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SUPREME COURT OF TEXAS
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No. 19-0767

IN THE SUPREME COURT OF TEXAS

TEXAS PROPANE GAS ASSOCIATION

v.

THE CITY OF HOUSTON

TEXAS PROPANE GAS ASSOCIATION'S RESPONSE 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—a civil statute—provides that 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 engaged in the LPG industry, sued Houston and other cities seeking a declaration that their piecemeal local LPG regulations of commercial conduct are preempted by 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 filed a plea to the 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. Opinion Dissenting in part by Chief Justice Rose. App.3.
Disposition in Court of Appeals:	As relevant to Houston's cross-petition, all justices rejected Houston's contention that the civil courts lack subject matter jurisdiction to review the preemptive effect of § 113.054, a civil statute, even assuming (without deciding) that Houston's local LPG regulations are "penal in nature." App.2 pp. 13-16; App.3 p.3 n.1.

ISSUES ON CROSS-APPEAL

1. Houston's jurisdictional challenge turns on the construction of an express preemption provision in a civil statute. Do the civil courts have jurisdiction to determine whether a civil statute preempts a local ordinance seeking to regulate commercial conduct? Or is this preemption case instead a "criminal law matter" over which this Court lacks jurisdiction because Houston's regulations call for "small fines"? Put another way, can a city effectively evade judicial review of an otherwise preempted local ordinance by sprinkling "penal" enforcement aspects into a civil regulatory scheme? The court of appeals rejected Houston's argument that "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." App.2 p. 13.

2. All justices below affirmed the trial court's denial of Houston's plea to the jurisdiction based on this "Court's recent decision in *City of Laredo*."[1] *See* App.2 p. 16. Even assuming this preemption case is a "criminal law matter," as Houston argues, this Court cannot accept Houston's jurisdictional challenge without concluding that it lacked jurisdiction to reach the merits in *City of Laredo*. Was this Court correct in holding "We have jurisdiction over the case"[2] in *City of Laredo*?

[1] *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 592 n.28 (Tex. 2018).
[2] *Id.* at 592 n.28.

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 TPGA's Opening Brief on the Merits:

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

STATEMENT OF FACTS

To avoid repetition of the factual record, TPGA incorporates and relies on the Statement of Facts in its opening brief on the merits. TPGA here provides procedural facts relevant to its response brief on the merits.

In this suit, TPGA claims that Houston's local propane regulations are preempted by the Railroad Commission's LPG Safety Rules, which "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." Tex. Nat. Res. Code § 113.054. That is TPGA's actual claim: that the state statute provides for preemption of all local regulation of the propane industry with unmistakeable clarity. And that claim turns on the scope and meaning of the preempting state statute, not the particulars of the local propane regulations.

In the trial court, Houston challenged subject-matter jurisdiction, arguing that its propane regulations are substantively "penal" regulations and therefore "jurisdiction to hold them preempted lies [exclusively] in the criminal courts." CR259, 268-78. The trial court denied Houston's plea to the jurisdiction. App.1. On appeal, the court of appeals affirmed the trial court's denial of Houston's jurisdictional challenge based on the alleged penal nature of its propane regulations. App.2 pp.13-16; App.3 p.3 n.1. Relying "on the Texas Supreme Court's recent decision in *City of Laredo*," the majority explained that even "[a]ssuming without

deciding . . . that the challenged ordinances and regulations are penal in nature," it "must conclude . . . TPGA's suit to declare certain Fire Code regulations invalid may be brought in civil court." App.1 p. 15-16.

SUMMARY OF ARGUMENT

This is a preemption case, and the subject of regulation is commercial conduct. TPGA seeks a declaratory judgment that Houston's regulations of propane and propane accessories are preempted by Railroad Commission regulations pursuant to provisions in the Texas Natural Resources Code—a civil statute. This Court has long held that the Legislature can preempt local regulation of commercial conduct by expressing its intent to do so with unmistakable clarity. And this Court—with its exclusively civil jurisdiction—routinely adjudicates preemption challenges to local regulations, as do the lower courts in civil actions.

Houston claims that this Court lacks jurisdiction because this preemption case is a "criminal law matter." Houston argues that aspects of its local propane regulations calling for enforcement in municipal court and fines for violations take this preemption case out of the scope of this Court's general civil jurisdiction and place it within the exclusive jurisdiction of the criminal courts and the Texas Court of Criminal Appeals.

But the essence of this preemption case is substantively civil, not criminal. It turns on the scope of the preemption provision in the Texas Natural Resources Code,

not the validity or the constitutionality of Houston's propane regulations. As a threshold matter, therefore, TPGA's plain-vanilla preemption claims fall on the civil side of the dividing line, not the criminal side. And even if this preemption case were a "criminal law matter," as Houston argues, this Court would still have jurisdiction to hear TPGA's preemption challenge because, in line with many cases before it—most recently *City of Laredo*—the void-as-preempted ordinance here threatens irreparable injury to vested property rights.

This Court has twice recently rejected the same argument on the same issue raised by the same party. In *City of Laredo*, which tracks this case exactly, this Court rejected the jurisdictional challenge Houston raised as amicus and held, "We have jurisdiction over the case," before going on to reach the merits and hold that the municipal ordinance was preempted by a state statute. 550 S.W.3d at 592 n.28. Before that, in *BCCA Appeal Grp., Inc. v. City of Houston*, this Court held that the municipal ordinance was preempted by a state regulatory scheme and rejected Houston's jurisdictional challenge on rehearing. 496 S.W.3d 1, 24 (Tex. 2016).

Houston's latest attempt at the same flawed attack cannot resurrect an issue that is dead and gone. To side with Houston, this Court would have to walk back *City of Laredo* (2018) for lack of jurisdiction; it would also have to walk back *BCCA Appeal Group* (2016) for lack of jurisdiction; and it would also have to walk back, for lack of jurisdiction, a century's worth of Texas jurisprudence on the preemption

of local regulations. Indeed, Houston has been fighting and losing this very battle for more than one hundred years. *See City of Houston v. Richter*, 157 S.W. 189, 190–92 (Tex. Civ. App.—Galveston 1913, no writ) (exercising civil jurisdiction to enjoin enforcement of "penal[]" local ordinance "in conflict with" state statute based on threat to "business"). The resolution here should be no different.

ARGUMENT

A. Texas courts routinely adjudicate claims that the Legislature has preempted local regulation of commercial conduct by expressing its intent with unmistakable clarity.

The Texas Constitution prohibits a city from acting in a manner inconsistent with the general laws of the state. Tex. Const. art. XI, § 5. Thus, an "ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute." *Dallas Merch.'s & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993).

In the same vein, "the legislature may, by general law, withdraw a particular subject from a home rule city's domain." *Tyra v. City of Houston*, 822 S.W.2d 626, 628 (Tex. 1991) (citing *Glass v. Smith*, 244 S.W.2d 645, 649 (Tex. 1951)). This Court reiterated that concept recently in *City of Laredo*. 550 S.W.3d at 592–93 & n.32 (collecting cases). The "question is not whether the Legislature *can* preempt a local regulation like the Ordinance but whether it *has*." *Id.* at 593 (emphasis in original).

To determine the extent of preemption, courts look "to the statutory text and the ordinary meanings of its words," *City of Laredo*, 550 S.W.3d at 594 (citation omitted), and consider "whether the Legislature's intent to provide a limitation appears with 'unmistakable clarity.'" *BCCA Appeal Group, Inc.*, 496 S.W.3d at 7 (citations omitted). That is the core merits question TPGA asks the civil courts to answer in this case: whether, by the statutory text of Texas Natural Resources Code § 113.054, the Legislature expressed with unmistakable clarity an intent to withdraw from Houston's local regulatory domain "any aspect or phase of the liquefied petroleum gas industry." *See* 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."). There is no facial constitutional challenge to Houston's propane regulations in TPGA's suit, just a plain-vanilla preemption claim of the sort that civil courts—including this Court—adjudicate all the time.[3]

Houston contends that the civil courts lack jurisdiction to adjudicate the preemption claim because its propane regulations impose fines for violations

[3] *See, e.g.*, *City of Laredo*, 550 S.W.3d at 598 (holding city ordinance preempted by statute); *BCCA Appeal Group, Inc.*, 496 S.W.3d at 24 (same); *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 679 (Tex. 2013) (same); *Dallas Merch.'s & Concessionaire's Ass'n*, 852 S.W.2d at 494 (same);

through its municipal courts. That penalty scheme makes this a criminal case, Houston argues, and therefore the civil courts have no jurisdiction over it. The jurisdiction question thus turns on whether Houston's unilateral action to impose fines through its municipal courts rather than administratively transforms this action into a criminal matter that cannot be adjudicated in the civil courts. This Court should reject Houston's challenge because as a definitional question TPGA's preemption claim is not a criminal matter under this Court's recent precedent; and even if it were, the claim comes within an exception this Court recognized and applied in *City of Laredo*. But in addition, adopting Houston's contrived view of the penal statute jurisdiction rule would effectively end the civil courts' ability to adjudicate whether state statutes preempt local ordinances.

B. The "essence" of this preemption case is substantively civil, not criminal, and it is properly adjudicated in the civil courts.

The first step in analyzing Houston's jurisdictional challenge entails a definitional question—is this preemption suit involving Railroad Commission propane regulations a "criminal law matter"?—because that is where the jurisdictional dividing line is drawn. The Texas Constitution sets out a bifurcated jurisdictional framework for the State's courts. "The Court of Criminal Appeals is the court of last resort for criminal matters, . . . while this Court is the court of final review for civil matters." *In re Reece*, 341 S.W.3d 360, 371 (Tex. 2011) (citing Tex. Const. art. V, §§ 3 & 5). The Constitution gives this Court jurisdiction over "all cases

except in criminal law matters." Tex. Const. art. V, § 3. The crux of Houston's jurisdictional argument is that this preemption case is a "criminal law matter" over which the criminal courts and the Court of Criminal Appeals have exclusive jurisdiction. Hous. BOM at 9 (quoting *State v. Morales*, 869 S.W.2d 941, 947–48 (Tex. 1994)). It is not.

1. This Court in *Heckman* set out the test to determine whether a case is a criminal law matter, and it turns on the essence of the case.

This Court has explained that, to "determine whether a case is a criminal law matter" for purposes of this bifurcated jurisdictional analysis, a court looks to the *essence* of the action to determine whether it is more substantively criminal or civil:

> . . . [W]e look to the essence of the case to determine whether the issues it entails are more substantively criminal or civil. Criminal law matters include disputes where 'criminal law is the subject of the litigation;' such cases include those 'which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure.' Criminal law matters also include disputes 'which arise as a result of or incident to a criminal prosecution.'

Heckman v. Williamson Cty, 369 S.W.3d 137, 146 (Tex. 2012) (citations omitted). *Heckman* allowed that "there are criminal cases which may incidentally involve a question of civil law, and civil cases in which in like manner points of criminal law call for solution." *Id.* at 149. In other words, the mere existence of a criminal aspect to a suit does not automatically translate into exclusive criminal jurisdiction if the suit predominately involves civil matters. Only if the issues are more substantively criminal will jurisdiction lie in the criminal courts.

Heckman was a class action brought by indigent criminal defendants claiming denial of their constitutional right to counsel in criminal proceedings. The claims in *Heckman* did not involve the "enforcement of statutes governed by the Texas Code of Criminal Procedure" or disputes arising "as a result of or incident to a criminal prosecution." *Id*. at 146. This Court determined that the case was substantively civil because it predominately involved questions of justiciability that did not require the naked construction of a criminal statute. *See id.* at 148. The *essence* was civil.

The Court also gave other examples to help define the contours of the analysis. Like *Harrell v. State*, where this Court held that a case involving the interpretation of a Texas Government Code provision dealing with the handling of inmate money by prison officials was not a "criminal law matter" because it presented the issue of how to interpret and enforce a civil statute. 286 S.W.3d 315, 319 (Tex. 2009); *see also In re Johnson*, 280 S.W.3d 866, 869 (Tex. Crim. App. 2008) (reaching the same conclusion). Under *Heckman*'s analysis, therefore, the mere fact that criminal law or procedural issues may be implicated is not the end of the inquiry. To resolve the criminal/civil jurisdiction dichotomy, the Court must determine what predominates: what is the "essence" of the particular case? Is criminal law truly the subject of the litigation?

Heckman also distinguished *Morales* (the key case on which Houston relies), explaining that *Morales* was a "criminal law matter" because it dealt with whether

"a penal code provision was unconstitutional." *Heckman*, 369 S.W.3d at 149. In *Morales*, this Court held that it lacked jurisdiction to render a "naked declaration as to the constitutionality of a criminal statute" absent a threatened "irreparable injury to property rights." 869 S.W.2d at 942. *Morales* involved a truly criminal statute—Texas Penal Code § 21.06, Texas' criminal sodomy statute at the time—and this Court emphasized the "crucial distinction" that the plaintiffs there sought "a naked declaration of the penal statute's unconstitutionality." *Id.* at 945 (distinguishing *Passel v. Fort Worth Indep. Sch. Dist.*, 440 S.W.2d 61, 62–63 (Tex. 1969), in which this Court held that it had jurisdiction to resolve claims where the plaintiffs did not seek a "naked declaration" as to constitutionality).

In cases leading up to *Morales*, this Court similarly—and correctly—tracked the long-held "general rule" that civil courts "will not pass on constitutionality of a criminal statute unless the requirement of irreparable injury of property rights is involved." *State v. Logue*, 376 S.W.2d 567, 569 (Tex. 1964) (collecting cases). Under *Heckman*, the "essence" of such *Morales*-type suits is necessarily criminal: the plaintiff seeks a "naked declaration" of whether the prohibited conduct under a truly criminal statute may constitutionally be criminalized. In other words, cases seeking a naked declaration as to the constitutionality of a criminal statute are criminal matters over which the civil courts generally lack jurisdiction unless an exception applies.

But that is not the case here, because TPGA seeks no declaration as to the constitutionality of Houston's propane regulations, even if they are—as Houston argues—"penal" because of the potential for fines. *See* CR234-35 (setting out the declaratory relief sought by TPGA). Rather, TPGA's preemption claims turn on the scope of the civil state statute mandating that the RRC's LPG Safety Rules preempt *all* local enactments regulating propane. *Id.*

Under *Heckman*, therefore, the answer in this case is easy. The essence of TPGA's preemption challenge is substantively civil: whether the Legislature with unmistakeable clarity preempted Houston's local regulation of certain commercial conduct by civil statute. The scope of preemption does not depend on the meaning or construction of any of Houston's propane regulations, and it certainly does not pertain to any criminal prosecution or involve any matters governed by the Texas Code of Criminal Procedure. *See Heckman*, 369 S.W.3d at 146. Nor does this suit depend on whether Houston's local propane regulations are unconstitutional. This case is, then, like *City of Laredo* and *BCCA Appeal Group*—plain-vanilla preemption cases that turned on the scope of state statutes, and in which the plaintiff did not seek a "naked declaration" as to the constitutionality of a criminal statute. Under *Heckman*, preemption cases like these are essentially civil matters, and this Court may properly exercise civil jurisdiction over them.

The civil courts routinely adjudicate this type of preemption case. The fact that interpreting and applying the preemptive text of Texas Natural Resource Code § 113.054 involves looking to see whether Houston's propane regulations fall within the scope of the Legislature's preemption does not make this a criminal law matter or change the reality that adjudicating a run-of-the-mill preemption challenge "falls squarely within [this Court's] constitutional authority." *Heckman*, 369 S.W.3d at 149; *see Tex. Alcoholic Beverage Comm'n v. Am. Legion Knebel Post 82*, 03-11-00703-CV, 2014 WL 2094195, at *6 (Tex. App.—Austin May 16, 2014, no pet.) (mem. op.) ("*Morales* does not create an absolute bar to the construction of a criminal statute by a court exercising its civil jurisdiction.").

In *Morales*, this Court sought to avoid the "danger" that "civil courts will get into the business of construing criminal statutes." *Morales*, 869 S.W.2d at 948 n.16. This preemption case does not carry that danger. Indeed, no preemption case presents a danger that a civil court will construe a criminal statute because the scope of the state statute, not the local enactment, controls the preemption inquiry.

The unfortunate reality is that recent case law regarding the criminal/civil divide is not wholly consistent. In the years since *Morales*, some courts of appeals have gone far afield and held that they lack jurisdiction in cases that either do not involve a truly criminal statute or in which the plaintiff does not seek a "naked declaration" as to the constitutionality of such a statute. *See, e.g.*, *Consumer Serv.*

All. of Tex., Inc. v. City of Dallas, 433 S.W.3d 796, 800 (Tex. App.—Dallas 2014, no pet.) (holding civil court lacked jurisdiction over request for "a declaration that [an] [o]rdinance was preempted" by provisions of the Texas Finance Code where plaintiff did not raise a naked constitutional challenge). These cases represent a departure from this Court's guidance as discussed below in section B.2 of the Argument. In any event, this Court can clarify the appropriate jurisdictional boundary line under *Heckman* by reiterating that *Morales* applies only narrowly, in actions that "arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure" or "arise as a result of or incident to a criminal prosecution." *Heckman*, 369 S.W.3d at 146. Or where the plaintiff seeks a "declaration as to the constitutionality of a criminal statute alone." *Morales*, 869 S.W.2d at 942.

Houston tries to duck *Heckman* and resists joining issue on whether the essence of this preemption case is "more substantively criminal or civil." Houston instead tries to reframe TPGA's claims as focused on Houston's alleged "criminal" regulations, rather than on the construction of the preemption provision in the Texas Natural Resources Code. *See* Hous. BOM at 13 n.23. But Houston's efforts fail. Under a standard preemption analysis, TPGA's claims ask the Court to determine the Legislature's intent as manifested in the statutory text and whether that text reflects an intent to preempt local propane regulations with unmistakable clarity. *See*

BCCA Appeal Group, Inc., 496 S.W.3d at 7. The "essence" controls whether a case is criminal or civil, and the "essence" of this case is emphatically civil.

2. Certain courts of appeals have applied different tests, but *Heckman*'s focus on the "essence" of the case controls.

Rather than join issue on *Heckman*, Houston tries to pivot to a line of unpublished cases from the Fort Worth Court of Appeals. Hous. BOM at xii (citing *Town of Flower Mound v. Eagleridge Operating, LLC*, 02-18-00392-CV, 2019 WL 3955197 (Tex. App.—Fort Worth Aug. 22, 2019, no pet.) (mem. op.); *ACE Cash Express, Inc. v. City of Denton*, 02-14-00146-CV, 2015 WL 3523963 (Tex. App.—Fort Worth June 4, 2015, pet. denied) (mem. op.); and *Destructors, Inc. v. City of Forest Hill*, 2-08-440-CV, 2010 WL 1946875 (Tex. App.—Fort Worth May 13, 2010, no pet.) (mem. op.)). The most recent in that line of cases, *Tower of Flower Mound*, post-dates *Heckman* and suggests the "test" for whether a law is "penal" turns on "whether the wrong sought to be redressed is a wrong to the public or a wrong to an individual." *Town of Flower Mound*, 2019 WL 3955197, at *4 (quoting *Consumer Serv. All. of Texas, Inc.*, 433 S.W.3d at 803); *see also Wild Rose Rescue Ranch v. City of Whitehouse*, 373 S.W.3d 211, 215 (Tex. App.—Tyler 2012, no pet.) (applying the same "test").

The root of that "test" for "penalty"—which conflicts with the standard set out in *Heckman*—is *Huntington v. Attrill*, 146 U.S. 657, 668 (1892). There, "the Supreme Court addressed the question of whether a judgment in a state court was

'penal,' and thus could not be enforced in another state under the Constitution's Full Faith and Credit Clause." *Johnson v. S.E.C.*, 87 F.3d 484, 487 (D.C. Cir. 1996) (discussing *Huntington*). This Court has expressly rejected *Huntington* "as little relevant, . . . considering that it was a case of applying the full faith and credit clause as between states to a judgment of one of them based on a local statute." *Basham v. Smith*, 233 S.W.2d 297, 301 (1950). The court of appeals opinions on which Houston relies thus conflict with *Heckman* and do not state Texas law on the jurisdictional dividing line. It is telling that despite TPGA's raising this issue in response to Houston's petition for review, *see* TPGA Resp. PFR at 8-9, Houston fails to address *Heckman*, *Huntington* or this competing "test" for "penalty" in its brief on the merits.

Houston's favorite unpublished case is *Destructors,* 2010 WL 1946875. In *Destructors*, the plaintiff, a commercial asphalt recycler, sought to enjoin enforcement of a local ordinance that prohibited the use of residential streets by commercial vehicles on grounds that the ordinance was unconstitutional. Like the plaintiffs in *Morales*—but unlike TPGA here—the plaintiff in *Destructors* sought injunctive relief based on a "naked declaration" of the ordinance's constitutionality. *Id.* at *4. The court of appeals first considered whether the ordinance was "penal." Without the benefit of the opinion in *Heckman*, the *Destructors*' court reasoned that "[b]ecause of the term 'unlawful' [in the ordinance], and the authority granted to the City's police department to enforce the ordinance, this is a penal ordinance." *Id.* at

*3. Having determined the "penal" nature of the ordinance based on that thin analysis, the court held that it lacked jurisdiction because the plaintiff was "seeking a naked declaration of a penal ordinance's unconstitutionality." *Id.* at *4 (citing *Morales*, 869 S.W.2d at 946).[4]

Destructors is inapposite. Under *Heckman*, the essence of this preemption case is civil—not criminal or "penal." This case turns on the construction of an express preemption provision in a civil statute. By contrast, *Destructors* involved a "naked declaration of a penal statute's unconstitutionality"—the essence of a criminal matter. Moreover, even assuming Houston's propane regulations are penal in nature because they carry fines, TPGA does not seek a "naked declaration" of their constitutionality. The interpretative subject of TPGA's declaratory judgment action is not Houston's regulations but rather Texas Natural Resources Code § 113.054.

Destructors does not conflict with the holding of the court of appeals below or this Court's opinion in *Heckman* because it involved a different question. But if

[4] It appears that the plaintiff also asserted a preemption claim, but the court "[did] not reach" that issue. *Id.* at *5.

there were a conflict, *Destructors* does not control.[5] *Heckman* controls. Under *Heckman*, this Court has jurisdiction over this essentially civil preemption case.[6]

C. Even if the essence of this case were "criminal," this case satisfies the exception in *Morales*—just like *City of Laredo*.

Even if this case were substantively a criminal law matter falling within the ambit of *Morales*, as Houston argues, the civil courts would still have jurisdiction to hear it because TPGA's preemption challenge satisfies the exception that "civil courts have jurisdiction to enjoin or declare void an unconstitutional penal ordinance when 'there is the threat of irreparable injury to vested property rights.'" *City of Laredo*, 550 S.W.3d at 592 n.28 (quoting *Morales*, 869 S.W.2d at 945).

On this point, TPGA's preemption challenge tracks *City of Laredo* exactly. There, a violation of the city bag ban ordinance was "punishable as a Class C misdemeanor with a fine of up to $2,000 per violation." *Id.* at 590. Here, section 109.4 of Houston's Fire Code provides that doing any act that the Fire Code declares

[5] The Fort Worth Court of Appeals later followed its holding in *Destructors* in a case where the plaintiff sought injunctive and declaratory relief based on a naked challenge to the constitutionality of a local ordinance, asserting that the "ordinance exceeded [the city's] police power, violated due process, and exceeded the city's constitutional authority." *ACE Cash Express, Inc.*, 2015 WL 3523963, at *1. *ACE Cash Express* is inapposite for essentially the same reasons *Destructors* is inapposite—namely, this preemption case is a civil matter, and TPGA does not seek relief based on the constitutionality of Houston's propane regulations.

[6] It bears noting that the ordinance at issue in *Destructors* was adopted and on the books for more than thirty years before the plaintiff asphalt recycler obtained the lease pursuant to which it sought to operate its recycling facility. *See Destructors* at *1. Perhaps the appearance of unclean hands on the part of the plaintiff led to "a case of bad facts making bad law." *See Texas Bank & Tr. Co. v. Moore*, 595 S.W.2d 502, 512 (Tex. 1980) (Greenhill, C.J., dissenting). But whatever the reason for its anomalous result (if any), *Destructors* does not control here.

to be unlawful, and for which no specific penalty is provided, including violations of Houston's propane regulations, "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." CR331-32. Incidentally, $2,000 is the maximum fine a home-rule city is allowed to impose for health-and-safety violations. Tex. Loc. Gov't Code § 54.001(b)(1).

In *City of Laredo* this Court explained that a local bag-ban ordinance threatens irreparable injury to vested property rights where the ordinance involves "a substantial per-violation fine that effectively precludes small local businesses from testing the ban's constitutionality in defense to a criminal prosecution." 550 S.W.3d at 592 n.28 (citing *City of Austin v. Austin City Cemetery Ass'n*, 87 Tex. 330, 28 S.W. 528, 529–30 (1894)). Based on the bag-ban ordinance's threat to ongoing business in *City of Laredo*, this Court held, "We have jurisdiction over the case." *Id.* The same conclusion supports jurisdiction here: the identical per-violation fines under Houston's propane regulations effectively preclude TPGA's individual small-business members from testing the regulations' validity in defense to a criminal prosecution. The courts thus have jurisdiction over this case.

The jurisdictional holding in *City of Laredo* is not "dicta," as Houston insists. Hous. BOM at xii, xiv, & 2. This Court has explained that it must always confirm its jurisdiction first: "Before we can reach the merits of [a] claim, we must first

determine whether we possess subject-matter jurisdiction to consider [an] appeal." *Minton v. Gunn*, 355 S.W.3d 634, 639 (Tex. 2011), *rev'd on other grounds*, 568 U.S. 251 (2013) (citing *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 9 (Tex. 2008) (considering jurisdiction before proceeding to determine the merits of the case)); *see also Morales*, 869 S.W.2d at 947 (explaining that "jurisdiction must exist before the writ can issue") (quoting *Ex Parte Hughes*, 129 S.W.2d 270, 273 (1939)).

But more to the point, there is no way to reach a different result here without concluding that *City of Laredo* was wrongly decided and the Court lacked jurisdiction to reach the merits. There is also no way to sustain Houston's jurisdictional challenge without concluding that this Court lacked jurisdiction to reach the merits in *BCCA Appeal Group*, in which Houston made the same jurisdictional arguments regarding *Morales* and the civil courts' lack of jurisdiction. *See* No.13-0768, Hous. Motion for Rehearing at 5-10.[7] This Court correctly rejected Houston's jurisdictional challenge in *City of Laredo* and *BCCA Appeal Group*, and it should do the same here.

There is no need to walk back this Court's holdings in *City of Laredo* or *BCCA Appeal Group*. It has long been the law that Texans have "a vested property right in

[7] The briefing in Houston's brief on the merits regarding this penal jurisdiction issue is largely identical to the briefing in its motion for rehearing in *BCCA Appeal Group* on the same issue.

making a living, subject only to valid and subsisting regulatory statutes." *Smith v. Decker*, 312 S.W.2d 632, 634 (Tex. 1958). Numerous Texas cases provide for civil jurisdiction where those property rights are threatened by void penal (or presumed penal) ordinances.[8] Houston fails to address any of these cases in its brief on the merits, despite TPGA's raising them in response to Houston's petition for review. TPGA Resp. PFR at 11 n.8. Houston nonetheless asks this Court to walk back the holdings in these cases as well. This Court should decline Houston's invitation.

D. Houston's expansive view of this criminal jurisdiction issue would prohibit this Court from reviewing whether the Legislature has preempted local regulation of commercial conduct.

Houston's proposed jurisdictional rule wouldn't just upend this Court's prior precedent; it is also terrible policy. Under Houston's construct, a city could

[8] *Vill. of Tiki Island v. Ronquille*, 463 S.W.3d 562, 587 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (civil jurisdiction exists where "a new law restricts an existing commercial use of a [property]"); *City of Corpus Christi v. Maldonado*, 398 S.W.3d 266, 270 (Tex. App.—Corpus Christi 2011, no pet.) (civil jurisdiction exists to address threat to "vested property right in the possession of legal, physical items of inventory"); *Robinson v. Jefferson County*, 37 S.W.3d 503, 509 (Tex. App.—Texarkana 2001, no pet.) (civil jurisdiction exists to address threat to "admitted . . . vested property interest in [] establishment," based on lost sales and prosecution of customers); *Air Curtain Destructor Corp. v. City of Austin*, 675 S.W.2d 615, 618 (Tex. App.—Tyler 1984, writ ref'd n.r.e.) ("We conclude that Air Curtain does have valuable vested property rights to manufacture, sell and operate the trench burners in the prohibited area, which rights will be irreparably damaged by the continued enforcement of the ordinance."); *Cabell's, Inc. v. City of Nacogdoches*, 288 S.W.2d 154, 159 (Tex. Civ. App.—Beaumont 1956, writ ref'd n.r.e.) (civil jurisdiction exists because "milk is property," and the "right to sell [] milk . . . is a vested one"); *Bielecki v. City of Port Arthur*, 12 S.W.2d 976, 978 (Tex. Comm'n App. 1929) ("A citizen has a lawful right to use his property for any purpose he may see fit, so long as such use does not operate to substantially injure the rights of others. A denial of the right of a citizen to so use his property is a deprivation of the property itself."); *City of Houston*, 157 S.W. at 192 ("[E]nforcement of the ordinance will injuriously affect, if not destroy, the business of plaintiffs . . . , a property right as much entitled to protection, in a proper case, as a horse or a farm.").

effectively avoid any judicial review regarding whether its local regulations are preempted by state law. A city need only attach a fine to any ordinance, give its municipal courts jurisdiction to enforce the fine, and the ordinance would be shielded from preemption review in the civil courts. A city could game the system and avoid preemption and judicial review of its local regulations simply by slapping a "penal" label on them—including those dealing with purely commercial activities—irrespective of the essence of any suit challenging the regulations' validity.

The potential impact of Houston's jurisdictional construct is not ephemeral or speculative. If this Court were to adopt the jurisdiction rule Houston advocates, this Court would lack jurisdiction to consider other preemption cases that are pending before it right now. For example, this Court would have no jurisdiction to consider the pending preemption challenge to the City of Austin's paid sick leave ordinance because the ordinance imposes "civil and criminal penalties" for violations, including a fine. *See Tex. Assoc. of Business v. City of Austin*, 565 S.W.3d 425, 430 (Tex. App.—Austin 2018, pet. filed [No. 19-0025]) (noting that under the paid sick leave ordinance "employers that violate the Ordinance face civil and criminal penalties, *see id*. §§ 4-19-6(C)(1) (up to $500 fine for each violation), 4-19-7(B) (Class C misdemeanor)"). Under Houston's construct, such penalties *ipso facto* transform the ordinance into a penal statute—irrespective of the nature of the

ordinance or the civil essence of a claim for preemption—and neither this Court nor the lower civil courts would have jurisdiction to adjudicate the preemption claim. Such a result would surely be poor policy, and it is not at all required or supported by Texas law.

The next question for this Court is: what to do about it? If this penal jurisdiction issue were the only issue presented in this appeal, the answer would be easy: deny Houston's petition for review and leave the court of appeals' opinion in place. But TPGA's petition for review in this appeal presents a significant issue regarding associational standing that this Court should review and correct. If this Court grants TPGA's petition (and it should), then it can address Houston's penal jurisdiction issue in as narrow or as fulsome a manner as it deems appropriate. It can draw a bright line and say that, under *Heckman*, preemption suits are substantively civil across the board. It can apply the vested property rights exception as it did in *City of Laredo*, which is what the court of appeals did. Or it can track through the (sometimes conflicting) body of Texas case law on this jurisdiction issue and straighten the path going forward for litigants and courts. The most critical consideration is that the civil courts and this Court retain jurisdiction to review plain-vanilla preemption issues like the one presented here.

Texas Propane Gas Association respectfully prays that this Court affirm the trial court's order denying all of Houston's jurisdictional challenges.

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I certify that the foregoing pleading was served on the attorneys of record for the City of Houston by electronic filing and e-mail on May 21, 2020:

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Texas Propane Gas Association's Response to the City of Houston's Brief on the Merits 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) contains 5,508 in a 14-point font size and footnotes in a 12-point font size.

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