FILED
19-0767
12/18/2019 2:07 PM
tex-39359864
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 19-0767

In the Supreme Court of Texas

TEXAS PROPANE GAS ASSOCIATION,
Petitioner/Cross-Respondent,
v.
THE CITY OF HOUSTON,
Respondent/Cross-Petitioner.

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

THE CITY OF HOUSTON'S RESPONSE TO TEXAS PROPANE GAS ASSOCIATION'S PETITION FOR REVIEW

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RESPONDENT'S RESTATED ISSUES PRESENTED

Whether this Court should defy the decisions of the U.S. Supreme Court, contradict its own recent preemption jurisprudence, and permit the issuance of advisory opinions in violation of the Texas and U.S. Constitutions by creating, for the first time in American jurisprudence, an exception to well-settled, claim-by-claim standing requirements when a plaintiff merely characterizes its claim as one asserting express preemption?

RESTATEMENT OF THE CASE

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

Trial court proceedings: After TPGA filed its Fourth Amended Petition, CR221, a Motion for Summary Judgment on the Merits, CR175, abandoned its claims against the RRC, and settled or dropped the remaining defendant cities, Houston filed a motion for summary judgment on subject matter jurisdiction/plea to the jurisdiction, CR259, alleging that TPGA's claims were barred for lack of standing, jurisdiction, or, 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 Meachum, 261st District Court of Travis County, sitting as a civil judge, denied both pleas/motions, by order, dated September 10, 2018, attached as Exh. A to the City's Petition for Review. CR582. 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."), attached as Exh. B to the City's Petition for Review. The Court reversed in part, concluding that the trial court erred in holding that TPGA had met its burden to plead facts affirmatively demonstrating that it had associational standing to bring its claims, and remanding the case to the trial court to allow TPGA an opportunity to cure the pleading defect. *Id.* at *1. Chief Justice Rose dissented. *Id.* at *8. The Court otherwise affirmed the trial court's denial of Houston's plea/motion which alleged, among other things, that civil courts lack jurisdiction over TPGA's claims relating to penal laws, it held that, "based on this [same] per day-violation fine and on the Texas Supreme Court's recent decision in City of Laredo, we must conclude that TPGA members are 'effectively preclude[d]' 'from testing the ban's constitutionality in defense to a criminal prosecution' … [and] TPGA's suit to declare certain Fire Code regulations invalid may be brought in civil court." *Id.* (citing *State v. Morales*, 869 S.W.2d 941, 945 (Tex. 1994)) ("*Morales*"). From this portion of the Court's decision alone,

Houston filed a timely petition for review. TPGA also filed one the same day.

RESTATEMENT OF JURISDICTION

This Court lacks jurisdiction over the questions posed by TPGA because the court of appeals correctly decided those questions below, and, in so doing, announced no new principles of law, and created no conflicts with other courts of appeals. In particular, the court of appeals correctly applied general Texas standing principles, *affirmed by the U.S. Supreme Court*, and applicable to both individuals and associations. In that regard, it made no error of law of such importance to the jurisprudence of this State as to require correction. Indeed, TPGA admits that its seeks review only to address the court of appeals' alleged misapplication of settled law.[1] Worse, it has not identified *any* conflicts for this Court to resolve between sister courts of appeals because the arguments on which it seeks review are so radical that they have never arisen in any American case and are unlikely ever to arise again. Instead, TPGA improperly utilizes most of its brief to attempt advance its *merits* arguments, arguments unnecessary to resolve the *jurisdictional* issues in this appeal, because TPGA failed to seek 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 …").

permissive interlocutory appeal of those arguments. This Court should not be fooled by TPGA's bait-and-switch efforts: jurisdiction over the issues TPGA would raise here is unavailable under Tex. Gov't Code Ann. § 22.001(a).

RESTATEMENT OF RELEVANT FACTS

Houston generally objects to TPGA's purported Statement of Facts which is nothing more than its repurposed legal arguments below regarding the construction of a statute. Consequently, this Court should reject it and substitute the detailed Statement of the Case and Statement of Facts included here and in Houston's Petition for Review. In addition, TPGA has made a number of unsupported or simply incorrect statements, most of which are disputed. In particular, Houston objects to TPGA's mischaracterization of the LPG "industry" as something that covers every aspect of the production marketing of propane and its statement that the LPG Safety Rules "cover[] every aspect of the LPG industry" because the statement is incomplete and inaccurate. TPGA Petition for Review ("TPGA Petition") at 2. As Houston argued below, the term "industry" has a very narrow meaning here.[2] In this regard, Houston also objects to TPGA's misleading characterization of the industry as "heavily-regulated." *Id.* Similarly, TPGA's statement that the RRC's "regulation of all aspects of the LPG industry is thorough and complete" is inaccurate, a statement of opinion

[2] Chapter 113 does not define that term but the Administrative Code does. 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 or services and *which are not small businesses*." *See* 31 Tex. Admin. Code § 357.11(d)(4). Consequently, § 113.054 would apply only to ordinances relating to the manufacture and/or production of LPG and would not apply to small businesses. All other ordinances would *not* be encompassed by § 113.054.

not fact, and belied by § 113.054's recognition of the need for local regulation. *Id*. Most of the local regulations and codes that TPGA seeks to hold preempted have no state counterparts, let alone conflicting ones. Equally important, Chapter 113 does not apply to whole categories of federal regulation and is subject to a number of statutory exemptions, further limiting its scope.[3]

TPGA's statement that its "petition identified specific instances in which Houston enforced its LPG local regulations against TPGA members" is also blatantly incorrect. TPGA Petition at 5. As the Court of Appeals recognized, *no TPGA member has ever been cited for any violation of a Houston ordinance or code.* Instead, the Court found alleged particularized "injury" based on only one member's merely paying a local permitting fee. *See* Exh. B at *5. Indeed, the Court remanded the case to force TPGA to identify any specific enforcement as to any challenged regulation.

Furthermore, Houston objects to the unsworn testimony of TPGA employees and lawyers, which TPGA improperly relies on as "legislative

[3] For example, § 113.003(a)(1) states that Chapter 113, including §§ 113.051 and 113.054, do not apply to "the production, refining, or manufacture of LPG." 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 its subject to the exclusions set forth in § 113.003(a)(1). Thus, Chapter 113 is inapplicable in the areas listed. 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.

history" of the statute's intent. TPGA Petition at 3; CR 194-199. Thus, TPGA's conclusions are nothing more than speculative testimony from an interested party—TPGA. TPGA Petition at 3.

Finally, Houston objects to the following statements by TPGA because they are purely argumentative, highly speculative, and state bare conclusions rather than facts: 1) "The plain language of the statute reflects a clear expression of legislative intent: the RRC's LPG Safety Rules expressly preempt and supersede *any* local ordinances or rules "relating to any aspect or phase of the liquified petroleum gas industry" to ensure consistent statewide regulation of the LPG industry under rules promulgated by the RRC as the single regulator." [TPGA Petition at 3]; 2) "By adopting the express preemption provision in § 113.054, the Legislature expressed its will in favor of a uniform and consistent state-wide regulatory scheme for the LPG industry rather than piecemeal local regulation." [*Id.* at 4]; and 3) the court of appeals' "holding conflates standing with the merits of preemption . . . ." [*Id.* at 6-7].

SUMMARY OF ARGUMENT

There is no such thing as "blanket" preemption. The assumption that there is such a thing is TPGA's first mistake, its white whale,[4] and the touchstone for its ill-founded and unnecessary petition for review. Review of TPGA's standing theory, grounded in this notion of "blanket" preemption, thus presents no question of law important to this State's jurisprudence because no court in America has ever embraced such a radical and constitutionally-infirm standing theory. This Court should not be the first to do so.

To understand why this is the case, this Court should recognize first that TPGA's petition for review does not actually address any issue peculiar to associational standing. Instead, the reason the court of appeals rejected TPGA's expansive and idiosyncratic standing argument is the same one any Texas court would have utilized for an individual making the same claim.

Second, the standing principles on which the court of appeals relied are so well-established that no review is necessary simply to reaffirm them. To adopt TPGA's standing theory here for any plaintiff, this Court would have to defy governing U.S. Supreme Court authority, this Court's own recent decisions, and the constitutional prohibition on issuing advisory opinions. In particular,

[4] See generally Herman Melville, Moby-Dick; or, The Whale (1851).

TPGA's unsupported standing theory would require that the Texas courts abandon even the traditional express preemption analysis repeatedly required by the U.S. Supreme Court and this Court. That analysis, assuming it even applies here,[5] requires that a court first assess *the scope* of a state statute's preemption, if any, then determine if all or part of a particular local law falls within its preemptive ambit. TPGA's standing and preemption theories, however, would improperly dispense with that essential analysis altogether and *reverse* the well-established presumption against preemption. It is not surprising that neither TPGA nor the dissenter has identified any court that has ever embraced TPGA's standing theory.

Moreover, adoption of TPGA's unsupported standing theory would also violate the constitutional ban on a court's issuing advisory opinions. Basing TPGA's standing exclusively on a single alleged incident in which one member of TPGA merely paid a local permitting fee (that had no state counterpart) but was not otherwise injured or cited, TPGA seeks an expansive advisory opinion holding preempted all *other* Houston laws that touch in any way on the subject of propane (whether they are in the Fire Code, Building Code, Plumbing Code,

[5] TPGA's standing theory is premised upon the notion that Texas Natural Resources Code § 113.054 is an express preemption clause. For the reason set forth in note 14 *infra*, that assumption is unfounded and incorrect.

or anywhere else) without any analysis of the preemptive scope or application of Texas Natural Resources Code § 113.054, or whether any particular Houston propane law falls within its ambit, or identification of any connection between any TPGA member and any other local law thus preempted.

Finally, this Court's review of TPGA's issue is unnecessary because other issues before this Court that are actually important to the State's jurisprudence will dispose of TPGA's claims on jurisdictional grounds. Houston has filed its own Petition for Review that seeks to resolve conflicting appellate decisions concerning this Court's jurisdiction to construe criminal statutes. Resolution of that issue will dispose of all if not most of TPGA's claims on jurisdictional grounds. There is, therefore, no need to review TPGA's issue as well.

For the reasons that follow, and because TPGA has presented no issue of importance to the State's jurisprudence that requires correction, this Court should 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. TPGA'S UNSUPPORTED STANDING THEORY PRESENTS NO QUESTION OF LAW IMPORTANT TO THIS STATE'S JURISPRUDENCE BECAUSE THIS COURT WOULD HAVE TO DEFY GOVERNING U.S. SUPREME COURT AUTHORITY, ITS OWN RECENT DECISIONS, AND THE CONSTITUTIONAL PROHIBITION ON ISSUING ADVISORY OPINIONS TO ADOPT IT

A. TPGA's Standing Theory Presents No Question of Law Important to this State's Jurisprudence Because It Has Nothing to Do with Associational Standing

Although TPGA asserts associational standing as a "hook" to obtain jurisdiction here, the reason the court of appeals found that it lacked standing and thus needed to replead has nothing to do with associational standing. Instead, it goes to fundamental standing principles applicable to all individuals, classes, and associations.

Under well-settled standing principles, "[a] plaintiff must demonstrate that the court has jurisdiction over … *each of his claims*…"[6] When, as here, a defendant challenges a trial court's subject-matter jurisdiction, the burden shifts to the plaintiff to allege and prove facts affirmatively demonstrating that the trial court has subject-matter jurisdiction over each claim.[7] As this Court has

[6] *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 152–53 (Tex. 2012) (emphasis supplied).

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

recognized, the U.S. Supreme Court has long held that "claim-by-claim analysis is necessary to ensure that a particular plaintiff has standing to bring each of his particular claims."[8] This is because "'*[s]tanding is not dispensed in gross…. [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*.'"[9]

This Court has made clear that this rule applies 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.[10] *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.'[11]

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[8] *Heckman*, 369 S.W.3d at 153.

[9] *Id.* at 153 (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)) (emphasis supplied); *see also 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 also Pagan v. Calderon*, 448 F.3d 16, 27–30 (1st Cir. 2006) (analyzing standing "plaintiff by plaintiff and claim by claim").

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

[11] *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 307 (Tex. 2008) (emphasis supplied).

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.

When Houston challenged the district court's subject-matter jurisdiction here, the burden shifted to TPGA to demonstrate, by pleadings and proof, that the court had jurisdiction to construe each challenged code or propane regulation. The court of appeals held that TPGA did not carry that burden but allowed TPGA the opportunity to replead to try to do so.[12] Rather than do so, TPGA now claims that the fact that it asserts preemption claims gives it a giant "pass" on standing: the Texas courts can somehow consider a claim of express preemption of many laws in a single claim and thus a showing of injury related to a single regulation is sufficient to establish standing as to all such regulations.[13] As demonstrated below, TPGA's theory would overturn decades of settled law and well-established constitutional protections without an valid reason to do so.

[12] *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) (emphasis supplied) [Exh. B].

[13] *Id.* at *5 ("[i]n TGPA's view, its sole claim is a challenge to the City's regulation of LP-Gas as a whole, and it has sufficiently demonstrated that at least one or more of its members has suffered injury as result of that regulation").

B. TPGA's Standing Theory Would Require that the Texas Courts Abandon Even the Traditional Express Preemption Analysis Repeatedly Required by the U.S. Supreme Court and this Court

The lynchpin of TPGA's standing (and preemption) arguments here and the dissent's is that Tex. Nat'l Res. Code § 113.054 is allegedly an express preemption clause. For a host of reasons, including the statute's plain language, it clearly is not.[14] Fortunately, *this Court need not determine the statute's status in*

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[14] Tex. Nat. Res. Code Ann. § 113.054 (West 2015) provides:

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

Id. (emphasis supplied). By its own terms, the provision is not an express preemption clause forbidding generally the local regulation of propane. Express preemption clauses *themselves* forbid certain kinds of conflicting regulation by inferior governmental entities or establish exclusive jurisdiction. *See, e.g.*, 21 U.S.C.A. § 360k (West 2016). Section 113.054 does not say that. Instead, it 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. *See City of Santa Fe v. Young*, 949 S.W.2d 559, 561 (Tex. App.—Houston [14th Dist.] 1997, no writ). Instead, it merely sets up a procedure for resolving direct conflicts between Commission rules and standards and local law.

Moreover, when § 113.054 speaks of "rules and *standards promulgated and adopted by the commission under Section 113.051*"[14] as preempting local law, that language clearly speaks to final rules and standards *actually "adopted and promulgated"* by the Commission under Chapter 113. 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 arguably preempted ordinances to determine if there was a direct conflict with all or part of the challenged ordinance.

Indeed, TPGA does not even argue that there is or needs to be any identity between any RRC rule or order and any ordinance. Instead, it claims that § 113.054 essentially clears the field of local propane regulation. Because the RRC has not regulated at all in most of the areas of activity in which the City has enacted ordinances, there likely will be no conflicting state rule

order to decide not to review of the court of appeals' decision on TPGA's alleged associational standing. 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 the Texas courts must engage in traditional express preemption analysis before they may determine whether a particular local law is preempted; second, that this Court and the U.S. Supreme Court continue to apply a presumption *against* preemption;[15] and third, for this Court to rule in TPGA's favor, TPGA's standing theory requires that this Court defy the U.S. Supreme Court and its own recent preemption decisions and ignore both of these long-standing, recently-reaffirmed principles.

Although the presence of an alleged express preemption provision "means that [courts] need not go beyond [the provision's] language to determine

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or standard in most cases. As a result, the terms "preempt" and "supersede," as used in § 113.054, really do not make a lot of sense. Nevertheless, neither Attorney General Paxton nor the City can read these terms as mere surplusage. *See* Tex. Gov't Code Ann. § 311.021(2) (West 2013). Both require two laws that conflict. A reasonable reading, therefore, is one that would use the term to mean that an ordinance, order, or rule is preempted when an existing RRC rule or standard directly conflicts with it. If there is no conflict, there is no preemption. That is not express preemption.

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

[15] *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).

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*.[16] Where the statute's language is unclear, the court must examine legislative history and other relevant matters to determine congressional intent.[17] In addition, courts look to "the language of the pre-emption statute and the statutory framework surrounding it" as well as "the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect" interested parties.[18] However, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that *disfavors* pre-emption.'"[19]

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[16] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (internal quotation marks and citations omitted). *See Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) ("If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains"); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992); *Rice*, 331 U.S. at 233-34.

[17] *See Lohr*, 518 U.S. at 486 (internal citations and quotation marks omitted).. The Court stated in *Lohr* that "Congress' intent, of course, primarily is discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it.'" *Id.* (citing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111-12 (1992) (Kennedy, J., concurring in judgment and concurring in part)). This may cause a court to look beyond the statute to other matters to determine a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Id.*

[18] *Lohr*, 518 U.S. at 486.

[19] *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (quoted in *Altria*, 555 U.S. at 77) (emphasis supplied).

Once the scope of preemption has been determined, the courts then assess the extent to which any particular local law falls within the scope of the statute's preemption, if at all.[20] Even when, unlike this case, the preemptive language is clear, this analysis of the language and operation of the local law that is allegedly preempted can be protracted and complicated.[21]

TPGA's standing theory, however, requires 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 held preempted even if the plaintiff does not bother to identify the specific regulations or codes it contends are thus rendered void. It then frees TPGA from the obligation to plead and demonstrate particularized injury as to each law challenged by treating its preemption challenge as a single claim.

It should be clear that the requirements of express preemption analysis, if applicable here, preclude TPGA's one-claim standing theory. Counsel for Houston was unable to identify any court decision in American jurisprudence

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[20] *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 321-23 (2008) (establishing a two-prong express preemption analysis); *City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 593–94 (Tex. 2018) ("the issue is whether the Ordinance falls within the Act's [preemptive] ambit") (citing *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) (orig. proceeding), *as supplemented on denial of reh'g* (Aug. 29, 2002) (an ordinance is preempted only "to the extent it conflicts with the state statute").

[21] *See Laredo*, 550 S.W.3d at 594-98. The scope and applicability of Section 113.054's preemption of Houston's propane regulations and codes is hotly contested here even if that issue will not be before this Court.

in which such a superficial but radical 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.

The court of appeals' majority correctly 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 long-standing standing and preemption principles established by this and the U.S. Supreme Court, this Court should decline to review TPGA's issues.

C. Adoption of TPGA's Standing Theory Would Violate the Constitutional Ban on Court's Issuing Advisory Opinions

This Court has "construed our separation of powers article to prohibit courts from issuing advisory opinions because such is the function of the

executive rather than the judicial department."[22] 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).

Garcia v. City of Willis, No. 17-0713, 2019 WL 1967140, at *3 (Tex. May 3, 2019). This was precisely the concern of the court of appeals. *See City of Houston v. Tex. Propane Gas Ass'n*, 2019 WL 3227530, at *5 (explaining the reasons for remanding the case for repleading on standing).

Nevertheless, TPGA seeks a broad declaration holding invalid and unenforceable all of Houston's propane regulations as well as "those portions of City of Houston's Ordinance Nos. 2015-1108, 2015-1289, and 2015-1316, that adopted or amended Chapter 61 of the Houston Amendment of the 2012 International Fire Code or purported to otherwise regulate the LP-Gas Industry, together with Chapter 61 of the Houston Amendments of the 2013 International

[22] *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (quoting *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1969)); *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 644 (Tex. 1933). The analysis is the same under the federal constitution. *See, e.g.*, *Correspondence of the Justices*, Letter from Chief Justice John Jay and the Associate Justices to President George Washington, August 8, 1793 in Laurence H. Tribe, *American Constitutional Law* 73 n.3 (2nd ed. 1988) (quoted in *Tex. Ass'n of Bus.*, 852 S.W.2d at 444, n.6).

Fire Code itself …"[23] No court could fashion an enforceable order based upon this vague description of so loosely challenged laws. TPGA apparently does not care. Instead, TPGA seeks an advisory opinion that any Houston law that even tangentially addresses propane would be preempted in all its parts.

TGPA's failure to satisfy the claim-by-claim standing requirements this Court and the U.S. Supreme Court have imposed is, therefore, particularly problematic here. This Court's adoption of a standing theory that lifts such requirements in this case alone would permit TPGA to obtain a broad advisory opinion despite the constitutional prohibitions against them.

II. REVIEW OF TPGA'S ISSUES IS UNNECESSARY BECAUSE OTHER ISSUES BEFORE THIS COURT THAT ARE ACTUALLY IMPORTANT TO THE STATE'S JURISPRUDENCE WILL DISPOSE OF TPGA'S CLAIMS ON JURISDICTIONAL GROUNDS

TPGA cannot have it both ways: it cannot claim that its members are harmed because they face criminal penalties yet also assert that this civil Court has jurisdiction to review and construe such criminal statutes. In the end, 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

[23] CR189-90. That is all the notice Houston has received concerning the claims against it. Despite Houston's repeated special exceptions, and TPGA's repleading, TPGA has still never identified all of the specific provisions of Houston's propane laws its challenges.

any civil courts' jurisdiction to construe such local laws or 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.

CONCLUSION AND PRAYER

For the reasons stated, this Court should 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 4,478 words.

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2019, a true and correct copy of the foregoing has been served on counsel below via e-service.

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