No. 13-0768

In the Supreme Court of Texas

BCCA APPEAL GROUP, INC.,
Petitioner,

v.

CITY OF HOUSTON, TEXAS,
Respondent.

On Petition for Review from the
First Court of Appeals at Houston, Texas, 01-11-00332-CV

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE SUPPORTING PETITIONER

Kate Comerford Todd
Sheldon Gilbert
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Chamber of Commerce of the United States

Linda E. Kelly
Quentin Riegel
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
(202) 637-3000
Counsel for the National Association of Manufacturers

James P. Sullivan (#24070702)
KING & SPALDING LLP
401 Congress Avenue, Suite 3200
Austin, Texas 78701
(512) 457-2014
jsullivan@kslaw.com

Ashley C. Parrish
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 737-0500

S. Shawn Stephens
KING & SPALDING LLP
1100 Louisiana Street, Suite 4000
Houston, Texas 77002
(713) 751-3220

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, directly representing 300,000 members and indirectly representing the interests of more than 3,000,000 business, trade, and professional organizations of every size, in every industry sector, and from every region of the country, including Texas. A central function of the Chamber is to represent the interests of its members by filing amicus briefs in cases, like this one, that raise issues of vital concern to the business community. To that end, the Chamber regularly participates in cases before the Texas Supreme Court, *see, e.g.*, *Shell Oil Co. v. Writt*, No. 13-0552 (Tex.), and before the U.S. Supreme Court, particularly those involving federal preemption doctrine, *see, e.g.*, *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014); *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011).

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty States.

[1] The Chamber of Commerce of the United States of America and the National Association of Manufacturers will be the sole source of any fee paid for preparing this amicus brief. *See* TEX. R. APP. P. 11(c).

Manufacturing employs over 12,000,000 men and women, contributes roughly $2,100,000,000,000 to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. The NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

In this case, the City of Houston claims the power to second-guess careful policy choices made by the Texas Commission on Environmental Quality ("TCEQ") in enforcing the Texas Clean Air Act, contrary to the unmistakably clear intent of the Texas Legislature. Left unchecked, a similar pattern of arrogation will likely unfold in other cities across the State with respect to other agencies and statutes, undermining important state policies and imposing significant burdens on Texas's citizens. Among other things, the cost of doing business in the Lone Star State will surely increase, to the detriment of Texas's economy and its citizens' welfare, if each exercise of prosecutorial discretion by a state agency can be trumped by an improper, redundant, and potentially conflicting layer of municipal bureaucracy. For the last

century, home-rule principles have benefited the people of Texas by allowing local governments to solve local problems. Houston's self-aggrandizing attempt to meddle in matters of statewide concern is not in keeping with this tradition.

This case presents an ideal opportunity for the Court to clarify Texas's preemption doctrine by rejecting Houston's latest attempt to undermine the Legislature and upset the delicate balances that state agencies, like the TCEQ, must make between the costs and benefits of statewide regulation. As the leading voices for the business community and the nation's manufacturers, including significant members who do business in Texas, the Chamber and the NAM have a substantial interest in helping this Court to prevent a city-by-city patchwork of counterproductive, conflicting regulation.

SUMMARY OF ARGUMENT

By passing the provocative Ordinance at issue in this case, the City of Houston has produced an ideal opportunity for this Court to clarify the proper scope and effect of preemption under the Home Rule Amendment to the Texas Constitution. That Amendment makes clear that a city like Houston has no authority to pass ordinances that are inconsistent with the general laws of Texas. Moreover, the constitutional underpinnings of Texas preemption doctrine indicate that it ought to be at least as strong as federal preemption doctrine, given the fundamental differences between a home-rule city and a sovereign State. Accordingly, this Court should not hesitate to look to decisions of the U.S. Supreme Court in considering the important issues raised in this case and clarifying the contours of Texas preemption law.

Federal preemption doctrine illustrates two ways in which Houston's Ordinance conflicts with, and so is preempted by, the Texas Clean Air Act. *First*, the Ordinance is inconsistent with the Legislature's chosen method for regulating the air in Texas, because it makes an end-run around the Texas Clean Air Act's delegation of authority to the TCEQ and careful enumeration of a subordinate

regulatory role for cities. *Second*, the Ordinance is inconsistent with the Legislature's express command that the TCEQ balance environmental and economic interests, because it appoints Houston as an additional and more aggressive enforcer of state-law standards.

Contrary to Houston's argument in this Court, the express preemption provision of the Texas Clean Air Act makes preemption of the Ordinance more appropriate, not less. That provision confers no new power on cities — indeed, it limits that power by describing circumstances in which a municipal ordinance must yield to the supreme force of state law.

ARGUMENT

I. Preemption Is Rooted In The Texas Constitution And Serves As An Essential Antidote To Improper Incursions On The State's Legislative And Regulatory Prerogatives.

A robust preemption doctrine is essential to the sound functioning of any tiered system of republican government, as Chief Justice Marshall famously established in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210–11 (1824). Preemption gives real-world effect to essential constitutional principles by resolving conflicting regulatory efforts and

promoting democratic accountability. A proper application of preemption also supports the separation of powers, which protects the liberty of the people. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 181 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals.").

This case provides an occasion to clarify preemption doctrine under Texas law as reflected in the Home Rule Amendment. *See* TEX. CONST. art. XI, § 5. In doing so, this Court can and should look to federal law for guidance. Since 1824, it has been settled that the U.S. Constitution's Supremacy Clause invalidates state and local laws that "interfere with, or are contrary to," federal law. *Gibbons*, 22 U.S. (9 Wheat.) at 211; *see also* U.S. CONST. art. VI, cl. 2 (dictating that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"). Applying the Supremacy Clause in concrete cases, courts have recognized several categories of preemption: express preemption, field preemption, obstacle preemption, and impossibility preemption. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000). These categories are not "rigidly distinct," *id.* at 372 n.6 (quoting

English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990)), but are instead components of the same multi-faceted inquiry: Does federal law displace a particular state law in the particular circumstances presented by a particular case?

Preemption thus occurs where federal regulation occupies a field to the exclusion of States, *see, e.g.*, *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1266 (2012), or where federal and state law actually conflict, *see, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2503–05 (2012); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577–78 (2011). A preemption-generating conflict occurs if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). If a lack of preemption would frustrate Congress's underlying policy goal, then preemption must be found. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105–06 (1992). It is never "enough to say that the ultimate goal of both federal and state law is the same," for a state law is preempted "if it interferes with the *methods* by which the federal statute was designed to reach that goal." *Id.* at 103 (plurality opinion) (emphasis added) (alteration and internal quotation marks omitted).

A similar preemption doctrine ought to flow from the Home Rule Amendment's command that "no [city ordinance] shall contain any provision inconsistent with . . . the general laws enacted by the Legislature of this State." TEX. CONST. art. XI, § 5. That broadly worded provision means that state-law preemption of a city ordinance can be either express or implied. *See, e.g.*, *LCRA v. City of San Marcos*, 523 S.W.2d 641, 645 (Tex. 1975) ("A limitation on the power of home rule cities by general law . . . may be either an express limitation or one arising by implication."). Indeed, since Texas adopted the Home Rule Amendment in 1912, city ordinances have frequently been required to yield to the superior force of state law.[2]

Comparing the Home Rule Amendment with the Supremacy Clause suggests that Texas preemption doctrine should be at least as strong as its federal counterpart. A law of the United States can

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[2] *See, e.g.*, *City of Houston v. Bates*, 406 S.W.3d 539, 546–48 (Tex. 2013); *Southern Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013); *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993); *Tyra v. City of Houston*, 822 S.W.2d 626, 628 (Tex. 1991); *Berry v. City of Fort Worth*, 124 S.W.2d 842, 845–47 (Tex. 1939); *City of Beaumont v. Fall*, 291 S.W. 202, 205–06 (Tex. 1927); *Yett v. Cook*, 281 S.W. 837, 838–39 (Tex. 1926); *Brewer v. State*, 24 S.W.2d 409, 409 (Tex. Crim. App. 1930); *Jere Dairy, Inc. v. City of Mt. Pleasant*, 417 S.W.2d 872, 873–74 (Tex. Civ. App.—Texarkana 1967, writ ref'd n.r.e.), *cited with approval in* *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982); *City of Baytown v. Angel*, 469 S.W.2d 923, 925 (Tex. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.).

preempt the law of a State, notwithstanding "the sovereignty [the State] enjoyed before the ratification of the Constitution," *Alden v. Maine*, 527 U.S. 706, 713 (1999), as a result of the "limitations imposed by the Supremacy Clause," *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Under federal preemption doctrine, then, the Supremacy Clause has the force to displace the sovereign authority of the States. *Cf. Printz v. United States*, 521 U.S. 898, 918–19 (1997) ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.' " (quoting THE FEDERALIST No. 39 (James Madison))); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("The States thus retain substantial sovereign authority under our constitutional system." (citing U.S. CONST. amend. X)).

Under Texas preemption doctrine, by contrast, a city ordinance necessarily yields to state law because cities are not sovereign entities. *See, e.g.*, *Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 53 (1982); *Reynolds v. Sims*, 377 U.S. 533, 575 (1964); *Avery v. Midland Cnty.*, 406 S.W.2d 422, 426 n.1 (Tex. 1966), *vacated on other grounds*, 390 U.S. 474 (1968); *City of Galveston v. State*, 217 S.W.3d 466, 477 & n.21 (Tex. 2007) (Willett, J., dissenting). The Home Rule Amendment is not a

limit on existing authority but rather the wellspring of authority that would otherwise not exist. *See* *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998) (describing "the constitutional authority granted to home rule cities"); *Payne v. Massey*, 196 S.W.2d 493, 495 (Tex. 1946) ("Municipalities are creatures of our law and are created as political subdivisions of the state as a convenient agency for the exercise of such powers as are conferred upon them by the state."). It is therefore significant that the constitutional grant of power comes with a clear and express limitation: cities are not empowered to enact municipal ordinances that are "inconsistent" with state law. *See* TEX. CONST. art. XI, § 5. The Home Rule Amendment thus creates a strong presumption that state laws are exclusive in their own sphere of operation and are not subject to supplementation by municipal ordinances.

That express, constitutional limit on municipal authority is hardly surprising. After all, "[i]n Texas, the people's will is expressed in the Constitution *and laws of the State*." *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003) (emphasis added). "It was the purpose of the people to bestow upon the cities coming under the Home Rule Amendment full power of *local* self-government." *City of Houston v.*

City of Magnolia Park, 276 S.W. 685, 689 (Tex. 1925) (internal quotation marks omitted, emphasis added); *see also* TEX. LOC. GOV'T CODE § 51.072(a) ("The municipality has full power of *local* self-government." (emphasis added)). Doing so relieved the Legislature of having to solve city-level problems, a task for which it was ill-equipped. *See Le Gois v. State*, 190 S.W. 724, 725 (Tex. Crim. App. 1916). But where the Legislature has deemed a matter worthy of evenhanded, statewide treatment, the people, speaking through the Home Rule Amendment, have withheld from home-rule cities any power to take "inconsistent" action. *See* TEX. CONST. art. XI, § 5.

Because the Home Rule Amendment *gives* cities limited power that they do not otherwise enjoy, whereas the Supremacy Clause has the force to *displace* the sovereign authority of the States, it would be paradoxical if cities were to enjoy greater protection against supreme state law than the State of Texas enjoys against supreme federal law. The laws of a sovereign State should not be squeezed from above and below through the operation of federal and state preemption doctrines. This Court cannot control the level of pressure asserted from above, bound as it is by the U.S. Supreme Court's robust federal preemption

doctrine. *See* *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 482 n.4 (Tex. 2010); *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 367 (Tex. 1998). What this Court can and should do is to ensure that Texas preemption doctrine remains at least as robust, so that preemption does not get the State coming and going.

II. Under Basic Principles Of Preemption Law, The Houston Ordinance Is Inconsistent With The Texas Clean Air Act And Should Not Be Allowed To Stand.

The court of appeals in this case overlooked two irreconcilable conflicts between Houston's Ordinance and the Texas Clean Air Act. *First*, the Ordinance is inconsistent with state law because it impermissibly circumvents the method that the Texas Legislature has selected for regulating the quality of Texas's air. *Second*, Houston's attempt to anoint itself as an enforcer of the Texas Clean Air Act is inconsistent with state law because it will unavoidably upset the delicate balance between environmental and economic interests that the Legislature sought to protect.

A. Preemption Bars Conflicting Methods Of Pursuing Common Goals.

The U.S. Supreme Court has explained that "[i]t 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). Houston nevertheless argues that its Ordinance does not conflict with the Texas Clean Air Act or the TCEQ's rules and orders because it "incorporates these standards by reference." Resp't Merits Br. 6. But that forgets that "a conflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy." *Arizona*, 132 S. Ct. at 2505 (alteration and internal quotation marks omitted). Under the Texas Constitution, Houston is obliged to respect both the goals of the Texas Clean Air Act and the Legislature's prescribed method for achieving them.

These principles are illustrated by *International Paper Co. v. Ouellette*, 479 U.S. 481, 483–84 (1987), in which owners of lakefront property in Vermont claimed that effluent discharges by a New York paper mill were a nuisance under Vermont law. The U.S. Supreme Court held that this attempt to apply Vermont law against an out-of-state source conflicted with, and was therefore preempted by, the federal Clean Water Act. *Id.* at 493–94. The Court described the Clean Water Act's establishment of "the National Pollutant Discharge Elimination System (NPDES), a federal permit program designed to

regulate the discharge of polluting effluents." *Id.* at 489. And the Court also explained how the Clean Water Act gave each State "only . . . an advisory role in regulating pollution that originates beyond its borders," insofar as it established a process whereby States could offer input during permitting and lodge objections with the relevant federal agency. *Id.* at 490–91.

The Court went on to find implied preemption, based on a conflict between the "methods" employed by federal and state law to achieve the same purported goal:

> In determining whether Vermont nuisance law stands as an obstacle to the full implementation of the [Clean Water Act], it is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal. In this case the application of Vermont law against [the New York paper mill] would allow [Vermonters] to circumvent the NPDES permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act.

Id. at 494 (citation and internal quotation marks omitted). In short, the Court held that Congress's enumeration of both a means and an end for regulating water pollution preempted a State's improvisational pursuit

of the same end through different means. *See also* *Crosby*, 530 U.S. at 379 (holding that "a common end hardly neutralizes conflicting means").

Here, as in *International Paper*, the Legislature has created a comprehensive scheme for regulating air quality that aims to achieve a delicate balance of competing regulatory objectives. As part of that comprehensive scheme, the Legislature established a specific — but subordinate and carefully limited — role for cities that want to assist in regulating Texas's air.

The Texas Legislature assigned "primary responsibility" for regulation to the TCEQ, TEX. WATER CODE § 5.012, the state agency charged with "establish[ing] the level of quality to be maintained in the state's air" and "control[ling] the quality of the state's air" through "practical and economically feasible methods," TEX. HEALTH & SAFETY CODE § 382.011(a)–(b). Armed as it is with "the powers necessary or convenient to carry out its responsibilities," the TCEQ enjoys great discretion. *Id.* § 382.011(c); *see also* *id.* § 382.024 (listing factors the TCEQ weighs, including "economic reasonableness"); *id.* § 382.025(a) (empowering the TCEQ to "order any action indicated by the circumstances"). The TCEQ can assess an administrative penalty for a

violation of the Texas Clean Air Act or regulations promulgated thereunder, TEX. WATER CODE § 7.051(a)(1), the payment of which will preclude further remedial action, *id.* § 7.068. Alternatively, the TCEQ can enlist the Office of the Attorney General to sue the violator for injunctive relief and a civil penalty. *Id.* § 7.105(a), (b)(5)–(6).

These and other statutory provisions make unmistakably clear that cities play an important, but ultimately subordinate role in the regulatory process established by the Legislature. A city can sue for injunctive relief and a civil penalty based on a violation within its borders of the Texas Clean Air Act or its implementing regulations. *Id.* § 7.351(a). But the city must give half of the proceeds to the State, *id.* § 7.107, and must litigate alongside the TCEQ and the Office of the Attorney General, *see id.* § 7.353; 30 TEX. ADMIN. CODE § 70.6(b)(5). The city is empowered to conduct its own air-pollution inspections, on the condition that it share the results with the TCEQ upon request. TEX. HEALTH & SAFETY CODE § 382.111. The city and the TCEQ can also enter into "cooperative agreements" relating to air quality. *Id.* § 382.115. And the city can offer "recommendations" to the TCEQ for

carrying out its regulatory and enforcement obligations, to which the TCEQ must give "maximum consideration." *Id.* § 382.112.

By carefully enumerating a role for cities, the Texas Clean Air Act by necessary implication limits municipal authority and prevents cities from enforcing the statute's requirements outside the comprehensive regulatory scheme established by the Legislature and administered by the TCEQ. *See Dallas Merchant's*, 852 S.W.2d at 493 n.7; *Prescott v. City of Borger*, 158 S.W.2d 578, 581–82 (Tex. Civ. App.—Amarillo 1942, writ ref'd). To hold otherwise, as the court of appeals did, *see* Mem. Op. 29–30, would be to treat the provisions just described as "a useless act," *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex. 1981). Because cities possess authority without the Texas Clean Air Act, thanks to the Home Rule Amendment, the statutory provisions are pointless if they are not properly read to limit municipal power within defined boundaries.

Understood in this light, there can be no real doubt that Houston's Ordinance represents an attempt to opt out of the detailed process that the Legislature put in place for regulating air quality in Texas. Not content with offering recommendations to the TCEQ or litigating

alongside that agency, Houston seeks to circumvent the statutory scheme and take the lead in enforcing its own preferred interpretation of what the Texas Clean Air Act and the TCEQ's regulations might require. This effort to change the method of enforcement by slapping a municipal label on existing state law creates precisely the type of conflict that, as in *International Paper*, should be preempted.

B. Preemption Protects Regulatory Efforts To Balance Competing Interests.

When federal law achieves a delicate balance between regulatory objectives, the U.S. Supreme Court will hold preempted any state law that upsets that careful balance. *See, e.g.*, *Arizona*, 132 S. Ct. at 2505; *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638–39 (1973). This sensible approach to preemption recognizes that one regulator's effort to satisfy statutory commands by striking a balance between competing policy goals will be unavoidably frustrated if another regulator is allowed to second-guess the balance struck.

Consider *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001), in which a fraud-on-the-FDA claim under state tort law was held impliedly preempted by the Food, Drug, and Cosmetic Act.

The Court explained that the FDA, in "pursu[it of] difficult (and often competing) objectives," was tasked with ensuring that certain medical devices are reasonably safe, effective, and available — and all of this without intruding on doctor-patient relationships. *Id.* at 349–50. To avoid "an extraneous pull on the scheme established by Congress," the Court held that fraud-on-the-FDA claims are best left to the prosecutorial discretion of the FDA itself. *Id.* at 353. As the Court explained, the federal statutory scheme "amply empowers" the FDA to police fraud, and "this authority is used . . . to achieve a somewhat delicate balance of statutory objectives." *Id.* at 348. The Court concluded that the balance sought to be achieved could "be skewed by allowing fraud-on-the-FDA claims under state tort law." *Id.*; *cf.* *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").

State-level environmental regulation frequently entails a similarly delicate balancing act, as suggested by the many cases in which state law has been held to preempt city- or county-level regulation of pollution sources. *See, e.g.*, *Bio Energy, LLC v. Town of Hopkinton*, 891 A.2d 509, 516–18 (N.H. 2005); *Talbot Cnty. v. Skipper*, 620 A.2d 880, 883–86 (Md. 1993); *R.I. Cogeneration Assocs. v. City of East Providence*, 728 F. Supp. 828, 833–39 (D.R.I. 1990); *Envirosafe Servs. of Idaho, Inc. v. Owyhee Cnty.*, 735 P.2d 998, 1001–03 (Idaho 1987). So it is in Texas, where the Texas Clean Air Act "was designed 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, 442 (Tex. 1993).

The Texas Clean Air Act "balance[s] economic concerns with environmental concerns," *Barshop v. Medina Cnty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 636 (Tex. 1996), through "the utilization of agency expertise to resolve complex problems," *State v. Associated Metals & Minerals Corp.*, 635 S.W.2d 407, 409 (Tex. 1982). In particular, the Texas Clean Air Act charges the TCEQ with "safeguard[ing] the state's air resources from pollution," TEX. HEALTH &

SAFETY CODE § 382.002(a), but commands that the agency do so through "practical and economically feasible methods," *id.* § 382.011(b), while considering the "economic reasonableness of reducing or eliminating the emissions," *id.* § 382.024(4). The TCEQ thus has a clear statutory duty "to balance mounting environmental concerns with our state's economic vitality." *Tex. Ass'n of Bus.*, 852 S.W.2d at 451.

Houston's Ordinance impermissibly upsets that delicate balance by wresting prosecutorial discretion from the TCEQ. Although the Ordinance incorporates the Texas Clean Air Act and its implementing regulations, Houston was not simply wasting its time by effecting a meaningless duplication of state law. The Ordinance was calculated to have a disruptive effect, and one aspect of the regulatory scheme will indeed change if the Ordinance is allowed to stand: Houston will prosecute perceived environmental violations that the TCEQ has chosen not to pursue. *See, e.g.*, Resp't Merits Br. 4 (purporting to champion "necessary regulation designed to further . . . protect and secure the public health of all Houstonians"); Editorial, *Playing Favorites: Counsel's Support for Suit Against Houston Ordinance Puts Environmental Agency on the Side of Polluters*, HOUS. CHRON., May 9,

2008, at B10 (reporting that Houston passed the Ordinance because it was "[w]eary of lax state enforcement of air quality standards").

As even the court of appeals recognized, Houston has appointed itself as "a vigilant watch dog" that "will enforce the *state's existing* rules and regulations." Mem. Op. 23. Such zealous and parochial regulation will systematically skew the balance toward environmental interests, at the expense of economic interests that the Texas Clean Air Act deems worthy of consideration. The Texas Constitution does not empower Houston to trump that determination by the Legislature.

III. The Texas Clean Air Act's Express Preemption Provision Reinforces The View That Houston's Ordinance Should Not Be Allowed To Stand.

Houston cannot seriously deny that its Ordinance is inconsistent with the enforcement process established by the Legislature, or that it poses unavoidable risks for the delicate balance that the TCEQ must strike between the environmental and economic costs and benefits of regulation. Instead, Houston seeks to ignore those irreconcilable conflicts with state law, arguing that its Ordinance is protected by Section 382.113's express preemption provision. *See* Resp't Merits Br. 19–21, 25–26, 29, 34–38, 44–45, 59–60 (discussing TEX. HEALTH &

SAFETY CODE § 382.113). Houston misunderstands preemption doctrine and misreads Section 382.113.

It is well established that the existence of an express preemption clause or savings clause "does *not* bar the ordinary working of conflict pre-emption principles" or impose any "special burden" for demonstrating preemption. *Geier*, 529 U.S. at 869–74; *see also Arizona*, 132 S. Ct. at 2504–05; *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). The U.S. Supreme Court has squarely rejected the argument "that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287–89 (1995).

In any event, Houston is mistaken in its interpretation of Section 382.113. If anything, Section 382.113 reinforces the conclusion that the Ordinance is preempted. That statutory provision does not purport to confer any new authority on cities, but instead declares that "a municipality has the powers and rights *as are otherwise vested by law in the municipality*." TEX. HEALTH & SAFETY CODE § 382.113(a) (emphasis added). Section 382.113 then tellingly echoes the precise constitutional language — "inconsistent" — that limits the authority of home-rule

cities. *Compare* TEX. CONST. art. XI, § 5, *with* TEX. HEALTH & SAFETY CODE § 382.113(a)(2), (b). Section 382.113 goes on to confirm that preemption will be appropriate in two situations not explicitly addressed in the Home Rule Amendment.

First, Section 382.113 establishes that a city ordinance can be preempted not only by the Texas Clean Air Act, but also by the TCEQ's rules and orders. *See id.* § 382.113(a)(2) (allowing for a city ordinance "not inconsistent with [the Texas Clean Air Act] *or the commission's rules or orders*" (emphasis added)); *id.* § 382.113(b) ("An ordinance enacted by a municipality must be consistent with [the Texas Clean Air Act] *and the commission's rules and orders* . . . ." (emphasis added)). The statute thus embraces the basic principle that preemption can occur both by statute and by regulation. *See, e.g.*, *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) ("Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."); *Locke*, 529 U.S. at 109–10 (same).

Second, Section 382.113(b) provides that a city ordinance "may not make unlawful a condition or act approved or authorized under [the

Texas Clean Air Act] or the commission's rules or orders." TEX. HEALTH & SAFETY CODE § 382.113(b); *see also* *Southern Crushed*, 398 S.W.3d at 678–79 (holding that this language preempted Houston's attempt to forbid construction of a concrete-crushing facility to which the TCEQ had issued a permit). Here, too, the statute tracks robust and longstanding principles of federal preemption doctrine. *See, e.g.*, *Gibbons*, 22 U.S. (9 Wheat.) at 210–11 (holding that New York could not prevent a federally licensed steamboat from operating a route between New York and New Jersey).

Section 382.113 therefore does nothing to help Houston ward off preemption of its Ordinance. *See* Mem. Op. 16–17. In fact, the provision moves the needle decidedly in the direction of preemption. By confirming that city ordinances cannot conflict with the TCEQ's regulations, and by making unmistakably clear that more regulation is not always better, Section 382.113 underscores that city ordinances, like Houston's Ordinance here, that seek to supplement, refine, or enhance the TCEQ's regulations under the Texas Clean Air Act inevitably conflict with the objectives of the state regulatory scheme and cannot be allowed to stand.

PRAYER

The Court should grant the petition for review, reverse the judgment of the court of appeals, and render judgment for BCCA Appeal Group, Inc.

Respectfully submitted,

/s/ James P. Sullivan

James P. Sullivan (#24070702)
KING & SPALDING LLP
401 Congress Avenue, Suite 3200
Austin, Texas 78701
(512) 457-2014
jsullivan@kslaw.com

Ashley C. Parrish
KING & SPALDING LLP
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 737-0500

S. Shawn Stephens
KING & SPALDING LLP
1100 Louisiana Street, Suite 4000
Houston, Texas 77002
(713) 751-3220

Counsel for Amici Curiae

Kate Comerford Todd
Sheldon Gilbert
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the Chamber of Commerce of the United States

Linda E. Kelly
Quentin Riegel
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10th Street, N.W., Suite 700
Washington, D.C. 20001
(202) 637-3000
Counsel for the National Association of Manufacturers

CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), undersigned counsel hereby certifies that this brief contains 5062 words, according to the word count of the computer program used to prepare the document.

/s/ James P. Sullivan
James P. Sullivan
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that, on January 12, 2015, a true and correct copy of the foregoing brief was served via electronic filing upon all parties as follows:

Evan A. Young
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Austin, Texas 78701
evan.young@bakerbotts.com
Counsel for BCCA Appeal Group, Inc.

Mary E. ("Mary Beth") Stevenson
Assistant City Attorney
CITY OF HOUSTON LEGAL DEPARTMENT
900 Bagby Street, 4th Floor
Houston, Texas 77002
Marybeth.stevenson@houstontx.gov
Counsel for City of Houston

/s/ James P. Sullivan
James P. Sullivan
Counsel for Amici Curiae