No. 13-0768

IN THE
SUPREME COURT OF TEXAS

BCCA APPEAL GROUP, INC.,

Petitioner,

v.

CITY OF HOUSTON, TEXAS,

Respondent.

FROM THE COURT OF APPEALS FOR THE
FIRST JUDICIAL DISTRICT OF TEXAS AT HOUSTON

BRIEF ON THE MERITS OF PETITIONER BCCA APPEAL GROUP, INC.

Macey Reasoner Stokes
State Bar No. 00788253
Cristina Espinosa Rodriguez
State Bar No. 00793701
Matthew L. Kuryla
State Bar. No. 24000312
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002
713.229.1234
713.229.1522 (facsimile)

Evan A. Young
State Bar No. 24058192
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Suite 1500
Austin, Texas 78701-4078
512.322.2506
512.322.8306 (facsimile)
evan.young@bakerbotts.com

COUNSEL FOR PETITIONER BCCA APPEAL GROUP, INC.

IDENTITY OF PARTIES AND COUNSEL

Plaintiff-Appellee: BCCA Appeal Group, Inc.

Trial Counsel:

Cristina Espinosa Rodriguez
Matthew L. Kuryla
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002
713.229.1234

Additional Appellate Counsel:

Evan A. Young
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Suite 1500
Austin, Texas 78701-4078
512.322.2506
512.322.8306 (facsimile)
evan.young@bakerbotts.com

Macey Reasoner Stokes
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002
713.229.1234

Defendant-Appellant: City of Houston, Texas

Trial Counsel

Kathy D. Patrick
Aundrea K. Frieden
Gibbs & Bruns L.L.P.
1100 Louisiana, Suite 5300
Houston, Texas 77002

Appellate Counsel:

David K. Feldman
City Attorney
Lynette K. Fons
First Assistant City Attorney
Judith L. Ramsey
Chief, General Litigation Section
Bertrand L. Pourteau, II
Senior Assistant City Attorney
Mary E. Stevenson
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

Texas Water Code

ORDINANCES

City of Houston, Texas, Code of Ordinances

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature of the Case:	BCCA Appeal Group, Inc. (Group) brought suit for declaratory relief and to enjoin enforcement of two ordinances enacted by the City of Houston (City). Ordinances No. 2007-208 (1 CR 105-12) and No. 2008-414 (1 CR 113-17)—collectively, "the Ordinance" (App. C)—amended the City's previous Air Quality Ordinance. The Group contended that the Texas Clean Air Act and the Texas Water Code (key provisions of which are at App. E and App. F) preempted the Ordinance, rendering it unconstitutional under Article XI, Section 5 of the Texas Constitution (App. D). It also contended that the Ordinance violated the non-delegation doctrine of the Texas Constitution. The Group and the City filed cross-motions for traditional summary judgment.
Trial Court:	269th Judicial District Court of Harris County, Texas, the Honorable Dan Hinde presiding.
Trial Court's Disposition:	Judge Hinde granted the Group's motion and denied the City's motion in a memorandum opinion explaining his rationale for holding the Ordinance unconstitutional and enjoining its enforcement (14 CR 3681-91) (App. B). He subsequently signed a final judgment (15 CR 4075-77).
Court of Appeals:	The Court of Appeals for the First Judicial District at Houston.
Court of Appeals' Disposition:	Justice Jim Sharp wrote a memorandum opinion, joined by Justices Terry Jennings and Laura Higley, that reversed and rendered judgment for the City. 2013 WL 4680224 (App. A).

STATEMENT OF JURISDICTION

This Court has at least three bases for jurisdiction over this appeal:

1. The Court has jurisdiction because the court of appeals' determination amounts to an error of law of such importance to the State's jurisprudence that it should be corrected. Tex. Const. art. V, § 3; Tex. Gov't Code § 22.001(a)(6). The Texas Constitution renders invalid municipal ordinances that are "inconsistent with . . . the general laws enacted by the Legislature of this State." Tex. Const. art. XI, § 5. The standard by which an inconsistency between state law and local ordinances is measured is of central importance to Texas law because it determines the allocation of legislative authority across the State. Under the judgment below, cities may freely ignore comprehensive regulation of statewide applicability that requires particular methods of enforcement and instead develop their own parallel regimes.

2. The Court has jurisdiction because the decision below conflicts with this Court's prior preemption decisions, as well as those of other courts of appeals. Tex. Gov't Code § 22.001(a)(2). Most obviously, it conflicts with *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676 (Tex. 2013). *Southern Crushed* also involved preemption under the Texas Clean Air Act (TCAA or Act) and yet another City of Houston ordinance. This Court

held that under Section 382.113(b), the express-preemption clause of the statute, the City could not "make unlawful" an operation that the Texas Commission on Environmental Quality (TCEQ) had specifically authorized at a given location. 398 S.W.3d at 679. The Ordinance under review here goes even further, "mak[ing] unlawful" *all* TCEQ-approved operations unless they accede to additional burdens imposed by the City. Ord. §§ 21-162(a), 21-164(c) (App. C).

Moreover, many opinions of this Court, and various courts of appeals, have explained that comprehensive statutory regulation displaces local ordinances. *See* Argument, *infra*, Part II (citing cases). The Act is among the most comprehensive statutory schemes in Texas. The court of appeals' judgment introduces conflict into the jurisprudence of the State by denying the Act the same preemptive effect that this Court has accorded far less comprehensive statutes over far more limited ordinances.

The opinion below creates a jurisprudential conflict not only with respect to preemption, but also with respect to the unlawful delegation of the City's legislative authority. *See Ex parte Elliott*, 973 S.W.2d 737, 741-42 (Tex. App.—Austin 1998, no pet.) (holding that a statute could be saved from unconstitutionality because it could be reasonably construed as adopting *on-*

ly a federal rule that was in effect at the time of the statute's enactment). This Ordinance, by contrast, expressly provides that future TCEQ rules are *automatically* incorporated into the City Code without any action by the City Council.

3. The Court has jurisdiction over the appeal because the case involves the construction of a statute necessary to the determination of the case. Tex. Gov't Code § 22.001(a)(3). In particular, the question turns on the preemptive scope of the Texas Clean Air Act. This Court sought to answer that question in *Southern Crushed*, but the court of appeals' opinion proves the need for further guidance from this Court about preemption in general, the Act in particular, or both, to avoid confusion in Texas courts and in Texas city councils.

ISSUES PRESENTED

1. Is the City's Ordinance preempted because it (a) "make[s] unlawful an act or condition approved or authorized" under the Texas Clean Air Act and (b) seeks to occupy regulatory territory that belongs to the State?

2. Does the Ordinance violate the Texas Constitution's non-delegation doctrine by authorizing a body other than the City Council to directly modify the City's Code of Ordinances at will?

STATEMENT OF FACTS

The Group disputes the court of appeals' application of the law, but finds the opinion's factual background to be generally accurate.

I. Previous air-quality cooperation between the City and TCEQ.

Since 1992, the City of Houston has had an air-quality ordinance covering "only regulated air pollution from facilities that were not already regulated by the State." Slip Op. at 7.[1] That ordinance made state-regulated facilities as "exempt" from its scope, 1 CR 249-50, 252, targeting only sources that would otherwise escape regulation. That ordinance appears never to have been challenged in court.

Despite not directly regulating state-permitted air-emissions sources, the City still played an important role by contractually partnering with TCEQ regarding inspections and enforcement. *See* Slip Op. at 8. The contract, specifically authorized under Section 382.115 of the Texas Clean Air Act (Act),[2] compensated the City for its cooperative efforts and generally required it to "refer cases requiring consideration for enforcement action to the TCEQ" after concluding any investigation. 10 CR 2550 (FY 2004-05 contract). The

---

[1] *See* 1 CR 248-58 (City of Houston Ordinance No. 92-180); 2 CR 259-62 (1993 amendments); 2 CR 263-92 (2002 amendments).

[2] The Act is codified as Chapter 382 of the Texas Health and Safety Code; in this brief, citations to sections without other identification are to the Act as codified.

City could "bring [certain] enforcement actions" if TCEQ was joined "as a necessary and indispensable party," 10 CR 2532, reflecting requirements under the Texas Water Code (TWC), which contains the Act's enforcement mechanisms. *See* TWC § 7.353. TCEQ thus transferred millions of dollars to the City. *See, e.g.*, 10 CR 2532 (FY 2005 contract amendment showing over $3 million transferred from TCEQ to City for two fiscal years).

Accordingly, the City was able to play an active role with respect to *all* sources of emissions. With respect to state-regulated sources, the City's role was cooperative and subordinate, but it directly regulated all other sources.

II. The City's termination of the cooperative relationship with TCEQ and its adoption of the Ordinance.

In 2005, upon the expiration of its latest contract, the City discontinued its cooperation with TCEQ. Slip Op. at 8. State law nonetheless allows any city to participate in the Act's enforcement, so long as the city remains within the statutory guidelines authorizing such participation. *See infra* Argument Part II.C. Instead, "due to what it perceive[d] to be TCEQ's lax enforcement efforts," Slip Op. at 23, the City enacted two ordinances (collectively, the "Ordinance") to "establis[h] *its own* air quality regulatory compliance program, along with a new fee schedule to fund the program." Slip Op. at 8

(emphasis added).[3] This new "air quality regulatory compliance program" vastly expanded the scope of the City's regulation.

First, the Ordinance expressly "made it 'unlawful for any person to operate or cause to be operated any facility' inside the City's borders" if that facility did not satisfy the City's new registration and fee requirements. Slip Op. at 8 (quoting Ord. § 21-162(a)). The City expanded the term "facility" in the Ordinance beyond its statutory definition (and beyond its definition in the City's own prior ordinance); that term now includes "any facility *or source* as those terms are defined in the [Act]." Ord. § 21-161(a) (emphasis added); *cf.* 1 CR 250-51 (original ordinance's discrete list of "facilities"). Registration is "issued by the health officer" and may be had upon "the tender of the applicable fee." Ord. § 21-163. The total amount of fees demanded under the Ordinance is the amount of the four highest registration prices per "premises." Ord. § 21-166(b). Fees to the City may therefore far exceed those paid to the State. 14 CR 3686-87 (district court opinion).

Second, the City's new "regulatory compliance program" effectively cut-and-pasted the bulk of TCEQ's substantive air-quality regulations from

[3] This brief cites the Ordinance as it is codified in the City Code (Tab C) through the abbreviation "Ord." The two ordinances as signed by Mayor White appear in the record at 1 CR 105-12 and 1 CR 113-17, respectively.

the Texas Administrative Code, "including appendices and other matters promulgated as part of the state rules." Ord. § 21-164(a). The Ordinance "incorporated [TCEQ's regulations] as if written word for word" into the City Code—including "as they may be changed from time to time" by TCEQ. *Id.* Five entire volumes of the clerk's record were required merely to print what the City in a single sentence inserted into its own Code. *See* CR vols. 5-9. Because the Ordinance is automatically amended whenever TCEQ makes any change, the City's Code of Ordinances itself is constantly changing without any action from the City Council.

The Ordinance makes "unlawful" the failure to "comply" with any substantive regulatory provision that appears within the hundreds of pages copied into the Code of Ordinances. Ord. § 21-164(c). It is "unlawful for any person to operate or cause to be operated any facility that does not comply" with every provision, no matter how minor. *Id.*

Violations are "prosecuted" in municipal court, with fines reaching $2,000 per day. Ord. §§ 21-162(c), 164(d), (e); 10 CR 2605 ("FAQs" on City website). The Ordinance provides "an affirmative defense to prosecution . . . that the prosecuted condition or activity" is both approved by the State *and* "is in compliance" with its "approval or authorization" under state law. Ord.

§ 21-164(d). That is, if TCEQ-approved facilities can affirmatively *prove* their innocence, then they will not be found guilty—something presumably true even without an affirmative defense.

III. The Group's suit and the district court's invalidation of the Ordinance.

Petitioner BCCA Appeal Group (the Group) filed suit for declaratory relief and to enjoin enforcement of the Ordinance on the grounds that it is preempted by the Act and that it unconstitutionally delegated core lawmaking authority to TCEQ.[4] Judge Dan Hinde heard extensive argument and reviewed multiple briefs from each party. In an 11-page order granting the Group's motion, Judge Hinde explained that the City lacked authority to enact or enforce a regulatory ordinance that competes with TCEQ. 14 CR 3681-91 (App. B). He thus did not need to reach the non-delegation question. He signed a final judgment on March 31, 2011, granting the Group's motion for summary judgment, denying the City's motion, declaring the Ordinance unenforceable, enjoining enforcement, and ordering each par-

[4] BCCA Appeal Group is a Texas non-profit corporation with various members sharing the "mutual goals of clean air and a strong economy." 2 CR 340 (affidavit of Group's president). It "has been an active participant" in air-quality regulatory developments, including, for instance, acting as "a leading advocate in the development of the Houston-Galveston-Brazoria air quality plans," helping to "strengthen[] those plans." *Id.*

ty to bear its own costs. 15 CR 4075-76.

IV. The court of appeals' reversal and rendition of judgment for the City.

The City appealed. The court of appeals reversed and rendered judgment for the City in a memorandum opinion by Justice Jim Sharp joined by Justices Terry Jennings and Laura Higley (App. A).

SUMMARY OF ARGUMENT

Preemption is a constitutional doctrine inherent in any system of government that distributes power at different levels. Like federal preemption, Texas state-law preemption turns on legislative intent. The Texas Clean Air Act is a comprehensive statute that insists on statewide application and uniformity; it preempts the Ordinance both expressly and by implication. The Act commands that "ordinance[s] . . . may not make unlawful a condition or act approved or authorized" by the State. § 382.113(b). The Ordinance, however, specifically targets *all* such already-approved facilities, making them "unlawful" absent compliance with the Ordinance's extra-statutory demands.

The Ordinance is also preempted by necessary implication. As part of its comprehensive air-quality program, the Act specifies in detail exactly how cities may lawfully participate, alongside TCEQ, in regulating TCEQ-approved facilities. Cities may even bring some enforcement suits—but only in

civil district court, with the city council's pre-suit authorization, and if TCEQ is made a necessary and indispensable party. Suits under the Ordinance lack all of those features, thereby ignoring the limitations so carefully drawn by the Legislature, and rendering the Act's articulation of local authority mere surplusage that a city can freely ignore. This Court's unbroken line of preemption cases rejects such "opt outs" and forecloses cities' ability to create a patchwork of local priorities and preferences where the Legislature has chosen uniformity.

The Ordinance also delegates lawmaking authority to TCEQ, contravening basic separation-of-powers principles. The Ordinance triggers automatic amendments to the City Code whenever TCEQ changes regulations that the Ordinance adopted into law. Both parties have now acknowledged that the court of appeals wrongly upheld the Ordinance as drafted. They dispute only whether the Ordinance can be reasonably understood to only have adopted TCEQ regulations as they existed at the time the Ordinance was passed. The court of appeals correctly recognized, however, that the Ordinance unambiguously provides for automatic amendments of the City Code itself; it also recognized that any other rule would cause the Ordinance to be facially inconsistent as soon as TCEQ amends any rule. The only way

the Ordinance can avoid non-delegation problems is by guaranteeing that it is preempted (and it cannot avoid preemption either way).

ARGUMENT

The law of preemption is of vital constitutional significance because it determines the vertical distribution of governmental power. When Congress legislates, the Supremacy Clause ensures national uniformity, preempting state laws that conflict with federal law or enter fields occupied by Congress. U.S. Const. art. VI, cl. 2. The Texas Constitution likewise preempts ordinances that conflict with state law or enter fields occupied by the Legislature. Tex. Const. art. XI, § 5.

State preemption, if anything, is more demanding than its federal counterpart. States are sovereigns; they do not derive their authority from Congress, which itself is limited to its constitutionally enumerated powers. But cities "are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Nixon v. Missouri Municipal League*, 541 U.S. 125, 140 (2004) (internal quotation and citations omitted); *accord City of Beaumont v. Fall*, 291 S.W. 202, 205 (Tex. 1927). Just as friction between the federal and state governments "is perpetually arising, and will probably continue to arise, as

long as our system exists," *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1817) (Marshall, C.J.), tension between enactments of the State and its home-rule cities are likewise inevitable. The law of preemption is designed to reduce that friction; in this age of increasing regulation by *all* levels of government, the need for clear guidance about who may exercise regulatory power over the People is more important than ever before.

As far as the Group is aware, this Court has never before considered an ordinance that so manifestly intrudes on a comprehensive, statewide statutory program. But far lesser intrusions have been readily invalidated. This Ordinance merits a finding of preemption as much as in any Texas case.

I. The Texas Clean Air Act is a comprehensive and preemptive statute that fully addresses permissible local roles in air-quality regulation.

Whether the Ordinance is preempted ultimately turns on the scope of the Texas Clean Air Act. Before applying any or all of the various forms of preemption, the analytical starting point logically lies with the Act itself. The following three questions about its text and structure are central to whether the Ordinance can lawfully coexist with the Act:

(A) How comprehensive is the Act, and does it invest TCEQ with broad authority to manage a statewide response to a complex problem of statewide concern?

(B) Does the Act comprehensively address the role of municipalities?

(C) Does the Act comprehensively address the payment of fees for the privilege of operating?

The Group, therefore, first offers an overview of the Act that focuses on those three considerations. Taken together, the Act is comprehensive, both substantively and procedurally. Through its structure and language of express prohibition, it cabins local regulation within narrow bounds. It occupies the air-quality field, but preserves limited roles for any cities willing to act cooperatively with TCEQ.

A. The Act is comprehensive and endows TCEQ with substantial statewide authority and discretion.

At the outset of the Texas Clean Air Act, the Legislature directed TCEQ to "prepare and develop a general, comprehensive plan for the proper control of the state's air." § 382.012. It did not stop there; the Act goes into great detail both about specific regulatory requirements and the general goals for TCEQ to achieve. The Act is lengthy, detailed, and complex, and TCEQ has buttressed it with exhaustive administrative regulations that address air quality in excruciating detail. *See* 30 Tex. Admin. Code §§ 101-122 (West. 2014) (currently occupying 1,081 pages).

TCEQ's role is paramount. The Legislature expansively charged it with "administer[ing]" the Act. § 382.011(a)(1). In recognition of the complexity of air-quality issues and the inevitable questions of balance that arise,

the Act orders TCEQ to "accomplish the purposes of [the Act] through the control of air contaminants by all *practical* and *economically feasible* methods." § 382.011(b) (emphases added). The Act broadly vests TCEQ with "the powers necessary or convenient to carry out its responsibilities." § 382.011(c).

Accordingly, the Legislature made TCEQ the "primary" or "principal" enforcement agent. TWC § 5.012.[5] Thus, TCEQ "may issue orders and make determinations as necessary to carry out the purposes of [the Act]. Orders authorized by [the Act] may be issued *only by [TCEQ]* unless expressly provided by [the Act]." § 382.023(a) (emphasis added). Considering the import of collected statutory provisions focusing on TCEQ primacy, "and from a reading of the Act as a whole, [this Court] conclude[d] that the Legislature intended for [TCEQ] to have the *sole authority* to grant or deny construction permits and to set emissions ceilings." *State v. Associated Metals & Minerals Corp.*, 635 S.W.2d 407, 410 (Tex. 1982) (emphasis added).

In pursuing the goal of "safeguard[ing] the state's air resources from pollution," § 382.002(a), TCEQ ordinarily adopts rules with "statewide effect." § 382.017(b). It can, however, use its expertise and experience to "dif-

[5] Provisions of the Texas Water Code, in which appear various enforcement authorities and rules applicable to the Texas Clean Air Act and other environmental laws, will be cited, as here, with the abbreviation "TWC."

ferentiate among particular conditions, particular sources, and particular areas of the state." § 382.017(e). Thus, for example, TCEQ must consider that "the degrees of conformance with [a] rule that may be proper for an essentially residential area of the state may not be proper for a highly developed industrial area or a relatively unpopulated area." § 382.017(e)(2).

More generally, the Legislature broadly requires TCEQ, when "issuing an order and making a determination," to "consider the facts and circumstances bearing on the reasonableness of emissions," § 382.024, and requires holistic consideration of widely disparate factors such as the following:

> (1) the character and degree of injury to or interference with the public's health and physical property;
>
> (2) the source's social and economic value;
>
> (3) the question of priority of location in the area involved; and
>
> (4) the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the source.

Id.

Enforcement is focused on practicality and flexibility; it depends upon the sound exercise of discretion based on TCEQ's expertise and experience. Among the many statutory provisions specifically calling for TCEQ discre-

tion to determine compliance with the Act's regulatory apparatus are:

- Discretion in determining, and in responding to, violations of the Act or a TCEQ rule, order, or determination. TCEQ and its Executive Director rely on interpretive guidance, interpretation memoranda, and enforcement discretion letters. §§ 382.023-.025;

- Discretion in evaluating whether there is an affirmative defense, under the Act, to certain "emissions events" by regulated entities. §§ 382.0215-.0216;

- Discretion in determining whether emissions events are excessive, applying six statutory criteria established for TCEQ in the Act, and if so, whether to order action to reduce the emissions. *Id.*;

- Discretion to make rules integrating into TCEQ enforcement programs a set of incentives for companies implementing the TCEQ-certified Environmental Management Systems. TWC § 5.127; and

- Discretion in making a determination that only informal enforcement guidance is necessary to bring a regulated entity into compliance with state and federal air-quality regulations. *See* § 382.023(b).

TCEQ must constantly maintain the expertise that allows it to soundly exercise discretion consistently across Texas in service of the multifaceted goals that the Legislature requires it to balance. TCEQ must "conduct or require any research and investigations it considers advisable and necessary to perform its duties under" the Act. § 382.034; *see also* § 382.036(2) ("conduct studies, investigations, and research concerning air quality control");

Tex. Health & Safety Code ch. 387 (Air Quality Research Support Program) (creating TCEQ role in "program to support research into air quality").

In light of that experience, if TCEQ "determines that air pollution exists, [TCEQ] may order any action indicated by the circumstances to control the condition." § 382.025(a). TCEQ may "hold hearings," "receive evidence," and "make findings of fact and decisions" relevant to the Act's administration. § 382.029.

As noted above, TCEQ must routinely exercise discretion in its response to so-called "emissions events," which are the inevitable consequence of something going wrong. If equipment malfunctions or there is a technical failure, some amount of excess emissions may result. *See* § 382.0215 (defining and providing basic regulatory guidelines for emissions events). Any excess emission from a state-regulated facility is unauthorized, but the Legislature recognizes that wholly unintentional emissions events having minimal effects do not require governmental responses as aggressive as in the case of intentional or even negligent conduct. Thus, under the Act, TCEQ "shall establish criteria for determining when emissions events are excessive," and balance statutory factors alongside other considerations TCEQ develops.

§ 382.0216(b).[6]

B. The Act carefully addresses local concerns and local participation in air-quality regulation.

Beyond creating a "comprehensive," statewide air-quality plan, *see* § 382.012, and delegating broad authority to TCEQ, the Legislature also focused on the question this case presents: What role should local governments play in the air-quality field? Rather than foreclosing *any* role for cities, or making the Act merely a starting point with cities free to ratchet it up at will, the Legislature provided for important yet clearly limited roles for cities to play. A multitude of structural and textual indications demonstrate a legislative embrace of local participation, *if* that participation remains within specifically enumerated and carefully calibrated forms.

Although local concerns are addressed throughout the Act, Subchapter E—"Authority of Local Governments"—is wholly devoted to exactly what role municipalities may play. Its provisions enumerate with precision how far cities may go:

- **Inspect.** Cities can "inspect the air and . . . enter public or private property . . . to determine" compliance with air standards. § 382.111(a). With respect to inspections, a city

[6] By contrast, the Ordinance makes *any* violation unlawful and subject to the same penalty. *See* Ord. § 21-164 (c) ("unlawful . . . to operate . . . any facility" if it "does not comply with" *every* regulatory provision).

"has the same power and is subject to the same restrictions as" TCEQ. *Id.* A city "shall send the results of its inspections to [TCEQ]" upon request. § 382.111(b).

- **Recommend.** When TCEQ is considering "a rule, determination, variance, or order . . . that affects an area in the local government's territorial jurisdiction," the city "may make recommendations to" TCEQ—and TCEQ "shall give maximum consideration to a local government's recommendations." § 382.112.

- **Fill gaps.** Cities retain the authority to "abate a nuisance" and "enact and enforce an ordinance for the control and abatement of air pollution, or any other ordinance, *not inconsistent with this chapter or [TCEQ]'s rules or orders*." § 382.113(a)(1), (2) (emphasis added). The Legislature made doubly sure that cities would not abuse this gap-filling mechanism (with which the City's pre-2007 air-quality ordinance was consistent) by directing that "[a]n ordinance enacted by a municipality must be consistent with this chapter and [TCEQ's] rules and orders and *may not make unlawful a condition or act approved or authorized under [the Act] or [TCEQ]'s rules or orders*." § 382.113(b) (emphasis added). Notably, "*any*" ordinance—one targeted at air-quality or otherwise—is subject to the limitations of this section.

- **Enter into cooperative agreements.** Local governments can enter into formal agreements with TCEQ itself "or other local governments" to accomplish the various tasks or responsibilities that each would otherwise be able to undertake. § 382.115.

Similarly, with respect to enforcement procedure, the Legislature placed TCEQ in the driver's seat and made it the default enforcer: "[TCEQ] may initiate an action . . . to enforce provisions of [the Act]" and other envi-

ronmental laws. TWC § 7.002. In Subchapter H of the Water Code, "Suit By Others," the Legislature expressly provides for precisely how cities may complement TCEQ's authority:

- **Limited civil suit.** Subject to multiple requirements, cities affected by a violation "may institute a civil suit . . . in a district court," and "for the injunctive relief or civil penalty, or both, as authorized by this chapter . . . ." TWC § 7.351(a).

- **Only absent TCEQ resolution**. Cities can bring suit only if an administrative penalty has not been paid to the State for the violation. TWC § 7.068.

- **Only with city-council authorization.** For any "violation" of the Act, "a local government may not exercise the enforcement power authorized by [provisions of the Water Code] unless its governing body adopts a resolution authorizing the exercise of the power." TWC § 7.352.

- **Only with TCEQ as a necessary and indispensable party.** Whenever a city *can* bring suit, "[TCEQ] is a necessary and indispensable party." TWC § 7.353.

- **Any penalties shared evenly with the State.** A civil-penalty recovery by a city must be shared equally with the state in any action. TWC § 7.107.

Criminal enforcement is limited. *See* TWC § 7.141-.203. Criminal prosecutors are always subject to TCEQ control; they must first inform TCEQ of the alleged offense, and the "prosecuting attorney *may not prosecute* an alleged violation if [TCEQ] determines that administrative or civil remedies are adequate and appropriate." TWC § 7.203(d) (emphasis added). Cities are ex-

pressly given a limited role in civil enforcement, but the criminal-enforcement regime makes no provision for cities, whether in district courts or in their own courts.

Instead of adhering to the procedural parameters that allow local participation, the City has charted its own course. Its Ordinance contemplates a criminal action in municipal court, when the "Health Officer" finds a violation, without TCEQ as a party (much less a "necessary and indispensable" one). The City keeps any penalties (and all registration fees) for itself.

Yet the Legislature foresaw that cities may wish to free themselves of the Act's constraints. Cities dissatisfied with the substantive and procedural options available to them, and that choose to forego their statutory authority, are invited to wash their hands of the matter by "discontinuing an air pollution program and thereby *relinquishing this responsibility to the state*." § 382.0622(d)(3) (emphasis added).

Local interests are protected in other ways. TCEQ must "advise, consult, and cooperate with other state agencies, political subdivisions of the state, industries," and others. § 382.036(4). Notice regarding various permits must be sent to state and local officials in affected communities. § 382.0516. As noted above, cities with views about TCEQ proceedings may

present those views to TCEQ, which must afford them "maximum consideration." § 382.112. *See also, e.g.*, Tex. Att'y Gen. Op. M-257, at 1 (1968) (cities wanting different results must seek them "from the Texas Air Control Board," TCEQ's predecessor, rather than engaging in self-help). Affected cities may participate in administrative proceedings and can seek judicial review of final actions by appealing to the district court of Travis County, *see* §§ 382.032(a), 382.061(c)(2), and eventually to this Court if need be. Cities' political influence is undoubted, and they may always present their views directly to the Legislature, which can change the Act if necessary.

The Legislature emphasized the relative roles of TCEQ and cities in another important way—it specifically accounted for the most local of needs through direction and delegation not to localities, but to TCEQ. *See, e.g.*, §§ 382.052, 382.053 (requiring TCEQ to consider effects of its orders on local schools). Removing any doubt that the Legislature was aware of and addressing local needs, the Act even requires publication of various notices "in the municipality" affected, printed in foreign languages when they are the spoken language of community residents, based on data from nearby schools. § 382.056(a). Meetings can occur in the municipality itself, not merely in Austin. § 382.056(e). TCEQ's preliminary decision must be posted locally,

§ 382.056(j), and a public meeting in the county of the municipality is required "if the executive director determines that there is substantial public interest in the proposed activity." § 382.056(k)(2).

Taken together, the Act comprehensively regulates to achieve statewide uniformity. The Legislature ensured that municipalities have every opportunity to assist TCEQ in reaching the right result when applying statewide standards within each Texas municipality, and to challenge results that cities dislike. But the Legislature never contemplated cities being able to bypass TCEQ in any way.

C. The Act comprehensively addresses fees for state-regulated facilities.

The Act comprehensively addresses fees that are required for state-regulated facilities to operate. *See* §§ 382.062, 382.0621, 382.202, 382.302. Fees that regulated entities pay TCEQ can be recycled to local governments in the form of "Clean Air Act Fees," which are created in Section 382.0622. *See* § 382.0622(d)(1) (under "the option of contracting for air pollution control services, including but not limited to compliance and permit inspections and complaint response, [TCEQ] may utilize appropriated money to purchase services from units of local government meeting [various] criteria"). Section 382.115(2) additionally authorizes the "transfer of money" among parties to a

cooperative agreement, such as from TCEQ to a city, "for the purpose of air quality management, inspection, enforcement, technical aid, and education." This, of course, is familiar to City, which has received millions of dollars to cooperate with TCEQ under the Act. *See, e.g.*, 10 CR 2532.

II. The Ordinance is preempted and invalid.

The Ordinance's breadth, juxtaposed against the Act's comprehensive regulatory regime, renders the Ordinance suspect from the start. Applying the law of preemption confirms that the City has gone too far. The Group begins with a brief discussion of general preemption principles, and then turns in detail to showing how, in its intrusion into state-occupied territory, the Ordinance violates nearly every longstanding preemption teaching.

A. Preemption ensures that local self-government adheres to general, statewide law.

"Home-rule cities have broad discretionary powers, provided that no ordinance 'shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.'" *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993) (quoting Tex. Const. art. XI, § 5). Home rule is wholly subordinate to state law and can be limited by the Legislature at will on any topic. "The state unquestionably has an interest in the government of its cit-

ies. . . . [I]n so far as their character is governmental, they are agencies of the state, and subject to state control." *City of Beaumont v. Fall*, 291 S.W. 202, 205 (Tex. 1927) (internal quotation omitted). Chief Justice Calvert explained that "[t]he Home Rule Amendment carefully preserved the priority of general laws enacted by the Legislature over ordinances passed by home rule cities." *Deacon v. City of Euless*, 405 S.W.2d 59, 62 (Tex. 1966). This extends even to "the power by general law, private rights not being involved, to detach from home rule cities all territory annexed since any given time or event." *Id.*[7]

While ordinances are therefore entirely subordinate to the will of the Legislature, they appropriately bear an initial presumption of validity—the same presumption that attends any enactment. This presumption serves legislative intent, because it prevents needless judicial invalidation of ordinances that the Legislature never intended to block. Thus, this Court has recognized that "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

[7] The City of Houston, with a long history of pushing the boundaries, once even sought to invalidate *statutes* in favor of ordinances dealing with "purely local or municipal affairs, the control of which," the City argued, "was vested exclusively in home rule cities" by the Texas Constitution. *Dry v. Davidson*, 115 S.W.2d 689, 690 (Tex. Civ. App.—Galveston 1938, writ ref'd). This Court roundly rejected that contention. *Id.*

unmistakable clarity." *Dallas Merchant's*, 852 S.W.2d at 491.[8]

"Unmistakable clarity" does not mean that courts will engage in a strained construction to avoid finding preemption. While statutes and ordinances "will not be held repugnant to each other if any other reasonable construction leaving both in effect can be reached," *Fall*, 291 S.W. at 206, this entails an exercise of ordinary statutory construction. *See, e.g.*, *id.* at 202, 205-06 (holding that ordinance treating all city taxes as "conclusively presumed to have been paid" after four years was preempted by statute providing that taxpayers could not "defeat a city tax lien upon any plea of limitation"); *City of Houston v. Bates*, 406 S.W.3d 539, 547-48 (Tex. 2013) (invalidating ordinance based on ordinary meaning of undefined statutory term, rather than choosing a meaning that would save the ordinance).

"Unmistakable clarity" includes both express and implied preemption: "A limitation on the power of home rule cities by general law or by charter may be *either* an express limitation *or* one arising by implication." *LCRA v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975) (emphases added). As

[8] The court of appeals also discussed the standard of review applicable when an ordinance is challenged as an invalid exercise of a city's police power. Slip Op. at 13. Yet the Group has not challenged the Ordinance on the ground that it was "arbitrary and capricious," but only on the ground *that it is preempted* (and that impermissibly delegates legislative power). The legal standards for rational-basis review are, therefore, wholly irrelevant to this case.

in every context, the central focus of statutory construction is to find the Legislature's will. *Bates*, 406 S.W.3d at 543-44. "To determine the legislature's intent, we consider the entire act as a whole." *Tex. River Barges v. City of San Antonio*, 21 S.W.3d 347, 353 (Tex. App.—San Antonio 2000, pet. denied) (citing *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998) (*per curiam*)). Thus, while "it is necessary to look to the acts of the legislature not for grants of power to such cities but only for limitations on their powers," *LCRA*, 523 S.W.2d at 643 (quotation omitted), it is still the ordinary construction of a statute that determines the "limitations" that cities must respect.

The question here, therefore, is whether the Act as a whole demonstrates an unmistakably clear limitation upon cities' ability to regulate in the field the Act occupies. Multiple pathways lead to the conclusion that it does, and that the Ordinance is preempted.

B. The Ordinance is expressly preempted.

The Act's express-preemption provision highlights the importance of state uniformity and the need for adherence to TCEQ oversight for regulation and enforcement: Ordinances "*must* be consistent with" TCEQ's "rules and orders," and they "*may not* make unlawful a condition or act approved or authorized under [the Act] or [TCEQ's] rules or orders." § 382.113(b) (em-

phases added).

This preemptive reach is among the clearest in Texas law. It is strong enough by itself to invalidate the Ordinance. But the express-preemption language of Section 382.113(b) is equally important because of the role it plays in the structure of the Act as a whole. It demonstrates that, in practically every conceivable way, the Legislature has created a comprehensive regulatory program and has protected it from local tinkering. The express-preemption provision supports the rest of the Act by hedging against municipal abuse of the authority that the Legislature *did* grant cities.

The opinion below misunderstands express preemption, simultaneously acknowledging that the necessary ingredients for express preemption were present in this case while denying that express preemption could play any role in it. On the one hand, the court of appeals accurately recited that the Ordinance makes operation of TCEQ-approved facilities "unlawful" absent compliance with both the Ordinance's regulatory sweep and its registration-and-fee requirement. Slip Op. at 8. Indeed, the Ordinance openly does just what Section 382.113(b) says it cannot—it even selected *the very word*, "unlawful," that the statute says cities may not attach to TCEQ-approved operations. *Compare* § 382.113(b) ("may not make unlawful"), *with* Ord. §§ 21-

162(a), 21-164(c) ("unlawful" to operate absent registration and fees or compliance with City-enforced standards).

Yet Justice Sharp's opinion for the court declared that express preemption was *irrelevant*. Slip Op. at 17 & n.4. The court reached this puzzling conclusion because the Act "expressly and unambiguously *acknowledges* the City's right to enact and enforce its own air pollution abatement program, subject to [Section 382.113's] limitations. As such, the [Act] does not expressly preempt the City's power to regulate air pollution within its borders." *Id.* at 17. In other words, unless a statute *wholly* excludes cities from *every* role touching on its subject matter, express-preemption provisions are irrelevant and can be ignored with impunity.

That is both a novel statement of law and a non sequitur. Express preemption is not a binary, all-or-nothing question. The Legislature can, and in the Act does, permit cities to play circumscribed roles, while *expressly* preempting efforts to go further. The court of appeals thought it important, and even dispositive, that TCEQ is not what it termed the "*exclusive* regulator" under the Act, *id.* at 17 n.4, but that has nothing to do with the question. Cities can serve as "the" regulator as to facilities left unregulated by the State; in that way, TCEQ is not "exclusive." For facilities that TCEQ does

license, TCEQ is not "exclusive" because cities have some roles, but wholly subordinate to TCEQ. That the Legislature has chosen not to freeze out local participation—instead allowing cities to be "the" regulator for facilities left unregulated by the State and allowing them to participate cooperatively with respect to all state-regulated facilities—does not resolve whether the Act expressly preempts *certain types* of local actions. The text of Section 382.113(b) shows that it does, by expressly preempting ordinances that make State-approved conditions "unlawful."

This Court last considered Section 382.113(b) in *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676 (Tex. 2013). The plain-text holding there should govern here: "Because the Ordinance makes it unlawful to [operate a TCEQ-approved] facility . . . that was specifically authorized under [TCEQ's] orders . . . , we hold that the Ordinance is preempted." *Id.* at 677. If anything, this Ordinance is more egregious than the one invalidated in *Southern Crushed*. The ordinance in that case carefully avoided an open collision on air-quality concerns, but invoked the City's land-use authority in an effort to restrict the locations of TCEQ-approved concrete-crushing facilities. The Ordinance here reaches *every* TCEQ-approved facility, of any type, and indeed *targets* them precisely for being facilities regulated under the

Act. It makes them "unlawful" unless they comply with requirements not imposed by the Act or TCEQ. Unlike the ordinance in *Southern Crushed*, this Ordinance is clothed with no land-use fig leaf. Indeed, the court of appeals noted the City's open acknowledgment that the Ordinance's exclusive goal is air-quality regulation, justifying this self-help because of its disagreement with how TCEQ enforces the Act. Slip Op. at 23.

If, as this Court explained in *Southern Crushed*, "purport[ing] to regulate something other than air quality" cannot justify "circumvent[ing] section 382.113(b)," 398 S.W.3d at 679, then *openly* regulating air quality certainly cannot escape scrutiny under Section 382.113(b). Competition with the State is precisely what the Act forbids. In both *Southern Crushed* and this case, the City "ma[d]e unlawful" operations which the State has approved; Section 382.113(b) expressly preempts such a result.[9]

[9] The court of appeals also sought to distinguish *Southern Crushed* on the ground that the Ordinance does not subject anyone "to a higher, more onerous standard than the one set forth by the state." Slip Op. at 23. This is self-evidently wrong. Requiring duplicative fees and registration on pain of criminal enforcement is "more onerous" than *not* demanding them, and a rigid enforcement regime for any perceived offense is "more onerous" than the ameliorative and flexible regime that the Act creates and TCEQ administers. Regardless, preemption under the Act is categorical, reaching *any* city burden that "make[s] unlawful" a TCEQ-approved operation. §382.113(b). Cutting and pasting some state-law standards cannot render the Ordinance consistent with the Act's comprehensive regime. *See infra* Part II.D.1.

C. The Ordinance is preempted by necessary implication.

Although express preemption is preemption's most basic form, preemption by implication is more diverse and context-dependent. It explains when the existence and nature of legislation on statewide topics precludes cities either from entering a field of regulation or from doing so other than in specified ways. Express-preemption provisions can influence the analysis of preemption by implication because, as here, they can be crucial indicators of statutory structure and purpose. A thorough analysis of Texas preemption law demonstrates that there can be no quarter for the Ordinance. It implicates practically every form of implied preemption, and finds no safe haven in any of the various mitigating doctrines that sometimes permit cities to regulate even in the shadow of a preemptive statute.

1. Field preemption is a longstanding feature of Texas preemption law.

"Field preemption," a commonly used term in federal preemption law, has long been a part of Texas preemption law as well. "In a word, as long as the state does not, in its Constitution or by general statute, *cover any field of the activity* of the cities of this state, any given city is at liberty to act for itself." *Fall*, 291 S.W. at 205-06 (emphasis added) (invalidating ordinance that treated city taxes over four years old as having been paid).

This Court's statement in *Fall* simultaneously addresses *when* field preemption applies (when general law "cover[s] any field") and *why* it applies (because a city's need "to act for itself" is diminished when the Legislature has already acted for the entire State). Thus, as courts have always recognized, "not only are cities prohibited from enacting local laws which are directly in conflict with statutory or constitutional provisions, but from *entering a field of legislation* which has been occupied by general legislative enactments." *City of Lubbock v. S. Plains Hardware Co.*, 111 S.W.2d 343, 345 (Tex. Civ. App.—Amarillo 1937, no writ) (emphasis added); *accord, e.g.*, *City of Baytown v. Angel*, 469 S.W.2d 923, 925 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.) (same). Once a field is occupied, courts invariably reject contentions—like the City's in this case—"that, since there is no specific legal inhibition against [a city's] adopting such an ordinance, its power to enact an ordinance such as the one in question is permitted by both the Constitution and statutes." *City of Lubbock*, 111 S.W.2d at 345.

Field preemption readily satisfies the requirement that the Legislature's intent to preempt be demonstrated with "unmistakable clarity." *LCRA*, 523 S.W.2d at 645. The clearest occupation of a field is a comprehensive regulatory regime, because the detail and interconnectedness inherent

in such a program depend upon excluding competing enactments that could disrupt the delicate balances that exist in every major statutory program. When the Legislature comprehensively occupies a field, *that is itself* the indicia of clarity that courts require.

> The legislature may regulate the activities of home rule cities through general statutes when it does so with unmistakable clarity. It has done so here *with its comprehensive regulatory framework* and express provisions regarding the issuance and cancellation of certificates, which the [TCEQ] has implemented through its rules. The code provides no other mechanism for the cancellation of certificates. That *this is the sole process contemplated by the legislature* for cancelling a certificate is as clear and unmistakable as is the application of the regulatory framework to home rule municipalities.

City of Carrollton v. TCEQ, 170 S.W.3d 204, 214 (Tex. App.—Austin 2005, no pet.) (emphases added). Properly understood, an "unmistakably clear" exclusion of municipal authority over a particular range of subject matter—whether broad or narrow, substantive or procedural—is the very nature of field preemption. A statutory framework is broadly comprehensive when the statute as a whole indicates intent "to cover" some subject by doing so thoroughly—when, for instance, "the state, by its legislation, had undertaken to cover an entire subject or business, and to define the conditions under which it might be carried on." *Xydias Amusement Co. v. City of Houston*, 185 S.W.

415, 420 (Tex. Civ. App.—Galveston 1916, writ ref'd); *see also, e.g.*, *Berry v. City of Fort Worth*, 124 S.W.2d 842, 846 (Tex. 1939) (finding service of process and penalties for usury were "lodged exclusively in the Legislature," which occupied the field). It cannot be disputed that the Act here is among the most comprehensive in Texas. *See supra* part I.A. This makes local action within the field presumably preempted.

That does not mean, of course, that preempted fields *only* flow from maximally comprehensive frameworks, or that occupied fields must be broad in order to have preemptive effect. This Court has repeatedly explained that even relatively narrow statutory enactments can preempt the relevant narrow field. In *City of Weslaco v. Melton*, 308 S.W.2d 18, 19 (Tex. 1957), an ordinance banning unpasteurized milk was challenged under a statute that created statewide uniformity with respect to milk *grading*. "Certainly," the Court agreed, "the state pre-empted the field, by the enactment of this statute, so far as the grading and labeling of milk is concerned," but by the same token did *not* preempt an ordinance dealing only with milk sales. *Id.*

Even when a preempted field is relatively narrow, ordinances that approach it—even indirectly, unintentionally, or from unquestionably salutary motives—are preempted. Under the same milk statute as in *City of Weslaco*,

for instance, an ordinance that demanded delivery of milk multiple times per week was held to "indirectly attempt[] to add a quality of freshness to the specifications for Grade A pasteurized milk distributed in" a city. *Jere Dairy, Inc. v. City of Mt. Pleasant*, 417 S.W.2d 872, 874 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.); *see City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982) (endorsing *Jere Dairy*'s preemption analysis). *Jere Dairy* held the ordinance preempted, even though "delivery of milk, the City point[ed] out, is not mentioned in the state statute and regulations," and even though the ordinance did not did "not add to or alter . . . the state's grading and labeling standards" for Grade A milk. 417 S.W.2d at 873.

Jere Dairy could have avoided field preemption if such avoidance were indeed required whenever literally possible. It would have adopted the city's view that its ordinance was "an exercise of the City's police power, reflecting concern for the health and welfare of its citizens," that merely "complements state standards" without being "inconsistent [or] in conflict with them." *Id.* Nonetheless, as sympathetic as the court may have been to the city's health-motivated enactment, it concluded that the ordinance "constitute[d] an entry into the field occupied exclusively by the state statutes and regulations pertaining to Grade A pasteurized milk." Despite the "incursion" being unques-

tionably "indirect[]," "[t]he City is powerless to legislate in [that] field," and general law "prohibits this incursion into the state pre-empted field of milk grading." *Id.* at 874.

The court of appeals acknowledged the accumulated case law on field preemption without disputing its applicability to this case. Slip Op. at 21-22. But it asserted that *this* Court abandoned all its field-preemption precedents, not openly but *sub silentio*, by means of a "writ refused" designation in *Unger v. State*, 629 S.W.2d 811, 812-13, which the court of appeals cited as "(Tex. App.—Fort Worth 1982, writ ref'd)." Slip Op. at 20, 21. According to the opinion below, any holdings by this Court before or after *Unger* were thereby rendered meaningless, because "*Unger* is 'writ refused' and has the same precedential value as a Texas Supreme Court opinion." Slip Op. at 21 (criticizing the Group for citing "several opinions that pre-date *Unger*").

The court of appeals was wrong on all fronts. First, *Unger* was *not* "writ refused" by this Court; it was never reviewed by this Court at all, but was "petition refused" by the Court of Criminal Appeals. In that court, a "refusal" of a petition for discretionary review means only that fewer than four judges voted to hear the case without assigning it the precedential weight of a Court of Criminal Appeals opinion. Tex. R. App. P. 69.1; *cf.* Tex.

R. App. P. 56.1(c) (when *this* Court "refuses" a petition, the lower-court opinion is treated as one of this Court's cases). Second, the court of appeals misread *Unger*. That two-page opinion merely followed settled law that the Legislature did not preempt cities' land-use authority over certain aspects of mineral exploration within city limits. *See* 629 S.W.2d 812-13. No other court, and certainly not this Court, has ever before thought that *Unger* or any other case undermines this Court's field-preemption precedents. Without *Unger*, the opinion below lacks any authority to support its field-preemption holding. That doctrine retains its original vitality and applies here, as with every other comprehensive regulatory program.

2. Specific grants of authority preempt all other authority.

Closely related to field preemption—and frequently coterminous with it—is the principle that "where a power is granted, and the method of its exercise prescribed, the prescribed method excludes all others, and must be followed." *Foster v. City of Waco*, 255 S.W. 1104, 1105 (Tex. 1923). In other words, without needing any expressly preemptive words, like "exclusive" or "prohibit," the Legislature's intent to narrow the scope of options for cities can be unmistakably clear simply by expressing what those options are. This analysis is standard in any context, not merely preemption. "[E]numeration

presupposes something not enumerated," as Chief Justice Marshall wrote in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). That principle is just as valid today; the U.S. Supreme Court reiterated earlier this year that "enumeration of exemptions and exceptions . . . confirms that courts are not authorized to create additional exceptions." *Law v. Siegel*, 134 S. Ct. 1188, 1196 (2014). And it is fatal to the City's argument.

a. Express recognition of some authority preempts authority outside the recognized sphere.

In the context of preemption, this Court has consistently affirmed that statutes that provide specified means to achieve a goal exclude alternative means. In essence, courts have applied the familiar canon of construction "*expressio unius est exclusio alterius*" (expressly stating one thing excludes all others) to the preemption context.

For instance, the Texas Alcoholic Beverage Code provides for generally "exclusive" regulation by the State—an example of express preemption—and generally disfavors cities "impos[ing] stricter standards" on businesses regulated by the Code. *See Dallas Merchant's*, 852 S.W.2d at 493 (quoting the statutory provisions). But it nonetheless provided specified mechanisms allowing cities some authority to regulate the sale of alcoholic beverages. In reliance on that authority, the dissent in *Dallas Merchant's* would have up-

held a city requirement subjecting purveyors of alcoholic beverages to more rigorous location requirements. It would have held that the challenged ordinance "merely imposes a restriction on their location," a matter traditionally within local governments' reach, and—echoing the City's argument in this case—that such a regulation was not expressly barred by the statute. *Id.* at 494 (Enoch, J., dissenting).

The Court forcefully responded by invoking the canon's preemptive strength: "The application of the doctrine of expressio unius est exclusio alterius further demonstrates the weakness of the dissent's conclusion that the City may regulate in this instance." *Id.* at 493 n.7. The Code, it continued,

> provide[s] specific instances when a governmental entity, such as a home-rule city, may regulate the location of an alcohol related business. Thus, *by expressly stating under what circumstances a governmental entity may regulate* the location of an alcohol related business, it follows that *there are no other instances when a governmental entity may regulate* the location of an alcohol related business.

Id. at 493 n.7 (emphases added).

This Court followed the same basic analysis in the so-called "fat firemen" case. *Tyra v. City of Houston*, 822 S.W.2d 626, 629 (Tex. 1991) (Gonzalez, J., dissenting). The issue was whether the City could adopt *performance* standards for firemen in light of a state statute imposing an exclusive means

to evaluate *physical or mental fitness*. The City argued in *Tyra*, as it has argued here, that the presumption in favor of ordinances means that any shred of colorable argument overcomes a comprehensive statute's preemptive effect. The dissent agreed, finding that the word "exclusive" in the statute covered only evaluations of *medical* fitness (because the statute required recourse to medical doctors for evaluation); performance standards that did not require medical knowledge, it argued, were not preempted with "unmistakable clarity." *Id.* at 631. The argument had some force, but the Court's majority rejected its reasoning, holding that the legislative intent was unmistakably clear. By imposing a specific way to determine adequate fitness to perform firemen's duties, the Legislature necessarily precluded the City from adopting a different method to achieve even a salutary goal. *Id.* at 628.

Such examples are legion from this Court,[10] as well as others. Case law

---

[10] In *Foster*, this Court considered express methods for assuming debt to purchase a municipal cemetery in a city charter (which, like a statute, is superior to and may preempt an ordinance). "[T]hese [debt-assumption] methods are exclusive," the Court explained, 255 S.W.2d at 105, not because the word "exclusive" was used, but because there would be no logical basis to undertake the effort to express *what is permitted* unless that effort necessarily demarcated *what is prohibited*. *See also, e.g.*, *Burch v. City of San Antonio*, 518 S.W.2d 540, 544-45 (Tex. 1975) (explaining that statutory expression of *how* cities can condemn property necessarily withdraws alternative means); *Yett v. Cook*, 281 S.W. 837, 839 (Tex. 1926) (construing various statutes describing the detailed procedural requirements that attend elections as "mandatory," and held an ordinance that preferred an alternative to be preempted).

routinely rejects as "not tenable" arguments that there is no preemption "because neither the Constitution nor the statute prohibits" city regulation in express terms, holding that "such contention runs afoul of the well-known legal maxim, expressio unius est exclusio alterius." *City of Lubbock*, 111 S.W.2d at 345; *see also, e.g.*, *Prescott v. City of Borger*, 158 S.W.2d 578, 582 (Tex. Civ. App.—Amarillo 1942, writ ref'd) (holding that, because the ordinance "goes beyond those specific powers extended to city authorities by [the statute], it is unconstitutional and void"); *City of W. Lake Hills v. Westwood Legal Def. Fund*, 598 S.W.2d 681, 684-85 (Tex. Civ. App.—Waco 1980, no writ) (holding that statute granting enforcement authority over sewage facilities to TCEQ predecessor agency made that authority exclusive by necessary implication, when Water Code empowered cities in other ways but was silent about municipal authority as to license-enforcement authority).[11] Until

[11] Although West Lake Hills is a general-law city, the statute expressly applied to *any* kind of city and actually imposed *greater* burdens on home-rule cities, thereby ensuring its preemptive reach over them: "'Every city in this state having a population of 5,000 or more inhabitants *shall*, and any city of this state *may*, establish a water pollution control and abatement program for the city.'" *W. Lake Hills*, 598 S.W.2d at 684 (quoting TWC §26.177) (emphases added). Regardless, the finding of TCEQ exclusivity turned on the Water Code's structure, not on any ostensible power deficit on the part of any sort of city: "[I]t is clear that the Legislature intended to reserve to the State the ultimate power to regulate in the area of pollution control." *Id.* at 685. Beyond what the statute authorized, "the legislative scheme simply does not contemplate independent regulatory action by a city." *Id.*

this case, only dissents have taken the extreme view that the Legislature must use language of prohibition, a view that would effectively erase preemption by implication. *See, e.g.*, *Royer v. Ritter*, 531 S.W.2d 448, 451 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.) (Stephenson, J., dissenting) ("In view of the established law in this State that a home rule city is authorized to do anything not specifically denied to it, the rule expressio unius est exclusio alterius cannot be used.").

This principle has also consistently informed the Attorney General's preemption analysis. "Because [a statute] prescribes specific costs that must be assumed by VIA, it necessarily follows that other charges may not be assessed. Thus, under the standard of the *Dallas Merchant's* case, [the statute] implicitly preempts 'with unmistakable clarity' the imposition of inspection fees." Tex. Att'y Gen Op. GA-0082 (2003), at 4; *see also* Tex. Att'y Gen. Op. JM-1195 (1990), at 2 ("Where a field of legislation has been occupied by a state statute, specific grants of authority to municipalities to enact ordinances in such field should be considered as implicitly limiting municipal authority to that specifically conferred by statute.").

b. By prescribing exactly how cities may regulate, the Act necessarily preempts the Ordinance.

These principles are fatal to the Ordinance. The Act and the Water

Code expressly authorize specified roles for cities that wish to combat air-quality problems, with concomitant restrictions on that authorization. *See supra* Part I.B (describing how the Act comprehensively addresses the authority of local governments). Those provisions are at least as precise, specific, detailed, and comprehensive in their expression of mechanisms by which cities may participate in air-quality enforcement as *any* of the statutes applied in the cases discussed above. That detail necessarily preempts the Ordinance's selection of alternative, inconsistent methods. Juxtaposed against TCEQ's broad authority, the legislative recognition of municipal power has precisely the effect it had in the cases cited above—to emphasize what authority the City *lacks*.

The court of appeals categorically misunderstood this aspect of preemption by necessary implication. It briefly acknowledged the Group's argument, but dismissed it without any analysis, asserting only that the *expressio unius* "principle . . . is not an inflexible rule, but merely a tool for ascertaining legislative intent." Slip Op. at 30 (citing *Mid–Century Ins. Co. v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999)). True enough—as with every canon, the Legislature can do something else that reveals a contrary intent. If a comprehensive regulatory program contained provisions that would be effec-

tive only if cities could independently enforce its provisions, then textual indications would be in tension, making the question of statutory construction more challenging.

But Justice Sharp's opinion below did not offer any such language from the Act to rebut application of the *expressio unius* canon. The best that it did was classically circular reasoning, pointing back to the Act's specific authorization of limited local air-quality regulation in Section 382.113(a). *E.g.*, Slip Op. at 29. The court of appeals, in other words, contended that the general rule is rebutted *by its own premise*. That simply rejects the general rule that granting specific authority withdraws *other* authority by implication, in part to avoid converting statutory provisions as merely advisory options, from which a city may exempt itself at will by choosing to enforce in ways other than expressly prescribed by law. The opinion below gets the matter backwards. By providing specific, narrowly drafted roles for cities (including allowing them to adopt ordinances that fit within the Act's contours), the Legislature made abundantly clear that it had fully considered cities when enacting a comprehensive regulatory scheme.

The logic of the court of appeals' conclusion, much like that of dissenting views in some of the cases cited above, is that cities may regulate full-

speed ahead unless the Legislature precludes them from doing so in express terms. That has never been the law, and for good reason; it would spell the end of preemption by implication in the vast bulk of cases, thereby imposing an unjustified burden on the Legislature to anticipate and expressly rebut every possible local move. Accordingly, "cities may assist in obtaining compliance with pollution standards," but "these efforts must be in cooperation with [TCEQ]." *City of W. Lake Hills*, 598 S.W.2d at 685. The Ordinance does not cooperate; it openly competes, and is therefore preempted.

3. When statutes have preemptive reach, cities can regulate only by meeting conditions that are absent here.

Ordinances begin with a presumption of validity, as all agree. But as discussed above, statutory text and structure can overcome that presumption. The final step of preemption analysis is to determine whether the Legislature has left an "escape" hatch for some local regulation. The two ways that ordinances might survive despite a preemptive statute is if (a) they actually regulate something that is "ancillary" to the field occupied by the State, but do not regulate the same thing that the State targets, or (b) the Legislature has expressly "unpreempted" a field, or some part of the field. Neither exception applies here.

a. The Ordinance does not qualify as "ancillary" local regulation complementing a narrow statute.

Statutes are not always comprehensive regulatory programs that broadly occupy a wide field. Sometimes they are pinpoint regulations, in which the Legislature swoops in to impose a precise and narrow requirement, leaving the rest of the field open to local regulation. Statutes might also comprehensively regulate one field without disturbing local authority over a related but wholly distinct field. Courts permit cities greater flexibility under those circumstances, because such a statute does not plausibly seek to forestall local action. Even then, however, cities may not contravene whatever state-law requirements the Legislature enacted, no matter how narrow.

This Court has explained in several cases how to ensure that ordinances that do *not* intrude on state-occupied terrain are not mistakenly swept away. In one, Texas and federal law regulated only a narrow field—the "construction, safety, and installation of mobile homes." *Comeau*, 633 S.W.2d at 796. And state law indeed had "preempted [that] field." *Id.* But such a statute did not occupy—because it plainly did not intend to occupy—the broader "field" of mobile homes altogether, and thus had nothing to say about the barely related question of where mobile homes could be located. *How* mobile homes are constructed has no more to do with *where* they may

be located than how a car is safely made determines whether it may be driven in particular places. Thus, the Court found no conflict between the State's manufacturing standards and the City's location requirements. *Id.* For that basic reason, it necessarily follows that the mere "entry of the state into a field of legislation ... does not *automatically* preempt that field from city regulation; local regulation, *ancillary to and in harmony with* the general scope and purpose of the state enactment, is acceptable." *Id.* (emphases added).

Nothing about the City's Ordinance here, however, is "ancillary to" the air-quality regulation field occupied by the State. Unlike the distinction between manufacturing and location, the Ordinance occupies *the precise territory* that the State staked out in the Act. Likewise, the Ordinance is not "in harmony with" the Act, because it disregards the Act's authorized enforcement mechanisms and competes with TCEQ. By contrast, the City's pre-2007 ordinance was both "ancillary to and in harmony with" the Act—it directly regulated only what the State did not, and cooperated with TCEQ under statutory guidelines.

Another of this Court's cases applies the same logic to a slightly different fact pattern, but reaching the same conclusion—pinpoint statutes do not

displace the entirety of broad ordinances. A "narrow statute" in the Penal Code "relate[d] only to dogs" and imposed only "restrain[t]" and "insurance coverage" requirements on owners—and only when "a person keeps a dog that has actually engaged in vicious conduct and fails to restrain the dog or obtain the required insurance coverage within sixty days of the dog's vicious conduct." *City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17, 19 (Tex. 1990). "Vicious conduct" was narrowly defined as a dog's "unprovoked" attack on a human other than in "a pen or other enclosure" from which the dog could not depart, where the dog failed "to retreat," and where it caused "bodily injury to the person" it attacked. *Id.* at 18. The ordinance, by contrast, reached "[a]ny animal" (not just dogs), both those whose past conduct showed aggressive "tendencies" and those "capable" of serious physical harm to humans or property, and imposed various other restrictions (dealing with "the inhumane treatment of animals, the impoundment of animals, the vaccination of animals, the sale of baby chicks and rabbits, and the permitting of guard dogs," as well as special limits on pit bulls). *Id.* at 18-19.

Given the statute's microscopic focus, the Court unsurprisingly recognized that the two enactments were "not inconsistent." *Id.* at 19. Pinpoint statutes do not, and are not intended to, occupy a broad field; as the Court

explained, "the mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted." *Id.*[12] A contrary rule would dissolve local government; some statute could be found that, however remotely, touches on *any* "subject." Thus, the common-sense and practical approach respects the primacy of state law while preventing unintended obliteration of ordinances that do not intrude upon state terrain.

That said, it is not the case that a state statute's narrowness entitles cities to ignore it. *Responsible Dog* acknowledged that "there is a small area of overlap in the provisions of the narrow statute and the broader ordinance," but found it "not fatal." *Id.* That was because there was no indication that the slight overlap in any way intruded on state law—such a concern was wholly "anticipatory." *Id.* at 19 n.2. But it was not frivolous, for cities may not supplant even the narrowest statute, and the Court specifically warned that it was *not* holding that "a person could be prosecuted under both the statute and ordinance in the rather limited circumstances where conduct is

[12] The court of appeals misunderstood this lesson from *Responsible Dog*. It divorced the case from its context, and thought that *Responsible Dog* means that *no matter how broad* the field of state action, and *no matter how much* an ordinance overlaps with the state-occupied field, ordinances will be upheld unless expressly precluded by the statute. Slip Op. at 18.

violative of both" or that "the ordinance could be enforced against conduct also violative of the statute." *Id.*[13]

The court of appeals did not argue that the Ordinance met this exception; it elided it altogether, quoting *Responsible Dog* only for the general proposition that statutes do not automatically preclude local regulation on related areas. Slip Op. at 18. But it did not and could not suggest that this cases mirrors the conditions for approval of local regulation required by *Comeau* and *Responsible Dog*, and lower court cases consistent with them. The statutes in those cases were narrow, not (like the Act) comprehensive; the cities in those cases regulated something different from the State, not (like the Ordinance) exactly the same thing. This Ordinance does *nothing but* regulate what is already comprehensively regulated by the State.

b. Tellingly, the Act contains no provision "unpreempting" an otherwise-preempted field.

The Legislature routinely "unpreempts" statutory provisions when it

[13] Other examples abound. For instance, while the Texas Alcoholic Beverage Code comprehensively regulates most aspects of the sale or consumption of alcoholic beverages, cities may regulate *other conduct* that is tangentially related to alcohol. *See, e.g.*, *Robinson v. City of Longview*, 936 S.W.2d 413, 414-15 (Tex. App.—Tyler 1996, no writ) (upholding ordinance prohibiting topless dancing where alcoholic beverages are served or consumed); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1280 (5th Cir. 1988) (neutral regulation of sexually oriented business not preempted by Alcoholic Beverage Code merely because clubs offered alcoholic beverages). At most, such regulations, while perhaps related to the state-occupied field, are "ancillary" to state regulation, and never inconsistent with it.

wishes to restore local regulatory authority that a statute would, in the absence of such a restoration, necessarily preempt. When it does so, local regulation by definition cannot be inconsistent with or an intrusion into state law. This final "exception" to preemption does not apply here. It only highlights the Ordinance's invalidity. It proves that the Legislature recognizes that statutes occupying a field preempt local authority *unless* the Legislature itself reverses that effect. The Act contains no "unpreemption" provision, but instead cabins local authority to enact ordinances.

Other statutes demonstrate how the Legislature could have eliminated the Act's preemptive scope, in full or part. For example, by enacting a state statute that comprehensively regulated fireworks, the Legislature necessarily preempted that field. But the Legislature did not intend to preclude further regulation or distinct enforcement. It therefore added to the statute a caveat, expressly providing that "nothing herein shall be construed to limit or restrict the powers of cities, town, or villages . . . to enact ordinances prohibiting or imposing further regulations on fireworks. *Alpha Enters., Inc. v. City of Houston*, 411 S.W.2d 417, 421-22 (Tex. Civ. App.—Houston 1967, writ ref'd n.r.e). To offer just a few examples beyond fireworks:

- **Signage.** Various statutes reverse the preemptive scope of sign requirements. *See, e.g.*, Tex. Local Gov't Code

§ 216.902(b) ("If a municipality extends its outdoor sign ordinance within its area of extraterritorial jurisdiction, the municipal ordinance supersedes the regulations . . . under" state law.); *see also City of Houston v. Harris County Outdoor Advertising Ass'n*, 732 S.W.2d 42, 48 (Tex. App.—Houston [14th Dist.] 1987, no writ) (applying similar statutory provision from Texas Highway Beautification Act).

- **Mineral development.** With increasingly comprehensive statutory provisions, the Legislature added that they did "not affect the authority of a municipality to require approval of subdivision plats or the authority of a home-rule city to regulate exploration and development of mineral interests within its boundaries." Tex. Nat. Res. Code § 92.007.[14]

- **Elections.** To unpreempt an otherwise preemptive statute, "the Election Code expressly allows home-rule cities . . . to establish their own application requirements in municipal elections." *In re Sanchez*, 81 S.W.3d 794, 797 (Tex. 2002) (orig. proceeding).

This need for "unpreemption" has existed since the very dawn of home-rule cities. Immediately after the Texas Constitution was amended in 1912 to provide for home rule in Article XI, Section 5, the Legislature passed a statute to implement the amendment, including a lengthy list of powers for cities. *See* Act approved Apr. 7, 1913, 33d Leg., R.S., ch. 147, § 4, 1913 Tex. Gen. Laws 310-16. Importantly, the Legislature then provided in the very next section:

[14] This "unpreemption" provision carefully avoids restoring *full* local control over mineral exploration, but instead ensures their continuing authority to subject mineral exploration to "regulation" that would legitimately apply to any other activity.

> The enumeration of powers hereinabove made shall never be construed to preclude, by implication or otherwise, any such city from exercising the powers incident to the enjoyment of local self-government, provided, that such powers shall not be inhibited by the Constitution of the State.

Id. § 5, 1913 Tex. Gen. Laws 316. These provisions—the lengthy enumeration of local powers and the statutory "unpreemption" provision—were for many years codified respectively as Articles 1175 and 1176 of the Revised Civil Statutes.[15] Preemption case law for much of the following century cited those two articles in many contexts, and this Court has relied upon Article 1176 to avoid a finding of preemption. Even as it has upheld ordinances, it made clear that Article 1175's preemptive effect, because of its enumeration of specific powers, would be preemptive *but for* Article 1176. For instance, in *LCRA*, this Court explained: "Where Article 1175 indicates that a power is to be exercised by the 'governing authority' or specifies the procedure to be followed, the statutory provisions may be regarded, in some instances at least, as limitations on the power of the city," but then cites Article 1176 to avoid a preemptive construction. 523 S.W.2d at 643-44. *See also, e.g.*, *Forwood v. City of Taylor*, 214 S.W.2d 282, 286 (Tex. 1948) (upholding ordinance relating

[15] Although the specifically enumerated powers have been scattered during codification, Articles 1175 and 1176 remain largely intact as codified in Section 51.072 of the Local Government Code.

to city's board of equalization by citing Article 1176).

"Unpreemption" provisions collectively indicate the Legislature's ability to signal when state regulation should not displace municipal ordinances. They would be superfluous and unnecessary if local regulation were valid regardless. The Act, by contrast, expressly requires affirmative *consistency*, and bars ordinances from "mak[ing] unlawful" what TCEQ authorizes. § 382.113. The court of appeals did not contend that this exception applied; it believed that no exception was needed. This was error.

4. The various fees charged by the Ordinance conflict with state law.

The court below upheld the Ordinance's duplicative fee provisions. Slip Op. at 24-25. If this Court finds the Ordinance preempted, the fees will be invalid for that reason, but they are also preempted on independent grounds.

Most prominently, fees for state-regulated facilities are the province of TCEQ. *See* §§ 382.062-.0622. The accumulation and distribution of "Clean Air Act Fees" are expressed in such detail in Section 382.0622 that the City cannot describe it as anything short of a comprehensive regime. It would serve little purpose to encourage municipal cooperation with the State by offering to share a portion of those fees if cities unilaterally could extract an even greater amount by ordinance, while avoiding the hassles of cooperative enforcement.

That the fees are duplicative also renders them invalid. The Act's comprehensive assessment structure is based on regulatory, enforcement, and support services to be provided at each facility. The City's new fees offer *nothing new*; after all, it used to have an active enforcement program based on its receipt of fees paid by facilities to TCEQ and then granted to the City. In the Ordinance, the City has granted its own wish to be free of statutory constraints on its enforcement activities; that is itself inconsistent with the Act, and it certainly cannot justify extracting duplicative fees from those who have already paid TCEQ what the Act requires for lawful operations. The duplicative fees violate Section 382.113(b) because those "operat[ions]" made lawful by the State are made "unlawful" by the City unless those fees have been paid, Ord. § 21-162(a). Yet the Act prohibits cities from "mak[ing] unlawful" state-approved operations. § 382.113(b).

The rule against duplicative fees when cities are simply paralleling what the State is already doing is a corollary of ordinary preemption. Thus,

> where one had acquired a right by compliance with a state statute, . . . the [Texas] Supreme Court has held several times that the city could not make the permit depend upon a condition, namely, the payment of a fee, which was *unlawful because this fee was for the exercise of the same right already acquired and held under the statute.*

Cabell's, Inc. v. City of Nacogdoches, 288 S.W.2d 154, 163 (Tex. Civ. App.—Beaumont 1956, writ ref'd n.r.e.) (citing cases; emphasis added). To be given the right to operate, TCEQ-regulated facilities comply with the Act, including its fee requirements. The City may not impose additional burdens for the same right. *See also* Tex. Att'y Gen. Op. GA-0082 (2003) (opining against duplicative city fees when Transportation Code already assessed them).

This does not mean that cities cannot assess fees for services, within various state-law limitations. But doing so depends on conditions missing here—that the relevant city program is valid and that the city is doing something different from the State. *See, e.g.*, *City of Amarillo v. Maddox*, 297 S.W.2d 750, 752 (Tex. Civ. App.—Amarillo 1956, no writ) (upholding city fees on police-power grounds where there was no state license fee but only an occupation tax). No authority supports the Ordinance's duplicative fees.

D. None of the Ordinance's features can forestall preemption.

The court of appeals accepted the City's arguments that various aspects of the Ordinance should save it from preemption—that it supposedly "mirrors" state law, that it provides for an "affirmative defense," or that it is merely local regulation and therefore not truly an intrusion into state law. None of these contentions can weather even cursory scrutiny.

1. Merely copying some statutes or regulations does not create "consistency."

The court of appeals largely adopted the City's assertion that the Ordinance could not be preempted because it copied substantive provisions directly from TCEQ's regulations. *See* Slip Op. at 23 (describing the Ordinance as not "more onerous," but merely a parallel regime to "enforce the *state's existing* rules and regulations"). This superficial argument fails because the Ordinance cannot and does not "mirror" the Act and its regulatory apparatus; and even if it could, there is no exception to preemption for doing so.

a. The Ordinance cannot, and does not try to, replicate the Act.

The Ordinance does not "mirror" the Act merely because it cuts and pastes huge swaths of TCEQ regulations. It disregards the Act's equally important procedural components, exchanging them for the path to justice that the City prefers. Nor does—or could—the Ordinance copy TCEQ's experience and discretion, which is a fundamental, indispensable attribute of the Legislature's comprehensive regulatory program.

First, the Ordinance is not even close to being a faithful copy of the Act's regulatory regime. Even the court of appeals could find only "considerable overlap between the Ordinance and the [Act]." Slip Op. at 18. That

was charitable; the Ordinance supplants the Act's enforcement mechanisms with those of its own choosing. Just as a half-truth is a falsehood, an opportunistic half-copying of a comprehensive program is an inaccurate facsimile.

Some statutes specifically *invite* cities to adopt statutory schemes as city ordinances; the Act here does not, another indication of the City's overreach. But even when cities *can* adopt statutes as ordinances, they may not pick and choose or make a partial adoption of what they like. *See, e.g.*, *Huff v. City of Wichita Falls*, 48 S.W.2d 580, 583 (Tex. 1932) (holding that city "was not compelled to adopt" operative provisions of Street Improvement Act, "but, having done so, they became general laws applicable to her affairs," and could not be selectively modified). In *Greater New Braunfels Home Builders Association v. City of New Braunfels*, the court agreed with the city's opponents "that the City, having chosen to adopt subchapter C [of the Local Government Code], is bound by all its restrictions and may not pick and choose the provisions with which it wishes to comply." 240 S.W.3d 302, 307 (Tex. App.—Austin 2007, no pet.). The court rejected the City of New Braunfels's attempt to justify its deviations as merely "imposed pursuant to the City's police power as a home-rule municipality." *Id.* at 308.

The Ordinance here, however, widely departs from the statutory re-

gime it purports to copy. The following chart displays just a few examples of how the Ordinance is an unfaithful copy of the Act:

	The Statute	The Ordinance
Venue	• Suits must be "in a district court," limited to relief "as authorized by" statute. TWC § 7.351(a).	• Suits are brought in city criminal court. Slip Op. at 8-9.
Prerequisites	• A pre-suit city-council resolution is required. TWC § 7.352. • TCEQ "is a necessary and indispensable party" in all suits. TWC § 7.353.	• No requirement of City Council authorization. • No provision for TCEQ to be a party.
Cooperation	• Cities may enter into cooperative formal agreements with TCEQ, § 382.115, and may "inspect" and "enter" facilities with "results" owed to TCEQ on demand. § 382.111. • Cities may "make recommendations to [TCEQ]," which "shall give maximum consideration to" the recommendation. § 382.112.	• City enforcement is conducted "on its own . . . rather than in cooperation with TCEQ." Slip Op. at 23. • Ordinance does not confine City to "recommendations." *Id.*
Penalties	• Penalties must be shared equally with the State, not taken by a city. TWC § 7.107.	• The City keeps all penalties and fees for itself. Slip Op. at 28.

These deviations destroy consistency. The Act authorizes certain suits *if* TCEQ is a "necessary and indispensable party." TWC § 7.353. It is not

"consistent" to bring a purportedly substantively identical suit *without* joining TCEQ. Similarly, despite the Legislature's view that litigation is sufficiently serious to warrant pre-suit city-council approval, TWC § 7.352, the Ordinance simply delegates this to the City's "health officers." Ord. § 21-164(b). And if the Legislature thought that these matters needed to be in district court and following civil rules, TWC § 7.351, the Ordinance cannot be "consistent" by proceeding in municipal court under criminal rules, using judges who are statutorily barred from presiding over even basic criminal matters. *See, e.g.*, Tex. Gov't Code § 29.003(a)(2) (barring municipal judges barred from hearing criminal matters if resulting fines could exceed $2,000).

In short, the adoption of statutory and regulatory requirements that the City likes, while ignoring those that it dislikes, is an example of *inconsistency*. The Ordinance circumvents the Act's procedural protections. The judgment below converts a carefully calibrated statutory regime into a default rule applicable only to any city foolish enough not to adopt whatever regime that city preferred; it transforms TCEQ from being "necessary and indispensable" to being eminently disposable.

The second reason that the Ordinance does not mirror the Act arises from the Act's reliance on TCEQ expertise and discretion, upon which the

entire structure of statewide air-quality regulation depends. *See supra* Part I.A. The Legislature has invested TCEQ with considerable discretion to achieve statewide air-quality goals, not merely to mechanically or formulaically apply technical air-emissions standards. *E.g.*, §§ 382.023-.025. Only TCEQ has the statewide knowledge, authority, and experience to apply and balance those standards evenhandedly across Texas.[16] It is simply impossible for any city to faithfully reproduce a state-created, statewide system. No city government, no matter how capable or well intentioned, could replicate TCEQ's statewide, institutional experience and its exercise of discretion.

But the City here does not even desire, much less achieve, a faithful replication of the TCEQ-focused system that the Legislature created. Far from disputing the matter, the City's open and explicit intent is to generate *different* outcomes. Dissatisfied with TCEQ's exercise of discretion, the City intends to enforce away on its own terms to "ensure that complaints of its citizens will not go unanswered and violations . . . will be prosecuted within the City of Houston." 13 CR 3423 (City's brief to the district court). The court of appeals openly admitted the City's competitive purpose: "[T]he City

[16] By setting up a competing version of TCEQ's emissions-events rules, for instance, the City subverts the statutory charge that *TCEQ's Executive Director* (not some *other* agency or entity) evaluate and order abatement of such events.

acknowledges that its decision to regulate and enforce the [Act] and TCEQ rules and regulations *on its own* in this case—*rather than in cooperation with TCEQ*—is due to what it perceives to be TCEQ's lax enforcement efforts." Slip Op. at 23 (emphases added).

Even accepting that the Ordinance and the Act share the same general goal, "[t]he fact of a common end hardly neutralizes conflicting means," *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379 (2000). In *Crosby*, the Court recognized that federal law reposed significant discretion in the President to suspend sanctions or impose new sanctions on Burma, *id.* at 373-74, and concluded that "discretionary action open to" the President would be undermined by *any* state law on the subject, which inevitably would make the President's authority less flexible and responsive. *Id.* at 377. Likewise, the Legislature delegated to TCEQ, not the City, the determination of how to proceed in targeting various air-emissions problems, subject to the Act. The Ordinance's purported enforcement of the Act's substantive standards diminishes TCEQ's flexibility in calibrating enforcement, contrary to the Act's text and structure. If the City dislikes TCEQ's results, it is limited to the options that the Legislature made available to it, *see supra* Part I.B, including seeking changes in the law. But what it cannot do is engage in self-help.

b. Even ordinances that *do* mirror statutes may still be preempted.

The Legislature, as noted above, sometimes invites cities to incorporate state law. *See also, e.g.*, *Wilson v. Andrews*, 10 S.W.3d 663 (Tex. 1999) (incorporation of Civil Service Act). Copying a statute without invitation, if legitimate at all, presents a different question; at least for preemptive statutes, such ordinances may be inherently invalid as intrusions into the State's regulatory terrain. Texas cases involving cities actually copying vast regulatory programs without invitation are practically nonexistent; the City seeks to open a new frontier. But the logic of field preemption compels the result that the Ordinance is invalid even if all it did was copy the Act.

Field preemption in federal law, as in Texas, turns on a statutory or regulatory regime being "so pervasive . . . that Congress left no room for the States to supplement it." *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (internal quotation omitted). When Congress provides "a full set of standards . . . designed as a harmonious whole . . . even *complementary* state regulation is impermissible," which is true "*even if* [state regulation] *is parallel to federal standards.*" *Id.* at 2502 (emphasis added; internal quotations omitted). "It is not always a sufficient answer to a claim of pre-emption to say that state rules supplement, *or even mirror*, federal requirements."

United States v. Locke, 529 U.S. 89, 115 (2000) (emphasis added).

The Ordinance does not, in fact, "mirror" state requirements—but even if it did, it would still be a preempted interference with the State's carefully balanced regulatory program. The Act describes how Cities may participate; venturing elsewhere, even in nominal accord with state law, is preempted.

2. The putative "affirmative defense" only confirms the Ordinance's invasion of state territory.

The City added a so-called "affirmative defense" to the Ordinance in an unsuccessful effort to avoid preemption. At the outset, it does nothing to cure the manifold procedural inconsistencies between the Act and the Ordinance. Aside from that, to avoid criminal prosecution, the City requires proof of "compliance" with all license provisions and Act requirements. Ord. § 21-164(d)(2). True affirmative defenses—like an admitted tortfeasor's statute-of-limitations defense—are independent of, not coterminous with, a claim's elements. *See, e.g.*, *In re USAA*, 307 S.W.3d 299, 308 (Tex. 2010). Forcing someone to bear the burden of affirmatively proving innocence as to hundreds of pages of technical regulations and license conditions is a pointless absurdity; if anything, it makes matters worse. It offers a criminal defendant the chance to escape prosecution (where the burden of proof would

be on the City) by proving his own innocence (with the burden of proof on the defendant). Perhaps in Madame Defarge's Paris, but not in today's Texas.

The Ordinance also makes *operations* unlawful in response to *any* violation, even the most technical—paperwork errors, reporting delays, emissions events. Ord. § 21-164(c). Given TCEQ's discretion and the statutory goal of achieving results rather than maximizing enforcement actions or shutting down industry important to the State for flimsy reasons, *see supra* Part I.A, operations under state law would *not* be unlawful for many of those technical violations. Individuals or entities could hardly *conclusively prove* as much in any given circumstance, however. And even if they could, the "affirmative defense" (and indeed the violation itself) turns not on TCEQ's determination that a facility is sufficiently compliant to continue operating, but on whether the facility can be proven *to be compliant* in the first place, and even the smallest error brings a facility out of compliance. *Id.*[17]

Section 382.113(b) compels the City not to "make unlawful" conduct approved by the State *in the first place*. The statutory obligation is on *the*

[17] An affirmative defense still requires a trial, unless by ordinary summary-judgment proceedings the defendant can "*conclusively prove* all of the elements of the affirmative defense." *Perry v. Greanias*, 95 S.W.3d 683, 691 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (emphasis added). Here, that means "conclusive[ly] prov[ing]" actual innocence.

City, and the affirmative defense is nothing more than the City's attempt to foist its burden onto the regulated public.

3. The Ordinance cannot be treated as merely a local regulation untethered to the Act.

In this litigation, the City has argued that it is exempt from the Act's procedural requirements because, having incorporated state law into the Ordinance, the City is *really* just enforcing its own "local regulations," not the Act at all. The court of appeals accepted that contention. Slip Op. at 28 (the City has power to "enact *and enforce* [its] own ordinances"). This is a shell game; only a few pages earlier, the court had asserted that the Ordinance was valid *because* "it will enforce the *state's existing* rules and regulations." Slip Op. at 23. The City cannot have it both ways. If it is truly just "enforcing the state laws," then it must follow the standards (like TCEQ joinder) that the Legislature insists upon for enforcing state law. But if it is enforcing something other than state law in this area, then it is explicitly exceeding its authority and has no warrant to punish, impose penalties, or collect fees. This Ordinance is preempted on its own terms, and recasting it as something else cannot save it. *Cf. City of Taylor v. Taylor Bedding Manufacturing Co.*, 215 S.W.2d 215, 217 (Tex. Civ. App.—Austin 1948, writ ref'd) (rejecting argument that city "was not attempting to adopt the State law but was inde-

pendently exercising its legislative powers"); *Greater New Braunfels*, 240 S.W.3d at 308 (rejecting similar effort to recharacterize ordinance).

III. The Ordinance unlawfully delegates City lawmaking authority.

The Ordinance adopts those TCEQ rules and regulations that are codified in the Texas Administrative Code, and incorporates them "as they currently are *and as they may be changed from time to time* . . . as if written word for word" in the Ordinance. Ord. § 21-164(a) (emphasis added). In addition to the Ordinance's preemption failings, it also unconstitutionally delegates core lawmaking power from the City Council to TCEQ. *See* Tex. Const. art. XI, § 5 (creating home-rule authority); *id.* art. II, § 1 (guaranteeing separation of powers).

The court of appeals upheld the Ordinance only through results-based reasoning, *starting* with the conclusion that the Ordinance is valid, and therefore concluding that there could not be a non-delegation problem:

> [T]he City is incorporating the air-pollution rules . . . to ensure that the Ordinance is consistent with state law on an ongoing basis. Otherwise, the city council would have to amend the Ordinance each time a relevant portion of the Administrative Code was amended, in order to maintain the consistency required by the [Act].

Slip Op. at 33. The court correctly understood that if the Ordinance ever deviates from state law, it immediately becomes inconsistent and invalid (alt-

hough it denied the many other ways that the Ordinance is preempted).

By contrast, a statute that could be reasonably construed to only incorporate a federal regulation in effect at the time of the statute's adoption could "survive constitutional scrutiny" under non-delegation principles. *Ex parte Elliott* 973 S.W.2d 737, 741-42 (Tex. App.—Austin 1998, no pet.). The opinion below thought that *Elliott* "side-stepped the question," Slip Op. at 32, but this misses the point. *Elliott* could save the statute *by giving it the saving construction*; that was not a mere "side-stepp[ing]." Justice Sharp's opinion below acknowledged that such a saving construction is not available here, yet summarily rejected *Elliott*'s constitutional concern without explaining why *Elliott*'s traditional view of delegation was wrong.

In its response to the Group's petition for review, the City argued that the Ordinance, like the statute in *Elliott,* could be given a saving construction. City Resp. to Pet. at 2, 20. While that would unquestionably avoid the *non-delegation* problem, the Ordinance cannot bear that construction; the court of appeals properly rejected it. Slip Op. at 32-33. Incorporating TCEQ rules "as they may be changed from time to time" is unambiguous, Ord. § 21-164(a), and courts cannot "judicially amend" statutes or ordinances to save them. *Lee v. City of Houston*, 807 S.W.2d 290, 295 (Tex. 1991). That would

be yet another separation-of-powers violation.

The court of appeals correctly construed the Ordinance; its error was then upholding it. It should have invalidated the express delegation of core lawmaking authority to TCEQ, an actor in no way responsible to the City. Apparently seeing no distinction between the Ordinance and ordinary administrative law, the court of appeals cited cases approving the Legislature's delegation to agencies *to enact rules.* Slip Op. at 33. This analogy is doubly inapposite: (1) the Legislature does not allow agencies *to amend laws themselves*, but only to enact regulations pursuant to law, and (2) even such delegation is permissible only "so long as the statutes delegating powers to the agencies establish 'reasonable standards *to guide the entity to which the powers are delegated.*'" *Elliott*, 973 S.W.2d at 740 (quoting *R.R. Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 689 (Tex. 1992)) (emphasis added). But the City Council certainly is not "guid[ing]" TCEQ in this delegation.[18]

[18] The court of appeals found "distinguishable" cases cited by the Group that held that city attorneys—*agents* of a city—could not bind a city without a city council ordinance or resolution. *See* Slip Op. at 31-32 (citing *DeSoto Wildwood Dev., Inc. v. City of Lewisville*, 184 S.W.3d 814, 826 (Tex. App.—Fort Worth 2006, no pet.), and *Whittington v. City of Austin*, 174 S.W.3d 889, 900 (Tex. App.—Austin 2005, pet. denied)). But TCEQ is not even an agent of the City. The court of appeals did not explain why, if ordinary business cannot be delegated to a city attorney, *lawmaking* could nonetheless be delegated to a third party.

PRAYER

For the foregoing reasons, the Group respectfully requests the Court to grant the petition for review, reverse the judgment of the court of appeals, and render judgment for the Group.

Respectfully submitted,

By: */ s / Evan A. Young*

Macey Reasoner Stokes
State Bar No. 00788253
Cristina Espinosa Rodriguez
State Bar No. 00793701
Matthew L. Kuryla
State Bar. No. 24000312
BAKER BOTTS L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002
713.229.1234
713.229.1522 (facsimile)

Evan A. Young
State Bar No. 24058192
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Suite 1500
Austin, Texas 78701-4078
512.322.2506
512.322.8306 (facsimile)
evan.young@bakerbotts.com

COUNSEL FOR PETITIONER

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 9.4 because it contains 14,835 words, excluding the parts of the brief exempted by Rule 9.4(i)(1).

/ s / Evan A. Young
Evan A. Young

CERTIFICATE OF SERVICE

I certify that a copy of BCCA Appeals Group, Inc.'s Brief on the Merits was served on all counsel of record listed below by CM/ECF electronic filing system and by electronic mail, on September 5, 2014:

Counsel for Respondent:

David K. Feldman
City Attorney
Lynette K. Fons
First Assistant City Attorney
Judith L. Ramsey
Chief, General Litigation Section
Mary E. Stevenson
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368
judith.ramsey@houstontx.gov

/ s / Evan A. Young
Evan A. Young

INDEX OF APPENDIX

APPENDIX A

Opinion issued August 29, 2013

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00332-CV

CITY OF HOUSTON, Appellant

V.

BCCA APPEAL GROUP, INC., Appellee

On Appeal from the 269th District Court
Harris County, Texas
Trial Court Case No. 2008-09399

MEMORANDUM OPINION

The present dispute requires us to determine the constitutionality of a home-rule city's ordinance which purports to regulate air pollution within that city's

borders. The BCCA[1] Appeal Group, Inc. (the Group), a non-profit organization whose members own and operate industrial facilities in the Houston area, brought suit to enjoin enforcement of two air pollution control ordinances enacted by the City of Houston (the City)—City of Houston Ordinance Nos. 2007-208 and 2008-414 (collectively, the Ordinance). The Group asserts that the Ordinance is preempted by state law. The parties filed cross-motions for summary judgment; the trial court denied the City's motion and granted the Group's motion. We reverse the trial court's judgment and render judgment in favor of the City.

I. Background

The Group asserts that the Ordinance is preempted because it claims for the City several powers the Legislature granted exclusively to the Texas Commission on Environmental Quality (TCEQ) in the Texas Clean Air Act (TCAA) and the provisions of the Texas Water Code (TWC) that govern enforcement of the TCAA. According to the Group, the Ordinance conflicts with the TCAA, TWC, and Article XI, Section 5 of the Texas Constitution which bars home-rule cities from enacting any ordinance that is "inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." TEX. CONST. art. XI, § 5(a). With that in mind, we will begin by discussing the relevant portions of the Ordinance, TCAA, and TWC.

[1] BCCA stands for "Business Coalition for Clean Air."

a. Texas Clean Air Act and Texas Water Code

In 1967, the Texas Legislature enacted the TCAA which was intended to safeguard the state's air resources without compromising the economic development of the state. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). The TCAA also created an administrative agency which is now known as the TCEQ and granted the agency the authority to promulgate regulations to accomplish the TCAA's goals, namely "to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility."[2] TEX. HEALTH & SAFETY CODE ANN. § 382.002(a) (West 2010); *see also Tex. Ass'n of Bus.*, 852 S.W.2d at 443. TCEQ's rules are codified in title 30 of the Administrative Code. Specifically, the TCAA states that TCEQ shall administer the TCAA and accomplish the TCAA's purpose "through the control of air contaminants by all practical and economically

[2] The agency that was initially created by the TCAA was the Texas Air Control Board. In 1991, the Texas Air Control Board and Texas Water Commission merged and became the Texas Natural Resources Conservation Commission which was later renamed the TCEQ in 2001. *See City of Carrollton v. Tex. Comm'n on Envtl. Quality*, 170 S.W.3d 204, 213 n.5 (Tex. App.—Austin 2005, no pet.); *United Copper Indus. v. Grissom*, 17 S.W.3d 797, 804 n.5 (Tex. App.—Austin 2000, pet. dism'd).

feasible methods." *See* TEX. HEALTH & SAFETY CODE ANN. § 382.011(b) (West 2010).

The TCAA authorizes TCEQ to issue orders and make determinations as necessary to carry out the TCAA's purposes. TEX. HEALTH & SAFETY CODE ANN. § 382.023(a) (West 2010). If it appears that the TCAA or a TCEQ rule, order, or determination is being violated, TCEQ may, inter alia, "take any other action authorized by [the TCAA] as the facts may warrant." *Id.* § 382.023(b) (West 2010); *see also* 30 TEX. ADMIN. CODE § 70.5 (stating TCEQ may resolve enforcement matters "informally without a contested case proceeding in appropriate circumstances"; stating other remedies available to TCEQ in enforcement actions include, inter alia, "issuance of administrative orders with or without penalties; referrals to the Texas Attorney General's Office for civil judicial action; referrals to the Environmental Protection Agency for civil judicial, or administrative action; referrals for criminal action; or permit, license, registration, or certificate revocation or suspension").

Under the TCAA, TCEQ has the sole authority to authorize air emissions, which includes the authority to issue and enforce permits for sources of air contaminants. *See* TEX. HEALTH & SAFETY CODE ANN. § 382.051 (West 2010) (authorizing TCEQ to issue and administer pre-construction permits, operating permits, special, general and standard permits, and "other permits as necessary");

see also State v. Associated Metals & Minerals Corp., 635 S.W.2d 407, 410 (Tex. 1982) (holding that trial court lacked authority to modify air permit since TCEQ's predecessor agency had "sole authority" to grant or deny permits and set emission levels). The TCAA also requires TCEQ to adopt, charge, and collect certain fees associated with its regulatory program. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 382.062(a) (West 2010) (requiring TCEQ to adopt, charge, and collect permit and inspection application fees); *id.* at § 382.0621(a) (West 2010) (requiring TCEQ to adopt, charge, and collect annual operating permit fees).

Although TCEQ has primary responsibility for enforcing the state's environmental laws, *see* TEX. WATER CODE ANN. § 5.012 (West 2008), the TCAA also acknowledges that home-rule cities have an important role to play with respect to air quality regulation in the State. *See* TEX. HEALTH & SAFETY CODE ANN. § 382.113 (West 2010). Subchapter E of the TCAA expressly recognizes that "a municipality has the powers and rights as are otherwise vested by law in the municipality to . . . abate a nuisance; and . . . enact and enforce an ordinance for the control and abatement of air pollution." *Id.* at § 382.113(a). Such ordinances, however, must be "consistent with [the TCAA] and [TCEQ's] rules and orders" and cannot "make unlawful a condition or act approved or authorized under [the TCAA] or [TCEQ's] rules or orders." *Id.* at § 382.113(b).

In addition to the right to enact and enforce its own air-pollution abatement

programs, home-rule cities, as well as other local governments, have the right to enforce state-level air-quality rules and regulations. Specifically, the TCAA provides that local governments may enter and inspect property to determine compliance with the TCAA or a TCEQ rule, variance or order, and requires them to share the results of their inspections with TCEQ when requested. *See* TEX. HEALTH & SAFETY CODE ANN. § 382.111 (West 2010). Local governments may also contract with the TCEQ or with one another to accomplish air quality management, inspection, and enforcement functions and local governments may receive a share of the fees that TCEQ collects to fund their local air-quality inspection programs. *See id.* at §§ 382.0622(d), .115(1) (West 2010). Local governments may also make recommendations to the TCEQ and petition the agency for a rulemaking. *Id.* at § 382.112 (West 2010).

Local governments also have the right to sue in civil district court for civil penalties or injunctive relief for violations of the TCAA. TEX. WATER CODE ANN. § 7.351 (West 2008). Any civil suits initiated by a local government under this subchapter of the TWC, however, must be authorized by the local government's governing body and TCEQ must be joined as a party. *Id.* at §§ 7.352, .353 (West 2008). Any civil penalties recovered by the municipality must be shared equally with the state. *Id.* at § 7.107 (West 2008).

In addition to the provision in the TWC authorizing local governments and

other parties to enforce the TCAA by civil suits, chapter 7 sets forth additional provisions governing enforcement of the TCAA. *See id.* at §§ 7.001, .0025–.005, .031–.051, .0525–.066, .068–.183, .184–.186, .188–.255, .301, .303–.358 (West 2008), §§ .002, .006, .052, .067, .1831, .187, .256, .320 (West Supp. 2012). Specifically, the TWC states that the TCEQ may enforce the TCAA through a number of methods including, inter alia, assessing administrative penalties, directing corrective action, revoking permits, and requesting the Attorney General's Office to file a civil suit seeking injunctive relief and/or civil penalties. *See id.* at §§ 7.032 (authorizing suits for injunctive relief), 7.051 (authorizing assessment of administrative penalties by TCEQ), 7.073 (authorizing assessment of administrative penalties and order of corrective action), 7.105 (authorizing attorney general to file civil suits seeking civil penalties and/or injunctive relief), & 7.302(a)(4), (b) (authorizing revocation or suspension of permits issued pursuant to TCAA).

b. City's Air Quality Ordinance

The City enacted an air-quality ordinance in 1992 which, until 2007, only regulated air pollution from facilities that were not already regulated by the State, i.e., sources of emissions not subject to regulation and licensure by the TCEQ. *See generally* HOUS., TEX., CODE OF ORDINANCES, ch. 21, art. VI (2013). Prior to 2007, the City contracted with TCEQ and cooperated with the agency to ensure

that sources of emissions located within the City's borders were in compliance with state law by inspecting and referring cases for enforcement action to the TCEQ. *See* TEX. HEALTH & SAFETY CODE ANN. § 382.115(1) (authorizing local governments to enter into cooperative agreements with TCEQ or with one another to provide for performance of air quality management, inspection, and enforcement functions). After fiscal year 2005, however, the City chose not to renew its contractual relationship with the agency.

Instead, in 2007, the City amended the Ordinance and established its own air quality regulatory compliance program, along with a new fee schedule to fund the program. HOUS., TEX., ORDINANCE 2007-208 (Feb. 14, 2007) (amending Chapter 21 of Code of Ordinances). The 2007 amendment expanded the Ordinance's scope to include the regulation of facilities and sources subject to regulation by TCEQ. The Ordinance, as amended in 2007, also made it "unlawful for any person to operate or cause to be operated any facility" inside the City's borders unless the facility was registered with the City. ORD. at § 21-162(a). Under the Ordinance, such City-issued registrations would only be "issued by the health officer" after the facility tendered "the applicable fee." *Id.* at § 21-163. Such violations are punishable by a fine of not less than $250 but not more than $1,000 for first-time offenders (and a fine of not less than $1,000 but not more than $2,000 for repeat offenders)." *Id.* at § 21-162(c). Citations for such violations, "like all city tickets,

are enforced in municipal court." *See generally* City's "Draft FAQ About the Changes to the City of Houston Air Pollution Abatement Program and Registration Ordinance."

Prior to 2007, the Ordinance authorized the City's health officers to "carry out a regulatory compliance program to determine whether registered facilities are in compliance with all applicable state and federal air pollution control laws and regulations." HOUS., TEX., ORDINANCE 92-180 § 21-164 (Feb. 2, 1992). Section 21-164 was amended in 2007. Rather than broadly referring to "air pollution control laws and regulations," the City opted to incorporate specific Administrative Code provisions by reference. *See* ORD. 2007-208 § 21-164. Under the version of section 21-164 enacted in 2007, a laundry list of state-level air pollution control laws and regulations implemented by the TCEQ are incorporated "as if written word for word in this section, including appendices and other matters promulgated as part of the state rules." *See id.* at § 21-164(a). Section 21-164, as amended in 2007, further states that such air pollution control laws and regulations are incorporated by reference "as they currently are and as they may be changed from time to time." *See id.* The Ordinance directs the City's health officers to "carry out a regulatory compliance program to determine whether registered facilities are in compliance with all applicable state and federal air pollution control laws and

regulations" and that "[c]ivil, administrative and criminal sanctions imposed by law shall be pursued where violations are determined to exist." *Id.* at § 21-164(b).

The Group filed suit in 2007 asking the trial court to declare the Ordinance unconstitutional and to enjoin the City from enforcing it. While the Group's suit was pending, the City amended the Ordinance in 2008 and made it "an affirmative defense to prosecution [under the Ordinance] . . . that the prosecuted condition or activity has been: (1) Approved or authorized by the [TCAA], state rule or state order; and (2) That the facility is in compliance with any such approval or authorization under the [TCAA], state rule or state order." HOUS., TEX., ORDINANCE 2008-414 § 21-164(d) (May 7, 2008). The 2008 amendments also removed the word "criminal" (without removing the references to prosecution), and capped the fees per location at the highest four fees for the facilities at that location.

c. Cross-motions for Traditional Summary Judgment

Both the City and the Group filed cross-motions for summary judgment. In its motion, the City argued that it was entitled to summary judgment because the Group did not have standing to bring the declaratory judgment action and, even if the Group did have standing, the Ordinance was a legitimate exercise of the City's

police powers.[3] According to the City, its right to regulate air pollution within its borders was not limited by any state law, and in fact, the Ordinance was consistent with applicable state law and in compliance with the Texas Constitution.

In its motion for summary judgment, the Group argued that it had standing to bring the declaratory judgment action and was entitled to have the Ordinance declared invalid and the City enjoined from enforcing the Ordinance as a matter of law. The Group argued that the TCAA created a comprehensive regulatory scheme which gave the TCEQ the exclusive authority to issue permits, set emission ceilings, assess fees, and otherwise regulate the state's air quality. It also set forth in express terms the manner in which local governments, including home-rule cities, could exercise enforcement authority with respect to the regulation of air pollution (e.g., through cooperative agreements with either TCEQ or other local governments, by bringing a civil suit in district court in which TCEQ was named as a necessary party, by enacting and enforcing ordinances for the control and abatement of air pollution that are not inconsistent with the TCAA or TCEQ's rules or orders).

According to the Group, the Ordinance, which created a "duplicative and inconsistent regulatory scheme," was an invalid attempt by the City to usurp

---

[3] Although the City initially disputed the Group's standing to bring this suit and sought summary judgment on that basis, the trial court held that the Group had organizational standing. The City is not appealing this portion of the trial court's order.

TCEQ's authority to regulate the state's air quality and was inconsistent with state law. For example, the Group argued that the provisions of the Ordinance requiring facilities to register with, and pay fees to, the City were inconsistent with the TCAA and made illegal conduct that was otherwise legal under state law. The Group further argued that the Ordinance's wholesale incorporation by reference with respect to specific state-level air pollution control laws as set forth in the Administrative Code "as they currently are and as they may be changed from time to time," *see* ORD. § 21-164, constituted an impermissible delegation of the City's authority.

After extensive briefing and argument on the parties' cross-motions for traditional summary judgment, the trial court ruled in an eleven-page order that the Ordinance was an invalid exercise of municipal power because it was inconsistent with state law. The final judgment issued on March 31, 2011, granted the Group's motion for summary judgment, denied the City's motion, declared the Ordinance's registration program, fees, and enforcement procedures to be unenforceable, and enjoined the City from enforcing the Ordinance.

The City is appealing.

II. Standard of Review

Traditional summary judgment is proper only when the movant establishes that there is no genuine issue of material fact and the movant is entitled to

judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Browning v. Prostok*, 165 S.W.3d 336, 344 (Tex. 2005). When we review cross-motions for summary judgment, we consider both motions de novo and render the judgment that the trial court should have rendered. *See Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007).

We review de novo the trial court's ruling on the validity of an ordinance and we consider all the circumstances and determine as a matter of law whether the legislation is invalidated by a relevant statute or constitutional provision. *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998) (citing *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 793 (Tex. 1982)). In doing so, we presume that the ordinance is valid, and hold the challenging party to its "extraordinary burden" to establish that the ordinance is invalid. *See City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984); *Comeau*, 633 S.W.2d at 792–93. An ordinance is a valid exercise of a city's police power so long as the regulation was adopted to accomplish a legitimate goal, that is, it must be "substantially related" to the health, safety, or general welfare of the people. *See Turtle Rock Corp.*, 680 S.W.2d at 805.

a. *Powers of Home Rule Municipality*

Home-rule cities, such as the City, derive their power from article XI, section 5 of the Texas Constitution. *See* TEX. CONST. art. XI, § 5; TEX. LOCAL

GOV'T CODE ANN. § 51.072 (West 2008); *Lower Colorado River Auth. v. City of San Marcos*, 523 S.W.2d 641, 643 (Tex. 1975) (citing *Glass v. Smith*, 244 S.W.2d 645, 649 (Tex. 1951)). Therefore, a home-rule city looks to the Legislature not for grants of authority, but for limitations on their powers. *City of San Marcos*, 523 S.W.2d at 643. The Legislature may limit the power of home-rule cities either expressly or by implication, so long as those limitations appear with "unmistakable clarity." *Id.* at 645 (citing *City of Sweetwater v. Geron*, 380 S.W.2d 550, 552 (Tex. 1964)).

When a home-rule city ordinance appears to be in conflict with a state statute, our duty is to reconcile the two "if any fair and reasonable construction of the apparently conflicting enactments exist[s] and if that construction will leave both enactments in effect." *Int'l Ass'n of Fire Fighters, Local 1173 v. City of Baytown*, 837 S.W.2d 783, 787 (Tex. App.—Houston [1st Dist.] 1992, pet. denied) (citing *City of Beaumont v. Fall*, 116 Tex. 314, 291 S.W. 202, 206 (1927)). If it is not possible to reconcile the two enactments, the state statute trumps the city ordinance. *Dall. Merchant's and Concessionaire's Ass'n v. City of Dall.*, 852 S.W.2d 489, 491 (Tex. 1993) (home-rule city's ordinance that attempts to regulate subject matter preempted by state statute unenforceable to extent it conflicts with statute).

b. *Principles of Statutory Construction*

Questions of statutory interpretation are questions of law which we review de novo. *City of DeSoto v. White*, 288 S.W.3d 389, 394 (Tex. 2009). Under the well-settled principles of statutory construction, we begin with the statutory language itself. *See State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). Our primary goal is to give effect to the Legislature's intent, and we turn first to the plain meaning of the words and terms chosen. *See id.*; *Owens & Minor, Inc. v. Ansell Healthcare Prods., Inc.*, 251 S.W.3d 481, 483 (Tex. 2008) (citation omitted) ("[I]t is a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent."). We presume that every word in a statute was chosen by the Legislature for a purpose. *TGS–NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).

If the statutory language is clear and unambiguous, we interpret its words according to their plain and common meaning unless that interpretation would lead to absurd results. *Id*. When a statute's language is unambiguous, it is inappropriate to resort to rules of construction or extrinsic aids. *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008); *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865–66 (Tex. 1999). The judiciary's role "is not to second-guess the policy choices that inform our statutes or to weigh the

effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent." *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 690 (Tex. 2007) (quoting *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003)). We use these same rules to construe municipal ordinances. *See Bd. of Adjustment of City of San Antonio v. Wende*, 92 S.W.3d 424, 430 (Tex. 2002).

III. Analysis

The question before us is whether the TCAA or TWC preempts the City's authority to enact the Ordinance or if, instead, there is a reasonable construction under which both these statutes and the Ordinance remain enforceable.

a. The City's authority to regulate air pollution or enact air pollution abatement programs is not preempted by state law.

If the Legislature decides to preempt a subject matter normally within a home-rule city's broad police powers (either expressly or by implication), it must do so with "unmistakable clarity." *Dall. Merchant's*, 852 S.W.2d at 491; *see also State v. Chacon*, 273 S.W.3d 375, 378 (Tex. App.—San Antonio 2008, no pet.).

i. Express Preemption

The Group argues that the TCAA gave the TCEQ the exclusive authority to issue permits, set emission ceilings, assess fees, and otherwise regulate the state's air quality. Neither the TCAA nor the state constitution, however, contains language expressly limiting a home-rule city's power—or granting TCEQ

exclusive authority—to enact the type of regulations at issue here, i.e., air pollution abatement programs.[4] On the contrary, the TCAA expressly and unambiguously *acknowledges* the City's right to enact and enforce its own air pollution abatement program, subject to two previously mentioned limitations. *See* TEX. HEALTH & SAFETY CODE ANN. § 382.113(a)(2), (b) (stating "a municipality has the powers and rights . . . [to] enact and enforce an ordinance for the control and abatement of air pollution, or any other ordinance, not inconsistent with [the TCAA] or [TCEQ's] rules or orders" and does not "make unlawful a condition or act approved or authorized under [the TCAA] or [TCEQ's] rules or orders.") As such, the TCAA does not expressly preempt the City's power to regulate air pollution within its borders.

ii. Preemption By Implication

The lack of an express preemption, however, does not end our analysis. We must now determine whether the Ordinance is implicitly preempted by state law. The Group argues that the Legislature can express its intention to preempt local

---

[4] Had the legislature intended the state to be the *exclusive* regulator of air pollution within the state's borders, it certainly could have done so, and indeed, has done so with respect to other areas of regulation. *See, e.g.*, TEX. ALCO. BEV. CODE ANN. § 1.06 (West 2007) ("Unless otherwise specifically provided by the terms of this code, the manufacture, sale, distribution, transportation, and possession of alcoholic beverages shall be governed exclusively by this code."); TEX. NAT. RES. CODE ANN. § 133.085(c) (West 2011) ("The provisions [of the Quarry Safety Act] supercede any other municipal ordinance or county regulation that seeks to accomplish the same ends as set out herein.").

regulation with "unmistakable clarity" by implementing a comprehensive regulatory regime that regulates the specific details of a given subject-matter (i.e., by occupying the field of regulation with respect to the subject matter). Although the TCAA is extensive in its scope and there is considerable overlap between the Ordinance and the TCAA, the mere fact that the City is attempting to regulate the same subject-matter as the State does not, in and of itself, mean that the legislature intended to preempt such municipal regulation, much less with "unmistakable clarity." *City of Richardson v. Responsible Dog Owners of Tex.*, 794 S.W.2d 17, 19 (Tex. 1990) (holding home-rule city's comprehensive animal control ordinance not preempted by state penal code provisions governing keeping of vicious dogs, despite "small area of overlap"; stating that "the mere fact that the legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted"); *see also Brooks v. State*, 226 S.W.3d 607, 610–11 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (citation omitted) ("In the absence of express limitations, there is nothing that prevents a city from enacting an ordinance covering the same subject as state or federal regulations.").

Generally, such ordinances are only void if they are inconsistent with state law. *See* TEX. CONST. art. XI, § 5(a) (prohibiting home-rule cities from enacting ordinances that "contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State"). With

respect to the TCAA, an ordinance that attempts to regulate the same subject matter as the TCAA is valid so long as it (1) is not inconsistent with the TCAA, the TWC provisions enforcing the TCAA, or TCEQ's rules, regulations, and orders, and (2) does not make unlawful a condition or act approved or authorized under the TCAA, TWC, or TCEQ's rules, regulations, or orders. *See* TEX. HEALTH & SAFETY CODE ANN. § 382.113(b).

iii. Discussion

The Ordinance requires facilities to register with the City by filing an application and paying the applicable registration fee. *See* ORD. §§ 21-163, -166. It is unlawful to operate a facility within the City's boundaries that is not registered with the City. *See id.* at § 21-162(a). Such violations are punishable by a fine of not less than $250 but not more than $1,000 for first-time offenders (and a fine of not less than $1,000 but not more than $2,000 for repeat offenders). *Id.* at § 21-162(c). The Group argues that these sections are not only inconsistent with state law, but also make unlawful a condition or act approved or authorized under state law.

1. Registration (§ 21-163)

The Group argues that a facility's lawful operation pursuant to TCEQ's rules and orders would nonetheless be unlawful under the Ordinance, if that facility failed to register with the City or pay a registration fee. *See* ORD. §§ 21-162

(requiring registration; enforcement provision), 163 (governing issuance of registration), & 166(a) (setting registration fees). Thus, according to the Group, the entire registration program created by the ordinance is preempted. If the Group is correct, then any concurrent regulatory scheme or permitting process by a municipality would be preempted. This does not appear to be the prevailing law in Texas.

Even when the Legislature gives an administrative agency extensive authority to regulate a given subject-matter, a municipal ordinance that establishes a parallel registration, licensing, and/or permitting program is not necessarily preempted. *See Unger v. State*, 629 S.W.2d 811, 812–13 (Tex. App.—Fort Worth 1982, writ ref'd). In *Unger*, the Fort Worth Court of Appeals upheld the authority of a home-rule city acting under its police power to both regulate and prohibit the drilling of oil wells within the city limits, despite the fact that the Legislature had given the Texas Railroad Commission (RRC) broad jurisdiction over all oil and gas wells in Texas and authorized the RRC to, among other things, issue drilling permits for such wells. *See* TEX. NAT. RES. CODE ANN. § 81.051 (a)(2) (West 2011) (granting RRC jurisdiction over all oil and gas wells in Texas); 16 TEX. ADMIN. CODE § 3.5 (requiring RRC-issued drilling permits). The ordinance in question made it unlawful to drill an oil or gas well within the city limits without a city-issued drilling permit. *Unger*, 629 S.W.2d at 812. The court held that the

Legislature's delegation of authority to the RRC to regulate the oil and gas business in Texas—which includes the issuance of drilling permits—was not inconsistent with municipal authority to also regulate in that area for its own legitimate purpose.[5] *See id.* at 812–13.

Unger is "writ refused" and has the same precedential value as a Texas Supreme Court opinion. Nevertheless, the Group cites to several opinions that pre-date *Unger* for the general proposition that "field-preemption" is one way that the Legislature can express its intention to preempt local regulation with "unmistakable clarity." *See City of Beaumont*, 291 S.W. at 205–06 ("In a word, as long as the state does not, in its Constitution or by general statute, cover any field of the activity of the cities of this state, any given city is at liberty to act for itself."); *Prescott v. City of Borger*, 158 S.W.2d 578, 581 (Tex. Civ. App.—Amarillo 1942, writ ref'd) ("It is well established law in this state that, generally, the governing authorities of cities are prohibited by the Constitution, Art. 11, Sec. 5 . . . from entering a field of legislation that has been occupied by general legislative enactments.").[6] The oil and gas industry in Texas is heavily regulated

---

[5] The same court upheld a similar ordinance the previous year on different grounds. *See Helton v. City of Burkburnett*, 619 S.W.2d 23, 24 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.) (rejecting argument that city ordinance which required, inter alia, permit to drill oil and gas well within city limits and assessed $250 permit fee, violated driller's federal 14th Amendment rights).

[6] The Group also relies upon *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982) and *City of Carrollton*, 170 S.W.3d at 214—both of which are

and if the Legislature did not preempt the field with respect to the location of oil and gas wells within the state's borders, as it clearly did not, based upon *Unger*,[7] then it certainly did not do so here with "unmistakable clarity."

We note that the Texas Supreme Court recently held that another City ordinance which required concrete-crushing facility operators to obtain a municipal permit in order to operate within the city was preempted. *See S. Crushed Concrete, LLC v. City of Hous.*, 398 S.W.3d 676, 679 (Tex. 2013). That case, however, is distinguishable. In *Southern Crushed Concrete*, the concrete-crushing facility applied for, and was granted, a permit by TCEQ to operate at a given location in the City. *Id.* at 677. The facility then applied to the City for a municipal permit and was denied because the facility's operations would violate the City's newly enacted land-use ordinance which imposed more restrictive

---

factually distinguishable. *City of Carrollton*, which—like the Attorney General's opinions the Group cites—is not binding authority, is also factually distinguishable because the court in that case did not determine the validity of a municipal ordinance, but rather whether the provisions in the Water Code that spoke directly to the certificate cancellation process for *all holders* also applied to a municipality that was also a certificate holder. 170 S.W.3d at 214. *Comeau* is also factually distinguishable. In that case, the Supreme Court concluded that a local ordinance governing the location of mobile homes was not inconsistent with, and therefore, not preempted by, state and federal laws governing mobile home construction, safety, and installation standards. 633 S.W.2d at 795–96. Although the Court stated that the applicable state and federal statutes "preempted the field as to construction, safety, and installation of mobile homes," unlike here, those statutes *expressly prohibited* local governments from adopting different standards.

[7] *See* TEX. NAT. RES. CODE ANN. § 81.051 (a)(2) (West 2011) (granting Railroad Commission jurisdiction over all oil and gas wells in Texas); 16 TEX. ADMIN. CODE § 3.5 (requiring RRC-issued drilling permits).

locality restrictions than those imposed under the TCAA and TCEQ air quality regulations and rules. *Id.* The Supreme Court rejected the City's argument that the ordinance did not abrogate TCEQ's permit because the ordinance regulated land-use, not air quality, noting that "[i]If the City's contention were true, a city could almost always circumvent section 382.113(b) and vitiate a [TCEQ] permit that it opposes by merely passing an ordinance that purports to regulate something other than air quality." *Id.* at 679. The Court expressly limited its holding to such circumstances by explaining that it was *not* deciding the issue of "whether a city may more restrictively regulate an activity that the State also regulates." *Id.*

Unlike in the *Southern Crushed Concrete* case, the City is not attempting to hold an affected industry to a higher, more onerous standard than the one set forth by the state. On the contrary, the Ordinance is the City's attempt to create a concurrent regulatory scheme or permitting process through which it will enforce the *state's existing* rules and regulations. In fact, the City acknowledges that its decision to regulate and enforce the TCAA and TCEQ rules and regulations on its own in this case—rather than in cooperation with TCEQ—is due to what it perceives to be TCEQ's lax enforcement efforts. According to the City, the Group is only challenging the constitutionality of the Ordinance because the industry "currently enjoys what it perceives to be a permissive regulatory approach from the TCEQ" and it fears regulation by "a vigilant watch dog" (i.e., the City).

2. Fees and Enforcement (§§ 21-162 and 166)

The Group argues that because the City's duplicative registration program is preempted, the fees associated with it, which are also duplicative, are also invalid.

First, we note that although the TCAA requires TCEQ to adopt, charge, and collect certain fees associated with its permitting process, the statute does not prohibit a municipality that has adopted its own air-pollution abatement program—which the TCAA recognizes it is authorized to do—from also charging and collecting fees to fund the program. *See*, *e.g.*, TEX. HEALTH & SAFETY CODE ANN. §§ 382.062 (requiring TCEQ to adopt, charge, and collect fees for permit and inspection applications), .0621 (requiring TCEQ to adopt, charge, and collect annual operating permit fees), & .113(a) (recognizing municipality's authority to enact its own air-pollution abatement program). Thus, the TCAA does not expressly preempt the imposition of such registration fees.

Second, we note that a home-rule city's authority to enact ordinances under its police power carries with it the corresponding right to impose fees to fund and implement such ordinances; such fees are presumed valid if they are reasonably associated with the cost of administering the ordinance. *See City of Hous. v. Harris Cnty. Outdoor Adver. Assoc.*, 879 S.W.2d 322, 326 (Tex. App.—[14th Dist.] writ denied) (stating statutes or ordinances imposing fees under home-rule city's police power to regulate are prima facie valid and presumed reasonable);

City of Amarillo v. Maddox, 297 S.W.2d 750, 752 (Tex. Civ. App.—Amarillo 1956, no writ). The Group does not contend that the registration fees imposed under section 21-166 are not reasonably associated with the cost of administering the ordinance. On the contrary, the Ordinance's fee schedule as amended in 2007 and 2008 is consistent with the TCAA's own fee schedule. Compare TEX. HEALTH & SAFETY CODE ANN. § 382.062(d) (West 2010) (authorizing application, permit, and inspection fees of no less than $25 or more than $75,000) with ORD. 2007-208 § 21-166(a) (setting registration fees of $250 to $3,000). *See also* ORD. 2008-414 § 21-166(b) ("Should more than one facility exist on any premises, then the total of all applicable fees shall be payable up to a maximum of the equivalent of a fee for the four facilities with the highest fees.").

Section 21-162's enforcement provision only pertains to violations of the Ordinance (i.e., a facility's failure to register with the City in violation of the Ordinance) and, as such, is not preempted by state law. *See* ORD. § 21-162(a) (stating that it is unlawful to operate facilities within City's boundaries that are not registered with City). Such violations are punishable by a fine of not less than $250 but not more than $1,000 for first-time offenders (and a fine of not less than $1,000 but not more than $2,000 for repeat offenders). *Id.* at § 21-162(c).

3. Enforcement and Incorporation of State Law

The Group also challenges the validity of section 21-164 which lists ten

sections of the Texas Administrative Code and purports to incorporate them by reference, as if they were written word for word in the Ordinance. *See id.* at § 21-164(a). Section 21-164(c) makes it unlawful to operate any facility not in compliance with any of the TCEQ rules listed in 21-164(a). A violation of section 21-164 is punishable by a fine between $250 and $1,000 for first-time offenders and a fine of between $1,000 and $2,000 for repeat offenders. *Id.* at § 21-164(e). "Each day that any violation under this section continues shall constitute a separate offense." *Id.* at § 21-164(f).

The City argues that since the Ordinance incorporates the enforcement provisions of the TCAA, the Ordinance can only be inconsistent with the TCAA if the TCAA were inconsistent with itself. In other words, an act can only violate section 21-164(a) of the Ordinance if it also violates the TCAA. The Group responds that, unlike the Ordinance, the TCAA and TWC give TCEQ broad discretion when it comes to determining compliance with the TCAA and TCEQ rules and orders. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 382.023–.025, .0216 (West 2010), § .0215 (West Supp. 2012); TEX. WATER CODE ANN. § 5.127. According to the Group, the City's duplicative program—with its wholesale incorporation of only parts of the TCEQ regulatory scheme—would render the TCEQ's discretionary actions and determinations ineffective inside the City's limits, subverting the express goals of the Legislature. However, as the City points

out, the Ordinance not only requires the City's health officers to cooperate with county, state, and federal agencies in the enforcement of the state and local laws, but the 2008 amendments to the Ordinance state that it was "an affirmative defense to prosecution [under the Ordinance] . . . that the prosecuted condition or activity has been: (1) Approved or authorized by the [TCAA], state rule or state order; and (2) That the facility is in compliance with any such approval or authorization under the [TCAA], state rule or state order." ORD. § 21-164(d); *see also id.* at §§ 21-146(3),-164(b).

A plain reading of the Ordinance, as amended, demonstrates that it does not subvert the Legislature's goals by rendering the TCEQ's discretionary actions and determinations ineffective inside the City's limits. On the contrary, the City officers charged with enforcing the Ordinance are required to defer to the agency's decisions with respect to the lawfulness of a given air-contaminant emitter's actions. If conduct is not unlawful under state law, as determined by TCEQ, it is not unlawful under the Ordinance.

The Group also argues that the Ordinance impermissibly empowers the City to prosecute air-quality cases criminally, in municipal court, rather than by filing suit in civil district court. Local governments have the right to sue in civil district court for civil penalties or injunctive relief for violations of the TCAA, so long as the TCEQ is joined as a party and an administrative penalty has not been paid to

TCEQ for the violation. TEX. WATER CODE. ANN. §§ 7.068, .351, .353. Any civil penalties recovered by the municipality must be shared equally with the state. *Id*. § 7.107. The Group contends that the Ordinance, which (1) only allows the City to prosecute violations of state law in municipal court under criminal rules rather than in district court under civil rules, as required by TWC section 7.351, (2) does not require joinder of the TCEQ as a "necessary and indispensable party" in its enforcement actions under this section, and (3) does not require the City to share any penalties it recovers with TCEQ, is inconsistent with state law.

The TCAA expressly states that municipalities retain the power to enact *and enforce* their own ordinances to control and abate air pollution. *See* TEX. HEALTH & SAFETY CODE ANN. § 382.113(a)(2). It does not limit where or how the municipality may carry out its enforcement responsibilities. Correspondingly, the TWC "does not exempt a person from complying with or being subject to other law," and, most importantly, its remedies are "cumulative of all other remedies." TEX. WATER CODE ANN. §§ 7.004, .005. Thus, the City has the authority to sue in civil district court for civil penalties or injunctive relief for violations of the TCAA pursuant to the TWC, but it is not prohibited from enforcing its own air-pollution abatement ordinances through other means. *See generally* TEX. LOC. GOV'T CODE ANN. § 54.001(a) (West 2008) ("The governing body of a municipality may enforce each rule, ordinance, or police regulation of the municipality and may

punish a violation of a rule, ordinance, or police regulation."); *id.* at § 54.012(1), (2) (West 2008) ("A municipality may bring a civil action for the enforcement of an ordinance . . . for the preservation of public safety . . . [or] relating to the preservation of public health. . . .").

As the party seeking to invalidate the Ordinance, the Group bore the burden of showing that the Legislature intended to preempt the Ordinance with "unmistakable clarity." The TCAA, which expressly acknowledges the City's right to enact and enforce its own air-pollution abatement programs, does not prohibit such cities from bringing air-pollution suits under their own ordinances. Furthermore, although the TWC gives cities the power to enforce state-level air-pollution requirements in civil district court, it expressly states that such remedies are cumulative, and thus it does not prohibit cities from enforcing their ordinances—whether they be in criminal or civil proceedings—in municipal court. As such, neither the TWC nor TCAA appears to preempt the City's power to enforce its own Ordinance which incorporates state law by reference, with "unmistakable clarity."

Invoking the statutory-construction principle of *expressio unius est exclusio alterius*—the mention of one thing impliedly excludes other things of the same type—the Group maintains that the Legislature's delineation of a specific method for local governments to enforce state air-pollution rules and regulations implies its

intent to prohibit local governments from enforcing those rules through any other process. This principle, however, is not an inflexible rule, but merely a tool for ascertaining legislative intent. *See Mid–Century Ins. Co. v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999). More importantly, because the statute is unambiguous, we need not resort to such rules of construction or other extrinsic aids.

b. The Ordinance's Incorporation of State Agency Rules Does Not Constitute an Impermissible Delegation of City's Power.

Section 21-163(a) lists ten sections of the Administrative Code and states that these "air pollution control laws as they currently are and as they may be changed from time to time, are hereby incorporated as if written word for word in this section, including appendices and other matters promulgated as part of the state rules." *See* ORD. § 21-163.

The Group argues that, even if this section of the Ordinance is not preempted, the Ordinance nevertheless fails because it impermissibly delegates power given to the City under Article XI, Section 5 of the Texas Constitution to TCEQ by incorporating by reference specific rules promulgated by TCEQ and codified in the Administrative Code that implement the TWA and TCAA. *See* ORD. § 21-163(a). The Group argues that such a delegation of legislative power violates the Texas Constitution's separation of powers clause which states:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a

> separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1. The Group argues that the City cannot delegate to any third party—even the TCEQ—the power to make unilateral changes to the City's Code of Ordinances without any action on the part of the city council. In the seminal "nondelegation doctrine" case, *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, the Texas Supreme Court cautioned that the doctrine "should be used sparingly" and that courts should consider delegations of authority narrowly to uphold their validity whenever possible. 952 S.W.2d 454, 475 (Tex. 1997).

The Group cites to *Desoto Wildwood Development, Inc. v. City of Lewisville*, 184 S.W.3d 814, 826 (Tex. App.—Fort Worth 2006, no pet.) and *Whittington v. City of Austin*, 174 S.W.3d 889, 900 (Tex. App.—Austin 2005, pet. denied) for the general proposition that a city may not delegate the transaction of city business except by resolution or ordinance. These cases, however, are distinguishable because the courts in both cases were deciding whether statements made by an agent of the city were binding upon the city. *Desoto Wildwood Dev., Inc.*, 184 S.W.3d at 826 (developer sued city for breach of contract; court held that city attorney's statements in pre-suit letter to developer were not binding on city

because there was no evidence that city attorney had been authorized by city council to act for it on this matter); *Whittington*, 174 S.W.3d at 900 (holding city, which could only act through its governing body, failed to meet its summary judgment burden in condemnation case because statements in city's petition and other pleadings were not conclusive proof that city's governing body—as opposed to its attorneys and other agents—determined to condemn property for public use).

The Group also directs us to a 1998 opinion of the Austin Court of Appeals which addresses the constitutionality of the Texas Legislature's alleged delegation of authority to a federal administrative agency. *See Ex parte Elliott*, 973 S.W.2d 737, 741 (Tex. App.—Austin 1998, pet. ref'd). *Elliott* is also distinguishable. In that case, although the court questioned the constitutionality of a state statute that attempted to adopt future laws, rules, or regulations of the federal government, it nevertheless side-stepped the question by concluding that the Texas Solid Waste Disposal Act's incorporation of the EPA's definition of "hazardous waste" in the federal Solid Waste Disposal Act was not a delegation of authority in violation of the Texas Constitution's separation of powers clause, but rather an incorporation by reference. *Id.* at 742–43.

Neither the Group nor the City has directed us to—and we have not found—any cases addressing the constitutionality of a home-rule city's ordinance that expressly incorporates state agency rules, as they currently exist, and as they may

be amended in the future. The Court of Criminal Appeals, however, has already upheld the Legislature's delegation of air-quality rulemaking and enforcement authority to TCEQ. *See State v. Rhine*, 297 S.W.3d 301, 312–13 (Tex. Crim. App. 2008) (concluding that state legislature's delegation of air-quality rulemaking and enforcement authority to TCEQ, an executive agency, did not violate non-delegation doctrine). TCEQ adopts rules (which are codified in Title 30 of the Administrative Code) in order to implement those powers and duties delegated to it by the Legislature. Here, the City is incorporating the air-pollution rules promulgated pursuant to that lawful delegation, as amended, to ensure that the Ordinance is consistent with state law on an ongoing basis. Otherwise, the city council would have to amend the Ordinance each time a relevant portion of the Administrative Code was amended, in order to maintain the consistency required by the TCAA.

We conclude that the Group failed to show that the Legislature intended to preempt the Ordinance with "unmistakable clarity," and thus, failed to meet its extraordinary burden to establish that the ordinance is invalid. *See Turtle Rock Corp.*, 680 S.W.2d at 805; *Comeau*, 633 S.W.2d at 792–93. We affirm the City's sole issue.

IV. Conclusion

We reverse the trial court's judgment and render judgment in favor of the City.

Jim Sharp
Justice

Panel consists of Justices Jennings, Higley, and Sharp.

APPENDIX B

185

(11)
MPSJ2

NO. 2008-09399

BCCA APPEAL GROUP,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
	§	
VS.	§	HARRIS COUNTY, TEXAS
	§	
CITY OF HOUSTON,	§	
	§	
Defendant.	§	269TH JUDICIAL DISTRICT

MEMORANDUM OPINION AND ORDER

Pending before the Court are (1) Plaintiff BCCA Appeal Group's Motion for Summary Judgment and (2) Defendant City of Houston's Motion for Summary Judgment. The Parties extensively briefed the issues raised by the various motions and gave detailed argument at the hearing on the motions. The issues raised by the parties are ripe for consideration and ruling, and the Court is persuaded that there are no genuine issues of material fact that require a trial or prevent the Court from deciding this case by summary judgment.

After reviewing the motions and responsive briefing and the admissible summary judgment evidence and after considering the arguments of counsel and the applicable law, the Court concludes that Plaintiff's motion for summary judgment should be granted and Defendant's motion for summary judgment should be denied.

I. BACKGROUND

A. The Legislature Enacts the Texas Clean Air Act.

In 1989, the Texas Legislature enacted the Texas Clean Air Act ("TCAA"), which is codified at Chapter 382 of the TEXAS HEALTH & SAFETY CODE. The purpose of the TCAA is "to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the

maintenance of adequate visibility." TEX. HEALTH & SAFETY CODE ANN. § 382.002(a). The TCAA empowers the Texas Commission on Environmental Quality ("TCEQ") to administer and enforce the TCAA. *Id.* § 382.011; TEX. WATER CODE ANN. §§ 5.001(2); 5.013(a)(11). To that end, the Legislature authorized the TCEQ to adopt rules for regulating air quality. TEX. HEALTH & SAFETY CODE ANN. § 382.017. TCEQ in turn promulgated regulations related to the commission's supervision of air quality. *See* 30 TEX. ADMIN. CODE, tit. 30.

B. The City of Houston Amends its Ordinances in 2007-2008.

In 2007, the City of Houston adopted Ordinance 2007-208 ("2007 Amendment"), which amended City of Houston Ordinance §§ 21-146, -161 to -165. A year later the City further refined its amendments of §§ 21-161 & -164 to -166. *See* City of Houston Ordinance 2008-414 ("2008 Amendment"). The 2007 and 2008 Amendments established a City-administered permitting regime for all TCAA facilities or sources within city limits; incorporated the TCEQ's rules and regulations governing air quality found in 30 TEX. ADMIN. CODE §§ 101, 106, 111-117, 122; empowered the City's health officer to investigate violations of the state's Clean Air Act; and imposed criminal penalties for violations of the Act. *See* HOUSTON, TEX. ORDINANCES §§ 21-146, 21-161 to -166.

C. Plaintiff Files Suit.

BCCA Appeal Group filed suit after the City enacted the 2007 Amendments and now asks this Court to (1) declare the 2007 and 2008 Amendments invalid and unenforceable under the Texas Health and Safety Code, the Texas Water Code, and the Texas Constitution and (2) enjoin enforcement of the ordinances and interference with the TCEQ's authority to regulate the state's air quality. (Plaintiff's First Amended Petition at 13-14) The City challenges BCCA Appeal Group's standing to bring this action and maintains that the 2007 and 2008 Amendments are valid and enforceable laws.

D. The Parties Move for Summary Judgment.

The parties each now move for summary judgment on their respective positions. BCCA Appeal Group argues that the 2007 and 2008 Amendments are inconsistent with the TCCA and the Texas Water Code because they:

1) Expand the sources to be regulated;

2) Add an additional layer of regulatory fees, which are payable only to the City of Houston;

3) Impose an additional regulatory scheme that conflicts with the system created by the TCAA and the TCEQ; and

4) Bypass the State's civil, administrative, and criminal enforcement mechanisms in favor of enforcement in the City's Municipal Courts.

The City of Houston contends in response and in its own motion for summary judgment that the 2007 and 2008 Amendments are not inconsistent with state law and are therefore valid exercises of the City's powers as a home-rule municipality. But as a preliminary matter, the City challenges the BCCA Appeal Group's standing to bring its claims at all.

II. STANDING

BCCA Appeal Group is an association formed to advance the common interest of its ten members with respect to their mutual goals of clean air and a strong economy. But the City of Houston questions BCCA Appeal Group's standing to challenge the 2007 and 2008 Amendments.

An association has standing to sue on behalf of its members if it can show:

1) Its members would have standing to sue in their own right;

2) The interests it is suing to protect are germane to the group's purpose; and

3) Neither the claim asserted nor the relief sought requires that any individual member participate in the suit.

Texas Ass'n of Business v. Texas Air Control Bd., 852 S.W.2d 440, 447 (Tex. 1993). The City alleges that BCCA Appeal Group cannot satisfy the first two elements of this test. The Court is not persuaded.

A. Three Members with Standing is Enough to Establish Associational Standing.

The City first argues that because so few of BCCA Appeal Group's members would have standing to sue the City in their own right, the association cannot satisfy the first element of associational standing. Three of BCCA Appeal Group's ten members operate facilities that are subject to the City's 2007 and 2008 Amendments. The City does not argue that the three members with facilities located within the City's jurisdiction lacked standing to sue in their own right: instead, the City simply argues that three out of ten is not enough.

"The first prong of associational standing may be satisfied if at least one of the organization's members would have standing individually." ***Save Our Springs Alliance, Inc. v. City of Dripping Springs***, 304 S.W.3d 871, 878 (Tex. App.—Austin 2010, pet. denied); ***accord Hays County v. Hays County Water Planning P'ship***, 106 S.W.3d 349, 357 (Tex. App.—Austin 2003, no pet.). The Court concludes that although three out of ten members is not a majority of the group's membership, it is enough to satisfy the associational standing test. For these reasons as well as those stated in BCCA Appeal Group's briefing on the issue, the Court is persuaded that BCCA Appeal Group satisfies the first element of associational standing.

B. The Interests Advanced in this Case are Germane to Plaintiff's Purpose.

But the City also challenges whether BCCA Appeal Group meets the second standing element: that the interests the group seeks to protect are germane to its purpose. One of the stated purposes of BCCA Appeal Group is to promote the dual goals of clean air and a strong economy. The Court concludes that the interests BCCA Appeal Group seeks to protect by way

of this lawsuit are germane to its purposes of promoting the dual goals of clean air and a strong economy. For these reasons as well as those stated in BCCA Appeal Group's briefing on the issue, the Court is persuaded that BCCA Appeal Group satisfies the second element of associational standing.

In sum, BCCA Appeal Group has satisfied the first two elements of the associational-standing test. The City of Houston does not challenge whether BCCA Appeal Group meets the third element. Therefore, the Court concludes that BCCA Appeal Group has standing.

III. PREEMPTION

Having concluded that BCCA Appeal Group has standing, the Court turns to the underlying question in this case: Are the 2007 and 2008 Amendments to §§ 21-146, 21-161 to -166 valid and enforceable under the Texas Health and Safety Code, the Texas Water Code, and the Texas Constitution? The City argues that since it is a home-rule municipality, it has broad power to enact and enforce ordinances to promote the general welfare. According to the City, rather than look to the Legislature for grants of power to act, as a home-rule municipality it need only look to state legislation for limits on its powers.

There are limits, however, to a home-rule municipality's authority to enact and enforce ordinances. Under § 5 of Article XI of the Texas Constitution, home-rule municipalities may not pass an ordinance containing "any provision inconsistent with the Constitution of this State, or of the general laws enacted by the Legislature of this State." More specific to this case, the TCAA allows municipalities to enact and enforce ordinances to control air pollution, so long as the ordinances are "not inconsistent" with the TCAA or the rules or orders of the TCEQ. TEX. HEALTH & SAFETY CODE § 382.113(a). Furthermore, under the TCAA, city ordinances may not make unlawful a condition or act approved or authorized by the TCAA or the rules or orders of the TCEQ. *Id.* § 382.113(b). So, to be enforceable the 2007 and 2008 Amendments must not be

inconsistent with a state statute or make unlawful an act or condition approved or authorized by the TCAA or the TCEQ's rules or orders. After considering the arguments raised by the Parties and comparing the 2007 and 2008 Amendments to the TCAA and the Texas Water Code, the Court concludes that numerous inconsistencies between the City's 2007 and 2008 Amendments and the TCAA and Texas Water Code render the Amendments unenforceable.

A. The 2007 and 2008 Amendment's Permitting Program is Inconsistent with State Law.

One component of the Amendments is a city-administered permitting program. Under § 21-162(a) of the City's Ordinances, it is "unlawful for any person to operate or cause to be operated a facility unless there is a registration for the facility." In other words, the Ordinance requires each "facility" to have a city-issued registration. (Under the Texas Water Code, this "registration" is considered a "permit." *See* TEX. WATER CODE § 7.001(2).)

Moreover, the Ordinances broaden the scope of what items need to have a permit. The Ordinances define "facility" as "any facility ***or source*** as those terms are defined in the Texas Clean Air Act . . . that emits one ton per year or more of airborne contaminants." HOUSTON, TEX. ORDINANCES § 21-161(a) (as amended; emphasis added). So, not only is a TCAA ***facility*** a "facility" under the Ordinance, but a TCAA ***source*** is also a "facility" for purposes of the Ordinance. But the TCAA defines a "facility" as a structure that ***contains a source***. TEX. HEALTH & SAFETY CODE § 382.003(6). So, for example under the TCAA, a structure containing three "sources" is considered ***one*** TCAA facility. But under § 21-162(a), that same structure contains ***three*** facilities because the ordinance defines a facility as ***either*** a facility ***or*** a source. Thus, § 21-161(a) is inconsistent with the TCAA and Water Code.

Additionally, the Ordinance requires that each ***source*** have a permit in order to operate, while the TCAA does not. Specifically, § 21-162(a) requires each City facility to have a

registration to operate, while § 21-162(c) make it unlawful to operate without a registration and § 21-162(e) sets minimum and maximum fines for doing so. As explained above, the Ordinance makes each "source" a "facility." Thus, the Ordinance requires that each "source" be registered. So, under the example above of the structure with three sources, the Ordinance essentially requires the operator to obtain four City permits to operate: one for each of the three sources, plus another one for the structure containing them (since it is a "facility" under the TCAA).

Conversely, the TCAA does not always require that each source have a separate permit. Under the TCAA, an operator can obtain a single operating permit covering multiple sources and facilities at the same site. ***See*** TEX. HEALTH & SAFETY CODE § 382.051(b)(5)-(6). For example, under the TCAA, the TCEQ might issue a single permit for the hypothetical structure under the TCAA. But so long as the facility containing the sources had a permit, the sources could operate lawfully without having permits for each specific source. ***See id.*** § 382.051(a)(3) (prohibiting sources to operate without a permit issued by the TCEQ); ***id.*** §382.051(b)(5)-(6) (allowing TCEQ to issue a single permit for a multi-source facility or facilities located at multiple locations).

So, while the TCAA in some situations allows a person to operate a particular source without its own source-specific permit if the facility that contains it has a permit, § 21-162 does not. As a result, the Court concludes that the 2007 and 2008 Amendments to §§ 21-161 & -162 are inconsistent with the TCAA and therefore unenforceable.

B. The Permitting Fees are Unenforceable.

In addition to erecting a permitting requirement, the 2007 and 2008 Amendments to § 21-163 and -166 establish a schedule of fees for the City's permits. Since the requirement to obtain permits is unenforceable, the fees required for the permitting process are unenforceable.

C. The Amendments' Enforcement Provisions are Inconsistent with State Law.

1. The 2007 and 2008 Amendments lack any civil or administrative provisions or remedies.

The 2007 and 2008 Amendments not only implemented a registration requirement and permit-fee structure, but also empowered the City's health officer to enforce the TCAA and TCEQ regulations. First, § 21-164(a) incorporates the regulations found in 30 TEX. ADMIN. CODE §§ 101, 106, 111-117, 122 into the City Ordinances. Next, § 21-164(c) makes a failure to comply with these provisions a violation of the City's Ordinances, which under § 21-164(e), is a criminal offense subject to fines up to $2,000 per violation.[1] In other words, under § 21-164, the City treats any violation of TCEQ's regulations in 30 TEX. ADMIN. CODE §§ 101, 106, 111-117, 122 as a ***criminal*** matter. The Ordinance does not establish provisions for civil or administrative proceedings in lieu of criminal prosecution: criminal enforcement is the only option.

In contrast to the discretionless, criminal-enforcement regime imposed by the City's 2007 and 2008 Amendments, the Legislature has framed a more flexible regulatory structure for enforcing the state's air-pollution laws and investigating possible violations. To start, the TCEQ has the authority to hold a public hearing any time it appears that a facility is violating the TCAA or TCEQ regulations. TEX. HEALTH & SAFETY CODE § 382.023(b). Once it holds a hearing, the TCEQ "may find that a violation has occurred and may assess a penalty, may find that a violation has occurred but that a penalty should not be assessed, or may find that a violation has not occurred." TEX. WATER CODE § 7.058. The remedy can be civil or administrative. ***See id.*** §§ 7.051; 7.073(1) (permitting administrative penalties); ***id.*** § 7.102 (setting the bounds for civil fines).

---

[1] The Ordinance establishes an affirmative defense if the condition or activity was "[a]pproved or authorized by the [TCAA], state rule or state order" and "the facility is in compliance with any such approval or authorization under the [TCAA], state rule or state order." HOUSTON, TEX. ORDINANCES § 21-164(d).

In fact, if air pollution exists, the TCEQ "may order ***any*** action indicated by the circumstances to control the condition." TEX. HEALTH & SAFETY CODE § 382.025(a); ***accord*** TEX. WATER CODE § 7.073(2). But in doing so, the TCEQ must allow the owner or operator time to comply with the order. TEX. HEALTH & SAFETY CODE § 382.025(b). And before it may issue an order or make a determination, the TCAA requires the TCEQ to "consider the facts and circumstances bearing on the reasonableness of emissions." ***Id.*** § 382.024. Such facts and circumstances, include the type and degree of injury to the public's health, the source's social and economic value, the priority of location in the area, and the practicability and economic reasonableness of reducing or eliminating the emissions at issue. ***Id.*** § 382.024(1)-(4).

But the 2007 and 2008 Amendments make no allowances for such civil or administrative procedures or remedies. The Amendments do not require the health officer to hold a public hearing before determining that a violation has occurred. The Ordinances do not require the health officer to grant an alleged violator time to comply after a finding of a violation. And the Amendments do not require that the health officer or municipal court consider any of the factors listed in § 382.024 when deciding whether a violation occurred. Finally, the health officer has no option to bring civil or administrative proceedings against an alleged violator; the only remedy for a violation under the 2007 and 2008 Amendments is criminal punishment. And it is here that the Amendments' inconsistencies with state law glare most brightly.

2. The 2007 and 2008 Amendments' criminal provisions are inconsistent with state law.

Section 7.203 of the Texas Water Code applies to ***all*** criminal prosecutions of environmental crimes related to activity for which a TCEQ permit was issued, including violations of the TCAA. TEX. WATER CODE § 7.203(a). Under subsection (b), before a peace officer may refer a violation to a prosecuting attorney, the officer ***must*** notify the TCEQ in

writing and send the Commission a report describing the facts and circumstances of the alleged violation. *Id.* § 7.203(b). The TCEQ then has 45 days to evaluate the report, determine whether a violation occurred, and decide whether civil or administrative remedies would appropriately address the situation. *Id.* § 7.203(c). "A prosecuting attorney ***may not prosecute*** an alleged violation if the commission determines that administrative or civil remedies are adequate and appropriate." *Id.* § 7.203(d) (emphasis added). Moreover, payment of an administrative penalty assessed by the TCEQ "precludes any other civil or criminal penalty for the same violation." *Id.* § 7.068. A prosecutor can only bring a criminal case against the alleged violator in 2 instances: (1) when the TCEQ determines that civil or administrative remedies are inadequate ***and*** inappropriate and the TCEQ recommends prosecution, or (2) the TCEQ does not make a determination with the 45 day period for evaluating the peace officer's report. *Id.* § 7.203(c)(1), (d).

The 2007 and 2008 Amendments are inconsistent with these statutory provisions. Neither § 21-162(c) nor § 21-164 make any provision for reporting alleged violations to the TCEQ, waiting the statutorily required 45 days, or declining prosecution in the event that the TCEQ determines that a violation did not occur or that civil or administrative remedies would adequately and appropriately address the alleged violation. While § 21-164(d) provides an affirmative defense if the activity in question was "[a]pproved or authorized by the [TCAA], state rule[,] or state order," this defense does not protect facilities from prosecution under the Ordinance when the TCEQ found no violation or determined that civil or administrative remedies would better remedy the alleged violations, as provided by § 7.203. In short, the 2007 and 2008 Amendments are simply inconsistent with the Water Code and the Health & Safety Code.

IV. CONCLUSION AND ORDER

After thouroughly considering the issues and arguments raised by the Parties' motions and responsive briefing and after carefully reading the City's 2007 and 2008 Amendments to the City Ordinances, the Court cannot escape the conclusion that the Amendments are inconsistent with provisions of the Texas Water Code and Texas Health & Safety Code. Since neither the Constitution nor the TCAA empower the City of Houston to enact laws that are inconsistent with state law, the City lacked authority to enact the Amendments. For the reasons stated in Plaintiff's motion for summary judgment and its briefing in response to Defendant's motion for summary judgment, as well as for the reasons stated in this Memorandum Opinion, the Court concludes that City of Houston, Texas Ordinance Nos. 2007-208 and 2008-414 are unenforceable. Since Plaintiff has standing to bring this action, the Court concludes that Plaintiff's motion for summary judgment should be granted and that Defendant's motion for summary judgment should be denied.

Therefore, it is ***ORDERED*** that Plaintiff BCCA Appeal Group's Motion for Summary Judgment is ***GRANTED*** and Defendant City of Houston's Motion for Summary Judgment is ***DENIED***.

It is further ***ORDERED*** that Plaintiff submit a proposed Final Judgment for the Court to sign by Friday, January 7, 2011.

SIGNED at Houston, Texas this 29th day of December, 2010.

Hon. Dan Hinde
Judge, 269th Judicial District Court

FILED
Loren Jackson
District Clerk
DEC 29 2010
Time:
By
Harris County, Texas
Deputy

: 03691

APPENDIX C

DIVISION 1. - GENERALLY

Sec. 21-146. - Air pollution abatement program.

The health officer shall conduct an effective program for the abatement of air pollution within the city. Such program shall include, but not be limited to, the performance of the following duties:

(1) Conducting air quality monitoring and evaluation and maintaining records thereof;

(2) Investigating complaints of violations of the Texas Clean Air Act, pursuant to Chapter 382 of the Texas Health and Safety Code, and other applicable state and federal air pollution laws and rules, regulations and standards promulgated thereunder, by making investigations, inspections and observations of sources and ambient air conditions and maintaining records of such complaints, investigations, inspections and observations;

(3) Cooperating with the city attorney and with county, state and federal officers, offices, departments and agencies in the filing and prosecution of legal actions for civil and criminal enforcement of air pollution and air quality standards laws, rules and regulations;

(4) Cooperating with city, county, state and federal officers, offices, departments and other agencies in planning activities for the development of beneficial air resource planning strategies for the city and other matters relating to air quality management;

(5) Encouraging voluntary cooperation by persons and by affected groups in the preservation and regulation of purity of the outdoor atmosphere;

(6) Collecting and disseminating information to the general public on air pollution.

(Code 1968, § 21-115; Ord. No. 71-1049, § 1, 6-9-71; Ord. No. 07-208, § 2, 2-14-07)

Secs. 21-147—21-160. - Reserved.

DIVISION 2. - SOURCE REGISTRATION [94]

Sec. 21-161. - Definitions; scope.

(a) *Definitions.* As used in this division, the following words and terms shall have the meanings ascribed in this section unless the context of their usage clearly indicates another meaning:

Act means the Texas Clean Air Act, Chapter 382 of the Texas Health & Safety Code, as may be amended from time to time.

Automotive body repair shop means any premises that engages in, conducts, or carries on automobile, truck or trailer body repairing or painting, or both.

Dry cleaning plant means any premises where fabrics or textiles are cleaned by use of perchlorethylene or petroleum solvents unless the devices used for the cleaning are coin-operated.

Facility means an automotive body repair shop, dry cleaning plant, gasoline dispensing site, sewage treatment plant, used vehicle sales lot or any facility or source as those terms are defined in the Texas Clean Air Act, Chapter 382 of the Texas Health Safety Code, as may be amended from time to time, that emits one ton per year or more of airborne contaminants.

Gasoline dispensing site means any premises where gasoline is dispensed from a fixed storage tank into vehicles.

Registration means a current and valid registration issued under this division.

Sewage treatment plant means a premises operated for the purpose of treating waste flowing into a publicly owned sanitary sewage system.

Used vehicle means an automobile, truck or trailer of any type that is used or intended for use on the streets and that has previously been registered in Texas or elsewhere.

Used vehicle sales lot means any premises utilized by a person required to be licensed as a dealer in motor vehicles under chapter 8 of this Code for the display of used motor vehicles for sale or trade.

(b) *Scope.* This article shall not be applicable to a facility that is owned and operated by the State of Texas or the United States of America.

(Ord. No. 92-180, § 2, 2-19-92; Ord. No. 93-460, § 1, 4-21-93; Ord. No. 07-208, § 3, 2-14-07; Ord. No. 08-414, § 2, 5-7-08)

Sec. 21-162. - Registration required; penalty.

(a) It shall be unlawful for any person to operate or cause to be operated any facility unless there is a registration for the facility.

(b) It is an affirmative defense to prosecution under this section with respect to gasoline dispensing sites that the premises has dispensed less than 10,000 gallons per month in each calendar month beginning with January 1, 1991. Any site that exceeded 10,000 gallons

in January of 1991 or that has exceeded 10,000 gallons in any ensuing month is not subject to this affirmative defense.

(c) Violation of this section shall be punishable upon first conviction by a fine of not less than $250.00 nor more than $1,000.00. If the violator has been previously convicted under this section, a violation of this section shall be punishable by a fine of not less than $1,000.00 nor more than $2,000.00.

(d) Each day that any violation under this section continues shall constitute a separate offense.

(Ord. No. 92-180, § 2, 2-19-92; Ord. No. 93-460, § 2, 4-21-93; Ord. No. 07-208, § 3, 2-14-07)

Editor's note—

For any facility that does not have a valid registration issued under Division 2 of Article VI of Chapter 21 of the Code of Ordinances, Houston, Texas, and is required to be registered by Division 2 of Article VI of Chapter 2 of the Code of Ordinances, Houston, Texas, as amended by Ord. No. 2007-208, the effective date of Section 21-162 shall be July 1, 2007.

Sec. 21-163. - Issuance; expiration.

Registrations shall be issued by the health officer. The director shall promulgate application forms on which applications shall be made. Upon the submission of a properly completed application form and the tender of the applicable fee, the health officer shall issue the registration. A separate application shall be required for each facility. A registration shall be valid for one year commencing on the date of its issuance and shall only apply to the facility identified on the registration. A registration is personal and may not be assigned, conveyed or transferred in any manner.

(Ord. No. 92-180, § 2, 2-19-92; Ord. No. 07-208, § 3, 2-14-07)

Sec. 21-164. - Incorporation of state rules; compliance; penalty. [95]

(a) The following state air pollution control laws as they currently are and as they may be changed from time to time, are hereby incorporated as if written word for word in this section, including appendices and other matters promulgated as part of the state rules.

(1) 30 Tex. Admin. Code § 101 (2006)(General Air Quality Rules).

(2) 30 Tex. Admin. Code § 106 (2006)(Permits by Rule).

(3) 30 Tex. Admin. Code § 111 (2006)(Control of Air Pollution from Visible Emissions and Particulate Matter).

(4) 30 Tex. Admin. Code § 112 (2006)(Control of Air Pollution from Sulfur Compounds).

(5) 30 Tex. Admin. Code § 113 (2006)(Standards of Performance for Hazardous Air Pollutants and for Designated Facilities and Pollutants).

(6) 30 Tex. Admin. Code § 114 (2006)(Control of Air Pollution from Motor Vehicles).

(7) 30 Tex. Admin. Code § 115 (2006) (Control of Air Pollution from Volatile Organic Compounds).

(8) 30 Tex. Admin. Code § 116 (2006)(Control of Air Pollution by Permits for New Construction or Modification).

(9) 30 Tex. Admin. Code § 117 (2006)(Control of Air Pollution from Nitrogen Compounds).

(10) 30 Tex. Admin. Code § 122 (2006)(Federal Operating Permits Program).

(b) The director shall ensure that the health officers carry out a regulatory compliance program to determine whether registered facilities are in compliance with all applicable state and

federal air pollution control laws and regulations. The regulatory compliance program shall include, but need not be limited to, on site inspections, complaint investigations and reviews of applicable compliance documentation.

(c) It shall be unlawful for any person to operate or cause to be operated any facility that does not comply with the requirements in subsection (a) of this section.

(d) It is an affirmative defense to prosecution under this section that the prosecuted condition or activity has been:

(1) Approved or authorized by the Act, state rule or state order; and

(2) That the facility is in compliance with any such approval or authorization under the Act, state rule or state order.

(e) Violation of this section shall be punishable upon first conviction by a fine of not less than $250.00 nor more than $1,000.00. If the violator has been previously convicted under this section, a violation of this section shall be punishable by a fine of not less than $1,000.00 nor more than $2,000.00.

(f) Each day that any violation under this section continues shall constitute a separate offense.

(Ord. No. 92-180, § 2, 2-19-92; Ord. No. 07-208, § 3, 2-14-07; Ord. No. 08-414, §§ 3—5, 5-7-08)

Sec. 21-165. - Cumulative.

The purpose of this division is to provide a viable means of locating and monitoring by routine compliance inspections sources of air contamination. A registration under this division shall neither excuse the securing of any license, permit, registration or other compliance document required under state or federal pollution laws or regulations, nor excuse full compliance with any applicable state or federal law or regulation. This division is cumulative of all other applicable laws and regulations.

(Ord. No. 92-180, § 2, 2-19-92; Ord. No. 07-208, § 3, 2-14-07)

Sec. 21-166. - Registration fees.

(a) There are hereby assessed the fees stated for this provision in the city fee schedule for the issuance of the following registrations:

(1) Automotive body repair shop;

(2) Gasoline dispensing site:

1—6 gasoline pump nozzles, per site

7 or more gasoline pump nozzles, per site

Where pumps are so configured that two or more nozzles dispensing different types or grades of fuel are attached to one meter, then the nozzles attached to each such meter shall be regarded as one nozzle for purposes of the above calculation.

(3) Dry cleaning plant (based upon the normal number of employees):

Fewer than 6 employees

6 to 10 employees

11 or more employees

(4) Used vehicle sales lot (based on the number of vehicles normally offered for sale):

1—5 vehicles

6—100 vehicles

101 or more vehicles

(5) Other facilities based upon annual airborne contaminant emissions:

1 ton or more but less than 5 tons

5 tons or more but less than 10 tons

10 tons or more

In any instance in which a facility is unable to produce the records needed to establish its emissions with a reasonable degree of certainty, then the health officer shall estimate the amount on the basis of the best available information.

(6) Dual chambered incinerators

Pathological waste incinerators

(7) Sewage treatment plant, based upon design capacity in gallons per day:

Less than 500,000

500,001 to 9,999,999

10,000,000 to 39,999,999

40,000,000 or more

(b) Should more than one facility exist on any premises, then the total of all applicable fees shall be payable up to a maximum of the equivalent of a fee for the four facilities with the highest fees.

(c) The foregoing fees shall apply to all privately and publicly owned facilities. Facilities owned and operated by a county, and city facilities that are operated with general fund revenues, shall be exempt from payment of the fees but shall be required to be registered.

(Ord. No. 92-180, § 2, 2-19-92; Ord. No. 93-460, §§ 3—5, 4-21-93; Ord. No. 02-528, § 13d., 6-19-02; Ord. No. 07-208, § 3, 2-14-07; Ord. No. 08-414, § 6, 5-7-08; Ord. No. 2011-1168, § 13, 12-14-2011)

FOOTNOTE(S):

---

(94) ***Editor's note—*** *Section 4 of Ord. No. 07-208 states that any valid registration heretofore issued under Division 2 of Article VI of Chapter 2 of the Code of Ordinances, Houston, Texas, prior to its amendment by this Ordinance, shall be regarded as a valid registration issued under Division 2 of Article VI of Chapter 21 of the Code of Ordinances, Houston, Texas, as amended by this Ordinance, for the remainder of the term of the registration.* *(Back)*

(95) ***Editor's note—*** *Ord. No. 08-414, § 3, adopted May 7, 2008 amended the title of § 21-164 to read as herein set out. Formerly said section was entitled Incorporation of state rules; compliance.* *(Back)*

APPENDIX D

THE TEXAS CONSTITUTION

ARTICLE 11. MUNICIPAL CORPORATIONS

Sec. 1. COUNTIES AS LEGAL SUBDIVISIONS. The several counties of this State are hereby recognized as legal subdivisions of the State.

Sec. 2. JAILS, COURT-HOUSES, BRIDGES, AND ROADS. The construction of jails, court-houses and bridges and the laying out, construction and repairing of county roads shall be provided for by general laws.

(Amended Nov. 2, 1999.) (TEMPORARY TRANSITION PROVISIONS for Sec. 2: See Appendix, Note 1.)

Sec. 3. SUBSCRIPTIONS TO CORPORATE CAPITAL; DONATIONS; LOAN OF CREDIT. No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law or to prevent a county, city, or other municipal corporation from investing its funds as authorized by law.

(Amended Nov. 7, 1989.)

Sec. 4. CITIES AND TOWNS WITH POPULATION OF 5,000 OR LESS; CHARTERED BY GENERAL LAW; TAXES; FINES, FORFEITURES, AND PENALTIES. Cities and towns having a population of five thousand or less may be chartered alone by general law. They may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful for any one year which shall exceed one and one-half per cent of the taxable property of such city; and all taxes shall be collectible only in current money, and all licenses and occupation taxes levied, and all fines, forfeitures and penalties accruing to said cities and towns shall be collectible only in

current money.

(Amended Aug. 3, 1909, and Nov. 2, 1920.)

Sec. 5. CITIES OF MORE THAN 5,000 POPULATION; ADOPTION OR AMENDMENT OF CHARTERS; TAXES; DEBT RESTRICTIONS. Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters. If the number of inhabitants of cities that have adopted or amended their charters under this section is reduced to five thousand (5000) or fewer, the cities still may amend their charters by a majority vote of the qualified voters of said city at an election held for that purpose. The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and 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 this State. Said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent. thereon. Furthermore, no city charter shall be altered, amended or repealed oftener than every two years.

(Amended Aug. 3, 1909, Nov. 5, 1912, and Nov. 5, 1991.)

Sec. 6. (Repealed Nov. 2, 1999.)

(TEMPORARY TRANSITION PROVISIONS for Sec. 6: See Appendix, Note 1.)

Sec. 7. COUNTIES AND CITIES ON GULF OF MEXICO; TAX FOR SEA WALLS, BREAKWATERS, AND SANITATION; BONDS; CONDEMNATION OF RIGHT OF WAY. All counties and cities bordering on the coast of the Gulf of Mexico are hereby authorized upon a vote of the majority of the qualified voters voting thereon at an election called for such

APPENDIX E

KEY PROVISIONS FROM THE TEXAS CLEAN AIR ACT
Texas Health and Safety Code Chapter 382

SUBCHAPTER E. AUTHORITY OF LOCAL GOVERNMENTS

§ 382.111. Inspections; Power to Enter Property

(a) A local government has the same power and is subject to the same restrictions as the commission under Section 382.015 to inspect the air and to enter public or private property in its territorial jurisdiction to determine if:

(1) the level of air contaminants in an area in its territorial jurisdiction and the emissions from a source meet the levels set by:

(A) the commission; or

(B) a municipality's governing body under Section 382.113; or

(2) a person is complying with this chapter or a rule, variance, or order issued by the commission.

(b) A local government shall send the results of its inspections to the commission when requested by the commission.

§ 382.112. Recommendations to Commission

A local government may make recommendations to the commission concerning a rule, determination, variance, or order of the commission that affects an area in the local government's territorial jurisdiction. The commission shall give maximum consideration to a local government's recommendations.

§ 382.113. Authority of Municipalities

(a) Subject to Section 381.002, a municipality has the powers and rights as are otherwise vested by law in the municipality to:

(1) abate a nuisance; and

(2) enact and enforce an ordinance for the control and abatement of air pollution, or any other ordinance, not inconsistent with this chapter or the commission's rules or orders.

(b) An ordinance enacted by a municipality must be consistent with this chapter and the commission's rules and orders and may not make unlawful a

condition or act approved or authorized under this chapter or the commission's rules or orders.

§ 382.115. Cooperative Agreements

A local government may execute cooperative agreements with the commission or other local governments:

(1) to provide for the performance of air quality management, inspection, and enforcement functions and to provide technical aid and educational services to a party to the agreement; and

(2) for the transfer of money or property from a party to the agreement to another party to the agreement for the purpose of air quality management, inspection, enforcement, technical aid, and education.

APPENDIX F

KEY PROVISIONS FROM THE TEXAS WATER CODE

Texas Water Code Chapter 7

SUBCHAPTER H. SUIT BY OTHERS

§ 7.351. Civil Suits

(a) If it appears that a violation or threat of violation of Chapter 16, 26, or 28 of this code, Chapter 361, 371, 372, or 382, Health and Safety Code, a provision of Chapter 401, Health and Safety Code, under the commission's jurisdiction, or Chapter 1903, Occupations Code, or a rule adopted or an order or a permit issued under those chapters or provisions has occurred or is occurring in the jurisdiction of a local government, the local government or, in the case of a violation of Chapter 401, Health and Safety Code, a person affected as defined in that chapter, may institute a civil suit under Subchapter D in the same manner as the commission in a district court by its own attorney for the injunctive relief or civil penalty, or both, as authorized by this chapter against the person who committed, is committing, or is threatening to commit the violation.

(b) If it appears that a violation or threat of violation of Chapter 366, Health and Safety Code, under the commission's jurisdiction or a rule adopted or an order or a permit issued under that chapter has occurred or is occurring in the jurisdiction of a local government, an authorized agent as defined in that chapter may institute a civil suit under Subchapter D in the same manner as the commission in a district court by its own attorney for the injunctive relief or civil penalty, or both, as authorized by this chapter against the person who committed, is committing, or is threatening to commit the violation.

§ 7.352. Resolution Required

In the case of a violation of Chapter 26 of this code or Chapter 382, Health and Safety Code, a local government may not exercise the enforcement power authorized by this subchapter unless its governing body adopts a resolution authorizing the exercise of the power.

§ 7.353. Commission Necessary Party

In a suit brought by a local government under this subchapter, the commission is a necessary and indispensable party.