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 IN SUPPORT OF ITS PETITION FOR REVIEW

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RESTATEMENT OF THE CASE

The City of Houston ("Houston") objects to Texas Propane Gas Association ("TPGA") purported Statement of the Case. First, it contains argument and specifically, merits argument. Second, it omits relevant portions of Tex. Nat. Res. Code Ann. § 113.054 (West 2019), which restrict the preemptive scope of that statute and which permit cities to avoid even such limited preemption by applying for waivers from the Texas Railroad Commission. It also misstates and omits relevant portions of the court of appeals' decision. Houston, therefore, asks that this Court utilize the Statement of the Case Houston submitted in its Petition for Review, to which TPGA did not object.

RESTATEMENT OF THE ISSUE PRESENTED

Houston objects to TPGA's attempt to inject its own merits arguments into Houston's interlocutory jurisdictional appeal by purporting to restate the issues presented. As with its statement of the case, TPGA includes argument, misstates Texas law concerning the standard for determining when a civil court may construe a criminal statute, and injects preemption issues that have no relevance at all to this Court's decision either to review this case or its merits decision in this interlocutory jurisdictional appeal. Houston, therefore, asks that the Court utilize the Issue Presented that Houston submitted in its Petition. It states as follows:

> *In* State v. Morales, *869 S.W.2d 941, 945 (Tex. 1994), 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'"*

[1] *City of Laredo v. Laredo Merch.'s Ass'n*, 550 S.W.3d 586, 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)).

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* court's assertion of subject-matter jurisdiction over construction of *criminal* laws here, based on *dicta* in *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 courts of appeals' decisions, and/or violates the Texas Constitution by usurping the jurisdiction of the State's criminal courts?

[2] *See City of Houston v. Tex. Propane Gas Ass'n*, No. 03-18-00596-CV, 2019 WL 3227530, at *8 (Tex. App.—Austin July 18, 2019, pet. filed) (mem. op.) ("TPGA Opin.") (citing *Morales*, 869 S.W.2d at 945).

SUMMARY OF ARGUMENT

This Court should grant review to 1) clarify and reaffirm that *Morales* and Texas law still require pleading and proof of threatened irreparable injury to a vested property right for civil courts to construe criminal laws *and* that neither adequacy of remedy, personal rights, nor the unsupported assumptions regarding potential penalties used in *Laredo* and, following *Laredo*, by the court of appeals here, will suffice to meet *Morales*' stringent requirements; and 2) resolve conflicts the court of appeals' decision on this issue created with sister appellate decisions.

ARGUMENT

I. TPGA Does not Dispute that Review is Essential to Resolve Direct Conflicts Between Sister Courts of Appeals' Decisions on the Foundational Jurisdiction Issue Presented

Numerous Texas appellate courts have decided cases, including the representative ones Houston cites, that specifically reject the grounds on which the court of appeals affirmed the civil trial court's assertion of jurisdiction to construe Houston's penal propane laws. Houston's Petition for Review ("Houston's Petition") at 16-18. In its Response, TPGA has not disputed the existence of such conflicts and thus concedes that review is necessary to resolve them.

TPGA does not cite *Destructors, Inc. v. City of Forest Hill*, No. 02-08-0440-CV, 2010 WL 1946875, at *4 (Tex. App.—Fort Worth May 13, 2010, no pet.) (mem. op.), in which the court reiterated that one has no vested right to operate a business free of local regulation. It then reaffirmed *Morales*' holding 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.* (citing *Morales*, 869 S.W.2d at 946). Yet that is precisely what the court of appeals did here. TPGA does not dispute that *Destructors*' and *ACE*'s holdings thus directly conflict with the court of appeals' holding on the issue presented. *See 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).

TPGA mentions *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.), in another context but does not address its conflict with the court of appeals' decision. In *Flower Mound*, the court refused to apply the *Morales* exception 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). TPGA does not dispute that this case directly conflicts with

the court of appeals' decision here because the court below did not require that TPGA plead or prove that any fines that had been imposed here (*none had*) "effectively precluded small local businesses from testing the ban's constitutionality in defense to a criminal prosecution."[3] TPGA never pleaded irreparable injury to or identified any vested property right. Instead, it claimed it did not need to do so. CR365. This Court should, therefore, grant review to resolve these irreconcilable conflicts.

II. REVIEW IS *STILL* ESSENTIAL BECAUSE THE COURT OF APPEALS' DECISION, EXPRESSLY FOLLOWING *LAREDO*, CANNOT BE RECONCILED WITH *MORALES'* AND ITS PROGENY'S CORE PRINCIPLES

A. In *Morales*, this Court Expressly Eschewed Adequacy of Legal Remedy as Grounds for Civil Jurisdiction Over Criminal Statutes

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*."[4] Otherwise, a person's remedy is to "'continue his activities until he is arrested

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

[4] *Id.* (emphasis supplied); *Passel v. Fort Worth Indep. Sch. Dist.*, 440 S.W.2d 61, 63 (Tex. 1969) ("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"); *Crouch v. Craik*, 369 S.W.2d 311, 315 (Tex. 1963); *Unger v. State,* 629 S.W.2d 811, 812 (Tex. App.—Fort Worth 1982, pet. ref'd).

and then procure his release by showing that the law is void.'" *Id*. (quoting *Passel*, 440 S.W.2d at 63).

The *Morales* Court made clear that vested property rights and personal rights are *not* interchangeable.[5] Indeed, it repeatedly held that adequacy of legal remedies did *not* drive civil jurisdiction. "*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. The *Laredo* Court did not question these principles. It reaffirmed them.

B. Without Review, the Conflict Between *Morales* and Its Progeny and Their Interpretation by the Court of Appeals, Expressly Following *Laredo*, Cannot Be Reconciled

Despite clear language in *Morales* and its progeny eschewing the use of adequacy of legal remedies as the basis for civil jurisdiction over criminal statutes, and this Court's reaffirmation of the *Morales* exception's requirements in *Laredo*, the court of appeals, relying upon *Laredo*, nevertheless substituted the

[5] *Morales*, 869 S.W.2d at 945, 946 (emphasis supplied); *City of New Braunfels v. Stop the Ordinances Please*, 520 S.W.3d 208, 221 (Tex. App.—Austin 2017, pet. denied) ("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").

presumed absence of an adequate legal remedy as the test for civil jurisdiction and effectively discarded the requirement that plaintiffs plead and prove irreparable injury to some vested property right in order for civil courts to construe criminal laws.[6] As testament, neither TPGA nor the *Laredo* plaintiff identified *any* vested property right allegedly injured. There is none here.

Texas courts have consistently held 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.[7] That is, however, exactly what TPGA demands: "what TPGA objects to is the fact that Houston purports to regulate the LPG industry at all." *See* Appellee's Brief at 34. It is undisputed that no member has ever been cited under any challenged regulation. Worse, unlike *Flower Mound* or cases TPGA cites in its Response, at 11, n.8, TPGA did not plead or attempt to prove any threatened injury to vested property rights in order to avail itself of *Morales'* exception. Instead, TPGA *expressly waived reliance upon Morales.* CR365. TPGA's attempt to claim some injury to vested property rights

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[6] *See Laredo*, 550 S.W.3d at 592 n.28 ("a substantial per violation fine that effectively preclude[d] small local businesses from testing the bans' constitutionality in defense to a criminal prosecution") (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*).

[7] *See* Houston's Petition at 8, n. 18 & case cited therein. Even when a business is severely impacted by local law, vested property rights are not implicated. *See id*. at 8, n. 19 & case cited therein.

in its response thus comes too late and, equally important, cannot be asserted by an association like TPGA since it requires individual proof of injury. *See infra* Section III.

Nevertheless, the court of appeals, following *Laredo*, simply *presumed* that individual TPGA members were threatened *by every law challenged* because their legal remedy—challenging local propane laws in defense to a criminal prosecution—was inadequate because of potential fines that could be imposed.[8] This interpretation turns *Morales* on its head, conflicts with sister court decisions, and eliminates any real restriction on civil courts' jurisdiction to interpret criminal statutes. Consequently, this interpretation, following *Laredo*, cannot be reconciled with *Morales'* and its progenies' core tenets. This Court should grant review to resolve this question.

C. Rather than Responding to Houston's Rationale for Review, TPGA Misrepresents the Standard for Determining Civil Courts' Jurisdiction, the Law They Seek to Enforce, and Improperly Attempts to Inject Merits Issues in this Jurisdictional Appeal

Because it failed to pursue discretionary review of merits issues involved on summary judgment below, TPGA has improperly tried to raise them here. Worse, in doing so, it misrepresents governing law on civil court jurisdiction and

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

the scope of § 113.054. While neither effort is relevant to this Court's decision whether to grant review, TPGA should not be permitted to do either.

1. *Heckman* Does Not Govern Civil Court Jurisdiction Over Criminal Laws, *Morales* Does

TPGA again improperly cites *Heckman* for the notion that this Court must look to the "essence" of the case to determine whether civil courts have jurisdiction to construe criminal statutes. *See* TPGA Response at 6-12; Appellee's Brief at 31. In *Heckman v. Williamson Cty.*, 369 S.W.3d 137 (Tex. 2012), the Court addressed *appellate* jurisdiction over procedural and jurisdictional issues. It did not, as the trial court here did, construe for preemption purposes hundreds of regulations and laws that impose criminal penalties. Indeed, *Heckman* cites *Morales* for the notion that civil courts lack jurisdiction to construe admittedly penal statutes. *Id*. at 149 & n. 40. This Court explained this crucial distinction:

> These constitutional provisions—or, more specifically, the justiciability doctrines of standing, ripeness, and mootness that derive from them—are the subject of this appeal, '*not any provision in the Code of Criminal Procedure nor any other criminal statute*.' *Nor must we 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.'

Id. at 147. Thus, *Heckman* actually *supports* Houston's bifurcation arguments. In fact, the only relevance that TPGA's discussion of *Heckman* has to this Court's decision to grant review is to supply yet another alleged conflict between this Court's past decisions that warrants review here to resolve it.

2. The Court of Criminal Appeals is the Proper Court to Determine Whether Laws Imposing Criminal Penalties Are Preempted

At page 12 of its response, TPGA decries that civil courts would lack jurisdiction to determine whether criminal ordinances were preempted if Houston is correct here. As demonstrated by *Unger*, 629 S.W.2d at 812–13, the criminal courts and the Court of Criminal Appeals are not only capable but are constitutionally-ordained to determine whether local laws are preempted by Railroad Commission regulations in the context of prosecutions under challenged ordinances. Thus, TPGA's remedy is a constitutional amendment eliminating bifurcation, not a demand that this Court subvert the Texas Constitution by hollowing-out long-standing restrictions on civil courts' interpreting criminal laws.

That this Court or courts of appeals have engaged in improper jurisdiction-creep in the past is no reason for this Court to allow this constitutional predation to continue. Indeed, it provides more reason for this Court to grant review to

end such unconstitutional conduct. A clear pronouncement from this Court after granting review is, therefore, essential to bring Texas jurisprudence into compliance with the Texas Constitution.

III. TPGA Does Not Dispute that Review is Essential to Reaffirm that Plaintiffs Must Plead and Prove the Applicability of the *Morales* Exception for Each Criminal Law Challenged

While misciting *Heckman* for *appellate* jurisdiction issues, TPGA fails to address Houston's argument and *Heckman*'s and its progeny's primary holding that TPGA must prove the court's civil jurisdiction for *each statute it challenges as preempted*.[9] TPGA did not carry that burden and, *until oral argument in the court of appeals*, contended that *it had no need* to do so. CR365.

Although TPGA seeks a broad declaration holding invalid and unenforceable all of Houston's propane regulations, CR189-90, 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. It has never identified each specific provisions of Houston's propane laws its challenges, let alone met the *Morales* standards for each one.

[9] *Id.* 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).

TPGA's anemic efforts are insufficient to support the court of appeals' finding subject-matter jurisdiction. *See Flower Mound*, 2019 WL 3955197, at *5, The *Flower Mound* 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 record here is bare on this issue.

Worse, TPGA's standing here, if any, is allegedly associational. *See* CR221. 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 vested property rights, *the need for individualized proof exceeds the scope of associational standing and renders it inappropriate*.[10] Consequently, TPGA's individual members must be parties to this action for this Court even arguably to have jurisdiction under *Morales* over each claims asserted. The court of appeals should have held that TPGA's claims should have been dismissed for want of jurisdiction.

[10] *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).

CONCLUSION AND PRAYER

For the reasons stated, this Court should grant Houston's petition for review and 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 2,341 words.

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, a true and correct copy of the foregoing has been served on counsel below via e-service.

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