducks" for litigation, punishing local governments even when they act in good faith in the face of an unconstitutionally vague statute.*

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[38] SB 814, § 7 [Sec. 102A.001].

[39] *Id.* [Sec. 102A.002].

[40] *Id.* [Sec.102A.003].

There can be only one purpose for stacking the deck so decisively against cities and counties: to make it so risky and costly even to attempt to regulate in good faith in any area even arguably touched by the covered codes that no city, despite the Texas Constitution's express authorization to do so, will choose to regulate at all. According to the authors' comments behind the scenes, *this unconstitutional chilling effect on cities in the exercise of their constitutional rights is the apparent point of the bills.*

D. The bills do not take into account that the covered codes are already partially preempted by *federal* law, some authorizing local co-regulation, leading to more confusion and litigation concerning what local laws would be preempted.

A quick review of the covered codes reveals that all have numerous provisions preempted by federal law.[41] Consequently, none of these preempted and thus invalid state statutes could, in turn, preempt local law. Nevertheless, because of the bills' vague wording, local laws could arguably be preempted by any *other* regulations in the "field" "occupied" by such federally preempted regulations. Cities may, therefore, be sued for violating such adjacent regulations and have to litigate anywhere in the State whether these adjacent state statutes are preempted by federal law as well. This will add more confusion and multiply litigation. The problem is particularly complex when the federal government itself authorizes municipal co-regulation the State may try to outlaw.

E. If SB 814 passes and is allowed to take effect, Texans will lose or experience disruptions in essential services and protections cities now provide because the State is unable or unprepared to assume or timely authorize them.

In a given day, city officials in each Texas city make thousands of decisions and undertake thousands of tasks essential to keep those cities running and their residents protected. There is no indication that the State is prepared or able to undertake or immediately delegate performance of these tasks for every city in Texas if HB 2127 takes effect and prevents cities from continuing to provide these services and protections. It is highly likely, therefore, that essential city services and protections in cities across Texas will be lost in the transition and thereafter.

There is no indication that the State of Texas is in any position either to assume these important tasks effectively or, once this legislative session is over, to pass timely bills authorizing Houston

[41] For example, numerous subsections of the Agriculture Code are preempted by the Federal Meat Inspection Act. *See National Meat Ass'n v. Harris*, 565 U.S. 452 (2012). Assessment liens on citrus producers and cotton buyers under Tex. Agric. Code §§ 74.115 and 80.017 are also preempted by the Food Security Act of 1985. Federal law also preempts certain pesticide regulations. *See id*., § 76.001; *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). Similarly, various provisions of the Finance Code are also preempted by federal law. *See* Tex. Fin. Code §§ 339.005 (by 12 U.S.C. Section 1735f-7a); 347.110 (by 38 U.S.C. Section 101, et seq., 42 U.S.C. Section 5401, et seq., 12 U.S.C. Section 1735f-7); and 345.357 (by 12 U.S.C.A. § 1702, *et seq*.).The other covered codes contain similar provisions.

to continue to provide these services. Indeed, there is no provision in the bills imposing any responsibility on the State to meet in special session or undertake even essential local services and protections.

There are millions of local problems and programs that will have to be sorted out by the State itself or through litigation if these vague and ill-considered bills are adopted. Consequently, *both* the State and local governments will be plunged into chaos if the bills pass.

III. THE BILLS WILL BE TERRIBLE FOR TEXAS BUSINESSES BY BOTH EXPONENTIALLY INCREASING AND NEEDLESSLY PROLONGING BUSINESS UNCERTAINTY AND LITIGATION

The authors of the bill continue to tout it as providing business owners with a simpler, more predictable regulatory regime. Many owners in the House testified that they believed the bills would free them from local regulations altogether. ***Both representations are incorrect*.** Instead, SB 814 or its substitute will create an endlessly confusing regulatory and litigation nightmare.

First, it cannot be the case that, as the Houston author testified and bragged, 95% of local regulations will remain on the books but, as the authors apparently assured the business owners, they will be free from virtually all local regulation and only be answerable to the State. ***Both cannot be true***.

Second, the reason the Texas Supreme Court has repeatedly reaffirmed the need to demonstrate intent to preempt with "***unmistakable clarity***"[42] ***is so that all parties, including those who must enforce the local laws and those who must obey them, will know what is preempted and what is not. Under SB 814, however, cities will not know what laws to enforce, and business will not know what laws to obey***. The "unmistakable clarity" standard does not mean, as the TPPF witness incorrectly asserted, that the Legislature may simply declare its intent to preempt *something* and leave it to those who must implement such laws to figure out what exactly the Legislature intended to preempt.

Contrary to several representatives' inquiries, it is not up to the *cities* to struggle to identify which of their local regulations will be preempted or to prove "consistency" state law. This is especially true when they will be liable for fees simply for seeking judicial confirmation of whether they may enforce their own laws. Instead, ***the long-standing burden of demonstrating with unmistakable clarity the intention to preempt specific laws rests squarely with the State and Legislature as the parties urging preemption and bearing "the difficult burden of overcoming the presumption against preemption***."[43] Although the Texas Supreme Court has very recently acknowledged that there is a "doctrinal dispute"[44] over the presumption's application in express preemption cases if generally, it has routinely applied the presumption to statutes with an express preemption clause

[42] *City of Laredo v. Laredo Merchants Ass'n,* 550 S.W.3d 586, 593 (Tex. 2018).

[43] *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001) (citing *Silkwood v. Kerr McGee Corp*., 464 U.S. 238, 255 (1984) (stating that the party urging preemption has the burden of proof)).

[44] *Wal-Mart Stores, Inc. v. Xerox State & Local Sols., Inc.*, No. 20-0980, 2023 WL 2543049, at *7, n. 51 (Tex. Mar. 17, 2023).

"the text of the pre-emption clause is susceptible of more than one plausible reading…"[45] as SB 814's surely is.

Because SB 814's authors have completely failed to meet their heavy burden of showing what local regulations or purported "fields" are preempted with unmistakable clarity, all stake holders, including the business owners who testified, will have to engage in the same difficult, costly, time-consuming, and ultimately fruitless legal analysis that follows ***or resort to litigation to decide such questions***:

a. **Is the local regulation *expressly* preempted by state law?** The answer will likely not often be positive because, contrary to the author's unsupported assertion, there is no point for local governments to regulate where the state has an express statute forbidding it. *See* Tex. Const. art XI, § 5 (preempting contrary home-rule laws). *When there is an express preemption provision, contrary laws would be preempted without SB 814 and there is no need for such legislation.*

b. **Is the local regulation *impliedly* preempted by state law?** The answer will also likely not often be positive because, contrary to the author's unsupported assertion, there is no point for local governments to regulate when the state has in place a directly contrary statute. *See* Tex. Const. art XI, § 5. *When there is a directly conflicting statute, a contrary law would be preempted without SB 814 and there is no need for such legislation.*

c. **<u>SB 814</u>: is the local regulation expressly authorized by another state statute?** The bill improperly purports to convert home-rule cities, which currently possess the "full power of self-government,"[46] based upon an express grant in the Texas Constitution, subject only to conflicts with state law, into general law cities, which may act only with state authorization. Consequently, for any home-rule city's laws to survive SB 814, even a needed one that fills gaps in state law like Houston's outdoor concert ordinance, there will have to be an existing statute authorizing it or one will have to be passed. This will increase the burden on the Legislature to authorize larger cities to enact essential regulations that may only be needed in cities of sufficient size.

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[45] *In re Facebook, Inc.,* 625 S.W.3d 80, 88, n.5. (Tex. 2021), *cert. denied sub nom. Doe v. Facebook, Inc*., 212 L. Ed. 2d 244, 142 S. Ct. 1087 (2022); *see Graber v. Fuqua*, 279 S.W.3d 608, 611 (Tex. 2009) (citing *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Grp., Inc*., 505 U.S. 504, 523 (1992)) (presumption also applies "to the scope of preemption"); *Sunset Transp., Inc. v. Tex. Dep't of Transp*., 557 S.W.3d 50, 65 (Tex. App.—Austin 2017, no pet.) (same); *see also In re Union Pac. R.R. Co*., 582 S.W.3d 548, 551 (Tex. App.—Houston [14th Dist.] 2018, no pet.) ("[c]ourts ordinarily accept a plausible reading of an express preemption provision that disfavors preemption") (citing *Franks Investment Co. v. Union Pacific Railroad Co.,* 593 F.3d 404, 407 (5th Cir. 2010)).

[46] *City of Houston v. City of Magnolia Park,* 115 Tex. 101, 276 S.W. 685, 689 (1925) (citation omitted). "It was the [constitutional drafter's] intention ... to give to cities the right to determine for themselves what kind of charter they should live under." *Id.,* 689; *City of Houston v. State ex rel. City of W. Univ. Place,* 142 Tex. 190, 176 S.W.2d 928, 929 (1943) (quoting *Magnolia Park*).

d. **<u>SB 814</u>: is the local regulation preempted because it falls "*<u>in a field of regulation that is occupied by a provision of this code</u>*"?**[47] **THIS LANGUAGE DOES NOT APPEAR ANYWHERE IN AMERICAN JURISPRUDENCE**. ***<u>IT IS A NON SEQUITUR</u>***. SB 814 does not explain how a provision of any law can "occupy" it or any subsection of it. Moreover, SB 814 directly contradicts decades of Supreme Court jurisprudence holding that the mere "entry of the state into a field of legislation ... does not automatically preempt that field from city regulation… Rather, 'local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable.'"[48] As demonstrated in the preceding paragraphs, with the exception of express preemption clauses, the provisions of the codes covered by SB 814 *do not preempt anything except a directly conflicting provision*. Moreover, as discussed in my revised testimony, a field cannot and is not identified by a single regulation. ***It is, therefore, not possible to determine from this clumsy, empty jargon what, if anything, is actually preempted.*** The only solution proposed by the author is endless litigation over every allegedly preempted local law at cities' exclusive expense.

e. **<u>Does federal law preempt state law purportedly preempting some state law or field</u>?** A quick review of the covered codes reveals that all have numerous provisions preempted by federal law.[49] Consequently, none of these preempted and thus invalid state statutes could, in turn, preempt local law. Nevertheless, because of the companion bills' vague wording, local laws could arguably be preempted by *other* regulations in the "field" allegedly "occupied" by such federally preempted regulations. Cities may, therefore, be sued for violating such adjacent regulations and have to litigate whether these adjacent state statutes are preempted by federal law as well. This will add more confusion and multiply litigation.

f. **<u>Does federal law expressly authorize local co-regulation</u>?** In some areas, such as flood control and insurance, federal law authorizes local governments to pass laws that support federal regulation. To the extent state law would interfere with such federally authorized local co-regulation, *state law would be preempted by federal law* and local law could be enforced.

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[47] *See, e.g*., HB 2127, § 4 [Sec. 1.004].

[48] *City of Laredo*, 550 S.W.3d at 593.

[49] For example, numerous subsections of the Agriculture Code are preempted by the Federal Meat Inspection Act. *See National Meat Ass'n v. Harris*, 565 U.S. 452 (2012). Assessment liens on citrus producers and cotton buyers under Tex. Agric. Code §§ 74.115 and 80.017 are also preempted by the Food Security Act of 1985. Federal law also preempts certain pesticide regulations. *See id*., § 76.001; *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). Similarly, various provisions of the Finance Code are also preempted by federal law. *See* Tex. Fin. Code §§ 339.005 (by 12 U.S.C. Section 1735f-7a); 347.110 (by 38 U.S.C. Section 101, et seq., 42 U.S.C. Section 5401, et seq., 12 U.S.C. Section 1735f-7); and 345.357 (by 12 U.S.C.A. § 1702, *et seq*.). The other covered codes contain similar provisions.

Because SB 814's authors essentially brag about ***not*** identifying the specific laws preempted, seek to put the burden on cities to guess at what laws are preempted or endlessly litigate the question, even refer to HB 2127 as a "living document," cities and businesspeople will have to hire lawyers or litigate whether a local law meets these six tests. ***Every local law allegedly preempted would have to undergo this tortured analysis and, because of SB 814's unconstitutionally vague wording, no definitive resolution could ever be reached. Consequently, compliance and enforcement will be exponentially more complicated and confusing than it is now.***

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