August 28, 2023

The Honorable Maya Guerra Gamble
345th Civil District Court, Travis County, Texas
1700 Guadalupe, 11th Floor
Austin, Texas 78701
Via E-Filing

Re: *City of Houston v. State of Texas*, Cause No. D-l-GN-23-003474
Amici Curiae Letter in Support of Texas's Motion to Dismiss and HB 2127

Judge Guerra Gamble:

The Texas Freedom Litigation Center and the Alliance for Securing and Strengthening the Economy in Texas ("ASSET") respectfully file this letter brief as amici curiae in support of the State of Texas's motion to dismiss and the Texas Legislature's prerogative to preempt local ordinances as expressed in HB 2127.

INTRODUCTION

In recent years, Texas businesses have been increasingly subject to different and varying ordinances, orders, and rules imposed by cities and counties across the State. Texas has nearly 300 home-rule cities alone, and the rules that these municipalities place on commerce and trade differ tremendously and can change quickly. Businesses thus face many challenges and costs in complying with a continuously shifting sea of regulation at the hands of thousands of potential regulators.

With the passage of the Texas Regulatory Consistency Act (HB 2127), the Texas Legislature did not end all regulation on businesses in Texas, as some have falsely suggested. Rather, the Legislature acknowledged that it "has historically been the exclusive regulator of many aspects of commerce and trade in this state." Section 2(1).

But the proliferation of local ordinances has led "to a patchwork of regulations that apply inconsistently across the state." Section 2(3). So the Legislature exercised its judgment—as is its undisputed right—to preempt those local ordinances in order to bring regulatory clarity and consistency to the specific rules of commerce and trade in Texas.

The plaintiffs now challenging this legislation in this lawsuit are wrong. Procedurally, they are the wrong plaintiffs suing the wrong defendant at the wrong time. Texas courts are well equipped to handle challenges to specific ordinances brought by parties who will be affected by the outcome of those specific cases. And a city or county can challenge the constitutionality of the Act in defending against those challenges. But here the plaintiffs are trying to manufacture a pre-enforcement challenge against a defendant that has nothing to do with the implementation or enforcement of HB 2127. What they are asking for from this Court is nothing more than an advisory opinion—albeit, one dressed up as a declaratory judgment—that will have no practical effect simply because they do not like a new state law.

On the merits, the plaintiffs are wrong that the Texas Constitution shields their ordinances from the judgment of the State's highest representative body. It is undisputed that the Texas Legislature can expressly preempt city and county ordinances. The Legislature has done exactly that with HB 2127 by proclaiming that certain fields of regulation are fully occupied by state law such that there is no room remaining for local ordinances. It is legally irrelevant that the plaintiffs might not like the breadth of the Legislature's exercise of preemption in HB 2127, and the breadth of preemption does not render the bill unconstitutional.

INTEREST OF AMICI CURIAE

The Texas Freedom Litigation Center is the litigation arm of the Texas Association of Business ("TAB"). TAB is the state chamber of commerce, representing companies of every size and various industries. TAB works in a bipartisan manner to protect Texas's pro-business climate, delivering solutions to the challenges affecting Texas employers. TAB's purpose is to champion the best business climate in the world, unleashing the power of free enterprise to enhance lives of Texans for generations.

ASSET is an organization that advances the policies that foster economic growth and allow the free market to operate without unreasonable government interference in business decisions. ASSET represents businesses from a wide array of sectors that provide opportunities for Texas employees and are essential to Texas communities.

Amici have a strong interest in the outcome of this litigation, as HB 2127 protects the business community from a labyrinth of inconsistent local rules and provides stability and predictability across the State.

ARGUMENT

I. These are the wrong plaintiffs suing the wrong defendant at the wrong time.

This lawsuit is procedurally improper from top to bottom. The plaintiffs lack standing to bring this suit. The State has sovereign immunity against these claims. And there is no actual case or controversy between the parties to this case.

First, the plaintiffs lack standing to bring this lawsuit because their alleged injury is neither traceable to the defendant they have sued nor redressable by an order from this Court.

The State of Texas has no role in enforcing HB 2127. As such, any injury alleged by the plaintiffs is not traceable to any action taken by the State. *Abbott v. Mexican American Legislative Caucus, Texas House of Representatives*, 647 S.W.3d 681, 696-97 (Tex. 2022) ("*MALC*") (noting that the Texas "courts of appeals have generally held that 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" (citing *Paxton v. Simmons*, 640 S.W.3d 588, 602-03 (Tex. App.—Dallas 2022, no pet. h.)). The plaintiffs' request for relief proves as much by failing to request *any* injunctive relief against the State or any of its officials—a glaring omission in a challenge to a state statute.

The plaintiffs argue that an enforcement connection exists merely because they interpret the statute to authorize "state agencies" to bring suits challenging local ordinances as preempted. Hous.'s First Am. Pet. 8 (hereinafter, "Pet."). But there are at least two problems with this argument. First, the plaintiffs did not sue any "state agencies." They sued the State of Texas itself. That is a difference of jurisdictional significance. *See MALC*, 647 S.W.3d at 696-98. Second, even if the plaintiffs had sued a state agency that theoretically *could* bring suit under HB 2127, the cities have neither alleged nor shown that any such agency *will* bring suit. "To establish standing based on a perceived threat of injury that has not yet come to pass, the '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) (quoting *Whitmore*

v. Arkansas, 495 U.S. 149, 158 (1990)). Thus, the plaintiffs have not established an injury-in-fact based on potential future litigation.

In the end, the plaintiffs' argument proves too much. If the plaintiffs were right, then they could simply sue any individual or business in Texas who meets the statutory definition of "person" under Sec. 102A.001, regardless of whether that person has any intention of pursuing an action under HB 2127. In short, the theory that an "agency or instrumentality" can sue a municipality pursuant to HB 2127—just like any other "person" in Texas—does not mean that the State is a proper party or that it has an "enforcement connection" with the statute in question.

Likewise, any injuries the plaintiffs might suffer cannot be redressed by an order from this Court. *See MALC*, 647 S.W.3d at 690 (explaining that for standing, "the defendant's allegedly unlawful conduct" must be "likely to be redressed by the requested relief"). It is blackletter law that "a trial court's declaration does not prejudice the rights of any person not a party to the proceeding." *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163 (Tex. 2004); *see also* Tex. R. Civ. P. 39 (same); Tex. Civ. Prac. & Rem. Code § 37.006(a) (same). The Texas Supreme Court reiterated this fundamental principle of declaratory judgments just a few months ago in *In re Kappmeyer*, 668 S.W.3d 651, 655 (Tex. 2023). There, the Court held that "the outcome of the [plaintiffs'] suit" seeking a declaratory judgment "does not affect" the ability of nonparty future plaintiffs to bring their own identical claims against the same defendant. *See also Brooks*, 141 S.W.3d at 163 (holding that "any non-joined homeowners would be entitled to pursue individual claims . . . *notwithstanding the trial court's judgment* in the current case" (emphasis added)).

Here, this Court's judgment, as a matter of law, cannot affect the rights of anyone who is not a party to this case. The plaintiffs claim that their injury is a torrent of litigation that hypothetically might be unleashed on them when HB 2127 takes effect. Pet. at 8. An order from this Court could, at most, prevent the State from filing suit pursuant to HB 2127. But no matter the outcome of this lawsuit, any individual or business may still bring a lawsuit to challenge city ordinances under HB 2127—even against the city plaintiffs in this case. Therefore, any relief this Court might order would not redress the plaintiffs' alleged injuries, so the cities have no standing to pursue those claims as plaintiffs.

Second, even if the plaintiffs had standing to bring this suit, the State of Texas retains sovereign immunity against their claims. Again, the statute does not give any state agency or state official authority to enforce its terms, as is typically required for courts to find an exception to the State's sovereign immunity. *MALC*, 647 S.W.3d at 698. Rather, the Legislature empowered the business community, the group uniquely burdened by

varying local ordinances, to challenge the patchwork of inconsistent regulations across the State. Thus, HB 2127 allows individuals, businesses, and trade associations to sue municipalities and counties—all without the involvement of any state official, let alone the State of Texas itself. The proper defendant in such a challenge is the municipality or county, and it can raise as a defendant the same constitutional arguments the plaintiffs raise here. Despite these cities' wish to be plaintiffs rather than defendants, the affirmative suit brought by them against the State of Texas is not the proper way to test the constitutionality of HB 2127.

Third, the plaintiffs' lawsuit is premature. The proper means of testing the constitutionality of HB 2127 is in a live controversy where a court can analyze HB 2127's applicability to a specific ordinance that a proper plaintiff claims is now preempted. But here, the plaintiffs ask this Court to comment on the theoretical application of the statute to unnamed ordinances based on a conjectural fear of hypothetical future lawsuits brought by unknown plaintiffs. This Court lacks jurisdiction to issue such an advisory opinion. *Id.*

II. The Texas Legislature undoubtedly has the power to preempt local ordinances.

Even if the plaintiffs could properly maintain this lawsuit—which they cannot—their lawsuit fails on the merits. First, the plaintiffs claim that HB 2127 violates Article XI, Section 5 of the Texas Constitution because the State has gone too far in preempting the efforts of home-rule municipalities from passing local laws. Pet. at 4. The plaintiffs are wrong. Home-rule municipalities "have all power not denied by the Constitution or State law," and the Constitution empowers "the Legislature" to "limit or withdraw that power by general law." *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 592 (Tex. 2018). Under the Texas Constitution, "[t]he question is not whether the Legislature *can* preempt a local regulation like the Ordinance but whether it *has*." *Id.* at 593 (emphasis in original).

The plaintiffs cite to the Texas Supreme Court for the proposition that "the entry of the state into a field of legislation . . . does not *automatically* preempt that field from city regulation." Pet. at 21 (quoting *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982)) (emphasis added). But that simply means that local laws are not "automatically" preempted as soon as the State begins regulating in a particular area. *City of Brookside Vill.*, 633 S.W.2d at 796 ("The entry of the state into a field of legislation, however, does not automatically preempt that field from city regulation."). In that case, "local regulation is acceptable," but only "if the local regulation is 'ancillary to and in harmony' with the state legislation." *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 17-18 (Tex. 2016) (quoting *City of Brookside Vill.*, 633 S.W.2d at 796). With HB 2127, the

Legislature has made expressly clear that local legislation is *not in harmony* with particular fields of Texas law.

Thus, there is a direct conflict between the now-preempted local ordinances and state law. The plaintiffs overlook that all forms of preemption—including express preemption and field preemption—are in reality conflict preemption. *See Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018) ("Our cases have identified three different types of preemption— 'conflict,' 'express,' and 'field,'—but all of them work in the same way" (internal citation omitted)). On the federal level, field preemption is simply another scenario in which federal and state law conflict. *Id*. The same principle is true with HB 2127. Here, local laws regulating conduct in a statutorily preempted field are now "inconsistent with state law" because those local rules or regulations are inconsistent with the Legislature's determinations in HB 2127.

The plaintiffs also argue that the Legislature can only achieve preemption of local ordinances when it speaks with "unmistakable clarity." Pet. at 4. But the only thing that has to be shown with "unmistakable clarity" is the Legislature's "intent to preempt local law." *City of Houston v. Houston Pro. Fire Fighters' Ass'n, Loc. 341*, 664 S.W.3d 790, 804 (Tex. 2023), *reh'g denied* (June 23, 2023). Pointing to "an express preemption provision" satisfies a litigant's "burden to show the legislative intent to preempt local law with unmistakable clarity." *Id.* The operative provisions in HB 2127 are titled "Preemption," and the Legislature unmistakably has shown its intent to preempt certain local regulations by rendering them "void, unenforceable, and inconsistent with [Texas law]."

The plaintiffs' real complaint isn't about the clarity of the Legislature's intent to preempt local ordinances but the clarity with which local ordinances are now preempted. Yet Texas law does not require unmistakable clarity for the latter. *See Houston Pro. Fire Fighters' Ass'n, Loc. 341*, 664 S.W.3d at 804; *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.) (separately analyzing whether "the legislature's intent to preempt a subject matter is unmistakably clear" and whether "the ordinance conflicts with the statute"). Texas courts are well equipped to determine whether any particular ordinance is preempted by a statutory preemption provision. *See Laredo Merchants Ass'n*, 550 S.W.3d at 593-94 ("The issue is whether the Ordinance falls within the Act's ambit."). And Texas caselaw is full of courts making that precise determination. *E.g., id.* at 595 (determining that a statutory preemption provision regarding "solid waste management purposes" barred a city's ordinance prohibiting single-use grocery bags). Some ordinances will be obviously

preempted.[1] Others may present closer calls. But the plaintiffs cite no case in which the Legislature's power to preempt local ordinances hinges on whether hypothetical future applications of a statute might present close calls.

Respectfully submitted,
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[1] For example, HB 2127 defines with even more specificity four areas of preemption, codified at: Texas Finance Code § 1.004(b); Texas Labor Code § 1.005(b); Local Government Code § 229.901; Texas Property Code § 1.004(b). Even if, however unlikely, this Court were to grant the plaintiffs some relief, it should focus its relief only on the sections of HB 2127 that it thinks are unlawful and sever out the rest. *See Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 22 (Tex. 2000).

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