Cause No: D-1-GN-23-003474

THE CITY OF HOUSTON Plaintiff,	§	IN THE DISCTRICT COURT OF
v.	§	TRAVIS COUNTY
THE STATE OF TEXAS, Defendants.	§	
THE CITY OF SAN ANTONIO AND THE CITY OF EL PASO, Intervenors.	§	345TH JUDICIAL DISTRICT

DEFENDANT'S MOTION TO DISMISS BASED ON LACK OF SUBJECT-MATTER JURISDICTION

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, the State of Texas ("the State"), moves the Court under Rule 91a of the Texas Rules of Civil Procedure to dismiss for lack of subject-matter jurisdiction the claims asserted by Plaintiff, the City of Houston, and Intervenors, the City of San Antonio and the City of El Paso ("the Cities").

Based solely upon the controlling law, the Court should dismiss this suit under Rule 91a because the Court lacks subject matter jurisdiction.

Introduction

This is a suit over the constitutionality of HB 2127, adopted at the Regular Session of the 88th Legislature. It uses the legal doctrine of field preemption to preempt certain municipal ordinances, orders, and rules. The areas preempted include the Agriculture Code, the Business and Commerce Code, the Finance Code, the Insurance Code, the Labor Code, the Local Government Code, the Natural Resources Code, the Occupations Code, and the Property Code. HB §§ 5–6, 8–15 (to be codified in several places).

In addition to preempting the field of local regulation in nine different statutory codes, HB 2127 has an enforcement mechanism that allows a "person who has sustained an injury in fact, actual, or threatened, from a municipal or county ordinance … in violation of any of the following provisions . . . has standing to bring or may bring an action against the municipality or county." *Id.* § 7 (To be codified at TEX. CIV. PRAC. & REM. CODE § 102A.002). A claimant must give a three months' notice before bringing suit, and this notice must describe both the injury and the ordinance that allegedly cause it. *Id.* (to be codified TEX. CIV. PRAC. & REM. CODE § 102A.005. The statute waives the local governmental entity's immunity for purposes of this statute. *Id.* (to be codified at TEX. CIV. PRAC. & REM. CODE § 102A.006.).

No state agency has any enforcement authority over this statute.

The Cities argue that HB 2127 violates the Texas Constitution, both facially and as-applied, entirely on the grounds of the text of the statute without any additional facts.

Statement of Position

A defendant may file a plea to the jurisdiction under Rule 91a to assert that a court lacks subject-matter jurisdiction. For five reasons, the Court lacks subject-matter jurisdiction over this lawsuit and must dismiss it under Rule 91a for having no basis in law.

First, the State has sovereign immunity, and no statute waives its sovereign immunity. The Uniform Declaratory Judgments Act ("UDJA"), Chapter 37 of the Texas Civil Practice and Remedies Code, waives immunity to constitutional challenges to statutes, but only against an appropriate governmental agency. The State is not an appropriate governmental agency because it has no authority to enforce the statute.

Second, similarly, the Cities lack standing to sue the State because the Cities' alleged injuries are not traceable to the State. Standing is jurisdictional.

Third, the Cities' challenge to HB 2127 is not ripe. HB 2127 does not itself preempt any statute. It is enforced via lawsuits by regulated parties alleging that an ordinance is preempted. Judicial review of HB 2127 will be appropriate if and when a municipality raises the supposed unconstitutionality of HB 2127 as a defense to one of those future lawsuits. OAG will intervene to defend the constitutionality of HB 2127 at that point. Ripeness is jurisdictional.

Fourth, the Cities' claims under Article I, Section 19 of the Texas Constitutional are facially invalid for the additional reason that the Cities are not citizens and has no rights under that provision. The Court lacks jurisdiction over facially invalid claims. The Cities' constitutional claims under Article I, Section 19 have no basis in law.

Fifth, the Cities' claims are facially invalid because HB 2127 does not violate the Texas Constitution. The Legislature may expressly preempt municipal ordinances, orders, and rules, and did so in HB 2127. The Court lacks jurisdiction over facially invalid claims. The Cities' constitutional claims have no basis in law.

Standard of Review

Rule 91a of the Texas Rules of Civil Procedure allows a party to move to dismiss a cause of action when it has no basis in law or fact. Tex. R. Civ. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." Tex. R. Civ. P. 91a.1. Texas courts have described two situations in which a claim has no basis in law: (1) the petition alleges too few facts to demonstrate a viable, legally cognizable right to relief; and (2) the petition alleges additional facts that, if true, bar recovery. See Stallworth v. Ayers, 510 S.W.3d 187, 190 (Tex. App.—Houston [1st Dist.] 2016, no pet.). Plaintiffs' petition presents both grounds for dismissal for lack of a waiver of the OAG's immunity from suit.

In assessing whether a cause of action has any basis in law or fact under Rule 91a, "the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action." TEX. R. CIV. P. 91a.6. "The rule does not limit the universe of legal theories by which the movant may show that the claimant is not entitled to relief based on the facts as alleged." *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 655 (Tex. 2020).

"As a procedural matter . . . a jurisdictional challenge, including one premised on sovereign immunity, 'may be raised by a plea to the jurisdiction[.]'" *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019). If there is no subject matter jurisdiction, the claim has no basis in law and thus "Rule 91a can be used to obtain dismissal." *Thibodeau v. Lyles*, 558 S.W.3d 166, 169 (Tex. App.— Houston [14th Dist.] 2018, no pet.). Accordingly, a challenge to subject matter jurisdiction based on sovereign or governmental immunity may be raised by any dispositive motion, including a motion under Rule 91a. *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724–25 (Tex. 2016). A Rule 91a motion used to challenge a trial court's subject-matter jurisdiction effectively constitutes a plea to the jurisdiction. *City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 822 n.1 (Tex. App.—Austin 2014, no pet.).

At all times, "[t]he plaintiff bears the burden to establish the trial court's jurisdiction." *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012). "Governmental immunity from suit defeats a trial court's subject matter jurisdiction." *Tex. Dep't of Transp. v. Jones*, 8 S.W.3d 636, 637 (Tex. 1999); *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26 (Tex. 2004). Governmental entities are not only presumed immune from suit, *Lubbock Cty. Water Control & Improv. Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 (Tex. 2014), but there is in fact a "heavy presumption in favor of immunity," *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007).

Subject matter jurisdiction is essential to the power of a court to decide a case, and without subject matter jurisdiction a court cannot render a valid judgment. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993). Subject matter jurisdiction may not be presumed and cannot be waived. *Cont'l Coffee Prod. Co. v. Cazarez*, 937 S.W.2d 444, 448–49 n.2 (Tex. 1996). Whether a court has subject matter jurisdiction is a question of law, *Hoff v. Nueces Cty.*, 153 S.W.3d 45, 48 (Tex. 2004), which may be challenged through a plea to the jurisdiction, *Harris Cty. v. Sykes*, 136 S.W.3d 635, 638 (Tex. 2004).

"When a plea to the jurisdiction challenges the pleadings, [the court] determine[s] if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause." Tex. Dep't of *Miranda*, 133 S.W.3d 226. "If the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend." *Id.* at 227. For a plaintiff to overcome a defendant's assertion of sovereign immunity, "the plaintiff must affirmatively demonstrate the court's jurisdiction by alleging a valid waiver of immunity." Dall. Area Rapid Transit v. Whitley, 104 S.W.3d 540, 542 (Tex. 2003).

Argument and Authorities

I. The UDJA does not waive the State's sovereign immunity to suit.

The State has sovereign immunity. The Cities have not sufficiently pled facts to show an exception to sovereign immunity applies. Therefore, all of the Cities' claims are barred by sovereign immunity.

The Cities bring claims under the Uniform Declaratory Judgment Act ("UDJA") only. The UDJA provides a narrow waiver of sovereign immunity for declaratory judgement actions that challenge the constitutionality of a statute, but only applies to "the relevant governmental entities." For claims challenging the validity of statutes the Declaratory Judgment Act requires that the relevant

governmental entities be made parties, and thereby waives immunity to claims against those entities. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 76 (Tex. 2015); *Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 904 (Tex. App.—Austin 2009, no pet.). Declaratory-judgment claims challenging the validity of a statute may be brought against the relevant governmental entity. *Abbott v. Mexican American Legislative Caucus* ("*MALC*"), 647 S.W.3d 681, 698 (Tex. 2022) ("MALC"). *Tex. Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 621–22 & n.3 (Tex. 2011); *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994); *Gant v. Abbott*, 574 S.W.3d 625, 633–34 (Tex. App.—Austin 2019, no pet.).

The State is not a relevant government entity. "[T]he State is not automatically a proper defendant in a suit challenging the constitutionality of a statute merely because the Legislature enacted it." *MALC*, 647 S.W.3d at 698. "In discussing the UDJA's waiver for claims challenging the validity of statutes, we have explained that the waiver extends to the relevant governmental entities. The identity of the relevant governmental entity for waiver purposes necessarily depends on the statue being challenged." *Id.* at 697 n. 7 (quotation and citation omitted). The State is not an appropriate government entity because it has no enforcement authority over HB 2127. *See MALC*, 647 S.W.3d at 698 (the State had no authority to enforce the challenged election statute). The Cities have not even alleged that the State has any enforcement authority.

Consequently, the State retains its sovereign immunity, and the Cities' claims against the State do not have basis in law. The Court should dismiss the Cities' claims against it.

II. The Cities' alleged injury is not traceable to the State.

"Subject matter jurisdiction requires that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable." *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994). "A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it." *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). The Texas

Constitution's separation of powers "prohibit[s] courts from issuing advisory opinions because such is the function of the executive rather than judicial department." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444. "The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties." *Id.*

To the extent not contradicted by state law, Texas courts "look to the more extensive jurisprudential experience of the federal courts on the subject [of standing] for any guidance it may yield." *Id.* To have standing, each plaintiff must meet three elements: (1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected or cognizable interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of—that is, the injury must be fairly traceable to the challenged action of the defendant and not the independent action of a third party not before the court; and (3) it must be likely, and not merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Brown*, 53 S.W.3d at 305 (referencing Lujan); *Heckman*, 369 S.W.3d at 155.

Under this precedent, the Cities lack sanding to sue the State. Because the State has no enforcement authority over HB 2127, the Cities' alleged injuries are not traceable to the State, and a court order against the State would not redress the Cities' alleged harm. "Though we have not been presented with the precise issue, our courts of appeals have generally held that challenges to the constitutionality of a statute are not properly brought against the State in the absence of an 'enforcement connection' between the challenged provisions and the State itself." *MALC*, 647 S.W.3d at 696–97. "As the State itself has no enforcement authority with respect to election laws, and the State is the only defendant against which the Gutierrez Plaintiffs seek a declaration regarding the constitutionality of those laws, the Gutierrez Plaintiffs have failed to meet the traceability element of standing." *Id.* at 681. Likewise, the State itself has no enforcement authority with respect to HB 2127,

and the Cities challenge to the constitutionality of HB 2127 is not properly brought against the State because there is no enforcement connection between the challenged provisions and the State itself.

Therefore, the Cities have no standing to sue the State. The State retains its immunity from suit, and the Cities' claims against the State do not have a basis in law. For those additional reasons, the Court should dismiss the Cities' claims against the State.

III. The Cities' claims are not ripe.

"Ripeness, which requires a plaintiff to have a concrete injury before bringing a claim, is a threshold issue that implicates subject matter jurisdiction." *Eagle Oil & Gas Co. v. TRO-X, L.P.*, 619 S.W.3d 699, 706 (Tex. 2021) (internal quotation marks omitted). "Under the ripeness doctrine, we consider whether, at the time a lawsuit is filed, the facts are sufficiently developed so that an injury has occurred or is likely to occur, rather than being contingent or remote." *Id.* "A case is not ripe when determining whether the plaintiff has a concrete injury depends on contingent or hypothetical facts, or upon events that have not yet come to pass." *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 852 (Tex. 2000).

In assessing ripeness, "a court is required to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Perry v. Del Rio*, 66 S.W.3d 239, 250 (Tex. 2001) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). The constitutionality of HB 2127 in the abstract is not fit for judicial review. Ordinances will be found preempted or not on a case-by-case basis, and municipalities may raise HB 2127's alleged unconstitutionality as a defense in such cases, which will concern concrete ordinances and statutes. HB 2127 does not itself preempt any ordinance, and the City of Houston does not identify any ordinance it believes may be preempted. Thus, withholding a ruling in this suit will not impose significant hardship on the Cities.

Thus, questions concerning the constitutionality HB 2127 are not ripe for review. Therefore, the State retains its immunity from suit, and the Cities' claims against the State of Texas do not have a basis in law. For those additional reasons, the Court should dismiss the Cities' claims against the State.

IV. Because the Cities lack standing to assert due process rights under Art. I, § 19, the Court must dismiss its void-for-vagueness challenge for lack of jurisdiction.

The Cities cannot assert any rights under Article I, section 19 of the Texas Constitution. Article I, section 19 states: "No *citizen* of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land." TEX. CONST. Art. I, § 19 (emphasis added).

The Cities are not a "citizens" within the meaning of Article I. "The City's argument is a due process challenge that the City lacks standing to assert because municipalities do not enjoy due process rights…. The City has no standing to raise due process and equal protection challenges." *Proctor v. Andrews*, 972 S.W.2d 729, 734 (Tex. 1998); *see also Texas Worker's Comp. v. Bridge City*, 900 S.W.2d 411, 414 (Tex. App.—Austin, 1995, reh'g denied, no writ).[1]

"Municipal corporations do not acquire vested rights against the State," and the Texas Supreme Court has rejected "a governmental entity's due course of law claim under the Texas Constitution." *Honors Academy, Inc. v. Texas Education Ass'n*, 555 S.W.3d 54, 68 (Tex. 2018); *see also Tooke v. City of Mejia*, 197 S.W.3d 325, 345 (Tex. 2006) ("a governmental entity acquires no vested rights against the State").

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[1] *See Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926); *Nootsie, Ltd. v. Williamson Co. Appraisal Dist.,* 925 S.W.2d 659, 662 (Tex.1996); *Deacon v. City of Euless,* 405 S.W.2d 59, 62 (Tex.1966); *see generally* 2 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS §§ 4.19 & 4.20 (3d ed.1988).

Thus, this Court should dismiss the Cities' void-for-vagueness arguments for lack of jurisdiction because the Cities have no standing to raise them, and the claims lack basis in law.

V. This Court lacks jurisdiction over all the Cities' claims that HB 2127 is unconstitutional because these claims are facially invalid.

The UDJA's waiver of immunity for declaratory-judgment claims challenging the validity of statutes is not automatic—plaintiffs must plead a valid constitutional claim to waive immunity. "Although the UDJA waives immunity for declaratory-judgment claims challenging the validity of statutes, we have held that immunity from suit is not waived if the constitutional claims are facially invalid." *MALC*, 647 S.W.3d at 698. That in itself is a jurisdictional question. *Id.* at 699. "As in every Texas case involving sovereign immunity, this jurisdictional inquiry touches on the merits because … courts lack jurisdiction to proceed if the claim appears 'facially invalid.'" *Id.*

Home rule cities are indisputably subject to the State's power. The very text of Article XI, section 5(a) of the Texas Constitution, which grants home rule cities their power, expressly states this fact:

> 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***.

Tex. Const. art. XI, § 5. The Cities' argument that the Texas Constitution lacks a Supremacy Clause thus lacks force, given that the very statute it relies on for its grant of power simultaneously limits it. *See* Pl. MSJ at 39.

And, indeed, the Texas Supreme Court has treated this clause as though it were a Supremacy Clause: "The Texas Constitution prohibits city ordinances that conflict with State law." *Hotze v. Turner*, __ S.W.3d __, 2023 WL 3027869, at *5 (Tex. 2023) (citing art. XI, § 5).

Despite the Cities' protests that "the Legislature has no power to repeal by statute what the Constitution and Texans have bestowed," Pl. MSJ at 42-43, the Cities are simply incorrect. "While home rule cities have all power not denied by the Constitution or state law, and thus need not look to the Legislature for grants of authority, the Legislature can limit or withdraw that power by general law." *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 593 (Tex. 2018). The Legislature may give and the Legislature may take away. "The question is not whether the Legislature *can* preempt a local regulation … but whether it *has*." *Id.*[2]

The recognition of the supremacy of State law over a home rule city's charter or ordinance has consistently been affirmed by Texas courts, most recently in *Hotze*. In *Hotze*, the Texas Supreme Court reaffirmed this interpretation of Article XI, section 5, noting that "City charters and the ordinances amending them must comply with the Texas Constitution and with state law. A city ordinance is thus unenforceable to the extent that it is inconsistent with a state statute preempting its subject matter." 2023 WL 3027869 at *3.

The *Hotze* Court recognized, however that "Courts do not invalidate city ordinances on this ground, however, if any other reasonable construction leaving both in effect can be reached." *Id.* (internal citations omitted.). The *Hotze* Court, like many before it, recognized both the validity of

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[2] *See also Wilson v. Andrews*, 10 S.W.3d 663 (Tex. 1999) (noting that the Texas Constitution allows a home rule city to be governed, generally, by ordinances adopted pursuant to its municipal charter, but the legislature can limit or augment a city's self-governance).

preemption where a state law and a city ordinance could not be read together without a conflict and the importance of attempting to give effect to both.[3]

The Cities do not disagree that conflict preemption both occurs and is constitutional—but it takes this idea a step further, arguing that conflict preemption is the only type of preemption that Texas state law allows. Pl. MSJ at 32-45. However, nothing in Texas law suggests that the presence of express conflict preemption excludes the possibility of express field preemption.

Therefore, the Cities have not met their burden to waive immunity. Their claim that HB 2127 is unconstitutional because Article XI, section 5 lacks a Supremacy Clause is facially invalid and has no basis in law. The Court should dismiss the Cities claims for lack of jurisdiction.

Prayer

The State asks the Court to grant its motion to dismiss because the Court lacks jurisdiction over the Cities claims against it, and the Cities' claims against the State of Texas have no basis in law.

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[3] Many cases have affirmed that a home rule city's power may be limited by the Legislature when the legislature does so with unmistakable clarity. *See, e.g.*, *Jones v. City of Houston*, 907 S.W.2d 871 (Tex. App. Houston 1st Dist. 1995), writ denied, (Feb. 29, 1996); *Proctor v. Andrews*, 972 S.W.2d 729 (Tex. 1998); *$27,877.00 Current Money of U.S. v. State*, 331 S.W.3d 110 (Tex. App. Fort Worth 2010); *State v.* Chacon, 273 S.W.3d 375 (Tex. App. San Antonio 2008); City of Carrollton v. Texas Com'n on Environmental Quality, 170 S.W.3d 204 (Tex. App. Austin 2005); State v. Chacon, 273 S.W.3d 375 (Tex. App.—San Antonio 2008); City of Santa Fe v. Young, 949 S.W.2d 559 (Tex. App.—Houston [14th Dist.] 1997).

Dated August 9, 2023.

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Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2023, a true and correct copy of the foregoing document was served via the Court's electronic filing system to all counsel of record.

/s/ Susanna Dokupil
SUSANNA DOKUPIL

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