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No. 19-0767

IN THE SUPREME COURT OF TEXAS

TEXAS PROPANE GAS ASSOCIATION

v.

THE CITY OF HOUSTON

TEXAS PROPANE GAS ASSOCIATION'S OPENING BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case: Section 113.054 of the Texas Natural Resources Code provides that Texas Railroad Commission ("RRC") regulations regarding liquefied petroleum gas ("LPG" or "propane") "preempt and supersede any ordinance, order, or rule adopted by a political subdivision . . . relating to any aspect or phase of" the LPG industry. Texas Propane Gas Association ("TPGA"), a statewide trade association whose members are companies and individuals engaged in the LPG industry, sued Houston and other cities seeking a declaration that their piecemeal local LPG regulations are preempted by the statewide RRC regulations pursuant to §113.054. CR221.

Trial Court: Hon. Amy Clark Meachum, presiding judge of the 261st District Court, Travis County, Texas

Course of Proceedings: The parties filed cross-motions for summary judgment on the merits, and Houston also challenged jurisdiction. CR175 (TPGA), CR259 (Houston). The trial court denied all motions. App.1. Houston took an interlocutory appeal from the order denying its jurisdictional challenge.

Court of Appeals: Third Court of Appeals. Memorandum Opinion by Justice Kelly joined by Justice Smith. App.2. Dissenting Opinion by Chief Justice Rose. App.3.

Disposition in Court of Appeals: The majority determined that TPGA had associational standing because its member was assessed penalties under a Houston regulation and thus had standing to sue individually. App.2. pp.7-8. But the majority held that TPGA must establish standing on a rule-by-rule basis as to each and every Houston LPG rule. App.2 pp.9-11. The dissent objected that rule-by-rule standing "imposes unreasonable obstacles to associational standing" and undermines the "foundational claim that section 113.054 preempts all local attempts to regulate the" LPG industry. App.3 p.3. All justices rejected Houston's other jurisdictional challenges. App.1 pp.11-16; App.2 p.3 n.1.

STATEMENT OF JURISDICTION

The court of appeals had jurisdiction over Houston's interlocutory appeal from an order denying its jurisdictional challenge pursuant to Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). This Court has jurisdiction pursuant to Tex. Gov't Code § 22.001(a) because this appeal presents a question of law that is important to the jurisprudence of the State involving the appropriate standard for associational standing when the Legislature has expressly preempted local regulations as to an entire subject matter.

ISSUE ON APPEAL

The majority below held that TPGA has associational standing to challenge Houston's propane regulations, but that it must establish that standing on a rule-by-rule basis as to each and every separate regulation it claims is preempted. Is that the proper standard to challenge local regulations that are preempted by a state statute as a blanket matter? Does that holding impose unreasonable obstacles to associational representation? Does it also conflate standing with the merits of preemption and thereby undermine the Legislature's manifest intent that local regulations regarding LPG be preempted on a blanket basis?

RECORD AND APPENDIX

There is a one-volume Clerk's Record in this appeal. Citations will be to the page number: CR___.

The following items are included in the Appendix to this Petition:

App.1	Order on Cross-Motions for Summary Judgment (CR582)
App.2	Memorandum Opinion and Judgment in the Court of Appeals
App.3	Dissenting Opinion in the Court of Appeals
App.4	Tex. Nat. Res. Code §§ 113.051, 113.054
App.5	Table of Contents, RRC Liquified Petroleum Gas Safety Rules, promulgated July 2016

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Section 113.054 of the Texas Natural Resources Code provides that the RRC's LPG regulations "preempt and supersede *any* ordinance, order, or rule adopted by a political subdivision of this state relating to any aspect or phase of the" LPG industry. The statute does not depend on any implication or conflict with state law. Instead, preemption is express, and it extends to *any* local LPG regulation. In this suit, TPGA seeks a declaratory judgment that *all of* Houston's LPG regulations are preempted by the RRC's LPG rules pursuant to the plain language of § 113.054.

The merits of preemption are not strictly at issue in this interlocutory appeal regarding jurisdiction. But the majority below conflated the merits with the threshold standing inquiry when it held that TPGA must establish associational standing as to each individual Houston LPG regulation that it claims is preempted. Associational standing asks only whether one or more of TPGA's members would have standing to sue in their own right. The majority goes far beyond that inquiry and "imposes unreasonable obstacles to associational standing." App.3 p.1. And in doing so, the majority renders toothless the Legislature's manifest intent to preempt wholesale the piecemeal local regulation of the LPG industry.

Disputes regarding preemption of local regulations arise frequently. This Court should grant review to clarify the proper standard for associational standing and to ensure that the court of appeals' error does not hamstring the Legislature's ability to ensure statewide regulatory uniformity by preempting local regulation.

STATEMENT OF FACTS

A. The history of § 113.054 and its express, blanket preemption

Chapter 113 of the Texas Natural Resources Code (the "LPG Code") addresses the heavily-regulated LPG industry. Tex. Nat. Res. Code §§ 113.001 *et seq*. The LPG Code delegates regulation over the state-wide LPG industry to the RRC, requires it to "promulgate and adopt rules or standards or both relating to any and all aspects or phases of the LPG industry," and authorizes it to do so by adopting certain national standards. *Id*. §§ 113.051, 113.052.

The history and structure of the statutory LPG regulations as a whole demonstrate that the term "LPG industry" has a comprehensive meaning in the context of LGP regulation. Section 113.054 preempts all local regulations "relating to any aspect or phase of the liquid petroleum gas *industry*," and that provision directly mirrors the statutory grant of authority to the RRC to regulate the LPG "industry." *Id*. § 113.051. The express statutory grant of regulatory authority to the RRC over "any and all aspects or phases of the LPG industry" has been part of Texas law since 1959, and it is part of the "elaborate regulatory provisions applicable to the liquified petroleum industry including the delegation of authority to the Railroad Commission 'to promulgate rules and regulations for the safety and protection of the public.'" Op. Tex. Att'y Gen. No. V-541 at 4 (1948). The term "LPG industry" has thus had a comprehensive meaning in Texas statutes for decades.

Pursuant to the statutory mandate in § 113.051 to regulate the LPG industry, the RRC adopted the Liquefied Petroleum Gas Rules (the "LPG Safety Rules"). 16 Tex. Admin. Code Chap. 9.[1] The LPG Safety Rules are more extensive than the LPG Code, covering every aspect of the LPG industry. The table of contents of the LPG Safety Rules demonstrates their comprehensive scope. App.5. The RRC's regulation of all aspects of the LPG industry is thorough and complete.

The Legislature adopted § 113.054 of the LPG Code in 2011. The statute consists of only two sentences:

> § 113.054. EFFECT ON OTHER LAW. The rules and standards promulgated and adopted by the [RRC] 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 [RRC'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.

Tex. Nat. Res. Code § 113.054. 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 liquefied petroleum gas industry" to ensure consistent statewide regulation of the LPG industry under rules promulgated by the RRC as the single LPG regulator.

[1] The LPG Safety Rules can also be found at http://www.rrc.state.tx.us/media/34085/lpg-safety-rules_06-16_interior.pdf (last visited Mar. 9, 2020).

The statute's legislative history confirms this intent to preempt all local LPG regulation. In 2010, the House Committee on Energy Resources conducted an interim study regarding LPG regulation. CR192-99. One of the challenges facing the LPG industry was a patchwork of local rules that "deviate from internationally and nationally accepted LPG standards for no rhyme or reason . . . often based on little more than the local Fire Marshall's whim." CR194. The Committee's Interim Report explained that the legislature must choose between a uniform statewide set of LPG regulations and local flexibility:

> A law may be passed to amend [the LPG Code] to add a new section that states the rules and standards promulgated and adopted by the [RRC] under Section 113.051 preempt and supersede any ordinance, order, or rule adopted by a political subdivision relating to any aspect or phase of the [LPG] industry. However, the legislature must decide if the need for a consistent regulatory scheme for the [LPG] industry outweighs the preference for local flexibility. The decision is left to the will of the legislature.[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. Indeed, the original bill analysis for HB 2663, which adopted § 113.054, states that it "seeks to ensure consistent statewide regulation of the LPG industry."[3]

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[2] http://www.house.state.tx.us/_media/pdf/committees/reports/81interim/House-Committee-on-Energy-Resources-Interim-Report-2010.pdf pp.48-50 (last visited Mar. 9, 2020).

[3] https://capitol.texas.gov/tlodocs/82R/analysis/pdf/HB02663H.pdf#navpanes=0 (last visited Mar. 9, 2020)

In 2015, the Chairman of the House Energy Resources Committee asked the Attorney General to issue an opinion concerning § 113.054. CR248-51. Houston actively participated and submitted written argument regarding the opinion request. CR249. The Attorney General issued Opinion No. KP-0086, which concludes that § 113.054 acts as a blanket preemption of all local regulations regarding the LPG industry. CR252-56.

B. Notwithstanding § 113.054, Houston adopted its own LPG regulations and enforced them against TPGA members.

In 2016, Houston adopted amendments to the 2012 International Fire Code, including Chapter 61 entitled "Liquefied Petroleum Gases." CR328-34. By these enactments, Houston imposed its own conditions and regulations on the LPG industry within its jurisdiction. The Houston regulations require local permits, inspections, and administrative fees over and above those required by the RRC's LPG Safety Rules.

TPGA's petition identified specific instances in which Houston enforced its LPG local regulations against TPGA members, including this incident involving TPGA member Green's Blue Flame Gas Company, Inc.:

> The project involved installation of an LP-Gas tank to fuel buses serving the Texas Medical Center. During the course of this project, Inspector Michael Gonzalez, with Houston Fire Marshall's Office, refused to evaluate the LP-Gas installation under the [RRC] LP-Gas Safety Rules and instead imposed inapplicable and more restrictive conditions and requirements from Houston's Fire Code and the 2006 and 2012 International Fire Codes . . . . Despite the fact that [TPGA's]

> member submitted LPG Form 501 to the [RRC] as required by the LP-Gas Safety Rules and otherwise fully complied with the LP-Gas Safety Rules, Inspector Gonzalez refused to issue anything more than a series of 90-day temporary permits for this LP-Gas installation, charging [TPGA's] member $2,180 in permit fees in the process.

CR233.

C. Proceedings in the courts below

TPGA filed this suit originally against Houston and ten other cities, all of which had local LPG regulations, seeking a declaration that the local regulations were preempted as a blanket matter by the RRC's LPG Safety Rules pursuant to § 113.054. CR5. TPGA dismissed its claims against all of the defendant cities except for Houston after the other cities adopted the RRC's LPG Safety Rules in place of their local regulations. CR221-23. Only Houston insisted on maintaining its local LPG regulations, so only Houston remained a defendant.

TPGA filed a motion for summary judgment on the merits of its preemption claim. CR175. Houston filed a cross-motion for summary judgment on the merits but also challenged jurisdiction on various grounds including associational standing. CR259. Regarding the merits of preemption, Houston argued that § 113.054 did not preempt local LPG regulations as a blanket matter but instead preemption must be analyzed on a rule-by-rule basis to determine if there is a direct conflict with the RRC's LPG Safety Rules:

> 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. In this regard, one can think of preemption as constitutional mahjong: there must be a precise match. There is none here.

CR303.

The trial court denied all motions. App.1. Houston filed this interlocutory appeal from the denial of its jurisdictional challenge, including a contention that TPGA lacked associational standing to bring its preemption claims. The majority in the court of appeals held that TPGA has associational standing as to some of Houston's LPG regulations based on allegations that its members had been assessed fees and subjected to permitting requirements under Houston's regulations that would not have been required under the RRC's LPG Safety Rules. App.2 p. pp. 7-8. The majority held, however, that TPGA had to establish such standing as to each and every specific Houston regulation relating to LPG. App.2 p. 10. Because that holding conflates standing with the merits of preemption and undermines the manifest legislative intent that local LPG regulations be preempted on a blanket basis, TPGA filed its petition for review.

SUMMARY OF ARGUMENT

The merits of TPGA's preemption claim ask whether the Legislature preempted *all* local regulation of the LPG industry as a blanket matter, or are local regulations preempted only on a rule-by-rule basis to the extent of any conflict with

state law. That is the merits inquiry, but the court of appeals conflated that inquiry with standing and held that TPGA must establish standing to bring that claim independently as to each and every Houston LPG regulation it contends is preempted. That holding ignores that TPGA's sole claim is one of blanket preemption. It also misapplies the standard for associational standing, which applies broadly to ensure that an entity has not "manufactured" a claim. And it also renders meaningless the Legislature's express intent to preempt all local LPG regulations and leaves the courts with no jurisdiction to enforce such preemption statutes.

This Court should grant review to ensure that the important issue of preemption is properly analyzed and that the courts have jurisdiction to enforce blanket preemption if that is what the Legislature has adopted.

ARGUMENT

A. The court of appeals' holding misapplies the standard for associational standing and conflates standing with the merits.

In this suit, TPGA claims that Houston's rules and regulations relating to the LPG industry—all of them, as a blanket matter—are preempted by the RRC's LPG Safety Rules pursuant to § 113.054. TPGA has associational standing to bring that claim as a trade association representing a statewide membership of companies and individuals engaged in the LPG industry.

1. Standing is established on a claim-by-claim basis, but TPGA has only one claim.

As a starting point, standing established on a claim-by-claim basis, but TPGA has just one claim in this action: that *all of* Houston's local regulations relating to LPG are preempted by the RRC's LPG Safety Rules as a blanket matter. Through § 113.054, the Legislature provided with unmistakable clarity that the RRC would be the sole regulator of LPG in Texas, and the RRC's LPG Safety Rules would preempt *any* local regulation of LPG, not just those particular local regulations that conflict with the LPG Safety Rules. The dissenting opinion in the court of appeals correctly identified "TPGA's foundational claim that section 113.054 preempts and supersedes all local attempts to regulate the LP-gas industry. Whether Houston has one such regulation or one thousand section 113.054 preempts them all as a matter of law." App.3 p.3 (cleaned up).

Some preemption claims turn on the existence of a conflict between a specific local regulation and state law, but this is not such a claim. Rather, TPGA contends that the Legislature chose to preempt an entire subject matter—LPG—through §113.054 as a blanket matter. The standing inquiry should mirror the *actual claim* that TPGA asserts, and that *actual claim* is one of blanket preemption.

2. TPGA satisfies the test for associational standing as to its sole claim.

The test for associational standing asks whether: (1) one or more of the association's members would have standing to sue in their own right; (2) the interests

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the association seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Tex. Ass'n of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 447 (Tex. 1993) (adopting the test announced in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

The only element at issue here is the first one: does one or more of TPGA's members have standing to bring the preemption claim independently? The majority below held that the first element for associational standing is satisfied because a TPGA member, Green's Blue Flame Gas, was subject to permitting requirements under Houston's local LPG regulations and would thus have independent standing to bring a preemption claim. App.2 pp. 7-8; *see also id*. p. 9 (holding that "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" Houston).

That is the correct holding, and the opinion should have stopped there. But the majority went on to require that TPGA establish its associational standing as to each and every Houston LPG regulation that it contends is preempted: "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.'" App. 2 p. 10 (emphasis added). TPGA seeks a single declaratory judgment that § 113.054 preempts "any" local regulation of the LPG industry as a blanket matter, but under the majority's holding, TPGA may pursue that preemption claim only to the extent its members have already been subjected to a given specific regulation. That holding is mistaken in two significant ways.

First, it misapplies the test for associational standing, which is meant to be inclusive. This Court explained that the requirement that a member of the association have independent standing "should not be interpreted to impose unreasonable obstacles to associational representation." *Tex. Ass'n of Bus.*, 852 S.W.2d at 447. Rather, "the purpose of the first part of the *Hunt* test is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *Id*. (quoting *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988)).

This Court's landmark case regarding associational standing reflects an inclusive application of the independent standing requirement. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 443. In that case, TAB brought a facial challenge to the constitutionality of the administrative penalty schemes in two different state agencies, claiming that: (1) certain administrative penalties violate the right to a jury

trial, and (2) the agencies' rules forfeiting the right to appeal a penalty unless it is superseded violates the open courts provision. *Id*. Analyzing standing, the Court did not require that TAB members have been subject to every different sort of administrative penalty they challenge, or that members have been assessed penalties by both agencies, or that they have been required to supersede a penalty in order to avoid forfeiting the right to appeal. The Court found associational standing to bring the broad facial challenges based on the bare general fact that "individual TAB members have been assessed penalties pursuant to the challenged enactments" and that "other of its members remain at substantial risk of penalty." *Id*. at 447. Based on those facts—which did not extend to all of the different potential factual permutations in the suit—the Court concluded that "we are satisfied that TAB has not manufactured this suit." *Id*. The majority here held TPGA to a much higher standing inquiry, going far beyond the showing necessary to ensure that TPGA "has not manufactured its suit."

Moreover, this Court has confirmed that a "substantial risk of injury is sufficient under *Hunt*" to support associational standing. *Tex. Assoc. of Bus*., 852 S.W.2d at 447 (citing *Pennell v. City of San Jose*, 485 U.S. 1, 7 n. 3 (1988) (concluding that association of landlords had standing based on pleadings that individual members would likely be harmed by rent ordinance)). The court of

appeals' standing analysis ignored that TPGA's members face substantial risk of being subjected to *all of* Houston's LPG regulations.

Moreover, the court of appeals' error regarding standing is not limited to associational standing. The requirement that TPGA establish standing for its preemption claim on a regulation-by-regulation basis would apply equally to individuals. The broad application of the court of appeals' error thus raises its significance to the jurisprudence of the State.

Second, and relatedly, the majority's inquiry improperly conflates standing with the merits of TPGA's preemption claim. TPGA has a single preemption claim: that *all of* Houston's LPG regulations are preempted by the RRC LPG Safety Rules pursuant to § 113.054. On the merits, TPGA contends that § 113.054 expressly authorizes preemption of *all* local regulation of the LPG industry as a blanket matter; on the merits, Houston contends that § 113.054 does not authorize blanket preemption, and preemption must be analyzed on a regulation-by-regulation basis only to the extent there is a direct conflict with the RRC's LPG Safety Rules. *See* CR302-04 (Houston: "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.").[4]

Houston's theory of preemption depends on a rule-by-rule analysis, while TPGA's theory of preemption does not. By requiring TPGA to establish standing on a rule-by-rule basis, the majority accepted Houston's contention regarding the merits of the preemption claim. And that is error. The dissenting opinion by Chief Justice Rose explains that the majority's holding essentially chooses sides and conflicts with TPGA's preemption claim on the merits:

> TPGA's suit asserts a preemption challenge to the City's authority to promulgate ordinances regulating the LP-gas industry. Specifically, TGPA claims that "under § 113.054, the LP-Gas Safety Rules adopted by the [RRC] preempt and supersede any ordinance, order, or rule adopted by a political subdivision of the state relating to any aspect or phase of the liquefied petroleum gas industry." TPGA makes additional allegations regarding specific City of Houston ordinances, but those allegations stem from and are resolved by TPGA's foundational claim that section 113.054 preempts all local attempts to regulate the LP-gas industry. *As TPGA notes in its briefs to this Court, "Whether Houston has one such regulation or one thousand, [section] 113.054 preempts them all as a matter of law."*

App.3 pp. 2-3 (citations omitted) (emphasis added).

[4] As an aside, Houston's theory that preemption requires a conflict would render the Legislature's express preemption language surplusage because local ordinances that conflict with state law are preempted even if there is no preemption language in the state enactment. This is a preemption merits point, however, and this appeal is limited to the threshold question of jurisdiction.

As Chief Justice Rose explains, the majority's error "imposes unreasonable obstacles to associational standing." *Id*. p. 1. This Court should grant review to confirm the proper standard for standing in the context of a preemption claim.

B. The majority renders the Legislature's manifest intent meaningless and makes it impossible for the courts to enforce express preemption enactments.

The net result of the majority's error regarding standing is not just that it imposes on TPGA a greater burden to plead and prove associational standing to challenge Houston's local LPG regulations. A more serious error is that the Legislature's express effort to eliminate the patchwork of local regulations in favor of uniform statewide regulation is rendered meaningless and shielded from enforcement in the courts.

As discussed above, an interim House committee report explained that adopting § 113.054 involved an express legislative choice between "the need for a consistent regulatory scheme for the [LPG] industry" and "the preference for local flexibility."[5] The choice was "left to the will of the legislature," and the Legislature expressed its will by adopting § 113.054: a provision that expressly preempts *any* local LPG regulation.

Section 113.054 is not unique. Where preemption is concerned, sometimes the Legislature preempts all local regulation of a given subject matter as a blanket

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[5] http://www.house.state.tx.us/_media/pdf/committees/reports/81interim/House-Committee-on-Energy-Resources-Interim-Report-2010.pdf pp.48-50 (last visited Mar. 10, 2020).

matter and sometimes it requires a conflict between state and local enactments for preemption. Below are a few examples of each:

Blanket preemption of a subject matter

Tex. Health & Safety Code § 486.005(b)

> This chapter preempts and supersedes a local ordinance, rule, or regulation adopted by a political subdivision of this state pertaining to over-the-counter sales of products that contain ephedrine, pseudoephedrine, or norpseudoephedrine.

Tex. Agric. Code § 63.007

> This chapter preempts and supersedes any ordinance, order, or rule adopted by a political subdivision of this state relating to the regulation, registration, packaging, labeling, sale, distribution, use, or application of commercial fertilizer.

Tex. Nat. Res. Code § 113.054

> 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. . . .

Preemption to the extent of a conflict

Tex. Local Gov't Code § 142.118(a)

> This subchapter preempts all ***contrary*** local ordinances, executive orders, legislation, or rules adopted by a municipality.

Tex. Transp. Code § 545.4252(e)

> This section preempts all local ordinances, rules, or regulations that are ***inconsistent*** with specific provisions of this section adopted by a political subdivision of this state relating to the use of a wireless communication device by the operator of a motor vehicle. . . .

Tex. Health & Safety Code § 382.113(a)

> [A] municipality has the powers and rights as are otherwise vested by law in the municipality to: . . . enact and enforce an ordinance for the control and abatement of air pollution . . . not ***inconsistent*** with this chapter or the commission's rules or orders.

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These examples are not alone; Texas law includes blanket preemption statutes regarding various additional subjects, including certain oil and gas operations (Tex. Nat. Res. Code § 81.0523); certain massage therapists (Tex. Occ. Code § 455.005); and certain sales and use taxes relating to railroad districts (Tex. Transp. Code § 173.353). These statutes reflect that the Legislature sometimes preempts local regulation of an entire subject matter, and it did so for LPG regulations through § 113.054 just as it previously did so for regulations of ephedrine and commercial fertilizer and other subjects. But under the majority's holding, that manifest intent is rendered meaningless. Unless an association's members (or an individual) happen to be subjected to enforcement of each and every local regulation of LPG—or ephedrine or commercial fertilizer or whatever subject matter—under the majority's holding, standing will be lacking, the courts will not be able to enforce the preemption statute as a blanket matter, and a local governmental entity like Houston can continue to enforce its local ordinances notwithstanding the existence of an express preemption statute.

What does the Legislature need to do to preempt local regulation of a given subject matter? You would think that would be an easy task: provide for express preemption with unmistakeable clarity. *See City of Laredo v. Laredo Merchants Assoc.*, 550 S.W.3d 586, 593 (Tex. 2018) ("A statutory limitation of local laws may be express or implied, but the Legislature's intent to impose the limitation "must

'appear with unmistakeable clarity.'"); *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 4 (Tex. 2016) ("We must determine whether the Act and the Water Code reflect unmistakeably clear legislative intent to limit the City's authority to enact an ordinance to enforce the state air-quality standards. . . .").

The merits of the preemption claim turn on whether the Legislature expressed its intent to preempt *any* local regulation of the LPG industry with unmistakeable clarity. But under the majority's mistaken holding regarding standing—a threshold jurisdictional inquiry—the court cannot even reach the merits question of whether the Legislature intended to preempt all local regulation, and there is no way to enforce the Legislature's manifest intent. That cannot be a proper result. This Court should grant review to clarify the proper standard for standing—associational or otherwise—so that express preemption provisions like § 113.054 are not rendered meaningless.

Texas Propane Gas Association respectfully prays that this Court grant its petition for review, reverse the court of appeals' holding in part regarding the need to establish associational standing on a rule-by-rule basis, and affirm the trial court's order denying all of Houston's jurisdictional challenges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing pleading was served on the attorneys of record for Respondent by electronic filing and e-mail on March 16, 2020:

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing pleading was prepared using Microsoft Word 2019, and that, according to its word-count function, the sections of the foregoing brief covered by TRAP 9.4(i)(1) contain 4,332 words in a 14-point font size and footnotes in a 12-point font size.

/s/ *Jane Webre*
Jane Webre

App. 1

Filed in The District Court
of Travis County, Texas

SEP 10 2018 JC
At 1:54 P.M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-17-001089

TEXAS PROPANE GAS ASSOCIATION, *Plaintiff,*	§	**IN THE DISTRICT COURT**
	§	
	§	
v.	§	**TRAVIS COUNTY, TEXAS**
	§	
	§	
RAILROAD COMMISSION OF TEXAS, ***ET AL.***	§	
	§	**261ST JUDICIAL DISTRICT**
Defendants.	§	

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

On May 16, 2018, the court heard Plaintiff Texas Propane Gas Association's Motion for Summary Judgment, and Defendant City of Houston's Motion for Summary Judgment for Lack of Jurisdiction and Partial Motion for Summary Judgment. The Court has considered the above-stated motions, pleadings, evidence, Responses, and Replies and rules as follows:

It is ORDERED that Texas Propane Gas Association's Motion for Summary Judgment is denied.

It is FURTHER ORDERED that the City of Houston's Motion for Summary Judgment for Lack of Jurisdiction is denied.

It is FURTHER ORDERED that the City of Houston's Partial Motion for Summary Judgment is denied.

It is FURTHER ORDERED that all written objections to summary judgment evidence are overruled.

SIGNED this 10th day of September, 2018.

PRESIDING JUDGE
AMY CLARK MEACHUM

App. 2

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00596-CV

The City of Houston, Appellant

v.

Texas Propane Gas Association, Appellee

FROM THE 261ST DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-17-001089, THE HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING

MEMORANDUM OPINION

The City of Houston appeals from the trial court's order denying its motion for summary judgment, in which the City asserts that the court lacks jurisdiction over claims for declaratory relief made by appellee Texas Propane Gas Association (TPGA). Because we determine that the trial court erred in concluding that TPGA met its burden to plead facts affirmatively demonstrating that it has associational standing to bring its claims, we will reverse and remand to the trial court to allow TPGA an opportunity to cure this pleading defect.

BACKGROUND

Chapter 113 of the Texas Natural Resources Code, also known as the Liquefied Petroleum Gas (LP-Gas) Code, provides that the Railroad Commission of Texas "shall administer and enforce the laws of this state and the rules and standards of the commission relating to liquefied petroleum gas." Tex. Nat. Res. Code §§ 113.001-.011. Pursuant to its authority under the Code to "promulgate and adopt rules or standards," the Commission adopted the LP-Gas

Safety Rules. *Id.* § 113.051; 16 Tex. Admin. Code §§ 9.1-.403 (Railroad Comm'n of Tex., LP-Gas Safety Rules).

In 2017 TPGA filed suit against the City challenging the legality of several "ordinances and regulations" that were passed by the Houston City Council in 2015 and which took effect in early 2016. According to its petition, 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." In general, the ordinances challenged by TPGA amended the City's Fire Code and placed new restrictions on the ability to store, use, handle, or dispense LP-Gas within the City's jurisdiction. According to TPGA, the ordinances impose more restrictive conditions on the LP-Gas industry than those imposed by the Commission's LP-Gas Safety Rules. TPGA sought a declaration that these ordinances and resulting regulations are invalid because they are pre-empted by Section 113.054 of the Texas Natural Resources Code and by the LP-Gas Safety Rules. *See* Tex. Civ. Prac. & Rem. Code §§ 37.001-.011 (Declaratory Judgments Act). In relevant part, Section 113.054 states:

> The rules and standards promulgated and adopted by the [Railroad 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 liquified petroleum gas industry.

Tex. Nat. Res. Code § 113.054. Specifically, TPGA requested that the court declare the following:

> 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 Amendments 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 2012 International Fire Code itself, . . . are invalid and ineffective to the extent they regulate to any aspect of the LP-Gas industry . . . .

In the alternative, TPGA requested declarations that certain portions of the City's regulations are invalid because they are more restrictive than the LP-Gas Safety Rules, including from Chapter 61 of the Fire Code: (1) "6101.02 relating to fees and permits, (2) "6101.2 and 6103.3 relating to aggregate water capacity of LP-Gas containers," (3) "6101.3 relating to the required submission of applications and/or construction documents," and (4) "6104.2 relating to maximum storage capacity within certain storage capacity within districts of limitation." TPGA also challenged what it contends are more restrictive provisions found in Chapter 1, entitled "Scope and Administration," generally setting out the procedural mechanisms for enforcing the Fire Code's substantive regulations.

TPGA subsequently filed a traditional motion for summary judgment on its claims against the City. *See* Tex. R. Civ. P. 166a. In response, the City filed a motion for summary judgment for lack of jurisdiction and a traditional motion for partial summary judgment. The trial court denied the parties' competing motions, including the City's motion for summary judgment for lack of jurisdiction. The City timely filed its notice of interlocutory appeal from the trial court's ruling on its jurisdictional challenge.[1] *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). In three issues, the City asserts that the trial court erred in concluding that it has subject-matter jurisdiction to consider TPGA's claims.

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[1] Generally, appeals may only be taken from final judgments and certain appealable interlocutory orders. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); *see* Tex. Civ. Prac. & Rem. Code § 51.014 (listing appealable interlocutory orders). Section 51.014(a)(8) of the Texas Civil Practice and Remedies Code provides for an interlocutory appeal from a grant or denial of a plea to the jurisdiction filed by a governmental unit. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8). The Texas Supreme Court has construed the phrase "plea to the jurisdiction" in Section 51.014(a)(8) to mean a challenge to jurisdiction, "irrespective of the procedural vehicle used." *Thomas v. Long*, 207 S.W.3d 334, 349 (Tex. 2006); *see Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000) (recognizing that subject-matter jurisdiction may be challenged by motion for summary judgment). Here, the City brought its jurisdictional challenge in a motion for summary judgment, which the trial court expressly denied. As a result, we have jurisdiction to consider this interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8).

STANDARD OF REVIEW

Subject-matter jurisdiction is essential to the authority of a court to decide a case. *Save Our Springs All., Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 878 (Tex. App.—Austin 2010, pet. denied) (citing *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 443-45 (Tex. 1993)). A challenge to subject-matter jurisdiction may be raised in a plea to the jurisdiction or in a motion for summary judgment. *Bland Indep. Sch. Dist. v. Blue*, 34 S.Wd.3d 547, 553-54 (Tex. 2000). "A summary-judgment motion challenging jurisdiction may challenge either the pleadings or the existence of jurisdictional facts." *Lazarides v. Farris*, 367 S.W.3d 788, 797 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (citing *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004), and applying standard of review to denial of motion for summary judgment challenging subject-matter jurisdiction). When the movant challenges the pleadings, we determine if the plaintiff has met his burden to allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Miranda*, 133 S.W.3d at 226. In conducting this review, we construe the pleadings liberally, taking them as true, and look to the pleader's intent. *Id.* (citing *Texas Ass'n of Bus.*, 852 S.W.2d at 446). If the plaintiff has not affirmatively pleaded facts to support jurisdiction or negate jurisdiction, the matter is one of pleading sufficiency, and the court should provide the plaintiff with the opportunity to amend its pleadings to cure jurisdictional issues. *Id.* at 226-27. But if the pleadings affirmatively negate the existence of jurisdiction, the motion should be granted. *Id.*

In addition, we may consider evidence that the parties presented below and must do so when necessary to resolve jurisdictional issues. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 547. When a motion for summary judgment challenges the existence of jurisdictional facts, the trial court must consider relevant evidence submitted by the parties to resolve the jurisdictional issues

raised. *Miranda*, 133 S.W.3d at 226. If a fact question is presented by the evidence regarding a jurisdictional issue, the trial court is precluded from granting summary judgment on the jurisdictional challenge. *Id.* at 227-28; *Lazarides*, 367 S.W.3d at 797. When the relevant evidence is undisputed or fails to raise a fact issue on the jurisdictional issue, the court should grant or deny the motion for summary judgment as a matter of law. *Miranda*, 133 S.W.3d at 228; *Lazarides*, 367 S.W.3d at 797.

Whether a trial court has subject-matter jurisdiction is a question of law, which we review de novo. *Miranda*, 133 S.W.3d at 228. "Our ultimate inquiry is whether the particular facts presented, as determined by the foregoing review of the pleadings and any evidence, affirmatively demonstrate a claim within the trial court's subject-matter jurisdiction." *Bacon v. Texas Historical Comm'n*, 411 S.W.3d 161, 171 (Tex. App.—Austin 2013, no pet.).

DISCUSSION

Standing

In its first and third issues on appeal, the City contends that the trial court erred in denying its jurisdictional challenge on grounds that there is no justiciable controversy between the parties. *See Texas Quarter Horse Ass'n v. American Legion Dep't of Tex.*, 496 S.W.3d 175, 180 (Tex. App.—Austin 2016, no pet.) (referring to doctrines of ripeness, mootness, and standing as justiciability doctrines derived from Texas Constitution). Specifically, in its first issue, the City asserts that the relevant pleadings and jurisdictional evidence fail to establish that TPGA has standing to sue as an organization on behalf of its members. In its third issue, the City argues that the relevant pleadings and jurisdictional evidence fail to establish that TPGA's claims are not ripe or, alternatively, are moot. We turn first to the City's arguments with respect to standing.

"Standing is a prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court's power to decide a case." *Bland Indep. Sch. Dist*, 34 S.W.3d at 553-54. A plaintiff must demonstrate standing for each of his claims, and the court must dismiss any claim for which it lacks jurisdiction. *Heckman v. Williamson County,* 369 S.W.3d 137, 150 (Tex. 2012) (citing *Andrade v. NAACP*, 345 S.W.3d 1, 14 (Tex. 2011)). The general test for constitutional standing in Texas is whether there is a "real" (i.e., justiciable) controversy between the parties that will actually be resolved by the judicial declaration sought. *Texas Ass'n of Bus*., 852 S.W.2d at 446. The requirement of standing is derived from the Texas Constitution's separation-of-powers provision, which denies the judiciary authority to decide cases in the abstract, and from the open-courts provision, which provides court access only to a "person for an injury done him." *Meyers v. JDC/Firestone, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018) (citing Tex. Const. art. I, § 13). "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." *Texas Ass'n of Bus.*, 852 S.W.2d at 444.

Standing is a constitutional prerequisite to filing suit for both individuals and associations. *South Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007). When, as in this case, an association sues on behalf of its members, the association's standing is established by a three-prong test established by the United States Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). *See Texas Ass'n of Bus.*, 852 S.W.2d at 447 (adopting *Hunt* test for associational standing). Under this test, an association must demonstrate that (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members. *Id.*

(quoting *Hunt*, 432 U.S. at 343). In its motion and on appeal, the City has focused its arguments on whether TPGA has adequately shown that it meets the first prong of the *Hunt* test.

The purpose of the first prong is "simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *Id.* (quoting *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988)). An association plaintiff satisfies this prong by showing that "at least one of the organization's members has standing individually." *Save Our Springs All.*, 304 S.W.3d at 878. That is, the plaintiff must first demonstrate that at least one of its members has suffered an "injury in fact"— an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Meyers*, 548 S.W.3d at 485 (laying out federal test for standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), noting similarity to elements of standing under Texas law); *see Save Our Springs All.*, 304 S.W.3d at 878, 882-84 (applying federal test under *Lujan* to analyze associational standing under first prong of *Hunt* test). Second, the plaintiff must demonstrate that the injury is fairly traceable to the challenged action and, third, is likely to be redressed by the requested relief. *Id.* When, as in this case, the suit challenges governmental action, the plaintiff must show that the injury is distinct from that sustained by the public at large. *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 555-56; *Lomas*, 223 S.W.3d at 307.

In its pleadings, TPGA alleges that one of its members, Green's Blue Flame Gas Company, Inc., became involved on a project that included installation of an LP-Gas tank "to fuel buses serving the Texas Medical Center." "During the course of this project, [an inspector from the Houston Fire Marshall's Office] refused to evaluate the LP-Gas installation under the LP-Gas Safety Rules and instead imposed inapplicable and more restrictive conditions and

requirements from Houston's Fire Code and the 2006 and 2012 International Fire Codes simply on the basis that the inspector 'felt' that they were 'relevant and increased public safety.'" According to TPGA's allegations, although Green's Blue Flame Gas had filed the form for installation required with the Railroad Commission, the inspector refused to issue a permit beyond 90 days and charged Green's Blue Flame Gas Company $2,180 in permitting fees. These undisputed allegations, taken as true, demonstrate that at least one member of the association has already been assessed fees for a permit that is currently required by Chapter 61 of the Houston Fire Code but not by the rules promulgated by the Railroad Commission. We conclude that TPGA has satisfied the first prong of the *Hunt* test for associational standing to the extent TPGA is challenging this permitting requirement on LP-Gas.

In its pleadings, TPGA also generally alleges that inspectors have reviewed projects involving installation of LP-Gas tanks and have issued red tags for "unspecified violations of Houston's Building Code" to unspecified persons. In one instance, a City inspector issued a "red tag" and directed a home owner to remove a propane bottle from under a mobile home, and in another instance, an inspector served a "Notice of Deficiencies" on a homeowner, a customer of a TPGA member, related to an LP-Gas tank used to fuel a pool heater. Similarly, TPGA describes an incident where another customer of a TPGA member installed "a rack housing" for LP-Gas cylinders and was later notified by an inspector that an operational permit was required based on the number and capacity of cylinders installed. In describing these instances, TPGA's pleadings fail to explain how any TPGA member, *as opposed to its customer*, has suffered an injury "fairly traceable" to enforcement of what it contends are invalid regulations on LP-Gas. *See Save Our Springs All.*, 304 S.W.3d at 878 (laying out Supreme Court's test for individual standing under first prong of test for associational standing and

concluding that allegations of harm to environmental, scientific, or recreational interests of members who did not possess property interest in or in connection to real property involved in development agreements were insufficient to demonstrate injury distinct from general public). 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. *See Stop the Ordinances Please v. City of New Braunfels*, 306 S.W.3d 919, 929 (Tex. App.—Austin 2010, no pet.) (explaining that indirect economic injury resulting from regulations placed on plaintiff's customers is substantially more difficult to establish than direct injury and that plaintiffs claiming that challenged ordinance "discourage[ed] tourists from visiting," and thus had "chilling effect" on their businesses, failed to meet burden).

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 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 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.

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." *Good Shepherd Med. Ctr., Inc. v. State*, 306 S.W.3d 825, 833 (Tex. App.—Austin 2010, no pet.) (citing *Save Our Springs All.*, 304 S.W.3d at 871 (concluding that association members had not established injury distinct from that of general public)). 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. *See* Tex. R. App. P. 43.3. Accordingly, we turn to the City's remaining appellate issues.

Ripeness and Mootness

Next, we consider the City's argument that the trial court lacks subject-matter jurisdiction because TPGA's claims are not ripe or, alternatively, have become moot. Like standing, ripeness and mootness doctrines concern whether a justiciable controversy exists between the parties and serve to bar the court from issuing advisory opinions. *Texas Quarter Horse Ass'n*, 496 S.W.3d at 180. Under the ripeness doctrine, a court must "consider whether, at the time the lawsuit is filed, the facts are sufficiently developed 'so that an injury has occurred or

is likely to occur, rather than being contingent or remote.'" *Id.* (quoting *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 851-52 (Tex. 2000)). Conversely, the mootness doctrine applies when a justiciable controversy existed between the parties at the time the case arose, but the live controversy no long exists because of subsequent events. *Id.*

In this case, the City's mootness and ripeness theories turn on an exception to preemption found in Section 113.054. Specifically, Section 113.054, which is the basis of TPGA's preemption claim, states in relevant part:

> 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.

Tex. Nat. Res. Code § 113.054. According to TPGA, there is no dispute that the Railroad Commission has not adopted any formal petition process, and therefore, the City does not have any "formal opportunity to save its propane regulations and ordinances from preemption under this [exception]." In the City's view, the Court cannot enforce the alleged restrictions of Section 113.054 "without also affording the City its statutory protections." Thus, unless and until a formal petition process is implemented by the Commission, TPGA's claims are not ripe. Similarly, in the alternative, the City asserts that the summary-judgment evidence shows that it has in fact received informal permission from the Commission to continue to enforce its local ordinances and regulations related to LP-Gas. The City reasons that this evidence establishes that the statutory exception to preemption has been met and that, as a result, TPGA's claims have become moot.

The issue of whether the City has met the statutory exception under Section 113.054 by receiving permission from the Commission to promulgate the challenged ordinances

and regulations is an issue to be resolved in the lawsuit and goes to the merits of TPGA's claim. To the extent the City argues that it has been effectively prevented from obtaining permission under Section 113.054 by the Commission's failure to implement a formal process, we conclude that this has no effect on the trial court's power to decide the immediate issues in this dispute: whether the challenged ordinances and regulations are preempted by Section 113.054 and, if so, whether the ordinances and regulations are excepted from preemption because the City has obtained permission from the Commission "to promulgate more restrictive rules and standards." Finally, the City's assertion that the evidence establishes that it in fact received permission from the Commission through informal measures is, in effect, an argument that the evidence establishes that it has met the statutory exception and that TPGA cannot, as a matter of law, prevail on the merits of its suit. Because the City's arguments regarding the statutory exception go to the merits of the case and not to the court's power to decide the case, the City's third issue on appeal is overruled.

Jurisdiction of Civil Courts over Penal Ordinances

Finally, we turn to the City's second appellate issue. In this issue, the City asserts that the trial court erred in denying its motion for summary judgment for lack of jurisdiction because the ordinances and regulations at issue are penal in nature and, as a result, the civil trial court does not possess jurisdiction to determine their validity.

Texas courts have long recognized that the meaning and validity of a penal statute or ordinance should ordinarily be determined by courts exercising criminal jurisdiction. *See State v. Morales*, 869 S.W.2d 941, 945 (Tex. 1994); *City of New Braunfels v. Stop the Ordinances Please*, 520 S.W.3d 208, 212 (Tex. App.—Austin 2017, pet. denied); *City of La Marque* v. *Braskey*, 216 S.W.3d 861, 863 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Sterling v.*

San Antonio Police Dep't, 94 S.W.3d 790, 793 (Tex. App.—San Antonio 2002, no pet.). This constraint on civil courts is grounded in both pragmatism, i.e., a need to avoid conflicting decisions by Texas high courts in Texas's bifurcated judicial system, and in longstanding limitations imposed on equity jurisdiction and thus, the "very balance of state governmental power imposed by framers of the Texas Constitution." *Morales*, 869 S.W.2d at 944, 947-48; *see City of New Braunfels*, 520 S.W.3d at 212; *Ryan v. Rosenthal*, 314 S.W.3d 136, 142 (Tex. App.—Houston [14th Dist.] 2010, no pet.). If the meaning and validity of a criminal statute or ordinance can be resolved in a criminal proceeding "and vested property rights are not in jeopardy," then a court of equity should not intervene. *Consumer Serv. All. of Tex., Inc. v. City of Dallas*, 433 S.W.3d 796, 804 (Tex. App.—Dallas 2014, no pet.) (quoting *Passel v. Fort Worth Indep. Sch. Dist.*, 440 S.W.2d 61, 63 (Tex. 1969)). "A person may continue his activities until he is arrested and then procure his release by showing that the law is void." *Id.*

When a penal statute or ordinance is being enforced and the plaintiff is being prosecuted or the threat or prosecution is imminent, an equity court will not interfere with the ordinary enforcement of the statute or ordinance unless (1) the statute or ordinance is unconstitutional and (2) its enforcement will result in irreparable injury to vested property rights. *Id.* This limitation on jurisdiction applies not only in suits where the plaintiff seeks to enjoin enforcement but also in suits seeking a declaratory judgment as to the constitutionality of the statute or ordinance. *Morales*, 869 S.W.2d at 947; *Ryan*, 314 S.W.3d at 142 ("The considerations that lead courts of equity to deny injunctive relief against enforcement of the criminal laws apply with equal force to an action for a declaratory judgment construing a penal statute.").

Recently, in *City of Laredo v. Laredo Merchants Association*, 550 S.W.3d 586 (Tex. 2018), the Texas Supreme Court considered whether the civil courts had jurisdiction in

a suit that challenged an ordinance prohibiting the use of certain non-compliant plastic bags by vendors. In deciding that the exercise of civil jurisdiction was proper in the suit, the court recognized that the challenged ordinance (the violation of which constituted a class C misdemeanor, punishable by a fine of up to $2,000 per violation) was penal in nature and therefore could only be enjoined or declared void if there was "a threat of irreparable injury to vested property rights." *Id.* at 592 n.28 (citing *Morales*, 869 S.W.2d at 945). The Texas Supreme Court concluded that this exception had been met, and therefore the challenge to the penal ordinance could be brought in civil court, because the ordinance imposed "a substantial per violation fine that effectively preclude[d] small local businesses from testing the ban's constitutionality in defense to a criminal prosecution." *Id.* (citing *City of Austin v. Austin City Cemetery Ass'n*, 28 S.W. 528, 529-30 (Tex. 1894)).

Here, the dispute on appeal centers on whether the ordinances and regulations at issue are penal in nature and, if so, whether their enforcement will result in irreparable injury to vested property rights. The City argues that Sections 104 and 109 of the Fire Code, found in Chapter 1, provide the enforcement mechanism for any substantive requirements in the Fire Code, including Chapter 61, and that these provisions make clear that violations of the Fire Code are punishable as criminal offenses. In response, TPGA asserts that the challenged LP-Gas regulations are not criminal regulations because they do not, on their face, impose criminal penalties or criminalize certain conduct.

Assuming without deciding, however, that the challenged ordinances and regulations are penal in nature, we conclude that the trial court did not err in determining that it has jurisdiction over TPGA's claims. Section 109.4 of the City's Fire Code provides that the doing of any act that the Fire Code declares to be unlawful, and for which no specific penalty is

provided, “shall be punished by a fine of not less than $500.00 and no more than $2,000.00” and that “each day any violation of this code shall continue shall constitute a separate offense.” Based on this 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.” *See id.* Because there is a “threat of irreparable injury to vested property rights,” TPGA’s suit to declare certain Fire Code regulations invalid may be brought in civil court. *See id.* (citing *Morales*, 869 S.W.2d at 945). We overrule the City’s second issue on appeal.

CONCLUSION

Because TPGA failed to plead facts affirmatively demonstrating subject-matter jurisdiction, we conclude that the trial court erred in denying the City’s motion for summary judgment for lack of jurisdiction and reverse the trial court’s order. We also conclude, however, that TPGA’s pleadings do not affirmatively negate the existence of subject-matter jurisdiction. Accordingly, we remand this cause so that TPGA may have a reasonable opportunity to amend its pleadings, if possible, to demonstrate that it has standing to bring its suit for declaratory relief.

____

Chari L. Kelly, Justice

Before Chief Justice Rose, Justices Kelly and Smith
Dissenting Opinion by Chief Justice Rose

Reversed and Remanded

Filed: July 18, 2019

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED JULY 18, 2019

NO. 03-18-00596-CV

The City of Houston, Appellant

v.

Texas Propane Gas Association, Appellee

APPEAL FROM THE 261ST DISTRICT COURT OF TRAVIS COUNTY
BEFORE CHIEF JUSTICE ROSE, JUSTICES KELLY AND SMITH
REVERSED AND REMANDED -- OPINION BY JUSTICE KELLY
DISSENTING OPINION BY CHIEF JUSTICE ROSE

This is an appeal from the interlocutory order signed by the trial court on September 10, 2018. Having reviewed the record and the parties' arguments, the Court holds that there was reversible error in the order. Therefore, the Court reverses the trial court's interlocutory order and remands the case to the trial court so that Texas Propane Gas Association may have a reasonable opportunity to amend its pleadings, if possible, to demonstrate that it has standing to bring its suit for declaratory relief. Each party shall pay the costs of appeal incurred by that party, both in this Court and in the court below.

APP. 3

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-18-00596-CV

The City of Houston, Appellant

v.

Texas Propane Gas Association, Appellee

FROM THE 261ST DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-17-001089, THE HONORABLE AMY CLARK MEACHUM, JUDGE PRESIDING

D I S S E N T I N G   O P I N I O N

I respectfully dissent because the majority's decision imposes unreasonable obstacles to associational standing.

Under the first prong of the *Hunt* test, an association has standing to sue on behalf of its members when "'its members would otherwise have standing to sue in their own right." *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 447 (Tex. 1993) (adopting standard for associational standing articulated in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 342 (1977)). The purpose of this requirement "is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9 (1988). The Texas Supreme Court has warned that "[t]his requirement should not be interpreted to impose unreasonable obstacles to associational representation." *Id.*

With little analysis and no citation to supporting authority, the majority holds that an association asserting a preemption challenge to a regulatory scheme that undeniably relates to its members' industry "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.'" *Ante* at p. 10 (citing *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) (describing general standing principals). But *Meyers* does not support such a restrictive interpretation of the first prong of the *Hunt* test—it held that an individual, not an association, lacked standing to sue because the relief requested would not remedy the individual's alleged injury. *See Meyers*, 548 S.W.3d at 487–89. More importantly, the majority's interpretation here does exactly what the supreme court has warned against and is contrary to the purpose of associational standing. *See Texas Ass'n of Bus.*, 852 S.W.2d at 447.

Applying the first prong of *Hunt* as directed by the supreme court, I would hold that TPGA has satisfied its burden of showing that its members have standing to sue in their own right. TPGA's suit asserts a preemption challenge to the City's authority to promulgate ordinances regulating the LP-gas industry. Specifically, TGPA claims that "under § 113.054, the LP-Gas Safety Rules adopted by the [Railroad] Commission preempt and supersede *any* ordinance, order, or rule adopted by a political subdivision of the state relating to any aspect or phase of the liquefied petroleum gas industry." *See* Tex. Const. art. XI, § 5 (mandating that no city ordinance "shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State"); Tex. Nat. Res. Code § 113.054 (providing that Railroad Commission rules "preempt and supersede any" local ordinance "relating to any aspect or phase of the" LP-gas industry). TPGA makes additional allegations

regarding specific City of Houston ordinances, but those allegations stem from and are resolved by TPGA's foundational claim that section 113.054 preempts all local attempts to regulate the LP-gas industry. As TPGA notes in its briefs to this Court, "Whether Houston has one such regulation or one thousand, [section] 113.054 preempts them all as a matter of law."

In support of its standing to bring this preemption claim and pursue the relief it seeks, TPGA alleges, and supports with affidavits, that it is a trade association representing a statewide membership of companies and individuals actively engaged in the LP-gas industry, and that its members have suffered adverse action and consequences as a result of the enforcement of the City's ordinances regulating the LP-gas industry. Thus, on the record before us, TPGA has satisfied the first prong of the *Hunt* test. *See Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995) (holding that association's members would have standing to sue in their own right, and thus association had standing, despite the lack of evidence showing injury to specific members because the court could "fairly assume the existence of such members" based on the nature and size of the association); *Texas Ass'n of Bus.*, 852 S.W.2d at 440 (applying first prong and holding that it was satisfied that association had not "manufactured this lawsuit" because association's members had been assessed administrative penalties pursuant to the challenged enactments and members remained at risk of penalty under same enactments). Accordingly, I would affirm the district court's order overruling the City's plea to the jurisdiction.[1]

[1] I agree with the majority's conclusions that none of the City's other issues merit reversal.

____

Jeff Rose, Chief Justice

Before Chief Justice Rose, Justice Kelly and Smith

Dissenting Opinion

Filed: July 18, 2019

APP. 4

V.T.C.A., Natural Resources Code § 113.051

§ 113.051. Adoption of Rules and Standards

Currentness

Except as provided in Section 113.003 of this code, the commission 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.

Credits

Acts 1977, 65th Leg., p. 2594, ch. 871, art. I, § 1, eff. Sept. 1, 1977. Amended by Acts 1979, 66th Leg., p. 2031, ch. 799, § 1, eff. Sept. 1, 1980.

V. T. C. A., Natural Resources Code § 113.051, TX NAT RES § 113.051
Current through the end of the 2019 Regular Session of the 86th Legislature

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V.T.C.A., Natural Resources Code § 113.054

§ 113.054. Effect on Other Law

Effective: September 1, 2011
Currentness

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.

Credits
Added by Acts 2011, 82nd Leg., ch. 1020 (H.B. 2663), § 1, eff. Sept. 1, 2011.

V. T. C. A., Natural Resources Code § 113.054, TX NAT RES § 113.054
Current through the end of the 2019 Regular Session of the 86th Legislature

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APP. 5

LIQUEFIED PETROLEUM GAS SAFETY RULES

A manual of rules and procedures for handling and odorizing liquefied petroleum gas in Texas, including specifications for design, construction, and installation of equipment used in transportation, storage, and distribution

RAILROAD COMMISSION OF TEXAS

CHRISTI CRADDICK, CHAIRMAN
DAVID PORTER, COMMISSIONER
RYAN SITTON, COMMISSIONER

July 2016

LP GAS SAFETY RULES

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