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 Petitions for Review
from the Third Court of Appeals, Austin

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE

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Statement of Interest of Amicus Curiae

For a century, this Court has respected the separate spheres of the civil and criminal courts while, at the same time, recognizing that a civil court must interpret criminal law when necessary to decide a civil case. The State has a substantial interest in these jurisdictional principles both as a frequent litigant and as sovereign. The State therefore writes as amicus curiae in support of cross respondent.

No fee has been or will be paid for the preparation of this brief.

To the Honorable Supreme Court of Texas:

Houston's argues that "only courts exercising criminal jurisdiction may construe criminal statutes." Hous. BOM at 8. That cramped view of this Court's jurisdiction is contrary to the very nature of judicial review. It also misconstrues over a century of precedent. Although criminal jurisdiction is reserved for the Court of Criminal Appeals and Texas's lower criminal courts, that does not mean civil courts cannot construe and apply criminal statutes when they are at issue in civil cases.

This Court has jurisdiction over "all cases except in criminal law matters." Tex. Const. art. V § 3(a). If a case is not a criminal law matter, then this Court has jurisdiction even if a criminal law is at issue. It is only when a criminal law matter comes before a civil court that the court need inquire into whether the vested-rights exception applies. Because this case is a civil one within the civil courts' jurisdiction, the courts have authority to interpret and apply any applicable law, including any criminal provisions at issue.

Argument

I. Civil Courts Are Not Barred from Interpreting Criminal Law.

This Court has appellate jurisdiction over "all cases except in criminal law matters," Tex. Const. art. V § 3(a)—that is, all civil matters. Conversely, the Texas Court of Criminal Appeals has appellate jurisdiction over "all criminal cases." *Id.* § 5(a); *see also id.* § 5(c) (describing that court's power to issue writs "in criminal law matters").

The dispositive issue, then, is whether this is a "criminal law matter." Although this Court has previously observed that "[n]o one rule clearly defines the content or

contours of 'criminal law matters,'" *Heckman v. Williamson County*, 369 S.W.3d 137, 146 (Tex. 2012), a review of the Court's approach to this issue reveals that it considers two questions: (1) whether the litigation relates to a provision of civil or criminal law and (2) whether the issues in the case are more substantively criminal or civil. Only if the case is a criminal law matter must the court ask whether enforcement of the criminal law threatens vested property rights.

A. The Court's first inquiry is whether the litigation relates to a provision of civil or criminal law. It is the rare criminal matter that involves civil law. *See Harrell v. State*, 286 S.W.3d 315, 318 (Tex. 2009) ("[I]n criminal-law matters, criminal law is the subject of the litigation." (quotation marks omitted)). The threshold question, therefore, is whether a law is civil, criminal, or a mix of both. That can usually be determined from the face of the provisions at issue. *See Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 441–42 (Tex. 1994).

Civil Law. It is often readily apparent that a provision is civil—for instance, a statute that appears on its face to be civil and that carries only civil consequences. *See Leeper*, 893 S.W.2d at 442. Consider, for example, the Statute of Frauds. *See* Tex. Bus. & Com. Code § 2.201. That provision deals with an archetypal topic of civil law (contracts) and failure to abide by its terms carries only civil consequences (unenforceability). *See id.* § 2.201(a). The Statute of Frauds is a civil provision.

What's more, an otherwise-civil provision will not be treated as a criminal one merely because it may be of relevance in criminal prosecutions. Consider *Leeper*. In that case, plaintiffs took the view that state officials had incorrectly interpreted the public-school mandatory-attendance law and the law's private-school exemption as

prohibiting home schooling. *Leeper*, 893 S.W.2d at 438. So plaintiffs "claimed that [the state-official] defendants' enforcement of the compulsory attendance law infringed upon their constitutional rights." *Id.* And they "sought a declaration . . . under the Declaratory Judgments Act" that defendants "had misinterpreted the private school exemption" as well as "an injunction prohibiting all school districts and attendance officers from enforcing the compulsory attendance law against bona fide home schools." *Id.* Defendants countered that the private-school exemption was a criminal provision because a separate statute criminalized non-attendance at public school and the exemption could serve as a defense to that criminal charge. *Id.* at 441. The Court rejected this contention. The compulsory-attendance law was "not a criminal statute on its face." *Id.* And although the exemption might be used to stave off a criminal prosecution, the exemption was also "part of the basis for determining whether a child who is not in attendance in public school is subject to [State] supervision . . . and whether a parent of the child may have his or her parental rights terminated for failing to enroll the child in school." *Id.* at 441–42. Thus, "[n]ot only [wa]s [the exemption] on its face a civil statute, it also ha[d] civil consequences." *Id.* at 442.

This commonsense approach to determining whether a statute is civil is consonant with civil courts' obligation to "say what the law is." *Am. K-9 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246, 252 (Tex. 2018) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The "very essence of judicial duty" is to "determine which of [two] conflicting rules governs." *Marbury*, 5 U.S. at 178. Making that determination requires interpreting and construing the conflicting

provisions. After all, "[i]f two laws conflict with each other, the courts must decide on the operation of each," and "those who apply [a] rule . . . must of necessity expound and interpret that rule." *Id.* at 177. So if a civil case requires interpretation of a criminal statute, the court must interpret it to decide the case. If a civil court were deprived of jurisdiction every time a civil law could conceivably be linked to a penal statute, the effect on its docket would be significant indeed.[1]

Criminal Law. Criminal law is also usually easy to spot. As the Court has noted, a provision is criminal in nature if it has any one of these characteristics:

- It is located in the penal code. *See Heckman*, 369 S.W.3d at 149.
- It treats proscribed conduct as a misdemeanor or felony. *See City of Laredo v. Laredo Merchs. Ass'n*, 550 S.W.3d 586, 592 n.28 (Tex. 2018) (characterizing an ordinance as "penal in nature" where a "violation [was] punishable as a Class C misdemeanor").
- It is a "statute[] governed by the Texas Code of Criminal Procedure." *Harrell*, 286 S.W.3d at 318; *see also Comm'rs Court of Nolan County v. Beall*, 81 S.W. 526, 528 (Tex. 1904) (treating a law as criminal because it "depend[s] wholly for [its] enforcement upon the infliction of the penalties prescribed by the statute through the procedure provided for that purpose by our Code of Criminal Procedure").
- Even if it does not appear on its face to be criminal, its "sole function" is to "define the elements of [an] offense proscribed by [a criminal statute], or the elements of a defense to prosecution." *Leeper*, 893 S.W.2d at 441.
- It is a rule of criminal procedure. *See Comm'rs' Court*, 81 S.W. at 528.

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[1] If every law enacted pursuant to police powers were therefore a criminal law matter, as Houston argues (at BOM 19), it is hard to imagine what would qualify as a civil matter. The police power is the source of the State's and its home-rule cities' general lawmaking authority.

Mixed. Some statutes are mixed. That is, they "both confer[] civil rights, and declare[] offenses punishable in the criminal courts. Under such a law both a civil action may be brought, and a criminal prosecution instituted." *Id.* Take, for example, the Texas Free Enterprise and Antitrust Act, Tex. Bus. & Com. Code § 15.01, *et seq.* That Act makes certain anticompetitive practices unlawful, *see id.* § 15.05, and provides for civil and criminal enforcement mechanisms, *see id.* §§ 15.20 ("Civil Suits by the State"), 15.21 ("Suits by Injured Persons or Government entities"), 15.22 ("Criminal Suits"). This Court and the Court of Criminal Appeals have concurrent jurisdiction over mixed statutes. *Comm'rs' Court*, 81 S.W. at 528; *cf. Caller-Times Pub. Co., Inc. v. Triad Commc'ns, Inc.*, No. C-9979, 1991 WL 235239, at *9 n.27 (Tex. Nov. 13, 1991) (in an opinion interpreting the Texas Free Enterprise and Antitrust Act, noting that the "opinion does not address the requirements of a criminal violation" because "[t]his Court does not have jurisdiction over criminal matters"), *withdrawn on other grounds*, 826 S.W.2d 576 (Tex. 1992).

* * *

If all the provisions at issue in the litigation are civil, civil courts have jurisdiction. If one or more of the provisions is criminal, the court goes on to consider a second inquiry: Whether the case is substantively more civil or more criminal. *See infra* B. If a provision is mixed, this Court has jurisdiction unless the appeal "arise[s] as a result of or incident to a criminal prosecution," *Harrell*, 286 S.W.3d at 318 (citation omitted), in which case the Court also proceeds to the second question.

B. Next, the Court considers whether the issues in the case are more substantively criminal or civil. Contrary to Houston's contention, the mere fact that

a provision includes criminal penalties does not deprive this Court of jurisdiction. *See Passel v. Fort Worth ISD*, 440 S.W.2d 61, 62 (Tex. 1969) ("It has been said that the power and authority to interpret criminal statutes rests solely with the courts of this state exercising criminal jurisdiction. We have already confessed that this statement is much too broad." (citations omitted)).

Rather, the Court "look[s] to the essence of the case to determine whether the issues it entails are more substantively criminal or civil." *Heckman*, 369 S.W.3d at 146. The focus is whether "the subject matter of" the issue before the court "concern[s] [plaintiff's] guilt, innocence, or punishment, the chief features of a criminal proceeding," *Harrell*, 286 S.W.3d at 319, or if the "points of criminal law" are only "incidental[]," *Heckman*, 369 S.W.3d at 149 (citation omitted); *accord Comm'rs' Court*, 81 S.W. at 528. If the case is substantively civil, the Court has jurisdiction.

Courts implicitly apply this balancing test whenever a civil case requires interpretation or construction of a criminal law. For instance, in *Hudiburg Chevrolet, Inc. v. Globe Indemnity Co.*, 394 S.W.2d 792 (Tex. 1965), the Court confirmed that "'theft' when used in an insurance policy . . . is given the same [meaning] it has under the criminal law." *Id.* at 795. That means a civil court's interpretation of insurance coverage or exclusions for "theft" will necessarily require the application of criminal law. *See, e.g.*, *Nautilus Ins. Co. v. Steinberg*, 316 S.W.3d 752, 755 (Tex. App.—Dallas 2010, pet. denied) (in an insurance dispute, interpreting the Texas Penal Code to determine whether certain acts constituted theft). That does not raise jurisdictional concerns because insurance disputes are substantively civil.

Criminal law also arises in civil cases when a party seeks "exemplary damages against a defendant because of the criminal act of another." Tex. Civ. Prac. & Rem. Code § 41.005. A plaintiff may recover this kind of damages if, among other things, she shows that "the criminal act was committed by an employee of the defendant," or that the defendant himself "is criminally responsible . . . under the provisions of Chapter 7, Penal Code." *Id.* § 41.005(b)(1), (2). Again, this presupposes a civil court's competency to decide questions of criminal law that are ancillary to a civil case. *See*, *e.g.*, *In re Daybreak Cmty. Servs. Tex., LLC*, No. 10-19-00395-CV, 2020 WL 958457, at *2–*3 (Tex. App.—Waco Feb. 26, 2020, no pet.) (discussing liability under Chapter 7 of the Penal Code in an exemplary-damages dispute). Accepting Houston's theory—"that only courts exercising criminal jurisdiction may construe criminal statutes," Hous. BOM at 8—would prevent Texas's civil courts from adjudicating all such matters. And criminal courts, lacking jurisdiction over civil matters, would similarly be unable to intervene.

In applying the balancing test, the Court has indicated that where "(1) the statute [at issue] is enforced and the party is being prosecuted, [or] (2) the statute is enforced and the threat of prosecution is imminent," the matter is usually substantively criminal. *State v. Morales*, 869 S.W.2d 941, 944 (Tex. 1994); *see also Passel*, 440 S.W.2d at 63 ("It is well settled that courts of equity will not interfere with the ordinary enforcement of a criminal statute."); *Laredo Merchs. Ass'n*, 550 S.W.3d at 592 n.28 (same). But certain matters that might, at first blush, appear to be criminal are in fact predominantly civil.

For one, preliminary questions of justiciability, such as standing, ripeness, and mootness, are almost always questions of civil law, even if the merits of the claim touch on criminal matters. *See Heckman*, 369 S.W.3d at 146–48; *id.* at 147 ("[Justiciability] goes to the heart of civil practice."). Similarly, a question as to "a lower court's jurisdiction over what may be a criminal matter" is within the Court's jurisdiction. *Id.* at 149; *see also Harrell*, 286 S.W.3d at 317 ("Courts always have jurisdiction to determine their own jurisdiction." (citation omitted)).

Additionally, this Court and courts of appeals have jurisdiction to "issue a writ of habeas corpus when a person is restrained in his liberty by virtue of" a contempt order in a civil case. Tex. Gov't Code § 22.002(e); *see also* Tex. Const. art. V § 3(a) (granting "[t]he Supreme Court and the Justices thereof" the "power to issue writs of habeas corpus"); Tex. Gov't Code § 22.221(d) (extending this habeas jurisdiction to the courts of appeals). That makes sense, as the underlying subject matter is civil. *See In re Reece*, 341 S.W.3d 360, 371 (Tex. 2011) ("[T]he Legislature apparently enacted [Tex. Gov't Code § 22.002(e)] to ensure the Court of Criminal Appeals determines criminal matters and this Court civil matters in habeas proceedings, in line with the bifurcated system contemplated in our Constitution."). And even though "a contempt proceeding . . . is quasi-criminal in nature," *Ex parte Cardwell*, 416 S.W.2d 382, 384 (Tex. 1967), the purpose of a writ of habeas corpus "is not to determine the ultimate guilt or innocence of the relator, but only to ascertain whether the relator has been unlawfully imprisoned." *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979). In making that determination, the Court examines issues well within its civil competency—namely, the "jurisdiction [of] the [lower] court to render" the

contempt order, *Ex parte Helms*, 259 S.W.2d 184, 186 (Tex. 1953), and whether the underlying order that the contemnor violated "infringes upon [a constitutional] right," such as freedom of expression, *Ex parte Tucci*, 859 S.W.2d 1, 2 n.2 (Tex. 1993) (plurality opinion).

Finally, when a prosecution is not ongoing, "threatened[,] or even contemplated," and the plaintiff does not seek to enjoin a penal statute, the Court is more inclined to find that an appeal is within its civil-law jurisdiction—even if the litigation involves an incidental attack on the validity of a criminal law. *Passel*, 440 S.W.2d at 64. In *Passel*, for example, "the minor plaintiffs sought a declaration that a penal statute unconstitutionally denied rights of free association, and an injunction to prevent school officials from denying them admission to public schools because of membership in certain student clubs." *Morales*, 869 S.W.2d at 945. "No injunctive relief was sought against the [penal] statute itself . . . Rather, injunctive relief was sought solely to prevent administrative enforcement of an administrative regulation adopted for the purpose of implementing the statute." *Id.* at 945 (quotation marks omitted). The "plaintiff's immediate complaint was" therefore "about the *rule*, a matter within the court's equity jurisdiction," rather than the criminal statute. *Id.* at 946. Moreover, because "there [was] no actual or threatened enforcement of the statute and the [plaintiffs] [did] not seek an injunction against its enforcement," *id.* at 945, there was a reduced risk of interfering with the jurisdiction of the criminal courts, *Passel*, 440 S.W.2d at 64. The matter was therefore more civil than criminal, and within the Supreme Court's civil-law purview. *See Morales*, 869 S.W.2d at 946. By contrast, in *Morales*, the Court concluded that civil courts had no jurisdiction to

hear an appeal because plaintiffs sought to enjoin prosecution under the criminal statute instead of seeking "to enjoin any rule or policy promulgated pursuant to" the statute. *Id.* at 942 & n.2.

C. Longstanding precedent holds that a civil court may nevertheless interfere in a criminal law matter if (1) the plaintiff seeks equitable relief; (2) the challenge is to a criminal law's constitutionality; and (3) the criminal law's "enforcement will result in irreparable injury to vested property rights." *Passel*, 440 S.W.2d at 63; *see also Morales*, 869 S.W.2d at 945 & n.8; *id.* at 946 (rejecting the notion that, for purposes of the exception, "a *personal* right can be uniformly substituted for a *property* right").

This vested-rights exception, often traced back to *City of Austin v. Austin City Cemetery Association*, 28 S.W. 528 (Tex. 1894), has existed for almost as long as the bifurcation of the State's high courts. *See Reece*, 341 S.W.3d at 371; *Laredo Merchs. Ass'n*, 550 S.W.3d at 592 n.28 (attributing the exception to *Austin City Cemetery*); *Passel*, 440 S.W.2d at 63 (same). This Court has narrowed it, however, in the intervening years. In *Austin City Cemetery*, the Court held that an injunction was proper because the very existence of the penal ordinance "acts in terrorem," 28 S.W. at 530, even though "the city was not immediately seeking to enforce" the ordinance, *id.* at 529. In *Morales*, however, the Court said "fear or apprehension of the possibility of injury is not a basis for injunctive relief," and "[a]n injunction will not issue unless it is shown that the respondent will engage in the activity enjoined." 869 S.W.2d at 946–47 (citation omitted).

Early cases also justified the exception on the basis that equity provided the only or most efficient form of relief. *See, e.g.*, *Dibrell v. City of Coleman*, 172 S.W. 550,

5532 (Tex. Civ. App.—Austin 1914, writ ref'd) (An "injunction will be granted to stay a criminal prosecution in order to avoid a multiplicity of suits."); *City of Houston v. Richter*, 157 S.W. 189, 192 (Tex. Civ. App.—Galveston 1913, no writ) ("[W]hen [a] prosecution will seriously impair, if not destroy, appellees' property rights, equity will interfere by the writ of injunction to prevent a multiplicity of suits."); *id.* at 191 (framing *Austin City Cemetery* as a case in which "plaintiff had no remedy except" an injunction). But *Morales* also rejected that theory, explaining that "equity jurisdiction does not rise or fall solely on the basis of the adequacy of [plaintiffs'] remedy at law." 869 S.W.2d at 947.

Under *Morales*, the vested-rights exception is better understood not as a standalone test, but as part of the civil-criminal balancing inquiry: Civil courts may use their equitable powers to interfere with a prosecution when vested property rights are at stake because the vested rights render the matter substantively civil. After all, the principal historical function of equity was "the protection of rights of property." *In re Sawyer*, 124 U.S. 200, 210 (1888); *see also Passel*, 440 S.W.2d at 63 ("It has . . . been said that courts of equity are concerned only with the protection of civil property rights."). Thus, when a court enjoins a statute to protect property, it performs a core civil-law function—the traditional equitable protection of property—even if the statute at issue is criminal, and even if criminal enforcement is ongoing. *See Davis & Farnum Mfg. Co. v. City of Los Angeles*, 189 U.S. 207, 218 (1903) ("It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the state had chosen to

assert its power to enforce such law by indictment or other criminal proceeding."); *Richter*, 157 S.W. at 192 ("There is respectable authority . . . for the broad proposition that where property rights will be destroyed, for this reason alone unlawful interference by criminal proceedings under void law or ordinance may be reached and controlled by a court of equity). This historical usage suggests that at the time the jurisdictional bifurcation was inserted into the Texas Constitution, the term "criminal law matter," Tex. Const. art. V § 3(a), was understood not to include injunctions against penal laws to prevent the destruction of vested property rights, which is the province of equity.

II. This Preemption Challenge to Houston's Fire Code is Not a Criminal-Law Matter.

As noted above, the Court usually looks to the face of the provision being challenged to determine whether it is civil or criminal. Houston is incorrect to suggest that every provision of the Fire Code is criminal just because violations of the Code can "subject one to . . . criminal penalties." Hous. BOM at 17; *see also id.* at 41. As in *Leeper*, not every provision of the Code is facially criminal. *See* 893 S.W.2d at 441. The Houston Fire Code also contemplates civil penalties, *see* Houston, Tex. Fire Code 109.4.1 (2016), license suspension, *see id.*, and license revocation, *see id.* at 105.5, for certain violations. And Plaintiffs allege the LPG regulations in the Code are the basis for Houston's LPG permitting requirements and have led to permitting delays, increased permitting fees, and citations. *See City of Houston v. Tex. Propane Gas Ass'n*, No. 03-18-00596-CV, 2019 WL 3227530, at *8 (Tex. App.—Austin July 18, 2019, pet. granted). Those are all civil consequences.

As in *Leeper*, then, this is not a criminal law matter. That means the court need not proceed beyond the first question in the criminal-law matter inquiry: whether the provision is civil or criminal.

Even if the Court were to proceed to the second question, the absence of any imminent or ongoing criminal prosecution would weigh against the conclusion that TPGA's challenge is substantively criminal. TPGA challenges Houston's right to impose any LPG regulation at all because such regulation, TPGA alleges, is preempted by state law. This claim does not depend on whether or not some such regulations include possible criminal (as well as civil) penalties. *Harrell*, 286 S.W.3d at 319 (a matter is criminal when "the subject matter of" the issue before the court "concern[s] [plaintiff's] guilt, innocence, or punishment"). There is no indication TPGA's claims will turn on any criminal application of the LPG regulations. *Cf.* CR.365 ("None of these Fire Code provisions, however, regulate the LP-Gas industry directly, and are thus not targets of TPGA's preemption challenge.").

The court of appeals reasoned that civil courts have jurisdiction to hear TPGA's case based on the vested-rights exception. *See Tex. Propane Gas Ass'n*, 2019 WL 3227530, at *7. It did not have to reach that inquiry, however, because this case is not a criminal-law matter to begin with. Indeed, the vested-rights inquiry—the purpose of which is to determine whether a civil court can enjoin a criminal prosecution—is an odd fit for the many civil matters that incidentally involve interpretation of a criminal law. *See supra* 6–10. In this case, for instance, Houston is not prosecuting or threatening to prosecute TPGA or any of its members. The alleged injury to TPGA's member is unrelated to criminal enforcement—it is

Houston's refusal to issue a permanent permit for an LPG tank.[2] That is a civil consequence.

Indeed, if the foregoing understanding of the vested-rights exception is correct, *see supra* 10–12, TPGA would be unable to rely on it because TPGA seeks only declaratory—not equitable—relief. *Cf. Cobb v. Harrington*, 190 S.W.2d 709, 713 (Tex. 1945) ("It has been said that an action under the statute for declaratory judgment is equitable in its nature. In our opinion, however, a better classification of the action is that it is neither legal nor equitable, but sui generis." (citation omitted)). Because the Court can dispose of the appeal without reaching the vested-rights issue, however, it need not decide that question. TPGA's preemption challenge is a civil matter within the civil courts' jurisdiction.

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[2] An associational plaintiff must point to at least one member with an injury-in-fact, traceability, and redressability for each form of relief the plaintiff seeks. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Ctr. for Biological Diversity v. EPA*, 937 F.3d 533, 539 (5th Cir. 2019) (past harms do not support standing for prospective relief). TPGA seeks prospective relief—a declaratory judgment—and showed that Houston's inspector "refused to issue [TPGA's member] a permit beyond 90 days." *Tex. Propane Gas Ass'n*, 2019 WL 3227530, at *5; *see* CR.217–18 (citing ROA.187), CR.233. Because TPGA alleges an ongoing need (imposed by Houston) for a permanent (or lengthier) permit, its member's injury could be remedied by a declaratory judgment.

Prayer

Amicus curiae the State of Texas respectfully suggests that the Court reject the arguments in Houston's cross-petition and affirm the judgment of the court of appeals.

Respectfully submitted.

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