**CAUSE NO. _____**

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| **THE CITY OF HOUSTON,** | § | **IN THE DISTRICT COURT OF** |
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| ***Plaintiff,*** | § | |
| | § | |
| **v.** | § | **TRAVIS COUNTY, TEXAS** |
| | § | |
| **THE STATE OF TEXAS,** | § | |
| | § | |
| ***Defendants.*** | § | **___ JUDICIAL DISTRICT** |

**THE CITY OF HOUSTON'S ORIGINAL PETITION FOR DECLARATORY JUDGMENT**

Plaintiff, the City of Houston ("Houston"), files this Original Petition for Declaratory Judgment against Defendant, the State of Texas ("Texas"), regarding House Bill 2127 ("HB 2127"). Houston states as follows:

## I. INTRODUCTION

For more than 100 years, Texas constitutional home rule cities, such as Plaintiff Houston, have derived their authority to govern themselves and to regulate their residents, local businesses, and affairs from the Texas *Constitution* and the *people of Texas* themselves, *not* the Texas *Legislature*. As the Texas Supreme Court has explained: "True sovereignty lies in the people of Texas, not the Government they created."[1] It was not always so.

[1] *Leach v. Tex. Tech. Univ.*, 335 S.W.3d 386, 391 n.3 (Tex. App.—Amarillo 2011, pet. denied); Tex. Const. art. I, § 2 ("all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit").

Texas' 1876 Constitution originally required that all Texas cities look to the state legislature for regulatory authority.[2] Texas quickly outgrew that arrangement. As one commentator explained:

> When Texas had just a few large cities, the Legislature had the bandwidth to pass special legislation for each of them.[3] But as the number of large cities grew, *requests from local governments swamped the legislature*; by 1911, *over twenty-five percent of the state's legislation related to municipal affairs*."[4]

Crying "uncle," the Legislature voted to amend the Texas Constitution and sent a home rule amendment to Texas voters for their approval. "In an exercise of their inherent sovereignty, the *people of Texas* approved the [home rule] amendment in 1912."[5]

Through the Texas Constitution's home rule provision, article XI, section 5, and Texas' enabling statutes, Texas voters reasserted their sovereignty by taking back the power they once had delegated to the Texas Legislature and, instead, endowing home-rule cities with broad, plenary, state legislative power within their borders.[6] Through Texas Constitution article XI, Section 5, Houston thus possesses "the full power of self government…"[7]

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[2] *See* Note, *To Save a City: A Localist Canon of Construction*, 136 HARV. L. REV. 1200, 1219 (2023) (for a good discussion of the genesis of home-rule in Texas).

[3] *Id.* (citing Tex. Const. art. XI, §§ 4-5 (1876)).

[4] *Id.* (citing John V. McDonald, *An Analysis of Texas' Municipal Home Rule Charters Since 1994* (Aug. 2000) (M.P.A. research project, Southwest Texas State University)), *available at* https://digital.libary.txstate.edu/bitstream/handle/10877/3741/fulltext.pdf [https://perma.cc/E66Z-RSPP] (emphasis supplied) *see also* Terrell Blodgett, Texas Home Rule Charters 2 (Kelly McBride & Scott Houston eds., 2d ed. 2000) (confirming the percentage of state legislative time required to address local issues).

[5] *Id.* (citing Blodgett, *supra* note 4, at 2) (emphasis supplied).

[6] *Forwood v. City of Taylor*, 147 Tex. 161, 214 S.W.2d 282, 286 (1948); *see Bolton v. Sparks*, 362 S.W.2d 946, 950 (Tex.1962).

[7] *Dallas Merchs.' and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490–91 (Tex. 1993); Tex. Loc. Gov't Code § 51.072.

Because constitutional home rule provisions "[a]re mini-Tenth Amendments designed to cordon off local matters from state intervention,"[8] article XI, section 5 was also enacted to ensure that local regulations in Texas could vary from city to city, as constitutional home rule cities tailored their ordinances and regulations to their inhabitants' needs and desires, and that the Texas Legislature would *never* be "the exclusive regulator" of city life, as HB 2127 wrongly asserts.[9]

Crucially important, unlike the federal constitution, the Texas Constitution does *not* contain a supremacy clause that would make state law always supreme. Instead, it includes only a primacy clause, article XI, section 5, grounded in conflicts and tempered by its constitutional home rule provision, that allows state law to preempt laws enacted by constitutional home rule cities only when they directly and irreconcilably conflict with such local law, and then only to the extent of that conflict.[10] The federal government's ability to preempt Texas' laws is, therefore, far more extensive than the Texas Legislature's ability to preempt Texas constitutional home rule cities' laws. Consequently, some kinds of preemption that may be asserted by the federal government against Texas, such as "field" preemption, are simply constitutionally supported for Texas to assert against Houston and other constitutional home rule cities.

As the Texas Supreme Court has interpreted the Texas Constitution's home rule provision, the party seeking to assert preemption of a local law bears the burden of establishing

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[8] David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 392 (2001).

[9] Article III, Section 56, which prohibits a host of specific local and special laws, also gives lie to the false notion of the Texas Legislature's regulatory supremacy.

[10] *See, e.g.*, *City of Houston v. Houston Prof'l Fire Fighters' Ass'n, Local 341*, No. 21-0518, 2023 WL 2719477, at *9 (Tex. Mar. 31, 2023) (quoting *Dallas Merchs.'*, 852 S.W.2d at 491).

a direct and irreconcilable conflict between state and local law as well as intent by the State to preempt the local law with "unmistakable clarity."[11] Consequently, under Texas law, there can be no open questions as to what laws are preempted. Houston, like all cities, needs to know with certainty what laws it may enforce, and its residents and businesses need to know with certainty what laws to obey. Laws with preemption clauses cannot be "living" documents, as HB 2127's author asserted in House hearings that HB 2127 would be. Instead, in Texas, if any uncertainty about what is to be preempted remains, there can be no preemption.

Against this backdrop, Texas House Bill 2127 was passed by the Texas Legislature and signed by Governor Greg Abbott on June 14, 2023. It is scheduled to go into effect on September 1, 2023. HB 2127 would effectively repeal Texas constitutional home rule, impermissibly expand the scope of state preemption of local law, and improperly shift the burden of *dis*proving preemption to cities, in direct contravention of article XI, section 5 of the Texas Constitution and decades of the Texas Supreme Court's preemption jurisprudence.

HB 2127 achieves these unconstitutional ends by using vague language so indefinite, awkward, and opaque that it fails to notify Texas cities which of their laws they may enforce or Texas businesses and residents which local laws they must obey, let alone afford Houston or any constitutional home rule city the "unmistakable clarity" the Texas Supreme Court has required to preempt local law. Instead, the Legislature has unconstitutionally delegated *to the courts* its own responsibility to identify specifically laws or purported fields allegedly preempted*, if they can.*

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[11] *Id*. (citing *Mo. Pac. R.R. v. Limmer*, 299 S.W.3d 78, 84 & n.30 (Tex. 2009)).

The Texas Constitution, through article XI, section 5's conflict provisions, already provides Texas with a ready means to preempt local laws that actually conflict with State law. HB 2127 is not needed to accomplish that. Moreover, if the Legislature had truly wanted the state-wide regulatory "consistency" *between cities* that only repeal of constitutional home rule would afford, then it should have proposed a constitutional amendment, approved it by a two-thirds' vote in each chamber, and submitted the question to Texas voters just as the Legislature did in 1911 when it passed the home-rule amendment. Because the Legislature has attempted to amend the Texas Constitution by enacting an unconstitutional "special" statute instead, it has violated article XVII, section 1 (the amendment process), article XI, section 5, and article III, sections 56(a)(2), 56(a)(16), and 56(b) (prohibiting local and special laws) of the Texas Constitution.

The statewide regulatory "consistency" and uniformity HB 2127 purports to seek are thus *antithetical* to constitutional home rule and the Texas Constitution. Because HB 2127 violates multiple provisions of the Texas Constitution, both facially and/or as applied, Houston seeks a declaration that HB 2127 is facially unconstitutional and/or unconstitutional as applied—to Houston and/or to local ordinances, rules, and regulations that do not already conflict with Texas general law or the Texas Constitution, under article XI, section 5—and is beyond the authority of the State Legislature to enact.

## II. PARTIES AND SERVICE OF PROCESS

1. The City of Houston, Texas is a home rule municipality.[12]

2. Defendant, the State of Texas, may be served with process through the Texas Secretary of State, 1019 Brazos Street, Austin, TX 78701.

## III. DISCOVERY CONTROL PLAN

3. Pursuant to Rule 190.4 of the Texas Rules of Civil Procedure, Houston intends that discovery, if any, be conducted under Level 3.

## IV. JURISDICTION AND VENUE

4. This Court has jurisdiction over the State of Texas because it is domiciled in and does business in Travis County, Texas and/or resides and has its principal place of business in Texas. The subject matter in controversy is within the jurisdictional limits of this Court, and the Court has jurisdiction over this action pursuant to article V, section 8, of the Texas Constitution and Section 24.007 of the Texas Government Code, as well as the Texas Uniform Declaratory Judgments Act ("UDJA"), Tex. Civ. Prac. & Rem. Code § 37.001, *et seq*.

5. Under Texas Rule of Civil Procedure 47(c)(5), Houston seeks non-monetary declaratory and injunctive relief.

6. Venue is proper in the District Court of Travis County, Texas because the State of Texas is a party to this lawsuit that seeks to declare a state law unconstitutional, void, and unenforceable, Tex. Civ. Prac. & Rem. Code § 15.014, and because all or a substantial part

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[12] In accordance with Texas Local Government Code § 9.008(b), Houston ask this Court to take judicial notice of the provisions of its published Charter, and status thereunder as a Texas home rule city.

of the events or omissions giving rise to the claims presented herein occurred in Travis County, Texas. Tex. Civ. Prac. & Rem. Code § 15.002(a)(1). The Texas Attorney General has been served with a copy of this lawsuit contemporaneous with the filing of this lawsuit. *See* Tex. Civ. Prac. & Rem. Code § 37.006(b),

## V. STANDING, WAIVER OF IMMUNITY, AND RIPENESS

7. Houston has a justiciable interest in cases challenging the constitutionality of civil statutes, like HB 2127, that it is charged with implementing.[13] To implement HB 2127, prior to September 1, 2023, Houston will have to examine each of its existing local regulations, rules, ordinances, and charter provisions, and, thereafter, examine any such laws that may be proposed to determine, if it can, whether those provisions are encompassed by HB 2127. If they are, Houston will then have to determine if the State Legislature has, nevertheless, expressly authorized its otherwise preempted local laws. If it has not and Houston has not identified any countermanding federal law, Houston will have to stop enforcing or even "maintaining" those local laws to comply with HB 2127. This may mean repealing them, including setting and holding repeal elections for charter provisions.

8. In that connection, Houston will also have to determine what services and protections its allegedly preempted local laws now provide will be lost or reduced under HB 2127 and attempt to identify state, federal, or other private programs and protections that might fill the gaps in providing essential and beneficial local programs and crucial protections.

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[13] *See, e.g.*, *Proctor v. Andrews*, 972 S.W.2d 729, 734 (Tex. 1998).

9. Finally, Houston will have to defend against a likely barrage of lawsuits brought by trade associations or individuals essentially to deregulate their industries or businesses at the local level.

10. Houston's interest in these matters, among others, provides it with a sufficient stake in the controversy to assure the presence of an actual controversy that the declaration sought will resolve. Here, there is a real controversy between the parties, which must be determined by the judicial declarations sought. Under this standard, Houston has standing to assert the claims raised herein.

11. Alternatively, there exists an actual enforcement connection—some enforcement power or act that will be affected—between the State of Texas and HB 2127. Among other things, under Section 7, proposed Texas Civil Practices and Remedies Code Section 102A.001, state agencies and any legal entity, including state governmental entities, instrumentalities, and the Texas attorney general, may sue cities for alleged violations of HB 2127's provisions, that is, to enforce the state laws that alleged preempt local ones. These lawsuits to enforce both HB 2127 and underlying state laws can result in voiding and/or enjoining Houston's laws.

12. In addition, under HB 2127's preemption provisions, Sections 5 [proposed Agriculture Code § 1.004], 6 [proposed Business & Commerce Code § 1.109], 8 [proposed Finance Code § 1.004(a)], 9 [proposed Insurance Code § 30.005], 10 [proposed Labor Code § 1.005], 13 [proposed Natural Resources Code § 1.003], 14 [proposed Occupations Code § 1.004(a)], and 15 [proposed Property Code §1.004] (collectively "the purported field preemption provisions"), Houston arguably violates HB 2127 merely by "enforcing" or even "maintaining" existing ordinances, local orders, or rules that are encompassed by HB 2127

as of September 1, 2023, whether notice under HB 2127 has been sent or a lawsuit under HB 2127 has been filed or resolved against them. Because of HB 2127's vagueness, Houston will not know with any certainty what laws it may enforce, and its residents and businesses will not know with certainty that laws they must obey. This high level of uncertainty and confusion concerning the validity of virtually all local laws in important regulatory areas and those concerning health and safety themselves constitutes a concrete injury that also confers standing on Houston.

13. For the same reasons, HB 2127 would render Houston's mayor, elected officials, and employees susceptible to the lawsuits HB 2127 encourages *and* suits under the *ultra vires* exception for enforcing allegedly preempted and void laws. Houston would also be subject to declaratory judgment actions by and in the name of the State, its agencies, instrumentalities, and its attorney general, to have such laws declared invalid, enjoin their further enforcement, and force Houston to pay fees if the State prevails.

14. Alternatively, to the extent this Court does not find it unconstitutionally vague, HB 2127 is self-enforcing. The effect of HB 2127 is to call into question the validity of significant numbers of Houston's important local laws and regulations. The threat and potential expense of the lawsuits HB 2127 facilitates and invites, even if brought by private parties, will deter the actions of reasonable city officials in Houston's cities who wish to exercise their city's constitutional home rule rights but will not exercise those rights because the local laws and regulations they would enforce or enact would likely be encompassed by HB 2127, even if they did not also conflict with state law under article XI, section 5. In essence, in HB 2127, the Legislature has created a public/private enforcement regime that will penalize and raise the risk of Houston's exercising its clear and expansive constitutional

authority granted by article XI, section 5. This tangible, imminent threat of harm and loss of constitutional home rule rights also creates sufficient injury to confer standing on Houston here.

15. There is a substantial likelihood that the requested declaratory relief sought will remedy the alleged injury suffered by Houston and caused by Texas.[14]

16. Texas' immunity is waived in this declaratory judgment action challenging the constitutionality of HB 2127.[15]

17. Houston, as a city that must implement HB 2127, must determine, *prior to September 1, 2023*, which of its laws, rules ordinances, charter provisions, and orders remain viable and enforceable and inform its residents and the public which laws they must still obey and which they need not. Consequently, Houston's constitutional challenge to HB 2127, as it applies to Houston and/or local laws that do not already directly conflict with state general laws and constitutional provisions, in violation of article XI, section 5, is ripe for consideration along with Houston's facial constitutional challenges here.

18. Both kinds of constitutional challenges are also ripe here because Houston has and enforces existing ordinances, regulations, and orders that currently provide important services and protections to the public. For example, Houston's pay-or-play program requires that City contractors either protect their workers with insurance covering their work on City projects or pay into a fund that now provides 30,000 uninsured Houstonians with health insurance. Not only does the program discourage City contractors from attempting to

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[14] *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018).

[15] *See* Tex. Civ. Prac. & Rem. Code § 37.006(b); *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 (Tex. 2011).

undercut their competitors by saving on the cost of insurance for their employees on City projects, but it also greatly benefits tens of thousands of Houstonians who would otherwise not have health insurance. Although this program and these practices do not conflict with State law, this program would still likely be halted as preempted under HB 2127 and tens of thousands of Houstonians would suffer as the result.[16]

19. The State of Texas has presented no plan and has no existing programs to identify, let alone maintain, any of Houston's preempted services or protections, like Houston's pay-or-play ordinance, nor has it inquired of Houston or any constitutional home rule city concerning what preempted programs, services, and protections, if any, it may need to assume as of September 1, 2023, and how it would do so. The real danger to the health and safety of residents and businesses in Houston the loss or interruption in such programs and loss of services and protections that HB 2127's enactment would cause is sufficiently great that Houston cannot risk waiting until HB 2127 goes into effect to file this discrete, well-defined as applied challenge.[17]

20. Finally, the confusion and chaos created as Houston attempts to implement HB 2127, a hopelessly vague statute, itself provides sufficient concrete harm and threats of probable, concrete injury, through lawsuits it will need to defend or initiate, to afford Houston standing and render both its facial and as applied constitutional challenges to HB 2127 ripe on the date of the filing of this document.

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[16] Because of HB 2127's vagueness, it is difficult for any city to identify with certainty examples of programs and protections that will definitely be reduced or eliminated if HB 2127 goes into effect.

[17] *See Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (permitting discrete, well-defined pre-enforcement, as applied constitutional challenges.

## VI. FACTUAL BACKGROUND

22. According to the official Texas House bill analysis, modified here to reflect the alterations in the enrolled version of the bill the Governor signed, HB 2127,[18] the ironically misnamed "Texas Regulatory Consistency Act," would prohibit a municipality or county from adopting, enforcing, or maintaining an ordinance, order, or rule regulating conduct in a "field of regulation" "occupied *by a provision"* of certain statutory codes unless the municipal or county regulation is "expressly authorized" by another state statute. The prohibition would apply to the following codes:

- Agriculture
- Business & Commerce
- Finance
- Insurance
- Labor
- Natural Resources
- Occupations
- Property

23. The term "occupied" is not defined in HB 2127 nor is the phrase "occupied by a provision." The bill, however, does explain that 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.[19]

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[18] A true and correct copy of the enrolled version of HB 2127 is attached as Exhibit 1.

[19] *See* Exh. 1, § 15 (proposed Property Code §1.004(b)).

24. For the prohibition under the Labor Code, an occupied field would allegedly include employment leave, hiring practices, breaks, benefits, scheduling practices, and any other terms of employment that exceeded or conflicted with federal or state law for employers other than a municipality or county.[20]

25. HB 2127, however, does not prevent a constitutional home rule municipality from providing the same services and imposing the same regulations authorized for general-law municipalities, *id.*, § 4 (2), or carrying out any authority expressly allowed by statute.[21] It likewise permits cities to repeal or amend an existing ordinances, orders, or rules that violate HB 2127 for the limited purpose of bringing that ordinance, order, or rule in compliance with it.[22]

26. HB 2127 also contains numerous "carve outs" to satisfy the concerns of particular interested parties. These carve outs, of course, undermine the very "uniformity" HB 2127 purports to mandate. They include local public awareness campaigns;[23] local regulation of massage establishment and prohibition of sexual assault or aggravated sexual

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[20] *Id.*, § 10 (proposed Labor Code §1.005(b)).

[21] *Id.*, § 4(1).

[22] *Id.*, § 4(6).

[23] *Id.,* § 4(4).

assault.[24] collective bargaining agreements with local government employees[25] and related policies;[26] building or maintaining roads, imposing a tax, and regulating animals.[27]

27. Under HB 2127, a municipality or county could still enforce or maintain any ordinance, order, or rule regulating any conduct related to credit service organizations and credit access businesses, if the regulation was adopted before January 1, 2023 and would have been valid under the law as it existed before the bill's enactment. If, however, a city or county amends such provisions, this exclusion would no longer apply.[28]

28. Under Section 5, proposing new Section 51.002 of the Local Government Code, 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. This provision appears to shift the burden of proof to cities to show "consistency" with state law as opposed to proponents of preemption's showing a direct conflict and "inconsistency" with state law. Consequently, Section 5 would affect all Texas local law, whether it is specifically referenced in HB 2127 and make it very difficult, if not impossible, for cities to show "consistency," particularly where the State of Texas does not regulate the matter at all.

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[24] *Id.,* § 14 (proposed Occupations Code § 1.004(b))

[25] *Id.*, § 4(5)(A). In the same session, however, the Legislature passed SB 736, which applies only to Houston, and which usurps this very authority for Houstonians to decide for themselves if they will use mandatory or voluntary arbitration in addressing impasses in Houston's collective bargaining with its own firefighter employees. Apparently, where special interests are concerned, uniformity is not such a high priority for the Legislature.

[26] *Id.*, § 4(5)(B); *see supra* note 26.

[27] *Id.*, §§ 4(3); 12 (proposed Local Government Code §§ 229.901(a) &(b)).

[28] *Id.*, § 8 (proposed Finance Code §1.004(b)).

29. HB 2127, Section 7 also creates a new cause of action. It would authorize any person who has sustained an injury in fact, actual or threatened, from a municipal or county regulation in violation of HB 2127's provisions above to bring an action against the municipality or county that adopted or enforced the regulation. A trade association representing the person also could bring such an action.[29]

30. Under HB 2127, the governmental immunity of a municipality or county is waived to the extent of liability created by the bill, and official and qualified immunity cannot be asserted as a defense.[30]

31. A municipality or county, however, would be entitled to receive notice of a claim against at least three months before a claimant filed an action.[31]

32. The claimant could recover declaratory and injunctive relief along with costs and reasonable attorney's fees from Houston. Houston, however, is only entitled to recover its costs and reasonable attorney's fees in such an action if the court finds that action to be frivolous. That is an inappropriately high and inequitable standard for Houston, but not potential plaintiffs, to meet.[32]

33. Finally, a claimant may bring the action in either the county in which all or a substantial part of the events giving rise to the cause of action occurred, or, if the defendant is

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[29] *Id.*, § 7 (proposed Civil Practices & Remedies Code §§ 102A.001 & 102A.002).

[30] *Id.* (proposed Civil Practices & Remedies Code §§ 102A.004).

[31] *Id.* (proposed Civil Practices & Remedies Code §§ 102A.005).

[32] *Id.* (proposed Civil Practices & Remedies Code §§ 102A.003).

a municipality, the county in which the municipality is located. An action cannot be transferred to a different venue without the written consent of all parties.[33]

## VII. CAUSES OF ACTION

### A. Declaratory Judgment – HB 2127 Violates the Texas Constitution

34. The UDJA is remedial in nature. It is intended to settle and afford relief from uncertainty and insecurity with respect to rights under a statute and must be liberally construed to achieve that purpose.

35. An actual controversy has arisen and now exists between the parties concerning their respective rights and obligations under Texas law. Each has an interest that would be affected by HB 2127.

36. Pursuant to Texas Civil Practice and Remedies Code §§ 37.001 *et seq.*, Houston seeks the following declarations from the Court under the UDJA, which are discussed in further detail below:

a) HB 2127's Sections 5 [proposed Agriculture Code § 1.004], 6 [proposed Business & Commerce Code § 1.109], 8 [proposed Finance Code § 1.004(a)], 9 [proposed Insurance Code § 30.005], 10 [proposed Labor Code § 1.005], 13 [proposed Natural Resources Code § 1.003], 14 [proposed Occupations Code § 1.004(a)], and 15 [proposed Property Code §1.004] are unconstitutional, violate article XI, section 5 of the Texas Constitution, and are void and unenforceable because they purport to impose "field" preemption and/or preemption not based upon a direct conflict between a state "general laws" or constitutional provisions and local law;

b) HB 2127's Sections 5 [proposed Agriculture Code § 1.004], 6 [proposed Business & Commerce Code § 1.109], 8 [proposed Finance Code § 1.004(a)], 9 [proposed Insurance Code § 30.005],

[33] *Id.* (proposed Civil Practices & Remedies Code §§ 102A.006).

10 [proposed Labor Code § 1.005], 13 [proposed Natural Resources Code § 1.003], 14 [proposed Occupations Code § 1.004(a)], and 15 [proposed Property Code §1.004] are unconstitutional as applied to Houston and/or local laws that are not already preempted under article XI, section 5, violate article XI, section 5 of the Texas Constitution, and are void and unenforceable because they purport to impose "field" preemption and/or preemption not based upon a direct conflict between a state "general laws" or constitutional provision and local law;

c) Alternatively, HB 2127's Section 11 [proposed Local Government Code § 51.002] is unconstitutional, violates article XI, section 5 of the Texas Constitution, contravenes the Texas Supreme Court's preemption jurisprudence, and is void and unenforceable because it improperly shifts the burden of proof on preemption to cities show "consistency" with State law;

d) Alternatively, HB 2127's Section 11 [proposed Local Government Code § 51.002] is unconstitutional as applied to Houston and/or local laws that are not already preempted under article XI, section 5, violates article XI, section 5 of the Texas Constitution, contravenes the Texas Supreme Court's preemption jurisprudence, and is void and unenforceable because it improperly shifts the burden of proof on preemption to Houston show "consistency" with State law;

e) Alternatively, HB 2127 is unconstitutional, violates article XVII, section 1 and article XI, section 5 of the Texas Constitution, and is void and unenforceable because its stated goal is effectively to eliminate constitutional home rule and to afford constitutional home rule cities only those rights and powers, granted by the Legislature, that general law cities may exercise, and because its substantive provisions would implement that goal. HB 2127 is, therefore, not a general law which law's provisions would have preemptive effect under article XI, section 5 of the Texas Constitution, but is a failed, unratified, void, and unenforceable proposed constitutional amendment;

f) Alternatively, HB 2127 is unconstitutional as applied to Houston and/or local laws that are not already preempted under article XI, section 5, violates article XVII, section 1 and article XI, section 5 of the Texas Constitution, and is void and unenforceable because, on its face, it demonstrates that its goal is effectively to eliminate constitutional home rule and to afford Houston only those rights and powers, granted by the

Legislature, that general law cities may exercise, and because its substantive provisions would implement that goal. HB 2127 is, therefore, not a general law which law's provisions would have preemptive effect under article XI, section 5 of the Texas Constitution, but is a failed, unratified, void, and unenforceable proposed constitutional amendment;

g) HB 2127's Sections 5 [proposed Agriculture Code § 1.004], 6 [proposed Business & Commerce Code § 1.109], 8 [proposed Finance Code § 1.004(a)], 9 [proposed Insurance Code § 30.005], 10 [proposed Labor Code § 1.005], 11 [proposed Local Government Code § 51.002], 13 [proposed Natural Resources Code § 1.003], 14 [proposed Occupations Code § 1.004(a)], and 15 [proposed Property Code § 1.004] are unconstitutionally vague, violate article I, section 19 and article II, section 1 of the Texas Constitution, and are void and unenforceable;

h) HB 2127's Sections 5 [proposed Agriculture Code § 1.004], 6 [proposed Business & Commerce Code § 1.109], 8 [proposed Finance Code § 1.004(a)], 9 [proposed Insurance Code § 30.005], 10 [proposed Labor Code § 1.005], 11 [proposed Local Government Code § 51.002], 13 [proposed Natural Resources Code § 1.003], 14 [proposed Occupations Code § 1.004(a)], and 15 [proposed Property Code § 1.004] are unconstitutionally vague as applied to Houston and/or local laws that are not already preempted under article XI, section 5, violate article I, section 19 and article II, section 1 of the Texas Constitution, and are void and unenforceable;

i) Alternatively, HB 2127 is unconstitutional, violates article III, sections 56(a)(2), 56(a)(16), and 56(b) of the Texas Constitution, and is void and unenforceable because it is a "special" law;

j) Alternatively, HB 2127 is unconstitutional as applied to Houston and/or local laws that are not already preempted under article XI, section 5, violates article III, sections 56(a)(2), 56(a)(16), and 56(b) of the Texas Constitution, and is void and unenforceable because it is a "special" law;

k) Alternatively, HB 2127 is unconstitutional, violates article 2, section 1 of the Texas Constitution, and is void and unenforceable because it unconstitutionally delegates to the Texas courts legislative authority to define which local laws are preempted and/or the scope and nature of the alleged "fields" preempted by HB 2127;

l) Alternatively, HB 2127 is unconstitutional as applied to Houston and/or local laws that are not already preempted under article XI, section 5, violates article 2, section 1 of the Texas Constitution, and is void and unenforceable because it unconstitutionally delegates to the Texas courts legislative authority to define which local laws are preempted and/or the scope and nature of the alleged "fields" preempted by HB 2127;

m) HB 2127 is void and unenforceable because the State of Texas lacks the legal authority to enact it; and

n) Because of the invalidity of HB 2127's Sections 5 [proposed Agriculture Code § 1.004], 6 [proposed Business & Commerce Code § 1.109], 7 [proposed Civil Practices and Remedies Code § 102A.003], 8 [proposed Finance Code § 1.004(a)], 9 [proposed Insurance Code § 30.005], 10 [proposed Labor Code § 1.005], Section 11 [proposed Local Government Code § 51.002], 13 [proposed Natural Resources Code § 1.003], 14 [proposed Occupations Code § 1.004(a)], and 15 [proposed Property Code §1.004], the remaining provisions of HB 2127 are void and unenforceable under Tex. Gov't Code § 311.032(c) because, in the absence of a severability clause, they cannot be given effect without the invalid provisions or application.

**B. HB 2127 Violates Article XI, Section 5 of the Texas Constitution Because it Purports to Impose "Field" Preemption and/or Preemption not Based Upon a Conflict Between State "General" Laws or Constitutional Provisions and Local Law**

37. Houston expressly incorporates by reference each of the foregoing paragraphs of the pleading as if fully set forth herein.

38. Houston asserts both a facial constitutional challenge on this ground and a challenge to HB 2127 as applied to Houston and/or local laws that are not already preempted under article XI, section 5.

39. HB 2127's Sections 5 [proposed Agriculture Code § 1.004], 6 [proposed Business & Commerce Code § 1.109], 8 [proposed Finance Code § 1.004(a)], 9 [proposed Insurance Code § 30.005], 10 [proposed Labor Code § 1.005], 13 [proposed Natural Resources Code § 1.003], 14 [proposed Occupations Code § 1.004(a)], and 15 [proposed Property Code

§ 1.004], its purported "field" preemption provisions, prohibit, unless expressly authorized by another statute, local regulation "*in a field of regulation that is occupied by a provision of this code*."[34]

40. HB 2127 is unconstitutional because it purports to impose "field" preemption, a kind of preemption the Texas Constitution does not empower the Legislature to impose because it does not require that there be a conflict between state and local law as required by article XI, section 5 of the Texas Constitution.

### C. Texas Courts Have Not Recognized or Adopted Field Preemption

HB 2127 purports to establish or recognize field preemption under Texas law for the first time. First, HB 2127 *expressly* removes constitutional home rule authority to regulate under specifically-referenced codes.[35] At best, that constitutes *express* preemption. The same is essentially true for the language in Section 11, proposed Local Government Code Section 51.002, that requires cities to show "consistency" with state law. Federal field preemption, by contrast, is a type of *implied* preemption.[36]

41. Second, *field preemption of local laws by state law has not been recognized or adopted in Texas*.[37] *It would be unconstitutional to do so*. Because the Texas Constitution contains only a

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[34] *See* Exh. 1 (emphasis supplied).

[35] *See* HB 2127 [Exh. 1], §§ 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).

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

[37] *See BCCA Appeal Grp., 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.

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 that field from city regulation; local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable."[38] Instead, *local law is preempted only to the extent of any direct conflict between the two*.[39] HB 2127 directly contravenes this long-standing preemption jurisprudence and constitutional interpretation.

42. 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.[40] 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*."[41] The Texas Constitution, and article XI, section 5 in particular, are, therefore, fundamentally inconsistent with the concept of field preemption advanced in HB 2127.

43. In addition, *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*

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

[39] *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 Merchs.'*, 852 S.W.2d at 491, 492.

[40] *Dallas Merchs.'*, 852 S.W.2d at 491.

[41] *BCCA Appeal Grp.*, 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).

*for the State to supplement federal law*.[42] The U.S. Supreme Court thus recognizes federal 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.'"[43] The Texas Legislature has not attempted to satisfy and cannot satisfy either test for HB 2127 and it has not established a different constitutional test of its own.

HB 2127 does not require the allegedly preempted fields to be "occupied" by comprehensive state regulation. Instead, under HB 2127, the purported "fields" are defined, if at all, only by unspecified, *single* provisions of a referenced code.

Moreover, the "fields" allegedly preempted by HB 2127 appear to have been selected based upon *private industry's* interest in them, not the State's interest. The Legislature made no effort to show and cannot show that its interest in the referenced fields, if its exists or is defined at all, "is so dominant" that it will be assumed to preclude enforcement of local laws on the same subject. Certainly, the Texas Supreme Court has never so held, despite numerous opportunities to do so.

Yet, even if field preemption were recognized in Texas, HB 2127 makes no pretense that there exists sufficiently comprehensive state regulation, sufficient state interest, or even conflicts with local law in the areas ostensibly preempted by HB 2127 to warrant true field

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[42] *La. 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)).

[43] *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.

preemption. Instead, the only requirements HB 2127 imposes for "field" preemption is that Texas merely regulate something in a referenced code. That is insufficient under any recognized test for field preemption. This test cannot be ignored simply because HB 2127 purports to impose field preemption expressly.

As discussed, federal field preemption has never been found to exist unless federal regulations have been found to leave no room for state co-regulation. Federal field preemption is, therefore, grounded in total displacement of state law. In stark contrast, HB 2127's purported state field preemption provisions attempt to implement a legal oxymoron: field preemption that simultaneously recognizes state-authorized local co-regulation. It provides: "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." *Id.*, § 5 [proposed Agriculture Code §1.004] (emphasis supplied). Even more confusing, its authors asserted during hearings in the Texas House that, because of the prevalence of such authorization for general law cities, almost 9 of 10 local ordinances and regulations will survive HB 2127. If there remains room for local regulation under HB 2127 then, as the bill concedes on its face it does and as its authors admit, the fields referenced are not, by definition, preempted "fields." HB 2127's own self-defeating text, therefore, demonstrates that what it provides is <u>not</u> field preemption even if that kind of preemption were permissible under the Texas Constitution. It is not.

Because they would impose impermissible and unconstitutional field preemption and, even if field preemption were recognized in Texas, would not meet any of its requirements, HB 2127 and its purported field preemption provisions violate article XI, section 5 of the Texas Constitution.

### D. Alternatively, HB 2127 Does Not Require the Direct Conflict Between Local and State Law the Texas Constitution Mandates

HB 2127 and its purported field preemption provisions, in particular, do not impose any requirement that any local law they allegedly preempt must conflict with any state law for that local law to be preempted. Instead, the local law must simply exist in a "field" "occupied" by a referenced state statutory provision. As discussed above, that is constitutionally fatal because article XI, section 5 requires a direct conflict between a state and local law.

Although HB 2127's authors and supporters claimed during House and Senate hearings that they were merely applying federal legal principles in Texas, Texas courts cannot do so because there is no supremacy clause in the Texas Constitution, as there is in the federal constitution, to support true field preemption in Texas. The Texas Legislature cannot effectively amend the Texas Constitution to insert one and eliminate article XI, Section 5's conflict requirements by declaring that it is preempting a field.

HB 2127, Section 12, which purports to bar regulation of animal businesses, also does not require that there be any conflict with existing state law on the subject or even any competing state regulation at all. Indeed, the provision concedes in Section (b) that Texas has no statewide regulation of such businesses. Under article XI, section 5, there can be no conflict or preemption between a local law and state laws that have never been enacted.

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,[44] Justice

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[44] *See, e.g., City of Laredo*, 550 S.W.3d at 592, n.32.

Boyd has correctly observed that it has never done so without also finding a preemptive conflict.[45] 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 can do so, such legislative intent does not render the [local laws] unenforceable. *The* [local laws] *are unenforceable only if they are inconsistent with state law*."[46] Intent to preempt and a preemptive conflict are, therefore, two separate requirements that may not be conflated.

Consequently, the Legislature's intent to preempt unspecified areas of home rule authority in HB 2127 does not and cannot alone create a conflict with local law sufficient to warrant preemption. This is particularly true where, as here, no particular state and local laws are even identified, let alone found to be in conflict. Were it otherwise, article XI, section 5 would be rendered a nullity.

44. Because HB 2127 and its purported field preemption provisions do not require that the local laws they allegedly preempt conflict with any state general laws or constitutional provisions, they violate article XI, section 5 of the Texas Constitution.

### E. Alternatively, HB 2127 Would Preempt Local Laws When There Is No State Regulatory Counterpart and, Therefore, No Possible Conflict with State Law

Although HB 2127 is touted by its authors and supporters as ensuring statewide, regulatory uniformity, it does not require that any local law have any state regulatory counterpart, let alone a conflicting one, before the local law is preempted. Instead, the local regulation must simply exist in a prohibited "field" that one or more *other* regulations

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[45] *See BCCA Appeal Grp.*, 496 S.W.3d at 30, n.1 (Boyd, J., dissenting in part).

[46] *Id*. (citing *In re Sanchez*, 81 S.W.3d at 796) (emphasis supplied).

"occupy." Under HB 2127, if the State regulates *anything* in an unspecified "field," local regulation is arguably entirely precluded in the undefined area unless there is express legislative authorization.

For preemption purposes, there can be no State interest in a matter it does not regulate. There is certainly no comprehensiveness that would justify field preemption of a matter the State of Texas does not regulate. Finally, there can be no conflict with local law where the State does not regulate. Consequently, there can be no preemption, let alone field preemption, of Houston laws with no state counterparts.

Because HB 2127's Section 11 requires that Houston show "consistency" with state law in all areas that it regulates, not just those specified in HB 2127, and because HB 2127 and its purported field preemption provisions do not require that there be even a state counterpart, let alone a conflicting one, before a local law is preempted, they violate article XI, section 5 of the Texas Constitution.

**F. Alternatively, HB 2127's Section 11 Violates Article XI, Section 5 of the Texas Constitution and Contravenes the Texas Supreme Court's Preemption Jurisprudence Because it Unconstitutionally Shifts the Burden of Proof to Cities to Show the Absence of a Preemptive Conflict**

45. Houston expressly incorporates by reference each of the foregoing paragraphs of the pleading as if fully set forth herein.

46. Houston asserts both a facial constitutional challenge on this ground and a challenge to HB 2127 as applied to Houston and/or local laws that are not already preempted under article XI, section 5.

47. HB 2127's Section 11 is unconstitutional because it overturns decades of Texas Supreme Court jurisprudence and violates article XI, section 5 by requiring that cities demonstrate "consistency" with even nonexistent state law, *not* that preemption proponents

bear the burden to show "inconsistency" with existing state law and an unmistakably clear intent to preempt specific local law.

48. Section 3 of the HB 2127 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 with Section 5, Article XI, Texas Constitution." First, as demonstrated above, sovereign powers are *not* vested in the Texas *Legislature*. *The State of Texas is not its state legislature alone*. Instead, Texas' sovereign powers are vested in Texans themselves and, in their Constitution, Texans delegated those powers to cities when they voted to approve the home rule constitutional amendment, article XI, section 5, in 1911.

49. Moreover, as also demonstrated above, nothing in article XI, section 5 authorizes, let alone mandates, statewide uniformity or makes state law supreme simply because the Legislature says it is. Instead, article XI, section 5 provides for broad, local power to innovate, tempered only by direct conflict with existing state law. Houston, as a home rule city, is, therefore, expressly, constitutionally empowered to regulate when and where the State has not enacted conflicting state law. Texas voters have endowed Houston and all constitutional home rule cities with sovereign power to create a brilliant patchwork of local regulations if they choose to do so. That is the whole point of constitutional home rule. Indeed, many such innovative local laws have worked so well that the Legislature has later embraced and enacted them for the State as a whole. That is the incredible value of constitutional home rule that will be lost under HB 2127.

50. Because of the Constitution's broad grant of power to constitutional home rule cities and concomitant limitation on state power over them, the Texas Supreme Court has interpreted the Texas Constitution to require that the party seeking state preemption of a local

law bears the burden of establishing a direct and irreconcilable conflict between specific state and local laws and intent to preempt identifiable local laws with "unmistakable clarity."[47]

51. HB 2127's Section 11, proposed Local Government Code § 51.002, however, provides: "notwithstanding Section 51.001 [which provides broad municipal ordinance-making authority, including to enact ordinance "for the trade and commerce of the municipality"], 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*." *Id.* (emphasis supplied).

52. Although vague, Section 11's language can be read to allow only local, parallel versions of existing state law, an extraordinarily limited authorization completely at odds with article XI, section 5's grant to constitutional home rule cities of the full power of self-government. Worse, one arguably cannot show a local law is "consistent" with state law *if the State does not regulate the matter it covers*. Put another way, this provision would arguably require explicit state authorization or existing state regulation for cities to regulate even outside the covered codes.

53. Section 11's phrasing can also be read so that the burden would be shifted to cities to show "consistency" with state law instead of preemption proponents showing a conflict with state law and unmistakably clear intent to preempt. Consequently, the provision would unconstitutionally impose an improper and unprecedented *presumption in favor of preemption* that Houston and constitutional home rule cities would have to overcome. It

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[47] *See, e.g., Houston Prof'l Fire Fighters' Ass'n,* 2023 WL 2719477, at *9 (citing *Limmer*, 299 S.W.3d at 84 & n.30).

would, therefore, shift the burden to cities to show consistency with state law. *That would unconstitutionally turn article XI, section 5 on its head*.

54. Worse, in shifting this burden, Section 11 does indicate how a city would show consistency, particularly when the State does not regulate in the area, and what degree of proof would be required. Instead, cities would be required to go to court to establish who bears the burden of proof on preemption or consistency and the particulars of that burden.

55. Because Section 11 would shift the heavy burden allocated to *proponents* of preemption to show *inconsistency* with state law with unmistakable clarity, to *Houston* to show "*consistency*" with State law by an unspecified standard even when the State does not regulate a matter, Section 11 violates article XI, section 5 of the Texas Constitution.

### G. Alternatively, HB 2127 Violates Article XVII, Section 1 and Article XI, Section 5 of the Texas Constitution Because It Is a Failed, Proposed, Void, and Unenforceable Constitutional Amendment

56. Houston expressly incorporates by reference each of the foregoing paragraphs of the pleading as if fully set forth herein.

57. Houston asserts both a facial constitutional challenge on this ground and a challenge to HB 2127 as applied to Houston and/or local laws that are not already preempted under article XI, section 5.

58. HB 2127 is unconstitutional because the Legislature has attempted to amend the Texas Constitution without going through the rigorous process required for such amendments. Instead, it has attempted impermissibly to amend the Constitution by statute.

72. Under article XI, section 5 of the Texas Constitution, Houston's laws are preempted only to the extent they are inconsistent with "general laws" and state constitutional provisions. HB 2127, however, is neither a general law nor a constitutional

provision that would have preemptive effect.

73. Instead, as demonstrated, through its purported field preemption and burden shifting provisions, among other provisions, HB 2127 intentionally and effectively repeals constitutional home rule and places Houston's regulatory authority under the control of the Legislature, as general law cities' now is. This purpose is made quite clear in the text of HB 2127. Section 2(1) wrongly refers to the State the "exclusive regulator" of commerce in Texas, a statement directly contrary to Texas Local Government Code § 51.001(1), which provides that "the governing body of a municipality may adopt any ordinance [or] rule that…is for the trade of commerce of the municipality."

74. Section 3 also states that HB 2127's purpose is to return "[s]overeign regulatory powers to the state where those powers belong…" This statement is misleading. As demonstrated, sovereign powers lie with the *people of Texas,* not the Texas Legislature, and were delegated by the people to constitutional home rule cities, like Houston, when Texas voters adopted article XI, section 5. HB 2127, however, grabs *for the Legislature alone* power *from the people* and the constitutional home rule cities to whom they have delegate their power.

75. Most damning, Section 4(2) declares that constitutional home rule cities will still have the powers general law cities may exercise once HB 2127 is enacted and Section 4(6) permits cities to carry out any authority expressly allowed by statute. There should be no mistake here: *HB 2127's clear target is effective repeal of constitutional home rule itself.*

76. Repeal or gutting of Houston's and all Texas home rule cities' constitutional authority in many important regulatory areas, irrespective of any conflict with state law, is, as demonstrated, unconstitutional under article XI, section 5. It can only be accomplished by constitutional amendment, not a simple statute or even a general law, which HB 2127

purports to be but is not.

77. Under article XVII, sections 1(a) and (c) of the Texas Constitution, a proposed constitutional amendment must be passed by two-thirds of both houses, that is, at least 100 affirmative votes of the members of the Texas House of Representatives and at least twenty-one affirmative votes of the members of the Texas Senate, and a majority vote of all the people of the State who choose to vote at a public election held for that purpose.

78. The vote to pass HB 2127 on third reading, however, was 84-58 in the Texas House and 18-13 in the Texas Senate.

79. As an unratified, proposed constitutional amendment, not designated as such and not set for a public vote, and that has failed to meet the required two-thirds vote thresholds, HB 2127 is neither a general law nor part of the Texas Constitution.

80. Because HB 2127's stated goal is effectively to eliminate constitutional home rule and to afford Houston and constitutional home rule cities only those rights and powers, granted by the Legislature, that general law cities may exercise, and because HB 2127's substantive provisions implement that goal, HB 2127 is not a general law which law's provisions would have preemptive effect under article XI, section 5 of the Texas Constitution, but is a failed, proposed, unratified, void and unenforceable constitutional amendment that violates article XVII, section 1 and article XI, section 5 of the Texas Constitution.

## H. HB 2127 Violates Article I, Section 19 and Article II, Section 1 of the Texas Constitution Which Prohibit Implementation and Enforcement of Vague Laws

81. Houston expressly incorporates by reference each of the foregoing paragraphs of the pleading as if fully set forth herein.

82. Houston asserts both a facial constitutional challenge on this ground and a challenge to HB 2127 as applied to Houston *and/or* local laws that are not already preempted

under article XI, section 5.

83. Even if HB 2127 were a proper and constitutional means to preempt Houston's laws and repeal constitutional home rule [it is not], the Texas Legislature would still need to enact an "unmistakably clear" law to accomplish those ends. *It has not done so*. To the contrary, in HB 2127, the Legislature has enacted a hopelessly vague, poorly drafted, intentionally fluid "living" statute that is almost a *non sequitur* even preemption experts have no clue how to apply. HB 2127 is, therefore, also unconstitutional because it is too vague to provide either Houston, which must enforce it, its residents, who must comply with Houston's local laws, or any constitutional home rule cities or their residents with adequate notice regarding what laws such cities may enforce and what laws their residents must still obey.

84. To prevail on a facial vagueness challenge to a statute, the statute must necessarily be vague as to the litigants.[48] Thus, a court addressing a vagueness challenge to a statute must first determine whether the statute is vague as applied to the party's conduct; if it is, the court will then address the facial challenge to the statute. *Id.*

***HB 2127's Purported Field Preemption Provisions Are Unconstitutionally Vague***

85. HB 2127's Sections 5 [proposed Agriculture Code § 1.004], 6 [proposed Business & Commerce Code § 1.109], 8 [proposed Finance Code § 1.004(a)], 9 [proposed Insurance Code § 30.005], 10 [proposed Labor Code § 1.005], 13 [proposed Natural Resources Code § 1.003], 14 [proposed Occupations Code § 1.004(a)], and 15 [proposed Property Code § 1.004], the purported field preemption provisions, prohibit, unless expressly authorized by

[48] *Gerron v. State*, 524 S.W.3d 308 (Tex. App.—Waco 2016, pet ref'd).

another statute, local regulation "*in a field of regulation that is occupied by a provision of this code*." *See* Exh. 1.

86. HB 2127 does not define the terms "field" or "field of regulation," does not instruct readers how to define a field for any provision or any code and does not define any field allegedly preempted for any code.

87. HB 2127 also does not define the term "occupied" or "occupied by a provision of this code" for any code, even though, in its Labor and Property Code provisions,[49] it attempts unsuccessfully to illustrate items that might be included in such fields. It does not, however, tie these items to any provision in those codes so that Houston or any home rule city could assess how to define the purported fields preempted. Those provisions are thus unconstitutionally vague too.

88. For example, HB 2127, Section 10, proposed Labor Code Section 1.005(b), includes broad topics but does not identify which local laws would fall under them or how the listed topics would create discrete, identifiable fields. It also does not restrict purported preemption under the listed topics to those local laws that actually conflict with state law, if any.

89. HB 2127 also does not explain how a single "provision" of any specified Texas code can or does "occupy" any field of regulation or how to define the field if it does. As demonstrated, field preemption at the federal level is a form of implied conflict preemption determined from the pervasiveness of federal regulation in a discrete, specifically defined area. There is no principle of *federal* field preemption that would find such preemption based upon

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[49] *See* Exh. 1, § 10 (proposed Labor Code § 1.005(b)); § 15 (proposed Property Code § 1.004(b)).

one or even a few federal regulations in an area. Moreover, because federal field preemption is also based upon the Supremacy Clause, and not conflicts, as in the Texas Constitution, article XI, section 5, field preemption has not been recognized as available to preempt Houston's or any constitutional home rule city's laws in Texas.[50]

90. HB 2127 also does not instruct as to whether the "fields" allegedly preempted encompass local laws that do not conflict with any provision of any code specifically referenced in HB 2127.

91. In House hearings, Chairman Burrows, the House author of HB 2127, confirmed that the purported field preemption provisions were intended to be "living" provisions, to anticipatorily preempt future local enactments, and that courts would ultimately have to interpret them and their applications to particular local regulations, especially when the Legislature is not in session. Chairman Burrows thus treated HB 2127's vagueness as an intended, desirable, necessary feature of the bill, and not an unconstitutional "bug" that would prevent or make more difficult or financially risky local regulation in the "fields" falling within HB 2127's referenced code provisions.

92. In sum, the only way for Houston or any constitutional home rule city to know with certainty which of their local laws they may enforce is to have a court decide the question at enormous cost and financial risk to Houston and such cities. Part of the purpose of

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[50] *See Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015) (field preemption is based upon powers in the Supremacy Clause); *BCCA Appeal Grp.*, 496 S.W.3d at 25 ("unlike state statutes, which are unenforceable when federal laws indicate that Congress 'intended the federal law or regulation to exclusively occupy the field' … city ordinances are not subject to state-law 'field preemption.' 'The entry of the state into a field of legislation ... does not automatically preempt that field from city regulation; local regulation, ancillary to and in harmony with the general scope and purpose of the state enactment, is acceptable') (citing *Comeau*, 633 S.W.2d at 796). The *BCCA* majority reaffirmed this interpretation of *Comeau*. *Id.*, 17-18.

constitutional home rule was to reduce the amount of litigation and uncertainty over the question of local authority. By contrast, HB 2127 makes litigation the lynchpin of local authority in direct contravention of article XI, section 5.

93. The Texas Constitution's prohibition on enforcing vague laws rests on the twin constitutional pillars of due process and separation of powers.[51] The first due process concern requires that statutes give people of ordinary intelligence fair notice of what the law demands of them. *Id.* Under the Texas Constitution's article I, section 19, "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." Vague laws contravene this basic tenet by failing to provide fair notice.[52]

94. The second constitutional concern is the separation of powers. *Id.* As detailed below, vague laws impermissibly delegate responsibility for defining a law's meaning and scope to those who enforce it and the courts that interpret it. *Id.* To protect these constitutional concerns, the courts have developed a doctrine that a vague law is void and may not be enforced. *Id.*

95. A statute is not rendered unconstitutionally vague merely because the words or terms are not specifically defined.[53] For a law to be unconstitutionally vague and ambiguous, a plaintiff must ordinarily demonstrate that persons of common intelligence would necessarily

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[51] *United States v. Davis*, __ U.S. __, 139 S. Ct. 2319, 2325 (2019) (cited in *State v. Zuniga*, 656 S.W.3d 925, 928 (Tex. App.—Houston [14th Dist.] 2022, pet. ref'd)).

[52] *Davis*, 139 S. Ct. at 2325.

[53] *Ahearn v. State*, 588 S.W.2d 327, 338 (Tex. Crim. App.1979).

guess at its meaning and differ as to its application.[54]

96. In particular, a statutory provision is ordinarily facially vague when it precludes "fair notice of the conduct it punishes."[55]

97. However, "the vagueness doctrine requires different levels of clarity depending on the nature of the law in question."[56] 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*."[57] Moreover, in Texas, a constitutional home rule cities' laws are preempted only when the Legislature has spoken with "*unmistakable clarity*."[58] Consequently, the scope of purported preemption must be particularly well defined so that local governments and those subject to their laws will know with "unmistakable clarity" what laws may be enforced and what laws must be obeyed. Under HB 2127, they cannot.

98. Because, among other ambiguities in HB 2127's provisions, persons of common intelligence would necessarily have to guess at their meaning and differ as to their application, and/or because its provisions do not evince with unmistakable clarity which Houston's laws are or would be preempted, HB 2127's Sections 5 [proposed Agriculture Code § 1.004], 6 [proposed Business & Commerce Code § 1.109], 8 [proposed Finance Code § 1.004(a)], 9 [proposed Insurance Code § 30.005], 10 [proposed Labor Code § 1.005], 13

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[54] *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Ahearn*, 588 S.W.2d at 338.

[55] *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 2556–58 (2015).

[56] *Comm'n for Lawyer Discipline v. Benton*, 980 S.W.2d 425, 437 (Tex. 1998) (citing *United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973)).

[57] *Id.*, 438 (citing *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982)) (emphasis supplied).

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

[proposed Natural Resources Code § 1.003], 14 [proposed Occupations Code § 1.004(a)], and 15 [proposed Property Code § 1.004] are unconstitutionally vague and ambiguous laws that violate article I, section 19 and article II, section 1 of the Texas Constitution on their face and/or as applied to Houston and/or local laws that are not already preempted under article XI, section 5.

***HB 2127's "Express Authorization" Provisions Are Unconstitutionally Vague***

99. HB 2127's purported field preemption provisions bar local regulation in the preempted fields "unless *expressly authorized* by statute."[59] This language, combined with two provisions that preserve the legislatively-authorized powers of general law cities for all cities, lays bare the Texas Legislature's clear intention to reduce Houston's and other constitutional home rule cities' authority to that of general law cities and effectively repeal constitutional home rule.

100. Although not defined in the HB 2127, the term "express" is ordinarily defined as something stated clearly and unmistakably, leaving no room for confusion or doubt.[60] Consequently, HB 2127 improperly appears to require express or detailed authorization for particular local regulations. More important, the context of the bill appears to require express *legislative* authorization to allow cities to co-regulate in the allegedly "field" preempted areas.[61]

101. Current state/local co-regulation statutes, however, do not ordinarily provide any express, detailed authorization for local co-regulation *because constitutional home rule cities,*

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[59] *See, e.g.*, HB 2127, § 5 [§ 1.004].

[60] The dictionary defines "express" as "clear; definite; explicit; plain; direct; *unmistakable*." BLACK'S LAW DICTIONARY 580 (6th ed. 1990) (cited in *Boykin v. State*, 818 S.W.2d 782, 786 (Tex. Crim. App. 1991)) (emphasis supplied).

[61] *See* Exh. 1 (§§ 2, 3, 4(2)).

*by definition, have not needed it*. Instead, the Legislature has historically simply recognized independent constitutional home rule authority in such instances. Arguably, such authority would be eliminated under HB 2127.

102. For 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 constitutional 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.

103. Under HB 2127, it is unclear whether such provisions, expressly acknowledging *cities'* prior constitutional home rule authority, qualify as "express authorization," have survived HB 2127, and would provide the "express" authorization HB 2127 requires. Instead, HB 2127 would require that Houston utilize only the framework in Section 552 that general law cities must use.

104. In addition, instead of stating with "unmistakable clarity" what local provisions are allegedly preempted, HB 2127's purported field preemption provisions force constitutional home rule cities and their inhabitants to undertake at least a two-part legal analysis for every existing and future local regulation, ordinance, and charter provision to determine which local regulations that are encompassed by their express/field preemption language nevertheless escape preemption because of "express" authorization elsewhere in Texas law. In sum, *cities and citizens will not know from the face of HB 2127 which laws cities may enforce, and which laws Texans must obey*.

105. Worse, because of HB 2127's vague purported "field" preemption language,

constitutional home rule cities will not know what laws may require "express authorization" to co-regulate.

106. Worse still, under HB 2127, it will be difficult, if not impossible, for Houston and other constitutional home rule cities to assess where "expressly authorized" local activity begins and preempted "fields" end. HB 2127 provides no guidelines for making such conflicting determinations.

107. In addition, both state and federal law provide for local co-regulation in a host of areas. Consequently, federal law and state authorization would undermine the very uniformity the Texas Legislature ostensibly seeks through HB 2127.

108. More important, where, as here, HB 2127 itself clearly authorize exceptions to preemption, the U.S. Supreme Court has held for federal preemption of state laws that *"[t]he concern with uniformity does not justify the displacement of" local laws* that serves the ends of particular state laws.[27] The same rule should apply to govern HB 2127's own "patchwork" preemption of local laws.

109. Because, among other ambiguities and opacity in HB 2127's provisions, persons of common intelligence would necessarily have to guess at their meaning and differ as to their application, and/or because they do not evince with unmistakable clarity which of Houston's laws are or would be preempted, HB 2127's Sections 5 [proposed Agriculture Code § 1.004], 6 [proposed Business & Commerce Code § 1.109], 8 [proposed Finance Code § 1.004(a)], 9 [proposed Insurance Code § 30.005], 10 [proposed Labor Code § 1.005], 13 [proposed Natural Resources Code § 1.003], 14 [proposed Occupations Code § 1.004(a)], and 15 [proposed Property Code § 1.004] and their "express authorization" language are unconstitutionally vague and ambiguous laws that violate article I, section 19 and article II,

section 1 of the Texas Constitution on their face and/or as applied to Houston and local laws that are not already preempted under article XI, section 5.

***HB 2127's Burden Shifting Provision Is Unconstitutionally Vague***

110. HB 2127's proposed Section 11, proposed Local Government Code § 51.002, provides: "notwithstanding Section 51.001 [which provides broad municipal ordinance-making authority, including to enact ordinance "for the trade and commerce of the municipality"], 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*." *Id.* (emphasis supplied).

111. Section 11 is unconstitutionally vague and unenforceable because persons of common intelligence would necessarily have to guess at its meaning and differ as to its application.[62] It is not merely an inartful restatement of Texas law.[63] Article XI, section 5 of the Texas Constitution limits local self-government only when state law is "inconsistent" with it. This inconsistency, however, has been interpreted to require that the *proponent* of preemption show a direct conflict between local and existing state law. Moreover, the *proponent* of preemption must also demonstrate intent to preempt identifiable local law with unmistakable clarity.

112. Section 11, however, 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 Houston of the full power of self-government. One cannot show a local law is

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[62] *Papachristou*, 405 U.S. at 162; *Ahearn*, 588 S.W.2d at 338.

[63] This is unlikely since Texas courts do not interpret statutes to be nullities. *See* Tex. Gov't Code § 311.021(2).

"consistent" with state law *if the State does not regulate in the area it covers*. Put another way, this provision would arguably require explicit state authorization or existing state regulation for cities to regulate even outside the covered codes.

113. Moreover, Section 11's phrasing indicates that the burden would be shifted to cities to show a local law's "consistency" with state law instead of preemption proponents showing a conflict with state law and unmistakably clear intent to preempt that local law.

114. Worse, to the extent the burden of proof on preemption has been shifted, Section 11 does not describe how a city would show consistency, particularly when the State does not regulate in the area, and what degree of proof would be required. Instead, cities would be required to go to court to establish who bears the burden of proof on preemption or consistency and the particulars of that burden.

115. Because, among other ambiguities in Section 11, persons of common intelligence would necessarily have to guess at its meaning and differ as to its application, and/or because it does not evince with unmistakable clarity which of Houston's laws are or would be preempted, Section 11's burden-shifting provision is unconstitutionally vague and ambiguous and violates article I, section 19 and article II, section 1 of the Texas Constitution on its face and/or as applied to Houston and/or local laws that are not already preempted under article XI, section 5.

***HB 2127's "Maintenance" Provisions Are Unconstitutionally Vague***

116. HB 2127's purported field preemption provisions include a prohibition on Houston or any constitutional home rule city "maintaining" "an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of this code."

117. HB 2127 does not define the term "maintain." The common understanding of

the term means to support or preserve. In this context, to avoid redundancy, the term could impose a requirement that Houston and other constitutional home rule cities take affirmative steps to repeal ordinances or regulations and rules that are arguably preempted under HB 2127. This would include calling elections to repeal covered charter provisions.

118. Because persons of common intelligence would necessarily have to guess at its meaning and differ as to its application, the term "maintain" in HB 2127's purported field preemption provisions is unconstitutionally vague and ambiguous and violates article I, section 19 and article II, section 1 of the Texas Constitution on its face and/or as applied to Houston and/or local laws that are not already preempted under article XI, section 5.

## I. Alternatively, HB 2127 Violates Article III, Sections 56(a)(2), 56(a)(16), and 56(b) of the Texas Constitution Because it is an Unconstitutional Special Law

119. Houston expressly incorporates by reference each of the foregoing paragraphs of the pleading as if fully set forth herein.

120. Houston asserts both a facial constitutional challenge on this ground and a challenge to HB 2127 as applied to Houston and/or local laws that are not already preempted under article XI, section 5.

121. The Texas Constitution, article III, sections 56(a)(2) and (b), provides in relevant part:

> The Legislature shall not, except as otherwise provided in this Constitution, pass any local or *special law … [r]egulating the affairs of counties, cities, towns, wards or school districts …* in all other cases *where a general law can be made applicable, no local or special law shall be enacted …*

*Id.* (emphasis supplied).

122. In addition, article III, section 56(a)(16) prohibits local or special laws "regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial

proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators or other tribunals…"

123. In violation of article III, section 56(a)(2), HB 2127 purports to regulate the affairs of Houston and other constitutional home rule cities when it prescribes the rules by which those affairs shall be governed. It would, therefore, restrict Houston's and their ability to regulate their inhabitants and businesses within their jurisdiction without legislative authorization and effectively convert Houston and such constitutional home rule cities to general law cities.

124. Alternatively, HB 2127 is also an unconstitutional special law in violation of Section 56(a)(2) because it does not set forth any police, sanitary, or similar regulations but instead purports only to grant or limit Houston's legislative power to enact police, sanitary, or similar regulations.[64]

125. HB 2127 is also an unconstitutional special law in violation of Section 56(a)(16) because it regulates the practice or jurisdiction of and changes the rules of evidence in judicial proceedings or other inquiries before Texas courts. First, as suggested above, its new cause of action in Section 7 arguably eliminates the conflicts and "unmistakable clarity" evidentiary requirements for preemption, among others, and thus overturns decades of the Texas Supreme Court's preemption jurisprudence.

126. Second, HB 2127 is also an unconstitutional special law in violation of Section 56(a)(16) because it establishes field preemption in contravention of Supreme Court jurisprudence and the Texas Constitution, which would allow plaintiffs to establish

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[64] *See* National League of Cities, *Principles of Home Rule for the 21st Century*, reprinted in 100 N.C.L. REV. 1329, 1351–52 (2022).

preemption without showing conflict between state and local law.

127. Third, Section 7 is also an unconstitutional special law in violation of Section 56(a)(16) because it undermines the UDJA, which HB 2127 does not acknowledge. Although an action to determine whether a local law is preempted by state law can still be brought under the UDJA in theory, Section 7 changes the fee and standing requirements, making them unfairly tilted in favor of plaintiffs, inviting and encouraging private parties to sue cities under HB 2127's much more favorable provisions which would likely deny Houston fees even if it prevailed.

128. Fourth, HB 2127 is also an unconstitutional special law in violation of Section 56(a)(16) because its Section 11 also shifts the evidentiary burden to cities to show "consistency" with State law and imposes a presumption *in favor* of preemption, reversing the historical presumption against it. It would also shift or reverse the presumption of the validity of Houston's and constitutional home rule cities' laws and the rule that, if a court can apply a reasonable construction that will render a local law constitutional, it must do so.

129. Finally, HB 2127 is also an unconstitutional special law in violation of Section 56(b) because, if its goal was truly regulatory uniformity, it could have accomplished its goal by enacting general laws, that is, laws preempting with unmistakable clarity those particular local laws it claims are "different" from state regulations.[65] Indeed, HB 2127's authors refused to do just that, despite numerous entreaties, including a proposed amendment on the Senate floor.

130. Consequently, HB 2127 is an unconstitutional special law, in violation of these

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[65] *See* Exh. 1 (§ 2(2)).

specified provisions of article III, section 56, warranting a declaration that HB 2127 is void, unenforceable, and unconstitutional on its face and/or as applied to Houston and/or local laws that are not already preempted under article XI, section 5.

### J. Alternatively, HB 2127 Violates Article II, Section 1 of the Texas Constitution Because It Unconstitutionally Delegates to the Texas Courts the Task of Identifying Which of Houston's Laws, if Any, Are Preempted and/or the Scope and Nature of the Alleged "Fields" Preempted by HB 2127

131. Houston expressly incorporates by reference each of the foregoing paragraphs of the pleading as if fully set forth herein.

132. Houston asserts both a facial constitutional challenge on this ground and a challenge to HB 2127 as applied to Houston and/or its local laws that are not already preempted under article XI, section 5.

133. Even if they are not invalidated as unconstitutionally vague, HB 2127's purported field preemption provisions still unconstitutionally delegate to the judiciary the task of defining the fields and identifying the particular local laws allegedly preempted. Indeed, at hearings in the House, author Burrows explained that, if a hurricane or other emergency requiring immediate local regulation arose when the Legislature was not in session, local governments and Houston's residents would have to look to the courts, and not a special session of the Legislature, for solutions and authorization and a determination of whether particular emergency local regulations were permissible under HB 2127.

134. Under article II, section 1 of the Texas Constitution, the three branches of Texas government are separate 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."

135. When delegating authority, the Legislature must provide standards that are

"reasonably clear and hence acceptable as a standard of measurement."[66] The Legislature need not, however, detail every rule for implementing that authority. *Id*.

136. Texas courts, however, will ordinarily hold broad standards constitutional in the adjudicatory context only 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.[67] That is not the case here. The Texas Legislature could easily have preempted conflicting laws expressly but chose not to do so, preferring instead to overreach and deter any local regulations, now or in the future, through ambiguity and opacity.

137. In HB 2127, the Legislature has given the courts virtually *no standards* to utilize to determine the scope of any alleged field preemption, let alone to identify any specific local laws that would be preempted. HB 2127 should be declared unconstitutional on that ground.

138. Worse, the Legislature could easily have identified specific laws it wished to preempt. It failed to do so likely because, in the last legislative session, specific protections preempting regulation of predatory payday lenders, for example, could not be passed on their own. Consequently, HB 2127's fuzzy, if sweeping, scope likely reflects little more than legislative log-rolling.

139. Yet even its failed attempts at specificity in Sections 8(b) and 10(b) are ineffective because those still-broad provisions do not make unmistakably clear which laws are preempted and, therefore, also violate the Texas Constitution.

140. The Texas Supreme Court has repeated reaffirmed that preemption of local law

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[66] *Houston Prof'l Fire Fighters' Ass'n,* 664 S.W.3d at 800 (quoting *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 741 (Tex. 1995)).

[67] *Id*. (*quoting Trimmier v. Carlton*, 116 Tex. 572, 296 S.W. 1070, 1079 (1927)).

must reflect the Legislature's unmistakably clear intent to preempt identifiable laws that directly conflict with state law. Nothing in that jurisprudence recognizes any state legislative power to ignore that strict standard and 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.

141. Because it unconstitutionally delegates to the Texas courts the task of identifying which local laws are preempted and/or the scope and nature of any alleged fields preempted, HB 2127 and its purported field preemption provisions, in particular, are an unconstitutional delegation of legislative authority to the Texas courts, in violation of article 2, section 1 of the Texas Constitution on their face and/or as applied to Houston and/or local laws that are not already preempted under article XI, section 5.

## K. HB 2127 is Void and Unenforceable Because the Texas Legislature Lacks the Legal Authority to Enact It

142. Houston expressly incorporates by reference each of the foregoing paragraphs of the pleading as if fully set forth herein.

143. There is nothing in article XI, section 5 of the Texas Constitution or elsewhere in that document that provides the Texas Legislature with the power to withdraw, by statute alone, from Houston or other constitutional home rule cities, in whole or in part, sovereign rights and powers granted to those cities and their inhabitants by the Texas Constitution when their local laws do not directly conflict with state law or the Texas Constitution.

144. Likewise, the State's police power does not include the right to withdraw, by statute alone, constitutional rights expressly granted to Houston or other constitutional home rule cities when their local laws do not conflict with existing state law.

145. As demonstrated, the Texas Constitution's special law provisions also do not

permit the State to pass statutes that purport to create a generalized conflict or preempt a field of local regulation without an existing conflict with state law.

146. Finally, the Texas Constitution does not permit the Texas Legislature to amend the Constitution to repeal its constitutional home rule provision in article XI, section 5, in whole or in part, without complying with the onerous requirements for amending the Texas Constitution.

147. For these reasons, the Texas Legislature lacked the authority to enact HB 2127. Having been passed without the authority to do so, HB 2127 is void and unenforceable.

## L. Because of the Invalidity of HB 2127's Sections 5-15, Its Remaining Provisions Are Void and Unenforceable Under Tex. Gov't Code § 311.032(c) Because, Without a Severability Clause, They Cannot Be Given Effect Without the Invalid Provisions or Application

148. Houston expressly incorporates by reference each of the foregoing paragraphs of the pleading as if fully set forth herein.

149. Under Tex. Gov't Code § 311.032(c), if any provision of a statute, like HB 2127, that does not contain a provision for severability or non-severability "[i]s held invalid, the invalidity does not affect other provisions or applications of the statute that can be given effect without the invalid provision or application, and to this end the provisions of the statute are severable." Under this rule, no provisions of HB 2127 can survive.

150. As demonstrated above, HB 2127's Sections 5-15 are unconstitutional, void and unenforceable for a host of reasons. Section 1-3 are merely purported legislative findings, titles, and statements of purpose. Section 4 addresses how HB 2127's operative provisions are to be construed or expressly reaffirms existing local authority. Section 16 addresses effective dates and Section 16 deals with an emergency that did not occur. None of these provisions can be given effect if Sections 5-15 are void and unenforceable.

151. Alternatively, if only some of HB 2127's provisions are held void and unenforceable, then the remainder cannot be given effect. If only its purported field preemption provisions are invalidated, for example, Section 7, which provides a cause of action for their enforcement, cannot be given effect.

152. To the extent HB 2127's provisions cannot be given effect if Sections 5-15 are invalidated, in whole or in part, HB 2127 in its entirety is void and unenforceable.

## VIII. CONDITIONS PRECEDENT

153. All necessary conditions precedent have been performed or have occurred. No bond is required pursuant to Section 6.002 of the Texas Civil Practices and Remedies Code.

## IX. REQUEST FOR DISCLOSURES

154. Pursuant to Texas Rule of Civil Procedure 194.2, Houston hereby request that Defendant, the State of Texas, make the disclosures identified in Texas Rule of Civil Procedure 194.2 (a-i) and (l) within fifty (50) days of the service of this Petition.

## X. PRAYER FOR RELIEF

Houston is entitled to the relief requested, which is in the best interest of the public health, safety, welfare, and prosperity of the residents of and businesses in their respective cities. For the foregoing reasons, Houston respectfully request that Defendant, the State of Texas, be cited to appear and answer, that this Court to set Houston's Declaratory Judgment action for an *expedited* full trial on the merits and, after the trial, that this Court issue a declaration that HB 2127 is unconstitutional, void and unenforceable, in its entirety, facially and/or as applied to Houston and/or local laws that are not already preempted under article XI, section 5, because it violates article I, section 19; article II, section 1; article III, sections

56(a)(2), 56(a)(16), and 56(b); article XI, section 5; and article XVII, section 1 of the Texas Constitution and exceeds the Legislature's authority.

Houston, therefore, respectfully request that this Court enter judgment against Defendant for:

- Declaratory Judgment that HB 2127 in its entirety is unconstitutional, void, and unenforceable, as described herein; and/or

- Declaratory Judgment that HB 2127 in its entirety is unconstitutional, as described herein, as applied to Houston and local laws that are not already preempted under article XI, section 5, and is void, and unenforceable; and

- All other relief, general or special, whether in law and equity, to which Houston may be justly entitled.

Respectfully submitted,

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