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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

BRIEF ON THE MERITS OF RESPONDENT/CROSS-PETITIONER, THE CITY OF HOUSTON

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

Other Authorities

RESTATEMENT 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 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.

Trial court proceedings: After numerous successful special exceptions aimed at forcing TPGA to identify exactly which propane regulations it claims are preempted, 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, alternatively, 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 September 10, 2018. CR582 (Exh. A to the City's Petition for Review). The same day, Houston filed a 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."). (Exh. B to the City's Brief on the Merits). 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, based on this Court's *dicta* in *City of Laredo v. Laredo Merch.'s Ass'n*, 550 S.W.3d 586, 592 n.28 (Tex. 2018) ("Laredo") . From this portion of the Court's decision alone, Houston filed a timely petition for review. TPGA also filed one the same day.

RESTATEMENT OF JURISDICTION

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

This Court lacks jurisdiction over the questions posed by TPGA because the court of appeals correctly applied long-standing Texas standing principles, consistently reaffirmed by the U.S. Supreme Court and this Court, and applicable to both individuals and associations. The court of appeals, therefore, did not make any error of law of such importance to the jurisprudence of this State as to require correction. Indeed, TPGA admits that it seeks review only to address the court of appeals' alleged *misapplication of settled law*.[1]

TPGA has also not identified any conflicts for this Court to resolve between sister courts of appeals because the arguments it advocates are so radical, irresponsible, and legally insupportable that they have never arisen in any other American case and are unlikely ever to be raised again. In truth, TPGA has just attempted to insert its *merits* arguments into a jurisdictional appeal. This Court should not be fooled: jurisdiction over the issues TPGA attempts to raise here is unavailable under Tex. Gov't Code § 22.001(a).

[1] *See* TPGA's Petition for Review at 7; *Sun Mut. Ins. Co. v. Roberts, Willis & Taylor Co.*, 90 Tex. 78, 79, 37 S.W. 311, 312 (1896) ("it is not sufficient to give jurisdiction that a court of civil appeals may have misapplied a principle of law …").

RESPONDENT'S RESTATED ISSUES PRESENTED

Houston is dissatisfied with TPGA's Issues Presented, *see* Tex. R. App. P. 55.3(c)(1), and would ask the Court to substitute the following:

> Whether, for the first time in American jurisprudence and in contravention of the U.S. and Texas Constitutions, this Court should create an exemption to bedrock, claim-by-claim standing requirements for plaintiffs who simply choose to mischaracterize their claims, which challenge hundreds of regulations, as a single claim, grounded in an idiosyncratic preemption theory no court has ever articulated, let alone adopted?

RESTATEMENT OF RELEVANT FACTS

Houston is dissatisfied with TPGA's purported Statement of Facts, which contains legal arguments and highly-misleading, and often false, statements. *See* Tex. R. App. P. 55.3(b). In fact, Houston outlined these defects in its response to TPGA's Petition for Review at 1-3. Houston adopts and reasserts those objections and corrections here.

Both TPGA's claim for declaratory relief and the City's motion for summary judgment on subject matter jurisdiction/plea to the jurisdiction, the sole subject of this appeal, deal with questions of law. Consequently, this Court needs only a few facts in order to decide this case. Those are set forth here and in the text where relevant. In order to provide the Court with sufficient context into which to place this case, however, Houston asks this Court to substitute the following:

The Text of Chapter 113

In interpreting state statutes that purport to preempt local law, a court often need not go beyond the statute's own language to determine whether the

Legislature intended that it preempt at least some municipal law. "Nonetheless, [it must] 'identify the domain expressly pre-empted' by that language."[2]

The full text of Tex. Nat. Res. Code Ann. § 113.054 (West 2015) provides:

> The *rules and standards promulgated and adopted by the commission*[3] *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.

Id. (emphasis supplied).

By its own terms, the provision cannot be considered an express preemption clause forbidding generally the local regulation of propane. While actual express preemption clauses forbid certain kinds of conflicting regulation by inferior governmental entities or establish exclusive jurisdiction,[4] Section 113.054 does not. Its first sentence does little more than restate and codify existing constitutional law that forbids local laws inconsistent with general state laws. *Cf.* Tex. Const. art. XI, § 5. Its second sentence, however, expressly

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[2] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992)).

[3] References to the "Commission" or "RRC" refer to the Texas Railroad Commission. *See* Tex. Nat. Res. Code Ann. § 113.002(1) (West 2015).

[4] *See, e.g.*, 21 U.S.C.A. § 360k (West 2016).

provides for local/state *co-regulation*. Consequently, any notion of field preemption, *see infra* note 8, or TPGA's DIY preemption theory, "blanket" preemption, *has no application to Section 113.054*.

Section 113.054 also states that "rules and standards promulgated and adopted by the commission" are what preempts local law. Under Texas law, such limiting language does not express an intent to preempt all local propane regulation.[5] Instead, it merely sets up a procedure for resolving direct conflicts between Commission rules and standards and local law. *Id.*

Moreover, when Section 113.054 speaks of "rules and standards promulgated and adopted by the commission under Section 113.051,"[6] such language speaks to final rules and standards actually "adopted and promulgated" by the Commission under Chapter 113.[7] Thus, to find an ordinance preempted, under the common understanding of these terms, one would ordinarily have to compare each of the Commission's existing rules to the allegedly preempted ordinances to determine if there was a direct conflict

[5] *See City of Santa Fe v. Young*, 949 S.W.2d 559, 561 (Tex. App.—Houston [14th Dist.] 1997, no writ).

[6] The "rules and standards" language is repeated in the second sentence when the statute discusses what political subdivisions may do.

[7] Curiously, the language does not include Railroad Commission regulations or orders.

with all or part of the challenged ordinance. In this regard, one can think of preemption as constitutional mahjong: there must be a precise match.

The second sentence of § 113.054 confirms that the statute does not expressly preempt the whole field of propane regulation.[8] To the contrary, the statute permits not just municipal regulation outside of the circumscribed area, *but more restrictive* local regulation addressing the propane industry.

Subsection 113.054 also applies only to an ordinance, order, or rule "relating to any aspect or phase of the liquefied petroleum gas *industry*." *Id.* (emphasis supplied). Despite TPGA's efforts to deflect, *Chapter 113 does not define that term.* The Texas Administrative Code, however, does define the term in the context of natural resources and conservation.[9] It provides: "industries, defined as corporations, partnerships, sole proprietorships, or other legal entities that are formed for the purpose of making a profit and which *produce or manufacture* goods

[8] "Field preemption may occur when "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Hyundai Motor Co. v. Alvarado*, 974 S.W.2d 1, 9 (Tex. 1998) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). It may also occur when "the Act of Congress ... touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 61 (1941)).

[9] In interpreting a statute, a court may consider "common law or former statutory provisions, including laws on the same or similar subjects." Tex. Gov't Code Ann. § 311.023(4) (West 2013).

or services and *which are not small businesses*."[10] Strictly construing[11] the term "liquefied petroleum gas industry" then would mean that § 113.054 would apply only to ordinances relating to "any aspect or phase" of the manufacture and/or production of LPG and would not apply to small businesses.

Consequently, the Legislature's use of the term LPG "industry" in § 113.054 narrows considerably its application.[12] This is particularly true since the Legislature could have used the much broader term LPG "activities" it used elsewhere in Section 113 but chose not to use in § 113.054. Defined narrowly, as it must be for preemption purpose, the word means that the subsection applies only to ordinances that regulate any aspect or phase of the production or manufacture of LPG. All other ordinances, however, including those that address small businesses and even some other "LPG activities," would not be encompassed by § 113.054. Such an interpretation preserves consistency for

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[10] *See* 31 Tex. Admin. Code § 357.11(d)(4) (emphasis supplied). Subsection (7) separately defines "small businesses," "as corporations, partnerships, sole proprietorships, or other legal entities that are formed for the purpose of making a profit, are independently owned and operated, and have fewer than 100 employees or less than $1 million in gross annual receipts." *Id*. at § 357.11(7). These designations are applied to "interest categories" for purposes of insuring diverse membership in the Regional Water Planning Group. Whether this definition is too far afield from the language and purposes of §§ 113.051 and 113.054 to allow it to govern those statutes is, therefore, a critical determination.

[11] *See Moore v. Brunswick Bowling & Billiards Corp.*, 889 S.W.2d 246, 250 (Tex. 1994).

[12] TPGA's attempt to define the term *simply by repeating it* and unsupported assertion that the term has had "a comprehensive meaning in Texas for decades" necessarily fails. *See* TPGA's Opening Brief on the Merits ("TPGA Brief"), at 2. Despite TPGA's posturing, it has still never provided a definition of the term. Houston, however, always has.

critical, industry-wide regulation but allows cities and town to regulate small businesses, private homes, and festivals as they see fit.

Section 113 is subject to further limitations. Under § 113.003 of the Natural Resources Code, "none of the provisions of this chapter apply to" a whole categories of LPG activities specified in that provision. For example, § 113.003(a)(1) states that the provisions of Chapter 113, including §§ 113.051 and 113.054, do not apply to "the production, refining, or manufacture of LPG," which are subject to federal regulation. Consequently, when, in § 113.051, the legislature gave the Commission authority to "promulgate and adopt rules or standards or both relating to any and all aspects or phases of the LPG industry …" it expressly limited that authority by making it subject to the exclusions set forth in § 113.003(a)(1).

There are other important exclusions under § 113.003. Under it, Chapter 113 does not apply to "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," *id.* at § 113.003(a)(3), "deliveries of LPG to another person at a place of production, refining, or manufacturing," *id.* at § 113.003(a)(4), or a laundry list of federal regulatory areas including underground storage, § 113.003(a)(5). At the other end, it does not apply to "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." *Id.* at § 113.003(a)(6). It also exempts from application truck loading racks. *See id*. at § 113.003(a)(7) and (b).

Similarly, the Commission is prohibited from adopting rules restricting advertising or competitive bidding.[13] Moreover, the Commission's rules do not apply to containers used in accordance with U.S. Department of Transportation regulations.[14] Thus, while the Commission "shall administer and enforce the laws of this state and the rules and standards of the commission relating to liquefied petroleum gas," *id*. at § 113.011, and "*except as provided in Section 113.003 of this code*," "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,"[15] the scope of the Commission's actual authority to regulate the LPG industry may actually be relatively narrow, if still important. Indeed, the "laws of this state" that address LPG in Chapter 113 consist largely of Commission licensing and education.[16]

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[13] Tex. Nat. Res. Code Ann. § 113.0511, *et seq*. (West 2015).

[14] *Id*. at § 113.053.

[15] *Id.* at § 113.051 (emphasis supplied).

[16] A quick look at Exhibit 5 in TPGA's Appendix also confirms this more limited role and demonstrates that the LPG Safety Rules are not "comprehensive." Indeed, they reference

Because the language of § 113.051 is expressly limited by § 113.003, it renders Chapter 113 inapplicable in the areas listed. Indeed, § 113.051 is made expressly subject to § 113.003. Although the language in §§ 113.051 and 113.054 is nearly identical, the preemptive sweep of § 113.054 is not expressly limited by § 113.003. To the extent that the Commission's rules and standards purport to preempt and supersede local regulations that address areas expressly excluded from its own authority to regulate by § 113.003, § 113.054 simply does not apply to bar the City's ordinances. Moreover, if a court were to adopt the restrictive definition of "industry" in the Administrative Code, it would both constrain the Commission's authority to regulate under § 113.051 and dramatically restrict § 113.054's ability to stifle local regulation. Thus, even under a relatively more expansive interpretation of § 113.054, the statute would likely still not apply to ordinances addressing end users, private sales, or small businesses generally because none is arguably encompassed by the strictly-construed term "liquefied petroleum gas industry."

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such peripheral items as reporting forms, licenses and fees, military fees, customer safety notification, and training. *Id.* While there is little doubt that the RRC has enough work to keep its relatively few employees busy enough to prevent them from putting into place a protocol for cities finally to exercise their rights under Section 113.054, *nine years after its passage*, in light of the statutory exceptions to the RRC's authority outlined above, its authority is also far from comprehensive.

Consequently, even under TPGA's proffered interpretation, § 113.054 purports to preempt a "field" that the RRC may largely have no power to regulate and to which its provisions do not even apply. That field of authority may also be subject to preemption by directly conflicting *federal* LPG regulations which obviously do not preempt the field either.[17]

It is well-settled that all provisions of Chapter 113 must be read together and in harmony to ascertain the Legislature's intent; therefore, Subsection 113.054 would be subject to all of the exclusions listed above.[18] Consequently, because § 113.054 does not even apply to much local regulation when § 113.003's exceptions are considered, it cannot be the case that all local propane regulations and ordinances are preempted.

The City's Interactions with the Railroad Commission

Under § 113.054, "a political subdivision may petition the commission's executive director for permission to promulgate more restrictive rules and standards only if the political subdivisions can prove that the more restrictive rules and standards enhance public safety." TPGA has admitted that no formal

[17] *See generally Bath Petroleum Storage, Inc. v. Sovas*, 309 F. Supp. 2d 357 (N.D.N.Y. 2004), *appeal dism'd*, 155 Fed. App'x 23 (2d Cir. 2005).

[18] *See In re Nestle USA, Inc.*, 387 S.W.3d 610, 620-21 (Tex. 2012); *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593, 600 n.9 (Tex. 1975).

Commission petition process yet exists and that the Commission or its Executive Director may never adopt formal procedures under § 113.054. In the absence of a formal petition process under § 113.054, TPGA has argued that "that does not stop Houston from seeking permission from the Commission's Executive Director through an ***informal petition process***.

Even TPGA concedes that Houston has twice sought from the Commission permission and guidance to continue to enforce its allegedly conflicting local propane ordinances and regulations, in particular, Houston's Fire Code provisions and safety regulations that pertain to LPG/propane use.[19] As the Affidavit of Yushan Chang makes clear that, to date, the Commission has acknowledged Houston's need for such regulation, has not sought additional information or documents from Houston, and has never suggested or taken any step to stop Houston's enforcement of any propane regulation or ordinance. In addition, Asst. Fire Marshal Valenti spoke with the Commission as recently as 2018 and Houston has been allowed to continue enforcement of its own local regulations, not less restrictive than LPG rules. CR343-44. Houston, therefore, contends that its existing propane rules, regulations, and ordinances meet all of the requirements for continued enforcement under the second sentence of

[19] *See* Affidavit of Yushan Chang. CR341-42.

§ 113.054, and Houston does not need to do anything more to continue to enforce its propane laws consistent with that statute. *See id.* As Houston has satisfied the only procedures available under § 113.054, has been asked by the Commission to do nothing further, and has continued to enforce its existing propane regulations with the Commission's full knowledge and cooperation, Subsection 113.054's second sentence is satisfied.[20]

The Attorney General's Opinion

Although this Court is not bound to adopt the opinion,[21] Texas Attorney General Paxton ("AG") apparently received a request from a state legislator asking him to opine whether certain Houston propane ordinances were preempted by Tex. Nat. Res. Code § 113.054. On May 10, 2016, after Houston had offered the AG a reasonable interpretation of Section 113.054, the AG

[20] TPGA seeks a declaration that "Section 113.054 preempts and supersedes all ordinances, orders, or rules…absent permission from the Commission's executive director…" *See* CR376-77 (Plaintiff's Motion for Summary Judgment, at 14-15). Consequently, TPGA recognizes that the statute has two interrelated parts which must *both* be available before any ordinance or regulation can be overturned.

[21] As one court explained:

> A specific ruling by the court on the interpretation and application of the statute would supersede an attorney general's opinion, but it is not the role of the court to interpret or prohibit an official from relying on that opinion until the court itself issues an interpretation and ruling contrary to the opinion. By the very nature of a judicial ruling, that ruling would take precedence over the opinion.

Weaver v. Head, 984 S.W.2d 744, 747 (Tex. App.—Texarkana 1999, no pet.).

issued an opinion which suffered from numerous omissions.[22] He concluded that § 113.054 precludes and renders void all municipal propane regulations, both existing and future, that are not more restrictive than state regulations and that have not been pre-approved by the Commission. CR33-34 (AG Opin. at 2-3). To that end, he would apply the statute retroactively. *Id.* at 3-4. And this is true even if the Commission has promulgated no regulation or rule on the same subject. *Id*. at 3.

In analyzing Section 113.054, the AG apparently did not read or interpret it in the context of the whole of Chapter 113. There is no mention of the limitations set forth in § 113.003 in the AG's opinion and he does not appear to have considered them at all in his analysis. Consequently, the AG assumes that § 113.054 applies in all circumstances. As set forth above, under Section 113's express language, it does not.

Second, the AG broadly interprets language that long-standing Texas preemption jurisprudence requires to be *narrowly* construed. First, he improperly focuses on the language "any aspect or phase" in § 113.054 but does not analyze or consider what is meant by the term "industry." Indeed, he seems to read that term out of § 113.054, like TPGA here, and makes no effort to define it. He

[22] *See* State of Texas, Office of the Attorney General, Opin. No. KP-0086 (May 10, 2016) ["AG Opin."]. *See* CR32-36.

apparently does not consider whether the term imposes any limits on the statute's applicability. Instead, the AG essentially treats the provisions as addressing LPG "activities" generally [even though the Legislature chose not to use that term] then engrafts language from § 113.051 which, subject to the exceptions in § 113.003, allows the Commission to "promulgate and adopt rules or standards or both relating to any aspects or phases of the LPG industry that will protect or tend to protect the health, welfare, and safety of the general public." In addition, he interprets such language broadly to permit the RRC to essentially do anything it views as furthering safety and public health in the LPG field and to preempt the cities from regulating in virtually all areas. As a defense asserted in light of a presumption against preemption, this loose and broad interpretation of § 113.054 was improper.

Third, the AG would apply § 113.054 retrospectively to extinguish existing ordinances even though the Commission itself would not.[23] As discussed above, representatives of the City of Houston approached the Executive Director of the Commission who did not object or require further communications and documentation to allow Houston to continue to enforce its existing ordinances.[24] An agency's own interpretation of a statute is ordinarily

[23] *See* CR34-35 (AG Opin. at 3-4).

[24] *See* Affidavit of Yushan Chang. CR341-42.

entitled to deference.[25] The AG gives it none. Indeed, TPGA would have this Court hold all of Houston's propane ordinances and regulations preempted in direct defiance of the RRC's prior communications with Houston.

Finally, as discussed above, representatives of the RRC themselves did not, upon meeting with City attorneys in 2012, require that the City have its existing ordinances further blessed. Nevertheless, in writing his opinion, the AG ignored the RRC's own actions with regard to the statute's effect and opined that the statute applied and rendered void all existing propane-related Houston ordinances as of its effective date. In so doing, however, he ignored the legal effect of the Commission's 2012 action.

The Court of Appeals' Decision

In the portion of its opinion that is relevant to TPGA's Petition for Review, *see City of Houston v. Tex. Propane Gas Ass'n*, No. 03-18-00596-CV, 2019 WL 3227530, at *5 (Tex. App.—Austin July 18, 2019, pet. filed), the court of appeals held as follows:

> 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

[25] An agency's own interpretation of a statute it administers is generally entitled to some deference. *See In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 490-91 (Tex. 2001) (orig. proceeding) (citations omitted). The AG gave it none. And this is true even though the RRC is the ostensible beneficiary of the preemption imposed by § 113.054 and the insurer of the consistent standards.

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 TPGA'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.'[26] 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.

Id. (emphasis supplied).

[26] *Good Shepherd Med. Ctr., Inc. v. State*, 306 S.W.3d 825, 833 (Tex. App.—Austin 2010, no pet.) (citing *Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871 (Tex. App.—Austin 2010, pet. denied) (concluding that association members had not established injury distinct from that of general public)).

SUMMARY OF ARGUMENT

An eminent eighteenth-century psychiatrist once observed that "style is when they're running you out of town and you make it look like you're leading the parade." TPGA unquestionably has style—but little else. In a desperate, but futile, attempt to salvage its omnibus preemption claim, TPGA asserts a brazenly-unconstitutional, "one-claim" standing theory that no court has ever adopted. To attempt to support it, TPGA offers a DIY preemption scheme that does not exist in American jurisprudence. Style, however, should not prevail over substance. Because there is no substance to TPGA's idiosyncratic theories and because, in asserting them, TPGA irresponsibly disregards the multiple, long-standing, fundamental, constitutional and jurisprudential principles it would violate, this Court should decline review of TPGA's petition or, if review is granted, affirm the decision of the court of appeals on the issues TPGA attempts to raise.

To demonstrate why the court of appeals' decision on TPGA's lack of standing was correct, this Court should remember first that TPGA does not raise any new or unresolved *associational* standing issues here. Instead, the court of appeals rejected TPGA's standing because not even one of its members would have standing to bring the claims it asserts on their behalf. Even TPGA agrees and U.S. Supreme Court and this Court's jurisprudence confirm that standing

to challenge the validity of a public act requires pleading and proof of particularized injury causally connected and fairly traceable to the challenged act. However, the U.S. Supreme Court and this Court have repeatedly reaffirmed that standing is not dispensed in gross, but must be pleaded and established for each provision challenged and each remedy sought. Other appellate courts, faced with situations and standing theories analogous to TPGA's theory here, have rejected them. By contrast, TPGA has not provided counsel or this Court with any authority to support its standing theory.

Unfortunately, adoption of TPGA's standing theory would also be disastrous: it would violate the U.S. and Texas constitutions, contravene U.S. Supreme Court and this Court's precedent, and long-standing preemption principles. Adoption of TPGA's standing theory would violate the U.S. and Texas Constitutions' ban on courts' advisory opinions, require that the Texas courts abandon well-established express preemption analysis established by the U.S. Supreme Court and this Court, and improperly reverse the presumption against preemption. The good news is that, contrary to TPGA's representations, analysis of its standing theory *does not* require that any court decide the merits of TPGA's claims at the pleadings stage, and the court of appeals *did not* do so here.

Yet even if TPGA's standing theory were constitutional and did not contravene this Court's and the Supreme Court's jurisprudence, TPGA still

would not have adequately pleaded or proved standing to challenge hundreds of local propane regulations. TPGA's purported jurisdictional evidence to support its associational standing, now consisting of one alleged incident, does not show any particularized injury causally connected to and fairly traceable to any Houston regulation or redressable by this Court. Consequently, TPGA still cannot show that one of its members could bring its lawsuit himself.

Finally, this Court need never reach the issues TPGA tries to raise because the jurisdictional issues Houston raises in its petition for review should result in dismissal of TPGA's claims, no matter how they are pleaded.

For the reasons stated, Houston respectfully requests that this Court deny TPGA's Petition for Review, grant Houston's Petition for Review, and grant to Houston such other relief as to which this Court finds Houston entitled.

ARGUMENT AND AUTHORITIES

I. STANDARDS GOVERNING REVIEW OF THE DENIAL OF PLEAS TO THE JURISDICTION

This Court reviews both denial of a plea to the jurisdiction and a motion for summary judgment *de novo*.[27] Rule 166a of the Texas Rules of Civil Procedure authorizes trial courts to grant summary judgment to eliminate

[27] *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004) (plea); *Laverie v. Wetherbe*, 517 S.W.3d 748, 752 (Tex. 2017) (summary judgment).

unmeritorious claims.[28] The purpose of a summary judgment is to provide the court a method of summarily terminating a case when it clearly appears that only a question of law is involved and that there is no genuine issue of fact.[29] Lack of subject-matter jurisdiction is properly raised in a summary judgment motion.[30] A plea to the jurisdiction seeks dismissal for want of jurisdiction.[31]

To prevail on a traditional motion for summary judgment, a movant must prove that no genuine issue of material fact issue exists and that the movant is, therefore, entitled to judgment as a matter of law.[32] The movant bears the burden of proof in a traditional motion for summary judgment, and all doubts about the existence of a genuine issue of material fact are resolved against the movant.[33] In reviewing the motion, the court takes as true all evidence favorable to the non-movant, and its indulges every reasonable inference, resolving any doubts in the non-movant's favor.[34] A court will grant a traditional summary judgment

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[28] Tex. R. Civ. P. 166a; *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n.5 (Tex. 1979).

[29] *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 296-97 (Tex. 2011) (per curiam).

[30] *State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009); *Thomas v. Long*, 207 S.W.3d 334, 339 (Tex. 2006); *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

[31] *City of Waco v. Kirwan*, 298 S.W.3d 618, 622 (Tex. 2009); *Miranda*, 133 S.W.3d at 226-27.

[32] *See Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 774 (Tex. 2017) (citing *SeaBright Ins. Co. v. Lopez*, 465 S.W.3d 637, 641 (Tex. 2015)); Tex. R. Civ. P. 166a(c).

[33] *See Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).

[34] *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

only if the record establishes that the movant has conclusively proved its defense as a matter of law or if the movant has negated at least one essential element of the plaintiff's cause of action.[35]

Where, as here, a dispute concerning standing does not implicate the merits of the parties' claims, a court evaluates whether the evidence in the record supports the trial court's findings.[36] When, however, the dispute over standing involves the merits of the case, a reviewing court must decide whether the evidence and pleadings show that an issue of material fact exists as related to the trial court's findings.[37]

II. THE COURT OF APPEALS CORRECTLY HELD THAT TPGA WAS REQUIRED TO ESTABLISH STANDING TO CHALLENGE EACH ALLEGEDLY-PREEMPTED REGULATION BUT FAILED TO DO SO

A. TPGA's Unconstitutional Standing Theory Does Not Raise Any New or Unresolved Associational Standing Issues

The reason the court of appeals found that TPGA lacked standing to challenge all of Houston's propane laws *en masse,* without even listing which laws the courts were supposed to hold preempted, has nothing to do with

[35] *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997).

[36] *See BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002).

[37] *See Miranda*, 133 S.W.3d at 226.

associational standing. Instead, it goes to fundamental standing principles applicable to *all individuals, classes, and associations*.

In *Hunt v. Washington State Apple Advertising Commission*, the U.S. Supreme Court held that an association has standing to sue on behalf of its members when (a) its members *would otherwise have standing to sue in their own right*; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[38] Consequently, *an association must also meet the same basic standing requirements its individual members would have to meet*. As one court explained:

> it generally suffices for an association to demonstrate 'at least one of [its] members would have standing to sue on his own.' But let us not forget: 'standing is not dispensed in gross.' … An association must follow these same black-letter rules. In *Summers v. Earth Island Institute*, the Supreme Court affirmed 'plaintiff-organizations [must] make specific allegations establishing that at least one identified member had suffered or would suffer harm.' *Any other 'novel approach,' the court wrote, 'would make a mockery of our prior cases.'* We believe this principle applies equally with regard to each standing element.[39]

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[38] 432 U.S. 333, 343 (1977) (citing *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988); *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 282 (1986)) (emphasis supplied). This Court adopted the *Hunt* standard in *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993).

[39] *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 255 (6th Cir. 2018) (citations omitted) (emphasis supplied); *see Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009).

As demonstrated below, *see infra* Section III, the court of appeals faulted TPGA for failing to meet basic standing requirements applicable to all plaintiffs, that is, TPGA failed to assert or demonstrate that at least one of its members had been injured by each regulation challenged and that preemption of hundreds of unspecified propane regulations would redress these alleged injuries. *Associational standing and the Hunt test, therefore, have nothing to do with why TPGA's claims should have been dismissed or with TPGA's petition for review.* Consequently, this case affords this Court no meaningful opportunity to revisit any issue of associational standing.

B. All Parties Agree and U.S. Supreme Court and this Court's Jurisprudence Confirms that Standing to Challenge the Validity of a Public Act Requires Pleading and Proof of Particularized Injury Causally Connected and Fairly Traceable to the Challenged Act

Jurisdictional standing requirements derive from the U.S. and Texas Constitutions' separation of powers among the branches of government, which denies the judiciary authority to decide issues in the abstract, and from Texas' Open Courts provision, which provides court access only to a "person for an injury done him."[40] That "injury," however, cannot be mere resentment or

[40] *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018) (citing Tex. Const. art. I, § 13; *Tex. Ass'n of Bus.*, 852 S.W.2d at 443–44): *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008) (same quotation); Tex. Const. art. I, § 13 ("all courts shall be open,

inconvenience at having to be subject to the challenged law at all. As Justice Scalia explained for the Court in *Lewis v. Casey*, 518 U.S. 343, 350 (1996):

> [t]he distinction between the two roles [of the legislative and judicial branches] would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but *merely the status of being subject to a governmental institution that was not organized or managed properly*. If—to take another example from prison life—a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care … simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons.

Consequently, it is not sufficient to establish standing to challenge Houston's propane laws for TPGA merely to claim that its members are "adversely affected" because they are subject to *any* local propane regulation, even though no member has ever been cited or prosecuted under any Houston regulation. *See* CR224. This is particularly true here because Chapter 61 and Subsection 113.054 specifically authorize not just state and local government *co-regulation* of propane but also local propane regulation that is *more restrictive* than state laws are when cities apply for it.

Instead, to have standing to challenge a governmental act, a plaintiff must have suffered *particularized injury causally connected and fairly traceable* to the

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and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law").

challenged act and *that can be rectified by the courts*. The "irreducible constitutional minimum" of standing thus consists of three elements:

> 1. the plaintiff must have suffered an *'injury in fact'*—an invasion of a 'legally protected' [or cognizable] interest which is (a) *concrete and particularized* and (b) '*actual or imminent, not conjectural or hypothetical*;'[41]
>
> 2. 'there must be a *causal connection between the injury and the conduct complained* of'—the injury must be *'fairly traceable' to the challenged action of the defendant* and not the independent action of a third party not before the court; [42] and
>
> 3. it must be likely, and not merely speculative, that the *injury will be redressed by a favorable decision*.[43]

By the time the court of appeals ruled here, TPGA had, at long last, admitted that at least one of its members must have suffered such a particularized injury in order for the association to claim standing to challenge any Houston propane law. *See* Brief of Appellee at 24-25. Nevertheless, as demonstrated below, TPGA never actually pleaded or proved such injury,

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[41] *Bland*, 34 S.W.3d at 555-56 (emphasis supplied); *Bacon v. Tex. Historical Comm'n*, 411 S.W.3d 161, 175 (Tex. App.—Austin 2013, no pet.) (citing *Bland*); *see Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001) ("our decisions have always required a plaintiff to allege some injury distinct from that sustained by the public at large"); *Tri Cty. Citizens Rights Org. v. Johnson*, 498 S.W.2d 227, 228-29 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).

[42] *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Heckman v. Williamson County*, 369 S.W.3d 137, 154 (Tex. 2012); *Williams v. Lara*, 52 S.W.3d 171, 178-79 (Tex. 2001); *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984).

[43] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (emphasis supplied); *see Brown*, 53 S.W.3d at 305; *Save Our Springs*, 304 S.W.3d at 878.

causal connection, or redressability for any member. In particular, TPGA *never attempted to plead or prove* any causal connection between any alleged injury and the myriad unspecified propane regulations it purports to challenge as preempted. Consequently, the trial court and court of appeals should have dismissed its claims.

C. The U.S. Supreme Court Has Repeatedly Reaffirmed that Standing is Not Dispensed in Gross, But Must Be Pleaded and Established for Each Act Challenged and Each Remedy Sought

Under well-settled standing principles, "[a] plaintiff must demonstrate that the court has jurisdiction over … *each of his claims*…"[44] As this Court recognized in *Heckman*, the U.S. Supreme Court has long held that such "claim-by-claim analysis is necessary to ensure that a particular plaintiff has standing to bring each of his particular claims."[45] Claim-by-claim analysis is also essential because

> a court that decides a claim over which it lacks jurisdiction violates the constitutional limitations on its authority, even if the claim is denied.... [T]he denial of a claim on the merits is not an alternative to dismissal for want of jurisdiction merely because the ultimate result is the same.[46]

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[44] *Heckman*, 369 S.W.3d at 152–53.

[45] *Id*. at 153 (citing *Lewis*, 518 U.S. at 358 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982)).

[46] *Id.* at 154 (citing *Inman*, 252 S.W.3d at 307) (emphasis supplied).

Consequently, when, as here, a defendant challenges a trial court's subject-matter jurisdiction over a plaintiff's claim, the burden shifts to that plaintiff to allege and prove facts affirmatively demonstrating "[s]tanding for *each claim he seeks to press and for each form of relief that is sought*."[47]

TPGA, however, has simply denied that such a duty even exists in a preemption case. Instead, TPGA and the dissent argue that TPGA has asserted only *one claim* here even though it challenges as preempted hundreds of individuals laws and portions of laws it has never bothered to list *and* the relief it seeks would void each of these unspecified laws. Worse, TPGA asserts that if it can establish standing to challenge any *one* Houston propane regulation, it has necessarily established standing to challenge *all of them*.[48] *No court in America has ever embraced such a standing theory for any kind of claim, not even in a preemption case.* This Court should not be the first.

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[47] *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (emphasis supplied); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.*, 528 U.S. 167, 185 (2000); *Miranda*, 133 S.W.3d at 228; *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).

[48] This notion is grounded completely in a court's taking as true and *deciding on the merits, at the pleadings stage*, that the state statute that allegedly provides for the preemption of Houston's propane regulations somehow wipes out the ability of any city in Texas to regulate propane at all. As demonstrated below, that conclusion is legally insupportable and dead wrong.

By contrast, Houston asks this Court to reaffirm long-standing constitutional, standing, and preemption principles and U.S. Supreme Court's and this Court's jurisprudence and hold that TPGA had to establish standing to challenge each propane law or provision it believes is preempted and to request relief that would render void each challenged law on that ground.

Fortunately for this Court, the U.S. Supreme Court has already resolved this issue definitively and in Houston's favor. Utilizing those cases, as this Court has held Texas courts should,[49] this Court should dismiss TPGA's claims for want of jurisdiction.

In a long line of U.S. Supreme Court cases starting with *Lewis*,[50] this Court reaffirmed that

> [*S]tanding is not dispensed in gross*. If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. *That is of course not the law.* As we have said, '[n]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.'[51]

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[49] *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

[50] 518 U.S. at 358, n.6; *see Flowers v. Mississippi*, 139 S. Ct. 2228, 2270 (2019); *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018); *Laroe Estates*, 137 S. Ct. at 1650; *Davis*, 554 U.S. at 734 (quoting *Lewis*); *Cuno*, 547 U.S. at 353; *Laidlaw*, 528 U.S. at 185.

[51] *Id.* (citing *Blum*, 457 U.S. at 999); *Heckman*, 369 S.W.3d at 153 (quoting *Lewis*, 518 U.S. at 358 n.6). Other federal courts—including the Fifth Circuit—have come to the same

In *Lewis*, the Court also held that this basic standing determination is separate from the issue of who asserts it.[52] Thus, in *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017), the Court reaffirmed that

> [w]hile, in cases involving multiple parties, courts do not require each of them to demonstrate standing for each claim pressed or form of relief sought, *courts check to make sure that every claim pressed or form of relief sought is supported by at least one litigant with constitutional standing*.[53] This principle applies regardless of how a party joins a lawsuit—"[f]or all relief sought, there must be a litigant with standing..."

Id. Consequently, under Supreme Court authority, in a case involving an association such as TPGA, *Hunt* would require that at least one TPGA member have constitutional standing for "every claim pressed or form of relief sought…"

The Supreme Court once again reaffirmed the *Lewis* principle in *Cuno*, 547 U.S. at 351-53, an analogous case in which city and state taxpayers brought a state-court lawsuit challenging local property tax abatements and state investment tax credits granted to Jeep, an automobile manufacturer, to induce

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conclusion. *See In re Gee*, 941 F.3d 153, 160 (5th Cir. 2019) ("nor could the plaintiffs identify one injury and then bootstrap it to complain about others"); *James v. City of Dallas*, 254 F.3d 551, 563-69 (5th Cir. 2001) (noting that "standing ... must be addressed on a claim-by-claim basis," concluding that the class representatives had standing to bring some claims but not others, and therefore dismissing only some claims); *see, e.g.*, *Pagan v. Calderon*, 448 F.3d 16, 27–30 (1st Cir. 2006) (analyzing standing "plaintiff by plaintiff and claim by claim").

[52] *Id.* ("the standing determination is quite separate from certification of the class") (citing *Blum*, 457 U.S. 997, n.11).

[53] *Id.* (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–106 n.7 (1983)).

it to remain in Toledo, Ohio. Like TPGA, the *Cuno* taxpayers asserted a novel standing theory: analogizing to a federal court's supplemental jurisdiction, they alleged that standing as to one claim should suffice for all claims arising from the same "nucleus of operative facts." They, therefore, asked the courts to allow them to challenge the expenditure of *state* tax dollars based upon their standing as *municipal* taxpayers. The Court refused to extend Article III so far. It explained:

> We see no reason to read the language of *Gibbs* so broadly, particularly since *our standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press*. *We have insisted, for instance, that 'a plaintiff must demonstrate standing separately for each form of relief sought*.' But if standing were commutative, as plaintiffs claim, this insistence would make little sense when all claims for relief derive from a "common nucleus of operative fact," as they certainly appear to have in both *Laidlaw*, and *Lyons*.

Id. at 352 (citations omitted). The Court then explained the dire constitutional implications of adopting such weakened standing principles:

> [Allowing] standing as to one claim to suffice for all claims arising from the same 'nucleus of operative fact' would have remarkable implications. The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language, no less than standing does. Yet if *Gibbs* 'common nucleus' formulation announced a new definition of 'case' or 'controversy' for all Article III purposes, a federal court would be free to entertain moot or unripe claims, or claims presenting a political question, if they 'derived from' the same 'operative fact[s]' as another federal claim suffering from none of these defects. Plaintiffs' reading of *Gibbs*, therefore, *would amount to a significant revision of our precedent interpreting Article III*. With federal courts thus deciding issues they would not otherwise be authorized to decide, *the 'tripartite allocation*

> *of power' that Article III is designed to maintain, would quickly erode; our emphasis on the standing requirement's role in maintaining this separation would be rendered hollow rhetoric.* As we have explained [in *Lewis*], *'[t]he actual-injury requirement would hardly serve the purpose ... of preventing courts from undertaking tasks assigned to the political branches[,] if once a plaintiff demonstrated harm from one particular inadequacy in government administration, the court were authorized to remedy all inadequacies in that administration*.'
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> [P]laintiffs failed to establish Article III injury with respect to their state taxes, and even if they did do so with respect to their municipal taxes, that injury does not entitle them to seek a remedy as to the state taxes. As the Court summed up the point in *Lewis*, 'standing is not dispensed in gross.'

Id. at 351–53 (citations omitted).

TPGA essentially makes the same argument here.[54] It asserts that so long as any regulation or ordinance is conceivably preempted by Section 113.054, TPGA would have standing to seek a declaration that all such regulations are void and unenforceable based upon one of its member's alleged injury under a single challenged provision. Like the *Cuno* taxpayers, TPGA tried to establish standing to challenge Houston's *Fire* Code by showing alleged injury under the *Building* and *Plumbing* Codes, which they do not challenge here. *See*, *e.g.*, CR145 & 146. In *Cuno*, the Court found that such "commutative" standing theories would violate Article III and require its wholesale rewriting. *This* Court is no

[54] While *Cuno* implicated some federalism concerns, its rationale is equally applicable to this state court action.

more at liberty to rewrite Article III or any provision of the Texas Constitution than the Supreme Court was in *Cuno*.

The Supreme Court faced a similarly "novel" standing theory in *Summers*, 555 U.S. at 498, a case in which multiple environmental organizations tried to circumvent the *Hunt* requirements by claiming that, *by statistical probability*, one of their 700,000 members must have been injured by the challenged environmental regulations. The Court found such a showing inadequate. It explained: "This novel approach to the law of organizational standing would make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm."[55]

Long-standing U.S. Supreme Court jurisprudence then requires that TPGA have pleaded and proved particularized injury causally connected and fairly traceable to each provision of Houston's Fire Code it challenges here. Because TPGA made no effort to satisfy these requirements, the Court of Appeals correctly held that, without significant repleading, TPGA's claims must be dismissed.

[55] *Id.; see Waskul*, 900 F.3d at 255 (quoting *Summers*).

D. Relying on U.S. Supreme Court Authority, *This Court* Has Also Consistently and Recently Reaffirmed that Standing Must Be Pleaded and Established for Each Act Challenged and Each Remedy Sought

This Court's standing jurisprudence is fully consistent with *Lewis* and its progeny. In *Heckman*, 369 S.W.3d 137, this Court, first reaffirmed the three *Lujan* requirements for standing, discussed above. *See supra* note 43. Then, relying on *Lewis*, it reaffirmed that, "whether considering the standing of one plaintiff or many, the court must analyze the standing of each individual plaintiff to bring each individual claim he or she alleges when that issue is before the court … meaning *the court must assess standing plaintiff by plaintiff, claim by claim*." *Id.* at 153 (emphasis supplied). Finally, it reaffirmed that the posture of the lawsuit or identity of the plaintiff is irrelevant for standing purposes. This Court explained:

> We see no reason why the rule should be different whether one plaintiff or many file suit, or whether that suit is brought as an individual or class action… [A plaintiff] must still show that he has an individual, justiciable interest in the case; the named plaintiff cannot 'borrow' standing from the class, nor does he otherwise get a 'pass' on standing. This is so because the motivating concern behind the standing inquiry is exactly the same regardless of the form of the suit: 'A court that decides a claim over which it lacks jurisdiction violates the constitutional limitations on its authority…'

Id. at 153-54.

Barely *one month ago*, in *In re Abbott*, No. 20-0291, 2020 WL 1943226, at *2–3 (Tex. Apr. 23, 2020), this Court reaffirmed *Heckman*'s holding that "each

party must establish that he has standing to bring each of the claims he himself alleges—meaning the court must assess standing plaintiff by plaintiff, claim by claim." *Id.* (quoting *Heckman*, 369 S.W.3d at 153). The Court observed that "the Texas standing requirements parallel the federal test for Article III standing, which provides that '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'"[56]

This Court has also made clear that the standing principles apply irrespective of the context in which a claim is brought.

> *We see no reason why the rule should be different whether one plaintiff or many file suit*, or whether that suit is brought as an individual or class action ... He must still show that he has an individual, justiciable interest in the case; the named plaintiff cannot 'borrow' standing from the class, nor does he otherwise get a 'pass' on standing.[57] *This is so because the motivating concern behind the standing inquiry is exactly the same regardless of the form of the suit: 'A court that decides a claim over which it lacks jurisdiction violates the constitutional limitations on its authority, even if the claim is denied*.... [T]he denial of a claim on the merits is not an alternative to dismissal for want of jurisdiction merely because the ultimate result is the same.'[58]

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[56] *See Heckman*, 369 S.W.3d at 154; *Lujan*, 504 U.S. at 560–61) (quoting *Allen*, 468 U.S. at 751).

[57] *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 710 (Tex. 2001).

[58] *Inman*, 252 S.W.3d at 307 (emphasis supplied); see *Heckman*, 369 S.W.3d at 153–54 (emphasis supplied).

Consequently, this rule would apply whether standing is individual or associational. TPGA does get a "pass" because that marketing association has brought claims here.

TPGA has produced no authority to support the notion that it should receive a pass on standing here. By contrast, it would violate the U.S. and Texas Constitutions, the U.S. Supreme Court's and this Court's jurisprudence, and that of many other courts in Texas for this Court to do so.

E. Other Appellate Courts, Faced with Situations and Standing Theories Analogous to TPGA's Theory Here, Have Rejected Them

Although no litigant has been as brazen and aggressive as TPGA has been in asserting standing to challenge a vast array of laws based on one alleged injury suffered as a result of certain regulations' mere existence [but not their enforcement], a few courts have encountered situations and standing theories analogous to the theory TPGA asserts here. In all of these cases, the courts have rejected such theories as inconsistent with constitutional standing requirements. Those decisions are highly instructive and should be persuasive here.

In *In re Gee*, 941 F.3d 153, the Fifth Circuit recently faced a simultaneous challenge to twenty-six laws that regulated abortion, many containing multiple

challenged provisions, brought by a group of abortion providers. Relying upon *Lewis*, the Court held first:

> In this case, Plaintiffs have proffered ample allegations to support their contention that the State of Louisiana is not regulating abortion properly. But Article III demands much more. *See* Lewis, 518 U.S. at 350. *To ensure that standing is not dispensed in gross, the district court must analyze Plaintiffs' standing to challenge each provision of law at issue*. It did not do so. That's especially problematic, because at least four categories of Plaintiffs' legal challenges appear to fall short of Article III's demands.

Id. at 161–62 (emphasis supplied). It then explained:

> It is irrelevant for purposes of standing that separate legal requirements are grouped together in a single section of the code. After all, a single section of a statutory code can be the product of many bills passed over many years, and a single section of an administrative code can be the result of several rulemakings. *Plaintiffs must demonstrate all the elements of standing for each provision they seek to challenge*. And they must do so at the same level of granularity we use in the following pages.

Id. at 162, n.4 (emphasis supplied). In rejecting the plaintiffs' standing to assert such a sweeping, generalized challenge, the Court explained that, as here, plaintiffs in *Gee* challenged definitional sections that did not do anything else and could not possibly cause them harm, *id*. at 162, other provisions that were incapable of injuring the plaintiffs, *id*. at 162-63, and still others that theoretically could apply to plaintiffs, but that plaintiffs had not alleged had or would hurt them. *Id*. at 163-64.

The *Gee* court was clearly aware that these requirements made the plaintiffs' job more difficult. Nevertheless, it explained: "we recognize that analyzing standing at this level of granularity can be tedious in a sweeping challenge like this one. *But it's what Article III requires*." *Id.* at 165 (emphasis supplied).

In this case, TPGA challenges Houston's Fire Codes generally without satisfying any of the constitutional concerns the *Gee* court outlined or explaining why each provision of such laws has or will cause at least one of its members particularized injury. TPGA's challenge likewise encompasses definitions, *see, e.g.*, § 202 of the Fire Code, provisions that will never affect its members, *id*. at §§ 6112.1, 6103.2.1.7, and, most important, provisions that parallel and are *not* more restrictive than those issued by the State of Texas.[59] Under the Supreme Court's authority, TPGA had to show that at least one of its members had suffered or would suffer a particularized injury resulting from enforcement of these provisions too. TPGA still refuses to do so.

[59] *Id.* at § 6104.1. Because Section 113.054 specifically permits parallel co-regulation by the State of Texas and cities, TPGA had to plead and prove that being subject to a single standard, imposed at both the state and local levels, would harm it when being subject to the same standard, imposed only by the State would not.

Moreover, *Gee* also stands for the principle that simply requiring compliance with Article III's requirement does not pose any *unreasonable* obstacle to TPGA's standing. It is just "what Article III requires." *Id.* at 165.

Fednav, Ltd. v. Chester, 547 F.3d 607 (6th Cir. 2008), is even more on point. In it, a coalition of maritime shipping companies and associations, port terminal and dock operators, and a port association filed suit against Michigan officials, challenging the constitutionality of Michigan's Ballast Water Statute, and various regulations promulgated under it. As TPGA does here, the *Fednav* association plaintiffs alleged that they had standing to challenge the statute and associated regulations because their members were "subject to and affected" by the statute's "regulatory scheme." *Id.* at 615. The panel rejected that standing theory.

The Court began its opinion by explaining that "our determination of standing is both plaintiff- and provision-specific… that a plaintiff has standing to challenge one of a statute's provisions does not mean the plaintiff has standing to challenge all of them; "[s]tanding is not dispensed in gross." *Id.* at 614 (quoting *Lewis*). It then explained why that standard had not been met:

> [i]t is true that each Plaintiff[] alleges that it is 'subject to, and affected by, [the Ballast Water Statute's] regulatory scheme as described above.' For several reasons, however, that allegation does not amount to an allegation of injury in fact caused by the treatment requirement. First, the Statute's 'regulatory scheme' includes not

> only the treatment requirement, but the permit requirement as well. And the *Shipping Companies and Associations cannot avoid the rule set forth in Cuno—namely, that a plaintiff cannot 'by virtue of his standing ' to challenge one government action, challenge other governmental actions that did not injure him'—by referring to regulatory actions in gross*. Second, Plaintiffs' allegation is only that they are affected by the Statute's 'regulatory scheme as described above'—and what is 'described above,' by our reading, pertains primarily if not entirely to the permit requirement. Third, *a mere allegation that a plaintiff is 'affected' by governmental action does not amount to an allegation of injury in fact*. *There are plenty of effects that do not rise to the level of legal harm; and a plaintiff must therefore tell us what the effect is in order to allege an injury in fact*.[60]

Like the *Fednav* associations, TPGA asserts that various regulations promulgated under a general code violate the [Texas] Constitution and should be declared void. Like those associations, TPGA asserts only that its members are "adversely affected" by the challenged regulations. CR9. Also like those associations, its actual evidence, if any, of any particularized harm pertains only to a limited kind of regulation, here, certain permitting requirements. Consequently, like those associations, TPGA should be held to have made an insufficient showing to satisfy Article III's and the Texas Constitution's standing requirements as to any other challenged regulation.[61]

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[60] *Id.* at 617–18 (quoting *Cuno*, 547 U.S. at 353 n.5) (emphasis supplied); *see Lewis*, 518 U.S. at 358, *Sierra Club v. Morton*, 405 U.S. 727, 735 n.8 (1972) (allegation that plaintiff's "interests would be vitally affected by the acts hereinafter described" did not confer standing absent an allegation as to how they were so affected).

[61] *Fednav* also stands for the proposition that associations do not get a "pass" when it comes to satisfying Article III standing requirements.

III. ADOPTION OF TPGA'S STANDING THEORY WOULD REQUIRE THAT THIS COURT VIOLATE THE U.S. AND TEXAS CONSTITUTIONS, CONTRAVENE U.S. SUPREME COURT AND THIS COURT'S PRECEDENT, AND LONG-STANDING PREEMPTION PRINCIPLES

A. Adoption of TPGA's Standing Theory Would Violate the Constitutional Ban on Courts' Advisory Opinions

Since 1793, the Supreme Court has consistently reaffirmed the principle that "the lines of separation drawn by the Constitution between the three departments of the government prohibit the federal courts from issuing such advisory opinions."[62] That prohibition remains "the oldest and most consistent thread in the federal law of justiciability."[63]

The prohibition against advisory opinions derives from Article III, Section 2 of the U.S. Constitution, which limits the authority of the federal courts to adjudicate "cases" or "controversies." The U.S. Supreme Court has recognized that the case-or-controversy limitation is crucial to maintaining the "'tripartite allocation of power'" set forth in the Constitution.[64] It has made clear that

[62] *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 678 (2016), *as revised* (Feb. 9, 2016) (quoting 3 Correspondence and Public Papers of John Jay 486–489 (H. Johnston ed. 1890–1893)).

[63] *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

[64] *Cuno*, 547 U.S. at 341 (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982) (quoting *Flast*, 392 U.S. at 95).

"'under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws.'"[65]

Under the Texas Constitution, "standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury."[66] Indeed, the open courts provision states:

> All courts shall be open, and every person for *an injury done him*, *in his lands, goods, person or reputation*, shall have remedy by due course of law.

Tex. Const. art. I, § 13 (emphasis added).

Texas has also adopted an interpretation of its own separation of powers doctrine that is similar to the one adopted under federal law.[67] Under this doctrine, governmental authority vested in one department of government cannot be exercised by another department unless expressly permitted by the Constitution.[68] Thus, this Court has construed Texas' separation of powers article "[t]o prohibit courts from issuing advisory opinions because that is the

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[65] *Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973) (quoting *Younger v. Harris*, 401 U.S. 37, 52 (1971)).

[66] *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

[67] *See* Tex. Const. art. II, § 1. "Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

[68] *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

function of the executive rather than the judicial department."[69] This Court further observed that the distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties.[70] Indeed, this Court recently reaffirmed that

> A plaintiff has standing to seek prospective relief only if he pleads facts establishing an injury that is 'concrete and particularized, actual or imminent, not hypothetical.' *Heckman v. Williamson County*, 369 S.W.3d 137, 155 (Tex. 2012) (internal quotations omitted). '*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*.' *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (citation omitted).[71]

Texas courts, like federal courts, have no jurisdiction to render such opinions.[72]

Nevertheless, TPGA seeks a broad declaration holding invalid and unenforceable as preempted "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*

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[69] *Id.* at 444 (quoting *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1969)) (emphasis supplied); *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 644 (Tex. 1933).

[70] *Tex. Ass'n of Bus.*, 852 S.W.2d at 444 (citing *Ala. State Fed'n of Labor v. McAdory,* 325 U.S. 450, 461 (1945); *Burch*, 442 S.W.2d at 333; *Cal. Prods., Inc. v. Puretex Lemon Juice, Inc.*, 160 Tex. 586, 591, 334 S.W.2d 780, 783 (1960)).

[71] *Garcia v. City of Willis*, No. 17-0713, 2019 WL 1967140, at *3 (Tex. May 3, 2019); *See Allen*, 468 U.S. at 751.

[72] *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.

to otherwise regulate the LP-Gas Industry, together with Chapter 61 of the Houston Amendments of the 2013 International Fire Code itself …" CR189-90. As an initial matter, it would be virtually impossible for any court to craft an enforceable order based upon so vague a description of the relief sought. TPGA apparently does not care. Instead, it openly admits that "TPGA seeks a declaratory judgment that *all* of Houston's LPG regulations are preempted by the RRC's LPG rules" under Section 113.054. TPGA Brief at 1 (emphasis in original). And this is true even though TPGA's current pleadings would not support such limitless relief.

More important here, TPGA has not pleaded or proved that any of its members has suffered any particularized injury that is causally connected or fairly traceable to the regulations it challenges, let alone one that can be redressed by the relief sought. Worse, several of the examples TPGA uses in attempting to establish standing here to challenge Houston's *Fire* Code involve laws *TPGA does not even challenge in its pleadings*, such as the Plumbing and Building codes. *See* CR145 & 146. Instead, TPGA now claims standing based upon a single tangential encounter one members allegedly had regarding unspecified provisions the Fire Code (that did not result in any enforcement). *See* TPGA Brief at 24-25.

The declaration TPGA seeks would violate at least *Lujan*'s second and third requirements for standing. *See supra* Section II.B. There can be no causal connection between an injury inflicted under one regulation and another regulation in the same or a different code book. Likewise, declaring one regulation preempted does nothing to redress an alleged injury inflicted under a second regulation.

Consequently, under well-settled standing principles and long-standing, governing jurisprudence regarding advisory opinions, what TPGA seeks is an unconstitutional advisory opinion that Section 113.054 generally preempts all of Houston's propane regulations because TPGA has neither pleaded nor proved that it has standing to challenge anything but a very few, if any, regulations that TPGA claims may have harmed one of its members.

B. TPGA's Standing Theory Would Require that the Texas Courts Abandon Well-Established Express Preemption Analysis Required by the U.S. Supreme Court and this Court and Improperly Reverse the Presumption Against Preemption

The lynchpin of TPGA's the dissent's standing (and preemption) arguments here and is that Tex. Nat. Res. Code § 113.054 is allegedly an all-encompassing express preemption clause. For a host of reasons, including the statute's plain language, it clearly is not.

Fortunately, this Court need not label the statute or determine Section 113.054's nature in order to reject TPGA's petition for review. Instead, this Court need only remember three things: first, even if Section 113.054 *were* an express preemption clause, this Court and the U.S. Supreme Court have repeatedly held that courts must engage in traditional express preemption analysis before they may determine whether a particular local law is preempted; second, this Court and the U.S. Supreme Court continue to apply a presumption *against* preemption;[73] third, for this Court to rule in TPGA's favor, TPGA's standing theory requires that this Court defy U.S. Supreme Court and its own recent preemption decisions and violate the principles set forth as nos. 1 and 2.

Although the presence of an alleged express preemption provision "means that [courts] need not go beyond [the provision's] language to determine whether Congress intended the [statute] to pre-empt *at least some state law*, [the courts] must nonetheless identify the domain expressly pre-empted by that language," that is, *the scope of preemption*.[74] Here, that would mean that the courts would have to define what the term "LPG industry" meant and take into

[73] *MCI Sales & Serv., Inc. v. Hinton*, 329 S.W.3d 475, 489 (Tex. 2010) (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009), which reaffirmed the presumption against preemption).

[74] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996). *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992); *Rice*, 331 U.S. at 233-34.

account the statutory exclusions set forth in Section 113. TPGA would do none of that.

Once the scope of preemption has been determined, the courts would then assess the extent to which any particular local law falls within the scope of the statute's preemption, if at all.[75] Even when the preemptive language is clear, this analysis of the particular language and operation of the local law that is allegedly preempted can be protracted and complicated.[76] Consequently, preemption opinions, like this Court's decisions in *Laredo* and *BCCA Appeal Group*, and those in cases decided in recent years by the U.S. Supreme Court, tend to involve granular analyses of the respective statutes. Moreover, because of the granularity required for traditional preemption analysis, even of allegedly express preemption clauses and the local laws they allegedly preempt, these cases tend to involve challenges targeted at single ordinances or types of ordinances, not an entire legal code.

TPGA's standing theory, however, would move this process from the merits to the pleadings stage. It would then eliminate any meaningful analysis of Section 113.054's preemptive scope. Instead, a court would simply have to

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[75] *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 321-23 (2008); *Laredo*, 550 S.W.3d at 593–94 (citing *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) (orig. proceeding), *as supplemented on denial of reh'g* (Aug. 29, 2002).

[76] *See Laredo*, 550 S.W.3d at 594-98.

assume that its legal effect is exactly what TPGA says it is no matter how unreasonable and divorced from plain English, applicable law, and reality that interpretation might be. TPGA's theory would also eliminate any analysis of Houston's laws that are allegedly preempted, including even identifying which laws are challenged as well as any assessment as to whether any part of any local law actually conflicts with state law or falls within Section 113.054's ambit.

TPGA's standing theory, would also require that the Texas courts reverse the presumption against preemption and assume, *at filing*, that any law that could conceivably fall under a statute that speaks of preemption will be assumed to be preempted even if the plaintiff does not bother to identify the specific regulations or codes it contends are thus rendered void. This would shift the burden to Houston to prove its regulations were *not* preempted. Against this backdrop, TPGA's theory then frees TPGA from the obligation to plead and demonstrate particularized injury as to each law challenged law by treating its preemption challenge as a single claim.

It should be clear that the constitutional underpinnings of express preemption analysis preclude TPGA's one-claim standing theory. Counsel for Houston was unable to identify any court decision in American jurisprudence in which such a fantastical approach to preemption and/or standing has ever been embraced by any court. TPGA has not cited a single case to support its

radical standing theory nor did the dissenting justice. Instead, when plaintiffs asserted preemption claims under the alleged express preemption statutes cited by TPGA at pages 13-14 of its Petition for Review, *none* asserted either the sweeping preemption or standing theories TPGA advances here. In fact, in *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 13-16 (Tex. 2016), in analyzing the preemptive reach of Tex. Health & Safety Code § 382.113, this Court engaged in precisely the kind of individual express preemption analysis that Houston has described here. This Court did the same in the Laredo bag ban case.

In sum, TPGA's standing theory cannot support its claims because that theory is ground in "blanket" preemption, which TPGA apparently imagines as field preemption on steroids, *and which does not and cannot exist*. Such a misbegotten theory would violate the U.S and Texas Constitutions and turn long-standing preemption jurisprudence on its head. Worse, it would require additional constitutional violations even to plead such nonsense.

The court of appeals apparently recognized that, even if TPGA were correct that Section 113.054 is an express preemption clause (which it is not), ordinary claim-by-claim standing analysis would still be required. Because the court of appeals correctly applied well-established standing principles, this Court

should decline to review TPGA's issues or affirm the court of appeals' decision on this issue.

C. Analysis of TPGA's Standing Theory Does Not Require that Any Court Decide the Merits of TPGA's Claims at the Pleadings Stage, and the Court of Appeals *Did Not* Do So

In a stunning display of psychological "projection," TPGA claims that the court of appeals' decision was flawed because that majority somehow decided the merits of TPGA's claims at the pleadings stage in ruling on Houston's jurisdictional challenge. It did not. Instead, the court of appeals *refused* to decide the merits of TPGA's claims and simply enforced traditional standing principles applicable to all plaintiffs. Apparently, in TPGA's warped reality, that must have felt like a loss on the merits. This Court, however, knows the difference.

Houston's jurisdictional arguments did not implicate the merits of TPGA's claims. Instead, Houston complained that TPGA had not pleaded or demonstrated any particularized injury sufficient to support standing to assert any of its claims. *See, e.g.*, CR221;224. This deficiency is made exponentially worse by the fact that TPGA still refuses even to identify which propane regulations or provisions of regulations it claims are actually preempted.

When it lost in the trial court and failed to seek or obtain an interlocutory appeal from the denial of its own summary judgment motion, however, TPGA

concocted a new standing theory that would allow it effectively to have the appellate courts decide the merits of its motion under the guise of deciding jurisdiction. Consequently, it argued that it had really asserted only a single claim: that Section 113.054 preempts all Houston propane regulations without any need to identify any Houston regulation or provisions of such regulation or determine if any is actually preempted by any existing state law or even falls within Section 113.054's ambit. Waiving the banner of preemption, TPGA asserts that it may bootstrap a minimal showing, if any at all, of an alleged injury to one of its members, under an unspecified provision of the Fire Code, into a full-blown challenge to *all* of Houston's propane regulations.

This Court should not be fooled by TPGA's cynical ploy. The court of appeals could and did decide Houston's jurisdictional challenge without ruling on the merits of TPGA's claims. It did so by reaffirming that *all plaintiff*s, no matter what claim they assert, must show particularized injury for each provision of any law they challenge. TPGA Opin. at *4. Any other conclusion would have violated Article III and the Texas Constitution.

In theory, this Court could also decide *to adopt*, for the first time in American jurisprudence, TPGA's standing theory without deciding the merits of its claims, although it is hard to find any supportable legal basis on which the Court could do so. TPGA argues and seeks a holding here to the effect that

Section 113.054 is some new kind of super-preemption clause that wipes out everything in its path with any need to consider whether the allegedly-preempted local law falls within its ambit finds a counterpart in State law, *even when the State has enacted no contrary regulation or the Houston provisions are already the same as those in State law.* Such an argument is fundamentally at odds with this Court's preemption jurisprudence, which allows preemption only to the extent of any conflict,[77] and, as demonstrated below, requires extensive analysis of the language and effect of the particular provisions that are allegedly preempted. Moreover, such an interpretation would lead to chaos as courts attempt to craft imprecise but all-encompassing orders and local governments and their citizens struggle to determine which laws were actually preempted and which they must still obey. Fortunately, this Court does not need to decide these questions to decide the jurisdictional issues Houston raises here.

Instead, this Court must simply decide whether *the mere allegation* that any statute has preemptive superpowers is sufficient to free a party from establishing standing consistent with the Constitution and U.S. Supreme Court and this Court's jurisprudence, and in contravention of all three. Because TPGA has provided this Court with no authority whatsoever to support such an ill-

[77] *Laredo*, 550 S.W.3d at 594 n.40 (citing *In re Sanchez*, 81 S.W.3d at 796).

conceived, radical undermining of constitutional principles, this Court should answer "no," deny review, or hold that the court of appeals was correct in finding that TPGA had failed to plead or demonstrate its standing to assert its broad preemption claims.

IV. PURPORTED JURISDICTIONAL EVIDENCE IS STILL LEGALLY INSUFFICIENT TO PROVIDE TPGA WITH STANDING TO CHALLENGE *ANY* HOUSTON PROPANE LAW

TPGA now concedes that even its "one-claim" standing theory requires that at least one of its members have suffered a particularized injury that is causally connected and fairly traceable to at least one challenged law and that such an injury can be redressed by the remedies sought. Yet, TPGA's jurisdictional evidence does not support that foundational allegation.

A. TPGA's Pleadings and Purported Jurisdictional Evidence Do Not Support the Sweeping Claims It Now Asserts

Despite having been given numerous opportunities to replead after Houston filed serial, largely-successful, special exceptions, TPGA still makes only a skeletal claim of associational standing to assert its claims.[78] Such an

[78] Plaintiff's Fourth Amended Petition is devoid of allegations of particularized harm to TPGA members and makes only two references to standing. "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." CR221. It also alleges:

> By this suit, Plaintiff, on behalf of its membership, seeks a declaration of rights, status, and legal relations under Section 113.054 of the Natural Resources

allegation is legally inadequate, particularly without jurisdictional proof to back it up.

First, as discussed above, TPGA's pleadings seeks a loose declaration holding preempted and unenforceable portions of Houston's *Fire Code.* CR189-90. Now, however, TPGA seeks it seeks multiple, broad declarations regarding the legal effect of § 113.054 as preempting *all* of Houston's propane regulations, irrespective of where they are found. Unquestionably, TPGA will also argue that such generalized declarations render invalid *all local propane regulations in the entire State;* however, TPGA's limited pleadings would not support such a sweeping declaration. Tex. R. Civ. P. 166a(c).

Second, TPGA pleaded generally that "one or more" of its members has somehow been "adversely affected" by unspecified conduct. *See supra* note 78. TPGA, however, does not explain what adverse effects, if any, any member may have actually suffered. This is important because the mere inconvenience of having to comply with local propane regulations, along with every other Houston resident, non-TPGA member, rodeo tail-gater, or weekend griller, is

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> Code. Plaintiff also seeks a declaration of the validity of certain municipal ordinances. Plaintiff has associational standing to sue for a declaration on behalf of its membership. One or more of Plaintiff's members have been adversely affected by the conduct complained of herein.

CR9; 224. No other allegations are offered regarding TPGA's alleged standing.

not a particularized injury conferring standing. Likewise, generalized economic injury is insufficient to confer standing. As one court Texas court explained: "although they broadly complain of lost revenues they 'attribute' to the ordinances collectively, these bare conclusions are insufficient to affirmatively demonstrate their standing…"[79] The court of appeals agreed.

> 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 challenged regulations.[80]

Third, TPGA's claim that its members' *merely being subject to local regulations* that TPGA thinks are preempted provides particularized injury is legally inadequate to support standing here. TPGA cites no authority for this notion nor does it respond to Houston's argument that such inconvenience does not, as a matter of Texas law, provide particularized injury for standing purposes. In fact, even "the harm inherent in prosecution for a criminal offense does not constitute irreparable harm as required by *Morales*."[81]

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[79] *Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 930 (Tex. App.—Austin 2010, no pet.).

[80] TPGA Opin. at *4 (citing *Stop the Ordinances*, 306 S.W.3d at 929 (Tex. App.—Austin 2010, no pet.).

[81] *Sterling v. San Antonio Police Dep't*, 94 S.W.3d 790, 795 (Tex. App.—San Antonio 2002, no pet.) (quoting *City of Longview v. Head*, 33 S.W.3d 47, 53 (Tex. App.—Tyler 2000, no pet.)).

Fourth, none of TPGA's relevant anecdotes or the affidavits[82] that contain them demonstrates particularized injury despite the court of appeals somewhat superficial look at them. It remains undisputed that 1) none references any specific Fire Code or propane provisions with respect to any activity by a TPGA member; 2) none involves the issuance of any actual citation by Houston, *see* CR187-88; and, 3) none shows that any other enforcement measures were ever taken by Houston under the Fire Code or any challenged law against any member of TPGA.

TPGA's first description of an alleged February 23, 2015 encounter does not reference a specific challenged provision. CR186. TPGA's description of an alleged March 9, 2015 "red tag" involved unspecified violations of the Houston *Building* Code, which TPGA does not challenge in its pleadings.[83]

Similarly, a referenced July 13, 2017 incident involved only the "threat of a red tag," for possible violation of the 2012 Uniform *Plumbing* Code, which TPGA likewise does not challenge by its pleadings. *Id.* The referenced July 2015 "large-scale" LP-Gas installation project vaguely mentions unknown

[82] Houston objected to all affidavits and incorporates by its reference Amended Objections to Plaintiff's Summary Judgment Evidence, filed separately with the Court. CR397.

[83] *Id*. No affidavit verifies the facts asserted by TPGA regarding an alleged March 9, 2015 red tag. Houston objected to all affidavits and incorporates by its reference Amended Objections to Plaintiff's Summary Judgment Evidence, filed separately with the Court. CR397.

"requirements from Houston's Fire Code or the 2006 and 2012 International Fire Codes." *Id.* However, such allegations are too general to supply evidence supporting standing.

The referenced September 2017 encounter allegedly involved a "customer of Plaintiff's member," not a TPGA member himself, and the customer's storage of over 500 pounds of propane cylinders. *Id.* As the court of appeals recognized, nothing in Texas law permits *associational* standing based on the alleged impact on a *customer of the association's member*. Even the court of appeals agreed that that is too attenuated.[84] Nevertheless, based on hearsay, the customer was allegedly instructed by Houston's Fire Marshall to obtain an operational permit. CR398. This anecdote cannot raise a fact issue on Houston's possible enforcement of Fire Code § 105.6.27 against a customer. It, therefore, cannot support TPGA's claim to associational standing. CR397-98.

Consequently, TPGA effectively has but one alleged incident, involving a single member, Green's Blue Flame Gas Company, that even arguably supports its claim of particularized injury.[85] The court of appeals also apparently agreed; however, the Court drew legally incorrect conclusions from this vignette. TPGA

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[84] TPGA Opin. at *4. *City of Austin v. Austin City Cemetery Ass'n*, 87 Tex. 330, 28 S.W. 528 (1894), provides TPGA no help. It involved a certified question from this Court. Standing was, therefore, not an issue.

[85] *See* TPGA Brief at 5-6; CR233.

Opin. at *4. There is no indication in this description that the allegedly idiosyncratic requirements allegedly imposed by the inspector, who was apparently there to check for both state and local compliance, derived from any Houston regulations and no regulation is referenced. The pleading suggests only that the inspector believed they were needed for safety purposes. Moreover, Green's Blue Flame admits that it received the permits for which it had applied using the State form, but complains only that they were temporary ones. Consequently, the amounts it paid do not necessarily reflect any additional amounts paid to have a property inspected and permitted. That is not particularized injury.

Fifth, even if TPGA could show that at least one of its members had actually been cited, the fact that a few TPGA members claim to have received a "red tag" would not be sufficient to demonstrate the particularized injury essential for standing. Instead, "the harm inherent in prosecution for a criminal offense does not constitute irreparable harm as required by *Morales*."[86] Instead, TPGA's members have an adequate legal remedy. That "'remedy would be [to] proceed with [their] business[es], and defeat any prosecution that should be

[86] *Sterling*, 94 S.W.3d at 795 (quoting *Head*, 33 S.W.3d at 53).

brought against [them] for the infraction of the void ordinance.'"[87] If and when TPGA members violate the ordinance and are criminally prosecuted, they may challenge the ordinance in defending against such prosecution. Their right to challenge the ordinance on appeal of a criminal conviction defeats this Court's jurisdiction.

TPGA, therefore, has no standing to proceed with its claims. All should have been dismissed.

B. There is Only One Reasonable Construction of Section 113.054; Therefore, Utilization of Purported Legislative Evidence Is Improper

This Court "only resort[s] to rules of construction or extrinsic aids when a statute's words are ambiguous."[88] A statute is ambiguous, in whole or in part, when its provisions are susceptible to more than one *reasonable* meaning.[89] As demonstrated above, no matter how poorly drafted, Section 113.054 cannot reasonably be interpreted as eliminating all local regulation of propane because its second sentence specifically authorizes local co-regulation. There can be no

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[87] *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*, 28 S.W. 528 (Tex. 1894)).

[88] *Greater Hous. P'ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015) (citing *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009)); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 (Tex. 2008).

[89] *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 405 (Tex. 2016).

reasonable dispute about that. This Court should not be swayed by TPGA's improper attempt to amend Section113.054 to reflect the sensibilities of its fellow preemption advocates.

Moreover, even if such statements were relevant, Appellants cannot offer random comments and rank speculation by friendly legislators as proof of legislative intent. "The individual legislator's intent is *not* legislative history controlling the construction to be given a statute."[90] In addition, TPGA cannot offer their own members' statements as evidence of legislative intent. Under Texas law, a lay witness' speculation as to the Legislature's intentions is inadmissible and could not support summary judgment for Petitioners. *See, e.g.*, *Ethicon, Inc. v. Martinez*, 835 S.W.2d 826, 831 (Tex. App.—Austin 1992, writ denied); Tex. R. Evid. 701. TPGA's attempt to lobby this Court politically is improper and should be rebuffed.

V. THIS COURT LACKS JURISDICTION OVER TPGA'S CLAIM NO MATTER HOW THEY ARE PLEADED

TPGA finally conceded that virtually all of the regulations and codes it challenges here carry criminal penalties. Houston filed a petition for review challenging this and any civil courts' jurisdiction to construe such local laws or

[90] *See Gen. Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993) (emphasis supplied).

decide their alleged preemption based upon the State's bifurcated judicial system. Those arguments are incorporated and reasserted here. If this Court agrees with Houston, then it must dismiss TPGA's claims or remand and require that TPGA plead and demonstrate that it challenges only civil statutes or that its individual members have suffered or will suffer some irreparable injury to a vested right. In that event, TPGA's issues will be rendered moot. There is no need otherwise to decide them here.

TPGA cannot have it both ways: it cannot claim, *in this brief,* that its members are harmed because they face criminal penalties, yet also assert, response to Houston's petition for review, that this civil Court has jurisdiction to review and construe such criminal statutes. Either way, TPGA's claims should eventually be dismissed for want of jurisdiction.

CONCLUSION AND PRAYER

For the reasons stated, Houston respectfully requests that this Court deny TPGA's Petition for Review, grant Houston's Petition for Review, 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 14,827 words.

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I hereby certify that on May 21, 2020, a true and correct copy of the foregoing has been served on counsel below via e-service.

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