



# Super-preemption

H.R 2127 and  
S.B. 814

## House Bill 2127 & Senate Bill 814

- Purports to preempt “a field of regulation that is occupied by a provision of” the following:
  - Agriculture Code
  - Business and Commerce Code
  - Finance Code
  - Insurance Code
  - Labor Code
  - Natural Resources Code
  - Occupations Code
  - Property Code





## House Bill 2127 & Senate Bill 814

- Adds a new cause of action to Civil Practices and Remedies Code
- Anyone “who has sustained injury in fact,” including governmental entities, can sue local governments seeking preemption
- Venue is in target’s county or adjacent county and cannot be moved without consent
- Imposes liability for violating new preemption provisions

## House Bill 2127 & Senate Bill 814

- Remedies are
  - “Compensatory damages,” that is, costs and attorney’s fees in defending against the law
  - Declaratory and injunctive relief
  - Costs and fees for bringing the action
- State government could recover fees and costs when cities seek judicial clarification of their own rights
- Waives cities’ governmental immunity
- *Eliminates official and qualified immunity as defenses for individuals*





# H.B. 2127 & S.B. 814 are unconstitutional

- Purported “field” preemption violates the Texas Constitution’s home-rule provision that requires a preemptive conflict and authorizes local innovation
- Misapplies federal “field” preemption doctrine that is not supported by the Texas Constitution
- Attempts to turn home-rule cities into general law cities by requiring express legislative authorization for all local regulation in designated areas
- Partially repeals home-rule, which can only be accomplished by constitutional amendment, not a simple statute

## H.B. 2127 & S.B. 814 are unconstitutionally vague

- Meaningless, vague language makes it impossible for cities to know what local regulation is preempted
- Unconstitutionally vague language renders the statute unworkable and unenforceable
- Vague language creates a substantial chilling effect on even permissible local regulation





## **H.B. 2127 & S.B. 814 will cause a litigation explosion**

- Encourage and subsidize expensive litigation against cities as cities, taxpayers, and the courts struggle to determine the scope of the bills' imprecise express preemption
  - Cities are financially penalized for suing to declare their own rights

## H.B. 2127's & S.B. 814's punitive litigation provisions will chill local regulation

- What author describes as a “living document’s” expansive standing, waiver of immunity, and attorneys’ fee provisions will chill and punish even permissible local regulation by encouraging the filing of lawsuits by almost anyone in “adjacent” counties







## **H.B. 2127's & S.B. 814's disruption of existing federalism will exacerbate even expected litigation increases**

- State statutes themselves may be preempted by federal law or effectively preempted by *federal* law authorizing local co-regulation, leading to more confusion and litigation

## Under H.B. 2127 & S.B. 814, businesses will not know what local laws they must obey

- *Existing*: Is the local regulation *expressly* preempted by state law?
- *Existing*: Is the local regulation *impliedly* preempted by state law
- Is the local regulation expressly authorized by another state statute?
- Is the local regulation preempted because it falls “in a field of regulation that is occupied by a provision of this code”?
- Does federal law preempt state law purportedly preempting some state law or field?
- Does federal law expressly authorize local co-regulation?
- Has or will the State step in to assume services or protections lost to preemption?





## The State is not prepared, willing or able to provide services and protections lost to preemption

- The bills will create chaos, economic uncertainty, and a regulatory vacuum about
  - What local laws may be enforced and which need to be obeyed?
  - What local fees may be collected and which may not?
  - What needless expenses may be imposed on cities or will need to be assumed by the State?
  - What legal and financial protections for local residents and governments may be lost and the State will need to assume?
  - Whether the State can or will fill gaps in funding, services, and protection created by the bill's preemption provisions?



Questions?