

Don't Mess with Houston, Texas: The Clean Air Act and State/Local Preemption

When a state fails to take adequate measures to regulate air pollution, what options does a city have to ensure that its citizens breathe clean air? Can a city impose clean air regulations that are different from or in addition to regulations imposed by the state? These are the central questions in *BCCA Appeal Group v. City of Houston*, a case currently pending in Harris County, Texas. The lawsuit arises out of the continuing battle to improve Houston's notoriously poor air quality. In 2007 Mayor Bill White of Houston, frustrated with the slow pace of progress under the inspection regime run by the Texas Commission for Environmental Quality ("TCEQ"), enacted an ordinance that gave the City of Houston broad powers to register and inspect polluting facilities within the City, and to fine them for violations of the Texas Clean Air Act ("TCAA").¹ In February 2008 the BCCA Appeal Group ("BCCAAG"), an organization formed to represent the litigation interests of refineries and petro-chemical companies in the Houston area, brought suit against the City seeking an injunction to halt enforcement of the ordinance and a declaration that the ordinance is preempted by state law. The City has responded that the ordinance is a valid exercise of its home-rule authority to protect the health and safety of the public.

This paper argues that in many situations local government may be the level of government that can address air pollution problems most effectively. This is particularly true when the actions of a state agency are inadequate to address the health risks presented to local

¹ City of Houston Ordinance No. 2007-208, *An Ordinance Amending Chapter 21 of the Code of Ordinances, Houston, Texas, Relating to Registration of Air Pollution Sources and Incorporation of State Rules Regarding Air Pollution; Containing Findings and Other Provisions Relating to the Foregoing Subject; Providing for Severability; and Declaring an Emergency*. Passed and approved February 14, 2007.

populations by air pollution, or when municipalities face the inherently local problem of “toxic hotspots.” How far a city can go in regulating air pollution, however, remains an open question. This paper considers this question under Texas law through the lens of *BCCA Appeal Group v. City of Houston*. Part I examines the background of the Houston Ordinance, in particular the city’s growing discontent with the TCEQ enforcement system. Part II presents the legal arguments on both sides and suggests that the court will likely find that the ordinance is not preempted by state law. Part III considers the question of municipal regulation of air pollution more broadly, and asks how similar state/local preemption disputes might play out in other states.

While there is a tremendous body of literature on the issues of federal/state preemption, comparatively little work has been done on the issues of state/local preemption.² I attribute this discrepancy of treatment to the fact that state/local issues generally do not present the kinds of constitutional dilemmas that make their way into the U.S. Reports, rather than to a lack of significance of state/local disputes. Indeed, most American citizens have the majority of their government contact with local government: local police departments, local school districts, and local property assessors are likely to have far more impact on the average citizen’s daily life than the actions of far-away federal agencies. In this vein, perhaps nothing a government can affect has as constant an impact on people’s daily lives as the quality of the air they breath. Whether

² On the issues of federal/state preemption, *see, e.g.*, Thomas O. McGarity, THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES, 2008 (arguing that Congress and the courts should avoid federal preemption of state common law tort claims because, among other reasons, federal regulatory regimes generally lack the corrective justice elements of the common law tort system). Other recent works on federal/state preemption include: Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008); Ernest Young, *Federal Preemption and State Autonomy*, in FEDERAL PREEMPTION: STATE’S POWERS, NATIONAL INTERESTS 249 (Richard A. Epstein & Michael S. Greve eds., 2007); Mary J. Davis, *The Battle over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. REV. 1089 (2007); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007).

the responsibility for that air quality falls primarily at the local, state, or federal level may have an impact on every breath a person takes.

Part I: Houston's Air Pollution Problem

Houston, the nation's fourth largest city³ and the center of the nation's petrochemical industry,⁴ has an air pollution problem. In 2003 the Fifth Circuit noted in a prior case involving the BCCA Appeal Group – that time concerning the group's challenge to the Houston-Galveston ozone plan – that “Houston-Galveston has one of the most serious ozone problems in the country.”⁵ In 2008 the American Lung Association ranked Houston as the nation's fourth most ozone-polluted city.⁶ Exposure to high ozone levels can cause coughing, new onset of asthma, aggravation of asthma and other chronic respiratory diseases, decreased lung capacity, impaired lung development in children, increases in hospital admissions, and premature deaths from cardiovascular and respiratory causes.⁷ In addition to an ozone problem, Houston has a toxic chemicals problem. In 2006 Mayor White commissioned a study by experts at local universities and medical schools to evaluate the risk posed by toxic emissions in Houston; the study identified twelve chemicals present in Houston air at levels high enough to pose health risks.⁸ A similar study conducted that year by Rice University, Baylor College of Medicine, Texas

³ Greater Houston Partnership, *Houston Area Profile*, February 15, 2009, <http://www.houston.org/pdf/research/02CW001.pdf> (“the city of Houston had a population of 2.21 million in mid-2007”).

⁴ Greater Houston Partnership, *Chemicals*, Sept. 23, 2008, <http://www.houston.org/pdf/research/16HW001.pdf> (“The Houston Metropolitan Statistical Area (MSA) has 40.8 percent of the nation's base petrochemical capacity”).

⁵ BCCA Appeal Group v. U.S. EPA, 355 F.3d 817, 822 (5th Cir. 2003).

⁶ AMERICAN LUNG ASSOCIATION, STATE OF THE AIR: 2008, http://www.stateoftheair.org/2008/key-findings/SOTA08_Table2.pdf.

⁷ Environmental Protection Agency, *Ground Level Ozone*, <http://www.epa.gov/air/ozonepollution/health.html>.

⁸ CITY OF HOUSTON, MAYOR'S TASK FORCE ON THE HEALTH EFFECTS OF AIR POLLUTION, A CLOSER LOOK AT AIR POLLUTION IN HOUSTON: IDENTIFYING PRIORITY HEALTH RISKS, June 2006, at 13, available at <http://www.epa.gov/ttn/chief/conference/ei16/session6/bethel.pdf>.

Southern University, University of Houston Law Center, and the University of Texas Medical Branch at Galveston considered the health risks posed by four pollutants in Houston and concluded: “Mounting evidence demonstrates that the population of Southeast Texas is exposed to disproportionate levels of toxic air pollutants considered to be a health risk to this population.”⁹

Air pollution harms not only Houston’s health, but its economy as well. The Mercer Quality of Living Survey, which many professionals consult in weighing job transfers, listed Houston in 2007 as having the worst air quality of any city in its survey.¹⁰ Business leaders have reported that the reputation of Houston’s air has put them at a disadvantage in recruiting employees to come to the city.¹¹ A study by CEOs for Cities suggests that Houston’s reputation for poor environmental quality makes it a less attractive destination for college graduates.¹²

Regulating Houston’s Air Pollution

In Texas, air quality is regulated under the federal Clean Air Act (“CAA”)¹³ and the Texas Clean Air Act (“TCAA”).¹⁴ Under the authority of the CAA, the Environmental Protection Agency (“EPA”) identifies pollutants to regulate and establishes national ambient air quality standards (“NAAQS”). EPA sets NAAQS for “criteria” pollutants, including particulate matter, ozone, carbon monoxide, nitrogen dioxide, and lead, and designates regions as in “attainment” or

⁹ RICE UNIVERSITY, BAYLOR COLLEGE OF MEDICINE, TEXAS SOUTHERN UNIVERSITY, UNIVERSITY OF HOUSTON LAW CENTER, AND THE UNIVERSITY OF TEXAS MEDICAL BRANCH AT GALVESTON, *THE CONTROL OF AIR TOXICS: TOXICOLOGY, MOTIVATION AND HOUSTON IMPLICATIONS*, Sept. 2006, at 181.

¹⁰ Monica Perin, *Poor air quality hindering recruiting in Houston, experts say*, HOUSTON BUSINESS JOURNAL, February 29, 2008, available at <http://houston.bizjournals.com/houston/stories/2008/03/03/story7.html>.

¹¹ *Id.*

¹² L.M. Sixel, *Houston Lacks Pull with New College Grads*, HOUSTON CHRONICLE, March 19, 2008, available at <http://www.chron.com/dispatch/story.mpl/business/sixel/5634211.html>.

¹³ 42 U.S.C. §§ 7401, et seq.

¹⁴ TEX. HEALTH & SAFETY CODE § 382.001, et seq.

“nonattainment” of the standards.¹⁵ In areas designated as nonattainment for a pollutant, states are empowered to develop and submit for EPA approval state implementation plans (“SIPs”) to provide attainment, maintenance, and enforcement of NAAQS within the state.¹⁶ EPA reviews and approves SIPs, and after their approval, they are enforceable by EPA and the state.

Houston has been classified as in non-attainment of the NAAQS for ozone every year since 1975, the original deadline by which cities were supposed to comply with the ambient air standards of the CAA or lose federal transportation funding.¹⁷ Houston has received four extensions on the deadline, the most recent at the request of Governor Rick Perry, who asked that Houston be reclassified from “moderate” to “severe” non-attainment of the standard so that the deadline would be pushed back to 2019.¹⁸ In September 2008 the EPA granted the governor’s request.¹⁹ While this change in status helps keep the highway money flowing, it does little to improve the air breathed by Houston’s 2.2 million inhabitants.

Up until 2005 the responsibility for monitoring Houston’s air pollution was shared by the TCEQ and the City of Houston under a contract in which the City oversaw registration and investigations and shared fees and penalties collected under the program with the TCEQ.²⁰ In September 2005 the City and the TCEQ agreed to terminate the contract, with the City retaining responsibility for regulation of most small businesses, such as dry cleaning operations and gas stations, while the TCEQ continued to have responsibility for regulation of most heavy

¹⁵ 42 U.S.C. §§ 7407, 7409.

¹⁶ 42 U.S.C. §§ 7409, 7410(a).

¹⁷ Ella Tyler, *Pack the House for Clean Air*, CITIZEN’S ENVIRONMENTAL COALITION, August 31, 2007, <http://www.cechouston.org/index.php/?p=2983>. See also REGIONAL AIR QUALITY PLANNING COMMITTEE OF THE HOUSTON-GALVESTON AREA COUNCIL, AIR QUALITY REFERENCE GUIDE FOR THE HOUSTON-GALVESTON AREA, July 2002, at 18-26, available at <http://www.cleanairaction.org/pubs/pdfs/2002/2002aqrg.pdf> (presenting Houston’s history of NAAQS violations from 1987 to 2001).

¹⁸ *Id.*

¹⁹ Texas Commission on Environmental Quality, *Houston-Galveston-Brazoria Eight-Hour Ozone Nonattainment Area*, <http://www.tceq.state.tx.us/implementation/air/sip/hgb.html> (visited March 15, 2009).

²⁰ Texas Commission on Environmental Quality, *Houston Air Program Undergoes a Remake*, NATURAL OUTLOOK, Winter 2006, http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/pd/020/06-01/houstonairprogram.html.

industry.²¹ John Steib, TCEQ deputy director of the Office of Compliance and Enforcement, said the contract was dropped when the two parties could not agree on a joint enforcement strategy.²² Observers of Houston's city government at the time may have suspected that the split was largely the doing of Houston's new mayor.

Taking Air Pollution Seriously

The 2007 Ordinance at issue in *BCCA Appeal Group v. City of Houston* did not come out of nowhere. Rather, it was the product of Mayor White's long-simmering discontent with the effectiveness of TCEQ's monitoring program.

Bill White (b. 1954) was elected Mayor of Houston in 2003 as a pro-business Democrat.²³ Educated at Harvard University and the University of Texas School of Law, White forged a successful career both as a commercial litigator and as a businessman, serving as CEO of Frontera Resources, an oil and gas development company, and of the WEDGE Group, an energy, construction, and real estate concern.²⁴ From 1993 to 1995 he served as U.S. Deputy Secretary of Energy under President Bill Clinton.²⁵ While campaigning for office White had expressed the need for Houston to take air pollution more seriously, and once in office he began changing city policies that could impact air quality or global warming. His internal city initiatives have included purchasing wind-powered electricity for the city, replacing cars in the city fleet with fuel-efficient hybrids, implementing a weatherizing program for old homes, and installing low-energy diodes in traffic lights.²⁶ The city's electrical usage has dropped almost six

²¹ *Id.*

²² *Id.*

²³ Wikipedia, *Bill White (mayor)*, [http://en.wikipedia.org/wiki/Bill_White_\(mayor\)](http://en.wikipedia.org/wiki/Bill_White_(mayor)).

²⁴ *Id.*

²⁵ Carolyn Feibel and Matthew Tresaugue, *Houston mayor's environmental to-do list is lengthy*, HOUSTON CHRONICLE, May 27, 2008, <http://www.chron.com/disp/story.mpl/realestate/neighborhoods/5804849.html>.

²⁶ *Id.*

percent during White's term in office.²⁷ But while the City is a comparatively large consumer of energy and services, it was clear from the beginning that the largest improvements in Houston's air quality could only be achieved by reducing emissions from Houston's largest pollution point sources – the refineries and petro-chemical facilities along the Houston Ship Channel.

During White's first term as mayor he spoke about the need for Houston's industries to take larger strides in controlling emissions, but he left direct enforcement of environmental regulations to the cooperative relationship between TCEQ and the City's regulators. In 2005, after White was reelected by a vote of ninety-one percent,²⁸ his approach became far more direct. In early 2005 Mayor White announced the City's first concrete initiative to clean up Houston's air – an air pollution monitoring network along the fences of the City's industrial sites to gain more accurate data on toxic emissions in the area, particularly of benzene and 1,3-butadiene.²⁹ In a briefing in which the Mayor explained that the plan was a response to the inadequacy of the current system of industry reported emissions data, he said, "I don't care who does it, but if somebody doesn't do it quick, we are going to do it."³⁰

In February and March of 2005 the *Houston Chronicle* ran a special report, "In Harm's Way," in which the paper reported the results of its own monitoring investigation of toxic emissions in east Houston.³¹ The report criticized the TCEQ's air monitoring system as "spotty" and overly reliant on industry-reported data.³² The *Chronicle* concluded, "It's as clear as the air quality readings measured by the *Chronicle* monitors that this state's system for protecting the

²⁷ *Id.*

²⁸ Bill White for Texas, *Biography*, <http://www.billwhitefortexas.com/biography/>.

²⁹ Dina Capiello, *Mayor unveils first specific actions on air toxics issue: New plan would monitor plants along their fences*, HOUSTON CHRONICLE, January 25, 2005, at A1.

³⁰ *Id.*

³¹ Editorial, *Dereliction of Duty: Lax state environmental regulations and barely existent enforcement have compromised the air quality of eastside neighborhoods. Who will stand up for the residents' interests?* HOUSTON CHRONICLE, March 2, 2005, <http://130.80.24.5:8081/cs/CDA/ssistory.mpl/special/04/toxic/3004073>.

³² *Id.*

environment has failed and must be overhauled. While state investigators have the common sense not to breathe the air they monitor, their bosses continue to turn a blind eye to poor air quality that subjects entire neighborhoods to substandard quality of life.”³³ In a later editorial, the *Chronicle* characterized the TCEQ as “the state’s featherweight environmental regulator.”³⁴

In a meeting with TCEQ representatives on March 1, 2005, the Houston city council questioned whether the TCEQ was responding fast enough to reports of high levels of benzene and butadiene in southeast Houston.³⁵ Councilwoman Carol Alvarado stated at the meeting, “What we are hearing today ... we’ve been talking about for fifteen years. I don’t see the seriousness of the issue from your agency. Frankly I just don’t know if you get it.”³⁶ Councilwoman Shelley Sekula-Gibbs questioned why the TCEQ had only recently detected toxic emissions in the Milby Park area, when residents had been complaining about the air for years.³⁷

In Spring of 2005, frustrated with delays in enforcement actions by the TCEQ after City monitors reported air pollution violations, the City amended its contract with the TCEQ so that it could independently bring suit for such violations.³⁸ Elena Marks, Mayor White’s health policy advisor, told a *Houston Chronicle* reporter about the City’s frustration with the TCEQ: “We’d write something up and turn it over to them, and they would or wouldn’t take action.”³⁹ The *Houston Chronicle* applauded the City’s decision to take local action: “Perhaps most importantly, the change will allow local officials who represent constituents in the most polluted

³³ *Id.*

³⁴ Lisa Falkenberg, *Commentary: Fog Clearing on Houston’s Emissions Thanks to White*, HOUSTON CHRONICLE, July 21, 2008, <http://www.chron.com/disp/story.mpl/metropolitan/falkenberg/5900317.html>.

³⁵ Dina Capiello, *Tough Talk on Toxics: Council asks agency to act sooner*, HOUSTON CHRONICLE, March 2, 2005, at A1.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Editorial, *Words into action: New city enforcement powers give officials the opportunity to back up speeches with civil lawsuits against air polluters*, HOUSTON CHRONICLE, March 2, 2005, <http://www.chron.com/disp/story.mpl/special/04/toxic/3006932.html>.

³⁹ *Id.*

areas of the city to initiate court action on their behalf. That’s a welcome addition of power to the governmental body most sensitive to the problem.”⁴⁰

By September of 2005 the City and the TCEQ agreed to part ways on their joint-monitoring program.⁴¹ The TCEQ maintained its office in the city to conduct registration and monitoring of “sources” – large industrial facilities – while the City conducted its own program of registration and monitoring “facilities” – smaller emitting sites such as dry cleaners and gas stations – under a city ordinance that had been on the books since 1992.⁴²

The City’s air pollution initiatives continued. In 2006 Mayor White and Mayor Laura Miller of Dallas, in conjunction with the mayors of fifteen other Texas cities, created the “Texas Cities for Clean Air Coalition,” a group formed to represent the interests of those cities in the permitting process for seventeen new coal-fired power plants that had been proposed to the TCEQ.⁴³ To represent the cities in their legal challenge to the proposed permits, White recruited the pro bono services of the prominent litigation firm Susman Godfrey, LLP, where White had worked as a litigator for many years.⁴⁴ The Coalition’s efforts helped induce the company TXU to reduce its planned number of coal plants from eleven to three; the story of the fight over the coal plants was captured in a documentary film titled “Fighting Goliath.”⁴⁵ The Coalition has

⁴⁰ *Id.*

⁴¹ Texas Commission on Environmental Quality, *Houston Air Program Undergoes a Remake*, NATURAL OUTLOOK, Winter 2006, http://www.tceq.state.tx.us/comm_exec/forms_pubs/pubs/pd/020/06-01/houstonairprogram.html.

⁴² City of Houston Ordinance No. 92-180, as amended by City of Houston Ordinance No. 94-430, and City of Houston Ordinance 2002-528.

⁴³ Press release, *Mayors Miller & White Announce Texas Cities for Clean Air Coalition & Introduce High-Profile Legal Team*, August 31, 2006, <http://www.houstontx.gov/mayor/press/20060831.html>.

⁴⁴ *Id.*

⁴⁵ See Iron Weed Film Club, *Fighting Goliath: Texas Coal Wars*, <http://www.ironweedfilms.com/films/fighting-goliath>. The movie is narrated by Robert Redford.

grown to represent thirty-seven Texas cities, and continues to push for more stringent regulation of power plant emissions near populated areas.⁴⁶

In 2007, as a result of two 2006 studies by researchers at area universities raising flags about the risks of toxic chemicals in Houston's air,⁴⁷ the City embarked on a more aggressive campaign against toxic emissions. A particular challenge for the City was the fact that Houston is in the center of the nation's most intensive region for refining and manufacturing petrochemicals, with heavy industrial facilities stretching from Beaumont in the east to Galveston in the south.⁴⁸ Although emissions from facilities outside of the city limits can contribute to air pollution within the city, the city has no regulatory authority over those facilities. Mayor White's solution to this dilemma was to announce in Spring of 2007 that the City would begin to use an existing nuisance ordinance to bring suit against industrial facilities outside of the City of Houston whose emissions increased the levels of toxic chemicals in Houston air.⁴⁹ White explained that the City was resorting to nuisance laws because the TCEQ had failed to adopt strong-enough standards on toxic emissions: "For years, we have urged Texas state regulators to set maximum levels for the concentration of carcinogens, such as benzene. They should adopt the city's detailed plan to reduce benzene or develop their own plan."⁵⁰

In March of 2007 Mike Jackson, the Republican state senator who represents Baytown and other industrial towns east of Houston where many of the intended targets of the Houston nuisance plan operate, introduced a bill in the Texas Senate that sought to prohibit local

⁴⁶ City of Houston press release, *Texas Clean Air Cities Coalition and Environmental Defense Fund Reach Milestone Agreements with NRG Texas on Limestone Station Expansion*, August 4, 2008, <http://www.houstontx.gov/mayor/press/20080804a.html>.

⁴⁷ See *supra* notes 8 and 9.

⁴⁸ Greater Houston Partnership, *Chemicals*, Sept. 23, 2008, <http://www.houston.org/pdf/research/16HW001.pdf> ("The Houston Metropolitan Statistical Area (MSA) has 40.8 percent of the nation's base petrochemical capacity").

⁴⁹ Kristen Mack, *Texas Senate votes to block White's air plan*, HOUSTON CHRONICLE, May 2, 2007, <http://www.chron.com/disp/story.mpl/metropolitan/4766869.html>.

⁵⁰ *Id.*

governments from regulating pollution coming from outside of their boundaries.⁵¹ Mayor White fired back in an editorial in the *Dallas Morning News* on May 3, 2007, stating: “[Jackson’s bill] strips away the power of cities to protect their citizens from toxic substances put into the air upwind from large concentrations of residents ... Despite our request, Texas failed to develop standards setting maximum allowed concentrations of chemicals such as benzene. In the meantime, our cities should not have our hands tied behind our backs to protect the public health of our largest population.”⁵² In the Senate debate over the bill, Senator Rodney Ellis, a Democrat from Houston, voiced similar concerns: “Why would you take away the ability of the largest city in the state to clean up its air? The city of Houston has stepped forward to show leadership to do something about ambient air-quality standards because the state is not doing it.”⁵³

Ultimately, the anti-nuisance bill never passed in the House, leaving Houston free to pursue lawsuits against polluting facilities in neighboring municipalities.⁵⁴ The City put the nuisance plan on hold, however, and it has yet to bring a nuisance suit under the plan.⁵⁵ The *Houston Chronicle*, commenting on the anti-nuisance fight and the general failure of the Legislature to enact any meaningful air pollution measures during the session, commented: “Houstonians are not willing to breathe bad air indefinitely. The latest legislative failure to deal with the issue should go a long way toward convincing business and civic leaders that a more

⁵¹ Texas Legislature Online, *History: Bill SB 1317*, <http://www.legis.state.tx.us/billlookup/History.aspx?LegSess=80R&Bill=SB1317>.

⁵² Bill White, *Mayor White: Fighting for Clean Air*, DALLAS MORNING NEWS, May 3, 2007, available at <http://billwhiteforhouston.com/000006.html>.

⁵³ *Id.*

⁵⁴ Editorial, *Helpless in Austin: Texas Legislature’s failure to address air pollution should spur local enforcement efforts*, HOUSTON CHRONICLE, June 10, 2007, <http://www.tmcnet.com/usubmit/2007/06/10/2701137.htm>.

⁵⁵ Editorial, *Foot-draggers: Regulators are too willing to grant polluters leeway; Mayor White is right to set a deadline*. HOUSTON CHRONICLE, Nov. 13, 2007, at B8.

aggressive local stance is necessary. If the state continues to drag its feet, it will be up to county and municipal government to effectively champion the cause of clean air.”⁵⁶

The Ordinance

The City’s broadest salvo so far in its clean air fight took place on February 14, 2007, when the City Council enacted Ordinance No. 2007-208 (together with 2008 amendments, “the Ordinance”), “Relating to Registration of Air Pollution Sources.”⁵⁷ The Ordinance amended and broadened the provisions in the Houston Code of Ordinances under which the City had been registering and monitoring polluting “facilities” since 1992; these provisions had been previously amended in 1994 and 2002 without challenge from industry or the state.⁵⁸ The Ordinance calls for the registration of any “facility,” which is defined as “an automotive 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 ... that emits one ton per year or more of airborne contaminants.”⁵⁹ This definition significantly broadens the scope of the Ordinance by bringing “sources” within the definition of “facility,” thereby including the heavy industrial operations that had previously been overseen by the TCEQ. Most significantly for the

⁵⁶ Editorial, *Helpless in Austin: Texas Legislature’s failure to address air pollution should spur local enforcement efforts*, HOUSTON CHRONICLE, June 10, 2007, <http://www.tmcnet.com/usubmit/2007/06/10/2701137.htm>.

⁵⁷ City of Houston Ordinance No. 2007-208, *An Ordinance Amending Chapter 21 of the Code of Ordinances, Houston, Texas, Relating to Registration of Air Pollution Sources and Incorporation of State Rules Regarding Air Pollution; Containing Findings and Other Provisions Relating to the Foregoing Subject; Providing for Severability; and Declaring an Emergency*. Passed and approved February 14, 2007. The current text of the City’s air registration ordinance is available at City of Houston Code of Ordinances, Chapter 21, Article VI, Division 2 *Source Registration*, <http://www.municode.com/resources/gateway.asp?pid=10123&sid=43>.

⁵⁸ City of Houston Ordinance No. 92-180; City of Houston Ordinance No. 94-430; City of Houston Ordinance 2002-528.

⁵⁹ City of Houston Ordinance No. 2007-208, Section 3, amending Houston Code of Ordinances, Division 2, Article VI, Chapter 21, § 21.161(a) (emphasis added).

case at hand, the new definition includes facilities operated by three members of the BCCAAG within the City of Houston.⁶⁰

The Ordinance increases registration fees and non-compliance penalties from the previous system. The registration fees range in scale from \$100 per year for a dry cleaning plant with fewer than six employees, to \$3,000 per year for a facility emitting ten tons or more of airborne contaminants.⁶¹ The Ordinance states, “It shall be unlawful for any person to operate or cause to be operated any facility unless there is a registration for the facility.”⁶² Violations under the section can be punished with fines of between \$250 and \$2,000 per day of violation.⁶³ Enforcement of the registration program is overseen by a health officer, who “shall issue the registration,” “[u]pon the submission of a properly completed application form and the tender of the applicable fee.”⁶⁴ The health officer is also empowered to conduct a regulatory compliance program, which “shall include, but need not be limited to, on site inspections, complaint investigations, and reviews of applicable compliance documentation. Civil, administrative, and criminal sanctions imposed by law shall be pursued where violations are determined to exist.”⁶⁵

The last quoted clause takes on additional significance when combined with the Ordinance’s third major amendment, by which it incorporates by reference the pollution standards and practices required by the TCAA.⁶⁶ In other words, the City stated that it could bring civil, administrative, and criminal sanctions for violations of state law – in effect, the City granted itself the full enforcement powers of the TCEQ within the City of Houston. The

⁶⁰ The three members with operations within the City of Houston are Lyondell Chemical Company, Texas Petrochemicals L.P., and Valero Refining-Texas L.P. Defendant City of Houston’s Motion for Summary Judgment, *BCCA Appeal Group v. City of Houston*, Cause No. 2008-09399, June 16, 2008, at 7.

⁶¹ City of Houston Ordinance No. 2007-208. amending § 21.166.

⁶² *Id.* amending § 21.162(a).

⁶³ *Id.* amending § 21.162(c-d).

⁶⁴ *Id.* amending § 21.163.

⁶⁵ *Id.* amending § 21.163(b).

⁶⁶ *Id.* amending § 21.164.

Ordinance also contains a severability provision, stating that if any part of the Ordinance is held unconstitutional or otherwise invalid the validity of the remaining portions shall be unaffected.⁶⁷

In explaining why the City chose to enact the Ordinance, Mayor White said he would “applaud state and federal regulation if it occurred. But without that, the city needs to take the actions that it can to protect its citizens.”⁶⁸ The gauntlet was thrown.

On May 7, 2008, approximately three months after BCCAAG filed its challenge to the original Ordinance, the City of Houston enacted Ordinance No. 2008-414, which altered several provisions in the previous Ordinance, most notably those dealing with civil and criminal enforcement.⁶⁹ The amendments removed the sentence, “Civil, administrative, and criminal sanctions imposed by law shall be pursued where violations are determined to exist.”⁷⁰ In its place the Ordinance states that “[i]t shall be unlawful for any person to operate or cause to be operated any facility that does not comply with [state air pollution control laws],” but provides an affirmative defense to prosecution under the section for any condition or activity that has been “[a]pproved or authorized by the [TCAA], state rule or state order.”⁷¹ This amendment was most likely a response to BCCAAG’s argument that the Ordinance created criminal penalties for activities approved by the TCEQ, discussed below.

BCCAAG Files Suit

⁶⁷ *Id.*, Section 5.

⁶⁸ Editorial, *Protecting their own: Industry group’s lawsuit is latest effort to undercut Houston’s enforcement of clean air regulations*, HOUSTON CHRONICLE, March 23, 2008, at Outlook 2.

⁶⁹ City of Houston Ordinance No. 2008-414, *An Ordinance Amending Sections 21-161, 21-164, and 21-166 of the Code of Ordinances, Houston, Texas, Relating to Registration of Air Pollution Sources; Containing Findings and Other Provisions Relating to the Foregoing Subject; Declaring Certain Conduct To Be Unlawful, Providing Affirmative Defenses Thereto and Penalties Therefor; Containing a Savings Clause; Providing for Severability; and Declaring an Emergency*. Passed and approved May 7, 2008.

⁷⁰ *Id.*, Section 4, amending Houston Code of Ordinances, Division 2, Article VI, Chapter 21, § 21.164.

⁷¹ *Id.*, Section 5, amending § 21.164(c-d).

Not everyone was happy with the City's bold assertion of authority. Houston industries that had worked with the TCEQ and its predecessors for decades were not pleased with the prospect of facing a second regulatory system with all the powers of the TCEQ but a far more aggressive public stance. The most displeased industrial operators found their voice in the BCCAAG. The BCCAAG was founded in 2001 as the legal arm of the "Business Coalition for Clean Air," a now defunct organization that was a regulated-industry spinoff of the Greater Houston Partnership, a Houston-area business coalition.⁷² The Greater Houston Partnership, which favors voluntary cooperation by industry and state action to strengthen air toxic enforcement,⁷³ has disclaimed any relationship with the BCCAAG.⁷⁴

The BCCAAG's incorporation papers declare that the group's purpose is "to advance the common business interests of its members with respect to their mutual goals of clean air and a strong business economy in Houston."⁷⁵ The ten current members of the BCCAAG are ExxonMobil Corporation, The Dow Chemical Company, ConocoPhillips Company, Lyondell Chemical Company, Celanese Chemicals, Ltd., Valero Refining-Texas L.P., Texas Petrochemicals L.P., Entergy Texas, Inc., Dynegy, Inc., and Air Products, L.P.⁷⁶ Since 2001 the group has been involved in a number of legal challenges to environmental regulations, most notably an unsuccessful challenge to the Houston-Galveston ozone plan that reached the Fifth

⁷² Editorial, *Protecting their own: Industry group's lawsuit is latest effort to undercut Houston's enforcement of clean air regulations*, HOUSTON CHRONICLE, March 23, 2008, at Outlook 2. The HOUSTON CHRONICLE has been highly critical of the BCCA Appeal's Group's motives: "In 2001, the BCCA launched a \$1.3 million advertising campaign featuring smiling schoolchildren shouting the punch line, "Clean air. It's everybody's business." Meanwhile, the BCCA Appeals Group was suing the state to water down elements of a smog reduction plan. As with a number of industry associations with disingenuous, green-friendly, double-speak titles, it's best to watch what they do, not what they say." *Id.*

⁷³ Editorial, *Helpless in Austin: Texas Legislature's failure to address air pollution should spur local enforcement efforts*, HOUSTON CHRONICLE, June 10, 2007, <http://www.tmcnet.com/submit/2007/06/10/2701137.htm>.

⁷⁴ Letter from Jeff Moseley, President and CEO of the Greater Houston Partnership, to Mayor Bill White, March 24, 2008, attached as Exhibit B to Defendant City of Houston's Motion for Summary Judgment, *BCCA Appeal Group v. City of Houston*, Cause No. 2008-09399, June 16, 2008.

⁷⁵ Editorial, *Protecting their own: Industry group's lawsuit is latest effort to undercut Houston's enforcement of clean air regulations*, HOUSTON CHRONICLE, March 23, 2008, at Outlook 2.

⁷⁶ City of Houston's Motion for Summary Judgment, at 7.

Circuit.⁷⁷ The group has been criticized by local environmental organizations, with one Houston attorney referring to the group as “the most litigious group in town.”⁷⁸

BCCAAG filed its original petition in *BCCA Appeal Group v. City of Houston* in Harris County District Court on Feb. 15, 2008.⁷⁹ The group’s spokesperson, Elizabeth Hendler, issued a written statement about the lawsuit which stated, “The city’s regulatory ordinance creates a new layer of regulation that is in conflict with the programs implemented by TCEQ... Such a patchwork style of environmental regulation is not the way to improve air quality in our community or protect our economy and job base.”⁸⁰ In the lawsuit BCCAAG is represented by Baker Botts, LLP, the prominent Houston-based law firm that has represented the group in its previous legal challenges.⁸¹ To mount a defense, Mayor White recruited the pro-bono services of the Houston litigation boutique Gibbs & Bruns, which in 2007 had successfully defended the City’s smoking ban in federal court.⁸² The battle was on.

Part II: *BCCA Appeal Group v. City of Houston*

BCCAAG’s Claim: The Ordinance is Preempted by State Law

⁷⁷ *BCCA Appeal Group v. EPA*, 355 F.3d 817 (5th Cir. 2004).

⁷⁸ Monica Perin, *Poor air quality hindering recruiting in Houston, experts say*, HOUSTON BUSINESS JOURNAL, February 29, 2008, available at <http://houston.bizjournals.com/houston/stories/2008/03/03/story7.html>. *See also*, Jenny Yau, *Change in Environmental Laws Could Have an Adverse Effect on Houston Air*, WORLD INTERNET NEWS COOPERATIVE (University of Houston), November 24, 2005, http://soc.hfac.uh.edu/artman/publish/article_306.shtml (“The Business Coalition for Clean Air Appeal Group is the organization that represents industry in its efforts to weaken Houston’s clean air plan. It has filed state and federal lawsuits with the goal of easing requirements on emissions.”).

⁷⁹ Original Petition, *BCCA Appeal Group v. City of Houston*, Cause No. 2008-09399, Feb. 15, 2008.

⁸⁰ Monica Perin, *Poor air quality hindering recruiting in Houston, experts say*, HOUSTON BUSINESS JOURNAL, February 29, 2008, available at <http://houston.bizjournals.com/houston/stories/2008/03/03/story7.html>.

⁸¹ BakerBotts.com, *Environmental – Industry Solutions*, http://www.bakerbotts.com/departments/practice_detail.aspx?id=9e98441e-0a53-4445-909e-902708d112f3.

⁸² Editorial, *Tapping the bar / Sometimes it pays to have a lawyer, especially if you're the mayor and get one for free*, HOUSTON CHRONICLE, August 16, 2007, at B-10.

BCCAAG seeks to invalidate the Ordinance on the grounds that it “contravenes the Constitution and statutes of the State of Texas and represents an impermissible intrusion on the exclusive powers granted by the Legislature to a state agency.”⁸³ As the basis for its challenge, BCCAAG points to the provision in the Texas Constitution that states, “no ordinance [of a home-rule city] shall contain any provision *inconsistent* with the Constitution of the State, or of the general laws enacted by the Legislature of this State.”⁸⁴ BCCAAG argues that the Ordinance contains provisions inconsistent with the Texas Clean Air Act (“TCAA”) and the Texas Water Code. The section of the TCAA dealing with Authority of Municipalities provides:

- (a) ... [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.⁸⁵

This provision echoes, twice, the Constitutional requirement that a municipal ordinance may not be inconsistent with state law. Thus, the central question in this case, as with most disputes over state/local preemption, is what it means to be inconsistent with state law.

BCCAAG argues that the Ordinance is inconsistent with state law because it impermissibly:

- (1) Establishes a duplicative City air quality regulatory program to that run by the TCEQ, but without the provisions the Legislature built in for the exercise of TCEQ discretion in implementing and enforcing TCEQ rules;

⁸³ First Amended Petition, *BCCA Appeal Group v. City of Houston*, Cause No. 2008-09399, June 9, 2008, at 1.

⁸⁴ TEX. CONST. ART. XI, § 5 [emphasis added].

⁸⁵ TEX. HEALTH & SAFETY CODE § 382.113 [emphasis added].

- (2) Assesses redundant air pollution fees, in clear conflict with TCEQ statutory fee programs;
- (3) Requires air pollutant emitting facilities to apply for permits to lawfully operate, in clear conflict with TCEQ permitting programs; and
- (4) Empowers the City to prosecute air quality cases criminally, in municipal court, rather than by filing suit in civil district court with the TCEQ as a necessary party, as required by the Texas Water Code.⁸⁶

The first two objections – to a duplicative regulatory program and redundant fees – are based not on any express conflict between the Ordinance and the text of the TCAA, but rather on an implicit conflict in the City regulating facilities that are already regulated, on essentially the same terms, by the TCEQ. BCCAAG’s argument is that through the TCAA the Legislature created a comprehensive regulatory regime for air emissions to be administered by the TCEQ, and that the limited authority granted to municipalities in the TCAA constrains the scope of authority that municipalities may exercise lawfully.⁸⁷ The TCAA specifically authorizes municipalities to perform certain functions, such as to enter and inspect property to determine compliance with the TCAA,⁸⁸ or to contract with the TCEQ to administer a local air quality inspection program and share in the air pollution fees collected.⁸⁹ BCCAAG argues that the granting of these specific powers indicates the Legislature’s intent that municipalities should not exercise powers beyond those granted in the TCAA. Since the TCAA clearly authorizes the TCEQ to register emitting facilities and to collect emission fees from them,⁹⁰ BCCAAG argues

⁸⁶ Plaintiff BCCA Appeal Group’s Motion for Summary Judgment, *BCCA Appeal Group v. City of Houston*, Cause No. 2008-09399, June 16, 2008, at 1.

⁸⁷ Plaintiff’s Motion for Summary Judgment, at 2-4.

⁸⁸ TEX. HEALTH & SAFETY CODE § 382.111.

⁸⁹ TEX. HEALTH & SAFETY CODE § 382.0622(d).

⁹⁰ TEX. HEALTH & SAFETY CODE § 382.062-.0622.

that municipalities are prohibited from exercising the same authority if not working in conjunction with the TCEQ.

BCCAAG's third objection suggests that there is an express conflict between the Ordinance and the text of the TCAA. BCAA argues that the Ordinance is invalid because it violates the provision of the TCAA that states, "An ordinance enacted by a municipality ... may not make unlawful a condition or act approved or authorized under this chapter or the commission's rules or orders."⁹¹ The relevant language of the Ordinance states, "It shall be unlawful for any person to operate or cause to be operated any facility unless there is a registration for the facility."⁹² BCCAAG argued in its original petition that this provision would make unlawful the operation of a facility that is in every respect in compliance with TCEQ regulations but has failed to register with the City of Houston.⁹³ The May 7, 2008 amendments to the Ordinance, however, provide an affirmative defense to a facility for any condition or activity that has been "[a]pproved or authorized by the [TCAA], state rule or state order."⁹⁴ While the creation of this affirmative defense undercuts BCCAAG's argument to some extent, BCCAAG has responded that "[t]he creation of an affirmative defense is not, as a practical or legal matter, equivalent to exempting conduct that is approved or authorized by the state," because the City could still bring charges against a facility and the burden would be on the facility to prove that its conduct was approved or authorized by the TCAA or a state rule or order.⁹⁵ In a related argument, BCCAAG argues that the Ordinance is inconsistent with the enforcement provisions of the TCAA because it "omits the TCEQ's statutory discretion in interpreting, applying, and

⁹¹ TEX. HEALTH & SAFETY CODE § 382.113(b) ("An ordinance enacted by a municipality ... may not make unlawful a condition or act approved or authorized under this chapter or the commission's rules or orders.").

⁹² City of Houston, Texas, Ordinance No. 2007-208, Section 3, amending Houston Code of Ordinances § 21.162(a).

⁹³ Original Petition, at 9.

⁹⁴ *Id.*, Section 5, amending § 21.164(c-d).

⁹⁵ Plaintiff's Motion for Summary Judgment, at 10.

enforcing its own rules.”⁹⁶ BCCAAG points to a number of provisions in the TCAA where the Executive Director of the TCEQ is granted discretion in whether or not to bring an action against an emitting facility or source.⁹⁷

BCCAAG’s fourth objection is that there is an express conflict between the provisions of the Ordinance and of the Water Code.⁹⁸ The Water Code authorizes local governments to bring civil suits in district courts for violations of the Health and Safety Code (which incorporates the TCAA),⁹⁹ but states, “In a suit brought by a local government under this subchapter, the commission [TCEQ] is a necessary and indispensable party.”¹⁰⁰ BCCAAG argues that since the Ordinance allows the City to bring suit in Houston municipal court without joining the TCEQ, the Ordinance is inconsistent with the Water Code.

The strength of BCCAAG’s arguments depends in large part on the standard the court uses to determine whether an ordinance is “inconsistent” with state law. On this issue both BCCAAG and the City of Houston cite Texas Supreme Court cases stating that if the Legislature is to limit home-rule municipalities’ power, it must do so with “unmistakable clarity.”¹⁰¹ Where the parties diverge is on how the “unmistakable clarity” standard applies in this case.

BCCAAG argues that the language of the TCAA and the Water Code makes unmistakably clear the legislature’s intent that the TCEQ should exercise exclusive jurisdiction over air emissions regulations.¹⁰² The TCAA states, “[t]he [TCEQ] shall seek to accomplish the

⁹⁶ Plaintiff’s Motion for Summary Judgment, at 11.

⁹⁷ Plaintiff’s Motion for Summary Judgment, at 11-12, citing TEX. HEALTH & SAFETY CODE §§ 382.023-.025 382.0215-.0216, 382.023(b).

⁹⁸ Plaintiff’s Motion for Summary Judgment, at 6.

⁹⁹ TEX. WATER CODE ANN. § 7.351.

¹⁰⁰ TEX. WATER CODE ANN. § 7.353.

¹⁰¹ Lower Colo. River Auth. v. City of San Marcos, 523 S.W.2d 641, 645 (Tex. 1975), citing City of Sweetwater v. Geron, 380 S.W.2d 550, 552 (Tex. 1964).

¹⁰² Plaintiff’s Motion for Summary Judgment, at 8. (“The Legislature’s empowerment of the TCEQ – rather than the City or other municipalities – to protect the state’s environment and regulate the quality of its air is unmistakably clear.”).

purposes of [the TCAA] through the control of air contaminants by all practical and economically feasible methods.”¹⁰³ The Water Code states, “[t]he [TCEQ] is the agency of the state given primary responsibility for implementing the constitution and laws of this state relating to the conservation of natural resources and the protection of the environment.”¹⁰⁴ This line of argument is probably the weakest part in BCCAAG’s case, since the quoted language does not imply exclusivity, and the presence of a provision in the TCAA that specifically contemplates municipal ordinances “for the control and abatement of air pollution” suggests that the legislature did not clearly intend that the TCEQ should be the exclusive regulator of air pollution.¹⁰⁵

More persuasive is BCCAAG’s argument concerning the 1980 case *City of West Lake Hills v. Westwood Legal Defense Fund*, in which the Waco Court of Appeals held invalid a municipal ordinance that provided for local licensing of sewage facilities, on the grounds that the ordinance was inconsistent with the Water Code’s specific grant of power to the TCEQ to license sewage facilities and assess fees.¹⁰⁶ The court reasoned that although the Water Code grants municipalities the general power to “control and abate water pollution,” the fact that the Code specifically grants the authority to license private sewage facilities to the TCEQ precludes the exercise of such power by municipalities, even though the Water Code contains no specific limitation on local licensing.¹⁰⁷ BCCAAG suggests that the parallel to the current dispute is clear: the TCAA grants general authority to municipalities to address air pollution, but grants

¹⁰³ TEX. HEALTH & SAFETY CODE § 382.011(b).

¹⁰⁴ TEX. WATER CODE ANN. § 5.012.

¹⁰⁵ TEX. HEALTH & SAFETY CODE § 382.113.

¹⁰⁶ *City of West Lake Hills v. Westwood Legal Defense Fund*, 598 S.W.2d 681, 685-86 (Tex. Civ. App. – Waco 1980, no writ) (“In the instant case the specific assignment of the power to license private sewage facilities . . . limits the more general grant of power to the cities.”).

¹⁰⁷ *Id.*

specific authority to register emitting facilities to the TCEQ, therefore the specific grant of authority precludes any registration program by municipalities.¹⁰⁸

In addition to its legal arguments, BCCAAG argues on the policy grounds that “[i]t is unfair and unreasonable to ask the operators of heavily regulated facilities, such as the Group’s members, to answer to potentially inconsistent and ever-changing regulation by local government.”¹⁰⁹

The City’s Claim: The Ordinance Falls Within Houston’s Home-Rule Authority

The City’s first argument is that the City’s power to enact the Ordinance is specifically authorized by both federal and state law.¹¹⁰ The City points to the explicit recognition of the role of municipalities in the federal Clean Air Act (“CAA”), which states, “Congress finds . . . that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States *and local governments*.”¹¹¹ The CAA further provides that it does not “preclude or deny the right of any State *or political subdivision thereof*” to adopt emissions standards or limitations so long as they are not “less stringent” than the SIP approved by the EPA.¹¹² The City suggests that this provision shows Congressional intent that the CAA should be a floor, and not a ceiling, for pollution regulation.¹¹³ The City states, “Congress has expressly invited local governments, like Houston, to assist in the fight against pollution.”¹¹⁴

While these indications of Congressional intent do provide some general support for the City’s

¹⁰⁸ Plaintiff’s Motion for Summary Judgment, at 9.

¹⁰⁹ First Amended Petition, at 2.

¹¹⁰ Defendant City of Houston’s Motion for Summary Judgment, *BCCA Appeal Group v. City of Houston*, Cause No. 2008-09399, June 16, 2008, at 3.

¹¹¹ 42 U.S.C. § 7401(a) & (a)(3) [emphasis added].

¹¹² 42 U.S.C. § 7416 [emphasis added].

¹¹³ Defendant’s Motion for Summary Judgment, at 3.

¹¹⁴ *Id.*

position, they are only persuasive in this case, since both sides acknowledge that Texas law governs the dispute.

The City finds statutory support for its position in the same provision of the TCAA that BCCAAG points to, but with different emphasis: “a municipality has the powers and rights ... 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.”¹¹⁵ Whereas BCCAAG argues that this provision limits the role of municipalities in regulating air pollution, the City sees it as a grant of power. Clearly, the provision does both – the central question is whether the ordinance is inconsistent with state law.

On the question of inconsistency, the City points to a line of precedents that establish a heavy burden for parties wishing to invalidate an exercise by a home-rule city of its police power.¹¹⁶ BCCAAG does not dispute that Houston is a home-rule city.¹¹⁷ The Texas Local Government Code states that a home-rule city “has full power of local self government,”¹¹⁸ and has power to “enforce ordinances necessary to protect health, life, and property ... of the municipality and its inhabitants.”¹¹⁹ The Appeals Court in Dallas has stated that the Texas Constitution vests home-rule cities with broad discretion to address “questions that deal with the public safety, health, morals, general welfare, and questions properly within the scope of the city’s police power.”¹²⁰ The Appeals Court in Tyler stated that courts considering preemption challenges to local ordinances should determine only “whether the Legislature has limited the

¹¹⁵ TEX. HEALTH & SAFETY CODE § 382.113.

¹¹⁶ Defendant’s Motion for Summary Judgment, at 12-15.

¹¹⁷ Its status as such was reaffirmed in *Brooks v. State of Texas*, 226 S.W.3d 607, 609 n.5 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

¹¹⁸ TEX. LOCAL GOV’T CODE § 51.072(a).

¹¹⁹ TEX. LOCAL GOV’T CODE § 54.004.

¹²⁰ *MJR’s Fare of Dallas, Inc. v. City of Dallas*, 792 S.W.2d 569, 573 (Tex. App.—Dallas 1990, writ denied).

power of a home rule city, not whether it has made specific grants of authority.”¹²¹ Regarding the specificity of such a limitation, the Texas Supreme Court stated in *In re Sanchez*, “If the Legislature decides to preempt a subject matter normally within a home-rule city’s broad powers, it must do so with unmistakable clarity.”¹²² The Court in *Sanchez* directed that a statute and a city ordinance should not be held repugnant to each other if a court can reach a reasonable construction leaving both in effect.¹²³ The Appeals Court of Amarillo has stated that limitations on a local government’s authority “will not be implied unless the provisions are clear and compelling to that end.”¹²⁴

The import of these precedents appears to be that if the Ordinance is found to concern “a subject matter normally within a home-rule city’s broad powers,” that is, if it is “necessary to protect health, life, and property” of Houston’s residents, then the court is only likely to find it preempted if the Legislature’s intent to preempt it is “unmistakably clear.” Thus, it is highly significant to the outcome of the case whether the judge deems the regulation of air pollution to fall within a municipality’s traditional police powers.

The City argues that it does. The preamble to the Ordinance contains the clause, “Whereas, in the exercise of its lawful authority, the City may enact police power ordinances to promote and protect the health, safety, and welfare of the public.”¹²⁵ The preamble goes on to refer to the previous version of the Ordinance, and states, “Whereas, the City Council finds that the Ordinance has been beneficial to the health, safety, and welfare of the public ... the City council finds that the adoption of the amendments to the Ordinance would further enhance the

¹²¹ *Robinson v. City of Longview*, 936 S.W.2d 413, 416 (Tex. App.—Tyler 1996, no pet.).

¹²² *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002).

¹²³ *Id.* See also *Robinson v. City of Longview*, 936 S.W.2d 413, 416 (Tex. App.—Tyler 1996, no writ) (“[T]he court must construe the city ordinance in a manner that renders it constitutional, if it is possible to do so, consistent with a reasonable interpretation of its language.”).

¹²⁴ *Barnett v. City of Plainview*, 848 S.W.2d 334, 338 (Tex. App.—Amarillo 1993, no writ).

¹²⁵ City of Houston Ordinance No. 2007-208, preamble.

benefits derived to the public health, safety, and welfare through regulation of additional sources of air pollution.”¹²⁶ Thus, when the City enacted the Ordinance it expressly claimed to do so under its police powers to protect the health, safety, and welfare of the public. While the City’s own statement on this issue is not conclusive, it does strengthen the City’s position. The City also connects the amendments in the Ordinance to a program that the City had been conducting under the prior Ordinance for the prior fifteen years. The fact that the City had been conducting the program for over a decade without challenge bolsters the argument that the Ordinance concerns “subject matter normally within a home-rule city’s broad powers.”

Simple logic does seem to support the City’s position here: air pollution can harm the public health; protecting the public health falls within a city’s traditional police powers; the Ordinance is directly targeted at reducing harmful air pollution; therefore, it is a valid exercise of the City’s police powers. The City strengthens this argument by presenting substantial evidence that air pollution presents a threat to the health of Houston’s citizens.¹²⁷ In support of its argument that regulating air quality falls within the City’s police power, the City points to cases in which courts have upheld city smoking ordinances, including a 2007 decision by a federal district court upholding Houston’s anti-smoking ordinance.¹²⁸ The City also notes that several other Texas cities, including Dallas, Corpus Christi, San Antonio, and Frisco, have all enacted ordinances similar to the Houston Ordinance.¹²⁹

Given the broad discretion granted to home-rule cities under Texas law, if the court finds that the Ordinance falls within the City’s police power to protect the health and welfare of the

¹²⁶ *Id.*

¹²⁷ *See supra* notes 8 and 9.

¹²⁸ *Houston Ass’n of Alcoholic Beverage permit Holders v. City of Houston*, 508 F. Supp. 2d 576 (S.D. Tex. 2007) (upholding City of Houston Ordinance No. 2006-1054). *See also* *Ex Parte Woodall*, 154 S.W.3d 698, 702 (Tex. App.—El Paso 2004, pet. denied) (holding that regulation of smoking, aimed at protecting air quality, is within home-rule city’s police power).

¹²⁹ *City of Houston’s Motion for Summary Judgment*, at 4.

public then it will likely reject BCCAAG’s implied preemption arguments. Unlike federal preemption law, where “federal law or regulations may impliedly preempt state law or regulations if the statute’s scope indicates that Congress intended federal law or regulations to occupy the field exclusively,”¹³⁰ under Texas law “the mere fact that the [state] legislature has enacted a law addressing a subject does not mean that the subject matter is completely preempted.”¹³¹ The Appeals Court in Houston has stated, “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.”¹³² These precedents present a problem for BCCAAG’s argument that the Ordinance is implicitly preempted by the TCAA because it requires registrations, inspections, and fees that are duplicative of TCEQ programs. It seems clear that the TCAA does not expressly forbid a city to impose its own registration requirement, and in fact it specifically authorizes a city to “enact and enforce an ordinance for the control and abatement of air pollution.”¹³³ This same provision requires that such an ordinance must be “not inconsistent” with the TCAA,¹³⁴ but, the City points out, under the Ordinance, which incorporates the relevant

¹³⁰ *Great Dane Trailers, Inc. v. Estate of Wells*, 52 S.W.3d 737, 743 (Tex. 2001).

¹³¹ *City of Richardson v. Responsible Dog Owners of Texas*, 794 S.W.2d 17, 19 (Tex. 1990); *see also* *City of Amarillo v. Griggs Southwest Mortuary*, 406 S.W.2d 230, 232 (Tex. Civ. App.—Amarillo 1966, writ ref’d n.r.e.) (“The fact that the state requires a license does not mean that the legislature has pre-empted the field.”).

¹³² *City of Houston v. Harris County Outdoor Advertising Ass’n*, 732 S.W.2d 42, 48 (Tex. App.—Houston [14th Dist.] 1987, no writ). The City points to several cases in which Texas courts have found that action by a state agency in an area does not preempt local action in the same area: *City of Mont Belvieu v. Enterprise Products Operating, L.P.* 222 S.W.3d 515 (Tex. App.—Houston [14th Dist.] 2007, no pet. h.) (holding that the legislative grant of authority to the Texas Railroad Commission over salt dome facilities does not preempt local ordinances on the same subject matter); *Manchester Terminal Corp. v. Texas TX TX Marine Transp. Inc.*, 781 S.W.2d 646, 649-50 (Tex. App.—Houston [1st Dist.] 1989, writ denied) (prior air quality legislation, which gave the Texas Air Control Board “principal authority” over regulation of the state’s air resources, did not preempt private right of action to seek injunctive relief or damages for air pollution; the Act did “not explicitly give the TACB exclusive jurisdiction.”); *Hollingsworth v. City of Dallas*, 931 S.W.2d 699 (Tex. App.—Dallas 1996, writ denied) (holding that where the Texas Pawnshop Act gave a state commissioner “exclusive authority regarding the operation of pawnshops,” but where the Local Government Code stated that municipalities should designate local pawnshops “[f]or the purposes of zoning regulation,” the inconsistency between the statutes meant that the legislature did not express with “unmistakable clarity” the intent that local ordinances on pawnshop locations should be preempted).

¹³³ TEX. HEALTH & SAFETY CODE § 382.113.

¹³⁴ *Id.*

compliance standards of the TCAA,¹³⁵ an act of pollution will only be found to be illegal under the Ordinance if it violates a standard of the TCAA.¹³⁶ Thus, argues the City, the Ordinance's enforcement provisions cannot be inconsistent with the TCAA because they incorporate the enforcement provisions of the TCAA, and the TCAA cannot be inconsistent with itself. BCCAAG argues that the Ordinance is inconsistent with the TCAA because it does not incorporate the discretion built into the TCEQ concerning whether or not to bring an enforcement action against a facility for any given act of pollution,¹³⁷ but the City responds that the lack of the TCEQ's discretion does not create inconsistency with the TCAA: "[T]he fact that BCCAAG ... currently enjoys what it perceives to be a permissive regulatory approach from the TCEQ [does not] change the fact that state law expressly *authorizes* Houston to regulate air pollution *within* the parameters set out under state law."¹³⁸

If BCCAAG's implied preemption arguments fail, it will have to rely on its arguments that the Ordinance expressly preempts the TCAA and the Water Code. BCCAAG's express preemption argument regarding the TCAA is that the Ordinance makes unlawful acts that are authorized by the TCEQ, which would violate the TCAA.¹³⁹ The City argues that the 2008 Ordinance, which provides an affirmative defense to prosecution under the Ordinance for any condition or activity that has been "[a]pproved or authorized by the [TCAA], state rule or state order," alleviates the conflict with the TCAA.¹⁴⁰ While in practice this provision should mean that facilities in compliance with TCEQ regulations should not have to worry about being penalized under the Ordinance, it does not entirely address BCCAAG's concerns that "[t]he

¹³⁵ City of Houston Ordinance No. 2007-208, amending § 21.164.

¹³⁶ City's Motion for Summary Judgment at 2.

¹³⁷ See *supra* note 97 and accompanying text.

¹³⁸ City's Motion for Summary Judgment at 2.

¹³⁹ TEX. HEALTH & SAFETY CODE § 382.113(b) ("An ordinance enacted by a municipality ... may not make unlawful a condition or act approved or authorized under this chapter or the commission's rules or orders.").

¹⁴⁰ City of Houston's Motion for Summary Judgment, at 27, citing City of Houston, Texas, Ordinance No. 2007-208, Section 5, amending § 21.164(c-d).

creation of an affirmative defense is not, as a practical or legal matter, equivalent to exempting conduct that is approved or authorized by the state,”¹⁴¹ or that a party prosecuted under the Ordinance would bear the burden of establishing its compliance with TCEQ orders in order to raise the affirmative defense. The City’s response is that BCCAAG’s concern about enforcement in such a situation is, at this time, entirely hypothetical, and consequently does not present a justiciable controversy under Texas law.¹⁴² The City further argues that the Ordinance can be interpreted as consistent with state law, and that under Texas law the court must interpret it in this way. The Texas Supreme Court has instructed courts to construe possibly conflicting laws so as “to avoid constitutional problems if possible.”¹⁴³ The Court of Appeals in Tyler stated that, “the court must construe the city ordinance in a manner that renders it constitutional, if it is possible to do so, consistent with a reasonable interpretation of its language.”¹⁴⁴ The City suggests that, given the clear intent of the 2008 Ordinance to avoid prosecutions for activities specifically authorized by the state, and given the purely hypothetical nature of the concern at present, that the court should read the 2008 Ordinance as eliminating any inconsistency with the TCAA.¹⁴⁵

BCCAAG also argues that the Ordinance expressly violates the Water Code because it allows the City to bring suit against violators of the Ordinance in municipal court without the TCEQ joined as a party, whereas the Water Code only authorizes local governments to bring civil suit in district court for violations of the Health and Safety Code,¹⁴⁶ and requires that the

¹⁴¹ Plaintiff’s Motion for Summary Judgment, at 10.

¹⁴² See *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) (“To constitute a justiciable controversy, there must exist a real and substantial controversy involving genuine conflict of tangible interests and not merely a theoretical dispute.”).

¹⁴³ *Brooks v. Northglen Ass’n*, 141 S.W.3d 158, 169 (Tex. 2004).

¹⁴⁴ *Robinson v. City of Longview*, 936 S.W.2d 413, 416 (Tex. App.—Tyler 1996, no writ).

¹⁴⁵ *City of Houston’s Motion for Summary Judgment*, at 27.

¹⁴⁶ TEX. WATER CODE ANN. § 7.351.

TCEQ be joined as a “necessary and indispensable party.”¹⁴⁷ The City responds that the Water Code does not limit the power of municipalities to regulate air pollution under their home-rule authority, and that the Ordinance authorizes it to bring suit for violations of the *Ordinance*, not state law, so there is no violation of the Water Code.¹⁴⁸ The City could also add that nothing in the Ordinance prevents the City from joining the TCEQ as a party if it were to bring a suit under the relevant provisions of the Health and Safety Code.

Other Parties Weigh In

This case has not gone unnoticed by other interested parties. Shortly after BCCAAG filed its lawsuit in February 2008, the General Counsel of the TCEQ, Les Trobman, sent a letter to District Judge John Woolridge, the judge overseeing the case at that time.¹⁴⁹ Trobman sided with BCCAAG’s position in the case, claiming that the Ordinance conflicts with the TCEQ’s authority, and stated, “I also have concerns that this ordinance is subject to challenge as unenforceable under the Texas Clean Air Act.”¹⁵⁰ BCCAAG has, understandably, cited Trobman’s views in support of its argument that the Ordinance is preempted by state law.¹⁵¹

Mayor White, who noted that the two TCEQ commissioners with whom he’d discussed Houston’s air pollution program since the passage of the Ordinance had expressed no concerns about its validity, suggested that the letter “appears to be in response to a group of companies

¹⁴⁷ TEX. WATER CODE ANN. § 7.353.

¹⁴⁸ City of Houston’s Motion for Summary Judgment, at 30. (“Thus, even if the City was attempting to enforce state law, rather than a local ordinance (which it is not) and even if the Legislature had made state law the exclusive avenue to regulate air quality (which it has not) the City *still* would be acting within its delegated home-rule authority.”).

¹⁴⁹ Editorial, *Playing favorites: Counsel’s support for suit against Houston ordinance puts environmental agency on the side of polluters*, HOUSTON CHRONICLE, May 9, 2008, at B-10.

¹⁵⁰ *Id.*

¹⁵¹ Plaintiff’s Motion for Summary Judgment, at 3.

who are emitting regulated chemicals into the air.”¹⁵² The *Houston Chronicle*, characterizing Trobman’s intervention in the case as a “classic fox guarding the henhouse scenario,” commented, “When Houston takes action to deal with the problem, the inappropriate response of the TCEQ’s pro-business counsel is to intervene on the side of polluters rather than the citizens whose environment the agency was created to protect.”¹⁵³ Environmental Law Professor Victor Flatt at the University of Houston described Trobman’s action as “unorthodox” and “not appropriate.”¹⁵⁴ The City has noted that the TCEQ has not joined as a party in the lawsuit, and argues therefore that Trobman’s letter should not be considered the official state position on the matter.¹⁵⁵ A relevant consideration here may also be that the TCEQ is not necessarily a disinterested party in the case – the Ordinance is, politically speaking, a vote of no confidence in the TCEQ – and consequently the views of the TCEQ’s general counsel should not be considered an unbiased take on state preemption law.

Several parties also weighed in supporting the City’s position in the case. On June 16, 2008, a nonprofit organization called the Environmental Integrity Project filed an amicus brief in conjunction with the Houston-based organizations Galveston-Houston Association for Smog Prevention (GHASP), Health Professionals for Clean Air, and Industry Professionals for Clean Air.¹⁵⁶ The brief echoed the City’s arguments that the Ordinance is a valid exercise of the City’s home-rule authority, that such authority can only be constrained by a legislative limitation of

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Matthew Tresauge, *TCEQ helps plants in suit / City leaders are shocked that agency is siding with ‘polluters’*, HOUSTON CHRONICLE, May 3, 2008, at B1.

¹⁵⁵ City of Houston’s Motion to Strike Inadmissible Summary Judgment Evidence, *BCCA Appeal Group v. City of Houston*, Cause No. 2008-09399, July 14, 2008, at 3 (“the TCEQ has taken no official action of any kind with regard to the City of Houston’s Ordinance.”).

¹⁵⁶ Memorandum of Amicus Curiae in Support of City of Houston’s Cross-Motion for Summary Judgment (Environmental Integrity Project), *BCCA Appeal Group v. City of Houston*, Cause No. 2008-09399, June 16, 2008.

unmistakable clarity, and that the statutes at question in this case provide no such limitation.¹⁵⁷

The brief states that the Ordinance is “a necessary step in protecting the health and safety of

Houston’s residents and ensuring that the City remains economically competitive.”¹⁵⁸ On

September 3, 2008 the City of Dallas filed an amicus brief in support of the City of Houston.¹⁵⁹

The Dallas brief likewise echoes Houston’s legal arguments, and concludes, “BCCA’s position, if successful, would limit cities’ ability to protect health, life, and property, not only in regard to air pollution, but in any area where the State had entered the field.”¹⁶⁰

Conclusion – Houston Has the Stronger Arguments

The City will likely prevail on summary judgment. As discussed above, Texas law grants home-rule cities a great deal of discretion in managing their affairs, and their ordinances will only be deemed invalid where the Legislature has limited their authority to pass such an ordinance with unmistakable clarity. The TCAA does not clearly limit a city’s authority to pass air pollution ordinances; rather it explicitly authorizes cities to pass ordinances that are not inconsistent with the TCAA. Since the enforcement provisions of the Ordinance incorporate the enforcement provisions of the TCAA, the Ordinance does not appear to be inconsistent with it in most situations.

BCCAAG’s strongest argument is that the Ordinance does make it unlawful for a facility which is otherwise in compliance with state law to operate without obtaining registration from the City, which may impermissibly “make unlawful a condition or act approved or authorized

¹⁵⁷ *Id.* at 2-15.

¹⁵⁸ *Id.* at 3.

¹⁵⁹ Brief of Amicus Curiae City of Dallas in Support of City of Houston, *BCCA Appeal Group v. City of Houston*, Cause No. 2008-09399, Sept. 3, 2008.

¹⁶⁰ *Id.* at 6.

under this chapter or the commission's rules or orders."¹⁶¹ It is debatable whether operating without a city permit is "a condition or act" for the purposes of the TCAA. The City could prevail if the court finds that the 2008 amendment, given the presumption in favor of avoiding constitutional problems, cures the problem. The court could, however, conclude that the 2008 amendment only applies to enforcement issues and not to registration issues, and consequently that the Ordinance does impermissibly make unlawful conditions that are otherwise authorized by the TCEQ.

If the court does find that this particular provision is inconsistent with the TCAA, the City has a few options. First, the Ordinance does contain a severability provision which states that if any provision is found invalid that the remainder of the Ordinance should continue in full effect.¹⁶² If the court finds the severability provision valid, and there is no particular reason why it should not, then the court could strike down the specific provision making it unlawful to operate a facility without a registration from the City, and the remainder of the City's inspection regime could continue as before. The City could then amend the Ordinance along the lines of the 2008 amendment to cure the defect. In other words, a win for BCCAAG on this particular issue is not likely to do away with the City's inspection program, which is presumably the goal of BCCAAG's lawsuit. In summary, although BCCAAG could win on one of its arguments, the most likely result is that the City's inspection program will continue as the City intends.

The Summary Judgment Hearing is currently scheduled for April 23, 2008, in Harris County's 269th District Court. Since the case involves questions of law only, the case should be resolved on summary judgment. Whatever the decision turns out to be, given the parties involved it seems likely that the decision will be appealed.

¹⁶¹ TEX. HEALTH & SAFETY CODE §382.113.

¹⁶² City of Houston Ordinance No. 2007-208, section 5.

Part III: Municipal Regulation of Air Pollution and State/Local Preemption

Why This Case Matters

The case of *BCCA Appeal Group v. City of Houston* is significant in two ways. First, the direct impact of the case itself could be substantial. The quality of the air in Houston affects a lot of people – the city is home to over 2.2 million people, and in 2007 it showed the largest numerical population increase of any city in the nation.¹⁶³ Regulations in Houston also have the capacity to have a substantial influence on industries – the greater Houston area contains 40.8 percent of the nation’s base petrochemical capacity.¹⁶⁴ While the Ordinance is unlikely by itself to make Houston’s air healthy or to cripple any area businesses, its cumulative impact on people and industry could be substantial.

The second way in which the case is significant is as a statement on the legal power of cities to address air pollution when states fail to take sufficient action. Houston’s initiatives show one approach that a local government may take in the face of a persistent public health threat. The initiatives may or may not have a substantial impact on Houston’s air quality; more germane to the point of this paper is that Houston has presented a compelling argument for why it legally may take these steps. Whether or not other cities adopt Houston’s specific regulatory approach, the legal outcome of this case will provide an indication of how far a city may go in regulating air pollution, and on what legal grounds it may do so.

¹⁶³ U.S. Census Bureau, *New Orleans Population Continues Katrina Recovery; Houston Leads in Numerical Growth*, July 10, 2008. <http://www.census.gov/Press-Release/www/releases/archives/population/012242.html>.

¹⁶⁴ Greater Houston Partnership, *Chemicals*, Sept. 23, 2008, <http://www.houston.org/pdf/research/16HW001.pdf>. The 40.8 percent represents the Houston Metropolitan Statistical Area (“MSA”), which includes Sugar Land, Baytown, and other surrounding municipalities. In 2007 the Gross Area Product for Houston’s MSA was estimated at \$416.6 billion. Greater Houston Partnership, *Gross Area Product by Industry*, <http://www.houston.org/pdf/research/15AW001.pdf>.

Why Local Regulation May Be Better

This paper proposes that in certain situations local governments may protect the public more effectively from the health risks of air pollution than will the state, provided that local governments are empowered to do so. There are a number of reasons why this may be so. First, local governments are likely to have a stronger incentive than the state to protect local health. Second, local governments, because of their proximity to and knowledge of the regulated parties, may be able to regulate local pollution sources more efficiently than can a distant state agency. And third, some health threats, such as “toxic hotspots,” are inherently local in nature, and it may be that statewide regulations as currently enforced are not well-suited to address these local problems.

Local Incentives Are Aligned

It is likely that local governments have a greater incentive to protect local health from air pollution, if empowered to do so, than state governments do. On the most basic level, local officials breathe where they regulate, so they have a personal incentive to regulate effectively. On a political level, local governments are likely to be more attuned than the state government to the concerns of their local constituents, who make up much larger percentages of the local government’s electorate than of the state government’s electorate. This distance from the constituents becomes more pronounced where, as in Texas, environmental regulation is overseen almost exclusively by unelected administrators. This distance between the local population and the regulating agency also tends to favor the interests of the regulated parties, who tend to have relatively greater resources and legal sophistication than the average citizen, and consequently

tend to exert disproportionately greater influence on the statewide regulatory process than do the citizens affected by their actions.¹⁶⁵ A further consideration is the general trend in contemporary American politics that urban areas tend more than rural areas do toward the Democratic party,¹⁶⁶ which is associated with more aggressive environmental regulation.¹⁶⁷ The significance of this trend is that states with powerful rural constituencies, such as Texas, may adopt less strict environmental regulations than would the leadership of their large cities.¹⁶⁸

An additional reason why local governments will likely be more concerned than state governments with protecting local health is that state governments formulating regulatory policy will likely have in mind many considerations other than the effectiveness of their policies in reducing health risks to particular populations. These considerations could include balancing the interests of different parts of the state (e.g. the air concerns of Lubbock and Houston are quite different), promoting statewide economic growth, or promoting the uniformity of regulations in the state. While local governments certainly must balance competing interests as well, they have fewer interests competing with the goal of reducing health risks right here, right now.

The fact that states likely take a wider range of considerations into account than do local governments is also an argument in favor of state regulation – after all, if every city issued its

¹⁶⁵ See, e.g., Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1441 (April 2005) (“[I]t has long been recognized that agency decision making has the capacity to be grossly distorted by the power imbalance between regulated industry and regulatory beneficiaries. The prevailing view is that ‘agencies unduly favor . . . the interests of regulated or client business firms and other organized groups at the expense of diffuse, comparatively unorganized interests such as consumers, environmentalists, and the poor.’” [quoting Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1667, 1684-85 (1975)]).

¹⁶⁶ See Samuel Issacharoff, *Judging Politics, the Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1683 (1993) (discussing voting rights and noting that large cities tend more towards the Democratic Party).

¹⁶⁷ See ROBERT L. GLICKSMAN, ET AL., *ENVIRONMENTAL PROTECTION LAW AND POLICY* 69 (5th ed. 2007) (noting that the Democratic is generally perceived to be more in favor of environmental regulations than is the Republican party).

¹⁶⁸ See Victor B. Flatt, *Act Locally, Affect Globally: How Changing Social Norms to Influence the Private Sector Shows a Path to Using Local Government to Control Environmental Harms*, 35 B.C. ENVTL. AFF. L. REV. 455, 458-59 (2008) (“States with Republican majorities that are powerful in rural areas, may reflexively reject additional environmental regulations from large cities, which tend to be more Democratic.”).

own air regulations then there would be no uniformity of law, and businesses would be forced to deal with competing and possibly conflicting air emissions standards. This desire for uniformity was the reason that the CAA explicitly preempted states from setting their own fuel efficiency standards.¹⁶⁹ The central policy question here is whether the desire for statewide uniformity of regulations should always prevail over the desire of municipalities to enforce their own solutions for protecting local health.

While uniformity of regulations is certainly a desirable goal, I would argue that it should be given somewhat less importance in the regulation of point-source emissions such as those addressed by the Houston Ordinance. A point-source, after all, does not move; as long as the rules to which it is subjected do not change haphazardly, the local management can learn and address the local regulations. While it is somewhat inconsistent to subject a Lyondell facility in Houston to different regulatory standards than one in Beaumont, this inconsistency is already a part of business for any company – like Lyondell – that operates in several states and several countries. Furthermore, facilities on the scale of refineries and petrochemical plants are not cooker-cutter operations. They are immense enterprises, with processes highly customized to each location, often with substantial resources in local management and expertise that can address the complications created by local regulations. In summary, while allowing local regulation of air pollution does exact a cost of disuniformity, this cost, as applied to the types of facilities addressed by the Houston Ordinance, is probably lower than it would be if applied to mobile sources of emissions that move from jurisdiction to jurisdiction. Furthermore, the cost

¹⁶⁹ See 42 U.S.C. § 7543(a) (“No state or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines.”); *see also* Engine Manufacturers Association v. South Coast Air Quality Management District, 541 U.S. 246, 258 (2004) (holding that a fleet fuel efficiency purchasing rule promulgated by a local air control district in California created “standards” which may be preempted by the CAA).

may be lower than the benefits to be gained by allowing a city to address its local air pollution issues.

Local Governments May Regulate Local Pollution More Effectively

It is possible that local governments may be able to regulate local air pollution more effectively than can state agencies due to their greater familiarity with local conditions and local regulated parties. In the context of the CAA the Ninth Circuit has stated that “local control fosters both administrative efficiency and democratic governance.”¹⁷⁰ Congress may have had this idea in mind when they stated in the CAA that “air pollution control at its source is the primary responsibility of States *and local governments*.”¹⁷¹ In a very early case involving the CAA, Justice Douglas, after noting the primary role given to state and local governments by the CAA, stated one of the rationales for emphasizing local control:

[G]eophysical characteristics which define local and regional airsheds are often significant considerations in determining the steps necessary to abate air pollution... Thus, measures which might be adequate to deal with pollution in a city such as San Francisco, might be grossly inadequate in a city such as Phoenix, where geographical and meteorological conditions trap aerosols and particulates. As a matter of law as well as practical necessity corrective remedies for air pollution, therefore, necessarily must be considered in the context of localized situations.¹⁷²

Justice Douglas recognized that a familiarity with “localized situations” will likely result in more efficient and effective regulation of air pollution. As the CAA has been implemented nationwide, however, regulation of air pollution has been taken over almost exclusively by the states.¹⁷³

¹⁷⁰ *Big Country Foods, Inc. v. Bd. of Educ.*, 952 F.2d 1173, 1179 (9th Cir. 1992).

¹⁷¹ 42 U.S.C. § 7401(a)(3) (emphasis added).

¹⁷² *Washington v. General Motors Corporation*, 406 U.S. 109, 115-16 (1972) (considering whether a suit brought by eighteen states alleging conspiracy by automobile manufacturers to impede development of air pollution control devices should be heard by the Supreme Court or federal district court).

¹⁷³ Flatt, *supra* note 168, at 456 (“the environmental arena since 1970 has been dominated by federal legislation that makes the states significant partners in the administration of the law, but generally sidelines local government.”). *See also* Kathleen M. Sullivan, *From States’ Rights Blues to Blue States’ Rights: Federalism After the Rehnquist*

There are some exceptions where states have delegated primary regulatory authority to local agencies: California has thirty-five local air pollution control districts responsible for promulgating rules and regulations for stationary sources within their districts,¹⁷⁴ and Washington has seven Local Clean Air Agencies which hold primary responsibility for air quality in their respective regions.¹⁷⁵ Other states, such as Texas, have encouraged cooperative relationships between state agencies and municipal governments such as the joint-monitoring relationship that prevailed between the TCEQ and the City of Houston prior to 2005.¹⁷⁶

The point here is that the more specific a problem a governmental unit is tasked with addressing, the more likely that it will address it effectively. A state is the proper governmental unit to address state-wide air pollution, but a local government may be more effective at addressing local problems. Some air pollution problems, such as toxic hotspots, are inherently local.

Some Air Pollution Problems Are Inherently Local: Toxic Hotspots

Air pollution is primarily regulated at the national and state levels, yet the effects of air pollution are often felt most acutely at the local level. Ozone and smog are primarily the problems of cities, where sufficient concentrations of vehicles and industry can emit enough NOX and VOCs to create hazardous conditions.¹⁷⁷ Many types of toxic emissions create health risks only in the immediate vicinity of the industrial sources that emit them, where the emissions are concentrated enough to create acute risks or prolonged enough to create cumulative risks.

Court, 75 FORDHAM L. REV. 799, 809-10 (2006) (commenting that, typically, discussion of local control means control at the state level).

¹⁷⁴ California Air Resources Board, *Local Air District Stationary Source Rules and Regulations*, <http://www.arb.ca.gov/html/lawsregs.htm>.

¹⁷⁵ Department of Ecology, State of Washington, *Local Clean Air Agencies*, <http://www.ecy.wa.gov/programs/air/local.html>.

¹⁷⁶ See *supra* note 20 and accompanying text.

¹⁷⁷ Environmental Protection Agency, *Ground Level Ozone*, <http://www.epa.gov/air/ozonepollution/>.

Health experts are devoting increasing attention to the issue of toxic hot spots – highly localized areas of acute or prolonged toxic exposure which substantially increase the risk of adverse health effects in nearby residents.¹⁷⁸ The TCEQ has identified three air toxic hotspots in Harris County, including one for 1,3-butadiene in the Milby Park area of East Houston.¹⁷⁹ And exposure to high levels of toxic emissions appears to have consequences: a January 2007 study by the University of Texas Health Science Center at Houston, found a 56% elevated risk of acute lymphocytic leukemia among children residing within two miles of the Houston Ship Channel, as compared with those living more than ten miles from the Ship Channel.¹⁸⁰

As discussed above in the background to the Houston Ordinance, a number of environmental groups and Houston politicians have suggested that the efforts of the TCEQ to regulate toxic emissions have been inadequate.¹⁸¹ The Galveston-Houston Association for Smog Prevention has suggested that the TCEQ does not treat the official effects screening levels for toxic chemicals as enforceable limits, and that it routinely issues permits for sources whose emissions exceed the effects screening levels.¹⁸² The organization has stated that, “Texas regulators and politicians ... have been unable or unwilling to place adequate limits on industrial toxic air emissions to protect the health of Texas. As a result, Texas industry has not been

¹⁷⁸ See GALVESTON-HOUSTON ASSOCIATION FOR SMOG PREVENTION, HOUSTON, WE HAVE A PROBLEM: A ROADMAP FOR REDUCING PETROCHEMICAL INDUSTRY TOXIC EMISSIONS IN THE LONE STAR STATE – EXECUTIVE SUMMARY, May 2008, at 2-5, available at

<http://www.environmentalintegrity.org/pubs/Houston%20We%20Have%20A%20Problem.pdf>.

¹⁷⁹ Texas Commission for Environmental Quality, *Air Pollutant Watch List*, <http://www.tceq.state.tx.us/implementation/tox/AirPollutantMain/APWL.html>.

¹⁸⁰ KRISTINA M. WALKER, ANN L. COKER, ELAINE SYMANSKI, PHILLIP J. LUPO, AN INVESTIGATION OF THE ASSOCIATION BETWEEN HAZARDOUS AIR POLLUTANTS AND LYMPHOHEMATOPOIETIC CANCER RISK AMONG RESIDENTS OF HARRIS COUNTY, TEXAS (2007).

¹⁸¹ See *supra* notes 29-38 and accompanying text.

¹⁸² GALVESTON-HOUSTON ASSOCIATION FOR SMOG PREVENTION, *supra* note 178, at 3.

required to utilize the best available controls and practices for limiting toxic emissions, and cities like Houston have struggled to protect their residents' health.”¹⁸³

In 2008 the City of Houston, dissatisfied with the TCEQ's toxics monitoring system along the highly polluted Houston Ship Channel, obtained a \$650,000 federal grant to conduct its own testing of toxic emissions in the Ship Channel using differential absorbing lidar, a highly accurate emissions auditing tool.¹⁸⁴ Mayor White had requested the grant in response to studies that had shown that the actual emissions of volatile organic compounds from some refineries and chemical plants were as much as 10 to 100 times higher than the industries had reported to the TCEQ using the EPA-approved formulas for self-reporting.¹⁸⁵ In July 2008 White sent a 26-page letter to the EPA requesting that it discard its self-reporting system, which relies on inputting estimated data and “emission factors” into formulas to estimate emissions, and replace it with a more accurate system of reliable monitoring.¹⁸⁶ While applauding White for the letter, the *Houston Chronicle* commented, “Why wait for EPA to tweak the formula and give us a new number to multiply by another? Who knows how long it will take the agency to get around to requiring emissions estimates to be accurate? Maybe the answer is on the local level. If we want to know the truth, we should seek it ourselves.”¹⁸⁷

Other Effects of Local Regulation

¹⁸³ *Id.*

¹⁸⁴ Lisa Falkenberg, *Commentary: Fog Clearing on Houston's Emissions Thanks to White*, HOUSTON CHRONICLE, July 21, 2008, <http://www.chron.com/disp/story.mpl/metropolitan/falkenberg/5900317.html>.

¹⁸⁵ *Id.* The evidence for substantial under-reporting by industry is presented in TEXAQS II RAPID SCIENCE SYNTHESIS TEAM, FINAL RAPID SCIENCE SYNTHESIS REPORT: FINDINGS FROM SECOND TEXAS AIR QUALITY STUDY (TEXAQS II), Aug. 31, 2007, at 7, available at <http://www.esrl.noaa.gov/csd/2006/rss/rsstfinalreport083107.pdf>.

¹⁸⁶ Lisa Falkenberg, *Commentary: Fog Clearing on Houston's Emissions Thanks to White*, HOUSTON CHRONICLE, July 21, 2008, <http://www.chron.com/disp/story.mpl/metropolitan/falkenberg/5900317.html>.

¹⁸⁷ *Id.*

While local regulation seems particularly well-suited to addressing local air pollution issues, some cities have taken active steps to address issues that are national or global in nature. Despite the relative inability of local government actions to have much impact on a problem on the global scale of climate change, there has been considerable activity by local governments, such as the City of London or New York City, to limit greenhouse gas emissions within their areas of jurisdiction.¹⁸⁸ Kirsten Engel and Scott Saleska have argued that such local initiatives, while not terribly significant in their direct effects, can generate a substantial overall impact by helping to spur national action.¹⁸⁹ Victor Flatt has argued that local initiatives can be particularly important when charismatic local leaders are able to influence the decision-making of local business leaders.¹⁹⁰ Flatt suggests that Mayor White's aggressive approach to addressing climate change and clean air in Houston could influence the perceived norms of the many energy industry executives who live and work in Houston, thereby affecting the environmental approach of those executives' companies worldwide.¹⁹¹ Thus, local initiatives might ultimately have a significant impact on widespread environmental issues even if the direct impact of municipal regulations is limited.

This paper argues that in some situations local regulation of air pollution will be more effective at protecting public health than will regulation by the state. Assuming that this is true, and further assuming that this is something to be desired, this paper concludes with the following

¹⁸⁸ See Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 *ECOLOGY L.Q.* 183, 184-86 (2005).

¹⁸⁹ *Id.* at 189.

¹⁹⁰ Flatt, *supra* note 168, at 473. See also Michael P. Vandenbergh, *Order Without Social Norms: How Personal Norm Activation Can Protect the Environment*, 99 *NW. U. L. REV.* 1101, 1101-03 (2005) (discussing the impact of environmental norms on the behavior of individuals).

¹⁹¹ Flatt, *supra* note 168, at 473. With twenty-five Fortune 500 companies headquartered in Houston, the city is second in the nation in corporate headquarters after New York City. Fortune Magazine, *Cities with 5 or more FORTUNE 500 headquarters*, *FORTUNE*, 2008, <http://money.cnn.com/magazines/fortune/fortune500/2008/cities/>. See also Carolyn Feibel and Matthew Tresaugue, *Houston mayor's environmental to-do list is lengthy*, *HOUSTON CHRONICLE*, May 27, 2008, <http://www.chron.com/disp/story.mpl/realestate/neighborhoods/5804849.html> ("White typically acts as environmental pitchman, setting examples across the city and asking others to follow suit.").

question: can other municipalities follow Houston's example and assume more direct control over regulating local air pollution?

State/Local Preemption

Whether a city can follow Houston's example will depend in large part on state/local preemption jurisprudence in the relevant jurisdiction. While the delineation of authority between state and local governments differs widely from state to state, there are some principles of state/local preemption that appear to be common across most jurisdictions. Municipal ordinances are generally inferior in status and subordinate to state law.¹⁹² The relationships between ordinances and statutes are defined in different states by varying permutations of state constitutions, statutory provisions, and city charters, but, as a general rule, ordinances regulating subjects on which there is a general state law must be consistent with that state law, and in any conflict between an ordinance and a statute the latter must prevail,¹⁹³ unless state law plainly and specifically gives predominance to local government on that subject matter.¹⁹⁴ In cases where the state gives local government limited authority to regulate an area that is already governed by a

¹⁹² 5 MCQUILLIN MUN. CORP. § 15:18 (3rd ed.).

¹⁹³ *Id.*; see, e.g., *Societa Per Azioni De Navigazione Italia v. City of Los Angeles*, 31 Cal. 3d 446, 645 P.2d 102 (Cal. 1982) (holding invalid a city ordinance purporting to relieve the city of liability for municipal pilots, to the extent it conflicted with state general laws either directly or by entering a field which the state laws were intended to occupy to the exclusion of municipal regulation); *Peoples Gas Co. of Kentucky, Inc. v. City of Corbin*, 625 S.W.2d 848 (Ky. 1981) (holding invalid a city ordinance prohibiting placement of gas meters or appurtenances within 25 feet of a public thoroughfare because the ordinance conflicted with a state regulation requiring that gas meters and regulators be located as close to the utility's main as might be practicable).

¹⁹⁴ See, e.g., *IT Corp. v. Solano County Bd. of Supervisors*, 1 Cal. 4th 81, 820 P.2d 1023 (Cal. 1991) (finding that an expressed intent in a hazardous waste disposal statute to allow local regulation or an express recognition of a local regulation governing hazardous waste disposal is convincing evidence that the state legislative scheme was not intended to occupy the field); *Monroe-Livingston Sanitary Landfill, Inc. v. Town of Caledonia*, 51 N.Y.2d 679, 417 N.E.2d 78 (NY 1980) (holding local sanitary landfill ordinance not preempted by state environmental conservation law since latter statute in express terms disclaimed any purpose to supersede or preclude enactment of local ordinances).

statute, the local government can only enact ordinances that are consistent with the statute.¹⁹⁵

Thus, as with Texas law generally, and the TCAA specifically, the central question in state/local preemption cases is whether the ordinance is inconsistent with state law. The McQuillin treatise on municipal corporations suggests that “the central question in a preemption case is not whether the legislature intended to grant authority to municipalities to act concerning a particular matter, but rather whether the legislature intended to deny municipalities the right to legislate on the subject.”¹⁹⁶

Considering the viability of local air pollution ordinances, the level of authority allowed to local governments will depend in each case upon the specific language in each state’s clean air act, the degree of autonomy permitted to local governments under the state’s constitution and local government code, the degree of authority claimed by the local government’s charter, and the state’s case law interpreting the relationship between these different sources of law. While each case will be fact specific, there are a few general principles we can draw about what will and will not be allowed. First, and most clearly, where a statute expressly forbids all local regulation of air pollution, any local ordinance will be preempted.¹⁹⁷ Likewise, where an air

¹⁹⁵ See, e.g., *County of Milwaukee v. Williams*, 301 Wis. 2d 134, 146, 732 N.W.2d 770, 777 (Wis. 2007). (“While [the statute] allows counties to regulate commercial ground transportation at airports, a county may not promulgate regulations that are inconsistent with state legislation.”); *Northern States Power Co. v. City of Granite Falls*, 463 N.W.2d 541, 544-45 (Minn. Ct. App. 1990) (“(a) As a general rule, conflicts which would render an ordinance invalid exist only when both the ordinance and the statute contain express or implied terms that are irreconcilable with each other. (b) More specifically, it has been said that conflict exists where the ordinance permits what the statute forbids... (c) Conversely, a conflict exists where the ordinance forbids what the statute expressly permits... (d) It is generally said that no conflict exists where the ordinance, though different, is merely additional and complementary to or in aid and furtherance of the statute.”).

¹⁹⁶ 5 MCQUILLIN MUN. CORP. § 15:18 (3rd ed.), citing, e.g., *Action Apartment Ass’n, Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1242, 163 P.3d 89, 96 (2007) (“‘[A]bsent a clear indication of preemptive intent from the Legislature,’ we presume that local regulation ‘in an area over which [the local government] traditionally has exercised control’ is not preempted by state law.”).

¹⁹⁷ See, e.g., *Montgomery County v. Atlantic Guns, Inc.*, 302 Md. 540, 543, 489 A.2d 1114 (Md. 1985) (holding an ordinance restricting local sale of ammunition to be expressly preempted where Maryland gun statute stated, “[t]hat all restrictions imposed by the law, ordinances, or regulations of the political subdivisions on the wearing, carrying, or transporting of handguns are superseded by this Act, and the State of Maryland hereby preempts the right of the political subdivisions to regulate said matters.”).

pollution ordinance is not generally prohibited but the particular ordinance violates an express provision of state law, as BCCAAG has argued concerning the Houston Ordinance, the ordinance will be wholly or partly invalid.¹⁹⁸ As in the present case, whether such express violation has occurred may be a subject of dispute.

Where the issues become murkier is where a statute establishes a comprehensive regulatory regime but does not expressly forbid local regulation. In such situations, particularly where the statute expresses an interest in uniformity, courts will often find that the state legislature has chosen to occupy the field, thus preempting all local regulation.¹⁹⁹ Where the statute establishes a comprehensive regulatory regime but authorizes or recognizes the possibility of local regulation (e.g., the TCAA), the questions of inconsistency become complex. Many statutes permit local regulation as long as the local ordinance is not more,²⁰⁰ or less,²⁰¹ stringent than the applicable state law. The Federal CAA allows states to enact air pollution statutes that are not “less stringent” than federal standards;²⁰² if states have incorporated similar language into

¹⁹⁸ See, e.g., *Iowa Grocery Industry Ass’n v. City of Des Moines*, 712 N.W.2d 675 (Iowa 2006) (“The [Iowa Alcoholic Beverages Control Act] does not give local authorities the power to establish a transfer fee. Instead the general assembly has, under its exclusive right to ‘establish licenses and [alcoholic beverage] permits,’ assigned the power to establish transfer fees to the administrator. The City usurps this power by establishing its own transfer fees.”).

¹⁹⁹ See, e.g., *Municipality of Monroeville v. Chambers Development Corp.*, 88 Pa. Commw. 603, 491 A.2d 307 (1985) (Where the general tenor of a statute indicates an intention on the part of the legislature that it should not be supplemented by municipal bodies, that intention must be given effect and the attempted local legislation held invalid); *Carlson v. Village of Worth*, 25 Ill. App. 3d 315, 318, 322 N.E.2d 852, 854 (1st Dist. 1974), judgment aff’d, 62 Ill. 2d 406, 343 N.E.2d 493 (Ill. 1975) (holding a municipal solid waste disposal ordinance invalid because the Illinois Environmental Protection Act, a “unified state-wide program,” preempted all local regulation of solid waste disposal).

²⁰⁰ See, e.g., *E. Perry Iron & Metal Co., Inc. v. City of Portland*, 941 A.2d 457, 461 (Me. 2008) (holding local waste disposal ordinance not preempted where state law provided, “municipalities ... may enact ordinances with respect to solid waste facilities that contain standards the municipality finds reasonable ... provided that the standards are not more strict than those contained in this chapter”); *Ypsilanti Tp. v. Edward Rose Bldg. Co.*, 112 Mich. App. 64, 315 N.W.2d 196 (1981) (holding local government building official without power to apply restrictions more severe than those imposed under state building code).

²⁰¹ See, e.g., *Middlesex County Health Dept. v. Middlesex County Utilities Authority*, 260 N.J.Super. 588, 590, 617 A.2d 300, 302 (1992) (upholding local air pollution ordinance more stringent than state law where statute provided, “No ordinances of any governing body of a municipality ... more stringent than this act ... shall be superseded by this act.”).

²⁰² 42 U.S.C. § 7416.

their own statutes, municipalities in such states may have more discretion in crafting their own anti-pollution ordinances.

Courts are generally reluctant to infer a legislative intent to preempt concerning subject matters involving significant local interests that may differ from municipality to municipality.²⁰³ Likewise, where ordinances regulate areas over which local governments have traditionally exercised control, such as the location of particular land uses, courts will generally presume that state law does not preempt the ordinance absent express preemptive language in the statute.²⁰⁴ Courts are also likely to give more leeway to local governments in jurisdictions, such as Texas, where municipalities are given “home-rule” status.²⁰⁵ In some states, ordinances enacted by home-rule municipalities in exercise of their traditional police power will only be constrained by a specific act of the legislature expressly limiting the power of the municipality.²⁰⁶ In such jurisdictions the result of a preemption challenge to an air pollution ordinance may be similar to that under the “unmistakable clarity” standard applied to preemption challenges against home-rule cities in Texas.²⁰⁷

Whether or not cities can take advantage of home-rule status, any city wishing to regulate air pollution should assert that it is doing so at least in part on the basis of its police powers. In most jurisdictions cities will be able to make a strong argument that protecting the public from

²⁰³ See, e.g., *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1149, 136 P.3d 821, 827 (2006) (upholding local ordinance restricting timber operations); *DiFrancesco v. County of Rockland*, 41 A.D.3d 530, 532, 839 N.Y.S.2d 105, 107 (2d Dep’t 2007), appeal dismissed, 9 N.Y.3d 953 (2007) (holding that New York state real property code does not preempt local ordinance regulating private water systems because county had a “rational, legitimate interest” in preventing contamination of the water system).

²⁰⁴ *Id.*

²⁰⁵ See, e.g., *City of Fargo v. Malme*, 737 N.W.2d 390, (N.D., 2007) (stating that home rule cities may enact ordinances contrary to the laws of the state where statutes authorize them to do so).

²⁰⁶ See, e.g., *City of Champaign v. Sides*, 349 Ill.App.3d 293, 299, 810 N.E.2d 287, 294 (Ill. App. 4 Dist., 2004), appeal denied, 211 Ill. 2d 572, 823 N.E.2d 963 (2004) and cert. denied, 125 S. Ct. 1645 (U.S. 2005) (upholding a public indecency ordinance, stating, “[t]he power of a home rule unit can only be restrained by a specific act of the legislature.”).

²⁰⁷ *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) (“If the Legislature decides to preempt a subject matter normally within a home-rule city’s broad powers, it must do so with unmistakable clarity.”).

unhealthy air falls under the city’s traditional police power to protect the public health. Prior to the era of federal environmental regulations, cities were the first line of defense against environmental harms.²⁰⁸ Cities have traditionally addressed local problems such as overflowing sewage and noxious smoke through the legal mechanisms of zoning laws and public nuisance ordinances.²⁰⁹ In 1960 the U.S. Supreme Court noted that “[l]egislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.”²¹⁰ While the focus of environmental enforcement has increasingly turned to the states and the federal government in recent decades as federal legislation has tackled increasingly widespread problems,²¹¹ there is no reason why local governments cannot still invoke their police powers to protect the health of local populations.²¹²

Cities’ legal positions will be stronger if their state clean air act authorizes cities to enact air pollution ordinances, as does the TCAA.²¹³ Cities should also note that the CAA explicitly recognizes the importance of local governments to addressing air pollution,²¹⁴ although courts have held that the CAA does not provide an independent grant of authority to local governments to regulate air pollution.²¹⁵

²⁰⁸ CRAIG N. JOHNSTON, WILLIAM F. FUNK, AND VICTOR B. FLATT, *LEGAL PROTECTION OF THE ENVIRONMENT* 3 (2d ed. 2007).

²⁰⁹ *Id.*

²¹⁰ *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960).

²¹¹ JOHNSTON, FUNK, AND FLATT, *supra* note 208, at 5-10.

²¹² See Paulette Wolfson & Ceil Price, *Watch Out for the City: Local Governments Can Enforce*, 36 ST. B. TEX. ENVTL. L.J. 65, 65 (2006) (noting that local governments have a role to play in enforcing environmental laws and can seek appropriate remedies including monetary penalties and injunctive relief).

²¹³ TEX. HEALTH & SAFETY CODE § 382.113.

²¹⁴ See *supra* notes 111 and 112 and accompanying text.

²¹⁵ *Southeastern Oakland County Resource Recovery Authority v. The City of Madison Heights*, 5 F.3d 166, 169 (6th Cir. 1993) (finding a local ordinance concerning solid waste incineration to be preempted by a Michigan statute that specifically prohibited such local regulation, and finding that the federal Clean Air Act does not grant local governments independent power to regulate air pollution); *Rhode Island Cogeneration Assocs. v. City of East Providence*, 728 F.Supp. 828, 833 n.11 (D.R.I. 1990) (“[T]he congressional finding that state and local governments

While there are few published cases on the question of state preemption of air pollution ordinances specifically, there are a few examples that cities can look to for guidance. In a 1992 case in New Jersey the Superior Court upheld a local air pollution in Middlesex County that was more stringent than state law where the state’s clean air act provided, “[n]o ordinances of any governing body of a municipality ... more stringent than this act ... shall be superseded by this act.”²¹⁶ Plaintiffs have sought to invalidate local air pollution ordinances on the grounds that they were preempted by federal law; in a recent California case a federal district court held that local air emissions rules promulgated by the pollution control district for the San Joaquin Valley were not preempted by the CAA.²¹⁷ Another federal preemption case in California suggests a route by which cities may avoid preemption – the market participant doctrine. In *Engine Manufacturer’s Association v. South Coast Air Quality Management District* the Ninth Circuit held that a local air control district’s rule governing fleet vehicle purchases by local governments was not preempted by the CAA’s prohibition on inconsistent vehicle fuel efficiency standards, because the rule governed activities in which the local governments acted as market participants.²¹⁸ The market participant doctrine, which developed from a series of dormant Commerce Clause

should have primary responsibility for controlling air pollution ... is not a grant of power to local governments... If the state has preempted [a local ordinance], its validity cannot be saved by a grant of authority from Congress.”).

²¹⁶ *Middlesex County Health Dept. v. Middlesex County Utilities Authority*, 260 N.J.Super. 588, 590, 617 A.2d 300, 302 (1992).

²¹⁷ *National Ass’n of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist.*, 2008 WL 4330449 (E.D.Cal.) (holding that land development air emissions rule of local air control district is not preempted by the CAA because the rule is not a “standard” for purposes of the CAA). The holding in this case was based in part on *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (applying presumption against preemption to a local regulation, and finding that the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) “does not expressly or impliedly preclude regulatory action by political subdivisions with regard to local use. To the contrary, FIFRA implies a regulatory partnership between federal, state, and local governments.”).

²¹⁸ *Engine Mfrs. Ass’n v. South Coast Air Quality Management Dist.*, 498 F.3d 1031, 1050 (9th Cir. 2007) (“[U]nder the market participant doctrine, the Clean Air Act does not preempt those provisions of the [local air management district’s] Fleet Rules directing state and local governmental entities’ purchasing, procuring, leasing, and contracting decisions.”).

cases,²¹⁹ provides that actions taken by a state or its subdivision as a market participant are generally protected from federal preemption.²²⁰ While this principle has apparently so far been applied only to federal preemption cases, a local government might be able to invoke it successfully by analogy in a state/local preemption challenge. For example, if Mayor White had pursued the city's hybrid-car purchasing policy by ordinance rather than through internal purchasing policy, the City could probably invoke the market participant doctrine to defend such an ordinance against a preemption challenge.

Cities may also be able to bolster their legal authority to regulate air quality by pointing to cases on an analogous issue – indoor smoking ordinances. The majority of courts to consider conflicts between local smoking ordinances and state smoking regulations have found, in the absence of express statutory preemption language, that local smoking ordinances are a valid operation of municipal police powers to protect the public health.²²¹

Conclusion

²¹⁹ See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809-10 (1976) (holding that Maryland did not violate the Commerce Clause by favoring in-state processors of scrap metal when participating in the market for scrap metal); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (holding that South Dakota, as a seller of cement, was free to discriminate in a time of shortage by selling cement only to in-state users).

²²⁰ *Engine Mfrs. Ass'n*, 498 F.3d at 1040.

²²¹ See e.g. *City of Tucson v. Grezaffi*, 200 Ariz. 130, 23 P.3d 675 (2001) (the state smoking restriction statutes did not reflect express or implied legislative intent to so occupy the field that no room was left for any supplementary or additional local regulation); *Tri-Nel Management v. Board of Health of Barnstable*, 433 Mass. 217, 741 N.E.2d 37, 44 (2001) (state statutes prohibiting smoking in various locations and restricting smoking in restaurants did not preempt or conflict with municipal regulation prohibiting smoking in all restaurants and bars because local ban “furthers, rather than frustrates, [state legislative] intent”); *Oregon Restaurant Ass'n v. City of Corvallis*, 166 Or. App. 506, 999 P.2d 518 (2000) (state's “Indoor Clean Air Act” did not preempt municipal ordinance prohibiting smoking in enclosed public spaces within city when no clear inconsistency or conflict existed between Act and ordinance); *Boreali v. Axelrod*, 71 N.Y.2d 1, 517 N.E.2d 1350 (1987) (state statute that restricted smoking for narrow class of public locations did not preempt field of indoor smoking regulation). Courts have, however, found local smoking ordinances preempted where there is an express conflict with state law; see *Michigan Restaurant Ass'n v. City of Marquette*, 245 Mich. App. 63, 626 N.W.2d 418 (2001) (local ordinance that completely banned smoking in restaurants within city directly conflicted with restaurants' right under state statute “to designate a certain percentage of its seating capacity as seating for smokers”); *LDM, Inc. v. Princeton Regional Health Comm'n*, 336 N.J. Super. 277, 764 A.2d 507, 526 (2000) (local smoking ordinance preempted by state law that established pervasive, comprehensive, and exclusive scheme regulating “when, where, and under what circumstances smoking is allowed”).

The City of Houston perceived that air pollution was posing a continuing threat to the public health, and further perceived that the state's efforts to regulate air pollution in Houston were inadequate. Consequently, the City chose to exercise its own police powers as a home-rule city to regulate air pollution in ways that it hopes will be more effective. Whether the City has the legal authority to take the steps that it did remains to be proven in court, but the City has presented a compelling legal argument that it has such authority.

Houston's initiative provides a significant example to other cities in two ways. First, it demonstrates an approach that a city may take when the state fails to take adequate measures to address air pollution. Second, it provides a blueprint for how a city may address a challenge to its legal authority to regulate air pollution independently. By establishing that an ordinance is grounded in a legitimate basis of municipal authority, and by demonstrating that an ordinance is not inconsistent with state law, a city may prove the validity of its ordinance. Houston's approach may not work, either environmentally or legally. But the City has attempted to take what steps it can to perform the most basic function of any government – to protect the health and safety of its people. Other cities and states should take note.