



TEXAS MUNICIPAL LEAGUE
Empowering Texas cities to serve their citizens

President **David Rutledge**, Mayor, Bridge City
Executive Director **Bennett Sandlin**

April 4, 2023

The Honorable Charles Schwertner
Chairman, Senate Business and Commerce Committee
Texas Senate
P.O. Box 12068
Austin, TX 78768-2068

Dear Chairman Schwertner:

I am writing on behalf of the Texas Municipal League to express our opposition to **S.B. 814** by **Senator Creighton**. S.B. 814 would prohibit a city from “regulating conduct in a field of regulation that is occupied by a provision of [a state] code.” Individuals and organizations would be authorized to file lawsuits to challenge ordinances they believe are preempted under this vague preemption theory. The bill strips the power of city residents and their local officials to make decisions they think are best for their communities and punts tough regulatory decisions to the courts. By not defining key standards, like when a field is occupied, or when a city is expressly authorized to act, S.B. 814 raises more questions than it answers.

When does the state occupy a field? For over fifty years, Texas courts have explained that for the state legislature to preempt city authority, it must do so with unmistakable clarity. S.B. 814 would prohibit a city from adopting or enforcing an ordinance when a field of regulation is occupied by a code. But the bill does not define nor provide clear guidance about when the state has occupied a legislative field. Is one regulation enough? Two regulations? Five regulations? Can a state occupy a field by choosing not to regulate certain conduct? The existing “unmistakable clarity” standard lets cities know what they can and cannot do and guides the courts when determining whether a city has crossed the line. S.B. 814 provides little clarity about what it does or does not preempt. While Section 4 of the bill attempts to spell out a regulatory baseline for city regulation, which is helpful, that section is not part of the statutory language and therefore may have little usefulness for the courts.

When is a city expressly authorized to act? S.B. 814 provides generally that a city may not regulate in an occupied field unless expressly authorized by another statute. Under S.B. 814, must a city be able to point to a statute expressly authorizing the exercise of a particular authority, or must it be able to show that it can take that specific action? Is a city expressly authorized to act under S.B. 814 through a general police power statute like Local Government Code Sec. 51.001 (a city may adopt an ordinance “for the good government, peace, or order of the municipality or for the trade and commerce of the municipality”)? Is a city expressly authorized to act if a statute does not grant

a city the authority to act but explains that a statute “shall not be construed” to limit a city’s authority to act under certain circumstances, as so many state statutes do?

What about home-rule city ordinances enacted in the absence of express city authority? For example, the state only expressly authorizes a county to regulate outdoor music festivals in Chapter 2014 of the Occupations Code. Can the state occupy a field by only granting certain authority to specific governmental entities but not others? The lack of express city authority could render home-rule city ordinances in these fields subject to preemption under S.B. 814.

What if two provisions of state law provide different authority? For example, Chapter 234 of the Local Government Code authorizes a county to regulate massage parlors. But Section 455.005 of the Occupations Code “does not affect a local regulation” that requires background investigations for massage parlor owners and operators. Under current law, a home rule city has the clear ability to regulate under the authority granted by the statute and the Texas Constitution. S.B. 814 could change that since a city may not be deemed to have express authority to act.

Why can some cities regulate payday lending while others cannot? S.B. 814 also includes an odd provision that would preserve existing city payday lending ordinances but preempt any other cities from adopting similar or identical ordinances. If the state occupies the payday lending field, how can some cities regulate the practice while others cannot? This provision seemingly conflicts with the bill’s purpose.

S.B. 814 is troublesome for several reasons. It undermines the home-rule authority Article XI, Section 5 of the Texas Constitution provides. It will subject cities to a flood of litigation challenging city ordinances based on claims under eight state codes, which will discourage cities from adopting and enforcing ordinances to protect public health, safety, and welfare. It provides little guidance about what a city can or cannot do, and the direction it does provide is left entirely to the courts to interpret.

For the above reasons, the League respectfully opposes S.B. 814 and urges the committee to take no action on this bill.

Sincerely,

A handwritten signature in black ink, appearing to read "Monty Wynn". The signature is stylized and cursive.

Monty Wynn
Director, Grassroots and Legislative Services
Texas Municipal League