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SUPREME COURT OF TEXAS
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No. 19-0767

In the Supreme Court of Texas

TEXAS PROPANE GAS ASSOCIATION,
Petitioner / Cross-Respondent,

v.

THE CITY OF HOUSTON,
Respondent / Cross-Petitioner.

On Appeal from the Third Court of Appeals at Austin, Texas
Cause No. 03-18-00596-CV

THE CITY OF HOUSTON'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the case: This is an action for declaratory judgment, brought by Plaintiff/Respondent Texas Propane Gas Association ("TPGA"), a trade association of propane marketers, against numerous Texas cities, including Defendant/Petitioner the City of Houston ("Houston") and the Railroad Commission of Texas ("RRC"), seeking a declaration that each of those cities' propane regulations, fire code provisions, and ordinances is preempted and void under Tex. Nat. Res. Code Ann. § 113.054 (West 2019), which includes a provision empowering cities to enact more stringent propane regulations than those promulgated by the RRC. CR221. No party disputes that that the RRC has not yet established any procedure to enable cities actually to obtain an enforceable order allowing them to enforce more stringent propane regulations. TPGA does not seek injunctive relief. *Id.* TPGA also did not plead that the *Morales* exception, discussed herein, applies to confer jurisdiction on civil courts to declare preempted propane regulations that impose criminal penalties. *Id.*

Trial court proceedings: After TPGA filed its Fourth Amended Petition, CR221, a Motion for Summary Judgment on the Merits, CR175, abandoned its claims against the RRC, and settled or dropped the remaining defendant cities, Houston filed a motion for summary judgment on subject matter jurisdiction/plea to the jurisdiction, CR259, alleging that TPGA's claims were barred for lack of standing, jurisdiction, or because they were not ripe or, alternatively, were moot. Houston also filed an alternative motion for summary judgment on the merits. CR259.

Trial court disposition: Judge Amy Clark Meachum, 261st District Court of Travis County, sitting as a civil judge, denied both pleas/motions, by order, dated Sept. 10, 2018, attached as Exh. A. CR582. The same day, Houston filed notice of interlocutory appeal on its motion for summary judgment on subject matter jurisdiction/plea to the jurisdiction only. CR584.

Ct. of App. Disposition The case was heard before a Third Court of Appeals panel consisting of Chief Justice Rose, and Justices Kelly and Smith. *See City of Houston v. Tex. Propane Gas Ass'n*, No. 03-18-00596-CV, 2019 WL 3227530 (Tex. App.—Austin July 18, 2019, pet. filed) (mem. op.) ("TPGA Opin."), attached as Exh. B. The Court reversed in part, concluding that the trial court erred in holding that TPGA had met its burden to plead facts affirmatively demonstrating that it had associational standing to bring its claims, and remanding the case to the trial court to allow TPGA an opportunity to cure the pleading defect. *Id.* at *1. Chief Justice Rose dissented. *Id.* at *8. The Court otherwise affirmed the trial court's denial of Houston's plea/motion which alleged, among other things, that civil courts lack jurisdiction over TPGA's claims relating to penal laws. It held that, "based on this [same] per day-violation fine and on the Texas Supreme Court's recent decision in City of Laredo, we must conclude that TPGA members are 'effectively preclude[d]' 'from testing the ban's constitutionality in defense to a criminal prosecution' … [and] TPGA's suit to declare certain Fire Code regulations invalid may be brought in civil court." *Id.* (citing *State v. Morales*, 869 S.W.2d 941, 945 (Tex. 1994)) ("*Morales*"). From this portion of the Court's decision alone, Houston filed its timely petition for review. TPGA also filed one the same day.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction to grant review here. By following this Court's *dicta* in footnote 28 of *City of Laredo v. Laredo Merch.'s Ass'n*, 550 S.W.3d 586, 592 n.28 (Tex. 2018) ("Laredo"), the court of appeals unconstitutionally expanded the jurisdiction of the Texas civil courts and the narrow exception to criminal jurisdiction this Court recognized in *Morales*, 869 S.W.2d at 945. In addition, the court effectively eliminated plaintiffs' long-standing jurisdictional pleading and proof requirements. In so doing, the court of appeals committed errors of law so fundamentally important to the State's jurisprudence that they should be corrected by this Court. *See* Tex. Gov't Code § 22.001(a). If not corrected, these errors will surely reoccur.

In particular, the Third Court of Appeals' decision conflicts directly on the issue presented with dozens of court of appeals decisions, of which the following decisions of its sister courts are representative: *Destructors, Inc. v. City of Forest Hill*, No. 02-08-0440-CV, 2010 WL 1946875, at *2-5 (Tex. App.—Fort Worth May 13, 2010, no pet.) (mem. op.); *ACE Cash Express, Inc. v. City of Denton*, No. 02-14-00146-CV, 2015 WL 3523963, at *4 (Tex. App.—Fort Worth June 4, 2015, pet. denied); and *Town of Flower Mound v. Eagleridge Operating, LLC*, No. 02-18-00392-CV, 2019 WL 3955197, at *5 (Tex. App.—Fort Worth Aug. 22,

2019, no pet.). Resolution of these conflicts is critical to the State's jurisprudence as well.

ISSUE PRESENTED

In Morales, 869 S.W.2d at 945, this Court held that "the holdings of our courts are legion that intervention by an equity court is inappropriate … unless the statute is unconstitutional and there is the threat of irreparable injury to vested property rights." In dicta in Laredo, this Court reaffirmed the Morales exception but stated, without benefit of pleadings or proof, that the exercise of civil jurisdiction over the interpretation of a criminal statute was nevertheless proper in that lawsuit because the ordinance imposed "a substantial per violation fine that effectively preclude[d] small local businesses from testing the bans' constitutionality in defense to a criminal prosecution."[1] *The court of appeals here, also without the benefit of pleadings or proof, relied on the same per day-violation fine and on Laredo in holding that "[T]PGA members are 'effectively preclude[d]' 'from testing the ban's constitutionality in defense to a criminal prosecution'" and, therefore, "TPGA's suit to declare certain Fire Code regulations invalid may be brought in civil court."*[2]

THE ISSUE PRESENTED IS: Whether the *civil* courts' assertion of subject-matter jurisdiction over construction of *criminal* laws here, based on *Laredo*'s footnote 28, unlawfully expands or supplants the *Morales* exception *Laredo* ostensibly reaffirmed, improperly removes a plaintiff's burden to plead and prove jurisdiction, conflicts with sister court of appeals' decisions, and/or violates the Texas Constitution by usurping the jurisdiction of the State's criminal courts?

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[1] *Id.* at 592 n.28 (citing *Morales*, 869 S.W.2d at 945; *City of Austin v. Austin City Cemetery Ass'n*, 87 Tex. 330, 28 S.W. 528, 529-30 (Tex. 1894)).

[2] TPGA Opin. at *8 (citing *Morales*, 869 S.W.2d at 945).

STATEMENT OF RELEVANT FACTS

Houston's petition addresses only questions of law and involves an appeal from denial of the City's plea to the jurisdiction/motion for summary judgment on jurisdictional grounds. Consequently, only jurisdictional facts are relevant here and this Court needs only a few such facts to grant review and reverse the decisions of the court of appeals and trial court. Those necessary to provide proper context are set forth in Houston's Statement of the Case.

In addition, TPGA conceded in its brief in the court of appeals that violations of the challenged provisions subject violators to criminal fines.[3] Houston's propane ordinances and regulations are enforced in municipal courts, punishable by relatively small fines, but no jail time.[4] It is undisputed that fire officials may elicit the help of the Houston Police Department to enforce code provisions, including propane regulations. Even violations of Houston's *Code of Ordinances* § 29-123 (which governs fuel supply and storage) subject one to

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[3] *See* Appellee's Brief in the Court of Appeals at 30. TPGA *had already conceded* that many, if not all, of the regulations and ordinances it challenges are criminal in nature. First, TPGA conceded in its Response that "Houston cite[d] to several provisions of its Fire Code [] that make certain conduct unlawful, *reference criminal citations and/or impose fines*." CR365 (TPGA Response at 3) (emphasis supplied). Second, Houston cited to *eight provisions* in the challenged Fire Code provisions that specifically mention "*criminal penalty*," "*unlawful*" *acts*, "*offenses and misdemeanors*," and "*prosecutions of violations*." CR270-72. *See infra* at pages 15-16.

[4] *See, e.g.*, City of Houston, Tex., *Code of Ordinances* § 21-162(c). CR325-27. Excerpts of all City ordinances relied on by the court of appeals are attached as Exh. C. *See* CR325-27.

limited criminal penalties. CR327. Appropriately, the court of appeals assumed the challenged law were penal in nature. TPGA Opin. at *8.

SUMMARY OF ARGUMENT

Houston seeks review and reversal of a portion of the court of appeals' decision to enable this Court to halt the unconstitutional, if inadvertent, "jurisdiction creep" that threatens to undermine the Texas Constitution and the foundations of the bifurcated judicial system it establishes and that renders the court of appeals' decision on criminal jurisdiction here erroneous. There can be no issue more important to the State's jurisprudence.

For a century, this Court has held that civil courts have no jurisdiction to construe criminal laws unless claimants can show that the challenged law is unconstitutional and that its potential enforcement threatens claimants with irreparable injury to vested property rights. *See, e.g.*, *Morales*, 869 S.W.2d at 945. While this Court purported to reaffirm the *Morales* exception in *Laredo's* footnote 28, it added dicta[5] that could be read to expand that exception unconstitutionally by substituting or improperly equating the adequacy of a claimant's legal remedy for irreparable injury to a vested property right as the test for civil courts' exercise of jurisdiction to construe criminal laws. Moreover, it did so without requiring

[5] Neither party in *Laredo* challenged jurisdiction.

that plaintiffs plead or prove compliance with the *Morales* exception's requirement of irreparable injury. Instead, the Court presumed injury based upon the fines that could potentially be imposed for violations. By this circular logic, the more severe the punishment that may be imposed for violating a criminal statute is, the more certain it is that civil courts have jurisdiction to construe that criminal statute. Under a thus hollowed-out *Morales* exception, civil courts that follow *Laredo*, like the Third Court here, are arguably free to construe virtually any statute the violation of which is punishable as a misdemeanor or felony. This case illustrates the serious constitutional problems thus created.

Following *Laredo's* footnote 28 to the letter, the court of appeals here held that, if a municipal law is punishable by a fine, at the Class C misdemeanor[6] level or above, a civil court may presume, from that fact alone, that claimants are deprived of their ability to challenge that law in defense to a criminal prosecution; therefore, that the *Morales* exception applies to confer jurisdiction on a civil court to construe Houston's propane laws that impose criminal penalties. That holding violates the Texas Constitution.

It is now undisputed that Houston's challenged propane regulations, codes, and ordinances are criminal in nature. Indeed, the court of appeals

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[6] *See* Tex. Penal Code Ann. §§ 12.21-23 (West 2019).

presumed that they were. Consequently, TPGA's claims should have been dismissed for want of jurisdiction. This is especially true because the trial court lacked jurisdiction over TPGA's claims under the only exception to the general rule that civil courts lack criminal jurisdiction. Indeed, TPGA never pleaded or established that it fell within the *Morales* exception.

The court of appeals' unsupported reliance upon *Laredo's* footnote 28 was improper and cannot save TPGA's claims. First, as discussed above, the *Laredo* footnote turns *Morales* on its head and hollows it out to the point of irrelevance. It thus improperly but exponentially expands this Court's and the Texas civil courts' criminal jurisdiction and violates Article V, Section 3(a) of the Texas Constitution. Second, *Austin City Cemetery Association*, 28 S.W. 528, on which both this Court and the court of appeals rely, involved an ordinance that the Court conceded would completely destroy the plaintiffs' property rights. By contrast, TPGA has yet to identify any property right that might potentially be infringed here. Indeed, this Court's affirmance of the court of appeals' decision on the issue presented would require that this Court overturn a whole line of cases consistently holding that there is no vested property right to engage in a particular business, or to engage in one's business in a particular manner, free of restrictions or regulation. Third, allowing the court of appeals' decision to stand would violate the core principle that, when challenged, a plaintiff must plead

and prove a court's jurisdiction. Without any pleadings or proof, the court of appeals simply assumed, as the Court in *Laredo* had, that at least one member or customer of a member of TPGA would suffer irreparable injury if faced with the potential fines. This presumption is not only legally improper but it makes no sense. Unlike the regulations in *Laredo* and *Austin City Cemetery Association*, most of the regulations, codes, and ordinances challenged here have existed, in substantially similar form, across the State *for decades* and Respondents have somehow managed to live under them.

Because the court of appeals could not properly rely upon *Laredo*'s footnote, TPGA had to plead and prove jurisdiction under the *Morales* exception. It failed to do so. First, TPGA, an association, has no standing to assert its members' individual vested property rights, if any. Alternatively, the *Morales* exception cannot apply here because TPGA cannot and did not plead or establish that any member possessed any endangered, vested property rights that are relevant here. The *Morales* exception also cannot apply here because TPGA cannot and did not plead or establish any recognized irreparable injury.

In addition, TPGA failed to sustain its burden to plead and establish this Court's jurisdiction to construe *each of* the challenged criminal regulations and ordinances. In particular, it failed to plead or prove the applicability of the *Morales* exception for each criminal law challenged.

Finally, the court of appeals' decision directly conflicts with sister courts of appeals' decisions on the issue presented. This Court should resolve those conflicts.

This Court, therefore, should grant review to 1) clarify that *Morales* and Texas law still require pleading and proof of threatened irreparable injury to a vested property right for a civil court to construe a criminal law and that neither adequacy of remedy, personal rights, nor the unsupported assumptions regarding potential penalties used in *Laredo* and by the court of appeals here, will suffice to meet *Morales'* stringent requirements; and 2) resolve the conflicts the court of appeals' decision on this issue created with sister appellate court decisions. On review, this Court should reverse the decision of the court of appeals on the question presented, affirm it in all other respects, and grant to Houston such other relief as to which this Court finds Houston entitled.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT, SITTING AS A *CIVIL* COURT, LACKED JURISDICTION TO CONSTRUE OR HOLD PREEMPTED HOUSTON'S *CRIMINAL* PROPANE ORDINANCES OR REGULATIONS

A. The Texas Constitution Establishes a Bifurcated Judicial System That Deprives Civil Courts of Jurisdiction to Construe or Establish Rights Under Criminal Laws

By its lawsuit, TPGA demanded that a Travis County district court, sitting only as a *civil* court, hold that *all* of Houston's propane ordinances, Fire Code provisions, and regulations, which they concede carry criminal penalties, are preempted and void under Tex. Nat. Res. Code § 113.054.[7] Neither that court nor this one has subject-matter jurisdiction to entertain such claims.

Unique among the states, the Texas Constitution mandates that Texas establish and utilize a bifurcated system of criminal/civil jurisdiction. *See* Tex. Const. art. V, §§ 3(a), 5(a). The Court of Criminal Appeals is the court of last resort for criminal matters and its decision "shall be final in all criminal cases *of whatever grade*…" *Id.* at § 5(a). Conversely, this Court has final review in civil matters.[8] Under this constitutional division of responsibilities, the jurisdiction of this Court expressly *excludes* "criminal law matters." *Id.* at § 3(a). As this Court

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[7] CR234-35. Excerpts of all Texas Natural Resources Code sections relied on herein are also attached and incorporated as Exh. D. CR319-22.

[8] Tex. Const. art. V, §§ 3 & 5; *In re Reece*, 341 S.W.3d 360, 370–71 (Tex. 2011).

explained: "this framework, while at times imperfect, has been in place since 1876, and is the cornerstone of the bifurcated system of appeals in this state."[9] Consequently, "*a civil court simply has no jurisdiction to render naked declarations of 'rights, status or other legal relationships arising under a penal statute*,'"[10] the only relief TPGA seeks here.[11] Instead, questions, such as whether a penal statute is preempted by State law, must ultimately be resolved by the Court of Criminal Appeals.[12]

This longstanding requirement that only courts exercising criminal jurisdiction may construe criminal statutes rests in part on "a pragmatic justification" arising from the fact that Texas has two courts of last resort.[13] Having competing courts construe criminal statutes in parallel civil and criminal proceedings would "'create confusion ... and might result finally in precise

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[9] *Reece*, 341 S.W.3d at 370; *see State ex rel. McNamara, Co. Atty. v. Clark,* 79 Tex. Crim. 559, 187 S.W. 760, 762 (1915) ("whether wisely or unwisely, the people of this state in framing their Constitution divided the jurisdiction of the civil and criminal courts of final resort…").

[10] *Morales*, 869 S.W.2d at 947 (citing *Malone v. City of Houston*, 278 S.W.2d 204, 206 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.)) (emphasis supplied).

[11] "The 'naked' declaration that section 255.001 was unconstitutional, without a valid request for injunctive relief, was not within the jurisdiction of the civil district court sitting in equity." *Dallas Cty. Dist. Atty. v. Doe*, 969 S.W.2d 537, 542 (Tex. App.—Dallas 1998, no pet.) (citing *Morales*, 869 S.W.2d at 942). TPGA has filed no pleadings seeking injunctive relief.

[12] *See, e.g.*, *Unger v. State*, 629 S.W.2d 811, 812 (Tex. App.—Fort Worth 1982, pet. ref'd) (the meaning and validity of a penal statute or ordinance should ordinarily be determined by courts exercising criminal jurisdiction).

[13] *Morales*, 869 S.W.2d at 947; *see also* Tex. Const. art. V, §§ 3(a), 5(a).

contradiction of opinions between the [civil courts] and the Court of Criminal Appeals to which the Constitution has [e]ntrusted supreme and exclusive jurisdiction in criminal matters.'"[14] "[I]f civil courts were to accept jurisdiction, a potential for conflicting decisions ... between our civil and criminal courts of last resort on the validity of such statutes [would be] ... a very real danger."[15] "*[I]t is the prospect that civil courts will get into the business of construing criminal statutes which represents the real danger*."[16]

That dangerous prospect for "jurisdiction creep" has already been realized in this case and in footnote 28 of *Laredo*. As the *Morales* court explained:

> It was because of this concern in *Dearing v. Wright*, 653 S.W.2d 288 (Tex. 1983), that this court declined to intervene in a prosecution for possession of marijuana based on the alleged unconstitutionality of Texas' marijuana possession statute. The court observed that if civil courts were to accept jurisdiction, a potential for conflicting decisions, between our civil and criminal courts of last resort on the validity of such statutes, was a very real danger. *Id.* at 290. Indeed, to demonstrate how close the supreme court and the court of criminal appeals have come to conflicting decisions on this very issue, one need only consider the latter court's recent rejection of a criminal defendant's state constitutional challenge, albeit under a

[14] *Morales*, 869 S.W.2d at 947-48 (quoting *Roberts v. Gossett*, 88 S.W.2d 507, 509 (Tex. Civ. App.—Amarillo 1935, no writ)).

[15] *Morales*, 869 S.W.2d at 948 (citing *Dearing v. Wright*, 653 S.W.2d 288, 290 (Tex. 1983)).

[16] *Morales*, 869 S.W.2d at 948 n.16 (emphasis in original).

> different provision of our constitution than that relied upon by the court of appeals to affirm the trial court's judgment.[17]

Pragmatism, however, is neither the only consideration nor the most important one in assigning the interpretation of criminal statutes and laws to the criminal courts. These jurisdictional limits also protect "[t]he very balance of state governmental power imposed by the framers of the Texas Constitution ..." *Id*. at 949. That balance "depends on each branch, and particularly the judiciary, *operating within its jurisdictional bounds*." *Id*. (emphasis supplied). "The checks and balances inherent in our form of government depend upon the judiciary's equanimity and particularly upon our self-restraint." *Id.* Thus, "when a court lacks jurisdiction, *its only legitimate choice is to dismiss*."[18] The trial court here, therefore, erred when it failed to make the "only legitimate choice" available to it here: to dismiss TPGA's claims.

The *Morales* rule applies no matter in what procedural context the respective courts' jurisdictional boundaries are exceeded. TPGA's argument below that *Morales* stands for the notion that bifurcation principles apply only to

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[17] *Morales*, 869 S.W.2d at 947–48 (citing *Boutwell v. State*, 719 S.W.2d 164, 169 (Tex. Crim. App. 1985) (rejecting an Equal Rights Amendment attack)).

[18] *Id*. (emphasis supplied). In focusing on the precedential effect of *Unger*, 629 S.W.2d 811, this Court, in *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 19 (Tex. 2016), apparently overlooked the fact that the process of criminal enforcement and review by criminal courts followed in *Unger* is the *only* available path for review because neither that Court nor the trial court had jurisdiction to review that ordinance's penal provisions.

a court granting injunctive relief is not just incorrect, it seriously misrepresents this Court's holding. *See* Appellee's Brief at 29. Instead, *Morales* holds:

> For the same reasons that equity courts are precluded from enjoining the enforcement of penal statutes, *neither this court, nor the courts below, have jurisdiction to render a declaratory judgment* regarding the constitutionality of 21.06. The legislature did not intend to enlarge such jurisdiction when it promulgated the Declaratory Judgments Act. *A civil court simply has no jurisdiction to render naked declarations of 'rights, status or other legal relationships arising under a penal statute.'*[19]

Likewise, in *Ryan v. Rosenthal*, 314 S.W.3d 136, 143 (Tex. App.—Houston [14th Dist.] 2010, pet. denied), the Houston court reaffirmed that

> 'the considerations that lead courts of equity to deny injunctive relief against enforcement of the criminal laws *apply with equal force to an action for a declaratory judgment construing a penal statute.' '[T]he procedures prescribed by the Legislature should not be circumvented or delayed by the prosecution of a declaratory judgment action to obtain a construction of the penal statute by the civil courts.'*[20]

It is telling that TPGA never mentions in its briefing, here or below, *Destructors, Inc. v. City of Forest Hill*,[21] a case Houston cited in its motion for summary judgment. In *Destructors*, the court of appeals, relying upon *Morales*, held that a

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[19] *Id.* at 947 (quoting *Stecher v. City of Houston*, 272 S.W.2d 925, 928 (Tex. Civ. App.—Galveston 1954, writ ref'd n.r.e.)); *see Tex. Liquor Control Bd. v. Canyon Creek Land Corp.*, 456 S.W.2d 891, 894 (Tex. 1970); *Malone v. City of Houston*, 278 S.W.2d 204, 206 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.).

[20] *Id.* (quoting *Tex. Liquor Control Bd.*, 456 S.W.2d at 896) (emphasis supplied).

[21] No. 02-08-0440-CV, 2010 WL 1946875, at *2-5 (Tex. App.—Fort Worth May 13, 2010, no pet.) (mem. op.).

civil court had no jurisdiction to rule *on the alleged preemption of an ordinance*, making certain activities "unlawful" without a city permit, absent a showing of irreparable injury to vested property rights. Thus, the notion that Texas' long-standing bifurcation rules apply only to injunctive relief and *not* to TPGA's declaratory judgment claims here is, therefore, nonsense.

Like the Court in *Morales*, the *Ryan* decision also undermines TPGA's prior argument that the Uniform Declaratory Judgments Act ("UDJA") somehow provides it with an independent source of jurisdiction or otherwise immunizes TPGA from Texas' bifurcation rules. It does not. Instead, the Court held:

> This further limitation dovetails with the precept that the statutory authorization for declaratory judgments *does not by itself confer jurisdiction*. *See generally* Tex. Civ. Prac. & Rem. Code Ann. § 37.001, *et seq.* (Vernon 2008). "Just as an injunction is a remedial writ that depends in the first instance on the existence of the issuing court's equity jurisdiction, *we have held that the Uniform Declaratory Judgments Act ... is merely a procedural device for deciding cases already within a court's jurisdiction*." *Morales*, 869 S.W.2d at 947 (citations omitted). "*A litigant's request for declaratory relief cannot confer jurisdiction on the court, nor can it change the basic character of a suit*."[22]

These cases stand for the proposition that civil courts, as compared to criminal courts, may only assert jurisdiction over the interpretation of a penal ordinance when a very narrow exception to constitutional bifurcation principles, discussed

[22] *Ryan*, 314 S.W.3d at 143 (emphasis supplied).

below, applies. Otherwise, long-standing bifurcation principles deprive civil courts of subject-matter jurisdiction.[23] Instead, a plaintiff's remedy lies in the *criminal* courts.

This is exactly the procedure followed in *Unger*, 629 S.W.2d at 812, which is directly applicable here. In *Unger*, the appellant had been convicted of drilling an oil well in his town without securing a local drilling permit. He *challenged his local conviction* on grounds that the law requiring him to obtain a drilling permit was preempted because it conflicted with delegation of authority over oil and gas to the RRC. The *criminal* court found no conflict.[24] *Unger*, therefore, stands for the proposition that a criminal court is fully empowered to determine

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[23] TPGA's citation to *Heckman v. Williamson County*, in its response to the City's petition for review, for the idea that this Court must look to the "essence" of the case to determine if the case is civil or criminal is misdirected and highly misleading. *See* Appellee's Brief at 31. In *Heckman*, the Court addressed *appellate* jurisdiction over procedural and jurisdictional issues, and not the substance of the claim. The Court observed that, *in that context*, the Court need not "provide any 'construction of a criminal statute' to answer the justiciability questions here. In other words, no 'criminal law is the subject of the litigation.' Arguably for this reason alone, this case does not present a 'criminal law matter.'" Because criminal laws and their construction and alleged preemption are the *centerpiece* of this case, *Heckman* actually *supports* Houston's bifurcation arguments.

[24] TPGA's previous reliance on *BCCA Appeal Group*, 496 S.W.3d 1, which cites *Unger*, was misplaced. The Texas Water Code, in a section discussed by that Court, has a special provision that effectively presumes that all relevant violations are civil. *See* Tex. Water Code Ann. § 7.203(c), (d) (West 2008) ("a prosecuting attorney may not prosecute an alleged violation if the [TCEQ] determines that administrative or civil remedies are adequate and appropriate"). Thus, the statute mandates administrative and civil remedies whenever possible, and the TCEQ is charged with the discretion to make that determination before any criminal proceeding may move forward. *Id.* Because there is no similar provision in the Texas Natural Resources Code, the *BCCA* case is, therefore, inapposite.

whether RRC regulations preempt local propane regulations and ordinances. Consequently, the trial court should have dismissed TPGA's claims for want of jurisdiction.

B. TPGA Cannot Have it Both Ways: Either Houston's Challenged Propane Regulations, Codes, and Ordinances Are Criminal in Nature or TPGA Has No Standing or Ability to Fit Itself Under the *Morales* Exception

It is now undisputed that Houston's challenged propane ordinances and regulations are criminal in nature: they are punishable by relatively small fines, no jail time, and are enforced in municipal courts.[25] Indeed, TPGA relied upon those very criminal penalties to argue both associational standing and civil jurisdiction based upon *Laredo*. TPGA Opin. at *8 (court assumed without deciding that challenged ordinances are penal in nature).

In particular, the Houston Fire Code explicitly prohibits unlawful acts, authorizes fire officials to issue criminal citations, and allows prosecution of fire code violations under the Texas Penal Code. Moreover, fire officials may elicit the help of the Houston Police Department to enforce code provisions, including

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[25] *See, e.g.*, City of Houston, Tex., *Code of Ordinances* § 21-162(c). Excerpts of all City of Houston Code of Ordinances relied on herein are attached and incorporated as Exh. C. CR325-27.

LPG regulations and unpermitted activities. Illustrative excerpts from the Houston Fire Code include:

> **[A] 104.5 Notices and orders.** As may be required to enforce this code, the fire code official is authorized to issue and to serve such notices, or orders, and *criminal citations*, as well as administrative citations or summonses in the manner prescribed by Chapter 10, Article XVIII, of the City Code as are required to affect compliance with this code in accordance with Sections 109.1 and 109.2.
>
> **[A] 104.10.1 Assistance from other agencies.** *Police* and other enforcement agencies shall have authority to render necessary assistance in the investigation of fires and in enforcing the provisions of this code when requested to do so by the fire code official.
>
> **[A] 105.1.1 Permits required.** Any property owner or authorized agent who intends to conduct an operation or business, or install or modify systems and equipment which is regulated by this code, or to cause any such work to be done, shall first make application to the fire code official and obtain the required permit. Permits required by this code shall be obtained from the Fire Permit Office. The property owner or authorized agent shall obtain a permit prior to engaging in any activities, operations, practices, or functions regulated by this code and requiring a permit as listed in Section 105.6, and shall pay permit fees, as required, prior to receiving issuance of the permit. Issued permits shall be kept on the premises designated therein at all times and shall be readily available for inspection by the fire code official. It shall be *unlawful* for any person to engage in any activities, operations, practices or functions listed in Section 105.6 for any reason without holding a current and valid permit for the activity, operation, practice or function as issued by the fire permit office.
>
> **[A] 109.1 Unlawful acts.** It shall be *unlawful* for a person, firm or corporation to erect, construct, alter, repair, remove, demolish or utilize a building, occupancy, premises or system regulated by this code, or cause same to be done, in conflict with or in violation of any of the provisions of this code.

[A] 109.4 General penalty; **continuing violations**. When in this code an act is prohibited or is made or declared to be *unlawful* or an *offense or misdemeanor*, or wherever in this code the doing of any act is required or the failure to do any act is declared to be unlawful, and no specific penalty is provided therefor, the *violation of any such provision of this code shall be punished by a fine* of not less than $500.00, nor more than $2000.00; provided, however, that no penalty shall be greater or lesser than the penalty provided for the same offense under the laws of the state. Each day any violation of this code shall continue shall constitute a separate offense. In *prosecutions under this code*, the various provisions hereof that are designated as exceptions shall not be treated as exceptions within the meaning of *Section 2.02 of the Texas Penal Code*, and instead, they shall constitute defenses to prosecution within the meaning of *Section 2.03 of the Texas Penal Code*.

> **109.4.1 License suspension/revocation.** The suspension, revocation, cancellation or denial of any license, permit or certificate by the jurisdiction shall not prohibit the imposition of any civil or *criminal penalty*. The imposition of a civil or criminal penalty by the jurisdiction shall not prohibit the suspension, revocation, cancellation or denial of any license, permit or certificate.

[A] 109.3 Notice of Violation. When the *fire code official* finds a building, premises, vehicle, storage facility or outdoor area that is in *violation of this code*, the *fire code official* is authorized to prepare a written *notice of violation* ("NOV") describing the conditions deemed unsafe and, when compliance is not immediate, specifying a time for reinspection. The NOV advises the recipient of the existence of a violation of this code but does not initiate a judicial or administrative proceeding. Service of an NOV is not required prior to service of a *citation* or summons or to other action to enforce this code.

> **[A] 109.3.3 Prosecution of violations.** If a person owning, operating, or maintaining an occupancy, property, or vehicle subject to this code allows a violation of this code to exist or fails to take immediate action to abate a violation when ordered to do so by the fire code official, *the fire code official is*

> *authorized to take any action authorized by this code or other applicable law.*[26]

Even violations of Houston's *Code of Ordinances* § 29-123 subject one to limited criminal penalties.[27] Consequently, a Texas civil court ordinarily has no jurisdiction to hear preemption challenges to any propane ordinances, codes, or regulations that are enforced criminally.

Because Houston's propane regulations, codes, and ordinances are unquestionably criminal in nature, jurisdiction to hold them preempted lies in the criminal courts. TPGA, however, has never made any attempt to distinguish between those propane regulations, codes, or ordinances that are criminal in nature and any that allegedly are not. Instead, it asks the civil courts to void them all and initially contended, without citation or analysis, that Houston's Fire Code regulations and its enforcement of those regulations are somehow civil and not criminal matters.[28] They are not.

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[26](Emphasis supplied). Excerpts of all Houston Fire Code regulations relied on herein were attached and incorporated to its petition for review as Exh. D. *See* CR328-34. TPGA cited the very same criminal regulations in its Motion and Fourth Amended Petition. CR175; 221. As set forth above, Houston relies on the following fire code provisions that TPGA specifically complained about in its Motion and Fourth Amended Petition:

§ 104.5 (relating to Houston Fire Department enforcement provisions)

§ 105.1.1 (relating to permitting fees)

CR185-86; CR230.

[27] City of Houston, Tex., *Code of Ordinances* § 29-82(d).

[28] TPGA's Response below, conceded that "Houston cite[d] to several provisions of its Fire Code [] that make certain conduct unlawful, reference criminal citations and/or impose

In addition to the regulations' and code's specific criminal attributes, such as imposition of fines and resolution in municipal court, this Court has long recognized that regulations concerning public health and safety are part of a city's police powers.[29] Houston's Fire Code and the enforcement of each and every regulation is thus a criminal matter because the regulations are enacted to protect the life and limb of Houston residents and millions of visitors to the city. Indeed, as stated in the International Fire Code, Houston's regulations "safeguard the public health and safety" of residents and visitors within its city limits. *Id.* To be sure, the first sentence in the International Fire Code[30] highlights the fact that the fire code "address[es] conditions hazardous to life and property from fire, explosion, handling or use of hazardous materials and the use and occupancy of buildings and premises."[31]

Violations of propane regulations under the Fire Code carry criminal penalties because these unlawful acts have grave consequences that concern the

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fines." CR365. Houston, in fact, cited to not one but eight provisions in the Fire Code that specifically mention "*criminal penalty*," "*unlawful*" *acts*, "*offenses and misdemeanors*," and "*prosecutions of violations*." *See* CR270-72.

[29] *See, e.g.*, *City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 793 (Tex. 1982).

[30] The Court may take judicial notice that Houston has adopted the entirety of the International Fire Code.

[31] *See* International Fire Code, International Code Council, Inc. (2012), p. iii, *available at* https://codes.iccsafe.org/public/document/IFC2012/preface.

life or death of Houston residents and visitors. All matters related to Fire Code standards and enforcement are indeed criminal in nature—not civil. This is especially true about Houston's propane regulations that TPGA directly challenges. Although TPGA once stated that there is "nothing substantively criminal about" the issues in this case, propane is a highly combustible and explosive gas that can, in an instant, cause the death of groups of people. *See* CR38. The challenged regulations and the "essence of the case" involves Houston's regulation of a dangerous gas to prevent the loss of life. There is nothing more criminal than violating such regulations. *See, e.g.*, *Unger*, 629 S.W.2d at 812-13.

If an individual or business fails to comply with the permitting provisions in Section 105 or propane use provisions in Chapter 61, then that individual or entity is subject to the all enforcement provisions in the Fire Code. The standards are provided in Section 105 and Chapter 61, and the enforcement mechanisms (that TPGA also directly challenges) are provided in Sections 104 and 109 of the Fire Code. Houston has demonstrated, with reference to provisions in the Houston Fire Code itself, that TPGA improperly seeks review of criminal laws by this civil court. *See Morales*, 869 S.W.2d at 945. The civil trial court, therefore, lacked subject-matter jurisdiction over TPGA's claims. It should have dismissed them.

In a last ditch effort to salvage its claims, TPGA argued that the challenged propane laws do not *on their face* impose criminal penalties but fall under related provisions of the Fire Code that set forth the criminal fines for their violation. *See* Appellee's Brief at 30. In particular, Section 105 and Chapter 61 provide the standards for violations, and Sections 104 and 109 of the Fire Code provide the enforcement mechanisms. TPGA then argues that this organizational separation has some legal significance for jurisdictional purposes because TPGA has not specifically challenged the provisions actually imposing fines. This distinction, however, *has no bearing on whether the challenged provisions may be characterized as criminal for jurisdictional purposes*.

TPGA's sole source for this argument is *Texas Education Agency v. Leeper*, 893 S.W.2d 432, 441-42 (Tex. 1994). Its reliance on *Leeper* is misplaced.[32] In this case, the Fire Code itself contains both the challenged provisions *and* their enforcement provisions. The challenged provisions also provide the standard for

[32] *Leeper* challenged the compulsory school attendance rule in the Texas *Education* Code, but relied on a penal provision in the Texas *Family* Code. *See id.* at 434-44. The Education Code provision provided an exception to compulsory education that was, in effect, a defense to prosecution for termination of parental rights proceedings under the Family Code. *See id.* The Court concluded that the criminal provisions in the *Family Code* were unrelated to the exception to compulsory education in the *Education Code*. *See id.* The Court explained that, had the Education Code provision "defined the elements of the [proscribed] offense" that was the basis for the enforcement provision of the Family Code, then the Education Code provision, although located in another code, could be considered criminal. *See id.* at 442.

compliance and the proscribed offense with respect to propane use. *Leeper* is, therefore, inapposite on this issue.

C. The Trial Court Lacked Jurisdiction Over TPGA's Claims Under the Only Exception to the General Rule that Civil Courts Lack Criminal Jurisdiction Because TPGA Never Pleaded or Established That It Fell Within That Exception

Criminal courts share their jurisdiction to interpret penal provisions with civil courts in only one limited circumstance. "'[C]ourts of equity may enjoin the enforcement of a penal ordinance where the ordinance *is unconstitutional and void*, *and* its enforcement will result in *irreparable injury to vested property rights*.'"[33] This Court has long recognized this shared, but highly circumscribed, criminal authority.[34] When either element is lacking, civil courts have no jurisdiction over civil challenges to criminal ordinances.[35] Thus, in *Destructors*,[36] for example, the court of appeals, relying upon *Morales*, held that a civil court had no jurisdiction to rule on the alleged preemption of an ordinance, making certain activities

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[33] *State ex rel. Burks v. Stovall*, 168 Tex. Crim. 207, 209, 324 S.W.2d 874, 875-76 (1959) (emphasis supplied) (quoting *State ex rel. Flowers v. Woodruff*, 150 Tex. Crim. 255, 200 S.W.2d 178 (1947)).

[34] *See, e.g.*, *Leeper*, 893 S.W.2d at 441; *Morales*, 869 S.W.2d at 942, 945.

[35] *See, e.g.*, *State v. Logue*, 376 S.W.2d 567 (Tex. 1964); *Consumer Serv. All. of Tex., Inc. v. City of Dallas*, 433 S.W.3d 796, 803-04 (Tex. App.—Dallas 2014, no pet.); *Ryan*, 314 S.W.3d at 142-43.

[36] 2010 WL 1946875, at *2-5.

"unlawful" without a city permit, absent a showing of irreparable injury to vested property rights. Under well-settled law, any challenge to the "criminal" provisions of a regulation, code, or ordinance arguably deprives civil courts of jurisdiction to hold them preempted without the challenger showing that enforcement would result in irreparable harm to its vested property rights.

TPGA never pleaded or proved this exception's alleged application here.[37] And this is true even though TPGA carries the burden to plead and prove a court's subject matter jurisdiction.[38] Instead, TPGA admitted that "what TPGA objects to is the fact that Houston purports to regulate the LPG industry *at all*." *See* Appellee's Brief at 34. (emphasis in original).

Worse, after Houston challenged the court's jurisdiction in the trial court, TPGA still made no effort to fit itself within that exception and argued instead that *it had not need to do so*. Instead, in the Third Court of Appeals, *improperly and for the first time*, TPGA tried to argue that some of its *members' customers* might arguably fall within this exception. It is too late to do so and TPGA, an association, could not do so even if it tried.

[37] Houston contends TPGA expressly waived reliance upon the *Morales* exception when it stated that "[T]PGA does not need to show irreparable injury to any vested property rights." CR365. The Court of Appeals, however, incorrectly failed to address or find waiver.

[38] *See, e.g.*, *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

Nevertheless, the court of appeals, following *Laredo*, simply presumed that TPGA members were thus threatened because their legal remedy—challenging local propane laws in defense to a criminal prosecution—was inadequate because of potential fines that could be imposed. The Court explained:

> Section 109.4 of the City's Fire Code provides that the doing of any act that the Fire Code declares to be unlawful, and for which no specific penalty is provided, 'shall be punished by a fine of not less than $500.00 and no more than $2,000.00' and that 'each day any violation of this code shall continue shall constitute a separate offense.' Based on this per day-violation fine and on the Texas Supreme Court's recent decision in *City of Laredo*, we must conclude that TPGA members are 'effectively preclude[d]' 'from testing the ban's constitutionality in defense to a criminal prosecution.' Because there is a 'threat of irreparable injury to vested property rights,' TPGA's suit to declare certain Fire Code regulations invalid may be brought in civil court.'[39]

1. The Court of Appeals' Reliance Upon *Laredo's* Footnote 28 Was Improper and Cannot Save TPGA's Claims

In *Morales*, 869 S.W.2d at 943, 945, & n. 8, this Court recognized that "[i]ntervention by an equity court is inappropriate … unless the statute is unconstitutional *and there is the threat of irreparable injury to vested property rights*."[40] Otherwise, a person's remedy is to "'continue his activities until he is arrested

[39] TPGA Opin. at *7-8 (citing *Morales*, 869 S.W.2d at 945).

[40] *Id.* at 945 & n.8 (emphasis supplied); *Crouch v. Craik*, 369 S.W.2d 311, 315 (Tex. 1963).

and then procure his release by showing that the law is void.'"[41] The *Morales* Court, however, made clear that *vested property* rights and *personal* rights are *not* interchangeable and expressly limited its exception to the former. "We did *not* hold … that a personal right can be uniformly substituted for a property right and that a civil court's equity jurisdiction over criminal statutes was thereby expanded."[42] Consequently, the *Morales* exception is available only when a claimant is threatened with irreparable injury to a vested *property* right that flows from the challenged law's enforcement against that claimant. As one court recently summarized:

> the upshot of *Morales* is that (1) the appellee businesses would have to demonstrate that the ordinances' enforcement against their customers has irreparably injured the businesses' vested property rights; (2) injury to any personal rights does not suffice; and (3) *any perceived inability of the businesses to obtain remedy through criminal proceedings does not change that analysis*.[43]

Indeed, the *Morales* court made the centerpiece of its decision the idea that the adequacy of legal remedies did *not* drive civil jurisdiction. In fact, it began its

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[41] *Id*. (quoting *Passel v. Fort Worth Indep. Sch. Dist.*, 440 S.W.2d 61, 63 (Tex. 1969)); *City of New Braunfels v. Stop the Ordinances Please*, 520 S.W.3d 208, 221 (Tex. App.—Austin 2017, pet. denied).

[42] *Morales*, 869 S.W.2d at 945, 946 (emphasis supplied); *City of New Braunfels*, 520 S.W.3d at 221 ("the supreme court [in *Morales*] also rejected any notion that injury to personal rights, as opposed to 'vested property rights,' sufficed as a basis for a civil court's equity jurisdiction over criminal statutes").

[43] *City of New Braunfels*, 520 S.W.3d at 222–23 (citing *Morales*, 869 S.W.2d at 942, 947).

opinion by observing that "*equity jurisdiction does not flow merely from the alleged inadequacy of a remedy at law*, nor can it originate solely from a court's good intentions to do what seems 'just' or 'right' …" 869 S.W.2d at 942 (emphasis supplied). Later, it reaffirmed that "*equity jurisdiction does not rise or fall solely on the basis of the adequacy of their remedy at law*." *Id*. at 947 (emphasis supplied).

In *Laredo*, 550 S.W.3d at 592, n.28, this Court's most recent discussion of the *Morales* exception, this Court reaffirmed *Morales* and the rule that the Supreme Court's jurisdiction is severely limited in construing criminal ordinances, like those challenged here, and that ordinarily such cases must ultimately be decided by the Court of Criminal Appeals. *Id.* In particular, at footnote 28, this Court fully reaffirmed the long-standing *Morales* rule that "civil courts have jurisdiction to enjoin or declare void an unconstitutional penal ordinance when 'there is the threat of irreparable injury to vested property rights.'"[44]

Although the *Morales* exception and the trial court's lack of jurisdiction was not raised by any party in *Laredo*, in footnote 28, this Court stated, without benefit of pleadings or proof and in direct contravention of *Morales*, that the exercise of civil jurisdiction over the interpretation of that criminal statute was

[44] *Laredo*, 550 S.W.3d at 592, n.28.

nevertheless proper because the bag ordinance imposed "a substantial per violation fine that effectively preclude[d] small local businesses from testing the bans' constitutionality in defense to a criminal prosecution."[45] Despite clear language in *Morales* and its progeny eschewing the use of adequacy of legal remedies as the basis for civil jurisdiction, and this Court's reaffirmation of the *Morales* exception's requirements in *Laredo*, this Court arguably, but unconstitutionally, substituted the *presumed* absence of an adequate legal remedy as the test for civil jurisdiction and effectively discarded the requirement that a plaintiff must plead and prove threatened irreparable injury to some vested property right in order for civil courts to construe criminal laws. As testament, both TPGA and the plaintiff in *Laredo* failed to identify *any* vested property right allegedly injured yet this Court and the court of appeals nevertheless found jurisdiction.

This Court, in *Laredo*, arguably found only that the *Morales* standard had been met *in that case*, devoting no analysis to the issue because none of the parties thought to raise it.[46] Unfortunately, the court of appeals here apparently felt compelled to follow the *Laredo* footnote and thus improperly substituted

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[45] *Id.* (citing *Austin City Cemetery Ass'n*, 28 S.W.2d at 529); *City of Houston v. Richter*, 157 S.W. 189, 191 (Tex. Civ. App.—Galveston 1913, no writ) (citing *Austin City Cemetery*).

[46] Instead, the issue was raised by amici.

presumed inadequacy of legal remedy for irreparable injury to a vested legal right as the touchstone for its jurisdiction over construction of laws the court of appeals assumed were criminal in nature. That other courts will feel similarly bound renders the language in *Laredo* untenable and mandates that this Court grant review to correct its conflict with *Morales*.

The court of appeals' reliance on *Laredo*'s footnotes is improper for several reasons. First, the *Laredo* footnote turns *Morales* on its head and hollows it out to the point of irrelevance. In this fashion, it improperly but exponentially expands this Court's and the Texas civil courts' criminal jurisdiction and violates Article V, Section 3(a) of the Texas Constitution, which expressly excludes criminal law matters from this Court's jurisdiction. If a civil court may simply *presume,* as this Court in *Laredo* and the court of appeals here did, that even minimal criminal penalties of the sort imposed for violations of Houston's propane regulations and codes necessarily present an irreparable injury to vested property rights under *Morales*, there is no limit to the number and importance of criminal statutes and regulations that civil courts would have jurisdiction to construe. Indeed, under the limited analysis in *Laredo* and the court of appeals' decision, the more severe the criminal penalty, the more appropriate it would be for civil courts to intervene. That result is fundamentally incompatible with *Morales*' repeated admonitions that adequacy of remedy does not drive civil jurisdiction

and that its exception is a very limited one. In *Laredo*, this Court did not overrule this portion of *Morales* and indeed, reaffirmed *Morales* without reservation. This Court, therefore, must clarify which rule prevails.

Second, *Austin City Cemetery Ass'n*, 28 S.W. 528, does not provide support for the court of appeals' and *Laredo*'s improper expansion of civil courts' criminal jurisdiction. That case involved an ordinance prohibiting burying bodies within the Austin city limits, even in existing cemeteries. *See id*. at 529. The court first found that, "if its enforcement be not restrained, *it may result in a total destruction of the value of appellee's* ***property*** *for the purpose for which it was acquired*." *Id.* (emphasis supplied). Land with numerous bodies buried on it would hardly be fit for use as anything *but* a cemetery. The Court thus found, as a foundational matter, irreparable injury to a vested property right.

In addition, the Court found unique circumstances, not present here, relative to whether the ordinance would ever be *violated*. Who would bury a loved one's body in Austin, knowing that it might have to be disinterred and moved elsewhere, just to challenge an ordinance? Thus, the Court explained:

> As long as the ordinance remains undisturbed, it acts *in terrorem*, and practically accomplishes a prohibition against the burial of the dead within the limits of the city of Austin, save in the excepted localities. Under these conditions, who would venture to bury, or be concerned in burying, a dead body in appellee's ground, or who would purchase a lot in its cemetery?

There are no pleadings or evidence to support either irreparable injury to any vested property right or such unique circumstances here.

In *Morales*, the dissenters, like the court of appeals here, cited and attempted to apply *Austin City Cemetery Ass'n* to support a much broader *Morales* exception based upon inadequacy of legal remedy. *See Morales*, 869 S.W.2d at 949 (Gammage, J., dissenting). The majority rejected that effort out of hand. This Court first explained that any exception relying upon harm to personal rights for jurisdiction necessarily amounted to no exception at all. It explained:

> The dissent's proposed *Morales* exception, however, is flawed. First, under item (1), the dissent's harm test is exactly the same as the test derived from a misreading of *Passel*, rejected today by the court. As we have already explained, *this test implodes upon itself, for any unconstitutional statute will necessarily impact upon personal rights*.

Morales, 869 S.W.2d at 948 (emphasis supplied). The Court then addressed not the alleged inadequacy of remedy (the notion for which the *Morales*' dissenters, the *Laredo* Court, and the court of appeals have relied upon *Austin City Cemetery Ass'n*), but the precise circumstance in that case: that the statute likely would never have been enforced *because it would likely never be violated*. It concluded that, "without commenting on whether the Attorney General has either the power or the requisite knowledge to make such a stipulation [that a statute is unlikely to be enforced], such a stipulation cannot be the linchpin of the jurisdiction of this

court."[47] A mere presumption that every TPGA member would somehow be harmed by the potential for enforcement of Houston's propane regulations would likewise be too thin a reed on which to base this Court's jurisdiction in this case. *Morales*, therefore, makes clear that reliance upon *Austin City Cemetery Association* does not modify or limit the *Morales* exception.

Third, allowing the court of appeals' decision to stand would violate the core principle, discussed in more detail below, that, when challenged, a plaintiff must plead and prove a court's jurisdiction. *See infra* Section I.D & I.E. Without any pleadings or proof, the court of appeals simply assumed, as the Court in *Laredo* had, that at least one member or customer of a member of TPGA would suffer irreparable injury if faced with the potential fines. Not only is the assumption legally improper, but it makes no sense here. Most of the propane regulations, codes, and ordinances challenged here have existed, in substantially similar form, *for decades,*[48] unlike the situation in *Austin City Cemetery Association* or even *Laredo,* in which new kinds of ordinances were challenged. Consequently, all of TPGA's members have lived *for decades* under a propane

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[47] *Morales*, 869 S.W.2d at 948–49; *cf. Poe v. Ullman*, 367 U.S. 497, 501 (1961) ("formal agreement between parties that collides with plausibility is too fragile a foundation for indulging in constitutional adjudication").

[48] Even the 2015 and 2016 revisions to Houston's Fire Code, which TPGA challenges as well, are nothing new and provide no basis for a claim that they will cause TPGA members irreparable injury.

regulatory regime that imposed such fines and they somehow managed to stay in business. None has claimed any irreparable harm. Instead, TPGA claims, without evidence, that they are simply uncomfortable with Houston regulating at *all*. *See* Appellee's Brief at 34 (emphasis in original). For the court of appeals or this Court simply to assume irreparable injury based only on the amount of fines without any consideration of how members had managed to survive under such a regime for years or evidence that any individual businesses would be destroyed by such fines is improper.[49] Moreover, as demonstrated below, to allow an *association* to fall within the *Morales* exception, based only on the presumption that any or all members of the association must have suffered some kind of irreparable injury also improperly exceeds the scope of associational standing.

Finally, this Court's embrace of the court of appeals' decision on the issue presented would require that this Court overturn a whole line of cases consistently holding that there is no vested property right to engage in a particular business, or to engage in one's business in a particular manner, free of restrictions or regulation.[50] Even when a business is severely impacted by local

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[49] *See Town of Flower Mound*, 2019 WL 3955197, at *5; *see also Robinson v. Parker*, 353 S.W.3d 753, 755-56 (Tex. 2011) (where, as here, plaintiff only offers "mere allegations and speculation" that a future injury will occur, a complaint is not ripe for review).

[50] *See, e.g.*, *Kemp Hotel Operating Co. v. City of Wichita Falls*, 170 S.W.2d 217, 219 (Tex. 1943) (holding that garbage haulers had no vested property right in the business of hauling garbage);

law, vested property rights have not been implicated.[51] In fact, the *Morrow* court explained that, "even if the [fireworks] ban had eliminated Truckload's Midland County retail business, no vested property right would be implicated." *Id.* at 240.

Following a century of Texas law, the Court in *Morales* announced that there must be irreparable injury to vested property rights for civil courts to assert criminal jurisdiction. Alleged injury to personal rights or inadequacy of legal remedies would not suffice. While ostensibly reaffirming *Morales*, this Court, in *Laredo,* nevertheless purported to substitute inadequacy of legal remedy and/or loss of personal rights as its jurisdictional touchstone *as did the court of appeals in this case*. Because the court of appeals thus violated *Morales*' core tenets, this Court should grant review on the question presented and reverse the court of appeals' decision on that question.

City of Beaumont v. Starvin Marvin's Bar & Grill, L.L.C., No. 09-11-00229-CV, 2001 WL 6748506 (Tex. App.—Beaumont Dec. 22, 2011, pet. denied) (mem. op.); *City of La Marque v. Braskey*, 216 S.W.3d 861, 863 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Sterling v. San Antonio Police Dep't*, 94 S.W.3d 790, 793 (Tex. App.—San Antonio 2002, no pet.).

[51] *See, e.g.*, *Morrow v. Truckload Fireworks, Inc.*, 230 S.W.3d 232, 239-40 (Tex. App.—Eastland 2007, pet. dism'd) ("Truckload's pleadings are clearly sufficient to articulate a claim that a total ban on the use of fireworks would result in a tremendous financial loss. This loss, even though tangible and significant, *is insufficient to constitute a vested property right because it represents losses due to restrictions on personal rights*") (emphasis supplied) (citing *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972); *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 483 (Tex. App.—Austin 2004, pet. denied); *Hang On III, Inc. v. Gregg Cty.*, 893 S.W.2d 724, 726 (Tex. App.—Texarkana 1995, writ dism'd by agr.)).

2. *Morales* Cannot Apply Here Because TPGA, an Association, Has No Standing to Assert Its Members' Individual Vested Property Rights, if Any

The only asserted basis for TPGA's standing here is associational.[52] An association has standing to sue on behalf of its members if: (1) its members would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purposes; and (3*) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit*.[53] While associational standing may be sufficient when there is no need for any member to participate as a party, where, as here, each must show irreparable injury to individual vested property rights, the need for individualized proof exceeds the scope of associational standing and renders it inappropriate.[54]

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[52] *See* CR221; *BCCA Appeal Grp.*, 496 S.W.3d at 6, n.2.

[53] *Tex. Ass'n of Bus.*, 852 S.W.2d at 446–47 (adopting the test from *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)) (emphasis supplied); *Hendee v. Dewhurst*, 228 S.W.3d 354, 382 (Tex. App.—Austin 2007, pet. denied); *City of New Braunfels*, 306 S.W.3d at 931.

[54] *See, e.g.*, *Self-Ins. Inst. of Am., Inc. v. Korioth*, 53 F.3d 694, 695-96 (5th Cir. 1995); *City of Arlington v. Scalf*, 117 S.W.3d 345, 347 (Tex. App.—Fort Worth 2003, pet. denied). While, in *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975) (the plaintiffs sought monetary relief, the principle for which it is cited here and the rules affirmed in *Korioth* and *Scalf* do not apply only to damages. Instead, they apply to evaluating standing *at the beginning of a case*. Consequently, their principles should apply with equal force here. TPGA members would still have to show their individual injury flowing from challenged regulations to demonstrate standing here.

For example, one propane ordinance allows the City to shut down a park for essentially emergency safety reasons, which would presumably include storing improper quantities of propane quite unsafely,[55] and to revoke the operator's license and demand that an operator vacate the property for violations of the ordinance. *Id*. at § 29-82(d). Yet operators enjoy no constitutionally-protected, vested right to use real property in any certain way, without restriction, particularly where their due process rights have been exercised and preserved prior to the City's reaching this point.[56]

Because there is no pleading evidence that TPGA members share any common vested property rights, and TPGA has not alleged that they do, proof of irreparable injury to vested property rights would necessarily involve *individualized demonstrations* and participation by each member as a party in civil lawsuits challenging the ordinance. Because TPGA's associational standing does not encompass such claims, it had no standing to initiate this challenge. Instead, TPGA's individual members should have been made parties to this action for

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[55] *See* City of Houston, Tex., *Code of Ordinances* § 29-82(e).

> Nothing contained in this section shall be construed to prevent the city from ordering the immediate evacuation or closure of any manufactured home park to the extent permitted by law in the event of imminent or extreme hazard to human life or property.

[56] *Braskey*, 216 S.W.3d at 862 (citing *Benners*, 485 S.W.2d at 778).

this Court even arguably to have jurisdiction over the claims asserted.[57] TPGA, an association, thus lacked standing to proceed in the civil courts. On that basis alone, its claims should have been dismissed.

3. Alternatively, the *Morales* Exception Cannot Apply Here Because TPGA Cannot and Did Not Plead or Establish that Any Member Possessed Any Endangered, Vested Property Rights That are Relevant Here

Even if this Court holds that TPGA can somehow assert its members claims here, it must still show that at least one member has standing to sue here. TPGA failed to do even that.

Property rights are created and defined by state law.[58] Local permits do not create vested property rights. "This is because a *permit is a 'negative pronouncement' that 'grants no affirmative rights to the permittee'* … A permit removes the government imposed barrier to the particular activity requiring a permit."[59]

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[57] *See, e.g.*, *City of Arlington v. Tex. Oil & Gas Ass'n*, No. 02-13-00138-CV, 2014 WL 4639912, at *7 (Tex. App.—Fort Worth Sept. 18, 2014, no pet.), in which the court held that "the City's claimed application of section 245.004(11)'s exemption to Appellees' members' vested rights does not require a fact-intensive, individual inquiry of each of Appellees' members necessitating that each of them be joined as a party to this litigation." By contrast, Houston's position here is that, to show injury from each of Houston's propane regulations, such individualized proof of potential economic injury is essential here.

[58] *Reese v. City of Hunter's Creek Vill.*, 95 S.W.3d 389, 391 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

[59] *FPL Farming Ltd. v. Envtl. Processing Sys., L.C.*, 351 S.W.3d 306, 310-11 (Tex. 2011) (emphasis supplied) (quoting *Magnolia Petroleum Co. v. R.R. Comm'n*, 141 Tex. 96, 170 S.W.2d 189, 191 (1943)).

This Court continued: "'[o]btaining a permit simply means that the government's concerns and interests, at the time, have been addressed; so, it, as a regulatory body, will not stop the applicant from proceeding under the conditions imposed, if any.'"[60] Thus, alleged interference with state or local permits cannot support a showing of irreparable injury to vested property rights.

TPGA has alleged no injury other than its offense at Houston's regulating propane at all. The fact that a TPGA member or member's customer is merely *subject to* Houston's regulation is not an injury that confers standing. The trial court and court of appeals thus erred in finding any cognizable injury supporting standing on that basis. Consequently, TPGA's claim of associational standing failed and its claims should have been dismissed.

4. *Morales* Cannot Apply Here Because TPGA Cannot and Did Not Plead or Establish Any Recognized *Irreparable* Injury

For the trial court to assert jurisdiction to hold the challenged provisions preempted, individual TPGA members would need to be parties to the lawsuit and show that each suffered irreparable injury. None could or even tried to do so in TPGA's pleading. Instead, in the court of appeals, TPGA tried to argue

[60] *FPL Farming*, 351 S.W.3d at 310-11 (quoting *Berkley v. R.R. Comm'n of Tex.*, 282 S.W.3d 240, 243 (Tex. App.—Amarillo 2009, no pet.)).

both that the challenged regulations are not criminal in nature *and* claim that their threatened criminal enforcement as irreparable harm.

TPGA cannot have it both ways, however. As discussed above, the challenged provisions general impose only relatively small fines, and no jail time.[61] These are not irreparable injuries. Moreover, "the harm inherent in prosecution for a criminal offense does not constitute irreparable harm as required by *Morales*."[62] Instead, TPGA's members have an adequate legal remedy: individual TPGA members can fully challenge their convictions as preempted as the defendant did in *Unger*.[63] That "'remedy would be [to] proceed with [their] business[es], and defeat any prosecution that should be brought against [them] for the infraction of the void ordinance.'"[64] City of Houston municipal courts have exclusive original jurisdiction over fire code violations.[65]

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[61] City of Houston, Tex., *Fire Code*, Chapter 61 § 109.4; *see also, e.g.*, City of Houston, Tex. *Code of Ordinances* § 21-162(c).

[62] *Sterling*, 94 S.W.3d at 795 (quoting *City of Longview v. Head*, 33 S.W.3d 47, 53 (Tex. App.—Tyler 2000, no pet.)).

[63] Tex. Gov't Code Ann. § 30.00014 (West 2004); City of Houston, Tex., *Code of Ordinances* § 16.54. That individuals cannot seek declarations in municipal court does not mean one charged has no remedy. It means that it does not have the remedy an interest group like TPGA finds most convenient. That is not irreparable harm.

[64] *City of Houston v. MEF Enters., Inc.*, 730 S.W.2d 62, 64 Tex. App.—Houston [14th Dist.] 1987, no writ) (quoting *Austin City Cemetery Ass'n*, 87 Tex. 330, 28 S.W. 528).

[65] Tex. Gov't Code Ann. § 29.003 (West 2004). Excerpts of all Texas Government Code sections relied on herein are attached and incorporated as Exh. E. CR335-40.

If and when TPGA members violate an ordinance or regulation or code provision and are criminally prosecuted, they may challenge the ordinance in defending against such prosecution.[66] *Id.* This right to challenge the ordinance on appeal defeated the trial court's jurisdiction.[67] It should have dismissed TPGA's claims.

TPGA's mis-citation below to *Austin City Cemetery Ass'n* does defeat this conclusion but instead demonstrates only how far afield from irreparable injury its members, who do not face arrest but merely citations and small criminal fines, are from irreparable harm. In *Austin City Cemetery Ass'n*, Austin passed an ordinance than no one could be buried in the Austin city limits. The ordinance had the effect of putting all the Austin cemetery owners out of business and rendering their land valueless. That was the irreparable harm that association faced. TPGA has not pleaded or proved anything of the kind here.

D. TPGA Failed to Sustain Its Burden to Plead and Establish this Court's Jurisdiction to Construe Each of the Challenged Criminal Regulations and Ordinances

When, as here, a defendant challenges a trial court's subject-matter jurisdiction in a motion for summary judgment, the burden shifts *to the plaintiff*

[66] *See also* City of Houston, Tex., *Code of Ordinances* § 16.2.

[67] Tex. Gov't Code Ann. § 30.00014 (West 2004); City of Houston, Tex., *Code of Ordinances* § 16.54.

to allege facts affirmatively demonstrating that the trial court has subject-matter jurisdiction.[68] TPGA has never sustained its burden to show that the civil courts have jurisdiction here by demonstrating either that *each individual regulation* challenged is civil in nature or, conversely that the exception to bifurcation, based on dangers to vested property rights posed by criminal regulations, applies to each one challenged.

Instead, TPGA *and the dissent* improperly tried to shift that burden to Houston. To that end, TPGA argued that Houston had somehow failed to show that the challenged laws are criminal because TPGA claims that it does not challenge *examples* of fire code provisions Houston included in its brief for illustrative purposes.[69] Similarly, the dissent contended that TPGA need not show any standing for particular propane laws since TPGA was somehow entitled to challenge them *en masse*. This Court should not be distracted into improperly shifting the burden of proof to Houston on either ground here.

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[68] *Alcala-Garcia v. City of La Marque*, No. 14-12-00175-CV, 2012 WL 5378118, at *3 (Tex. App.—Houston [14th Dist.] Nov. 1, 2012, no pet.); *Lovato v. Austin Nursing Ctr., Inc.*, 113 S.W.3d 45, 51 (Tex. App.—Austin 2003), *aff'd*, 171 S.W.3d 845 (Tex. 2005); *see also Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

[69] TPGA is mistaken—again. The examples cited, Fire Code §§ 104.5 and105.1, are the same criminal regulations relied on by TPGA in its Motion for Summary Judgment and Fourth Amended Petition. *See* CR185-86; 230.

As discussed, TPGA seeks a broad declaration holding invalid and unenforceable all of Houston's propane regulations as well as "those portions of City of Houston's Ordinance Nos. 2015-1108, 2015-1289, and 2015-1316, that adopted or amended Chapter 61 of the Houston Amendment of the 2012 International Fire Code or purported to otherwise regulate the LP-Gas Industry, together with Chapter 61 of the Houston Amendments of the 2013 International Fire Code itself …" CR189-90. Houston challenged the civil district court's subject-matter jurisdiction to construe and rule on preemption of such criminal regulations, codes, and ordinances. Consequently, it was up to TPGA to demonstrate that the civil courts have jurisdiction to construe each challenged local law.

TPGA conceded in its brief to the Court of Appeals that violation of any of the challenged provisions subjects the violators to criminal fines. *See* Appellee's Brief at 30. It could do nothing less since Houston's propane ordinances and regulations are enforced in municipal courts, and punishable by relatively small fines, but no jail time.[70] It is undisputed that fire officials may elicit the help of the Houston Police Department to enforce code provisions,

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[70] *See, e.g.*, City of Houston, Tex., *Code of Ordinances* §21-162(c). Excerpts of all City of Houston Code of Ordinances relied on herein were attached and incorporated as Exh. C to its opening brief. CR325-27.

including LPG regulations and unpermitted activities. Even violations of Houston's *Code of Ordinances* §29-123 subject one to limited criminal penalties.[71]

Instead of sustaining its burden and analyzing each challenged regulation, then demonstrating why none can be considered criminal in nature, in the court of appeals, TPGA states only the bare conclusion, without citation or analysis, that Houston's Fire Code regulations and its enforcement of those regulations are somehow civil and not criminal. *See* Appellee's Brief at 34. TPGA then attempts to excuse its complete failure to sustain its heavy jurisdictional burden by arguing that such constitutional and jurisdictional impediments should be ignored because "what TPGA objects to is the fact that Houston purports to regulate the LPG industry *at all*." *Id*. (emphasis in original). An industry group's taking offense because a city did exactly what the Constitution and Legislature authorized it to do, however, does not change the jurisdictional rules of this Court, the Texas Constitution, due process clause, or the character of the regulations TPGA challenges. Because TPGA has *still* failed to sustain *its* burden to demonstrate that the challenged criminal regulations fall within the trial court's civil jurisdiction, its claims should have been dismissed.

[71] City of Houston, Tex., *Code of Ordinances* § 29-82(d).

E. TPGA Failed to Plead or Prove the Applicability of the *Morales* Exception for *Each* Criminal Law Challenged

"[A] plaintiff must demonstrate that the court has jurisdiction over … *each of his claims*; the court must dismiss those claims (and only those claims) over which it lacks jurisdiction."[72] As discussed, when, as here, a defendant challenges a trial court's subject-matter jurisdiction, the burden shifts *to the plaintiff* to allege and prove facts affirmatively demonstrating that the trial court has subject-matter jurisdiction.[73] Consequently, when Houston challenged the district court's (sitting as a civil court) subject-matter jurisdiction, the burden shifted to TPGA to demonstrate, by pleadings and proof, that the court had jurisdiction to construe each challenged local criminal law under *Morales*.[74] TPGA did not carry that burden. Indeed, *until oral argument*, TPGA contended that *it had no need* to do so.

In its opinion, however, the court of appeals, following *Laredo*, effectively absolved TPGA of its sins and *presumed* that the severity of the fines that could

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[72] *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 152–53 (Tex. 2012); *Shannon v. Memorial Drive Presbyterian Church U.S.*, 476 S.W.3d 612, 621 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

[73] *Alcala-Garcia v. City of La Marque*, No. 14-12-00175-CV, 2012 WL 5378118, at *3 (Tex. App.—Houston [14th Dist.] Nov. 1, 2012, no pet.); *Lovato v. Austin Nursing Ctr., Inc.*, 113 S.W.3d 45, 51 (Tex. App.—Austin 2003), *aff'd*, 171 S.W.3d 845 (Tex. 2005); *see also Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

[74] *See Town of Flower Mound*, 2019 WL 3955197, at *5.

have been, but were never imposed, *alone* prevents TPGA from challenging Houston's propane regulations in defense to criminal prosecution. TPGA Opin. at *8. Consequently, it held that civil courts could hear TPGA's claims. *Id.* The court's presumptions are legally insupportable.

As discussed, TPGA seeks a broad declaration holding invalid and unenforceable all of Houston's propane regulations as well as "those portions of City of Houston's Ordinance Nos. 2015-1108, 2015-1289, and 2015-1316, that adopted or amended Chapter 61 of the Houston Amendment of the 2012 International Fire Code or purported to otherwise regulate the LP-Gas Industry, together with Chapter 61 of the Houston Amendments of the 2013 International Fire Code itself …" CR189-90. Instead of satisfying its jurisdictional burden as to each challenged regulation, TPGA stated only the bare conclusion, without citation or analysis, that Houston's Fire Code regulations and its enforcement of those regulations generally were somehow civil and not criminal. *See, e.g.*, Appellee's Brief at 34. TPGA, however, has never identified all of the specific provisions of Houston's propane laws its challenges let alone met the *Morales* standards for each one.

TPGA's anemic efforts are insufficient to support the court of appeals' finding subject-matter jurisdiction. In *The Town of Flower Mound*, 2019 WL 3955197, at *5, for example, the plaintiffs, relying on *Laredo's dicta*, actually

pleaded that they would suffer irreparable injury because they would suffer "hefty" fines under the challenged ordinance. The court dismissed for want of jurisdiction because, "while the Ordinance imposes a fine for violations, *the record* does not show that the imposition of the fines would be so great so as to destroy Appellee's business …" *Id.* (citing *Laredo*, 550 S.W.3d at 592 n.28) (emphasis supplied). The trial court and court of appeals should have reached the same conclusion.

II. THE COURT OF APPEALS' DECISION DIRECTLY CONFLICTS WITH SISTER COURTS OF APPEALS' DECISIONS ON THE ISSUE PRESENTED

Although no longer a specified ground for granting Supreme Court review, resolution of conflicts between opinions of courts of appeals is critical to the State's jurisprudence. In this case, a host of sister courts have decided cases that specifically rejected the grounds on which the court of appeals decided this case. Several cases are representative. This Court should grant review to resolve those conflicts.

In *Destructors*, 2010 WL 1946875, at *2-5, for example, the court, relying upon *Morales*, held that a civil court had no jurisdiction to rule on the alleged preemption of an ordinance, making certain activities "unlawful" without a city permit, absent a showing of irreparable injury to vested property rights. *Id.* "When these questions can be resolved in any criminal proceeding that may be

instituted and vested property rights are not in jeopardy, there is no occasion for the intervention of equity."[75] The *Destructors* court, however, did not consider the penalties involved or Destructors' claim that the ordinance would put them out of business to be injuries that invoke vested property rights. 2010 WL 1946875, at *1. Instead, the court reiterated that one has the right to operate a business free of local regulation. *Id.* at *4. Moreover, the court held that "*a personal right cannot uniformly be substituted for a property right and thereby expand a civil court's equity jurisdiction over criminal statutes or ordinances*." *Id.* (emphasis supplied). Yet that is precisely what the court of appeals did here. The *Destructors* holding, therefore, directly conflicts with the court of appeals' holding on the issue presented. *See also ACE Cash Express, Inc. v. City of Denton*, No. 02-14-00146-CV, 2015 WL 3523963, at *4 (Tex. App.—Fort Worth June 4, 2015, pet. denied) (court affirmed granting of plea where plaintiff failed to show irreparable harm to a vested property right, but only alleged injury to personal rights).

Likewise, in *The Town of Flower Mound,* 2019 WL 3955197, at *5, discussed above, the court refused to apply *Morales* because "the record does not show that the imposition of the fines would be so great so as to destroy Appellee's business …" *Id.* (citing *Laredo*, 550 S.W.3d at 592 n.28). This case

[75] *Passel,* 440 S.W.2d at 63 (emphasis supplied); *see Unger*, 629 S.W.2d at 812.

directly conflicts with the court of appeals' decision here on the issue presented because the court of appeals here did not require that TPGA plead or prove the alleged applicability of *Morales*' exception, and in particular, to plead it with regard to each claim. TPGA never pleaded or attempted to prove that any fines imposed here (no TPGA member or customer was ever cited or fined here) "effectively preclude[] small local businesses from testing the ban's constitutionality in defense to a criminal prosecution."[76] TPGA did not plead irreparable injury or vested property rights at all. Nevertheless, the court of appeals here not only applied the *Morales* exception without pleadings or proof, but presumed that TPGA had met it.

Because the court of appeals effectively relieved TPGA of its threshold burden to plead and prove the *Morales* exception's applicability, this Court should grant review to resolve the conflict with *Flower Mound* as to what pleading and proof of jurisdiction *Morales* and *Laredo* now require.

CONCLUSION AND PRAYER

For the reasons stated, this Court should grant Houston's petition for review, reverse the Court of Appeals' decision on the question presented alone,

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[76] Indeed, there is no such risk here because the only applicable definition of the limiting term LPG "industry" in Tex. Nat. Res. Code § 113.054 *does not include small businesses*. *See* 31 Tex. Admin. Code § 357.11(d)(4).

affirm it in all other respects, and grant to Houston such other relief as to which this Court finds Houston entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing was prepared in Microsoft Word 2016 Version 14.0 in Calisto MT 14 point font; the word-count function shows that, excluding those sections exempted under TRAP 9.4(i)(1), the brief contains 11,851 words.

/s/ Collyn A. Peddie
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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2020, a true and correct copy of the foregoing has been served on counsel below via e-service.

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Exh. A

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CAUSE NO. D-1-GN-17-001089

TEXAS PROPANE GAS ASSOCIATION, *Plaintiff,*	§ §	**IN THE DISTRICT COURT**
v.	§ § §	**TRAVIS COUNTY, TEXAS**
RAILROAD COMMISSION OF TEXAS, ***ET AL.*** ***Defendants.***	§ § § §	**261ST JUDICIAL DISTRICT**

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

On May 16, 2018, the court heard Plaintiff Texas Propane Gas Association's Motion for Summary Judgment, and Defendant City of Houston's Motion for Summary Judgment for Lack of Jurisdiction and Partial Motion for Summary Judgment. The Court has considered the above-stated motions, pleadings, evidence, Responses, and Replies and rules as follows:

It is ORDERED that Texas Propane Gas Association's Motion for Summary Judgment is denied.

It is FURTHER ORDERED that the City of Houston's Motion for Summary Judgment for Lack of Jurisdiction is denied.

It is FURTHER ORDERED that the City of Houston's Partial Motion for Summary Judgment is denied.

It is FURTHER ORDERED that all written objections to summary judgment evidence are overruled.

SIGNED this 10th day of September, 2018.

PRESIDING JUDGE
AMY CLARK MEACHUM

APPROVED AS TO FORM ONLY:

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Exh. B

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED JULY 18, 2019

NO. 03-18-00596-CV

The City of Houston, Appellant

v.

Texas Propane Gas Association, Appellee

APPEAL FROM THE 261ST DISTRICT COURT OF TRAVIS COUNTY
BEFORE CHIEF JUSTICE ROSE, JUSTICES KELLY AND SMITH
REVERSED AND REMANDED -- OPINION BY JUSTICE KELLY
DISSENTING OPINION BY CHIEF JUSTICE ROSE

This is an appeal from the interlocutory order signed by the trial court on September 10, 2018. Having reviewed the record and the parties' arguments, the Court holds that there was reversible error in the order. Therefore, the Court reverses the trial court's interlocutory order and remands the case to the trial court so that Texas Propane Gas Association may have a reasonable opportunity to amend its pleadings, if possible, to demonstrate that it has standing to bring its suit for declaratory relief. Each party shall pay the costs of appeal incurred by that party, both in this Court and in the court below.

2019 WL 3227530
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Austin.

The CITY OF HOUSTON, Appellant
v.
TEXAS PROPANE GAS ASSOCIATION, Appellee

NO. 03-18-00596-CV
|
Filed: July 18, 2019

FROM THE 261ST DISTRICT COURT OF TRAVIS COUNTY, NO. D-1-GN-17-001089, THE HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING

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Before Chief Justice Rose, Justices Kelly and Smith

MEMORANDUM OPINION

Chari L. Kelly, Justice

***1** The City of Houston appeals from the trial court's order denying its motion for summary judgment, in which the City asserts that the court lacks jurisdiction over claims for declaratory relief made by appellee Texas Propane Gas Association (TPGA). Because we determine that the trial court erred in concluding that TPGA met its burden to plead facts affirmatively demonstrating that it has associational standing to bring its claims, we will reverse and remand to the trial court to allow TPGA an opportunity to cure this pleading defect.

BACKGROUND

Chapter 113 of the Texas Natural Resources Code, also known as the Liquefied Petroleum Gas (LP-Gas) Code, provides that the Railroad Commission of Texas "shall administer and enforce the laws of this state and the rules and standards of the

commission relating to liquefied petroleum gas." Tex. Nat. Res. Code §§ 113.001-.011. Pursuant to its authority under the Code to "promulgate and adopt rules or standards," the Commission adopted the LP-Gas Safety Rules. *Id.* § 113.051; 16 Tex. Admin. Code §§ 9.1-.403 (Railroad Comm'n of Tex., LP-Gas Safety Rules).

In 2017 TPGA filed suit against the City challenging the legality of several "ordinances and regulations" that were passed by the Houston City Council in 2015 and which took effect in early 2016. According to its petition, TPGA is a "trade association representing a statewide membership of companies and individuals actively engaged in the liquefied petroleum gas ('LP-gas' or 'propane') industry." In general, the ordinances challenged by TPGA amended the City's Fire Code and placed new restrictions on the ability to store, use, handle, or dispense LP-Gas within the City's jurisdiction. According to TPGA, the ordinances impose more restrictive conditions on the LP-Gas industry than those imposed by the Commission's LP-Gas Safety Rules. TPGA sought a declaration that these ordinances and resulting regulations are invalid because they are pre-empted by Section 113.054 of the Texas Natural Resources Code and by the LP-Gas Safety Rules. *See* Tex. Civ. Prac. & Rem. Code §§ 37.001-.011 (Declaratory Judgments Act). In relevant part, Section 113.054 states:

> The rules and standards promulgated and adopted by the [Railroad Commission] under section 113.051 preempt and supersede any ordinance, order, or rule adopted by a political subdivision of this state relating to any aspect or phase of the liquified petroleum gas industry.

Tex. Nat. Res. Code § 113.054. Specifically, TPGA requested that the court declare the following:

> Those portions of City of Houston's Ordinance Nos. 2015-1108, 2015-1289, and 2015-1316, that adopted or amended Chapter 61 of the Houston Amendments of the 2012 International Fire Code or purported to otherwise regulate the LP-Gas industry, together with Chapter 61 of the Houston Amendments of the 2012 International Fire Code itself, ... are invalid and ineffective to the extent they regulate to any aspect of the LP-Gas industry ....

In the alternative, TPGA requested declarations that certain portions of the City's regulations are invalid because they are more restrictive than the LP-Gas Safety Rules, including from Chapter 61 of the Fire Code: (1) "6101.02 relating to fees and permits, (2) "6101.2 and 6103.3 relating to aggregate water capacity of LP-Gas containers," (3) "6101.3 relating to the required submission of applications and/or construction documents," and (4) "6104.2 relating to maximum storage capacity within certain storage capacity within districts of limitation." TPGA also challenged what it contends are more restrictive provisions found in Chapter 1, entitled "Scope and Administration," generally setting out the procedural mechanisms for enforcing the Fire Code's substantive regulations.

***2** TPGA subsequently filed a traditional motion for summary judgment on its claims against the City. *See* Tex. R. Civ. P. 166a. In response, the City filed a motion for summary judgment for lack of jurisdiction and a traditional motion for partial summary judgment. The trial court denied the parties' competing motions, including the City's motion for summary judgment for lack of jurisdiction. The City timely filed its notice of interlocutory appeal from the trial court's ruling on its jurisdictional challenge.[1] *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). In three issues, the City asserts that the trial court erred in concluding that it has subject-matter jurisdiction to consider TPGA's claims.

STANDARD OF REVIEW

Subject-matter jurisdiction is essential to the authority of a court to decide a case. *Save Our Springs All., Inc. v. City of*

Dripping Springs, 304 S.W.3d 871, 878 (Tex. App.—Austin 2010, pet. denied) (citing *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443-45 (Tex. 1993)). A challenge to subject-matter jurisdiction may be raised in a plea to the jurisdiction or in a motion for summary judgment. *Bland Indep. Sch. Dist. v. Blue*, 34 S.Wd.3d 547, 553-54 (Tex. 2000). "A summary-judgment motion challenging jurisdiction may challenge either the pleadings or the existence of jurisdictional facts." *Lazarides v. Farris*, 367 S.W.3d 788, 797 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004), and applying standard of review to denial of motion for summary judgment challenging subject-matter jurisdiction). When the movant challenges the pleadings, we determine if the plaintiff has met his burden to allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Miranda*, 133 S.W.3d at 226. In conducting this review, we construe the pleadings liberally, taking them as true, and look to the pleader's intent. *Id.* (citing *Texas Ass'n of Bus.*, 852 S.W.2d at 446). If the plaintiff has not affirmatively pleaded facts to support jurisdiction or negate jurisdiction, the matter is one of pleading sufficiency, and the court should provide the plaintiff with the opportunity to amend its pleadings to cure jurisdictional issues. *Id.* at 226-27. But if the pleadings affirmatively negate the existence of jurisdiction, the motion should be granted. *Id.*

In addition, we may consider evidence that the parties presented below and must do so when necessary to resolve jurisdictional issues. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 547. When a motion for summary judgment challenges the existence of jurisdictional facts, the trial court must consider relevant evidence submitted by the parties to resolve the jurisdictional issues raised. *Miranda*, 133 S.W.3d at 226. If a fact question is presented by the evidence regarding a jurisdictional issue, the trial court is precluded from granting summary judgment on the jurisdictional challenge. *Id.* at 227-28; *Lazarides*, 367 S.W.3d at 797. When the relevant evidence is undisputed or fails to raise a fact issue on the jurisdictional issue, the court should grant or deny the motion for summary judgment as a matter of law. *Miranda*, 133 S.W.3d at 228; *Lazarides*, 367 S.W.3d at 797.

***3** Whether a trial court has subject-matter jurisdiction is a question of law, which we review de novo. *Miranda*, 133 S.W.3d at 228. "Our ultimate inquiry is whether the particular facts presented, as determined by the foregoing review of the pleadings and any evidence, affirmatively demonstrate a claim within the trial court's subject-matter jurisdiction." *Bacon v. Texas Historical Comm'n*, 411 S.W.3d 161, 171 (Tex. App.—Austin 2013, no pet.).

DISCUSSION

Standing

In its first and third issues on appeal, the City contends that the trial court erred in denying its jurisdictional challenge on grounds that there is no justiciable controversy between the parties. *See Texas Quarter Horse Ass'n v. American Legion Dep't of Tex.*, 496 S.W.3d 175, 180 (Tex. App.—Austin 2016, no pet.) (referring to doctrines of ripeness, mootness, and standing as justiciability doctrines derived from Texas Constitution). Specifically, in its first issue, the City asserts that the relevant pleadings and jurisdictional evidence fail to establish that TPGA has standing to sue as an organization on behalf of its members. In its third issue, the City argues that the relevant pleadings and jurisdictional evidence fail to establish that TPGA's claims are not ripe or, alternatively, are moot. We turn first to the City's arguments with respect to standing.

"Standing is a prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court's power to decide a case." *Bland Indep. Sch. Dist*, 34 S.W.3d at 553-54. A plaintiff must demonstrate standing for each of his claims, and the court must dismiss any claim for which it lacks jurisdiction. *Heckman v. Williamson County*, 369 S.W.3d 137, 150 (Tex. 2012) (citing *Andrade v. NAACP*, 345 S.W.3d 1, 14 (Tex. 2011)). The general test for constitutional standing in Texas is whether there is a "real" (i.e., justiciable) controversy between the parties that will actually be resolved by the judicial declaration sought. *Texas Ass'n of Bus.*, 852 S.W.2d at 446. The requirement of standing is derived from the Texas Constitution's separation-of-powers provision, which denies the judiciary authority to decide cases in the abstract, and from the open-courts provision, which provides court access only to a "person for an injury done him." *Meyers v. JDC/Firestone,*

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Ltd., 548 S.W.3d 477, 484 (Tex. 2018) (citing Tex. Const. art. I, § 13). "An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury." *Texas Ass'n of Bus.*, 852 S.W.2d at 444.

Standing is a constitutional prerequisite to filing suit for both individuals and associations. *South Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007). When, as in this case, an association sues on behalf of its members, the association's standing is established by a three-prong test established by the United States Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). *See Texas Ass'n of Bus.*, 852 S.W.2d at 447 (adopting *Hunt* test for associational standing). Under this test, an association must demonstrate that (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members. *Id.* (quoting *Hunt*, 432 U.S. at 343). In its motion and on appeal, the City has focused its arguments on whether TPGA has adequately shown that it meets the first prong of the *Hunt* test.

***4** The purpose of the first prong is "simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *Id.* (quoting *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988)). An association plaintiff satisfies this prong by showing that "at least one of the organization's members has standing individually." *Save Our Springs All.*, 304 S.W.3d at 878. That is, the plaintiff must first demonstrate that at least one of its members has suffered an "injury in fact"— an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " *Meyers*, 548 S.W.3d at 485 (laying out federal test for standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), noting similarity to elements of standing under Texas law); *see Save Our Springs All.*, 304 S.W.3d at 878, 882-84 (applying federal test under *Lujan* to analyze associational standing under first prong of *Hunt* test). Second, the plaintiff must demonstrate that the injury is fairly traceable to the challenged action and, third, is likely to be redressed by the requested relief. *Id.* When, as in this case, the suit challenges governmental action, the plaintiff must show that the injury is distinct from that sustained by the public at large. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 555-56; *Lomas*, 223 S.W.3d at 307.

In its pleadings, TPGA alleges that one of its members, Green's Blue Flame Gas Company, Inc., became involved on a project that included installation of an LP-Gas tank "to fuel buses serving the Texas Medical Center." "During the course of this project, [an inspector from the Houston Fire Marshall's Office] refused to evaluate the LP-Gas installation under the LP-Gas Safety Rules and instead imposed inapplicable and more restrictive conditions and requirements from Houston's Fire Code and the 2006 and 2012 International Fire Codes simply on the basis that the inspector 'felt' that they were 'relevant and increased public safety.' " According to TPGA's allegations, although Green's Blue Flame Gas had filed the form for installation required with the Railroad Commission, the inspector refused to issue a permit beyond 90 days and charged Green's Blue Flame Gas Company $2,180 in permitting fees. These undisputed allegations, taken as true, demonstrate that at least one member of the association has already been assessed fees for a permit that is currently required by Chapter 61 of the Houston Fire Code but not by the rules promulgated by the Railroad Commission. We conclude that TPGA has satisfied the first prong of the *Hunt* test for associational standing to the extent TPGA is challenging this permitting requirement on LP-Gas.

In its pleadings, TPGA also generally alleges that inspectors have reviewed projects involving installation of LP-Gas tanks and have issued red tags for "unspecified violations of Houston's Building Code" to unspecified persons. In one instance, a City inspector issued a "red tag" and directed a home owner to remove a propane bottle from under a mobile home, and in another instance, an inspector served a "Notice of Deficiencies" on a homeowner, a customer of a TPGA member, related to an LP-Gas tank used to fuel a pool heater. Similarly, TPGA describes an incident where another customer of a TPGA member installed "a rack housing" for LP-Gas cylinders and was later notified by an inspector that an operational permit was required based on the number and capacity of cylinders installed. In describing these instances, TPGA's pleadings fail to explain how any TPGA member, *as opposed to its customer*, has suffered an injury "fairly traceable" to enforcement of what it contends are invalid regulations on LP-Gas. *See Save Our Springs All.*, 304 S.W.3d at 878 (laying out Supreme Court's test for individual standing under first prong of test for associational standing and concluding that allegations of harm to environmental, scientific, or recreational interests of members who did not possess property interest in or in connection to real property involved in development agreements were insufficient to demonstrate injury distinct from general public). To the extent TPGA is suggesting that members will suffer an indirect economic impact as a result of regulatory burdens placed on their customers or others, TPGA has failed to sufficiently plead facts demonstrating a particularized injury from the

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challenged regulations. *See Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 929 (Tex. App.—Austin 2010, no pet.) (explaining that indirect economic injury resulting from regulations placed on plaintiff's customers is substantially more difficult to establish than direct injury and that plaintiffs claiming that challenged ordinance "discourage[ed] tourists from visiting," and thus had "chilling effect" on their businesses, failed to meet burden).

***5** Although, as previously discussed, TPGA has established that at least one of its members has suffered an "injury in fact" that is "fairly traceable" to permitting requirements imposed by the City, TPGA's challenge to the ordinances is not limited to permitting requirements. Instead, in its pleadings to the trial court, TPGA broadly requests a declaration that "those portions of the City of Houston's [ordinances] that adopted or amended [Chapter 61] or purported to otherwise regulate the LP-Gas industry, together with [Chapter 61] itself ... are invalid and ineffective to the extent they relate to any aspect of the LP-Gas industry." The City argues that because standing must be examined on a claim-by-claim basis and because the TPGA effectively seeks a declaration that all LP-Gas regulations promulgated by the City are invalid, TPGA must establish associational standing as to each regulation but has failed to do so. *See Heckman*, 369 S.W.3d at 153, 156. In response, TPGA explains that is has sufficiently established associational standing as to each of its claims because it effectively has only one claim: a declaration that the Railroad Commission's LPG Safety Rules "preempt and supersede *any* ordinance, order, or rule adopted by a political subdivision of this state relating to any aspect or phase of the liquefied petroleum gas industry." (Emphasis added.). In other words, in TGPA's view, its sole claim is a challenge to the City's regulation of LP-Gas as a whole, and it has sufficiently demonstrated that at least one or more of its members has suffered injury as result of that regulation.

In effect, TPGA challenges all of the City's regulations "relating to" the LP-Gas industry. Thus, to demonstrate that the first prong for associational standing has been satisfied as to TPGA's sole claim—as it has been framed by TPGA—the pleadings and evidence must demonstrate that at least one of its members has suffered a particularized injury, distinct from the general public, that is "fairly traceable" to each of the City's regulations relating to the LP-Gas industry—whatever TPGA contends those are—that the requested declaration will "redress." *See Meyers*, 548 S.W.3d at 485. Based on our review of the pleadings, liberally construed and taken as true, we cannot conclude that this burden has been satisfied.

In its pleadings, TPGA does not specifically identify for the trial court which regulations "relat[e] to" the LP-Gas industry or where those regulations are found in the City Code, other than to assert that the entirety of Chapter 61 of the Fire Code consists of impermissible regulations. Similarly, TPGA does not identify what, if anything, the City's regulations require of TPGA members and it and has not pleaded any facts demonstrating an injury from direct restrictions imposed on its members, apart from the one previously mentioned permitting requirement. Because TPGA has not identified what action or inaction is required by the regulations and from whom, we cannot evaluate whether a member of TPGA has suffered or imminently will suffer an invasion of "some 'legally protected' interest that is sufficiently unique to the member, as distinguished from the general public," as a result of the challenged regulatory scheme. *See Stop the Ordinances Please*, 306 S.W.3d at 929. Similarly, because the relief requested, on its face, does not ask the trial court to determine which regulations, if any, qualify as being sufficiently "relat[ed] to any aspect or phase of the liquefied petroleum gas industry," we cannot conclude that the relief requested by TPGA would effectively redress any injury caused by the City's regulations related to LP-Gas.

In conclusion, TPGA has failed to demonstrate the members it represents have a sufficient personal stake in the controversy such that "the lawsuit would not yield a mere advisory opinion or draw the judiciary into generalized policy disputes that are the province of other branches." *Good Shepherd Med. Ctr., Inc. v. State*, 306 S.W.3d 825, 833 (Tex. App.—Austin 2010, no pet.) (citing *Save Our Springs All.*, 304 S.W.3d at 871 (concluding that association members had not established injury distinct from that of general public)). However, because this defect is a matter of pleading sufficiency, we will reverse and remand to the trial court to allow TPGA an opportunity to cure the pleading defect, unless one of the City's remaining issues requires that we reverse and render judgment in favor of the City. *See* Tex. R. App. P. 43.3. Accordingly, we turn to the City's remaining appellate issues.

Ripeness and Mootness

***6** Next, we consider the City's argument that the trial court lacks subject-matter jurisdiction because TPGA's claims are not

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ripe or, alternatively, have become moot. Like standing, ripeness and mootness doctrines concern whether a justiciable controversy exists between the parties and serve to bar the court from issuing advisory opinions. *Texas Quarter Horse Ass'n*, 496 S.W.3d at 180. Under the ripeness doctrine, a court must "consider whether, at the time the lawsuit is filed, the facts are sufficiently developed 'so that an injury has occurred or is likely to occur, rather than being contingent or remote.' " *Id.* (quoting *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000)). Conversely, the mootness doctrine applies when a justiciable controversy existed between the parties at the time the case arose, but the live controversy no long exists because of subsequent events. *Id.*

In this case, the City's mootness and ripeness theories turn on an exception to preemption found in Section 113.054. Specifically, Section 113.054, which is the basis of TPGA's preemption claim, states in relevant part:

> A political subdivision may petition the commission's executive director for permission to promulgate more restrictive rules and standards only if the political subdivision can prove that the more restrictive rules and standards enhance public safety.

Tex. Nat. Res. Code § 113.054. According to TPGA, there is no dispute that the Railroad Commission has not adopted any formal petition process, and therefore, the City does not have any "formal opportunity to save its propane regulations and ordinances from preemption under this [exception]." In the City's view, the Court cannot enforce the alleged restrictions of Section 113.054 "without also affording the City its statutory protections." Thus, unless and until a formal petition process is implemented by the Commission, TPGA's claims are not ripe. Similarly, in the alternative, the City asserts that the summary-judgment evidence shows that it has in fact received informal permission from the Commission to continue to enforce its local ordinances and regulations related to LP-Gas. The City reasons that this evidence establishes that the statutory exception to preemption has been met and that, as a result, TPGA's claims have become moot.

The issue of whether the City has met the statutory exception under Section 113.054 by receiving permission from the Commission to promulgate the challenged ordinances and regulations is an issue to be resolved in the lawsuit and goes to the merits of TPGA's claim. To the extent the City argues that it has been effectively prevented from obtaining permission under Section 113.054 by the Commission's failure to implement a formal process, we conclude that this has no effect on the trial court's power to decide the immediate issues in this dispute: whether the challenged ordinances and regulations are preempted by Section 113.054 and, if so, whether the ordinances and regulations are excepted from preemption because the City has obtained permission from the Commission "to promulgate more restrictive rules and standards." Finally, the City's assertion that the evidence establishes that it in fact received permission from the Commission through informal measures is, in effect, an argument that the evidence establishes that it has met the statutory exception and that TPGA cannot, as a matter of law, prevail on the merits of its suit. Because the City's arguments regarding the statutory exception go to the merits of the case and not to the court's power to decide the case, the City's third issue on appeal is overruled.

Jurisdiction of Civil Courts over Penal Ordinances

Finally, we turn to the City's second appellate issue. In this issue, the City asserts that the trial court erred in denying its motion for summary judgment for lack of jurisdiction because the ordinances and regulations at issue are penal in nature and, as a result, the civil trial court does not possess jurisdiction to determine their validity.

***7** Texas courts have long recognized that the meaning and validity of a penal statute or ordinance should ordinarily be determined by courts exercising criminal jurisdiction. *See State v. Morales*, 869 S.W.2d 941, 945 (Tex. 1994); *City of New Braunfels v. Stop the Ordinances Please*, 520 S.W.3d 208, 212 (Tex. App.—Austin 2017, pet. denied); *City of La Marque* v. *Braskey*, 216 S.W.3d 861, 863 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Sterling v. San Antonio Police Dep't*, 94 S.W.3d 790, 793 (Tex. App.—San Antonio 2002, no pet.). This constraint on civil courts is grounded in both pragmatism, i.e., a need to avoid conflicting decisions by Texas high courts in Texas's bifurcated judicial system, and in longstanding limitations imposed on equity jurisdiction and thus, the "very balance of state governmental power imposed by framers of the

Texas Constitution." *Morales*, 869 S.W.2d at 944, 947-48; *see City of New Braunfels*, 520 S.W.3d at 212; *Ryan v. Rosenthal*, 314 S.W.3d 136, 142 (Tex. App.—Houston [14th Dist.] 2010, no pet.). If the meaning and validity of a criminal statute or ordinance can be resolved in a criminal proceeding "and vested property rights are not in jeopardy," then a court of equity should not intervene. *Consumer Serv. All. of Tex., Inc. v. City of Dallas*, 433 S.W.3d 796, 804 (Tex. App.—Dallas 2014, no pet.) (quoting *Passel v. Fort Worth Indep. Sch. Dist.*, 440 S.W.2d 61, 63 (Tex. 1969)). "A person may continue his activities until he is arrested and then procure his release by showing that the law is void." *Id.*

When a penal statute or ordinance is being enforced and the plaintiff is being prosecuted or the threat or prosecution is imminent, an equity court will not interfere with the ordinary enforcement of the statute or ordinance unless (1) the statute or ordinance is unconstitutional and (2) its enforcement will result in irreparable injury to vested property rights. *Id.* This limitation on jurisdiction applies not only in suits where the plaintiff seeks to enjoin enforcement but also in suits seeking a declaratory judgment as to the constitutionality of the statute or ordinance. *Morales*, 869 S.W.2d at 947; *Ryan*, 314 S.W.3d at 142 ("The considerations that lead courts of equity to deny injunctive relief against enforcement of the criminal laws apply with equal force to an action for a declaratory judgment construing a penal statute.").

Recently, in *City of Laredo v. Laredo Merchants Association*, 550 S.W.3d 586 (Tex. 2018), the Texas Supreme Court considered whether the civil courts had jurisdiction in a suit that challenged an ordinance prohibiting the use of certain non-compliant plastic bags by vendors. In deciding that the exercise of civil jurisdiction was proper in the suit, the court recognized that the challenged ordinance (the violation of which constituted a class C misdemeanor, punishable by a fine of up to $2,000 per violation) was penal in nature and therefore could only be enjoined or declared void if there was "a threat of irreparable injury to vested property rights." *Id.* at 592 n.28 (citing *Morales*, 869 S.W.2d at 945). The Texas Supreme Court concluded that this exception had been met, and therefore the challenge to the penal ordinance could be brought in civil court, because the ordinance imposed "a substantial per violation fine that effectively preclude[d] small local businesses from testing the ban's constitutionality in defense to a criminal prosecution." *Id.* (citing *City of Austin v. Austin City Cemetery Ass'n*, 28 S.W. 528, 529-30 (Tex. 1894)).

Here, the dispute on appeal centers on whether the ordinances and regulations at issue are penal in nature and, if so, whether their enforcement will result in irreparable injury to vested property rights. The City argues that Sections 104 and 109 of the Fire Code, found in Chapter 1, provide the enforcement mechanism for any substantive requirements in the Fire Code, including Chapter 61, and that these provisions make clear that violations of the Fire Code are punishable as criminal offenses. In response, TPGA asserts that the challenged LP-Gas regulations are not criminal regulations because they do not, on their face, impose criminal penalties or criminalize certain conduct.

***8** Assuming without deciding, however, that the challenged ordinances and regulations are penal in nature, we conclude that the trial court did not err in determining that it has jurisdiction over TPGA's claims. Section 109.4 of the City's Fire Code provides that the doing of any act that the Fire Code declares to be unlawful, and for which no specific penalty is provided, "shall be punished by a fine of not less than $500.00 and no more than $2,000.00" and that "each day any violation of this code shall continue shall constitute a separate offense." Based on this per day-violation fine and on the Texas Supreme Court's recent decision in *City of Laredo*, we must conclude that TPGA members are "effectively preclude[d]" "from testing the ban's constitutionality in defense to a criminal prosecution." *See id.* Because there is a "threat of irreparable injury to vested property rights," TPGA's suit to declare certain Fire Code regulations invalid may be brought in civil court. *See id.* (citing *Morales*, 869 S.W.2d at 945). We overrule the City's second issue on appeal.

CONCLUSION

Because TPGA failed to plead facts affirmatively demonstrating subject-matter jurisdiction, we conclude that the trial court erred in denying the City's motion for summary judgment for lack of jurisdiction and reverse the trial court's order. We also conclude, however, that TPGA's pleadings do not affirmatively negate the existence of subject-matter jurisdiction. Accordingly, we remand this cause so that TPGA may have a reasonable opportunity to amend its pleadings, if possible, to demonstrate that it has standing to bring its suit for declaratory relief.

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Dissenting Opinion by Chief Justice Rose

DISSENTING OPINION

Jeff Rose, Chief Justice

I respectfully dissent because the majority's decision imposes unreasonable obstacles to associational standing.

Under the first prong of the *Hunt* test, an association has standing to sue on behalf of its members when " 'its members would otherwise have standing to sue in their own right." *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993) (adopting standard for associational standing articulated in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 342 (1977)). The purpose of this requirement "is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988). The Texas Supreme Court has warned that "[t]his requirement should not be interpreted to impose unreasonable obstacles to associational representation." *Id.*

With little analysis and no citation to supporting authority, the majority holds that an association asserting a preemption challenge to a regulatory scheme that undeniably relates to its members' industry "must demonstrate that at least one of its members has suffered a particularized injury, distinct from the general public, that is 'fairly traceable' to each of the City's regulations relating to the LP-Gas industry—whatever TPGA contends those are—that the requested declaration will 'redress.' " *Ante* at p. 10 (citing *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (describing general standing principals). But *Meyers* does not support such a restrictive interpretation of the first prong of the *Hunt* test—it held that an individual, not an association, lacked standing to sue because the relief requested would not remedy the individual's alleged injury. *See Meyers*, 548 S.W.3d at 487–89. More importantly, the majority's interpretation here does exactly what the supreme court has warned against and is contrary to the purpose of associational standing. *See Texas Ass'n of Bus.*, 852 S.W.2d at 447.

Applying the first prong of *Hunt* as directed by the supreme court, I would hold that TPGA has satisfied its burden of showing that its members have standing to sue in their own right. TPGA's suit asserts a preemption challenge to the City's authority to promulgate ordinances regulating the LP-gas industry. Specifically, TGPA claims that "under § 113.054, the LP-Gas Safety Rules adopted by the [Railroad] Commission preempt and supersede *any* ordinance, order, or rule adopted by a political subdivision of the state relating to any aspect or phase of the liquefied petroleum gas industry." *See* Tex. Const. art. XI, § 5 (mandating that no city ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State"); Tex. Nat. Res. Code § 113.054 (providing that Railroad Commission rules "preempt and supersede any" local ordinance "relating to any aspect or phase of the" LP-gas industry). TPGA makes additional allegations regarding specific City of Houston ordinances, but those allegations stem from and are resolved by TPGA's foundational claim that section 113.054 preempts all local attempts to regulate the LP-gas industry. As TPGA notes in its briefs to this Court, "Whether Houston has one such regulation or one thousand, [section] 113.054 preempts them all as a matter of law."

In support of its standing to bring this preemption claim and pursue the relief it seeks, TPGA alleges, and supports with affidavits, that it is a trade association representing a statewide membership of companies and individuals actively engaged in the LP-gas industry, and that its members have suffered adverse action and consequences as a result of the enforcement of the City's ordinances regulating the LP-gas industry. Thus, on the record before us, TPGA has satisfied the first prong of the

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Hunt test. *See* *Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995) (holding that association's members would have standing to sue in their own right, and thus association had standing, despite the lack of evidence showing injury to specific members because the court could "fairly assume the existence of such members" based on the nature and size of the association); *Texas Ass'n of Bus.*, 852 S.W.2d at 440 (applying first prong and holding that it was satisfied that association had not "manufactured this lawsuit" because association's members had been assessed administrative penalties pursuant to the challenged enactments and members remained at risk of penalty under same enactments). Accordingly, I would affirm the district court's order overruling the City's plea to the jurisdiction.[1]

All Citations

Not Reported in S.W. Rptr., 2019 WL 3227530

Footnotes

1 Generally, appeals may only be taken from final judgments and certain appealable interlocutory orders. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); *see* Tex. Civ. Prac. & Rem. Code § 51.014 (listing appealable interlocutory orders). Section 51.014(a)(8) of the Texas Civil Practice and Remedies Code provides for an interlocutory appeal from a grant or denial of a plea to the jurisdiction filed by a governmental unit. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). The Texas Supreme Court has construed the phrase "plea to the jurisdiction" in Section 51.014(a)(8) to mean a challenge to jurisdiction, "irrespective of the procedural vehicle used." *Thomas v. Long*, 207 S.W.3d 334, 349 (Tex. 2006); *see* *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000) (recognizing that subject-matter jurisdiction may be challenged by motion for summary judgment). Here, the City brought its jurisdictional challenge in a motion for summary judgment, which the trial court expressly denied. As a result, we have jurisdiction to consider this interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8).

1 I agree with the majority's conclusions that none of the City's other issues merit reversal.

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Exh. C

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

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

(b) It is an affirmative defense to prosecution under this section with respect to gasoline dispensing sites that the premises has dispensed less than 10,000 gallons per month in each calendar month beginning with January 1, 1991. Any site that exceeded 10,000 gallons in January of 1991 or that has exceeded 10,000 gallons in any ensuing month is not subject to this affirmative defense.

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

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

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

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

Sec. 29-82. - Revocation and expiration of license.

(a) A manufactured home park operator's license may be revoked if the licensee interferes with lawful inspection of the park or if there are uncorrected, repeated or serious violations of any applicable provision of the ordinances of the city or laws of the State of Texas.

(b) Upon information that grounds for revocation may exist, the building official shall cause an investigation of the facts to be conducted. If he determines that a reasonable probability of grounds for revocation exists, he shall schedule a hearing thereupon to be conducted before the building official or such other person as he may designate as a hearing examiner therefor. The building official shall not designate any person who participated in the active conduct of the investigation as the hearing examiner. Written notice of the date, time and place of the hearing shall be given to the licensee or his designated agent by certified United States mail, postage prepaid, return receipt requested, addressed to the address set forth in the application. Such notice shall be mailed at least ten days prior to the date of the hearing, shall set forth the grounds upon which revocation will be sought in sufficient detail to advise the licensee thereof and shall advise the licensee of his right to be present in person and through counsel to present evidence and cross examine witnesses appearing at such hearing.

(c) The burden of proof at such hearing shall be upon the city. If the building official determines that grounds for revocation exist, he shall order the manufactured home park operator's license revoked by written decision. Such decision may be appealed as provided in section 29-126 of this Code.

(d) After a manufactured home park operator's license has expired, or if a manufactured home park operator's license has been revoked, notice shall be given by the city to the occupants to vacate the premises within a period of 30 days and to remove their manufactured homes therefrom. Failure of any such occupant to comply therewith shall constitute a misdemeanor.

(e) Nothing contained in this section shall be construed to prevent the city from ordering the immediate evacuation or closure of any manufactured home park to the extent permitted by law in the event of imminent or extreme hazard to human life or property.

(Ord. No. 85-498, § 1, 4-10-85; Ord. No. 90-635, § 57, 5-23-90; Ord. No. 94-1268, §§ 14, 15, 11-22-94)

Sec. 29-123. - Fuel supply and storage.

(a) Liquefied petroleum gas containers installed on a manufactured home site shall be securely, but not permanently, fastened to prevent accidental overturning. Such containers shall not be less than five water gallon or more than 25 water gallon capacity.

(b) No liquefied petroleum gas vessel shall be stored or located inside or beneath any storage cabinet, carport, manufactured home, or any other structure. All installations must conform to state and city regulations.

(Ord. No. 85-498, § 1, 4-10-85)

Exh. D

Vernon's Texas Statutes and Codes Annotated
Natural Resources Code (Refs & Annos)
Title 3. Oil and Gas (Refs & Annos)
Subtitle D. Regulation of Specific Businesses and Occupations
Chapter 113. Liquefied Petroleum Gas (Refs & Annos)
Subchapter A. General Provisions

V.T.C.A., Natural Resources Code § 113.003

§ 113.003. Exceptions

Currentness

(a) None of the provisions of this chapter apply to:

(1) the production, refining, or manufacture of LPG;

(2) the storage, sale, or transportation of LPG by pipeline or railroad tank car by a pipeline company, producer, refiner, or manufacturer;

(3) equipment used by a pipeline company, producer, refiner, or manufacturer in a producing, refining, or manufacturing process or in the storage, sale, or transportation by pipeline or railroad tank car;

(4) any deliveries of LPG to another person at the place of production, refining, or manufacturing;

(5) underground storage facilities other than LP-gas containers designed for underground use;

(6) any LP-gas container having a water capacity of one gallon or less, or to any LP-gas piping system or appliance attached or connected to such container; or

(7) a railcar loading rack used by a pipeline company, producer, refiner, or manufacturer.

(b) Nothing in Subsection (a) of this section shall be construed to exempt truck loading racks from the jurisdiction of the

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commission under this chapter.

Credits

Acts 1977, 65th Leg., p. 2594, ch. 871, art. I, § 1, eff. Sept. 1, 1977. Amended by Acts 1979, 66th Leg., p. 2031, ch. 799, § 1, eff. Sept. 1, 1980; Acts 1991, 72nd Leg., ch. 725, § 2, eff. Aug. 26, 1991; Acts 1993, 73rd Leg., ch. 1016, § 2, eff. Sept. 1, 1993; Acts 1995, 74th Leg., ch. 239, § 1, eff. Sept. 1, 1995.

V. T. C. A., Natural Resources Code § 113.003, TX NAT RES § 113.003
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

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Vernon's Texas Statutes and Codes Annotated
Natural Resources Code (Refs & Annos)
Title 3. Oil and Gas (Refs & Annos)
Subtitle D. Regulation of Specific Businesses and Occupations
Chapter 113. Liquefied Petroleum Gas (Refs & Annos)
Subchapter C. Rules and Standards

V.T.C.A., Natural Resources Code § 113.051

§ 113.051. Adoption of Rules and Standards

Currentness

Except as provided in Section 113.003 of this code, the commission shall promulgate and adopt rules or standards or both relating to any and all aspects or phases of the LPG industry that will protect or tend to protect the health, welfare, and safety of the general public.

Credits

Acts 1977, 65th Leg., p. 2594, ch. 871, art. I, § 1, eff. Sept. 1, 1977. Amended by Acts 1979, 66th Leg., p. 2031, ch. 799, § 1, eff. Sept. 1, 1980.

V. T. C. A., Natural Resources Code § 113.051, TX NAT RES § 113.051
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

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Vernon's Texas Statutes and Codes Annotated
Natural Resources Code (Refs & Annos)
Title 3. Oil and Gas (Refs & Annos)
Subtitle D. Regulation of Specific Businesses and Occupations
Chapter 113. Liquefied Petroleum Gas (Refs & Annos)
Subchapter C. Rules and Standards

V.T.C.A., Natural Resources Code § 113.054

§ 113.054. Effect on Other Law

Effective: September 1, 2011

Currentness

The rules and standards promulgated and adopted by the commission under Section 113.051 preempt and supersede any ordinance, order, or rule adopted by a political subdivision of this state relating to any aspect or phase of the liquefied petroleum gas industry. A political subdivision may petition the commission's executive director for permission to promulgate more restrictive rules and standards only if the political subdivision can prove that the more restrictive rules and standards enhance public safety.

Credits

Added by Acts 2011, 82nd Leg., ch. 1020 (H.B. 2663), § 1, eff. Sept. 1, 2011.

V. T. C. A., Natural Resources Code § 113.054, TX NAT RES § 113.054
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

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