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TEXAS PROPANE GAS ASSOCIATION, Petitioner,
v.
The CITY OF HOUSTON, Respondent

NO. 19-0767

Supreme Court of Texas.

Argued October 29, 2020
Opinion delivered: April 16, 2021
Rehearing Denied June 11, 2021

Brent Webster, Houston, Natalie D. Thompson, Ryan Lee Bangert, Atty. Gen. W. Kenneth Paxton Jr., Kyle D. Hawkins, for Amicus Curiae.

Tiffany Sue Bingham, Judith L. Ramsey, Ronald C. Lewis, Houston, Collyn A. Peddie, Suzanne Reddell Chauvin, Houston, for Respondent.

Mary Elizabeth Smith, Austin, for Other interested party.

Leonard Barton Smith, Jane M. N. Webre, Austin, William C. Cochran, Elizabeth G. Bloch, Austin, for Petitioner.

Chief Justice Hecht delivered the opinion of the Court, in which Justice Guzman, Justice Lehrmann, Justice Devine, Justice Busby, Justice Bland, and Justice Huddle joined.

Texas comprehensively regulates the liquefied petroleum gas (LPG)[1] industry

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through the LPG Code[2] and agency regulations[3] that "preempt and supersede any [city] ordinance".[4] The Texas Propane Gas Association (TPGA)[5] has sued the City of Houston for a declaratory judgment that its ordinances regulating the LPG industry, to include imposing criminal fines for violations, are preempted by state law. Two jurisdictional challenges the City has made to the suit are the only issues before us in this interlocutory appeal. First, the City argues that civil courts lack subject-matter jurisdiction to adjudicate TPGA's preemption claim because the local regulations it challenges carry criminal penalties. We conclude that TPGA's claim is not a "criminal law matter" that must be raised in defense to prosecution. Second, the City argues that TPGA cannot challenge the City's LPG regulations "en masse" but only those that have injured at least one of its members. Although the City frames this argument as a challenge to TPGA's standing, we conclude that it is really a merits challenge and that TPGA has demonstrated standing to bring the singular preemption claim it has pleaded. We reverse the judgment of the court of appeals[6] and remand the case to the trial court for further proceedings.

I

The State has regulated the LPG industry for more than 60 years. In 1959, the Legislature enacted the LPG Code,[7] which directed the Railroad Commission to "promulgate and adopt ... adequate rules, regulations, and/or standards pertaining to any and all aspects or phases of the LPG industry ... which will protect or tend to protect the health, welfare, and safety of the general public."[8] In response, the Commission has adopted comprehensive statewide LPG regulations[9] that the parties refer to as the LP-Gas Safety Rules. The LP-Gas Safety Rules prescribe various monetary penalties for violations.[10] In 2011, the Legislature added Section 113.054 to the LPG Code:

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> The rules and standards promulgated and adopted by the commission under Section 113.51 preempt and supersede any ordinance, order, or rule adopted by a political subdivision of this state relating to any aspect or phase of the liquefied petroleum gas industry. A political subdivision may petition the commission's executive director for permission to promulgate more restrictive rules and standards only

> if the political subdivision can prove that the more restrictive rules and standards enhance public safety.[11]

Four years later, the City adopted three ordinances amending its Fire Code,[12] which is modeled on the 2012 International Fire Code. The amended Code now includes Chapter 61, entitled "Liquefied Petroleum Gases".[13] This was the City's first venture into regulating activities involving LPG. The Code imposes monetary penalties for a violation that range from $500 to $2,000 per day.[14]

TPGA brought a declaratory judgment action against the City of Houston and several other cities,[15] asserting the defendants' local LPG regulations have not been approved by the Commissioner's executive director and, under Section 113.054, are therefore preempted by the LP-Gas Safety Rules. In response, all defendants but the City either adopted the LP-Gas Safety Rules or settled with TPGA. Only the City contested TPGA's assertions. TPGA asserts that under Section 113.054, the LP-Gas Safety Rules "preempt and supersede *any* ordinance, order, or rule adopted by a political subdivision of this state relating to *any* aspect or phase of the liquefied petroleum gas industry" (emphasis in original), whether in Chapter 61, other provisions of the Fire Code, or other City regulations, such as those in its Building Code. "Alternatively," TPGA asserts that the LP-Gas Safety Rules preempt the City's regulations that are more restrictive than the LP-Gas Safety Rules.[16]

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TPGA's pleadings recount the history of Section 113.054's enactment from its perspective. The LPG industry, TPGA explains "is heavily regulated", both by the State and also "by local governments that [have] ... adopted local rules that substantially differ[ ] from the ... LP-Gas Safety Rules." TPGA asserts in its pleadings that "one of the challenges facing the LP-Gas industry [is] local rules that deviate from internationally and nationally accepted LP-Gas standards for no rhyme or reason". "The inconsistent, hodge-podge nature of local rules, especially local rules that deviate substantially and irrationally from the rules adopted by" the State burden the industry. The goal of Section 113.054, TPGA alleges, is a "consistent regulatory scheme for the LP-Gas industry" to relieve the industry of "the burden of inconsistent local regulation". TPGA further alleges that in a meeting between its representatives and the City's mayor and attorney, the City officials "made clear that Houston would continue to regulate the LP-Gas industry within its jurisdiction as it wished without regard to § 113.054".

TPGA's pleadings assert that "[o]ne or more of [its] members have been adversely affected by" the City's enactment of local regulations that differ from the LP-Gas Safety Rules and describe five instances in which the City has enforced LPG regulations that differ from the LP-Gas Safety Rules. In four of the five, it is unclear whether the incident involved one of TPGA's members. The fifth example involves a member who was charged $2,180 in permit fees for installing an LPG tank in a manner that violated the amended Fire Code, even though the installation complied with the LP-Gas Safety Rules.

The parties filed cross-motions for summary judgment on the merits. The City's motion also included a plea to the jurisdiction. The trial court denied both sides' motions and the City's plea to the jurisdiction. The City appealed the trial court's

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refusal to dismiss for lack of jurisdiction.[17] On appeal, the City argued that because its regulations can result in the imposition of fines, they are criminal in nature and beyond challenge in a civil action. The City also argued that TPGA lacks standing to challenge the City's regulations without showing injury to a TPGA member for each discrete regulation challenged. The court of appeals disagreed with the former argument[18] but agreed with the latter[19] and remanded the case to the trial court for TPGA to amend its pleadings.

We granted TPGA's and the City's petitions for review. We begin with the City's criminal law argument and then turn to its standing argument. It bears emphasizing that the merits of TPGA's preemption claims are not at issue here—only its right to proceed on them.

II

A

The Texas Constitution prohibits city ordinances that conflict with state law.[20] In *City of Laredo v. Laredo Merchants Association* , we held that "a local antilitter ordinance prohibiting merchants from providing 'single use' plastic and paper bags to customers for point-of-sale purchases" was preempted by the Texas Solid Waste Disposal Act and therefore invalid.[21] We concluded that the Merchants Association challenging the ordinance was entitled to declaratory relief.[22]

Just like the LPG ordinances in the present case, the City of Laredo's ordinance punished violations with monetary fines.[23] The City of Laredo did not contest the trial court's jurisdiction over the suit, but the City of Houston did, as amicus curiae, making exactly the same argument it makes now: that because the ordinance was "penal in nature", it could be challenged "only in defense to a criminal prosecution for violating it."[24] The City centered its argument on our decision in *State v. Morales* , where we held that the trial court lacked jurisdiction over a declaratory judgment action challenging the constitutionality of the Texas statute criminalizing sodomy.[25] "It is well settled," we wrote, "that courts of equity will not interfere with the ordinary enforcement of a criminal statute unless the statute is unconstitutional and its enforcement will result in irreparable injury to vested property rights."[26] "The underlying reason for this rule," we explained, "is that the meaning and validity of a penal statute or ordinance

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should ordinarily be determined by courts exercising criminal jurisdiction."[27] "For the same reasons that equity courts are precluded from enjoining the enforcement of penal statutes," we concluded, the trial court lacked "jurisdiction to render a declaratory judgment regarding the constitutionality of [the sodomy statute]."[28]

Morales distinguished our decision a century earlier in *City of Austin v. Austin City Cemetery Association* .[29] There, the Cemetery Association challenged an ordinance prohibiting burials within the Austin city limits north of the Colorado River except in the State Cemetery, the Austin City Cemetery, and the Mount Calvary Cemetery.[30] We held that the trial court had jurisdiction to enjoin enforcement of the ordinance, despite the "general rule" that "the aid of a court of equity cannot be invoked to enjoin criminal prosecutions."[31] Though the ordinance could be challenged in a criminal prosecution or on habeas corpus, we acknowledged, "[a] criminal prosecution is unpleasant to all people who have due respect for the law, and almost necessarily involves inconvenience and expense."[32] As a result, "[a]s long as the ordinance remains undisturbed, it acts in terrorem, and practically accomplishes" its goal by only threatening enforcement.[33] Unless the ordinance was restrained, it could "result in a total destruction of the value of [the Cemetery Association's] property for the purpose for which it was acquired."[34] The sodomy statute challenged in *Morales* posed no such threat, we explained, because it was not being enforced; there was "no record of even a single instance in which the sodomy statute ha[d] been prosecuted against conduct that the plaintiffs claim[ed] [was] constitutionally protected".[35]

Unlike the statute in *Morales* , the antilitter ordinance in *City of Laredo* threatened irreparable injury to vested property rights in a way similar to the ordinance in *City of Austin* . The City of Laredo's ordinance "impose[d] a substantial per-violation fine that effectively preclude[d] small local businesses from testing the ban's constitutionality in defense to a criminal prosecution."[36] *Morales* was thus no impediment to the trial court's jurisdiction over the Merchants Association's suit for declaratory

relief.

With more rhetoric than logic, the City of Houston insists that *City of Laredo* should not be followed and was wrongly decided. The City dismisses our jurisdictional holding as dicta. But a jurisdictional holding can never be dicta because subject-matter jurisdiction must exist before we can consider the merits, a challenge to it cannot be waived, and "we have an obligation to examine our jurisdiction any time it is in doubt".[37] The City argues that *City of Laredo* is directly contrary to *Morales* , even though the sodomy statute at issue in *Morales* was never enforced, and

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the City of Laredo adopted its antilitter ordinance precisely to enforce it. The City argues that the City of Austin's cemetery ordinance threatened the total destruction of the value of the challenger's property, while the City of Laredo's regulations posed much less of a threat to the property of the Merchants Association. But the threat of prosecution and the fines imposed in each situation were similar.

In sum, just as in *City of Laredo* , the City's LPG regulations threaten irreparable injury to vested property rights.

B

The City's jurisdictional argument also fails because TPGA's lawsuit is not a "criminal law matter" outside a Texas civil court's subject-matter jurisdiction.

The Texas Constitution bifurcates the civil and criminal law jurisdiction of the State, giving the Court of Criminal Appeals appellate jurisdiction "in all criminal cases"[38] and this Court appellate jurisdiction "except in criminal law matters".[39] In *Heckman v. Williamson County* , we held that to determine the boundary between civil and criminal jurisdiction, courts must "look to the essence of the case to determine whether the issues it entails are more substantively criminal or civil."[40] Disputes "aris[ing] over the enforcement of statutes governed by the Texas Code of Criminal Procedure" or "as a result of or incident to a criminal prosecution" are usually criminal law matters.[41] But the mere existence of some criminal-law question, characteristic, or context will not transform a dispute that is fundamentally civil into a criminal law matter.[42]

In *Harrell v. State* , for example, Harrell contended that a trial court order directing the Texas Department of Criminal Justice to withdraw money from his inmate trust account to pay for court costs and attorney fees violated due process.[43] We had jurisdiction to decide the merits because the case was "more civil in nature than criminal."[44] We reasoned that the withdrawal order was issued years after Harrell's conviction; that the Government Code provision authorizing the order also authorized withdrawal for costs incurred in civil proceedings; that neither Harrell's guilt nor his punishment was at issue; and that the case was "substantively akin to a garnishment action or an action to obtain a turnover order."[45]

The "essence" test articulated in *Heckman* requires a holistic, common-sense analysis. The essence of this case is a dispute over the City's legal authority to regulate a specific category of commercial activity, the LPG industry. TPGA's primary substantive claim is that

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Section 113.054, a civil statute, forbids the City from regulating any aspect of the industry without the permission of the executive director of the Railroad Commission. TPGA's alternative claim is that certain of the City's regulations are preempted by Section 113.054 because they conflict with the Railroad Commission's LP-Gas Safety Rules. Adjudicating the merits of TPGA's claims will turn on the scope of Section 113.054.

Though violating the City's LPG regulations may result in a criminal proceeding or monetary penalty, that fact is merely incidental to the legal issue TPGA raises. Accepting the City's argument would allow a political subdivision to evade a preemption challenge by cloaking its commercial regulations with criminal features. And it would result in the anomaly of civil courts

having jurisdiction to adjudicate the validity of local LPG regulations that do not carry criminal penalties but no jurisdiction to adjudicate local regulations that do.

Both *Morales* and *City of Laredo* repeated the rule that a civil court has jurisdiction to declare a criminal statute invalid only when irreparable injury to vested property rights is threatened.[46] Viewed in the context of our case law as a whole, the rule is but a corollary to the ultimate test articulated in *Heckman* : looking to the essence of the case, are the issues presented more substantively civil or criminal? Protection of property rights is a core civil-law function.[47] In a suit challenging the constitutionality of a criminal statute, the threat of irreparable injury to property rights may tip the scales in favor of the matter being a civil one.

The essence of this case is civil, as was the essence of *City of Laredo* . Accordingly, this case is within the trial court's subject-matter jurisdiction.

III

The City challenges TPGA's standing to assert its claim that the City's regulations are preempted by Section 113.054. "The Texas standing requirements parallel the federal test for Article III standing, which provides that a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[48] The City challenges only the injury component of standing, which must be "actual or imminent, not conjectural or hypothetical".[49] The City argues that TPGA must demonstrate that at least one of its members meets the injury requirement with respect to each discrete regulation that TPGA challenges. There are hundreds. For authority, the City relies on the basic principle that "[s]tanding is not dispensed in gross"[50] but must instead be analyzed "claim-by-claim ... to ensure that a particular plaintiff has standing to bring each of his particular claims."[51]

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We agree, of course, that standing must be analyzed claim by claim. But TPGA maintains that it has only one claim in this lawsuit: that *all* of the City's local regulations relating to LPG are preempted by the LP-Gas Safety Rules under Section 113.054. TPGA has pleaded an actual and imminent injury to its members: "inconsistent, hodge-podge ... local rules", including the City's, "that deviate substantially and irrationally from the rules adopted by" the State and thereby burden the industry. TPGA's pleadings also recount a meeting in which the City officials "made clear that Houston would continue to regulate the LP-Gas industry within its jurisdiction as it wished without regard to ... § 113.054". And TPGA's pleadings outline five instances in which the City has enforced LPG regulations in the amended Fire Code that are inconsistent with the LP-Gas Safety Rules.

We agree with the dissent that standing requirements should be rigorously applied and that Texas law and federal law are parallel. We also agree with the dissent that "[a]s a practical matter, it seems likely that the members of the Texas Propane Gas Association face injury or threatened injury from most—if not all—of Houston's LPG regulations."[52] According to TPGA's pleadings, the City's mayor and city attorney promised them exactly that. We disagree that TPGA failed to allege an actual and imminent injury. We agree with the dissent that a plaintiff cannot challenge a broad array of regulations, or even a companion regulation, without showing standing as to each. We agree, to be specific, with *In re Gee* .[53] But *Gee* was, as the opinion said in its first sentence, "an extraordinary case."[54] There, "[a]n abortion clinic and two of its doctors [sought] a federal injunction against virtually all of Louisiana's legal framework for regulating abortion", challenging "legal provisions that do not injure them now and could not ever injure them."[55] But that is far different from this case. TPGA challenges the City's amendments to its Fire Code for reasons that TPGA also used to successfully advocate for the enactment of Section 113.054—because of the burden those amendments impose on its members and because of the actual and imminent injury promised by the City's mayor and city attorney.

We disagree with the dissent that TPGA has standing to assert its claim "on the theory that, if all the regulations are invalid, they are all invalid for the same reason".[56] TPGA has standing not merely because there is one reason that the regulations are invalid, but because of what that reason is: that the City lacked the authority to adopt the regulations without State approval. TPGA has standing to challenge regulations it claims the City had no authority to enact.

TPGA has standing to assert its claim. Whether the law allows such a claim and, of course, whether TPGA can prevail on it are issues going to the merits, not standing.[57]

* * * * *

We conclude that the trial court does not lack jurisdiction on either ground asserted

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by the City. We therefore reverse the court of appeals' judgment and remand to the trial court for proceedings on the merits.

Justice Blacklock filed an opinion concurring in part and dissenting in part, in which Justice Boyd joined.

Justice Blacklock, joined by Justice Boyd, concurring in part and dissenting in part.

Courts cannot enjoin a statute or ordinance at the request of a party who is not injured by the statute or ordinance. This elementary principle of standing provides an important limitation on the judiciary's power relative to the other branches of government. It should be rigorously observed, even when doing so seems technical, because courts "are not roving commissions assigned to pass judgment on the validity of ... laws." *Broadrick v. Oklahoma* , 413 U.S. 601, 611, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Instead, our duty is to withhold judgment on "all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured." *Watson v. Buck* , 313 U.S. 387, 402, 61 S.Ct. 962, 85 L.Ed. 1416 (1941).

Under the federal courts' view of standing, which this Court has adopted into Texas law, "[i]t is now beyond cavil that plaintiffs must establish standing for each and every provision they challenge." *In re Gee* , 941 F.3d 153, 161–62 (5th Cir. 2019) (per curiam) (rejecting omnibus challenge to the State of Louisiana's abortion regulations). TPGA's pleadings do not even attempt to meet that burden. Instead, TPGA seeks the judicial invalidation of the entirety of the City of Houston's liquid petroleum gas (LPG) regulatory scheme despite alleging concrete injury as to, at most, a small subset of the City's regulations. The Court's decision nevertheless authorizes TPGA to seek an injunction against *all* the City's LPG regulations on the theory that, if all the regulations are invalid, they are all invalid for the same reason as the regulations for which the City alleges a concrete injury.

This Court is not bound by the federal courts' view of standing, but if we take seriously the notion that federal standing doctrine has been incorporated into Texas law, we should not depart so starkly from the consensus view of the federal courts when it comes to plaintiffs' standing to challenge statutes and regulations. Under that view, "[t]o ensure that standing is not dispensed in gross, the [ ] court must analyze Plaintiffs' standing to challenge each provision of law at issue." *Id*. TPGA makes no attempt to establish its "standing to challenge each provision of law at issue," and regrettably, the Court's decision makes no attempt to require it to do so.

As a practical matter, it seems likely that the members of the Texas Propane Gas Association face injury or threatened injury from most—if not all—of Houston's LPG regulations. But standing is not established by supposition or surmise. Standing is established by pleading and proving facts demonstrating, among other things, that the challenged government action is injuring or threatens to injure the plaintiff. Absent that showing, the plaintiff has no standing to challenge the regulation, and the courts have no power to enjoin it.

None of this is to say that TPGA cannot obtain relief from the courts for the City's alleged continued enforcement of expressly preempted ordinances. At least three options are available. First, TPGA could amend its pleadings to allege injury as to each provision it wants the courts to declare invalid; this may take some effort, but it is not an unfamiliar burden for

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plaintiffs seeking judicial invalidation of statutes or regulations. Second, TPGA could proceed with a targeted challenge to particular aspects of the City's LPG regulations and use that proceeding to establish the legal precedent that *all* the City's LPG regulations are preempted by state statute. Third, TPGA could assist its members who are prosecuted for violating allegedly preempted ordinances and thereby advance its preemption arguments as a defensive matter. What TPGA should not be permitted to do, however, is seek judicial invalidation of wide swaths of regulatory territory without even alleging in its petition that its members face threatened injury from each provision it wants invalidated.

Because the Court's decision departs from bedrock principles of standing, I respectfully dissent in part. I also concur in part, however, because TPGA has adequately pleaded injury with respect to at least some provisions of the City's LPG regulations.[58] It should be permitted to proceed with a challenge to those provisions, which, if successful, could establish a precedent on the underlying preemption question that would doom all the City's other LPG regulations. As for TPGA's challenge to the rest of the City's LPG regulatory scheme, for which TPGA has not sufficiently pleaded concrete injury, I would affirm the court of appeals' judgment and remand those claims to allow TPGA to replead them if it wishes to continue pursuing an omnibus challenge to all the City's LPG regulations.[59]

* * *

This Court has adopted the standing criteria articulated by the U.S. Supreme Court as a means of evaluating litigants' standing under the Texas Constitution. *Heckman v. Williamson County* , 369 S.W.3d 137, 154 (Tex. 2012). To establish standing under this framework, a plaintiff must plead facts showing that (1) he has suffered, or is at imminent risk of suffering, a "concrete and particularized ... injury"; (2) the injury is "traceable" to the defendant's challenged actions; and (3) the injury will " 'likely' ... be 'redressed by a favorable decision.' " *Id.* at 154–55 (quoting

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Lujan v. Defs. of Wildlife , 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). We often look to federal case law for guidance in applying these criteria. *Id.* at 152 n.60. Like the federal courts, we analyze standing "*claim-by-claim* ," so as to "ensure that a particular plaintiff has standing to bring each of his particular claims." *Id.* at 153 (citing *Lewis v. Casey* , 518 U.S. 343, 358 n.6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996)). This case presents the question of how to apply this claim-by-claim analysis when a plaintiff challenges a wide swath of government regulations.

TPGA seeks a declaratory judgment that all of Houston's LPG ordinances—of which there are hundreds—are categorically preempted by state law. The Court concludes that TPGA has adequately alleged standing to pursue this sweeping declaration based on the lone allegation that fees were assessed against one TPGA member pursuant to one aspect of the City's regulations. Although I disagree with the Court's decision, there seems to be broad agreement on two basic principles. First, to establish standing to challenge government action, a plaintiff must plead facts showing (among other things) that he has suffered, or is likely to suffer, a concrete injury as a result of the challenged action. Second, this showing must be made with respect to each of the plaintiff's claims. The Court's opinion affirms the validity of both propositions, but it misapplies them to this case by (1) allowing TPGA to opportunistically define its lone "claim" as an omnibus challenge to all the LPG regulations; and (2) holding that alleging injury from one or

two LPG regulations gives TPGA standing to bring an omnibus challenge against all the LPG regulations.

Although I am aware of no Texas decisions confronting this precise issue, the federal jurisprudence is emphatic in requiring plaintiffs seeking judicial invalidation of entire regulatory schemes to allege injury as to each provision challenged. "[S]tanding is not dispensed in gross," the U.S. Supreme Court has explained. *Lewis* , 518 U.S. at 357, 116 S.Ct. 2174. "[A] citizen aggrieved in one respect" by "one particular inadequacy in government administration" does not thereby acquire standing to "bring the whole structure of state administration before the courts for review." *Id.* at 358 n.6, 116 S.Ct. 2174. Thus, the fact "that a plaintiff has standing to challenge one of a statute's provisions does not mean the plaintiff has standing to challenge all of them." *Fednav, Ltd. v. Chester* , 547 F.3d 607, 614 (6th Cir. 2008). Nor can he, " 'by virtue of his standing to challenge one government action, challenge other governmental actions that did not injure him'—by referring to regulatory actions in gross" as part of a single "regulatory scheme." *Id.* at 617–18 (quoting *DaimlerChrysler Corp. v. Cuno* , 547 U.S. 332, 353 n.5, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006)). The federal case law uniformly so holds.[60]

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These decisions are consistent with a principle articulated by the U.S. Supreme Court long ago: The judiciary should "delay passing upon the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured." *Watson v. Buck* , 313 U.S. 387, 402, 61 S.Ct. 962, 85 L.Ed. 1416 (1941). TPGA attempts to circumvent this clear line of authority by arguing that, although standing is properly established on a claim-by-claim basis, TPGA has just one claim. Its claim is "that *all of* Houston's [LPG] regulations ... are preempted ... as a blanket matter." The Court agrees with this argument, but all the available precedent squarely rejects it. "[S]tanding regarding one aspect of a policy cannot be bootstrapped into standing as to the rest." *Rock for Life-UMBC v. Hrabowski* , 411 Fed. Appx. 541, 547 (4th Cir. 2010). Likewise, a plaintiff "cannot leverage its injuries under certain, specific provisions [of an ordinance] to state an injury under the ... ordinance generally." *Get Outdoors II, LLC v. City of San Diego* , 506 F.3d 886, 892 (9th Cir. 2007). "[S]tanding 'focuses on the party seeking' " to invoke a court's jurisdiction "and not on the issues he wishes to have adjudicated." *Simon v. E. Ky. Welfare Rights Org.* , 426 U.S. 26, 38, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) (quoting *Flast v. Cohen* , 392 U.S. 83, 99, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968)). As this Court has noted, "a plaintiff who has been subject to injurious conduct of one kind" does not "possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Heckman* , 369 S.W.3d at 153 (quoting *Lewis* , 518 U.S. at 358 n.6, 116 S.Ct. 2174).

I find it impossible to reconcile these well-established principles with the theory of blanket standing advanced by TPGA and adopted by the Court. A plaintiff cannot establish standing to challenge the entirety of a regulatory scheme merely by alleging that one part of the scheme injures him and then couching his "claim" as an attack on the entire scheme. Instead, a plaintiff seeking an injunction against *all* the elements of a regulatory scheme must show that *all* the elements of the regulatory scheme injure the plaintiff.

Federal courts routinely reject TPGA's proffered approach to standing, under which litigants attempt to establish standing to challenge multiple elements of a regulatory scheme by formulating their claims in capacious terms. The Fifth Circuit held, for instance, that a plaintiff had standing to challenge one of two neighboring statutory provisions, but not the other, even though both "provisions raise[d] similar constitutional concerns." *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott* , 647 F.3d 202, 209 (5th Cir. 2011). "We are cognizant," the court explained, "that the [two] provisions are seemingly identical in all material respects and

that, should [one] fall as unconstitutional, a subsequent challenge to the [other] will almost certainly succeed. But the seemingly intertwined fates of the two provisions does not eviscerate Article III's requirements." *Id.*

Likewise here, the "seemingly intertwined fates" of the City's many LPG regulations do not "eviscerate [the Texas Constitution's] requirement[ ]" that standing be established on a claim-by-claim basis. "[S]hould [one such regulation] fall" as preempted, "a subsequent challenge" to any of the others "will almost certainly succeed." But the shared fate of the LPG regulations as matter of preemption does

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not excuse TPGA from having to show injury-in-fact arising from every provision it wants the courts to enjoin. In other words, TPGA is free to *argue* that *all* the City's LPG regulations are preempted as a basis for obtaining an injunction against the few regulations for which it has alleged actual injury to its members. But it cannot obtain an *injunction* against *all* the City's regulations unless it adequately pleads injury as to *each provision it wants enjoined.*

Similarly, in *In re Gee* , 941 F.3d 153 (5th Cir. 2019) (per curiam), the plaintiffs "s[ought] a federal injunction against virtually all of Louisiana's legal framework for regulating abortion," including "provisions that do not injure them now and could not ever injure them." *Id.* at 156. The district court concluded that the plaintiffs had standing to pursue their "blanket" attack on Louisiana's law on the theory that "it would [have] be[en] 'untenable' to make Plaintiffs establish their standing" as to each provision "because doing so would make it more difficult for them to succeed on the merits"—a conclusion that the Fifth Circuit called "obvious error." *Id.* While noting that the plaintiffs had "proffered ample allegations to support their contention" that Louisiana was "not regulating abortion properly," the appellate court nonetheless held that "Article III demands much more. To ensure that standing is not dispensed in gross, [courts] must analyze Plaintiffs' standing to challenge *each provision of law at issue.* " *Id.* at 161–62 (emphasis added). This was so despite the fact that the plaintiffs challenged every provision under the same legal theory.

Along the same lines, the Seventh Circuit held that several plaintiffs' alleged injuries arising from certain aspects of an administrative rule "[could] not support their standing to challenge" the rule in its entirety. *Johnson v. U.S. Office of Pers. Mgmt.* , 783 F.3d 655, 662 (7th Cir. 2015). Like TPGA, those plaintiffs argued that the "claim-by-claim approach [was] inapplicable ... because they [had] only one claim—that the ... Rule [was] unlawful." *Id.* The court rejected this characterization as "paint[ing] with too broad a brush." *Id.* "[I]n order to demonstrate standing, a plaintiff's injury must match the legal problem he alleges. A plaintiff cannot attack a perceived problem that does not cause him injury, regardless of its ... relationship to other provisions (illegal or not) that do cause him injury." *Id.* at 663. Nor can he broaden his standing by seeking "a remedy—vacatur of the ... Rule as a whole"—broad enough to implicate aspects of the rule beyond those that injure him. *Id.*

Also instructive is a Ninth Circuit decision considering a challenge to a federal agency's identification policy governing airline passengers. There, the plaintiff (who was prohibited from boarding a flight due to that policy) sought invalidation of not just the identification policy, but also a host of other practices that "he collectively refer[red] to as 'the Scheme,' " including "various airport security ... policies" that were "predicated upon the results of the identification policy," as well as the " 'similar' .... identification policies of.... the interstate bus and train systems." *Gilmore v. Gonzales* , 435 F.3d 1125, 1134–35 (9th Cir. 2006). The court held that the plaintiff lacked standing to attack any of these measures aside from the identification policy that resulted in his inability to fly. "The fact that the identification policy relates to the other security programs does not mean that [he] suffered an 'injury in fact' due to these additional programs." *Id.* at 1135.

The lesson of the foregoing decisions—and

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many others[61] —is that a plaintiff attacking an entire statutory or regulatory scheme must plead facts showing a concrete injury arising from every provision of the scheme he wants the courts to enjoin, even if all such provisions are assailed on the same legal ground. I would require TPGA's pleadings to conform to this well-established rule.

In challenging any given regulatory requirement, TPGA is of course free to advance a legal theory that implies the invalidity of the entire regulatory scheme, just as a court invalidating a lone regulatory requirement is free to adopt reasoning that implies the invalidity of a wide swath of regulation. Although a "characteristic of judicial power is that it pronounces on special cases, and not upon general principles," a court may "in deciding a particular point destroy[ ] a general principle, by passing a judgement which tends to reject all the inferences from that principle." 1 ALEXIS DE TOCQUEVILLE , DEMOCRACY IN AMERICA 137 (1835). "[U]nder the doctrine of *stare decisis* , [that court's] reasoning—to the extent that it is necessary to the holding"—will, as "a logical consequence of the opinion," effectively control outcomes in future cases raising similar legal questions. *City of Los Angeles v. Patel* , 576 U.S. 409, 429–30, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2015) (Scalia, J., dissenting). A court, however, cannot *render judgment* as to the validity of a regulatory requirement unless the plaintiff pleads a legally cognizable injury arising from the requirement.

* * *

For the foregoing reasons, TPGA has thus far failed to show standing to challenge any of Houston's LPG regulations apart from the provisions under which it alleges a TPGA member was fined. TPGA's appellate briefing, however, contends that TPGA has standing to attack Houston's entire system of LPG regulation because its "members are subject to *all* of [those] regulations and face a substantial risk that *all* will be enforced against them." Reply Brief on the Merits at 16. Such an allegation of the substantial risk of enforcement as to all the regulations, made with sufficient specificity as to the various elements of the regulatory scheme, could confer standing to challenge the entirety of the City's regulations.[62]

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The Court cannot evaluate the sufficiency of pleadings it has not seen, however. TPGA's live pleading—the subject of the plea to the jurisdiction from which this appeal arises—contains no attempt to allege a substantial risk of injury as to each regulation challenged. The live petition alleges injury-in-fact to a TPGA member only with respect to one instance of City enforcement. I would hold that TPGA's petition adequately alleges injury with respect to the regulations implicated by that episode. As for the remainder of TPGA's omnibus challenge to the City's LPG regulations, I would affirm the court of appeals' judgment granting the plea to the jurisdiction, and I would remand the case to allow TPGA the opportunity to replead.[63]

Notes:

[1] Liquefied petroleum gas is a mixture of volatile hydrocarbons, including butane and propane. When in a pressurized tank, LPG is in liquid state and can easily be stored and transported. When released at room temperature, it is gaseous and highly flammable.

[2] *See* Tex. Nat. Res. Code ch. 113.

[3] *See* 16 Tex. Admin. Code ch. 9.

[4] Tex. Nat. Res. Code § 113.054.

[5] TPGA is a trade association whose 300 members statewide include "producers, wholesalers, propane retailers, manufacturers, fabricators, distributors, service providers, engineers, plumbers, RV parks, associations, and others involved in the propane industry." *Who are Our Members* , TPGA, https://www.txpropane.com/why-join (last visited Apr. 4, 2021). Its purpose is "to help the propane

industry navigate complex rules, regulations, and codes" and to serve "as the voice for the propane industry in Texas." Homepage, TPGA, https://www.txpropane.com/ (last visited Apr. 5, 2021).

[6] 608 S.W.3d 27, 39 (Tex. App.—Austin 2019).

[7] The Liquefied Petroleum Gas Code, 56th Leg., R.S., ch. 382, 1959 Tex. Gen. Laws 844, 845 (codified as amended at Tex. Nat. Res. Code ch. 113).

[8] *Id*. § 3.A. This provision has since been recodified as Section 113.051, whose language is substantially the same: "[T]he commission shall promulgate and adopt rules or standards or both relating to any and all aspects or phases of the LPG industry that will protect or tend to protect the health, welfare, and safety of the general public." Exceptions to this provision in the 1959 enactment are now listed in Section 113.003. One exception is that "[n]one of the [Code's provisions] apply to ... the production, refining, or manufacture of LPG". Tex. Nat. Res. Code § 113.003(a)(1).

[9] *See* 16 Tex. Admin. Code ch. 9.

[10] *Id*. § 9.15. The provision sets out lengthy, detailed schedules of penalties for hundreds of violations.

[11] Tex. Nat. Res. Code § 113.054.

[12] These ordinances, Nos. 2015-1108, 2015-1289, and 2015-1316, took effect in early 2016.

[13] Hous., Tex., City of Houston Fire Code ch. 61 (2015).

[14] For example, Section [A] 109.4 provides that:

> When in this code an act is prohibited or is made or declared to be unlawful or an offense or misdemeanor, or wherever in this code the doing of any act is required or the failure to do any act is declared to be unlawful, and no specific penalty is provided therefor, the violation of any such provision of this code shall be punished by a fine of not less than $500.00, nor more than $2000.00; provided, however, that no penalty shall be greater or lesser than the penalty provided for the same offense under the laws of the state. Each day any violation of this code shall continue shall constitute a separate offense.

Id. § 109.4.

[15] Other defendants were the Cities of Abilene, Bonham, El Paso, Greenville, Lake Jackson, Lubbock, Lucas, Mesquite, Mission, Montgomery, Sherman, West Columbia, and Woodway.

[16] TPGA's Fourth Amended Petition states:

> Alternatively, and without waiving the above and foregoing, in the event only those Houston ordinances, rules, and regulations that are more restrictive than the LP-Gas Safety Rules are preempted, Plaintiff asserts that the following are more restrictive and, therefore, preempted:
>
> 1. Houston Sections [A] 105.1.1, [A] 105.1.2, [A] 105.6.27, and 6101.2 relating to permits and fees are more restrictive than and, therefore, preempted by LP-Gas Safety Rule § 9.101;
>
> 2. Houston Sections [A] 105.6.27, 6101.2, and 6103.3 relating to aggregate water capacity of LP-Gas containers are more restrictive than and, therefore, preempted by LP-Gas Safety Rule § 9.101;
>
> 3. Houston Sections [A] 105.6.27 and 6101.3 relating to the required submission of applications and/or construction documents are more restrictive than and, therefore, preempted by LP-Gas Safety Rules §§ 9.3 and 9.101;

4. Houston Sections 113.1 – 113.113.7 relating to fees are more restrictive than and, therefore, preempted by LP-Gas Safety Rules §§ 9.101 and 113.082;

5. Houston Section 312 relating to barriers is more restrictive than and, therefore, preempted by LP-Gas Safety Rule § 9.140;

6. Houston Sections 203.1 and 6104.2 relating to maximum storage capacity within certain districts of limitation are more restrictive than the LP-Gas Safety Rules because the LP-Gas Safety Rules impose no similar restriction in any area of limitation defined by Houston;

7. Houston Sections [A] 104.1 and 104.1.1 relating to the authority of Houston's fire code official to enforce provisions of Houston's Fire Code, to render interpretations of any matter, and/or to exercise discretion with respect to any aspect or phase of the LP-Gas industry are more restrictive than the LP-Gas Safety Rules because the LP-Gas Safety Rules: (i) impose an enforcement regime, including various penalties, and (ii) delegate no enforcement authority to Houston's fire code official;

8. Houston Section [A] 104.5 relating to the authority of Houston's fire code official to issue criminal citations, administrative citations, or summonses with respect to any aspect or phase of the LP-Gas industry for violation of any provision of the Houston Fire Code is more restrictive than the LP-Gas Safety Rules because the LP-Gas Safety Rules: (i) impose an enforcement regime, including various penalties, and (ii) delegate no enforcement authority to Houston's fire code official;

9. Houston Section [A] 105.3.1 relating to expiration of an LP-Gas permit is more restrictive than the LP-Gas Safety Rules because the LP-Gas Safety Rules grant no such authority to Houston; and

10. Houston Section [A] 105.5 relating to revocation of an LP-Gas permit is more restrictive than the LP-Gas Safety Rules because the LP-Gas Safety Rules grant no such authority to Houston.

[17] *See* Tex. Civ. Prac. & Rem. Code § 51.0148(a)(8) (authorizing an interlocutory appeal from a ruling on a governmental unit's plea to the jurisdiction); *Thomas v. Long* , 207 S.W.3d 334, 339 (Tex. 2006) (noting that "governmental unit[s]" are entitled to interlocutory appeal following the trial court denying their jurisdictional challenges "irrespective of the procedural vehicle used").

[18] 608 S.W.3d 27, 38–39 (Tex. App.—Austin 2019).

[19] *Id*. at 33–37.

[20] Tex. Const. art. XI, § 5 (a) ("[N]o ... ordinance passed under [a city] charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.").

[21] 550 S.W.3d 586, 589 (Tex. 2018).

[22] *Id*. at 598.

[23] *Id*. at 590 ("A violation is punishable as a Class C misdemeanor with a fine of up to $2,000 per violation plus court costs and expenses.").

[24] *Id*. at 592 n.28.

[25] 869 S.W.2d 941, 942 (Tex. 1994).

[26] *Id*. at 945 (quoting *Passel v. Fort Worth Indep. Sch. Dist.* , 440 S.W.2d 61, 63 (Tex. 1969)).

[27] *Id.*

[28] *Id.* at 947.

[29] 87 Tex. 330, 28 S.W. 528 (1894).

[30] *Id.* at 528.

[31] *Id.* at 529.

[32] *Id.* at 530.

[33] *Id.*

[34] *Id.* at 529.

[35] 869 S.W.2d 941, 943 (Tex. 1994).

[36] 550 S.W.3d 586, 592 n.28 (Tex. 2018).

[37] *Pike v. Tex. EMC Mgmt., LLC* , 610 S.W.3d 763, 774 (Tex. 2020) ; *see also Tex. Ass'n of Bus. v. Tex. Air Control Bd.* , 852 S.W.2d 440, 443–444 (Tex. 1993) ("Subject matter jurisdiction is never presumed and cannot be waived.").

[38] Tex. Const. art. V, § 5 (a).

[39] *Id.* art. V, § 3(a).

[40] 369 S.W.3d 137, 146 (Tex. 2012).

[41] *Id.* (quoting *Harrell v. State* , 286 S.W.3d 315, 318 (Tex. 2009)).

[42] *See Passel v. Fort Worth Indep. Sch. Dist.* , 440 S.W.2d 61, 62 (Tex. 1969) ("It has been said that the power and authority to interpret criminal statutes rests solely with the courts of this state exercising criminal jurisdiction. We have already confessed that this statement is much too broad." (citations omitted)); *Comm'rs' Ct. of Nolan Cnty. v. Beall* , 98 Tex. 104, 81 S.W. 526, 528 (1904) (explaining that "there are ... civil cases in which ... points of criminal law call for a solution" and giving the example of a damages claim for false imprisonment that challenges the defendant's right to make an arrest under the Code of Criminal Procedure).

[43] 286 S.W.3d 315, 318 (Tex. 2009).

[44] *Id.*

[45] *Id.* at 318–319.

[46] *City of Laredo v. Laredo Merchs. Ass'n* , 550 S.W.3d 586, 592 n.28 (Tex. 2018) ; *State v. Morales* , 869 S.W.2d 941, 945 (Tex. 1994).

[47] The principal historical function of equity courts was the "protection of rights of property." *In re Sawyer* , 124 U.S. 200, 210, 8 S.Ct. 482, 31 L.Ed. 402 (1888) ; *see Passel* , 440 S.W.2d at 63 ("It has ... been said that courts of equity are concerned only with the protection of civil property rights.").

[48] *In re Abbott* , 601 S.W.3d 802, 807 (Tex. 2020) (cleaned up).

[49] *Id.* at 808 (cleaned up).

[50] *Heckman v. Williamson Cnty.* , 369 S.W.3d 137, 153 (quoting *Lewis v. Casey* , 518 U.S. 343, 358 n.6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996)).

[51] *Id.* (emphasis removed).

[52] *Post* at 2.

[53] 941 F.3d 153 (5th Cir. 2019) (per curiam).

[54] *Id.* at 156.

[55] *Id.*

[56] *Post* at 2.

[57] *See Pike v. Tex. EMC Mgmt., LLC* , 610 S.W.3d 763, 777 (Tex. 2020) ("[W]hether a party can prove the merits of its claim or satisfy the requirements of a particular statute does not affect the court's subject-matter jurisdiction." (citing *Meyers v. JDC/Firethorne, Ltd.* , 548 S.W.3d 477, 484–485 (Tex. 2018))).

[58] Specifically, TPGA's petition alleges that "in July 2015, [a TPGA] member, Green's Blue Flame Gas Company, Inc., became involved with a project" involving "installation of an LP-Gas tank." "Inspector Michael Gonzalez, with Houston Fire Marshall's Office," demanded that

the installation comply with "requirements from Houston's Fire Code and the 2006 and 2012 International Fire Codes" that were more restrictive than those imposed by the state-law LP-Gas Safety Rules. "Inspector Gonzalez refused to issue anything more than a series of 90-day temporary permits for this LP-Gas installation, charging [Green's Blue Flame] $2,180 in permit fees in the process." Although this incident took place several years ago and does not necessarily establish an ongoing threat of injury on its own, TPGA also alleges that the mayor of Houston and its city attorney have indicated their intention to continue enforcement of the City's LPG regulations. In my view, these allegations are sufficient at the pleading stage to establish TPGA's standing as to all provisions of the City's ordinances implicated by this incident.

As the Court notes, TPGA's petition also mentions four other incidents of Houston's enforcement of its LPG regulations, but the petition does not provide sufficient information to determine whether *TPGA members* were thereby injured. *See Tex. Workers' Comp. Comm'n v. Garcia* , 893 S.W.2d 504, 518–19 (Tex. 1995) ("An association may sue on behalf of its members" only if, *inter alia* , at least some such "members ... would have standing to sue in their own right."). Nor, in several places, is the petition specific about which municipal regulations were at issue in the incidents of which it complains.

[59] I agree with the Court that TPGA's claims against the City are not "criminal law matter[s]" of the sort that may not be brought to this Court.

[60] *See, e.g., Davis v. Fed. Election Comm'n* , 554 U.S. 724, 733–34, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) ; *FW/PBS, Inc. v. City of Dallas* , 493 U.S. 215, 233–36, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) ; *Planned Parenthood of Cent. Mo. v. Danforth* , 428 U.S. 52, 62 n.2, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) ; *In re Gee* , 941 F.3d 153, 161–62 (5th Cir. 2019) (per curiam); *K.P. v. LeBlanc* , 729 F.3d 427, 436 (5th Cir. 2013) ; *Legacy Cmty. Health Servs., Inc. v. Smith* , 881 F.3d 358, 369 (5th Cir. 2018) ; *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.* , 968 F.3d 357, 365 (5th Cir. 2020) ; *CAMP Legal Def. Fund, Inc. v. City of Atlanta* , 451 F.3d 1257, 1273 (11th Cir. 2006) ; *Clark v. City of Lakewood* , 259 F.3d 996, 1006 (9th Cir. 2001) ; *Covenant Media of SC, LLC v. City of N. Charleston* , 493 F.3d 421, 429 (4th Cir. 2007) ; *United States v. Smith* , 945 F.3d 729, 734–37 (2d Cir. 2019) ; *Advantage Media, L.L.C. v. City of Eden Prairie* , 456 F.3d 793, 801 (8th Cir. 2006) ; *Freiman v. Ashcroft* , 584 F.2d 247, 249–50 (8th Cir. 1978), *aff'd* , 440 U.S. 941, 99 S.Ct. 1416, 59 L.Ed.2d 630 (1979) ; *Mueller v. Raemisch* , 740 F.3d 1128, 1132 (7th Cir. 2014) ; *Weiss v. Sec'y of U.S. Dep't of Interior* , 459 Fed. Appx. 497, 499 (6th Cir. 2012).

[61] *See Serv. Emps. Int'l. Union, Local 5 v. City of Houston* , 595 F.3d 588, 597 (5th Cir. 2010) ("[A] lawsuit is not a general license for a federal court to examine all provisions of a municipal ordinance and decide if any are flawed. First Amendment challenges do not eliminate the need for a party to demonstrate it has constitutional standing."); *Env't Tex. Citizen Lobby* , 968 F.3d at 365, 366 ("Plaintiffs argue that although they must prove standing for each Clean Air Act *claim* (that is, group of violations of a particular emission standard), there is not a separate standing inquiry for each *violation* asserted as part of that claim. But ... Clean Air Act penalties are tied to violations, not the broader claims.... That the plaintiffs ... repeatedly suffered the same injury resulting from a series of similar discharges does not mean that a plaintiff injured by one violation can automatically challenge all a defendant's violations."); *Freiman* , 584 F.2d at 249–50 (holding that plaintiff had standing to bring constitutional challenge to one provision of a law but not the other, even though the court noted that the latter provision raised similar constitutional concerns); *see also Preterm-Cleveland, Inc. v. Kasich* , 153 Ohio St.3d 157, 102 N.E.3d 461, 469–70 (2018) (applying federal test for standing to hold that "a party challenging multiple provisions in a[ ] [legislative] enactment"—even if the whole law is assailed as one "violati[on of] the Single Subject Clause" of the Ohio Constitution—must show an injury-in-fact traceable to "each provision the

party seeks to have severed from the enactment.").

[62] Neither Texas nor federal courts have regarded "an actual arrest, prosecution, or other enforcement action" as "a prerequisite to challenging [a] law." *Susan B. Anthony List v. Driehaus* , 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). Rather, an organization's "alleg[ation] that [some] of its members [were] at substantial risk of penalty" has been found sufficient to show injury-in-fact. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.* , 852 S.W.2d 440, 447 (Tex. 1993) ; *accord Garcia* , 893 S.W.2d at 518 ("to challenge a statute, a plaintiff must first suffer some actual *or threatened* restriction") (emphasis added). The other requirements of associational standing are not at issue here.

[63] When pleadings lack "sufficient facts to affirmatively demonstrate ... jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction," as is the case here, "plaintiffs should be afforded the opportunity to amend." *Tex. Dep't of Parks & Wildlife v. Miranda* , 133 S.W.3d 217, 226–27 (Tex. 2004) ; *accord Tex. Dep't of Transp. v. Ramirez* , 74 S.W.3d 864, 867 (Tex. 2002).
