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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 REPLY BRIEF ON THE MERITS

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OVERVIEW OF THIS REPLY

The standing issue presented in this appeal is not complex or exotic. It does not defy state and federal constitutional principles or violate this Court's or the Supreme Court's precedent or flout long-standing preemption principles. Houston's brief calls Texas Propane Gas Association's arguments regarding standing "brazen" and a "stunning display of psychological projection." Hous. Brief 35, 49. But all the hyperbole and name-calling are a mismatch for the very straightforward standing inquiry, which fits neatly into this Court's well-developed jurisprudence.

The Legislature enacted § 113.054 of the Texas Natural Resources Code to preempt all local regulation of the propane industry so that there would not be a patchwork of regulation across the state. Under that provision, cities like Houston must get out of the propane regulation business entirely. That was the Legislature's manifest intent in providing expressly that "*any*" local propane regulation is preempted, not just local regulations that conflict with state law. One or more of TPGA's members are subject to enforcement of Houston's propane regulations, and that gives TPGA associational standing to bring its single declaratory judgment claim that all of Houston's local propane regulations are preempted. The Court should grant review to confirm that unremarkable proposition.

RESPONSE TO RESTATEMENT OF RELEVANT FACTS

Houston's "Restatement of Relevant Facts" misstates both the facts and the law relating to standing in various ways.

A. Texas courts recognize that the Legislature can preempt local regulation of a given subject matter, and § 113.054 does exactly that.

Houston argues that, "by its own terms," § 113.054 "cannot be considered an express preemption clause forbidding the local regulation of propane." Hous. Brief 2. In fact, the statute's plain terms do exactly that.

As a starting point, Texas courts have long recognized that the Legislature can preempt local regulation of a given subject matter by expressing such intent with unmistakable clarity. *In re Sanchez*, 81 S.W.3d 794, 796 (Tex. 2002) ("[I]f the Legislature decides to preempt a subject matter normally within a home-rule city's broad powers, it must do so with 'unmistakable clarity.'"); *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993).[1] "Deciding whether uniform statewide regulation or nonregulation is preferable to a patchwork of local regulations is the Legislature's prerogative. The question is not

[1] *See also City of Santa Fe v. Young*, 949 S.W.2d 559, 560 (Tex. App.—Houston [14th Dist.] 1997, no writ) ("If the Legislature does choose to preempt a given subject matter usually encompassed by the broad powers of a home-rule city, it must do so with unmistakable clarity."); *RCI Entm't (San Antonio), Inc. v. City of San Antonio*, 373 S.W.3d 589, 595 (Tex. App.—San Antonio 2012, no pet.) (same); *State v. Portillo*, 314 S.W.3d 210, 214 (Tex. App.—El Paso 2010, no pet.) (same); *City of Houston v. Todd*, 41 S.W.3d 289, 295 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (same); *Nat'l Solid Wastes Mgmt. Ass'n v. City of Dallas*, 903 F. Supp. 2d 446, 469 (N.D. Tex. 2012).

whether the Legislature *can* preempt a local regulation like the Ordinance but whether it *has*." *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 593 (Tex. 2018) (emphasis in original).

The Legislature has on multiple occasions exercised its authority to preempt local regulation of entire subject matters, and courts enforce such blanket preemption. For example, in *Dallas Merchant's* this Court considered a provision that the Texas Alcoholic Beverage Code "shall exclusively govern the regulation of alcoholic beverages in this state" except as otherwise provided by the Code. 852 S.W.2d at 492-93. The "Legislature's intent is clearly expressed in [the statute]—the regulation of alcoholic beverages is exclusively governed by the provisions of the TABC unless otherwise provided." *Id*. The Court held that a Dallas ordinance attempting to prohibit the sale of alcoholic beverages at certain locations not "otherwise provided" by the Code was therefore preempted. *Id*.; *see also* Op. Tex. Att'y Gen. DM-253 at 2 (1993) (discussing *Dallas Merchant's* and explaining: "In the view of the Texas Supreme Court, section 109.57(b) was a sufficiently clear indication of legislative intent to preempt the home-rule powers of the City of Dallas with respect to the zoning of liquor stores"). The Legislature expressed an intent to preempt all local regulation of liquor store zoning, and the Court enforced it.

Additional examples cited in TPGA's opening brief reflect the Legislature's express preemption of all local regulation of ephedrine (Tex. Health & Safety Code

§ 486.005(b)); certain oil and gas operations (Tex. Nat. Res. Code § 81.0523); certain massage therapists (Tex. Occ. Code § 455.005); certain sales and use taxes relating to railroad districts (Tex. Transp. Code § 173.353); and commercial fertilizer (Tex. Agric. Code § 63.007). The Legislature can expressly preempt all local regulation of a subject matter, it sometimes does so, and it did so here regarding propane and propane accessories.

By its terms, § 113.054 reflects an intent by the Legislature to exercise its authority to preempt all local propane regulation. It provides 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 liquified petroleum gas industry." Tex. Nat. Res. Code § 113.054 (emphasis added). That plain language sounds a blanket preemption of *any* local regulation of LPG, and it is of the sort that Texas courts enforce.

Houston argues that § 113.054 does not preempt local regulation but "merely sets up a procedure for resolving direct conflicts between Commission rules and standards and local law" because it provides that "'rules and standards promulgated and adopted by the commission' are what preempts local law." Hous. Brief 3. That contention ignores that the RRC rules (promulgated pursuant to the statutory mandate in § 113.051) are the substantive state law that preempts local law. Just like the TABC provision was the state law in *Dallas Merchant's* that preempted local

regulation of alcohol sales, the RRC rules and standards promulgated pursuant to § 113.051 are the state law that preempts local regulation of LPG. Far from limiting the scope of preemption, the RRC rules and standards are the *means* of preemption.

B. The use of the term "industry" in the statute does not reflect an intent to limit the scope of preemption.

Houston argues that express preemption extends only to the LPG "industry," and the use of that term "narrows considerably" its scope of preemption of local regulation. Hous. Brief 5 and n.10 (citing a definition of "industries" in 31 Tex. Admin. Code § 357.11(d)(4), which relates to the Texas Water Development Board and regional water planning activities).

As with much of Houston's brief, that contention goes to the merits of the preemption question—whether the Legislature intended to effect a blanket preemption—which is an issue not presented in this interlocutory appeal regarding jurisdiction. But more important, it ignores the history and structure of the statutory LPG regulations as a whole. Section 113.054 preempts all local regulations "relating to any aspect or phase of the liquid petroleum gas industry." That provision mirrors the statutory grant of authority to the RRC to regulate the LPG "industry": the RRC "shall promulgate and adopt rule or standards or both relating to *any and all aspects or phases of the LPG industry*." Tex. Nat. Res. Code § 113.051 (emphasis added).

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 statutes since at

least 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) (emphasis added); *see also id*. at 4, 7 (referring alternately to the LPG "industry," "business," and "enterprise"). The statute does not define "industry," but its plain meaning is consistent with a general description of the LPG business. *Industry*, MERRIAM-WEBSTER DICTIONARY ONLINE, *available at* https://www.merriam-webster.com/dictionary/industry (last visited June 2, 2020) (defining "industry" as "a distinct group of productive or profit-making enterprises" such as "the banking industry"); *see also* Op. Tex. Att'y Gen. KP-0086 at 2 (2016) ("[T]he 'subject matter' preempted by section 113.054 is not an individual aspect of the LPG industry, such as container size, storage, etc., but the regulation of the industry itself."). The term "industry" thus has a long-standing use in the context of LGP regulation to describe the LPG business generally, and that is consistent with the plain meaning of the phrase "LPG industry." Houston's contention that it somehow limits the scope of preemption ignores the statute's history and plain terms.

Houston then argues that the scope of preemption is limited because the Legislature's delegation of authority to the RRC is subject to certain statutory exceptions—including exceptions for matters subject to federal regulation, such as

the production, manufacture or refining of LPG or underground storage. Hous. Brief 6 (citing Tex. Nat. Res. Code §§ 113.003 & 113.051). But while delegation to the RRC is subject to exceptions, the preemption provision is not similarly limited. *Compare* § 113.051 *with* § 113.054. Instead, the preemption provision states that the RRC's rules and standards—whatever they are, however broad or limited they are—"preempt and supersede *any* ordinance . . . adopted by a political subdivision of this state relating to any aspect or phase of the LPG industry." § 113.054. That is how the Legislature structured the preemption provision, and the Court must take the statute as it finds it.

Houston's single-minded effort to limit the RRC rules and standards by these ill-fitting statutory exceptions leads Houston to misrepresent the actual scope of the RRC's enactments in the first place.[2] The table of contents of the RRC's LPG Safety Code illustrates the comprehensive nature of the regulations. App.5. Houston argues that a "quick look at Exhibit 5 in TPGA's Appendix also confirms this more limited role and demonstrates that the [RRC's] LPG Safety Rules are not 'comprehensive'"

[2] Houston's assertion that these exceptions limit the scope of preemption is also at odds with its prior argument that the scope is "narrow[ed]" by the use of the term "industry." Houston first argues that use of the term "industry" means that the scope of preemption "applies only to ordinances that regulate any aspect or phase of the *production or manufacture* of LPG." Hous. Brief 5 (emphasis added). But on the very next page it argues that the scope of preemption is limited by the exceptions in § 113.003, including specifically an exception for the manufacture of LPG. *Id*. at 6. Is the scope of preemption *limited to* manufacturing? Or does it *except* manufacturing? From one page to the next, Houston's argument regarding the statute's meaning flips between two opposite positions. This moving-target approach highlights the fundamental incoherence in Houston's overall argument.

and are limited to "such peripheral items as reporting forms, licenses and fees, military fees, customer notification, and training." Hous. Brief 7-8 n.16. That is false. App.5 shows that the RRC has adopted regulations regarding substantive LPG-related issues such as "LP-Gas Installations, Containers, Appurtenances and Equipment Requirements" and "School Bus, Public Transportation, Mass Transit, and Special Transit Vehicle Installations and Inspections." App.5 Subchapter B and § 9.203. But most significant, the RRC has also adopted comprehensive national codes of LPG regulation including the NFPA 54 National Fuel Gas Code and the NFPA 548 LP-Gas Code. App.5 §§ 9.301, 9.401. The RRC's enactments are comprehensive and far from simply "peripheral items" as Houston asserts.

Houston opines that "it cannot be the case that all local propane regulations and ordinances are preempted," but it is unmistakably clear that is exactly the case. Hous. Brief 9.

C. The RRC never gave Houston permission to adopt local propane regulations, but regardless, that issue goes to the merits of the preemption claim.

Section 113.054 provides that a local government can petition the RRC for "permission to promulgate more restrictive rules and standards" if it makes a showing that the local enactments will enhance public safety. Houston cites the self-serving affidavits of its employees and implies that it secured permission from the RRC such that its "existing rules, regulations, and ordinances meet all of the requirements for continued enforcement under the second sentence of § 113.054."

Hous. Brief 10-11. That is false. While Houston asked the RRC for permission to promulgate its local propane regulations, the RRC never granted such permission. James Osterhaus, the Director of the Pipeline Safety Department of the Oversight and Safety Division of the RRC, was at the June 2012 meeting with Houston personnel during which Houston contends it secured permission to promulgate its local propane regulations. CR379. Osterhaus states that neither he nor the Acting Executive Director of the RRC "gave the City of Houston written or oral permission to enact more stringent LP-gas standards pursuant to Tex. Nat. Res. Code § 113.054" and "the [RRC] has not entered into any agreements or granted any permission, whether in writing or orally, to the City of Houston regarding this matter." *Id*.

In the courts below, Houston argued that TPGA's preemption claims were moot because it had secured such permission from the RRC. The court of appeals correctly reasoned that the "issue of whether [Houston] has met the statutory exception under Section 113.054 by receiving permission from the Commission to promulgate the challenged ordinances and regulation is an issue to be resolved in the lawsuit and goes to the merits of TPGA's claims." App.2 pp. 12-13 (holding that the question of RRC permission goes "to the merits of the case and not to the court's power to decide the case").

Houston's contention that the RRC has approved its local enactments are thus contrary to affidavit testimony from the RRC in the record, and in any event has no bearing on this Court's standing analysis.

D. The Attorney General's opinion tracks TPGA's position exactly.

At the request of a member of the Texas House of Representatives, the Attorney General issued an opinion interpreting § 113.054 and the scope of preemption of local propane regulations. Op. Tex. Att'y Gen. KP-0086. The Attorney General considered the plain language of § 113.054 and concluded that it preempts all local propane regulations as a blanket matter, including local regulations that were adopted prior to its enactment: "Construing section 113.054 to impliedly 'grandfather' already-existing local ordinances would frustrate the intent of the Legislature to achieve uniformity in the regulation of the LPG industry." *Id*. p. 4. The opinion also explained that § 113.054 preempts local propane regulations even if they address a matter on which the RRC has not adopted its own regulation: "Construing section 113.054 to permit a patchwork of local provisions on some aspect or phase of the LPG industry pending [RRC] regulation on that subject would frustrate the Legislature's intent under the text of the law to maintain consistent statewide regulation of the industry." *Id*. p. 3. On the merits, therefore, TPGA and the Attorney General read § 113.054 exactly the same way.

The Attorney General's opinion goes to the merits of preemption, not standing, which is the precise issue presented in this interlocutory appeal. And it is true, as Houston argues, that this Court is "not bound to adopt the opinion." Hous. Brief 11. The opinion is nonetheless notable for a couple of reasons.

As a rhetorical matter, the fact that the Attorney General's opinion perfectly matches TPGA's contention regarding the scope of blanket preemption belies Houston's condemnation that TPGA's position is "irresponsible" and "aggressive" and "does not exist in American jurisprudence." Hous. Brief 17, 35. TPGA did not just dream up the notion that § 113.054 operates as a blanket preemption of all local propane regulation.

Substantively, the Attorney General's opinion that § 113.054 acts as a blanket preemption of all local propane regulation reflects TPGA's core contention regarding standing: that it has only one preemption claim. Chief Justice Rose, dissenting on the standing issue in the court of appeals, acknowledged the nature of TPGA's single preemption claim: "Whether Houston has one regulation or one thousand, § 113.054 preempts them all." App.3 p. 3. Standing must be shown claim-by-claim and plaintiff-by-plaintiff, but here there is only one claim—does § 113.054 provide for blanket preemption of local propane regulations or not?—and TPGA has established associational standing to bring that one claim.

ARGUMENT

A. This Court's robust standing jurisprudence embraces the justiciability principles of the federal courts.

TPGA's position regarding standing is not exotic. TPGA has a single claim—that § 113.054 preempts all of Houston's local propane regulations, whether there is one regulation or one thousand—and it has associational standing to bring that claim because one or more of its members is subject to enforcement of Houston's local propane regulations. The contention does not ignore guidance from the federal courts or flout separation of powers principles or seek an advisory opinion as Houston argues. Rather, it reflects fundamental standing principles that this Court has adopted from federal jurisprudence and applied unremarkably for years.

This Court's landmark case regarding associational standing explained that standing is an essential component of subject matter jurisdiction, mandated by the separation of powers doctrine and the prohibition against rendering advisory opinions. *Tex. Ass'n of Bus. v. Tex. Air Control Bd*., 852 S.W.2d 440, 444 (Tex. 1993). In analyzing justiciability, the Court did not depart from federal law, but rather sought guidance from it: "Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield." *Id*. Indeed, the Court adopted the 3-part test for associational standing from the federal courts. *Id*. at 447 (adopting the test for associational standing

announced in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

This Court's analysis of standing over the years has reaffirmed constitutional justiciability principles and continued to embrace federal case law analyzing those principles. *See, e.g., Heckman v. Williamson Cty.*, 369 S.W.3d 137, 147, 151-53 (Tex. 2012); *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 485 (Tex. 2018) *In re Abbott*, 20-0291, ___ S.W.3d ___, 2020 WL 1943226, at *3 (Tex. Apr. 23, 2020). This Court has consistently applied the principle that standing is analyzed "plaintiff by plaintiff, claim by claim." *Heckman*, 369 S.W.3d at 153; *In re Abbott*, 2020 WL 1943226, at *3. And this Court has reiterated the principle that "standing is not dispensed in gross." *Heckman*, 369 S.W.3d at 153 (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)).

The constitutional principles Houston brandishes are thus baked into this Court's black-letter jurisprudence regarding standing. It is not necessary to parse through string cites of federal cases articulating the same principles, because this Court applies them as well. And this Court's settled standing jurisprudence makes plain that TPGA has associational standing to bring its single preemption claim here.

B. Fundamental, black-letter principles this Court has applied for years support TPGA's standing to bring its single preemption claim.

1. Standing is analyzed claim-by-claim, and TPGA has only one claim here.

As discussed in TPGA's opening brief (and as recognized by the dissenting justice below), TPGA has only one preemption claim—that § 113.054 provides for preemption of all of Houston's propane regulations as a blanket matter, "whether Houston has one or one thousand." App.3 p. 3. That is one claim, and TPGA has standing to bring that one claim because one or more of its members are subject to Houston's preempted local propane regulations.[3]

Houston argues that the Court cannot accept that TPGA advances only a single, blanket preemption claim because that would require the Court to engage in preemption merits analysis at the pleadings stage when analyzing standing. Hous. Brief 46-47. The merits of a preemption claim should not be a part of a standing analysis; TPGA contends that the court of appeals erred in doing just that. A court analyzing standing instead looks at the claim actually pleaded—here, the claim actually pleaded is a single claim of blanket preemption—and determines whether

[3] Houston contends that TPGA "does not explain what adverse effects, if any, any member may have actually suffered." Hous. Brief 53. That is false. It ignores the record and the court of appeals' opinion, which explained that the "undisputed allegations, taken as true, demonstrate that at least one member of [TPGA] 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" RRC. App.2 p. 8; CR233. In addition, as discussed below in section B.2 of the Argument, TPGA members who conduct their business in the Houston area are subject to all of Houston's propane regulations and face substantial risk of enforcement, and that is sufficient to establish standing under this Court's test for associational standing.

the plaintiff has standing to bring *that actual claim*. Analyzing standing in that way does not shift the burden to disprove preemption, as Houston contends. *Id*. at 47. TPGA retains the ultimate burden to prove blanket preemption at the merits stage, but that decision has no place when analyzing standing.

Houston ultimately argues that standing cannot rest on a single claim of blanket preemption because it "*does not and cannot exist*." Hous. Brief 48 (emphasis in original). That is truly a merits argument, and Houston asks this Court to accept it under the guise of standing. Putting aside the fact that resolution of the merits is not appropriate at this stage, Houston's position demands that this Court negate the Legislature's authority to preempt an entire subject matter even if that is its intent. What did the Legislature have in mind when it adopted § 113.054? If it really was a manifest intent to get local governmental entities out of the business of regulating propane entirely, does the Legislature have the authority to do that? Houston says that the Legislature can never do that—that such blanket preemption "*does not and cannot exist*" and is "nonsense." Hous. Brief 48.

Houston is wrong; the Legislature can preempt local regulation of an entire subject matter by expressing its intent to do so with unmistakable clarity. But whether blanket preemption does or doesn't exist is not an appropriate inquiry when analyzing standing. Because the court of appeals improperly made that merits decision under the guise of a standing analysis, the Court should grant review.

2. TPGA's members are subject to *all* of Houston's propane regulations and face a substantial risk that *all* will be enforced against them.

The *Hunt* test for associational standing, which this Court adopted in *Texas Association of Business*, asks whether one or more members of the group "would have standing to sue in their own right." 852 S.W.2d at 447. The Court determined in that case that TAB had associational standing to challenge the administrative penalty provisions at issue because "individual TAB members have been assessed administrative penalties pursuant to the challenged enactments." *Id*. But the Court went on to explain that even a "substantial risk" of enforcement is sufficient to support standing: "Additionally, TAC has alleged that other of its members remain at substantial risk of penalty. *A substantial risk of injury is sufficient under Hunt*." *Id*. (emphasis added).

The "substantial risk" standard for standing is a vital one, and both Texas and federal courts apply it widely. *See, e.g., Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 (Tex. 1995)[4] (holding that "to challenge a statute, a plaintiff must first suffer some actual *or threatened restriction* under that statute") (emphasis

[4] The Court in *Garcia* articulated this very broad notion of standing to challenge the workers compensation statutory regime: "Although there was no showing of specific members who have suffered a compensable injury since the effective date of the Act, we may fairly assume the existence of such members based on the size of the union. By doing so, we are not engaging in unadorned speculation that the Act will be enforced against AFL–CIO members. We are satisfied that the Texas AFL–CIO represents members who would have standing to sue in their own right." 893 S.W.2d at 518-19 (citations omitted). TPGA is not arguing for so expansive a rule, but *Garcia* illustrates that associational standing is not meant to be a prohibitive bar to seeking judicial review.

added); *Tex. Ass'n of Bus. v. City of Austin, Tex.*, 565 S.W.3d 425, 433 (Tex. App.—Austin 2018, pet. denied) (holding that private employers could sue to invalidate City of Austin's paid sick leave ordinance where employers "will be subject to" the ordinance: "The likelihood of the Ordinance being enforced once effective, along with the probability that the Private Parties would comply by granting paid sick leave to their employees, is a sufficient threat of actual injury to satisfy the justiciability requirement for challenging a statute or ordinance—*i.e.*, demonstration of a *realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement*") (emphasis added).[5]

The Supreme Court has also explained that a threat of injury by future enforcement of a challenged regulation is sufficient to support standing: "The *likelihood of enforcement*, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the

[5] Additional cases applying the "substantial risk" standard for standing include: *Hays County v. Hays County Water Planning P'ship*, 106 S.W.3d 349, 357 (Tex. App.—Austin 2003, no pet.) ("To satisfy the [*Hunt*] test's first prong, the Partnership must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the kind that would make a justiciable case if the members had brought suit in their own right. *A substantial risk of injury is sufficient*.") (emphasis added) (citation omitted); *Stringer v. Whitley*, 942 F.3d 715, 721 (5th Cir. 2019) ("For a threatened future injury to satisfy the imminence requirement, there must be *at least a substantial risk* that the injury will occur.") (emphasis added); *OCA-Greater Houston v. Tex.*, 867 F.3d 604, 612 (5th Cir. 2017) ("But the injury alleged as an Article III injury-in-fact need not be substantial; it need not measure more than an identifiable trifle. This is because the injury in fact requirement under Article III is qualitative, not quantitative, in nature.") (cleaned up); *City of Laredo v. Rio Grande H20 Guardian*, 04-10-00872-CV, 2011 WL 3122205, at *4 (Tex. App.—San Antonio July 27, 2011, no pet.) (mem. op.) ("That members are subject to a 'substantial risk of injury' is sufficient under the Supreme Court's mandate in *Hunt*.").

absence of the Ordinance, is a sufficient *threat of actual injury* to satisfy Art. III's requirement that a plaintiff who challenges a statute must demonstrate *a realistic danger of sustaining a direct injury* as a result of the statute's operation or enforcement." *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (emphasis added).

In two of this Court's most recent preemption cases, members of the plaintiff associations had not been injured by actual enforcement of the preempted local regulations, but they were among the discrete class of individuals *subject to* the local regulations. For example, in *City of Laredo* the Laredo Merchants Association sued to invalidate Laredo's bag-ban ordinance "shortly before the Ordinance's effective date." 550 S.W.3d at 590. The bag-ban ordinance could not have been enforced against the Merchants Association because the ordinance was not yet effective, but members of the Merchants Association were among the class of local businesses that would be subject to the ordinance once it became effective. Though the opinion does not expressly analyze standing, the Court could only have had subject matter jurisdiction over the case if being "subject to" the bag-ban ordinance was sufficient to confer standing.

The same was true in *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1 (Tex. 2016). The Court recited that BCCA had associational standing to challenge Houston's air quality enforcement program because "three BCCA Appeal Group members are subject to the ordinance." *Id*. at 6 n.2. The trial court's judgment

found that "three of BCCA Appeal Group's ten members operate facilities that are subject to the City's 2007 and 2008 Amendments" and there was no contention that "the three members with facilities located within the City's jurisdiction lacked standing to sue in their own right."[6] There was no allegation or evidence that any portion of Houston's air quality enforcement program—let alone each and every regulation within that program—had actually been enforced against the three BCCA members. Instead, the mere fact that the members operated facilities within Houston's jurisdiction that were "subject to" the regulations provided a sufficient basis for associational standing.[7]

TPGA's members are situated similarly to the three BCCA members and the Laredo Merchants Association members in terms of falling within Houston's jurisdiction and therefore being "subject to" Houston's preempted regulations. But TPGA has an even stronger argument for standing than those plaintiffs had, because some of TPGA's members have already had certain of Houston's preempted regulations actually enforced against them. At least one TPGA member, Green's

[6] The trial court's judgment is available as Appendix B to Brief on the Merits of Petitioner, No. 13-0768, *BCCA Appeal Group, Inc. v. City of Houston*, filed in the Supreme Court of Texas Sept. 5, 2014.

[7] *BCCA* not only illustrates that associational standing exists in this case; it also forecloses Houston's cross-point that the civil courts lack jurisdiction because Houston's propane regulations are "penal" enactments. The *BCCA* Court recited, multiple times, that the Houston regulatory scheme at issue was criminal in nature and imposed criminal penalties for violations, *see* 496 S.W.3d at 13-14, but the Court nonetheless exercised jurisdiction because the essence of BCCA's preemption claim was civil, not criminal. The Court the same result is proper here.

Blue Flame, "is involved in the LP-Gas industry and serves all areas of the Greater Houston area," CR217, and has been forced to pay fees pursuant to Houston's local propane regulations that it would not have had to pay under RRC regulations, CR233. Another TPGA member, Buster Brown Propane Service, is also "involved in the LP-Gas industry" in Houston and therefore subject to the preempted local regulations. CR215.

The court of appeals held that the fees already assessed against Green's Blue Flame were sufficient to support standing as to the specific regulation at issue. App.2 p. 8. That truncated analysis failed to account for the reality that TPGA has members who operate propane businesses within Houston's jurisdiction and are therefore "subject to" *all* of Houston's preempted propane regulations. Those members—just like the BCCA members and the Laredo Merchants Association members—face a substantial risk of enforcement of *all* of Houston's regulations, not just those specific regulations that have already been enforced against them. Those members would have standing in their own right to bring TPGA's single claim of blanket preemption, which establishes TPGA's associational standing to do so here.

CONCLUSION AND PRAYER

This appeal presents a straightforward standing issue relating to a single, straightforward preemption claim. TPGA does not seek a pass on standing, and its contentions regarding the scope of blanket preemption are certainly not brazen or

nonsense or any of the other stones Houston throws at it. TPGA brings a single claim that § 113.054 effects a blanket preemption of all of Houston's local propane regulations, and TPGA's members that operate in the Houston area face a substantial risk of enforcement of all of those local regulations. TPGA's claim here falls cleanly within this Court's well-settled jurisprudence regarding associational standing. If the standard for standing required that an association or individual be subject to actual enforcement of each and every regulation, then the courts would never have jurisdiction to enforce the Legislature's decision to preempt an entire subject matter from local regulation, if that is its manifest intent as expressed with unmistakable clarity. Houston insists that the bar is sky-high to establish associational standing, but its position is both wrong and poor policy. The civil courts have jurisdiction over TPGA's preemption claim, and TPGA has associational standing to bring it.

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 the City of Houston by electronic filing and e-mail on June 5, 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 5,428 words in a 14-point font size and footnotes in a 12-point font size.

/s/ *Jane Webre*
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