

“Death Star” Preemption - House Bill 2127

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Texas Constitutional Home Rule

- ▶ Under Article XI, Section 5 of the Texas Constitution and Tex. Loc. Gov't Code § 51.072, home rule cities have ***the full power of self-government*** subject only to ***contrary*** state general law and the Texas Constitution
- ▶ Constitutional home rule cities are free to regulate where the State has not enacted contrary law

Texas Constitutional Home Rule

- ▶ ***The only limiting principle governing the State's interference with home rule cities' self-governance is the Texas Constitution's conflict requirement***

Texas State-Law Preemption

- ▶ A party seeking to assert preemption of a local law by state law bears the burden of establishing
 - ▶ ***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***.”

Texas State-Law Preemption – What it Means

- ▶ The Texas Supreme Court has repeatedly reaffirmed that
 - ▶ A local law is preempted by state law only **“to the extent of any conflict”**
 - ▶ *Dallas Merch.’s*, 852 S.W.2d at 491 (quoting *City of Richardson v. Responsible Dog Owners*, 794 S.W.2d 17, 19 (Tex. 1990); *Comeau*, 633 S.W.2d at 796
 - ▶ **“The mere ‘entry of the state into a field of legislation ... does not automatically preempt that field from city regulation’”**
 - ▶ *Laredo*, 550 S.W.3d at 598

House Bill 2127

Signed by Governor Abbott on June 14, 2023

Went into effect on September 1, 2023

House Bill 2127 – Purported “Field” Preemption

- ▶ Prohibits 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.

House Bill 2127 – Affected Codes

- ▶ **HB 2127's prohibition would apply to the following codes:**
 - ▶ **Agriculture**
 - ▶ **Business & Commerce**
 - ▶ **Finance**
 - ▶ **Insurance**
 - ▶ **Labor**
 - ▶ **Natural Resources**
 - ▶ **Occupations**
 - ▶ **Property**

House Bill 2127- Burden Shifting Provision

- ▶ **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**

House Bill 2127 – New Cause of Action

- ▶ Authorizes 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
- ▶ Governmental immunity of a municipality or county is waived to the extent of liability created by the bill

House Bill 2127 – New Cause of Action

- ▶ A municipality or county would be entitled to receive notice of a claim against **at least three months** before a claimant filed an action.
- ▶ 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, which is rarely found

House Bill 2127 - What it means

- ▶ Constitutional home-rule self-governance would be prohibited in a “**field of regulation**” “**occupied by a provision**” of certain statutory codes
 - ▶ **No conflict requirement**/ test is “mere entry into the field” by the state
 - ▶ Texas admits that 2127 is different from other preemption laws in that not tied to conflicts between specific clauses
Removes clear way to identify which laws are preempted
- ▶ Legislative intent to preempt would be the sole test for preemption even if not tied to clearly identifiable laws

House Bill 2127 - What it means

- ▶ Unless the municipal or county regulation is “***expressly authorized***” by another state statute
 - ▶ Constitutional home-rule cities would have the ***same status and authority as general law cities*** under covered codes

House Bill 2127 - What it means

- ▶ ***Removes burden*** on preemption proponents to show preemptive conflict with local law and *unmistakably clear intent to preempt that local law*
- ▶ ***Shifts burden to cities*** to show “consistency” with state law, without a standard,
- ▶ ***Burden-shifting provision applies to any local law***, not just those in the listed codes

Houston's Lawsuit – Nature of Claims

- ▶ Houston asserts both facial and pre-enforcement “as applied” constitutional challenges
 - ▶ As applied to Houston as a constitutional home rule city, an existing status
 - ▶ As applied to Houston's local laws that are not already preempted, also an existing status
 - ▶ Brought by Houston as city that must enforce House Bill 2127
- ▶ El Paso and San Antonio intervened

Houston's Lawsuit - Format

- ▶ **Seeks declaration of HB 2127's unconstitutionality alone**
 - ▶ **No request for injunction**
 - ▶ **No automatic appeal to the TSC**
 - ▶ **Injunctions against the State alone are inadequate**
 - ▶ **Attempted to obtain relief on the merits before Sept. 1 effective date**

Houston's Lawsuit – Claims *Vagueness*

- ▶ **HB 2127 is Unconstitutionally Vague**
 - ▶ **Due process concern - must give people of ordinary intelligence fair notice of what the law demands of them.**
 - ▶ **A vague law contravenes this basic tenet by failing to provide “fair notice of the conduct it punishes.”**
 - ▶ **Separation of powers concern - vague laws impermissibly delegate responsibility for defining a law's meaning and scope to those who enforce it and the courts that interpret it**

Houston's Lawsuit – Claims

Vagueness

- ▶ “Field” Preemption Provisions – field, occupied by a provision
- ▶ “Express Authorization” is unconstitutionally vague
- ▶ Burden Shifting Provision is unconstitutionally vague
- ▶ “Maintenance” Provisions are unconstitutionally vague
- ▶ Notice Provisions are unconstitutionally vague

Houston's Lawsuit – Claims *Unconstitutional Delegation*

- ▶ **HB 2127 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**

Houston's Lawsuit – Claims Violates Home Rule Amendment/ Failed Constitutional Amendment

- ▶ **HB 2127 improperly removes the conflict requirement of Article XI, Section 5 and, therefore, improperly amends the Texas Constitution**
- ▶ **Such alterations would require a constitutional amendment**
- ▶ **Strict requirements for constitutional amendments were not met**

Travis County Court's Decision on Houston's/Intervenors' Motion for Summary Judgment

- ▶ Entered a final judgment declaring HB 2127
 - ▶ facially unconstitutional and
 - ▶ unconstitutional as applied to Houston as a home rule city and as applied to laws other than those already preempted under Article XI, Section 5
 - ▶ On all grounds asserted in the MSJ
- ▶ Denied the State's motion to dismiss Houston's claims on jurisdictional grounds

Case Status

- ▶ State of Texas automatically supersedes any order or judgment upon filing a notice of appeal
 - ▶ NOA filed the same day
- ▶ Judgment is superseded during appeal as any other judgment would be upon the filing of a supersedeas bond
- ▶ Houston and intervenors have opted not to seek temporary relief

Case Status - Next steps

- ▶ **If notice letters under the statute are received, an appropriate response is to assert that:**
 - ▶ Statute has been declared unconstitutional in its entirety in a final judgment
 - ▶ That judgment has been appealed
 - ▶ City intends to assert HB 2127's unconstitutionality pending final resolution of that appeal
 - ▶ City will not enforce HB 2127 or fail to enforce any local law under it until final resolution of that appeal
 - ▶ City will move to stay any lawsuit asserting preemption under HB 2127 pending final resolution of that appeal

Case Status - Next steps

- ▶ **Timing – unclear if negative response triggers ability to file suit**

Case Status - Next steps

- ▶ **State's opening brief is due Nov. 22, 2023**
- ▶ **Houston and intervenors' brief will be due at the earliest December 22, without an extension**
- ▶

Case Status – Amicus Briefs

- ▶ ***Amicus briefs complying with TRAP 11 and 38 are quite welcome***
 - ▶ **Courts of Appeals**
 - ▶ **Petition for Review, if Houston/Intervenors are required to seek review**
 - ▶ **Supreme Court merits briefing**
- ▶ **Public Rights Project – elected officials – looking for additional signatories**
- ▶ **Groups may be best – show bipartisan opposition**

**Houston Thanks
the Cities, Elected Officials,
Non-Profits, and Academics
Who Have Supported this
Important Litigation**