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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 REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Houston is dissatisfied with TPGA's Statement of the Case, *see* Tex. R. App. P. 55.3(b), and asks that this Court substitute the following:

Nature of the case: This is an action for declaratory judgment, brought by Texas Propane Gas Association ("TPGA"), a trade association of propane marketers, against numerous Texas cities, including the City of Houston ("Houston") and the Railroad Commission of Texas ("RRC"), seeking declarations that each city's propane regulations, Fire Code provisions, and ordinances are preempted and void under Tex. Nat. Res. Code § 113.054, 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, which is Exh. A to Houston's opening brief. 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."), which was 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.

ISSUE PRESENTED

Houston is dissatisfied with TPGA's Restatement of the Issues Presented, *see* Tex. R. App. P. 55.3(c), and asks this Court to substitute the following:

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 *civil* courts' assertion of subject-matter jurisdiction to construe the penal laws challenged here, based on *Laredo*'s footnote 28, fatally undermines 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 violates the Texas Constitution by usurping the State's criminal courts' jurisdiction?

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[1] *City of Laredo v. Laredo Merch's Ass'n*, 550 S.W.3d 586, at 592 n.28 (Tex. 2018) (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 is dissatisfied with TPGA's additions to its Statement of Facts, which contain legal arguments and omit critical portions of relevant statutes. *See* Tex. R. App. P. 55.3(b).

Houston provided an accurate factual statement in the Brief on the Merits of Respondent/Cross-Petitioner, the City of Houston at pages 1 to 16. That statement is adopted and re-urged here. Other relevant facts are included in the text where relevant.

SUMMARY OF ARGUMENT

TPGA's only real response to Houston's merits brief on its cross-petition is deeply troubling, not because it is legally challenging (it isn't), but because of its naked cynicism and deep disrespect for the Court. TPGA essentially asks this Court to ignore the clear constitutional constraints imposed upon it, and its own jurisprudence in *Logue, Passel, Morales,* and their progeny, so that Texas' civil courts can hear any state/local preemption claim industry groups like TPGA choose to file, even if it involves obviously penal ordinances, as TPGA's claims do here. Expedience and commercial interest, TPGA urges, should triumph over constitutional constraints and intellectual honesty.

Worse, TPGA brazenly baits this Court to decide the merits of its preemption claims, even resorting to *dicta*, and even though this is an

interlocutory appeal restricted to jurisdictional issues alone. This would enable TPGA to argue below that the result of any merits appeal is already known and, therefore, a trial court need not require TPGA to replead or even allow Houston to brief the merits of TPGA's preemption allegations.

Houston is not cynical but it is realistic. It knows it asks a lot of this Court: voluntarily to grant Houston's petition and then circumscribe civil courts' jurisdiction, including its own. Moreover, Houston seeks such self-restraint against a highly-charged political backdrop: the Governor who initially appointed many members of this Court has consistently sought greater state power to control what cities do.[3] The drafters of Texas' constitutions, however, had faith that this Court would scrupulously maintain a wall of separation between civil and criminal courts even when it was tempting to obliterate it. For a century, this Court kept that faith. Houston respectfully asks that this Court renew that faith by granting review on Houston's petition alone, reaffirming the *Morales* exception, in letter *and* in spirit, holding that the civil courts lack subject-matter jurisdiction over TPGA's claims and, therefore, that such claims should be dismissed.

[3] *See, e.g.*, Daniel York, *The End of Local Laws" War on Cities Intensifies in Texas*, Governing (Apr, 5, 2017), *available at* https://www.governing.com/topics/politics/gov-texas-abbott-preemption.html.

As a preliminary matter, TPGA should not even be permitted to rely on *Morales*' exception because it never pleaded or attempted to satisfy that exception at any relevant time, and never pleaded or proved that any member was ever cited or prosecuted under any challenged law. It likewise cannot avoid having to satisfy *Morales*' requirements, based on some alleged disagreement over the nature of challenged regulations, because this Court already decided in *Laredo* that civil court challengers to laws imposing penalties identical to or even *less* onerous than those imposed for violations of the laws challenged here must still satisfy *Morales.* Consequently, TPGA's attempt to substitute *Heckman's* standard for *Morales*' necessarily fails.

Against this backdrop, the Court of Appeals was wrong to conclude that TPGA had satisfied *Morales*' requirements. TPGA hardly tried to do so. First, neither TPGA nor the Court identified any vested property right TPGA members possess that Houston's propane regulations threaten irreparably to injure. Second, in *Morales*, this Court *expressly rejected* the standard, adopted by the Court of Appeals and this Court in *Laredo*, that essentially eliminates *Morales*' requirement that plaintiffs show injury to their vested property rights *separate from* harm inherent in criminal prosecution. Third, even TPGA does not dispute *Morales'* express rejection of an adequacy of remedy test for jurisdiction, which this Court, in *Laredo*, and the Court of Appeals here adopted. Fourth, TPGA

also concedes Houston's argument that *Morales* cannot apply here because TPGA, an association, has no standing to assert its members' individual vested property rights, if any. Similarly, TPGA does not dispute Houston's argument that TPGA improperly failed to plead or prove the applicability of the *Morales* exception for *each* criminal law challenged.

Instead of addressing these arguments and the direct conflicts between the Court of Appeals' decision and those of its sister courts, TPGA advocates that this Court simply ignore these legal and constitutional constraints, misappropriate criminal jurisdiction from the criminal courts, and decide the merits of this case because it serves TPGA's and other groups' and corporations' commercial interest. This Court, however, should not unconstitutionally expand civil courts' jurisdiction or the strict limits of its interlocutory appellate jurisdiction for expediency's sake and TPGA offers this Court no substantive reason to do so.

Instead, TPGA asserts some generalized "commercial" or preemption exemption from *Morales* and subject-matter jurisdiction. There is none and this Court should not create one. In that regard, this Court has no need to decide the merits of TPGA's preemption arguments to decide the narrow jurisdictional questions Houston's interlocutory appeal raises. Finally, even if the Texas civil courts have unconstitutionally asserted jurisdiction to construe criminal statutes

in the past, and Houston believes they have, this Court should end such "jurisdiction creep" immediately with an unequivocal and substantive reaffirmation of *Morales*' limited exception, and not continue to permit constitutional violations to further commercial interests.

For these reasons, Houston respectfully requests that this Court grant Houston's petition for review, reverse the Court of Appeals' decision on the question presented alone, 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. INSTEAD OF RESPONDING SUBSTANTIVELY TO HOUSTON'S ARGUMENT THAT THE COURT OF APPEALS' INTERPRETATION OF *MORALES*, DRAWN FROM *LAREDO*, FATALLY UNDERMINES *MORALES*, CANNOT BE RECONCILED WITH IT, AND VIOLATES THE TEXAS CONSTITUTION, TPGA CHANGES THE SUBJECT

TPGA's response to Houston's detailed argument that *Laredo*'s footnote 28 guts rather than reaffirms *Morales* is basically to change the subject and argue for a *third* test for plaintiffs to establish *trial courts' jurisdiction over each of their claims*: the test established for this Court's *appellate* jurisdiction in *Heckman*. As demonstrated below, however, *Heckman* cannot be substituted for *Morales* and, even if it could, TPGA has not and could never satisfy that test either. Indeed, *Heckman* expressly supports Houston's arguments here.

This Court, however, should not be diverted from the fact that the jurisdictional theory, derived from *Laredo*, that the Court of Appeals adopted here cannot be reconciled with *Laredo's* purported reaffirmation of *Morales* and its requirement of irreparable injury to vested property rights. In addition to the compelling reasons why the trial court lacked subject-matter jurisdiction that Houston identified in its opening brief, Houston would add the following:

A. TPGA Does Not Dispute that it Expressly Waived Reliance on *Morales,* Never Pleaded or Attempted to Satisfy *Morales'* Exception at Any Relevant Time, and Did Not Plead or Show that Any Member Was Cited, Prosecuted, or Threatened with Imminent Prosecution Under Any Challenged Law

It is undisputed that TPGA never pleaded or proved the *Morales* exception's application to its claims even though TPGA carried the burden to plead and prove the civil district court's subject-matter jurisdiction.[4] In fact, when Houston challenged the district court's jurisdiction, TPGA *expressly waived reliance upon the Morales exception*.[5] It argued instead that its members merely

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

[5] Houston argued that 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. At oral argument in the Court of Appeals, improperly and for the first time, TPGA argued that some of its *members' customers* might arguably fall within this exception. The Court of Appeals, however, incorrectly failed to address or find waiver.

being subject to any local regulation constituted sufficient injury. "What TPGA objects to is the fact that Houston purports to regulate the LPG industry *at all*."[6]

The Court of Appeals' reliance on *Laredo's* interpretation of *Morales* was, therefore, improper. First, the Court could not fix the gaping holes in TPGA's case by relying upon an exception TPGA expressly waived. *See supra* note 5. Second, the Court's reliance on that exception was also improper because all parties concede that *no TPGA member has ever been prosecuted or threatened with prosecution under any challenged law here.*[7] Instead, the sole discernible basis for any alleged particularized injury here is the alleged payment of *permitting fees for temporary, as opposed to lengthier, permits*.[8]

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[6] *See* Appellee's Brief at 34. (emphasis in original)

[7] At best, the evidence here shows that one inspector told one member that it needed to comply with both state and Houston propane regulations. CR233.

[8] *Compare* CR233 with TPGA Opin., at *4 ("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"). While TPGA is entitled to the benefit of reasonable inferences, the evidence it submitted does not support the conclusion that any member paid more in permitting fees than it would already have paid for *state* inspection. Moreover, there is no evidence that additional amounts were paid upon expiration of temporary permits.

B. In *Laredo,* This Court Decided that Civil Court Challengers to Laws Imposing Penalties Identical to or *Less* Onerous Than Those Imposed for Violations of the Laws Challenged Here Must Satisfy the *Morales* Exception; Therefore, *Heckman* Cannot Save TPGA's Claims

In its brief, TPGA attempts to make much of the fact that the Court of Appeals assumed, without deciding, that Houston's challenged propane laws imposed criminal penalties and, therefore, required TPGA to satisfy the *Morales*' exception's requirements. TPGA, however, achieves distraction, not substance. First, the Court of Appeals could not determine whether every challenged law imposed criminal penalties because TPGA has never identified all of the laws and provisions it challenges despite multiple special exceptions having been granted to force it to do so. Indeed, the list has expanded just during this appeal. TPGA, however, has never come forward with any challenged law that *does not* impose a criminal penalty for violations. This is fatal to TPGA's claims because it is TPGA's burden to show jurisdiction for each claim. It has failed to do so. Consequently, the Court required TPGA to replead to identify and show jurisdiction for each challenged regulation.

Second, TPGA cannot have it both ways. It cannot rely on the Court of Appeals' decision that it was bound to find jurisdiction under *Morales*' exception because the fines imposed in *Laredo* were the same as those Houston imposed, yet avoid *Laredo*'s conclusion in footnote 28 that those challenging such

regulations must satisfy *Morales*.[9] "*That [Morales] rule applies here*, where the ordinance … imposes a substantial per-violation fine that effectively precludes small local businesses from testing the ban's constitutionality in defense to a criminal prosecution."[10] For purposes of Houston's petition alone then, whether the Court of Appeals actually determined the particular nature of any challenged regulation here is immaterial. *This* Court has already decided that any challenge to laws imposing such penalties must satisfy *Morales*.

Consequently, TPGA's lengthy discussion of *Heckman v. Williamson County* is pointless and misleading.[11] TPGA still cites *Heckman* for the notion

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[9] *Compare* City of Laredo, Tex., *Code of Ordinances*, § 33-508 *with* "Section 109.4 of [Houston's] Fire Code [which] 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." TPGA Opin., at *8-9; *Laredo*, 550 S.W.3d at 590, n.16 (citing § 33-508). The Court may take judicial notice that Section 33-508, "Penalties for noncompliance," provides in relevant part:

> Any person who violates this article or fails to comply with any of its requirements shall upon conviction thereof be fined not more than two thousand dollars ($2,000.00) for each violation, and in addition shall pay all court costs and expenses involved in the case. Each day of violation and each violation of a particular section of this article shall constitute separate offenses.

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

[11] For example, TPGA argues that preemption decisions lack constitutional dimensions. TPGA is mistaken. *See, e.g.*, *Gulf Coast Alloy Welding, Inc. v. Legal Sec. Life Ins. Co.*, 981 S.W.2d 239, 241 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd) (determination of whether preemption applies involves "traditional constitutional analysis") (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) for that concept). Worse, in making that argument at pages 11-12, TPGA misrepresents the holding in *Consumer Serv. All. of Tex., Inc. v. City of Dallas*, 433 S.W.3d 796, 805 (Tex. App.—Dallas 2014, no pet.). In that case, petitioners alleged that the challenged "ordinance is unconstitutional because it

that this Court must look to the "essence" of the case to determine if the case is civil or criminal.[12] In *Heckman*, however, the Court addressed *appellate* jurisdiction over procedural and jurisdictional issues. *Heckman* thus offers TPGA no assistance here. Moreover, no court, including the Court of Appeals, has ever utilized *Heckman*'s standard for appellate jurisdiction as a substitute for *Morales*' requirements or plaintiffs' burden to plead and demonstrate a *trial court's* subject-matter jurisdiction.

Yet, even if *Heckman* applied to the issues in Houston's petition, it would surely support, and not defeat, them. In *Heckman*, this Court reasoned that, when a court "provide[s] any 'construction of a criminal statute'" or a "'criminal law is the subject of the litigation,'" as the determination of whether Houston's propane regulations are preempted would , such cases would present a "criminal law matter" requiring resolution in the *criminal* courts.[13] Because criminal laws and their construction and alleged preemption are the *centerpiece* of this case, *Heckman* actually *supports* Houston's bifurcation arguments.[14]

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is preempted by state law." Although there was a *waiver issue* concerning that allegation, the court focused on *Morales'* irreparable injury requirement instead. *Id.*

[12] *See* Appellee's Brief at 31; *See* TPGA Response at 6-16.

[13] *Heckman v. Williamson County*, 369 S.W.3d 137, 146 (Tex. 2012).

[14] *See, e.g.*, *Unger v. State*, 629 S.W.2d 811, 812 (Tex. App.—Fort Worth 1982, pet. ref'd). This is true despite TPGA's tortured argument that the only statute the courts will need to interpret here is Tex. Nat. Res. Code § 113.054. As Houston argued in its Respondent's brief on the merits, ordinary preemption analysis focuses equally on whether individual regulations and

C. Neither TPGA nor the Court of Appeals Identified Any Vested Property Right TPGA's Members Possess That Houston's Propane Regulations Threaten Irreparably to Injure; Therefore, *Morales* Was Not Satisfied Here

In *Laredo's* footnote 28, this Court ostensibly reaffirmed *Morales*' requirement that plaintiffs in the civil courts must plead and prove irreparable injury to a vested property right. Nevertheless, that Court never actually identified one. Instead, it held that the possibility of confiscatory fines was somehow sufficient under *Morales*.

As in *Laredo*, the Court of Appeals' sole basis for holding that the trial court had jurisdiction to hear TPGA's challenge was because the potential severity of fines that might be imposed—if plaintiffs were ever cited and prosecuted under the challenged laws *and* TPGA's preemption challenge were ultimately unsuccessful—would "effectively preclude" TPGA members "from testing the ban's constitutionality in defense to a criminal prosecution." TPGA Opin., at *8 (citing *Laredo*). Because the Court believed that *Laredo* required it to treat such hypothetical injury as a "threat of irreparable injury to vested property rights," the Court held that TPGA's suit to declare certain Fire Code regulations that impose criminal penalties invalid may be brought in civil court. *See id*.

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provisions fall within the preemptive scope of the state statute. TPGA improperly skips that step.

(citing *Morales*, 869 S.W.2d at 945). A closer examination of such alleged threat of irreparable injury, however, reveals that there actually is *no injury to any real or imagined vested property right here*.

Just because a party challenges an existing law that has never been held invalid does not mean that he may thereafter treat it as void and disobey it. Indeed, under Article IX, Section 5 of Houston's City Charter, "all ordinances of the City of Houston, not inconsistent with the provisions of this Charter, shall remain in full force and effect, until altered, amended or repealed by the City Council." Consequently, no matter how fervently TPGA may believe that Houston has no authority to regulate propane, it still has to comply with Houston's regulations until they are repealed or found invalid. Otherwise, anyone could stop obeying any law with which he disagrees simply by filing a lawsuit to invalidate it.

TPGA members also have no vested right to conduct their businesses or utilize their property free from local regulation.[15] Consequently, there is no

[15] *City of Univ. Park v. Benners*, 485 S.W.2d 773, 778 (Tex. 1972); *City of La Marque v. Braskey*, 216 S.W.3d 861, 862 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *Benners*). Even *Smith v. Decker*, which TPGA cites, says that the right to make a living is "*subject…to valid and subsisting regulation statutes*." 312 S.W.2d 632, 634 (Tex. 1958) (emphasis supplied). Worse, the cases TPGA cites at note 8, involve *demonstrated* injury to businesses, separate from mere enforcement, exactly the evidence *Morales* requires and that is missing here. Indeed, one court observed: "Post-*Smith* cases, such as *Morrow*, demonstrate that a law that does not forbid a lawful business from operating will not be regarded as harming vested property rights." *Consumer Serv. All.*, 433 S.W.3d at 806.

vested right for whole industries to be free from local regulation, nor should one be created here.

Equally important, since no TPGA member has been cited or prosecuted for violating any challenged propane regulation, the Court of Appeals based its decision here on the *possibility* that TPGA's members might someday have to pay Houston's *up to* $2000 "per day-violation fine."[16] As in *Laredo*, however, the Court's unstated but underlying assumption is that TPGA members would never bring any prosecuted violations up to code during TPGA's challenge and, therefore, would continue to violate the regulations daily and have to pay

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In *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562, 587 (Tex. App.—Houston [1st Dist.] 2015, no pet.), a zoning case, the Court recognized the *Benners* rule (and its narrow exception for changes in zoning) but found that Ronquille "introduced evidence of, unique concrete imminent harm to her investment and business activities … such as potential breach-of-contract liability to short-term renters she has contracts with for future dates." In *Robinson v. Jefferson County*, 37 S.W.3d 503, 509 (Tex. App.—Texarkana 2001, no pet.), the jurisdictional evidence showed that banning sales of alcohol in sexually-oriented business would cause severe economic harm and would subject Robinson's customers to criminal prosecution. The county also admitted that Robinson had a vested property interest. *Id. City of Corpus Christi v. Maldonado*, 398 S.W.3d 266, 270 (Tex. App.—Corpus Christi 2011, no pet.), is inapposite because it involves inventory, not an issue here, and "a seller does have a vested property right *in the possession of legal, physical items of inventory that it owns*." This Court, in *Morales*, 869 S.W.2d at 950, cited *Air Curtain Destructor Corp. v. City of Austin*, 675 S.W.2d 615, 618 (Tex. App.—Tyler 1984, writ ref'd n.r.e.) for the notion that *Austin City Cemetery Ass'n* applies in cases in which it is highly unlikely that an ordinance may be tested.

The remaining cases pre-date *Morales* and *Benners* and thus provide TPGA no support but do provide additional conflicts with the Court of Appeals' decision that this Court should resolve by granting *Houston's* petition.

[16] TPGA Opin., at *8. Because each day a condition persists is considered a new violation, later compliance with Houston's propane codes and ordinances would likely not render any challenge to initial prosecuted violations moot.

exorbitant amounts if their legal challenge to such regulations was ultimately unsuccessful. TPGA members, however, have no right, and certainly no vested property right, to continue to violate extant laws or commit new violations while they are challenging them.[17] Consequently, the alleged severity of the *accumulated* fines that might potentially be imposed *if TPGA members continue their violations* cannot and should not provide any grounds for satisfying *Morales*' "vest property rights" test.

Yet even if the purported "rights" described existed, at best, they would constitute *personal* rights, not the vested property rights *Morales* requires. Property rights are created and defined by state law.[18] By contrast, the "'concept of personal rights … includes the right to conduct a specific activity' and that the 'right to conduct an activity, such as using property for a specific purpose, does not equate that personal right with a vested property right.'"[19] That court concluded that even a "'tremendous financial loss,' even though tangible and significant, was 'insufficient to constitute a vested property right *because it*

[17] TPGA did not seek to enjoin Houston's regulations during this litigations' pendency.

[18] *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972).

[19] *City of New Braunfels v. Stop the Ordinances Please*, 520 S.W.3d 208, 215–16 (Tex. App.—Austin 2017, pet. denied) (quoting *Morrow v. Truckload Fireworks, Inc.*, 230 S.W.3d 232, 238 (Tex. App.—Eastland 2007, pet. dism'd). The direct conflict between these decisions and the decision here provides additional reasons for this Court to grant review to resolve these conflicts.

represents losses due to restrictions on personal rights.'"[20] Consequently, the potential financial loss this Court hypothesized in *Laredo* and the Court of Appeals adopted here *cannot as a matter of law satisfy Morales*, which is strictly limited to vested property rights and which requirement was reaffirmed in *Laredo*. As demonstrated below, there are good constitutional reasons for this limitation.

D. In *Morales*, this Court Expressly Rejected the Standard Adopted by the Court of Appeals and this Court in *Laredo* That Essentially Eliminates *Morales*' Requirement That Plaintiffs Show Injury to Vested Property Rights Separate From Losses Arising from Criminal Prosecution Itself

For a hundred years, this Court consistently held that the opportunity to assert the unconstitutionality of a penal provision as a defense to criminal prosecution is an adequate legal remedy that forecloses litigants' ability to bring such challenges in civil courts.[21] Consequently, Texas courts have long held that the harm inherent in defending against *any* criminal prosecution alone was insufficient to warrant civil court's hearing such constitutional challenges. Civil courts, however, could assert jurisdiction when there was *also* threatened irreparable injury to *property rights* "'which naturally and necessarily follows the

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[20] *Id*. at 215 (quoting *Morrow v. Truckload Fireworks*, 230 S.W.3d at 239-40) (emphasis supplied).

[21] *See, e.g.*, *Morales*, 869 S.W.2d at 944; *Passel v. Fort Worth Indep. Sch. Dist.*, 440 S.W.2d 61, 63 (Tex. 1969); *State v. Logue*, 376 S.W.2d 567, 572 (Tex. 1964); *Austin City Cemetery Ass'n*, 28 S.W. at 530.

threatened enforcement of the law, and *not a loss arising merely from the arrest and prosecution of the party threatened*.'"[22] Irreparable injury thus occurred "[w]here the enforcement of the penal provision would result in the *destruction of the property* before the validity of the provision could be tested in the courts."[23] Thus, in *Austin City Cemetery Association*, the Court found civil jurisdiction when an ordinance banning human burial within the city limits would have destroyed completely the value of plaintiffs' existing cemetery properties. In *Adams*, the Court found jurisdiction when gambling machines barred by the ordinance would have been physically destroyed.

TPGA and the Court of Appeals, however, ignore the fact that *Morales* 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."[24] In a passage directly applicable to this Court's decision here, it explained:

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[22] *Logue*, 376 S.W.2d at 572 (quoting *State ex rel. Munro v. Superior Court*, 35 Wash.2d 217, 212 P.2d 493, 496 (1949)).

[23] *Adams v. Antonio*, 88 S.W.2d 503, 506–07 (Tex. Civ. App.—Waco 1935, writ ref'd).

[24] *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").

> if Passel is misread as the court of appeals appears to have read it—that a court has jurisdiction to decide whether a statute affects 'personal rights' even though no action is anticipated that might affect the exercise of those rights—*the two limitations of unconstitutionality and irreparable harm to protected rights are collapsed into one*. Rather than being required to prove that the statute is both unconstitutional and that its enforcement would result in irreparable injury, a party would only need to show that the statute is unconstitutional and that its hypothetical enforcement will harm a personal right of constitutional significance. *This near tautology means that any statute that is unconstitutional, necessarily infringes on a* Passel*-personal right. Once the court satisfies itself that the statute is unconstitutional, it has satisfied the test which is supposed to be the very limit on its ability to declare such statutes unconstitutional. We disapprove of this interpretation of* Passel.

Morales, 869 S.W.2d at 946 n.13 (emphasis supplied).

TPGA's response thus re-urges the arguments this Court explicitly rejected in *Morales,* and the Court of Appeals' decision, like *Laredo*'s footnote 28, essentially adopts those discarded arguments. Nevertheless, TPGA urges this Court to focus improperly on the merits of its preemption arguments and hypothesize harm to personal rights. The *Morales* Court recognized, however, as does Houston, that embracing such arguments not only eviscerates *Morales,* but turns it into judicial oxymoron: the more severe the hypothetical criminal penalty a law imposes, the more *likely* the *civil* courts are to possess subject-matter jurisdiction over a claim challenging its validity.

Worse, because the Court's decision in *Laredo* and the Court of Appeals' here thus eliminate *Morales*' and its progeny's requirement of irreparable injury

to vested property rights, a high standard, they have removed any remaining real restriction on civil courts' assertion of jurisdiction to decide the validity of criminal laws. The *Laredo*/Court of Appeals standard *is thus no standard* at all and state, county, or local laws imposing criminal fines at the Class C misdemeanor level or above would be subject to review for validity by *civil* courts. In this manner, *Laredo's* footnote and the Court of Appeals' decision improperly but exponentially expand the Texas civil courts' criminal jurisdiction and violate Article V, Section 3(a) of the Texas Constitution, which expressly excludes criminal law matters from civil courts' jurisdiction.

Because *Laredo's* footnote, which purports to reaffirm *Morales*, the Court of Appeals' opinion on this issue, the contrary opinions of sister appellate courts, and *Morales* exception itself *cannot be reconciled*, this Court should grant review, reaffirm *Morales,* in letter and spirit, and restore the bright line separating the respective jurisdictions of the civil and criminal courts.

E. TPGA Concedes *Morales'* Express Rejection of an Adequacy of Remedy Test for Jurisdiction, Which this Court, in *Laredo,* and the Court of Appeals Adopted

In its opening brief, Houston argued that the centerpiece of *Morales* is the principle that adequacy of legal remedies does *not* drive civil jurisdiction. "*Equity jurisdiction does not rise or fall solely on the basis of the adequacy of their remedy at*

law."[25] 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 and the Court of Appeals arguably, but unconstitutionally, substituted the *presumed* absence of an adequate legal remedy as the test for civil jurisdiction and essentially discarded the requirement that a plaintiff must plead and prove threatened irreparable injury to some vested property right for civil courts to construe criminal laws. As discussed above, *see supra* Section I.C, both TPGA and the plaintiff in *Laredo* failed to identify *any* vested property right allegedly injured, yet both courts nevertheless found jurisdiction. TPGA has no response to Houston's argument and, therefore, has conceded it.

TPGA likewise had no response to Houston's argument that, in *Morales*, the dissenters, like the court of appeals here, urged a much broader *Morales* exception based upon inadequacy of legal remedy.[26] The majority rejected that effort. As in its rejection of a self-defeating interpretation of *Passel*, the Court explained that any exception relying upon harm to personal rights for jurisdiction necessarily amounted to no exception at all. It explained that "this

[25] 869 S.W.2d at 947 (emphasis supplied). "*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).

[26] *See Morales*, 869 S.W.2d at 949 (Gammage, J., dissenting).

test implodes upon itself, for any unconstitutional statute will necessarily impact upon personal rights." *Morales*, 869 S.W.2d at 948 (emphasis supplied).

TPGA also concedes Houston's argument that 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 TPGA member would suffer irreparable injury if faced with hypothetical, accumulated 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.*[27] Consequently, all of TPGA's members have lived *for decades* under a propane regulatory regime that imposed such fines and they somehow managed to stay in business.

For the Court of Appeals or this Court simply to assume irreparable injury based only on the amount of potential fines without any consideration of how members had operated under such a regime for years or evidence that any individual businesses would be destroyed by such fines is improper even under

[27] 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.

case law TPGA cites.[28] Moreover, as demonstrated below, to allow an *association* to fall within the *Morales* exception, based only on the presumption that any association members must have suffered some kind of irreparable injury also improperly exceeds the scope of associational standing.

Finally, TPGA also concedes Houston's argument that 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, as well as cases holding that particular civil courts had no jurisdiction to review criminal statutes.[29]

F. TPGA Concedes Houston's Argument that *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.[30] An association has standing to sue on behalf of its members if: (1) its members

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[28] *See supra* note 15; *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.); *see also Robinson v. Parker*, 353 S.W.3d 753, 755-56 (Tex. 2011).

[29] *See, e.g.*, *Kemp Hotel Operating Co. v. City of Wichita Falls*, 170 S.W.2d 217, 219 (Tex. 1943).

[30] *See* CR221; *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 6, n.2 (Tex. 2016).

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*.[31] 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.[32]

Houston argued in its opening brief that, because there are no pleadings or evidence that TPGA members share any common vested property rights, 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 propane regulations. 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 this Court even arguably to have jurisdiction over the claims

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[31] *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.

[32] *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).

asserted.[33] TPGA, an association, thus lacked standing to proceed in the civil courts. TPGA did not respond to this argument either. It has, therefore, conceded it.

G. TPGA Concedes that It Failed to Plead or Prove the *Morales* Exception's Applicability for *Each* Criminal Law Challenged

In *Heckman*, this Court held: "[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."[34] As discussed above, 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.[35] Consequently, when Houston challenged the district court's (sitting as a civil

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[33] *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.

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

[35] *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).

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*.[36] TPGA did not carry that burden. Indeed, *until oral argument*, TPGA contended that *it had no need* to do so. In its brief, TPGA does not contest Houston's argument.

TPGA's efforts, if not waived, remain insufficient to support the Court of Appeals' finding subject-matter jurisdiction. In *The Town of Flower Mound*, 2019 WL 3955197, at *5, 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 …"[37] The trial court and court of appeals should have reached the same conclusion and required that at least one TPGA member show irreparable injury and satisfy *Morales* for each law or provision challenged.

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

[37] *Id.* (citing *Laredo*, 550 S.W.3d at 592 n.28) (emphasis supplied); *see supra* note 15.

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

For a hundred years, the Third Court's sister courts issued opinions in which they expressly rejected the grounds on which the Court decided this case. While Houston focuses on several representative cases and asks this Court to grant review to resolve those conflicts, they are certainly not the only conflicting cases that exist. Indeed, TPGA itself has provided numerous cases that, while ruling that *Morales* had been satisfied, nevertheless reaffirmed and applied *Morales* in exactly the manner Houston advocates. *See supra* note 15. Instead of dealing with the principles embodied in cases spanning a century of jurisprudence, TPGA tries to distinguish the representative cases on their facts in footnotes at page 16. Even if successful (and TPGA was not), TPGA has still not addressed the principles underlying these conflicts. Consequently, this Court still needs to resolve them.

III. THIS COURT SHOULD NOT UNCONSTITUTIONALLY EXPAND CIVIL COURTS' JURISDICTION OR THE STRICT LIMITS OF ITS INTERLOCUTORY APPELLATE JURISDICTION FOR COMMERCIAL, POLITICAL, OR JUDICIAL EXPEDIENCY, EVEN THOUGH PLEAS FOR EXPEDIENCY ARE ALL TPGA OFFERS

A. There is No Generalized "Commercial" or Preemption Exception to *Morales* or Subject-Matter Jurisdiction and this Court Should Not Create One

Reduced to its essence, TPGA argues that this Court should just skip over all that bothersome constitutional and procedural stuff and decide to the merits of commercial disputes. TPGA, however, has not provided this Court with any authority that would permit it or any other civil court to do so. By contrast, Justice Willett warned that "hearing this case, and perhaps future cases like it, may force us to handle appeals from civil cases with criminal penalties…"[38]

Worse, TPGA has not even provided a good reason to do so. Instead, it preaches expediency. This Court, however, has repeatedly held that "the wisdom or expediency of a law is for the Legislature to determine, not this Court."[39] Consequently, even if this Court agreed with TPGA, this Court is not legally empowered to allow expediency to trump the Texas Constitution.

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[38] *In re Reece*, 341 S.W.3d 360, 400 (Tex. 2011) (Willett. J. dissenting).

[39] *See, e.g.*, *Enron Corp. v. Spring Indep. Sch. Dist.*, 922 S.W.2d 931, 934 (Tex. 1996) (citing *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex.1968)).

In particular, TPGA has provided no reason why preemption claims are entitled to preferential, lesser jurisdictional treatment when preemption claims are subject to a *higher* standard of proof than other claims are. There is, for example, a well-recognized presumption *against* federal preemption of state law.[40] Similarly, under Tex. Gov't Code § 311.021, statutes are presumed to be constitutional.[41] Consequently, there is an elevated standard of proof for state preemption of local law.[42] The unsupported notion that litigants who assert preemption claims should be given a break on standing or subject-matter jurisdiction, therefore, runs contrary to traditional preemption jurisprudence.

What TPGA really demands, however, is preferential treatment *for TPGA*. It apparently seeks to be able to file one lawsuit as a trade group, without establishing any real injury, and wipe out every propane regulation in the State without having to bother even identifying the regulations thus annihilated. Moreover, it desperately and improperly seeks to have this Court decide the merits of this case even though the interlocutory appeal before this Court is

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[40] *See, e.g.*, *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 489 (Tex. 2010).

[41] *See EXLP Leasing, LLC v. Galveston Cent. Appraisal Dist.*, 554 S.W.3d 572 (Tex. 2018) (courts always start with presumption that legislation is constitutional; *In re Nestle USA, Inc.*, 387 S.W.3d 610, 623 (Tex. 2012).

[42] *See, e.g.*, *Dall. Merch.'s & Concessionaire's Ass'n*, 852 S.W.2d at 491, 494 (Tex. 1993) (cited in *BCCA Appeal Grp.*, 496 S.W.3d at 7–8).

strictly limited to jurisdiction alone and TPGA failed to seek a permissive interlocutory appeal of its claims. Consequently, TPGA seeks effective resolution on the merits, even by comments in dicta, without Houston's having an opportunity to try or brief the merits of its claims. While one-stop shopping may be the ideal for TPGA, however, it would violate every principle of fairness, due process, and proper judicial conduct here.

B. This Court Has No Need to Decide the Merits of TPGA's Preemption Arguments to Decide the Jurisdictional Questions Houston's Interlocutory Jurisdictional Appeal Raises

As discussed above, TPGA has likely advocated a merits decision both for expediency and because the validity of challenged laws is the most important consideration in the arguments, explicitly rejected in *Morales,* that TPGA has nevertheless recycled here. *See supra* Section I.D. As demonstrated above, however, Houston's petition can be decided easily without any discussion of the merits [or lack thereof] of TPGA's preemption claims or the granting of TPGA's petition for review. Consequently, any merits decision would constitute an

improper advisory opinion, even if rendered in *dicta*,[43] and would thus violate Texas' separation of powers doctrine.[44]

C. If Texas Civil Courts Have Unconstitutionally Asserted Criminal Jurisdiction in the Past, This Court Should End Such "Jurisdiction Creep" Immediately, Not Allow Constitutional Violations to Continue

TPGA argues that this Court would undermine its decisions in *Laredo* and *BCCA Appeal Group* and other intermediate appellate cases were it to reaffirm *Morales* in letter and in spirit. *See* TPGA Response Brief at 18-21. All of the intermediate appellate cases TPGA cites at page 19, n.8, however, were decided under either Houston's interpretation of *Morales* or the narrow, traditional interpretations of the civil courts' limited criminal jurisdiction that Houston advocates here. In that case-by-case analysis, one the Texas courts have utilized for a century, courts, based on jurisdictional evidence, sometimes find jurisdiction to construe criminal laws under *Morales* and sometimes do not. It is *TPGA*, however, that argues for "blanket" rules for preemption and jurisdiction

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[43] *Hudson v. United States*, 522 U.S. 93, 112 (1997) (Stevens, J., concurring) (stating that an advisory opinion flowing from the Court's "desire to reshape the law" lacks legitimate basis and has "the precedential value of pure dictum"); Alan J. Meese, *Reinventing Bakke*, 1 Green Bag 2d 381, 382 (1998) (stating that dicta is "the functional equivalent of an advisory opinion").

[44] *Tex. Ass'n of Bus.*, 852 S.W.2d at 444 (quoting *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1969)); *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 644 (Tex. 1933).

and a strong break from *Morales'* traditional and constitutionally appropriate standards.

Second, any suggestion that this Court will somehow endanger its prior decisions by ruling in Houston's favor is illusory. To the extent this Court or any other civil court has intruded upon the Court of Criminal Appeals' jurisdiction, such decisions have always been subject to diminution by that Court's contrary decisions because it is not bound by civil courts' interpretations of criminal law. That is the reason for *avoiding* jurisdiction creep, not a justification for continuing the practice. Houston does agree, however, that this Court should grant review to resolve the irreconcilable tension between *Laredo*, *Morales*, and the Court of Appeals' opinion.

Finally, the notion that Houston has or will attach criminal penalties to violations of its codes and ordinances solely to deprive this Court of jurisdiction to construe them is laughable. Houston, like every city in the country, attaches criminal penalties *to ensure that its regulations are obeyed* and to avoid creating an entirely separate and expensive administrative compliance regime.

TPGA, however, has clearly attempted to manipulate jurisdiction here by filing suit in civil court, when no member has ever been cited or prosecuted under any challenged regulation or code. As Justice Willett warned, "an astute attorney may determine that his client stands to receive a more favorable ruling

at one court rather than the other, and arrange jurisdiction-manipulative arguments accordingly."[45] This Court should not permit such manipulation to succeed.

CONCLUSION AND PRAYER

For these reasons, Houston respectfully requests that this Court grant Houston's petition for review, reverse the Court of Appeals' decision on the question presented alone, affirm it in all other respects, and grant to Houston such other relief as to which this Court finds Houston entitled.

[45] *In re Reece*, 341 S.W.3d at 400 (Willett. J. dissenting).

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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 7,475 words.

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I hereby certify that on June 5, 2020, a true and correct copy of the foregoing has been served on counsel below via e-service.

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