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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 TO THE CITY OF HOUSTON'S PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the Case:	Section 113.054 of the Texas Natural Resources Code 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 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 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. Dissenting Opinion by Chief Justice Rose. App.3.
Disposition in Court of Appeals:	As relevant to Houston's Petition for Review, all justices rejected Houston's contention that the civil courts lack subject matter jurisdiction to review the validity of § 113.054 because it carries criminal penalties. App.1 pp.11-16; App.2 p.3 n.1.

ISSUES ON CROSS-APPEAL

1. Relying on "the Texas Supreme Court's recent decision in *City of Laredo,*"[1] all justices of the court of appeals affirmed the trial court's denial of Houston's plea to the jurisdiction for lack of subject matter jurisdiction over this statutory preemption case. *See* App.2 p. 16. The court of appeals rejected Houston's argument that "the ordinances and regulations at issue are penal in nature and, as a result, [a] civil trial court does not possess jurisdiction to determine their validity." App.2 p. 13. 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 a "criminal law matter" over which this Court lacks jurisdiction? Can a city effectively evade judicial review of an otherwise preempted local ordinance by sprinkling "penal" enforcement aspects like fines into a civil regulatory program dealing with commercial activities?

2. Even assuming this preemption case is a "criminal law matter," as Houston argues, this Court cannot reverse the denial of 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] last year in *City of Laredo*?

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

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

In the interest of brevity, TPGA incorporates the Statement of Facts in its Petition for Review. TPGA here provides procedural facts relevant to its Response to Houston's Petition for Review.

In the trial court, Houston challenged subject-matter jurisdiction, arguing that its LPG 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 LPG regulations. App.1 pp.11-16; App.2 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 a state 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 routinely adjudicates preemption challenges to local regulations, as do the lower courts in civil actions.

Houston claims that this Court lacks jurisdiction over this particular preemption question because this preemption case is a "criminal law matter." Houston argues that aspects of Houston's local LPG regulations calling for enforcement in municipal court and fines for violations take this preemption case out of the scope of this Court's 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. 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 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 ordinance was

preempted by a state regulatory scheme and then rejected Houston's jurisdictional challenge on rehearing. 496 S.W.3d 1, 24 (Tex. 2016).

Houston's third 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 constitutionality and 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"). These realities highlight the absurdity of Houston's argument.

ARGUMENT

A. The Legislature can preempt local regulation of commercial conduct by expressing its intent to do so 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 last year in *City of Laredo*. 550 S.W.3d at 592–93 & n.32 (collecting cases). In short, 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* 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."[3]

[3] *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.").

It should go without saying that the civil courts—including this Court—routinely adjudicate preemption challenges of this nature.[4]

B. The "essence" of this preemption case is substantively civil, not criminal.

The Texas Constitution sets out a bifurcated jurisdictional framework for the Judicial Department. "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 thus 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 matter" over which the Court of Criminal Appeals has exclusive jurisdiction. Hous. PFR at 2 (quoting *State v. Morales*, 869 S.W.2d 941, 947–48 (Tex. 1994)).

Just seven years ago this Court articulated how to "determine whether a case is a criminal law matter" for purposes of this bifurcated jurisdictional analysis:

> . . . [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.'

[4] *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);

Heckman v. Williamson County, 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.

This Court determined in *Heckman*—a class action brought by indigent criminal defendants claiming denial of their constitutional right to counsel in criminal proceedings—that the case was substantively civil, because it involved questions of justiciability that did not require the naked construction of a criminal statute. *See id.* at 148. This Court also gave other examples to help define the contours of the *Heckman* 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).

Heckman also discussed *Morales* (the key case on which Houston relies), explaining that *Morales* was a substantively "criminal law matter," because it presented the question of whether "a penal code provision was unconstitutional." *Heckman*, 369 S.W.3d at 149. The plaintiffs in *Morales* sought "[a] naked declaration as to the constitutionality of a criminal statute"—namely, "Texas Penal

Code § 21.06 [], Texas' [criminal] sodomy statute." *Morales*, 869 S.W.2d at 942.[5] The "essence" of suits like *Morales* is necessarily criminal: it involved whether the prohibited conduct under a criminal statute could constitutionally be criminalized.

Conspicuously absent from Houston's Petition for Review is any analysis of whether the "essence" of TPGA's preemption case is "more substantively criminal or civil" under *Heckman* and the examples it cites.[6] But under *Heckman* the answer is easy. The essence of this preemption challenge is substantively civil: whether the Legislature preempted Houston's local regulation of commercial conduct by civil statute. The scope of preemption does not depend on the meaning or construction of any of Houston's LPG regulations (the alleged "criminal" enactments), but rather on the scope of the state statute mandating that the RRC's LPG Code preempts *all* local enactments regarding LPG.

As discussed above, 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 LPG regulations fall within the scope of the Legislature's preemption does not change the

[5] Other courts have similarly—and correctly—held that civil courts lack jurisdiction to take up "naked" constitutional challenges to criminal statutes. *See, e.g.*, *Ryan v. Rosenthal*, 314 S.W.3d 136, 144–45 (Tex. App.—Houston [14th Dist.] 2010, pet. denied). But make no mistake—"*Morales* does not create an absolute bar to the construction of a criminal statute by a court exercising its civil jurisdiction." *Texas Alcoholic Beverage Com'n v. Am. Legion Knebel Post 82*, 03-11-00703-CV, 2014 WL 2094195, at *6 (Tex. App.—Austin May 16, 2014, no pet.).

[6] Houston cites *Heckman* elsewhere in its Petition for Review but ignores *Heckman* on this point. *See* Hous. PFR at 11.

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.

Ignoring this Court's recent on-point pronouncement in *Heckman*, Houston relies on a line of cases from intermediate courts of appeals post-dating *Heckman* that 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." *See, e.g., Town of Flower Mound v. Eagleridge Operating, LLC*, 02-18-00392-CV, 2019 WL 3955197, at *4 (Tex. App.—Fort Worth Aug. 22, 2019, no pet.); *Consumer Serv. All. of Texas, Inc. v. City of Dallas*, 433 S.W.3d 796, 803 (Tex. App.—Dallas 2014, no pet.); *Wild Rose Rescue Ranch v. City of Whitehouse*, 373 S.W.3d 211, 215 (Tex. App.—Tyler 2012, no pet.).

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, in 1892, "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) (discussing *Huntington*).

The intermediate court of appeals opinions on which Houston relies thus conflict with *Heckman* and do not state Texas law on the standard for distinguishing this Court's jurisdiction from that of the Court of Criminal Appeals. The "essence" controls whether a case is criminal or civil, and the "essence" of TGPA's preemption claims is emphatically civil.

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

Even if this case were substantively a "criminal law matter," as Houston argues, the civil courts would still have jurisdiction to hear it because TPGA's preemption challenge satisfies the exception providing 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 to be unlawful, and for which no specific penalty is provided, including violations of Houston's LPG 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.[7]

In *City of Laredo* this Court explained that a local 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 *Austin v. Austin City Cemetery Ass'n*, 87 Tex. 330, 28 S.W. 528, 529–530 (1894)). Based on the ordinance's *in terrorem* threat to ongoing business in that case, this Court held, "We have jurisdiction over the case." *Id.* The same conclusion supports jurisdiction here: the substantial per-violation fines under Houston's LPG regulations effectively preclude TPGA's individual small-business members from testing the regulations' validity in defense to a criminal prosecution.

The predicate jurisdictional holding in *City of Laredo* is not "dicta," as Houston suggests. Hous. PFR at 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

[7] 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).

S.W.3d 1, 9 (Tex. 2008) (considering jurisdiction before proceeding to determine the merits of the case)).

But more to the point, there is no way to reach a different result here without concluding that *City of Laredo* was wrongly decided. There is also no way to reverse the denial of Houston's jurisdictional challenge here without concluding that this Court lacked jurisdiction to reach the merits in *BCCA Appeal Group*. But this Court need not walk back its holding in *City of Laredo*, because the same result should obtain here. It has long been the law of this Court that Texans have "a vested property right in 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, in some cases, presumed penal) ordinances.[8] Houston fails to address any of these cases

[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

in its Petition for Review, but it nonetheless asks this Court to walk back these cases as well. This Court should decline Houston's invitation.

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

Under Houston's construct, a city could effectively avoid judicial review regarding whether its ordinances 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 review in the civil courts and this Court. A city could game the system and avoid preemption and judicial review of its ordinances simply by slapping a "penal" label on its ordinances—including ordinances dealing with commercial activities—irrespective of the essence of any suit challenging the ordinances' validity. Such a result would surely be poor policy, but 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

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.").

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 apply the vested property rights exception as it did in *City of Laredo*, which is what the court of appeals did. It can draw a bright line and say that preemption suits are substantively civil across the board. Or it can track through the 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 either deny Houston's Petition for Review or affirm the trial court's order denying all of Houston's jurisdictional challenges.

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I certify that the foregoing Texas Propane Gas Association's Response to the City of Houston's Petition for Review was served on the attorneys of record for the City of Houston by electronic filing and e-mail on December 18, 2019:

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Texas Propane Gas Association's Response to Petition For Review 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 3,367 words in a 14-point font size and footnotes in a 12-point font size.

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