No. 03-23-00531-CV

In the Court of Appeals
Third District of Texas at Austin

THE STATE OF TEXAS,
Appellant,

v.

THE CITY OF HOUSTON; **THE CITY OF SAN ANTONIO**; and **THE CITY OF EL PASO**,
Appellees.

Appeal from the 354th Judicial District Court, Travis County, Texas
Cause No. D-1-GN-23-003474

BRIEF OF AMICUS CURIAE THE CITY OF DALLAS IN SUPPORT OF APPELLEES THE CITIES OF HOUSTON, SAN ANTONIO, AND EL PASO

TAMMY L. PALOMINO
City Attorney

JENNIFER C. HUGGARD
Chief of Litigation

JAMES B. PINSON
Chief of Appellate Section

NICHOLAS D. PALMER
Deputy Chief of Appellate Section

NICHOLAS D. PALMER
State Bar No. 24067814
Assistant City Attorney
nicholas.palmer@dallas.gov

CITY ATTORNEY'S OFFICE
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

Telephone: 214-670-3519
Telecopier: 214-670-0622

ATTORNEYS FOR THE CITY OF DALLAS

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

CHARTERS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Like Appellees, the Cities of Houston, San Antonio, and El Paso, the City of Dallas is a home-rule municipality under the Home Rule Amendment to the Texas Constitution, Tex. Const. art. XI, § 5; Dallas, Tex., Charter ch. II, § 2. As such, Dallas has an interest in the proper interpretation and application of the Home Rule Amendment.

No fee has been paid for the preparation of this brief, and a copy of this brief has been served on all parties.

No. 03-23-00531-CV

In the Court of Appeals
Third District of Texas at Austin

THE STATE OF TEXAS,
Appellant,

v.

THE CITY OF HOUSTON; THE CITY OF SAN ANTONIO; and THE CITY OF EL PASO,
Appellees.

BRIEF OF AMICUS CURIAE THE CITY OF DALLAS IN SUPPORT OF APPELLEES THE CITIES OF HOUSTON, SAN ANTONIO, AND EL PASO

TO THE HONORABLE COURT OF APPEALS:

The City of Dallas submits this amicus brief in support of Appellees, the Cities of Houston, San Antonio, and El Paso (collectively, the "Cities"), and asks the Court to affirm the trial court's judgment declaring unconstitutional the Texas Regulatory Consistency Act ("TRCA"), 88th Leg., R.S., ch. 899, 2023 Tex. Sess. Law Serv. 2873. Dallas agrees with the Cities' assertions that the TRCA is unconstitutionally vague and violates the Home Rule Amendment. (*See generally* Br. of Appellee

Houston; Br. of Appellees San Antonio & El Paso.) Dallas submits this amicus brief to emphasize that the TRCA, in effect, repeals the Home Rule Amendment without following the required process for amending the constitution as set forth in article XVII.

ARGUMENT

The broad scope of the TRCA's intended preemptive effect cannot be denied. It prevents home-rule cities from "adopt[ing], enforce[ing], or maintain[ing] an ordinance, order or rule regulating conduct in a field of regulation that is occupied by a provision" of eight statutory codes, unless home-rule regulation is specifically "authorized by statute." TRCA §§ 5 (Tex. Agric. Code § 1.004), 6 (Tex. Bus. & Com. Code § 1.109), 8 (Tex. Fin. Code § 1.004), 9 (Tex. Ins. Code § 30.005), 10 (Tex. Lab. Code § 1.005), 13 (Tex. Nat. Res. Code § 1.003), 14 (Tex. Occ. Code § 1.004), 15 (Tex. Prop. Code § 1.004). The Cities' challenge to the TRCA does not ask the Court to weigh in on the wisdom of the TRCA's sweeping reach. Rather, the question presented is whether the TRCA, as enacted, is a permissible means for the State to accomplish its preemptive goal. It is not.

In this Court, the State stresses its legislative primacy over local governments and maintains that it has the authority to remove broad

fields of regulation from home-rule cities' governance. (Br. of Appellant 34-41.) In so arguing, the State overlooks the source of its authority as well as the constitutional limitations imposed upon that authority. The State derives its authority from the people of Texas: "All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit." Tex. Const. art. I, § 2; *see* Note, *To Save a City: A Localist Canon of Construction ("To Save a City")*, 136 Harv. L. Rev. 1200, 1219 (2023) (noting the Texas Constitution's "rousing recognition of popular sovereignty"). Through the TRCA, the State attempts to convert home-rule cities into general-law cities by statute. Because the people's adoption of home-rule authority can only be abrogated by constitutional amendment, the TRCA is unconstitutional.

I. The people of Texas popularly adopted municipal home rule, vesting home-rule cities with the power to govern local affairs except insofar as local regulation is demonstrably inconsistent with state law.

Before the adoption of the Home Rule Amendment in 1912, the Texas Legislature had complete authority over cities. *To Save a City*, *supra*, at 1219 (discussing history of home rule in Texas). The people of Texas approved the Home Rule Amendment on November 5, 1912, with nearly seventy-five percent of participants voting in favor of the

amendment. *See* Legis. Reference Libr. of Tex., *available at* https://lrl.texas.gov/legis/billsearch/lrlhome.cfm (search "32nd R.S. (1911)" "HJR" "10," and select "Election Details") (last visited Apr. 9, 2024).

In approving the Home Rule Amendment, the people of Texas bestowed upon home-rule cities "the full power of self government." *Dall. Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993) (citing *MJR's Fare of Dall. v. City of Dallas*, 792 S.W.2d 569, 573 (Tex. App.—Dallas 1990, writ denied)); *see Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998) ("'A home rule city derives its power not from the Legislature but from Article XI, Section 5 of the Texas Constitution.'") (quoting *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 643 (Tex. 1975)). Yet, in recognition of the fact that home-rule cities should not be able to adopt local laws that conflict with the general laws of the State, the Home Rule Amendment includes a primacy clause: "no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of the State." Tex. Const. art. XI, § 5(a). As a result, home-rule cities "look to the Legislature

not for grants of power, but only for limitations on their power." *Dall. Merchant's & Concessionaire's Ass'n*, 852 S.W.2d at 490-91 (citing *MJR's Fare of Dall.*, 792 S.W.2d at 573). This starkly contrasts with general-law cities, which "'possess [only] those powers and privileges that the State expressly confers upon them.'" *Town of Lakewood Villas v. Bizios*, 493 S.W.3d 527, 531 (Tex. 2016) (modification in original) (quoting *Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 645 (Tex. 2004)). Thus, home-rule cities look to state law for restrictions on their power to act; general-law cities look to state law for the power to act at all, as all cities did before the adoption of the Home Rule Amendment.

II. The Home Rule Amendment's primacy clause vests the State only with the power of conflict preemption, not field preemption.

Importantly, the primacy clause of the Home Rule Amendment vests the State only with the power of *conflict* preemption, *see* Tex. Const. art. XI, § 5(a), not the power of field preemption as claimed by the State on appeal (*see, e.g.*, Br. of Appellant 36). The people of Texas vested in home-rule cities the full powers of self-government except insofar as their charters or ordinances are "inconsistent" with state law. Tex. Const. art. XI, § 5(a). Inconsistent means incompatible. *See Inconsistent*, Merriam-

Webster's Dictionary, *available at* https://www.merriam-webster.com (search "inconsistent") (last visited Apr. 10, 2024) (defining "inconsistent" as, among other things, "not compatible with another fact or claim" or "containing incompatible elements"); *Inconsistent*, Black's Law Dictionary (11th ed. 2019) (defining "inconsistent" as "[l]acking agreement among parts; not compatible with another fact or claim"). And the fact that the State and a home-rule city enact regulations within the same field does not necessarily render those regulations incompatible. *See* Richard Briffault, *Home Rule for the Twenty-First Century*, 36 Urb. Law 253, 264-65 (2004). If local regulation conflicts with state law such that the two are incompatible, state law prevails. But if the state and local regulations can compatibly exist, they are not inconsistent within the meaning of the Home Rule Amendment. *See, e.g.*, *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 593 (Tex. 2018) ("Absent an express limitation, if the general law and local regulation can coexist peacefully without stepping on each other's toes, both will be given effect or the latter will be invalid only to the extent of any inconsistency."); *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 7 (Tex. 2016)

(citing *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982)).

The State itself acknowledges that different levels of government can consistently regulate within the same field and that a lower level of government's entry into a field that a higher level also regulates does not necessarily create conflict. The State is currently in litigation with the federal government concerning whether federal law preempts a new immigration law adopted by the State, *see* Act effective Mar. 5, 2024 ("S.B. 4"), 88th Leg., 4th C.S. (2023). In arguing against the federal government's application for a preliminary injunction, the State maintains that S.B. 4 is not preempted because, according to the State, S.B. 4 does not conflict with federal law, it comports with and compliments federal law. *See United States v. Texas*, __ F.4th __, 2024 WL 1297164, at *14 (5th Cir. Mar. 26, 2024). The merits of the State's position in that suit are immaterial to the resolution of the question this case presents, but it is important that there the State concedes that there are circumstances when two levels of government can compatibly regulate within the same field.

That the Home Rule Amendment only vests the State with the power of conflict preemption is further supported by standards the supreme court has articulated for finding the State has preempted a local enactment. The supreme court has stressed that home-rule cities' enactments are presumptively valid, *e.g.*, *Comeau*, 633 S.W.2d at 792 (citing *Hunt v. City of San Antonio*, 462 S.W.2d 536, 539 (Tex. 1971)), such that when "the Legislature decides to preempt a subject matter normally within a home-rule city's broad powers, it must do so with 'unmistakable clarity,'" *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) (orig. proceeding) (citing *Dall. Merchant's & Concessionaire's Ass'n*, 852 S.W.2d at 491). Where a state law and a local ordinance regulating the same field do not conflict, it is not unmistakably clear that the two are incompatible or inconsistent. Thus, both the plain text of the Home Rule Amendment and the supreme court's interpretation of that amendment demonstrate that the Home Rule Amendment's primacy clause vests the State with conflict preemption and no more.

III. Through the TRCA, the State is attempting to convert home-rule cities into general-law cities.

The State's purpose in adopting the TRCA is to convert home-rule cities into general-law cities via statute. The State does not deny this

objective in its brief on appeal (*see* Br. of Appellant 38-41; Reply Br. 18); nor could it, as the TRCA's text and legislative history clearly evince this intent.

The TRCA's legislative findings and purpose state, "the state has historically [i.e., before the adoption of the Home Rule Amendment] been the exclusive regulator of many aspects of commerce and trade in this state," TRCA § 2(1), and that the purpose of the TRCA "is to provide statewide consistency by returning sovereign regulatory powers to the state where those powers belong," *id.* § 3. This is an express legislative concession that the TRCA seeks to return home-rule cities to their pre-Home Rule Amendment status.

That the TRCA effectively converts home-rule cities into general-law cities is further exhibited by the fact that the TRCA required the inclusion of a savings clause to ensure that under the TRCA home-rule cities would at least retain the same powers of general-law cities. *See* TRCA § 4(2) ("This Act . . . may not be construed to prohibit a home-rule municipality from providing the same services and imposing the same regulations that a general-law municipality is authorized to provide or impose"). Indeed, when advancing the TRCA before the House

Committee on State Affairs, the author of the TRCA explained that section 4(2) was added because legislators believed the TRCA was so broad in scope that home-rule cities would have less authority than general-law cities. TRCA: Hr'g Before the House Comm. on State Affs., H.B. 2127, 88th Leg., R.S. (Mar. 15, 2023) (statement of Chairman Burrows), at 1:05:20, 1:27:50, https://www.house.texas.gov/video-audio/committee-broadcasts/ (select "State Affairs" on 03/15/23 at 11:14 AM) (last visited Apr. 9, 2024).

Again, the preemption provisions that the TRCA adds to the Agriculture, Business and Commerce, Finance, Insurance, Labor, Natural Resources, Occupations, and Property Codes prevent home-rule cities from "adopt[ing], enforce[ing], or maintain[ing] an ordinance, order, or rule regulating conduct in a field of regulation that is occupied by a provision of" the relevant code, "*[u]nless authorized by statute*." TRCA §§ 5-6, 9-10, 13, 15 (emphasis added). The scope of the (vague) phrase "regulating conduct in a field of regulation that is occupied by a provision of this code" prevents home-rule cities from locally legislating in any area that the codes amended by the TRCA touch upon absent express statutory authorization. Stated differently, cities cannot act

before searching state law for an express grant of authority to do so from the legislature. This turns the form of home-rule governing enshrined in our constitution on its head. Home-rule cities need only look to state law for *restrictions* on their authority, not for *permission to act*. But under the TRCA, this is no longer the case. The TRCA's preemption provisions effectively convert home-rule cities into general-law cities.

IV. The TRCA's attempt to transform home-rule cities into general-law cities by statute as opposed to constitutional amendment violates the Home Rule Amendment and article XVII of the constitution.

In attempting to convert home-rule municipalities into general-law municipalities by statute, the State runs afoul of the Home Rule Amendment and article XVII of the constitution. As explained above, the authority to govern comes from the people of Texas. *See* Tex. Const. art. I, § 2. When the people of Texas adopted municipal home rule in 1912, they entrusted the full power of governance to home-rule cities except insofar as their ordinances were inconsistent with state law. Through the TRCA, the State attempts, via statute, to take back the power it once held over all Texas cities before the adoption of the Home Rule Amendment. *See* TRCA §§ 2(1), 3. Stated simply, the State is effectively

using the TRCA—a statute—as a metaphorical eraser to eliminate the Home Rule Amendment from the pages of our constitution.

The State downplays the TRCA's impact by broadly construing the supreme court's prior statements that the State may "'withdraw[] a particular subject from a home rule city's domain' 'by general law'" (Br. of Appellant 34 [quoting *Tyra v. City of Houston*, 822 S.W.2d 626, 628 (Tex. 1991)]), and that "'[d]eciding whether uniform statewide regulation or nonregulation is preferable to a patchwork of local regulations is the Legislature's prerogative" (*id.* [modification in original] [quoting *Laredo Merchs. Ass'n*, 550 S.W.3d at 592-93]). However, the court made these statements upon review of statutes that preempted only a discrete and identifiable subject matter.

In *Tyra*, the court held that a statute that explicitly set forth "'the exclusive procedure for determining whether a fire fighter . . . is sufficiently physically or mentally fit to continue the person's duties or assignments,'" 822 S.W. at 627 (quoting Tex. Loc. Gov't Code § 143.1115(a)), preempted a fire department's internal procedure that required firefighters to pass annual tests concerning the firefighters' ability to perform prescribed tasks within a specified period of time, *see*

id. at 626-28. The court reasoned that the State's adoption of a statute setting forth the "'*exclusive* procedure for determining whether a fire fighter . . . is sufficiently physically or mentally fit to continue the person's duties or assignments,'" *id.* at 628 (emphasis added) (quoting Tex. Loc. Gov't Code § 143.1115(a)), clearly and unmistakably "withdr[ew] the City's authority to create its own procedures for that purpose," *id.*

Similarly, in *Laredo Merchants Association*, the court held that a statute providing that "[a] local government . . . may not adopt an ordinance . . . to . . . prohibit or restrict, for solid waste management purposes, the sale or use of a container or package in a manner not authorized by law," 550 S.W.3d at 589 (quoting Tex. Health & Safety Code § 361.0961(a)(1)), preempted a local ordinance that prohibited retailers from providing paper or plastic checkout bags to customers, *id.* at 590, 594-98. In describing the respective powers of the State and local governments, the court stated that "[d]eciding whether uniform statewide regulation or nonregulation is preferable to a patchwork of local regulations is the Legislature's prerogative." *Id.* at 592-93.

When read in context, the language upon which the State relies out of *Tyra* and *Laredo Merchants Association* stands for the uncontroversial proposition that the State has the authority to withdraw a discrete subject matter from municipal regulation or establish a state-wide policy that the lack of regulation is preferable within a defined field. The supreme court's recognition of the State's authority with respect to the discrete areas of preemption before it in *Tyra* and *Laredo Merchants Association* does not mean that the State may effectively repeal the Home Rule Amendment by adopting a single statute that purports to preempt home-rule cities authority to regulate at all absent express legislative permission.

If the State desires to effectively repeal the Home Rule Amendment, it may only do so through the process set forth in article XVII, section 1 of the constitution. The legislature must afford the people of Texas a voice in the decision of whether to repeal municipal home rule. *See* Tex. Const. art. XVII, § 1(a), (c). The people chose to put their trust in home-rule cities, and the State cannot take that choice away without presenting the choice to the people once again via the constitutional amendment process. The State can, of course, enact laws that would

preempt municipal ordinances by passing conflicting state legislation. *See* Tex. Const. art. XI, § 5(a). But it may not *carte blanche* abrogate cities' constitutional home-rule authority by statute as it has attempted to do via the TRCA. Because the TRCA seeks to accomplish an outcome that can only be lawfully achieved by constitutional amendment, the trial court correctly held that the TRCA was unconstitutional. This Court should therefore affirm the trial court's judgment.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Appellees' briefs, the Court should affirm the trial court's judgment declaring the TRCA unconstitutional.

Respectfully submitted,

TAMMY L. PALOMINO
City Attorney

JENNIFER C. HUGGARD
Chief of Litigation

JAMES B. PINSON
Chief of Appellate Section

/s/ Nicholas D. Palmer
NICHOLAS D. PALMER
Texas Bar No. 24067814
nicholas.palmer@dallas.gov
Assistant City Attorney

CITY ATTORNEY'S OFFICE
1500 Marilla Street, Room 7D North
Dallas, Texas 75201
Telephone: 214-670-3519
Telecopier: 214-670-0622

ATTORNEYS FOR THE CITY OF DALLAS

CERTIFICATE OF COMPLIANCE

I certify that this document contains 2,840 words, excluding the parts exempted by Texas Rule of Appellate Procedure 9.4(i)(1), and has been prepared in a proportionally spaced 14-point Century Schoolbook typeface using Microsoft Word for Microsoft 365 MSO.

/s/ Nicholas D. Palmer
Attorney for the City of Dallas

Dated: April 17, 2024