

# HOME SWEET HOME-RULE: UNRAVELING TEXAS'S REGULATORY CONSISTENCY ACT.

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## ABSTRACT

Texas Regulatory Consistency Act provides Texas citizens a private right of action against their municipal government if local regulations injured—or might injure them.<sup>1</sup> The legislative purpose was to correct the patchwork of regulations from city-to-city that require businesses to adapt to local regulations.<sup>2</sup> To do this, the law field preempts nine state codes, so if a local law is “occupied” in one of these codes, it is at risk of litigation.<sup>3</sup> Large Texas cities sued the state, claiming the law violates the Texas Constitution Article XI, Section five that gives broad governing authority to home-rule cities.<sup>4</sup>

This Comment examines why the Texas Regulatory Consistency Act is bad public policy and unnecessary to correct local overregulation by cities.<sup>5</sup> Further, this Comment advocates a return to the purposeful patchwork approach to preemption cases previously used to control local regulation.<sup>6</sup> Finally, this Comment is the first to refer to the purposeful patchwork and is a moderate perspective to the HB 2127 dialogue.<sup>7</sup> This Comment advises local leaders to reject overregulation, while simultaneously urging state representatives to loosen the reigns and respect the autonomy and decision-making of cities.<sup>8</sup>

## I. INTRODUCTION

Enacted September 1, 2023, the Texas Regulatory Consistency Act (HB 2127) was meant to remedy the economic regulatory patchwork of local ordinances that burden businessowners and—ideally—will create uniformity for business and commerce in the state.<sup>9</sup> Creating a uniform regulatory system in theory, is a good idea—especially in Texas, where the state GDP is nearly two trillion dollars, and as

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<sup>1</sup> H.B. 2127 at 1–2, 88th Leg., Reg. Sess. (Tex. 2023).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Joshua Fechter, *Judge Declares New Texas Law that Would Erode Cities’ Power to Enact Local Rules Unconstitutional*, TEXAS TRIBUNE (Aug. 30, 2023), <https://www.texastribune.org/2023/08/30/texas-death-star-bill-unconstitutional/>; Grace Reader, *‘Death Star’ Bill Signed by Gov. Abbott, Here Are Some of the Impacts in Austin*, KXAN: TEXAS POLITICS (June 19, 2023), <https://www.kxan.com/news/texas-politics/death-star-bill-signed-by-gov-abbott-here-are-some-of-the-impacts-in-austin/>.

<sup>5</sup> See *infra* Section III.A (showing the prior handling of state preemption cases).

<sup>6</sup> See *infra* Section IV (proposing the state return to the prior way of handling preemption claims).

<sup>7</sup> See *infra* Section III–IV (showing both why HB 2127 is unnecessary and why the state should return to the purposeful patchwork).

<sup>8</sup> See *infra* Section V (concluding that state and local leaders need to find a balance).

<sup>9</sup> H.B. 2127 at 1–2, 88th Leg., Reg. Sess. (Tex. 2023).

an individual state has the ninth largest economy in the world.<sup>10</sup> Texas is business friendly, so a bill that supports companies with regulatory concerns is not out of the ordinary, and likely supported by both sides of the aisle.<sup>11</sup> So why are municipal leaders calling HB 2127 the “death star” bill? <sup>12</sup>

HB 2127 creates a field preemption of nine entire codes.<sup>13</sup> The statute states, “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.*”<sup>14</sup> Further, the enforcement mechanism in HB 2127 states, “Any person who has sustained *an injury in fact, actual or threatened*, from a municipal or county ordinance . . . in violation of any of the following provisions . . . has standing to bring . . . an action against the municipality or county.”<sup>15</sup> This gives citizens the opportunity to not only sue for actual injury, but the threat of injury for any ordinance in the city code that is occupied in the preempted codes.<sup>16</sup> The fear surrounding HB 2127 is essentially the fear of the unknown for cities, and how they will be able to operate in an HB 2127 Texas.

Section II provides background of Texas’s home-rule authority and preemption precedent, the HB 2127 lawsuit, federalism versus localism, direct democracy, and the tension between local and state authorities.<sup>17</sup> This Comment addresses the unnecessary nature and unintended effects of HB 2127 instead of the arguments made by the city and state in the lawsuit.<sup>18</sup> Section III reveals why HB 2127 is bad public policy and instead of correcting overregulation, creates more

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<sup>10</sup> Nia Bradley & Shannon Halbrook, *Understanding GDP: What It Does and Does Not Tell Us About the Economy*, COMPTROLLER.TEXAS.GOV: ECONOMY (Feb. 2022), <https://comptroller.texas.gov/economy/fiscal-notes/2022/feb/gdp.php>.

<sup>11</sup> TEXAS ECONOMIC DEVELOPMENT: WHY TEXAS? <https://gov.texas.gov/business/page/why-texas> (last visited Nov. 5, 2023).

<sup>12</sup> Andrew Schneider, “Death Star Law” Takes Effect on Schedule, Following the State’s Appeal of a Lower Court Ruling, TEXAS PUBLIC RADIO (Sept. 3, 2023) <https://www.tpr.org/government-politics/2023-09-05/death-star-law-takes-effect-on-schedule-following-the-states-appeal-of-a-lower-court-ruling>; Andrew Weber, Texas’ ‘Death Star’ Bill Could Kill a Slew of Local Laws. Here’s How., TEXAS STANDARD (June 9, 2023), <https://www.texasstandard.org/stories/texas-death-star-house-bill-could-kill-local-control-worker-housing-protections/>; Fechter, *supra* note 4.

<sup>13</sup> Weber, *supra* note 13 (emphasis added). The Agriculture, Business & Commerce, Finance, Insurance, Labor, Local Government, Natural Resources, Occupations and Property Codes now have an HB 2127 preemption. *Id.*

<sup>14</sup> H.B. 2127 at 2, 88th Leg., Reg. Sess. (Tex. 2023).

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *See id.* at 3.

<sup>17</sup> *See infra* Section II (showing the history of home-rule authority in Texas).

<sup>18</sup> *See infra* Section III–IV (focusing on the practical effects or impacts of HB 2127 instead of reiterating the lawsuit arguments).

problems than benefits.<sup>19</sup> Section IV shows how HB 2127's does not unravel the patchwork, but instead adds to it.<sup>20</sup> Therefore, Section IV proposes the purposeful patchwork—or the return to the pre-HB217 approach of resolving local preemption cases.<sup>21</sup>

## II. A HISTORY OF TEXAS'S HOME-RULE AUTHORITY AND HB 2127

In Texas's early years, the legislature was responsible for issuing charters to municipalities giving local authority to enact ordinances for the people in the towns—if the laws did not conflict with the laws of the State.<sup>22</sup> These charters gave municipalities license to incorporate the city and give them general rule authority.<sup>23</sup> These special charters could only be ratified by the citizens of the town.<sup>24</sup>

As Texas grew, the legislature's time was spent granting and creating special charters for towns—each unique due to the specific differences regionally or because of population size.<sup>25</sup> By 1912, the legislature decided that charter-writing should be left up to towns because “[t]he growth of the cities in Texas was outstripping the legislature's ability to deal with local matters.”<sup>26</sup> Through Texas's constitutional amendment process, the Home Rule Amendment was put on the ballot for the voters to decide, and “in an exercise of their inherent sovereignty” it was approved.<sup>27</sup>

### A. Texas's Home-Rule Requirements and Preemption Standard

Cities in Texas can be either general or home-rule cities.<sup>28</sup> Each state with home-rule authority interprets the powers of local government differently, but in

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<sup>19</sup> See *infra* Section III.A (arguing the statute does not benefit public policy and violates federalism ideas that are important and valued in Texas).

<sup>20</sup> See *infra* Section IV (giving reasons the enforcement provision of HB 2127 does the opposite of what the law intended).

<sup>21</sup> See *infra* Section IV (providing that preemption precedent finds the balance between local or state overregulation).

<sup>22</sup> Terrell Blodgett, *Home Rule Charters*, TSHA,

<https://www.tshaonline.org/handbook/entries/home-rule-charters> (last visited Nov. 5, 2023).

<sup>23</sup> See *id.*

<sup>24</sup> *Id.*; *To Save a City: A Localist Canon of Construction*, 136 HARV. L. REV. 1200, 1219 (2023).

<sup>25</sup> See Blodgett, *supra* note 22.

<sup>26</sup> See *id.*

<sup>27</sup> *To Save a City supra* note 24 (designating home rule city authority in the Texas Constitution in Article XI, Section 5).

<sup>28</sup> *Local Governing Authority: Dillon's Rule vs. Home Rule*, TEXAS POLITICAL SCIENCE (Dec. 22, 2022), <http://texaspoliticalscience.com/index.php/2022/12/22/local-governing-authority-dillons-rule-vs-home-rule/>.

Texas, “[a] home rule city may do anything authorized by its charter that is not specifically prohibited or preempted by the Texas Constitution or state or federal law.”<sup>29</sup> Home-rule cities are differentiated from general rule cities in Texas, “[a] general law city has no charter and may only exercise those powers that are specifically granted or implied by statute.”<sup>30</sup> Therefore, there is more power given to home-rule cities to self-govern as long as the laws stay within the limits set by the state.<sup>31</sup>

To be a home-rule city in Texas there are certain requirements that must be met.<sup>32</sup> First, there must be over 5,000 citizens living in the incorporated boundaries of the city.<sup>33</sup> Second, the city council will nominate a charter committee—made up of members of the community—to prepare charter amendments for a general election.<sup>34</sup> This can also be done through a petition process if ten percent of the qualified voters request to create a home rule charter.<sup>35</sup> In Texas, there are roughly 380 home rule cities.<sup>36</sup>

In Texas, the state legislature must use “unmistakable clarity” when preempting subject matter from home rule ordinances.<sup>37</sup> This standard was affirmed in the *Dallas Merchants & Concessionaire's Association v. City of Dallas* opinion.<sup>38</sup> There, the Texas Supreme Court held that the City of Dallas’s ordinance that prevented the sale of alcohol within 300 feet from a residential area was preempted by the Texas Alcoholic Beverage Code (the code).<sup>39</sup> The court looked at the home-rule discretionary powers of the City of Dallas versus the legislative intent of the code to determine if the local ordinance is preempted.<sup>40</sup> Providing the standard still used today, “If the Legislature chooses to preempt a subject matter usually encompassed by the broad powers of a home-rule city, it must do so with *unmistakable clarity*.”<sup>41</sup> There, the court found § 109.57 of the code showed with unmistakable clarity the intentions of the state to exclusively impose certain

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<sup>29</sup> TML LEGAL DEPARTMENT, ALPHABET SOUP: TYPES OF TEXAS CITIES 10, (last updated Dec. 2017).

<sup>30</sup> *Id.* at 10.

<sup>31</sup> *See id.* at 1.

<sup>32</sup> *See id.* at 5.

<sup>33</sup> *Id.*

<sup>34</sup> TEX. LOC. GOV’T CODE ANN. §§ 9.002 (West 1987).

<sup>35</sup> *Id.*

<sup>36</sup> HANDBOOK FOR MAYORS AND COUNCILMEMBERS, TML 15 (2022).

<sup>37</sup> *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 490.

<sup>40</sup> *Id.* at 491–92.

<sup>41</sup> *Id.* at 491.

standards on alcohol sales.<sup>42</sup> Therefore, the Texas Supreme Court held that the City of Dallas’s ordinance banned selling alcohol within 300 feet of residential areas was expressly preempted.<sup>43</sup>

Interestingly, the court affirmed that home-rule cities have authority to prohibit alcohol sales within 300 feet from churches, schools, or public hospitals, but the City of Dallas was going beyond the intentions of the legislature.<sup>44</sup> The court said, “[T]he mere fact that the legislature [] enacted a law addressing a subject *does not mean the complete subject matter is completely preempted*.”<sup>45</sup> Ultimately, home-rule cities have broad powers, but are expressly preempted by the state if there is no mistaking that certain laws are reserved to the state.<sup>46</sup>

Another example is in the *ESI/Employee Solutions, L.P. v. City of Dallas* case where the City of Dallas enacted an ordinance requiring every business in city limits with six or more employees to have paid sick leave.<sup>47</sup> The United States District Court of the Eastern District of Texas held the City of Dallas’s ordinance was unenforceable, pointing that the Texas Third Court of Appeals found Austin’s similar paid sick leave ordinance was preempted by the Texas Minimum Wage Act (TMWA).<sup>48</sup> Both courts—state and federal—looked to the intent of the legislature to preempt this area of the law that followed the Texas Supreme Court’s guidance, “Where statutory text is clear, that test is determinative of legislative intent unless the plain meaning of the statute’s words would produce an absurd result.”<sup>49</sup> The federal court determined it was bound by the decision of the Third Court of Appeals, since the Dallas and Austin ordinances were essentially the same, and the legislative intent of TMWA was clear.<sup>50</sup>

### *B. The HB 2127 Lawsuit and Cities’ Concerns*

Immediately after Governor Abbot signed HB 2127 into law, the City of Houston filed suit claiming HB 2127 violates the Texas Constitution Article XI,

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<sup>42</sup> *Id.* at 491–92.

<sup>43</sup> *Id.* at 490.

<sup>44</sup> *Id.* at 493.

<sup>45</sup> *Id.* at 491–93 (emphasis added).

<sup>46</sup> See ALPHABET SOUP: TYPES OF TEXAS CITIES *supra* note 29 at 12.

<sup>47</sup> *ESI/Emp. Sols., L.P. v. City of Dallas*, 450 F. Supp. 3d. 700, 710–11 (E.D. Tex. 2020).

<sup>48</sup> *Id.* at 734.

<sup>49</sup> *Id.* at 735–36.

<sup>50</sup> *Id.* at 735–36.

Section five, which grants cities home-rule authority.<sup>51</sup> The city argued that HB 2127 does not follow the “unmistakable clarity” test that is the precedent of the state.<sup>52</sup> The lawsuit was later joined by San Antonio and El Paso, and later an amicus letter including more cities was signed in support of the lawsuit.<sup>53</sup> On August 30, 2023—one day before it was to take effect—the 345th Travis County District Court found HB 2127 unconstitutional and the state has filed an appeal in the Third Court of Appeals.<sup>54</sup> Shortly after the court’s opinion was released, the Office of the Attorney General issued a press release assuring that citizens can still make HB 2127 claims against cities not enjoined on the suit.<sup>55</sup>

First, the cities claim HB 2127 is so vague it cannot preempt any home-rule city ordinance because on its face it is not unmistakably clear, which is upheld by the Supreme Court of Texas.<sup>56</sup> Further, the burden to prove unmistakable clarity is on the party seeking to assert preemption of law therefore “in Texas, if any uncertainty about what is to be preempted remains, there can be no preemption.”<sup>57</sup> Additionally, the use of field preemption in Texas has not been accepted and the current judicial precedent directs courts to uphold city ordinances “if they can reach a reasonable construction leaving both in effect.”<sup>58</sup>

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<sup>51</sup> *Press Release: City of Houston Files Suit Against the State of Texas’ “Death Star” Super Preemption Law*, CITY OF HOUSTON MAYOR’S OFFICE OF COMMUNICATIONS (July 3, 2023), <https://www.houstontx.gov/moc/city-files-suit-against-death-star-law.html> [hereinafter *Press Release*].

<sup>52</sup> John Surma & Jeff T. Leslie, *Texas’s HB 2127 ‘Death Star’ Law Doesn’t Strike Back Against Employers’ Workplace Safety and Health Responsibilities*, NATIONAL LAW REVIEW (July 14, 2023), <https://www.natlawreview.com/article/texas-s-hb-2127-death-star-law-doesn-t-strike-back-against-employers-workplace>; *Press Release supra* note 51; Brief for Petitioner at 3–4, *City of Houston v. State*, (345th Dist. Court) (Cause No. D-1-GN-23-003474).

<sup>53</sup> Fechter, *supra* note 4; Christine Fernando, *Would a Texas Law Take Away Workers’ Water Breaks? A Closer Look at House Bill 2127*, ASSOCIATED PRESS (Aug. 19, 2023), <https://apnews.com/article/texas-death-star-water-breaks-construction-workers-2654af3e256274dd43b52bdf149a0ebc>.

<sup>54</sup> Josephine Lee, *Judge Strikes Down Lege’s Power-Grab Against Cities, HB 2127*, TEXAS OBSERVER (Aug. 30, 2023), <https://www.texasobserver.org/judge-strikes-down-leges-power-grab-against-cities-hb-2127/>; *Texas Law Enabling Citizens to Sue Over Local Ordinances Pre-Empted by State Laws Takes Effect*, KEN PAXTON ATTORNEY GENERAL OF TEXAS, (Sept. 1, 2023) <https://www.texasattorneygeneral.gov/news/releases/texas-law-enabling-citizens-sue-over-local-ordinances-pre-empted-state-laws-takes-effect> [hereinafter ATTORNEY GENERAL OF TEXAS].

<sup>55</sup> ATTORNEY GENERAL OF TEXAS, *supra* note 54.

<sup>56</sup> *See* Brief for Petitioner at 4, *City of Houston v. State*, (345th Dist. Court) (Cause No. D-1-GN-23-003474).

<sup>57</sup> *See id.* at 4 (citing *Mo. Pac. R.R. v. Limmer*, 299 S.W.3d 78, 84 & n.30 (Tex. 2009)).

<sup>58</sup> *Id.* at 19–23 (“[F]ield-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.”)

Additionally, another concern is specifically the remedies section of HB 2127 that states, “Any person who has sustained an injury in fact, *actual or threatened*, from a municipal or county ordinance . . . has standing to bring and may bring an action against the municipality or county.”<sup>59</sup> The statute allows people to recover declaratory and injunctive relief and attorney fees for not just actual damage, but potential damage.<sup>60</sup> A city is able to recover for attorney’s fees if the judge finds the lawsuit is frivolous.<sup>61</sup> Therefore, any claim even the most basic-level operational ordinances in the city code can be subject to lawsuits—depending on what citizens feel has caused them injury.<sup>62</sup>

### C. Federalism and Local Federalism

Historically, the three main points of federalism include: (1) prevent tyranny of the majority (2) allow government to be closer to citizens to allow more public participation (3) decentralization allows states to act as laboratories for new ideas and innovation, without threatening the stability of the entire nation.<sup>63</sup> First, preventing “tyranny of the majority” entails that all citizens, not just those who align with the political party of majority, have equal protections and freedoms.<sup>64</sup> Second, in regards to more public participation as the result of a government closer to the people, honorable Justice O’Connor said it best, “If we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems.”<sup>65</sup> Third, federalism allows states to function like laboratories of new ideas without threatening the entire nation—encouraging progress with lower risk.<sup>66</sup>

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<sup>59</sup> H.B. 2127 at 3, 88th Leg., Reg. Sess. (Tex. 2023) (emphasis added).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 4.

<sup>62</sup> *See id.* at 3.

<sup>63</sup> *See Texas Local Electeds Sound Alarm on Harmful Preemption Bill*, LOCAL PROGRESS (Mar. 15, 2023) <https://localprogress.org/2023/03/15/texas-local-electeds-sound-alarm-on-harmful-preemption-bill/>; Fechter, *supra* note 4.

<sup>64</sup> Amanda Voeller, *A Leap of Faith: Questioning the Constitutionality of Texas's Legislative Prayer Practice*, 51 TEX. TECH L. REV. 305, 330 (2019); *Federalist No. 51* (1788), BILL RIGHTS. INST., <https://www.billofrightsinstitute.org/primary-sources/federalist-no-51> (last visited Dec. 15, 2023).

<sup>65</sup> *Fed. Energy Reg. Comm’n v. Mississippi*, 456 U.S. 742, 790 (1982).

<sup>66</sup> Shannon K. McGovern, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1522 at note 13 (2011).



One of the fathers of federalism, James Madison wrote, “In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.”<sup>67</sup> This double security is the separation between the federal government and the state government.<sup>68</sup> Further, under the theory of local federalism (also known as localism) there is double security between state and local government giving citizens another layer of protection of their liberties.<sup>69</sup> The Supreme Court has affirmed in several cases local federalism, even implying that the principles of federalism and local federalism—when there is no conflict between the two—as indistinguishable.<sup>70</sup> Even though localism and federalism essentially operate the same, local and state government do not.<sup>71</sup> The main difference between state and local powers is best shown when comparing their lawmaking authority—with cities needing to prove two points of authority while the state only has to prove one:

A local government must prove both that it has the power to adopt the measure in the first place, and that its measure has not been prohibited or preempted by a higher level of government. State legislation is subject only to the second challenge—prohibition or preclusion by the national government.<sup>72</sup>

This difference allows localism to enhance features of federalism that state government simply cannot do, and vice versa.<sup>73</sup> Local governments are more capable of grass-roots democracy, while state governments are too large for meaningful citizen involvement.<sup>74</sup> Alternatively, state governments have more inherent legal, political, and fiscal resources than local government.<sup>75</sup> Therefore,

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<sup>67</sup> Paul D. Moreno, *“So Long As Our System Shall Exist”: Myth, History, and the New Federalism*, 14 WM. & MARY BILL RTS. J. 711, 715 (2005).

<sup>68</sup> *See id.* at 715.

<sup>69</sup> *See id.* at 715.

<sup>70</sup> *See* Richard Briffault, *“What About the ‘Ism’?” Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1329–34 (1994).

<sup>71</sup> *Id.* at 1335–43.

<sup>72</sup> *Id.* at 1342.

<sup>73</sup> *See id.* at 1348–49.

<sup>74</sup> *Id.* at 1348.

<sup>75</sup> *Id.* at 1349.

state and local governments are uniquely better-suited to accomplish certain virtues of federalism—which is the purpose of encouraging both localism and federalism.<sup>76</sup>

#### *D. Texas's Initiative and Referendum Petition Ability*

In Texas, the only availability for citizens to petition their government is at the local level.<sup>77</sup> There are two forms of direct democracy: citizen initiative and popular referendum (referred to often as I&R).<sup>78</sup> Citizen initiative petitions allow citizen-proposed laws to bypass elected officials and be placed on the ballot for popular vote.<sup>79</sup> Popular referendum process gives authority to citizens to either approve or repeal statutes by the elected representatives, typically done through popular vote or through the petition process.<sup>80</sup> At least twenty-three states have I&R processes that are on the state level, while Texas only has I&R availability at the local level, and *only* for home-rule cities.<sup>81</sup> “City government in home-rule cities is the most accountable and accessible level of government in Texas. . . . the very fact that the ideas can be publicly debated and decided by the voters highlights the vital role cities play in Texas.”<sup>82</sup>

According to the Associated Press, “Twenty-four states . . . have ways for citizens to bypass the Legislature by gathering signature sand taking proposals directly to voters.”<sup>83</sup> Each state’s policies differ in the restrictions for citizens to bring initiative or referendum petitions, while some states provide an easier process for citizens.<sup>84</sup> Interestingly, there is political diversity regarding the states that do, or do not, have I&R policies.<sup>85</sup> For example, California and Idaho both have initiative and processes, while Texas and New York do not have statewide policies.<sup>86</sup>

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<sup>76</sup> *Id.* at 1334–35; *Federalism and the Separation of Powers*, NAT’L CONST. CENT., <https://constitutioncenter.org/education/classroom-resources-by-topic/federalism> (last visited Dec. 15, 2023).

<sup>77</sup> *Initiative and Referendum Processes*, NAT’L CONF. OF STATE LEGISLATURES (last updated Jan. 4, 2022), <https://www.ncsl.org/elections-and-campaigns/initiative-and-referendum-processes>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*; TML LEGAL STAFF, TOP LEGAL QUESTIONS RECEIVED BY TML LEGAL SERVICES, TEXAS MUNICIPAL LEAGUE at 2–3 (last updated Aug. 2019) (emphasis added); *Quick v. City of Austin*, 7 S.W.3d 109, 123 (Tex. 1998); *Glass v. Smith*, 244 S.W.2d 645, 648–49 (Tex. 1951).

<sup>82</sup> *Id.* at 5 & 9.

<sup>83</sup> David Crary, *US states split on allowing citizen ballot initiatives*, ASSOCIATED PRESS (Oct. 31, 2018), <https://apnews.com/article/efb5b289cfb544968c5b79c2d0be20f7>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

In Texas, after the constitutional amendment for home-rule designation was approved in 1912, two ministers from Galveston began lobbying to amend the constitution to add state I&R.<sup>87</sup> In 1913, the state legislature passed a bill that gave home-rule cities the option to include I&R processes to their charters.<sup>88</sup> By the time the statewide I&R constitutional proposition made it on the ballot in 1914, many citizens lived in home-rule cities with I&R power, and the proposition failed.<sup>89</sup> From 1914 to 1980, there were unsuccessful pushes by Republican legislators to add statewide I&R to the constitution, but after President Bush was elected in 1994, the party flipped to an anti-I&R position.<sup>90</sup>

In Texas’s seminal I&R petition case, *Glass v. Smith*, the Texas Supreme Court affirmed the significance of initiative petitions as a way for citizens to exercise their right to change laws or hold local officials accountable.<sup>91</sup> The court held, “When the people exercise their rights and powers under the initiative provisions of a city charter they are acting as and become in fact the legislative branch of the municipal government.”<sup>92</sup> There, the Autin City Council refused to put a certified initiative that “fixed” pay and provided certain holidays for first responders on the ballot because they claimed the ordinance would be void as it was expressly preempted by the Texas Firefighters Act in the Texas Local Government Code.<sup>93</sup> The court reasoned that because the citizens were acting within the rules and limits of the city charter, and because the initiative’s subject matter was legislative in character, the city council was required to put the initiative on the ballot, regardless if the ordinance would be preempted—the citizens were entitled to have their certified petition put on the ballot.<sup>94</sup>

### *E. Past and Present Tension Between State and Local Leadership*

Each of these examples below show how there has been a growing tension between local and state control. In 2017, Governor Abbott called a special session, including three major municipal-related topics were on the agenda: (1) revenue and spending caps for cities; (2) annexation reform—which is how cities create or

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<sup>87</sup> *Initiative & Referendum Institute*, UNIV. OF S. CAL., <http://www.iandrinstitute.org/states/state.cfm?id=47> (last visited Nov. 8, 2023).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Glass*, 244 S.W.2d at 650.

<sup>92</sup> *See id.* at 647.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 648–49 (showing the Texas Supreme Court’s affirmation of citizen initiative petitions, however the court did not address whether the initiative would be preempted by state law).

manage their municipal boundaries; and (3) preemption of tree ordinance, permit vesting and streaming, and cell phone uses.<sup>95</sup> Of the three items the preemption of local tree regulations and the annexation reform passed, which have both historically been locally regulated.<sup>96</sup>

In 2019, there were two “Super-Preemption Bills”, HB 3899 and SB 1209 that proposed a more sweeping preemption, like HB 2127, instead of the more focused approaches from the prior session.<sup>97</sup> SB 1209 ended up dying in committee, while HB 3899 did not move past the chamber.<sup>98</sup> Both were directed at “the authority of a municipality to regulate statewide commerce” and “the authority of a political subdivision to regulate certain activities.”<sup>99</sup> Importantly, there was a recording that was leaked during the 2019 session that documented the Texas Speaker of the House saying he wanted to have a terrible session for cities, which likely put municipal leaders on alert to contest the preemption bills that were filed that year.<sup>100</sup>

In 2021, the legislature pushed to prohibit taxpayer-funded lobbying, claiming municipalities were wasting taxpayer money by hiring lobbyists to advocate for policies that would increase taxes for their constituents.<sup>101</sup> This plan would ultimately prohibit municipalities from hiring lobbyists to work on their legislative agendas.<sup>102</sup> For many mid-to-small cities, the option of hiring a firm to advocate for their city in Austin during session so they could stay and take care of

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<sup>95</sup> See generally TML LEGISLATIVE UPDATE, Number 27 at 2–3 (July 14, 2017) (providing more detailed information about the special session topics); Kolten Parker, *This Week: Behind Greg Abbott’s Bizarre Beef with Tree Ordinances*, TEXAS OBSERVER: POLITICS (June 16, 2017), <https://www.texasobserver.org/week-behind-greg-abbotts-bizarre-beef-tree-ordinances/>.

<sup>96</sup> See Madlin Mekelburg, *Texas Special Session Ends with Half of Abbott’s Priorities Passed*, EL PASO TIMES (Aug. 16, 2017), <https://www.elpasotimes.com/story/news/politics/texlege/2017/08/16/texas-special-session-ends-half-abbotts-priorities-passed/573471001/>; see TML LEGISLATIVE UPDATE, Number 33 at 1–3 (Aug. 25, 2017).

<sup>97</sup> TML LEGISLATIVE UPDATE, Number 15 at 1–5 (Apr. 12, 2019).

<sup>98</sup> S.B. 1209, 86th Leg., Reg. Sess., (Tex. 2019); H.B. 3899, 86th Leg., Reg. Sess., (Tex. 2019).

<sup>99</sup> LEGISSCAN, <https://legiscan.com/TX/drafts/HB3899/2019> (last visited Nov. 5, 2023); LEGISSCAN, <https://legiscan.com/TX/drafts/SB1209/2019> (last visited Nov. 5, 2023).

<sup>100</sup> TML LEGISLATIVE UPDATE, Number 40 at 1–2 (Oct. 25, 2019).

<sup>101</sup> Ross Ramsey, *Analysis: The fight over local control turns to representation—and lobbyists*, TEXAS TRIBUNE (Mar. 29, 2021), <https://www.texastribune.org/2021/03/29/texas-taxpayer-funded-lobbyists/>.

<sup>102</sup> Carla Astudillo & Texas Tribune Staff, *The 2021 legislation session is over. Here are the big bills that passed—and the ones that failed*, TEXAS TRIBUNE (May 18, 2021), <https://apps.texastribune.org/features/2021/permitless-carry-abortion-restrictions-texas-bills/#SB-10>.

the day-to-day city business was crucial.<sup>103</sup> This initiative split party lines, because conservative local leaders had to consider if they would be able to advocate for their constituents in Austin without the assistance of lobbying advocates.<sup>104</sup> In 2023, this initiative was addressed again, the bill passed the Senate but did not move on to the House State Affairs.<sup>105</sup> Even though the prohibition of taxpayer funded lobbyists was unsuccessful the last two sessions, it will likely stay on the chopping block until the legislature is successful.<sup>106</sup>

In 2023, the Governor’s focus was on “school choice” and the voucher system parents can use to move public dollars to private schools of their choosing—which is another area the local government is removed from local tax dollars.<sup>107</sup> The 2023 constitutional amendment, proposition four, was a \$12.7 billion property tax cut—a much needed relief from inflation and cost of living increases—but another large decrease in the budget for municipalities.<sup>108</sup> There is also the concerning developments of independent school district take-overs by the state, approved by the Texas Supreme Court, which most certainly has been an area traditionally held at the local level.<sup>109</sup> These examples show possible motivation around HB 2127.

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<sup>103</sup> Ramsey, *supra* note 101 (providing that one of the arguments for taxpayer-funded lobbyists is that small or midsize cities do not have the resources for a full-time government liaison to work on legislative initiatives).

<sup>104</sup> *Id.*

<sup>105</sup> SB 175, TEXAS PRESS ASSOCIATION (<https://www.texaspress.com/sb-175> (last visited Nov. 7, 2023)); LEGISCAN, <https://legiscan.com/TX/drafts/SB1209/2019> (last visited Nov. 7, 2023).

<sup>106</sup> See Patrick Gleason, *Texas Could Soon Be The First State To End Taxpayer-Funded Lobbying*, FORBES: POLICY (Jan. 31, 2023), <https://www.forbes.com/sites/patrickgleason/2023/01/31/texas-could-soon-be-the-first-state-to-end-taxpayer-funded-lobbying/?sh=44880de03323>.

<sup>107</sup> Brian Lopez, *Texas’ main voucher bill seeks to avoid other states’ mistakes but keeps ideas that attracted criticism*, TEXAS TRIBUNE (Oct. 3, 2023), <https://www.texastribune.org/2023/10/13/texas-school-vouchers-other-states/>; Brian Lopez, *Texas Senate unveils its priority school voucher bill*, TEXAS TRIBUNE (Oct. 9, 2023), <https://www.texastribune.org/2023/10/09/texas-senate-vouchers-education-savings-accounts/>.

<sup>108</sup> Though this will be a relief to many home and property owners because of the extreme inflation in 2022–2023, this is still a notable deduction in funding for municipalities—even though it will be good for Texans. JOHN BONURA, 2023 GUIDE TO CONSTITUTIONAL AMENDMENTS IN TEXAS, TEXAS PUBLIC POLICY FOUNDATION at 4–5 (Sept. 2023); Karen Brooks Harper, *Billions in property tax cuts need Texas voters’ approval before taking effect. Here’s what you need to know*, TEXAS TRIBUNE (July 28, 2023), <https://www.texastribune.org/2023/07/27/texas-property-tax-cuts-explained/>.

<sup>109</sup> See Briana Zamora-Nipper, *Timeline: How the TEA takeover of Houston ISD unfolded*, CLICK2HOUSTON.COM (last updated Aug. 24, 2023), <https://www.click2houston.com/features/2023/04/06/timeline-how-the-tea-takeover-of-houston-isd-unfolded/>; Maria Mendez, *What happens when Texas takes over a school district like Houston ISD*, TEXAS TRIBUNE (Mar. 16, 2023), <https://www.texastribune.org/2023/03/16/tea-hisd->

### III. HB 2127 CREATES MORE DOUBTS THAN BENEFITS

HB 2127 is bad policy because it brings an elephant gun to a knife fight—meaning the state has previously settled local overregulation without enacting such sweeping measures.<sup>110</sup> First, HB 2127 is overinclusive and prior preemption issues between local and state government have been settled through legislative action or judicial decisions.<sup>111</sup> Second, HB 2127 disrupts local federalism, and ultimately federalism ideals, because it invalidates the importance of local government.<sup>112</sup> Third, HB 2127 limits how citizens can engage in direct democracy through the I&R process because popularly voted ordinances might make the city susceptible to litigation.<sup>113</sup> Finally, the effects of HB 2127 will impact small or midsize cities more than actually reigning-in large, progressive cities.<sup>114</sup>

#### A. *HB 2127 is Overbroad and Unnecessary*

HB 2127 is a “belt and suspenders” overreaction—because local preemption cases have regularly been settled by the courts and legislature.<sup>115</sup> The claimed purpose of HB 2127 is to “block progressive activism in municipalities that have traditionally been regulated at the state level.”<sup>116</sup> Specific concerns by the bill authors cited the “Green New Deal” ban on gas motor lawn equipment in Dallas, fracking in Denton, mandatory water-breaks in Harris County, and required paid sick leave for employees in Dallas and Austin.<sup>117</sup> When HB 2127 was originally

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[takeover-texas-houston-schools/](#); Bennett Sandlin, *Governor says his voice is only one that matters*, GOSANANGELO. (Mar. 30, 2017), <https://www.gosanangelo.com/story/opinion/contributors/2017/03/29/governor-says-his-voice-only-one-matters/99693024/>; *Local Government in the Texas Constitution*, TEXAS POLITICS PROJECT AT THE UNIVERSITY OF TEXAS AT AUSTIN, <https://texaspolitics.utexas.edu/educational-resources/local-government-texas-constitution> (last visited Nov. 7, 2023); Valerie Strauss, *The real story behind the state takeover of Houston public schools*, WASHINGTON POST (Mar. 27, 2023), <https://www.washingtonpost.com/education/2023/03/27/real-story-takeover-houston-public-schools/>.

<sup>110</sup> See *infra* Section III.A (giving reasons HB 2127 is unnecessarily overbroad).

<sup>111</sup> See *infra* Section III.A (providing examples of how overregulation by cities has been handled by the state, without the need for HB 2127).

<sup>112</sup> See *infra* Section III.B (showing that home rule authority is a direct function of federalism).

<sup>113</sup> See *infra* Section III.C (limiting how citizens can be engaged in their local government or use their direct democracy powers).

<sup>114</sup> See *infra* Section III.D (providing that smaller, more conservative cities will bear the brunt of HB 2127, harming more conservative areas of the state).

<sup>115</sup> See *supra* Section II.B (showing prior court decisions that accomplish HB 2127’s purpose).

<sup>116</sup> James Quintero, *HB 2127 with Representative Dustin Burrows*, TEXAS PUBLIC POLICY FOUNDATION: THE LAYOUT (Feb. 17, 2023), <https://www.texaspolicy.com/multimedia/article/the-layout-hb-2127-with-chairman-dustin-burrows>.

<sup>117</sup> *Id.*

introduced, much of the reporting surrounding the bill was concerned with these issues, especially the mandatory water breaks.<sup>118</sup> However, each of these areas have *already been addressed* by the state legislature or lawsuits—without the help of HB 2127.<sup>119</sup>

### 1. *SB 1017 Preempts the Lawn Mower Law in Dallas*

First, SB 1017 was signed into law May 2023, and prohibits local government authorities from banning the sale of gas-powered lawn equipment.<sup>120</sup> Governor Abbott recorded himself signing the bill stating it would “protect energy choice in Texas.”<sup>121</sup> This initiative is directed at the City of Dallas’s proposed ordinance in 2022 to prohibit gas-powered lawn equipment in the city limits, to address air quality concerns.<sup>122</sup> To do this, SB 1017 amends Chapter 247, Subtitle C, Title 7 in the Local Government Code.<sup>123</sup> Unlike HB 2127’s enforcement method, SB 1017 simply prohibits the bans or limitations, and does not create a private right of action for threats of injuries.<sup>124</sup> SB 1017 uses unmistakable clarity to describe the preemption, and only addresses a specific section of the Local Government Code, which likely would be upheld by the *Dallas Merchants* standard.<sup>125</sup> Since SB 1017 addresses Dallas’s overregulation of gas motors in lawn equipment, it is unclear the need for HB 2127 in this instance.

### 2. *Fracking Bans in Denton Settled in 2015*

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<sup>118</sup> Francisco Uranga & Erin Douglas, *As Texas swelters, local rules requiring water breaks for construction workers will soon be nullified*, TEXAS TRIBUNE (June 16, 2023), <https://www.texastribune.org/2023/06/16/texas-heat-wave-water-break-construction-workers/>; Hannah Levitan, *In scorching-hot Texas, Gov. Abbott just took away construction workers’ right to a rest break*, TEXAS PUBLIC RADIO (June 16, 2023), <https://www.tpr.org/government-politics/2023-06-16/in-scorching-hot-texas-gov-greg-abbott-just-took-away-construction-workers-right-to-a-rest-break>.

<sup>119</sup> See *infra* Section III.A.1–4 (showing how the alleged concerns have already been settled, and why HB 2127 is unnecessary).

<sup>120</sup> S.B. 1017 at 2, 88th Leg., Reg. Sess. (Tex. 2023).

<sup>121</sup> Greg Abbott (@GregAbbott\_TX), Twitter (May 17, 2023), [https://twitter.com/GregAbbott\\_TX/status/1658884565425848349](https://twitter.com/GregAbbott_TX/status/1658884565425848349).

<sup>122</sup> Everton Bailey Jr., *Dallas Changes Plans to Ban Gas-Powered Lawn Equipment*, GOVERNING (July 20, 2023), <https://www.governing.com/policy/dallas-changes-plans-to-ban-gas-powered-lawn-equipment>.

<sup>123</sup> S.B. 1017 at 1, 88th Leg., Reg. Sess. (Tex. 2023).

<sup>124</sup> See *infra* Section IV.C (showing the unique and contentious nature of HB 2127’s enforcement mechanism).

<sup>125</sup> See S.B. 1017 at 1–3, 88th Leg., Reg. Sess. (Tex. 2023); *Dallas Merch.’s*, 852 S.W.2d at 493.

Second, HB 2127 will have no effect on fracking bans in Denton or any other city in Texas because HB 40—enrolled in 2015—gave the state exclusive jurisdiction to regulate oil and gas operations and expressly preempted local regulation in these areas.<sup>126</sup> In 2014, a major battle began between the state and the City of Denton when local advocates petitioned the City of Denton to ban fracking within city limits.<sup>127</sup> The ordinance in Denton was eventually preempted by HB 40 in the 2015 regular session.<sup>128</sup> Since this instance, there have been no other cities in the state of Texas that have attempted to ban fracking operations within city limits—because it is expressly preempted.<sup>129</sup> HB 2127 is legislation simply for the sake of legislating—and if local overregulation issues are settled, what is the purpose of HB 2127?

### 3. *Mandatory Paid Sick Leave Preempted in 2018 and 2019*

Third, municipally required paid sick leave ordinances in Dallas and Austin have both been enjoined and determined unenforceable, by the Third Court of Appeals and the Eastern District of Texas.<sup>130</sup> These ordinances required employers in the city limits with six or more employees to provide paid sick leave.<sup>131</sup> The decision by the federal court judge directly followed the analysis of the Third Court of Appeals, and the Texas Supreme Court declined to review the petition—leaving these kinds of local ordinances void for cities.<sup>132</sup> With this judicial precedent in place, it is clear that the legislative intent was to control wage-setting through the Texas Minimum Wage Act.<sup>133</sup> Therefore, because the legislative intent is clear, and

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<sup>126</sup> Texas Legislative Guide, *House Bill 40*, TEXAS TRIBUNE, <https://txlege.texastribune.org/84/bills/HB40/> (last visited Dec. 15, 2023).

<sup>127</sup> Peggy Heinkel-Wolfe, *Five years later: Denton's epic battle to ban fracking and keep local control*, DENTON RECORD-CHRONICLE (updated Nov. 3, 2019), [https://dentonrc.com/news/five-years-later-dentons-epic-battle-to-ban-fracking-and-keep-local-control/article\\_df910328-7409-5acf-b951-5934ad766c12.html](https://dentonrc.com/news/five-years-later-dentons-epic-battle-to-ban-fracking-and-keep-local-control/article_df910328-7409-5acf-b951-5934ad766c12.html); Jim Malewitz, *Dissecting Denton: How One City Banned Fracking*, TEXAS TRIBUNE (Dec. 15, 2014), <https://www.texastribune.org/2014/12/15/dissecting-denton-how-texas-city-banned-fracking/> (noting that although the strength of the state eventually stamped out the efforts of local activists, it is an excellent example of grass-roots direct democracy efforts referred in Section III.C).

<sup>128</sup> Wade Goodwyn, *New Texas Law Makes Local Fracking Bans Illegal*, NPR: MORNING EDITION (May 20, 2015), <https://www.npr.org/2015/05/20/408156948/new-texas-law-makes-local-fracking-bans-illegal>.

<sup>129</sup> Heinkel-Wolfe, *supra* note 127.

<sup>130</sup> See *supra* Section II.A (giving background on the lawsuit regarding Dallas's ordinance).

<sup>131</sup> ESI/Emp. Sols., L.P., 450 F. Supp. 3d at 710–11.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*



the courts found these ordinances are unenforceable, HB 2127’s purpose to prohibit similar ordinances is redundant and unnecessary.<sup>134</sup>

#### 4. *Mandatory Water Break Ordinances from 2010 and 2015*

Fourth, another law HB 2127 was intended to address was “labor union bills” specifically the local laws that require construction employees to take mandatory water breaks.<sup>135</sup> These ordinances are not new, the City of Dallas enacted a water-break law in 2015 and Austin did in 2010—requiring a ten minute break for every four hours worked.<sup>136</sup> The purpose of these laws was to protect manual workers from the Texas heat; the Dallas ordinance was enacted after 25-year-old Roendy Granillo died on a jobsite from heatstroke.<sup>137</sup> One HB 2127 supporter claimed, “Water breaks are better solved by OSHA (Occupational Safety and Health Act)”, and these local ordinances “try to make one size fits all, and that is not how it should work.”<sup>138</sup> Interestingly, that is exactly what HB 2127 does—creating an overinclusive, one-size-fits-all preemption that is unnecessary to correct overregulation by cities. The supporter said, “These ordinances just add confusion and encourage people to do the minimum *instead of doing the right thing*,” which is—again—like the overbroad HB 2127.<sup>139</sup>

HB 2127 cannot prevent employers from following OSHA guidelines for worker safety, but does prevent the city from enforcing water breaks.<sup>140</sup> However, the federal government has not preempted local or state governments from this practice—which means only the state is concerned with the cities’ involvement.<sup>141</sup> This again demonstrates the sweeping nature of HB 2127.<sup>142</sup> Instead of the one-size-fits-all statute, perhaps the state should have *expressly preempted* water-breaks—or let cities regulate ten-minute water breaks for the safety of its citizens.<sup>143</sup>

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<sup>134</sup> *See id.*

<sup>135</sup> Fernando, *supra* note 53.

<sup>136</sup> AUSTIN, TEX., CODE § 20100729-047 (2010).

<sup>137</sup> Andrea Ball, *Worked to Death*, USA TODAY: HOSTAGE TO HEAT, <https://stories.usatodaynetwork.com/hostagetoheat/texas-heat-no-regulations-cause-workers-death/> (last visited Dec. 15, 2023).

<sup>138</sup> Uranga & Douglas, *supra* note 118.

<sup>139</sup> *Id.* (emphasis added); *see infra* Section III.B (emphasizing the importance of local federalism and cities as laboratories to innovate, benefit, and protect their citizens).

<sup>140</sup> Surma & Leslie, *supra* note 52.

<sup>141</sup> *See generally* Uranga & Douglas, *supra* note 118; *Id.* (showing the “water break” laws have been in place for years in Texas).

<sup>142</sup> *See supra* Section III.A.1–3 (providing other examples of how the state has expressly preempted local laws).

<sup>143</sup> *See supra* Section III (showing how HB 2127 is overreaching and unnecessary).

Finally, each of these alleged purposes for HB 2127 have already been addressed through current state preemption, litigation—some settled nearly ten years ago—or with federal regulation.<sup>144</sup> Other local initiatives that are expressly preempted by the state government include bans on plastic bags,<sup>145</sup> installing red-light cameras,<sup>146</sup> prohibition of certain rideshare companies,<sup>147</sup> city regulations of gas stoves,<sup>148</sup> tree-cutting ordinances,<sup>149</sup> and how many chickens citizens can raise in their neighborhoods.<sup>150</sup> These examples show the legislature can and has enacted specific preemptions in the past. Therefore, why was the vaguely written HB 2127 passed by the same policy makers who have successfully blocked prior local overregulation? Instead of providing unmistakably clear legislative intent for preemption—which is consistently upheld by the courts—the legislature instead chose a one-size-fits-all bill.<sup>151</sup> This broad-stroke overregulation is unacceptable, especially for a GOP controlled House and Senate, which was historically built on the virtue of small government and personal accountability.<sup>152</sup>

### *B. HB 2127 Disrupts Local Federalism of Texas Cities*

HB 2127 creates conflict between local and state government; therefore, it disrupts local governments' active role in federalism.<sup>153</sup> While state government is

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<sup>144</sup> See Quintero, *supra* note 116; see *supra* Sections III.A.1–4 (conceding that this is likely not an exhaustive list, but the ones directly listed by the statute author).

<sup>145</sup> Emma Platoff, *Texas Supreme Court strikes down Laredo's plastic bag ban, likely ending others*, TEXAS TRIBUNE (June 22, 2018), <https://www.texastribune.org/2018/06/22/texas-supreme-court-rules-bag-bans/> (noting this decision came from the Texas Supreme Court and not the legislature).

<sup>146</sup> Casey Leins, *Gov. Abbott Outlaws Red-Light Traffic Cameras in Texas*, U.S. NEWS (June 3, 2019), <https://www.usnews.com/news/best-states/articles/2019-06-03/gov-abbott-outlaws-red-light-traffic-cameras-in-texas>.

<sup>147</sup> Alex Samuels, *Uber, Lyft return to Austin as Texas Gov. Abbott signs ride-hailing measure into law*, TEXAS TRIBUNE (May 29, 2017), <https://www.texastribune.org/2017/05/29/texas-gov-greg-abbott-signs-measure-creating-statewide-regulations-rid/>.

<sup>148</sup> H.B. 1501 at 1, 87th Leg., Reg. Sess. (Tex. 2021).

<sup>149</sup> Michael Hardy, *How the Texas GOP Became the Party of Big Government*, TEXAS MONTHLY (May 2023), <https://www.texasmonthly.com/news-politics/how-texas-gop-became-party-of-big-government/>; Parker, *supra* note 95.

<sup>150</sup> H.B. 1191, 88th Leg., Reg. Sess. (Tex. 2023).

<sup>151</sup> See *supra* Section II.A, B, E (showing there is a judicial precedent that HB 2127 would not pass).

<sup>152</sup> PLATFORM AND RESOLUTIONS AS AMENDED AND ADOPTED BY THE 2022 STATE CONVENTION OF THE REPUBLICAN PARTY OF TEXAS, REPUBLICAN PARTY OF TEXAS 3 (2022 Platform Committee Members, 2022).

<sup>153</sup> See *supra* Section II.C (providing that local governments accomplish parts of federalism that cannot be done by the state).

better suited to prevent tyranny of a national majority, local governments encourage more political participation and innovation.<sup>154</sup>

### 1. *HB 2127 Discourages Public Participation*

First, at the local level there are many more opportunities for citizens to participate the political process.<sup>155</sup> A vital part of federalism—done best by local governments—is increasing political participation because local government is closer to the people.<sup>156</sup> From the city council, school board, boards and commissions, or even the PTA, citizens’ admittance to local politics is unbelievably more accessible than at the state level.<sup>157</sup> This threshold is important because it allows young, minority, and politically diverse candidates to enter into political participation.<sup>158</sup> Texas’s population is growing more diverse, therefore this should be representative in the local and state participation.<sup>159</sup>

Second, HB 2127 indicates to citizens that local political participation is futile, so why should they bother with involving themselves at the state level either?<sup>160</sup> Texas’s voter turnout is already very low.<sup>161</sup> In 2023 Texas saw a 14% voter turnout for constitutional amendments, which was an improvement from 2021

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<sup>154</sup> See Briffault, *supra* note 70 at 1324.

<sup>155</sup> See *Election Administration at State and Local Levels*, NAT’L CONF. OF STATE LEGISLATURES (updated Nov. 1, 2022), <https://www.ncsl.org/elections-and-campaigns/election-administration-at-state-and-local-levels>.

<sup>156</sup> See Briffault, *supra* note 70 at 1324.

<sup>157</sup> See Sheryl Trent, *How to Facilitate Inclusive Community Outreach and Engagement*, ICMA (May 1, 2021), <https://icma.org/articles/pm-magazine/how-facilitate-inclusive-community-outreach-and-engagement>.

<sup>158</sup> See generally Jessica Trounstine & Melody E. Valdini, *The Context Matters: The Effects of Single-Member versus At-Large Districts on City Council Diversity*, 52 AM. J. POL. SCI. 554, 566–567 (2008) (showing that especially in single-member district city council seats, diverse representation is available to local city councils).

<sup>159</sup> See generally Ross Ramsey, *Analysis: Texas’ population has changed much faster than its political maps*, TEXAS TRIBUNE (Dec. 8, 2012), <https://www.texastribune.org/2021/12/08/texas-redistricting-demographics-elections/> (growing population in Texas means growing diversity too).

<sup>160</sup> See generally *To Save a City*, *supra* note 24 (showing how courts should view state and local preemption cases); Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2009–10 (2000); David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 782 (Mar. 10, 2017).

<sup>161</sup> Christopher Adams, *Turnout tracker: How many people have voted in the November 2023 election?* KXAN (Oct. 24, 2023) <https://www.kxan.com/news/your-local-election-hq/november-2023-turnout-tracker/>; *Voter Turnout Tops 14 Percent in Constitutional Amendment Election*, TEXAS SECRETARY OF STATE JANE NELSON (Nov. 8, 2023), <https://www.sos.state.tx.us/about/newsreleases/2023/110823.shtml> [hereinafter *Voter Turnout*].

with voter turnout at 8.75%.<sup>162</sup> Some may argue that the voting numbers were low *before* HB 2127, not because of it. However, this concerning trend may continue since citizens have less accessibility to state legislators when it comes to constitutional amendments—much less basic regulatory issues.<sup>163</sup> Further, HB 2127 has many city leaders wondering if they must *seek permission* from the state during regular session before enacting a local ordinance.<sup>164</sup> If citizens and cities must slog through state bureaucracy to seek local or regulatory changes, that likely will not encourage voter turnout, or local participation.<sup>165</sup> What do laws like HB 2127 tell citizens about the significance of local leadership? Unfortunately, it says to Texans that their state representation does not trust *their* judgment or find them capable of making sound decisions for their own communities.

## 2. *HB 2127 Slows Cities' Innovation Opportunities*

Next, HB 2127 sweeps cities' opportunity to be laboratories of innovation by chilling the ways cities can attract and retain entrepreneurs and workforce talent.<sup>166</sup> For example, innovation hubs bring entrepreneurs, local, and state governments together to encourage science and technology creation—and not just in urban cities—many in flourishing college towns.<sup>167</sup> These innovations hubs are

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<sup>162</sup> Adams, *supra* note 161; *Voter Turnout*, *supra* note 161.

<sup>163</sup> See *How does voter turnout in the US change by state, age and race?* USA FACTS (last updated Oct 3, 2023), <https://usafacts.org/articles/how-many-americans-vote-and-how-do-voting-rates-vary-state/> (showing that Texas has one of the lowest voter turnout even for Presidential elections, which typically engage more voters); See Schleicher, *supra* note 160 at 782.

<sup>164</sup> See generally Nick Robertson, *Texas judge rejects bill restricting legal power of progressive cities*, THE HILL (Aug. 30, 2023), <https://thehill.com/homenews/state-watch/4180121-texas-judge-rejects-bill-restricting-cities-authority/#:~:text=House%20Bill%202127%2C%20which%20opponents%20have%20dubbed%20the,The%20measure%20was%20set%20to%20take%20effect%20Friday> (highlighting that there is an interpretation of HB 2127 that requires cities to seek permission to pass local laws when the state legislature meets every other year).

<sup>165</sup> See *supra* Section II.B (noting that some interpretation of HB 2127 would require citizens or cities to get permission directly from the state before enacting local laws).

<sup>166</sup> *Cities as innovation labs*, HARVARD KENNEDY SCHOOL (Nov. 30, 2017), <https://www.hks.harvard.edu/faculty-research/policy-topics/cities-communities/cities-innovation-labs> (“Not just ‘how mayors can make cities better, but how cities can make the country better.’”).

<sup>167</sup> *FACT SHEET: Biden-Harris Administration Announces 21 Regional Tech Hubs to Spur American Innovation, Strengthen Manufacturing, and Create Good-Paying Jobs in Every Region of the Country*, WHITE HOUSE BRIEFING ROOM (Oct. 23, 2023) <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/23/fact-sheet-biden-harris-administration-announces-31-regional-tech-hubs-to-spur-american-innovation-strengthen-manufacturing-and-create-good-paying-jobs-in-every-region-of-the-country/> [hereinafter WHITE HOUSE]; INNOVATION HUB AT RESEARCH HUB, <https://www.depts.ttu.edu/research/research-park/>;

encouraged to compete for federal grants, but many are created through private-public partnerships between industries and municipal governments.<sup>168</sup> Importantly, the White House encouraged not just state governments, but also local governments to be valuable partners for aiding entrepreneurship innovation.<sup>169</sup> Examples include Texas Tech University’s Innovation Hub and the partnership between John Deere and the University of Texas—serving as incubators for student creators with academic support and lower entrepreneurial risk.<sup>170</sup> Both of these institutions receive state funding, but neither would be successful without local government partners sponsoring and supporting these programs.<sup>171</sup>

HB 2127 supporters would argue that start-ups will also be restricted by local government regulations—and that is true—local governments must not stifle innovation by overregulation.<sup>172</sup> However, local governments must still be empowered to enact laws that encourage a good quality of life and unique community culture, which attracts young millennial and gen-Z innovators and work-force.<sup>173</sup> The priorities of a younger workforce means local “progressive”

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TEXAS INNOVATION CENTER, <https://texasinnovationcenter.utexas.edu/>; *Austin’s Innovation District*, DOWNTOWN AUSTIN ALLIANCE, <https://downtownaustin.com/innovationdistrict/>; Maria Clara Cobo, *College Towns Are The Next Big Thing For Startup*, FORBES (June 25, 2019), <https://www.forbes.com/sites/mariaclaracobo/2019/06/25/college-towns-are-the-next-big-thing-for-startups/?sh=4ad0ea5f3b76>.

<sup>168</sup> See Cameron Davis et. al, *Building innovation ecosystems: Accelerating tech hub growth*, MCKINSEY & COMPANY (Feb. 28, 2023), <https://www.mckinsey.com/industries/public-sector/our-insights/building-innovation-ecosystems-accelerating-tech-hub-growth>; Clara Cobo, *supra* note 167.

<sup>169</sup> WHITE HOUSE, *supra* note 167.

<sup>170</sup> *News Release, John Deere Launches Innovation Hub in Austin, Texas*, JOHN DEERE (Feb. 24, 2022), <https://www.deere.com/en/news/all-news/austin-innovation-hub/>; TTU INNOVATION HUB, *supra* note 167.

<sup>171</sup> See Texas Economic Development, *Incentive & Financial Programs*, OFFICE OF THE TEXAS GOVERNOR, <https://gov.texas.gov/business/page/incentives> (last visited Dec. 15, 2023); UT News, *UT Austin Seed Fund Launched With First Investment*, UNIVERSITY OF TEXAS AT AUSTIN (Nov. 29, 2023), <https://news.utexas.edu/2022/11/29/ut-austin-seed-fund-launched-with-first-investment/> (noting the “state funding” is referring to the state funding that both universities receive).

<sup>172</sup> See *Supra* Section III.A (acknowledging there are situations where cities have gone too far, but those examples are the exceptions).

<sup>173</sup> BID Daily Newsletter, *College Towns Spur Economic Growth*, PCBB (Aug. 7, 2023), <https://www.pcbb.com/bid/2023-08-07-college-towns-spur-economic-growth>; Jade Scipioni, *Millennials have been moving out of big cities—here’s where they are going*, CNBC (updated Apr. 15, 2021), <https://www.cnbc.com/2021/04/15/millennials-moving-out-of-big-cities-where-they-are-going-smartasset.html#:~:text=Millennials%20have%20been%20moving%20out%20of%20big%20cities%20...%20Portland%20Oregon%20...%20More%20items>; Clara Cobo, *supra* note 167.

ordinances—done correctly—might be necessary to retain talent.<sup>174</sup> This might require the legislature to exercise some restraint, and give cities a chance to find that balance, before interfering.

HB 2127 authors claim municipalities are regulating areas traditionally done at the state, but perhaps citizens are tired of the “we’ve always done it this way” mentality.<sup>175</sup> The State Constitution’s home-rule provision allows cities to be laboratories and innovators without threatening the entire state.<sup>176</sup> Enacting HB 2127 is the state legislature being overcautious by preventing cities’ innovation—even with local interest from citizens to try something new.<sup>177</sup>

### C. *Texans’ Direct Democracy is Limited by HB 2127*

Initiative and referendum (I&R) petitions, direct democracy tools already limited by the state, are more narrow because of HB 2127.<sup>178</sup> Further, Texas Supreme Court’s standard of upholding citizen’s right for I&R petitions might create conflict due to HB 2127.<sup>179</sup> With the limitations created by HB 2127, citizens will still be able to bring I&R petitions to the ballot, but the sweeping preemption might make these popularly voted ordinances void due to the risk of litigation.<sup>180</sup> The I&R mechanism remains, but HB 2127 nullifies the voices of citizens by muddling the areas citizens can petition the government—and if those petitions will even be enacted or enforced.<sup>181</sup> This Comment does not advocate for a state-wide

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<sup>174</sup> See IAIN WHITAKER, CHICAGO COUNCIL ON GLOBAL AFFAIRS, CITIES COMPETING FOR TALENT IN THE GLOBAL ECONOMY 1–2 (Apr. 2019).

<sup>175</sup> See Quintero, *supra* note 116.

<sup>176</sup> See *supra* Section II (providing the state was too big for a centralized government scheme, so the people voted to add home-rule designation to the State Constitution).

<sup>177</sup> See Bloomberg Cities Network, *The future of city innovation*, JOHNS HOPKINS UNIV. (Mar. 19, 2019), [https://bloombergcities.jhu.edu/news/future-city-innovation#:~:text=The%20future%20of%20city%20innovation%201%20Mayors%20will,with%20the%20jobs%20of%20tomorrow%20...%20More%20items](https://bloombergcities.jhu.edu/news/future-city-innovation#:~:text=The%20future%20of%20city%20innovation%201%20Mayors%20will,with%20the%20jobs%20of%20tomorrow%20...%20More%20items;); Steven Pedigo, *The 2020 Census Shows Texas Metros Are Booming. The Guv and Lege Keep Getting in Their Way*, TEXAS MONTHLY (Aug. 20, 2021), <https://www.texasmonthly.com/news-politics/census-growth-diversity-metros/>.

<sup>178</sup> See *supra* Section III.D (giving a background on initiative and referendum in Texas).

<sup>179</sup> See *supra* Section II.D (referring to the Glass v. Smith case where the Texas Supreme Court was in favor of the local petition).

<sup>180</sup> See generally Glass, 244 S.W.2d 648–49, Joshua Fechter et al, *Texas House approves sweeping limits on local regulations in GOP’s latest jab at blue cities*, TEXAS TRIBUNE (last updated Apr. 19, 2023), <https://www.texastribune.org/2023/04/18/texas-house-local-control/>; ATTORNEY GENERAL OF TEXAS, *supra* note 54 (combining the rule of law protecting I&R from Glass, the limitations of HB 2127, and the risk of litigation promised by the Attorney General’s office).

<sup>181</sup> See *supra* Section II.D (emphasizing that HB 2127 is overinclusive and is unclear about what local laws will be at risk for litigation).

I&R amendment to the Constitution because there are certainly some negative aspects to citizen petitioning.<sup>182</sup> However, HB 2127 overreaches by preventing Texans from exercising direct democracy to aide in both individualizing local laws, and holding municipal officials accountable.<sup>183</sup>

An example of the power of direct democracy can be shown through the Lubbock Sanctuary City for the Unborn Ordinance that was put on the May 2021 ballot.<sup>184</sup> It is unclear if this ordinance is now moot due to the overruling of *Roe v. Wade*, and the Texas “Heartbeat Bill”, but is an excellent example of how grassroots citizen efforts could adopt ordinances.<sup>185</sup> However, because of HB 2127, it is possible that citizens could spend countless hours, and enormous amounts of private dollars to organize a petition that is put on the ballot, only for the ordinances to be the subject of an HB 2127 lawsuit.<sup>186</sup>

Furthermore, citizens may be penalized by paying for HB 2127 lawsuits over ordinances that *they voted for*—which will continue to discourage political participation.<sup>187</sup> To be fair, HB 2127’s effect on I&R petitions is still unknown.

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<sup>182</sup> See Michael A. Carrier, *Five Actions to Stop Citizen Petition Abuse*, 118 COLUM. L. REV. 82, 93 (2018); Ryan Fonseca, *A new push to reform California’s referendum rules*, LOS ANGELES TIMES (Mar. 21, 2023), <https://www.latimes.com/california/newsletter/2023-03-21/essential-california-referendum-rule-reform-essential-california>.

<sup>183</sup> See generally *Initiative and Referendum Processes*, *supra* note 77; Gus Bova, *The Reason Texans Can’t Vote on Abortion and Weed*, TEXAS OBSERVER (Nov. 8, 2023), <https://www.texasobserver.org/the-reason-texans-cant-vote-on-abortion-and-weed/> (quoting, “If you’re out of government, you’re in favor of initiatives. If you’re in government, they become not so appealing.”)

<sup>184</sup> *Lubbock’s sanctuary city proposition approved by voters*, EVERYTHINGLUBBOCK (last updated May 1, 2021), <https://www.everythinglubbock.com/news/local-news/lubbocks-sanctuary-city-proposition-leading-in-early-voting-results/>.

<sup>185</sup> Matt Dotray, *Lubbock voters say yes to Sanctuary City for the Unborn ordinance to limit abortion*, LUBBOCK AVALANCHE-JOURNAL (May 2, 2021), <https://www.lubbockonline.com/story/news/2021/05/01/lubbock-voters-approve-anti-abortion-ordinance-municipal-election/4908890001/>; *Petition – Initiative Sanctuary City for the Unborn*, CITY OF LUBBOCK, <https://ci.lubbock.tx.us/news/1605911186-petition-initiative-sanctuary-city-for-the-unborn> (last visited Nov. 8) (showing the City of Lubbock’s update regarding the Sanctuary City Initiative Petition).

<sup>186</sup> See generally Julianna Russ & Amy Koczera, *State Senator asks Lubbock to join him in battle against Planned Parenthood*, EVERYTHINGLUBBOCK (Sept. 9, 2020), <https://www.everythinglubbock.com/news/local-news/state-senator-asks-lubbock-to-join-him-in-battle-against-planned-parenthood/> (providing an example of a State Senator who capitalized on the I&R petition in the home-rule city charter to by-pass the city council to put the Sanctuary City for the Unborn Ordinance on the May 2021 ballot).

<sup>187</sup> See *supra* Section III.B.1 (showing the participation of citizens is important for federalism, and wasting citizen time and money is no way to encourage more participation).

However, the potential damage to citizens' time and money shows the lack of consideration that was given to the practical impact of HB 2127.<sup>188</sup>

Unfortunately, because HB 2127 is so wide-reaching, it has impacted not only the municipality's ability to regulate local issues, but reduced citizens' as well.<sup>189</sup> HB 2127 limits direct democracy tools that might be used to ensure accountability of local elected officials.<sup>190</sup> Direct democracy could also be used in place of HB 2127 to correct the regulations that burden citizens.<sup>191</sup> It is admittedly a slower process, but one that reserves authority to citizens, without interference of the state legislature.<sup>192</sup> In a report by the Texas Municipal League Legislative Policy Committee, regarding I&R:

[W]hen it comes to participatory democracy measures like initiative and referendum in Texas, cities are the only game in town. Home rule cities are the only level of government in Texas that actually gives voters the ability to directly shape public policy. State government provides no such mechanism. That begs the question of whether the state legislature should be involved at all?<sup>193</sup>

HB 2127 again shows the little faith the state legislature has in local leaders, *and Texans*. “The idea of political accountability stems from the fact that *the people* provide the ultimate check on government officials through the ability to cast them

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<sup>188</sup> See generally Andrew Schneider, ‘Death Star bill’ aimed at overriding local government control powers is likely to pass the Senate, TEXAS STANDARD (May 3, 2023), <https://www.texasstandard.org/stories/bill-override-local-government-control-powers-likely-pass-texas-senate/> (assuming the potential issues with I&R petitions and HB 2127 were not considered during floor discussions).

<sup>189</sup> See *supra* Section II.D (limiting cities through overreaching legislation also limits citizens direct democracy).

<sup>190</sup> See generally *Initiative and Referendum Processes*, *supra* note 77 (using I&R more frequently at the local level could be a great way for citizens to hold local leaders accountable—but HB 2127 essentially squashes that option).

<sup>191</sup> See *supra* Section III.A (emphasizing that other local regulations have been overruled by the courts or state legislative—so I&R could be used this way); see TEXAS MUNICIPAL LEAGUE, LEGISLATIVE POLICY COMMITTEE ON BALLOT PROPOSITIONS 84 (Nov. 30, 2018) [hereinafter COMMITTEE ON BALLOT PROPOSITIONS]; Hardy, *supra* note 149.

<sup>192</sup> See *supra* Section III.A (providing that HB 2127 is unnecessary to “reign-in” cities since there are other, less extreme measures to do so); see generally COMMITTEE ON BALLOT PROPOSITIONS, *supra* note 191 at 84 (allowing citizens to not only repeal ordinances, but recall city councilmembers as well—giving citizens authority to hold laws and leaders accountable).

<sup>193</sup> COMMITTEE ON BALLOT PROPOSITIONS, *supra* note 191 at 11.



out of office.”<sup>194</sup> Again, HB 2127 is unnecessary, and topples systems of accountability in the process.<sup>195</sup>

#### *D. Small and Midsize Cities Will Pay the Price in HB 2127 Litigation*

HB 2127 will reign-in large cities from enacting ordinances that inhibit commerce, however smaller cities will also be penalized.<sup>196</sup> HB 2127 encourages litigation if there is *actual or potential* damage to a person or business.<sup>197</sup> HB 2127 is so overinclusive that even when cities are not overregulating, but simply performing basic municipal operations, it may still be subject to a lawsuit.<sup>198</sup> Therefore, small and midsize home-rule cities will be disproportionately impacted by HB 2127 suits, and their republican elected officials are merely collateral damage.<sup>199</sup>

##### *1. Local Leaders are in a Difficult Position*

HB 2127 is a “win against progressive activism” while local republican elected officials and their typically conservative cities are casualties.<sup>200</sup> West Texas cities like Lubbock, Amarillo, Odessa, Midland, and San Angelo are home-rule, conservative, and traditionally republican majority.<sup>201</sup> Compared to large Texas

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<sup>194</sup> Allison Morgan, *Municipal Liability Under McMillian: How the Fifth Circuit’s Dual-Hat-Problem Can Be Solved with a New Local Policy Presumption*, 55 TEX. TECH. L. REV. Issue 4, 16 (2023).

<sup>195</sup> See *supra* Section III.A (providing examples when courts or the state have handled preemption issues).

<sup>196</sup> See Doug Chayka, *Republican and Democratic Cities Band Together to Blow Up the Death Star Bill*, TEXAS MONTHLY (Nov. 2023), <https://www.texasmonthly.com/news-politics/republican-and-democratic-cities-band-together-to-blow-up-the-death-star-bill/>.

<sup>197</sup> See *supra* Section II.B (referring to HB 2127’s enforcement mechanism) (emphasis added).

<sup>198</sup> See Chayka, *supra* note 196.

<sup>199</sup> Hannah Norton, *Texas House approves bill limiting cities’ ability to pass variety of local ordinances*, COMMUNITY IMPACT (last updated Apr. 20, 2023), <https://communityimpact.com/austin/central-austin/texas-legislature/2023/04/19/texas-house-approves-bill-limiting-cities-ability-to-pass-variety-of-local-ordinances/>; see Ross Ramsey, *Analysis: The blue dots in Texas’ red political sea*, TEXAS TRIBUNE (Nov. 11, 2016), <https://www.texastribune.org/2016/11/11/analysis-blue-dots-texas-red-political-sea/>.

<sup>200</sup> See generally Chayka, *supra* note 196; Brad Johnson (@bradj\_TX), TWITTER (Aug. 21, 2023, 2:35 PM), [https://twitter.com/bradj\\_TX/status/1693708457717723355?s=20](https://twitter.com/bradj_TX/status/1693708457717723355?s=20) (showing that Republican mayors are speaking out against the republican introduced statute).

<sup>201</sup> Christopher Adams, *These are the reddest and bluest counties in Texas, based on recent election results*, KXAN (updated Oct. 2, 2023), <https://www.kxan.com/news/your-local-election-hq/these-are-the-reddest-and-bluest-counties-in-texas-based-on-recent-election-results/>. Important to note that local elections are non-partisan, however candidates still typically campaign using their party affiliation.

cities, which are typically democratic and have been guilty of overregulation.<sup>202</sup> Both democratic and republican cities alike risk HB 2127 lawsuits—whether the ordinances are simply regarding basic operations, or progressive laws that stifle local business.<sup>203</sup>

HB 2127 is likely the result of tension between state and local government in the last several years.<sup>204</sup> In the past several years, city leaders have become a viable scapegoat for state representatives, even if those scapegoats are other republicans.<sup>205</sup> This alienation of small-town republican leaders is a risky approach because a major base of Texas’s GOP is rural republicans.<sup>206</sup> Former Senator, Amarillo Mayor, and Councilmember, Kel Seliger, warned that the party should “work together instead of trying to work off of two Republican parties.”<sup>207</sup> Local leaders have joined together in a bipartisan effort to challenge HB 2127—a major

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<sup>202</sup> *Id.* The recent exception is the Dallas Mayor who recently claimed he was “switching parties” from a Democrat to a Republican making Dallas the largest city in the United States with a GOP mayor. However, the voting turnout is still blue. Acacia Coronado, *Dallas mayor switches parties, making the city the nation’s largest with a GOP mayor*, ASSOCIATED PRESS (Sept. 22, 2023), <https://apnews.com/article/dallas-mayor-eric-johnson-democrat-republican-072490c1290c7da6cb965f50a46c7d89>.

<sup>203</sup> See H.B. 2127 at 1–2, 88th Leg., Reg. Sess. (Tex. 2023).

<sup>204</sup> Sharon Jayson, *In the Lone Star State, Cities Feel the Heat*, U.S. NEWS & WORLD REPORT (Dec. 27, 2018), <https://www.usnews.com/news/best-states/articles/2018-12-27/cities-versus-state-a-battle-for-control-in-the-texas-legislature>; Bret Jaspers, *Power Struggles Between State and Local Officials Escalate in Texas—and Across the Nation*, KERA NEWS (Feb. 21, 2023), <https://www.keranews.org/government/2023-02-21/power-struggles-between-state-and-local-officials-escalate-in-texas-and-across-the-nation>; James Henson & Joshua Blank, *The Demise of Local Control*, TEXAS MONTHLY: POLITICS & POLICY (Mar. 30, 2017), <https://www.texasmonthly.com/burka-blog/demise-local-control/>; Matt Goodman, *What Can Texas Cities Do When State Legislators Admit to Hating Them?*, D: POLITICS (Oct. 16, 2019) <https://www.dmagazine.com/politics-government/2019/10/dennis-bonnen-local-control-texas-legislature-hates-cities/>; see Chris Marr, *Also Bigger in Texas: The State’s Preemption of Local Ordinances*, BLOOMBERG LAW (May 30, 2023), <https://news.bloomberglaw.com/daily-labor-report/also-bigger-in-texas-the-states-preemption-of-local-ordinances>.

<sup>205</sup> See *supra* Section II.E (providing the growing tension between local and state representatives); Chayka, *supra* note 196.

<sup>206</sup> See generally Brian Lopez & Patrick Svitek, “Our public school system is our town”: *Why this rural Republican is voting against school vouchers*, TEXAS TRIBUNE (Nov. 17, 2023), <https://www.texastribune.org/2023/11/17/texas-school-vouchers-rural-republicans-gary-vandeaver/>; Christopher Hooks, *Californians Could Ruin Texas—But Not the Way You Might Think*, TEXAS MONTHLY (Mar. 2021), <https://www.texasmonthly.com/news-politics/californians-could-ruin-texas-but-not-the-way-you-might-think/> (identifying the different ideals of rural republicans from the GOP leaders).

<sup>207</sup> Jonathan Tilove, *Retiring Kel Seliger Hopes Someone Else in the Texas GOP Will Stand Up To Dan Patrick*, TEXAS MONTHLY (Feb. 9, 2022), <https://www.texasmonthly.com/news-politics/kel-seliger-dan-patrick/>.

sign that HB 2127 is a state overreach—or that republican mayors and councilmembers have finally been pushed too far.<sup>208</sup>

## 2. *Small and Midsize Cities Subject to HB 2127 Lawsuits*

HB 2127 puts local leaders in the position to go against the wishes of their constituents, or risk HB 2127 litigation that is costly to taxpayers.<sup>209</sup> First, in many small or midsize home-rule cities, the elected leaders on the city council are often small business owners.<sup>210</sup> Those councilmembers have great incentives to limit the amount of money spent in HB 2127 suits because it directly impacts their own businesses.<sup>211</sup> Additionally, smaller cities operate on smaller budgets, therefore each lawsuit award of damages and attorney’s fees could be detrimental to providing city services.<sup>212</sup> Further, already burdened district courts in smaller counties tied up with pending litigation will have more claims to review with HB 2127 suits.<sup>213</sup> Regardless if a town is more progressive or conservative, even “innocuous city ordinances” are subject to possible litigation due to HB 2127.<sup>214</sup>

Finally, HB 2127 authors claim cities are regulating in areas never done before, while cities claim the state government is entering into new territory through field preemption.<sup>215</sup> The state GOP has fallen into temptation and abandoned the “political philosophy that emphasized local government, limited government” for a statute like HB 2127.<sup>216</sup> The purpose of HB 2127 was to help small businesses

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<sup>208</sup> See *supra* Section II.B (providing that republican and democratic city leaders support the Travis County opinion that HB 2127 is unconstitutional); Chayka, *supra* note 196.

<sup>209</sup> Chayka, *supra* note 196.

<sup>210</sup> See generally, Caroline Kitchener, *Texas highways are the next anti-abortion target. One town is resisting*, TEXAS TRIBUNE (Sept. 1, 2023), <https://www.texastribune.org/2023/09/01/texas-cities-abortion-trafficking/>; *City Council*, CITY OF LUBBOCK, <https://ci.lubbock.tx.us/pages/city-government/city-council> (last visited Dec. 15, 2023); *Mayor & Council Members*, CITY OF AMARILLO, <https://www.amarillo.gov/city-hall/city-government/mayor-council-members> (last visited Dec. 15, 2023); *City Council*, CITY OF ABILENE TEXAS, <https://www.abilenetx.gov/CityCouncil> (last visited Dec. 15, 2023); *City Council*, ODESSA, <https://www.odessa-tx.gov/670/City-Council> (last visited Dec. 15, 2023). These are all City websites showing examples of city councils in West Texas towns, and how many representatives are locally born and raised, many of whom are also small business owners.

<sup>211</sup> See Andrea Drusch, *San Antonio joins lawsuit challenging ‘Death Star’ bill*, SAN ANTONIO REPORT (July 24, 2023), <https://tinyurl.com/2s3952fs>.

<sup>212</sup> See *supra* Section II.B (showing the damages portion of the statute).

<sup>213</sup> See Chayka, *supra* note 196; See Skylar Soto, *Lubbock courts still behind amid the pandemic*, EVERYTHING LUBBOCK (Nov. 30, 2021), <https://www.everythinglubbock.com/news/lubbock-courts-still-behind-amongst-the-pandemic/>.

<sup>214</sup> Chayka, *supra* note 196.

<sup>215</sup> See Quintero, *supra* note 116; Hardy, *supra* note 149.

<sup>216</sup> Hardy, *supra* note 149.

from local regulations, but the execution was overbroad, and potentially unconstitutional.<sup>217</sup>

#### IV. TEXAS SHOULD CONTINUE THE PURPOSEFUL PATCHWORK APPROACH

This Comment advocates for the *purposeful patchwork* through case-by-case consideration of local regulations by the courts, and narrowly drafted legislation to expressly preempt local regulations. This approach is essentially what was done before HB 2127—and is how the state and courts have settled other local regulation issues mentioned above.<sup>218</sup> The purposeful patchwork is not overinclusive and does not cause constitutional doubts, unlike HB 2127.<sup>219</sup>

To accomplish the purposeful patchwork, the state legislature should propose legislation that is more narrowly tailored to the desired legislative intent to expressly regulate in an area.<sup>220</sup> Narrowly tailored statutes are more likely to be upheld because the “unmistakable clarity” test that is the precedent of the Texas Supreme Court municipal preemption cases.<sup>221</sup> This has been done previously with the fracking preemption to, “maintain statewide uniformity in matters of energy production, environmental protection, economic regulation, and other areas.”<sup>222</sup> Similarly, the state was able to maintain the purposeful patchwork when it enacted SB 1017 that prohibited cities from banning gas lawn equipment.<sup>223</sup>

Additionally, HB 2127’s enforcement mechanism will add to the patchwork the legislature was trying to avoid.<sup>224</sup> The response by the State of Texas in the lawsuit says, “HB 2127 does not preempt any ordinance,” but instead allows citizens who feels they have been injured to bring claims to district court.<sup>225</sup> This is

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<sup>217</sup> See *supra* Section II.A–B (giving both the background purpose of HB 2127 and the lawsuit surrounding the law).

<sup>218</sup> See *supra* Section III.A (showing examples of how the courts and legislature have handled overregulation by cities).

<sup>219</sup> See *supra* Section II.B (discussing the lawsuit filed by cities against the state).

<sup>220</sup> See *Dallas Merch.’s*, 852 S.W.2d at 491.

<sup>221</sup> *Id.*

<sup>222</sup> See Lauren Morgan Fincher & Jordan Rodriguez, *The Texas Regulatory Consistency Act: Overdue Relief From Excessive Regulation or an Affront to Local Control?*, JDSUPRA (June 19, 2023), <https://www.jdsupra.com/legalnews/the-texas-regulatory-consistency-act-6219429/>.

<sup>223</sup> See *supra* Section III.A.1 (providing examples of how the legislature writes expressly preemptive legislature).

<sup>224</sup> See H.B. 2127 at 1–2, 88th Leg., Reg. Sess. (Tex. 2023); State of Texas’s Motion to Dismiss at 1–2, *City of Houston v. State* (345th Dist. Court) (Cause No. D-1-GN-23-003474); See ATTORNEY GENERAL OF TEXAS, *supra* note 54.

<sup>225</sup> State of Texas’s Motion to Dismiss at 1–2, *City of Houston v. State* (345th Dist. Court) (Cause No. D-1-GN-23-003474).

unlike other preemption statutes because it does not expressly preempt any area, but instead allows citizens to sue for potential damages as the result of *any* ordinance.<sup>226</sup> Consequently, the claims from county to county will differ—even regarding the same ordinance—because it relies on citizens to bring claims.<sup>227</sup> The same policy seeking to cure the regulatory patchwork will, in practice, further advance the patchwork.<sup>228</sup>

The benefit of returning to the purposeful patchwork is that—unlike with HB 2127—the court can compare the legislative intent and statutory language to the local ordinance.<sup>229</sup> With HB 2127, the court must consider the actual or potential damage to the citizen and if the local ordinance is occupied somewhere in the code.<sup>230</sup> HB 2127 will result in preemption on a county-by-county basis—because citizens might not file suit *against the exact same ordinance* in another town.<sup>231</sup> In contrast, the purposeful patchwork will continue to follow state precedent, which can be upheld by other courts—like the decisions regarding sick leave pay.<sup>232</sup>

The purposeful patchwork should continue to be used for preemption cases, which will both honor the home-rule authority of cities, while keeping local overregulation in check. It is understandable why the legislature would propose HB 2127 to effectively prevent local overregulation attempts.<sup>233</sup> However, the Texas Regulatory Consistency Act will create inconsistency through an enforcement patchwork and will likely not be as effective as the legislature would hope.

The dissenting opinion of *Dallas Merchants* joined by current Chief Justice Hetch, and former Justice Cornyn (now U.S. Senator for Texas), states:

The suggestion that the Legislature has decided that the Commission (TABC) should address the local problems involved here instead of home-rule cities is most unlikely. Only those local planning, zoning

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<sup>226</sup> State of Texas’s Motion to Dismiss at 1–2, *City of Houston v. State* (345th Dist. Court) (Cause No. D-1-GN-23-003474); *See supra* Section II.B (giving background on the suit between the cities and the state).

<sup>227</sup> *See supra* Section II.B (showing the concerns about the HB 2127 enforcement mechanism).

<sup>228</sup> *See supra* Section I (explaining the intended purpose of HB 2127).

<sup>229</sup> *See supra* Section II.A (presenting the Dallas Merch.’s standard and judicial process for preemption cases).

<sup>230</sup> *See supra* Section I (requiring courts to decide what “occupied” means to preempt the local statute).

<sup>231</sup> *See supra* Section II.B (emphasizing that the enforcement mechanism used was unusual for this kind of preemption statute).

<sup>232</sup> *See supra* Section III.A.3 (showing that a federal court followed the Third Court of Appeal’s decision because there was a clear standard to follow).

<sup>233</sup> *See supra* Section III.A.1–4 (giving examples where cities tried to regulate in areas the state wanted to solely regulate).

and legislative bodies have, or can be expected to have, a pulse on the particular land use needs of their jurisdiction.<sup>234</sup>

Three justices joined the dissent, finding that even in the *Dallas Merchants* decision, the language used by the state did not meet the unmistakable clarity standard, and that home-rule cities have a better idea what is necessary in their communities.<sup>235</sup> Essentially, these justices found the language should have been more clear.<sup>236</sup> This Comment urges the higher courts to uphold the purposeful patchwork precedent, and review HB 2127 with the same skepticism, and demand for unmistakable clarity, as the dissenting opinion from *Dallas Merchants*.

## V. CONCLUSION

HB 2127 is unnecessary for the legislature to enforce its intent to be the sole regulatory authority in the state.<sup>237</sup> This Comment exhibits ways the legislature and courts have successfully managed local overregulation—and how the purposeful patchwork should continue instead of using HB 2127.<sup>238</sup> The state has the power to preempt local governments from slowing economic development, however, HB 2127 is an excessive law that does not meet the state preemption precedent.<sup>239</sup> There are ways to limit overregulation of local laws without such sweeping, and possibly unconstitutional, actions by the state.<sup>240</sup> Texans, local officials, and state representatives should reject laws like HB 2127, which overstep into the constitutional power reserved to Texas citizens and home-rule cities.

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<sup>234</sup> *Dallas Merch.'s*, 852 S.W.2d at 495.

<sup>235</sup> *Id.* at 495–96.

<sup>236</sup> *Id.*

<sup>237</sup> *See supra* Section III.A (providing examples of ways the state legislature or the courts have controlled local overregulation).

<sup>238</sup> *See supra* Section III–IV (discussing the reasons why HB 2127 is overbroad and unnecessary and why the current process should remain).

<sup>239</sup> *See supra* Section II.A (showing the standard from *Dallas Merch.'s*).

<sup>240</sup> *See supra* Section III (providing examples of how the state and judicial system can keep cities in check).