

No. 13-0768

In the Supreme Court of Texas

BCCA APPEAL GROUP, INC.,
Petitioner,

v.

CITY OF HOUSTON, TEXAS,
Respondent.

On Petition for Review from the
First Court of Appeals at Houston, Texas, No. 01-00332-CV

**BRIEF FOR THE GOVERNOR OF TEXAS
AS AMICUS CURIAE SUPPORTING PETITIONER**

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INTEREST OF AMICUS CURIAE

As chief executive officer of the State of Texas, Governor Greg Abbott files this brief of amicus curiae to defend the executive branch's constitutional duty to implement and enforce state policy without interference from city officials. *See* TEX. CONST. art. 4, sec. 10.

The Governor also is committed to promoting economic development and job growth in the State of Texas by reducing the regulatory burden that drives up the cost of doing business—especially for small businesses that cannot always fend for themselves against overzealous regulators. The Governor seeks to raise a concern that has not received enough attention in this case: the devastating consequences that the ordinance will impose on Houston's small businesses, such as auto repair shops, gas stations, and dry cleaners, if the City is allowed to pursue its aggressive approach to environmental regulation. The Governor of Texas respectfully submits this brief in support of Petitioner.¹

REGULATORY BACKGROUND

A brief anatomy of a typical TCEQ enforcement action may prove helpful to understanding how the City of Houston's ordinance interferes with TCEQ's enforcement powers.

Environmental complaints usually arrive at one of the sixteen TCEQ regional offices and are assigned to an investigator. The investigator travels

¹ No fee was paid or will be paid for the preparation of this brief. *See* TEX. R. APP. P. 11(c).

to the offending facility to assess the seriousness of the violation, if any. The investigator places all violations into one of three categories: Category “A” are the most serious violations which are automatically referred for civil enforcement; Category “B” are of medium severity and do not always trigger an enforcement action; instead, TCEQ often attempts to induce the facility into voluntary compliance without involving the enforcement division; Category “C” are the least serious violations which TCEQ always attempts to resolve through voluntary compliance. If facilities with “B” or “C” violations refuse to come into voluntary compliance, the TCEQ investigator refers the case for civil enforcement. TEX. HEALTH & SAFETY CODE § 382.085(b); TEX. WATER CODE § 7.102 (Any person “who causes, suffers, allows, or permits a violation of a statute, rule, order, or permit relating to any other matter within the [TCEQ’s] jurisdiction . . . shall be assessed for each violation a civil penalty not less than \$50 nor greater than \$25,000 for each day of each violation.”).

An important feature of anti-pollution laws like the Texas Clean Air Act is the use of civil penalties as a first line of defense, supplemented by criminal penalties where the need for deterrence or retribution is extraordinary. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1533 (1996) (“[I]n most cases, corporate civil liability is socially desirable.”); Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984). The State and Nation’s environmental laws “are basically administrative and civil regulatory schemes, with crimi-

nal enforcement tacked on almost as an afterthought.” Susan F. Mandiberg, *Fault Lines in the Clean Water Act: Criminal Enforcement, Continuing Violations, and Mental State*, 33 ENVTL. L. 173, 174 (2003).

TCEQ brings civil enforcement actions in civil courts, alleging strict liability violations requiring no culpable mental state, and must prove its case by a preponderance of the evidence. *See, e.g.*, Resource Conservation and Recovery Act, 33 U.S.C. §1319(d); Clean Water Act, 42 U.S.C. §6928(g); Clean Air Act, 42 U.S.C. §7413(b); *see also City of Galveston v. State*, 518 S.W.2d 413, 416 (Tex. Civ. App.—14th Dist. 1975, no writ).²

If found liable, the polluter pays a civil penalty. TCEQ calculates the appropriate penalty using a matrix whose inputs include the severity of the present offense and the severity of any prior offenses. *See, e.g.*, TEX. WATER CODE § 7.053 (providing that TCEQ must consider compliance history when assessing penalties); TEX. ADMIN. CODE § 60.2 (implementing that statutory command). Thus, a long history of past violations, especially serious violations, will result in higher civil penalties in the future. Specifically, when TCEQ determines a facility’s compliance history, the agency

² The purpose of a strict liability tort regime, like this one, is to shift the cost of discharge of pollution onto the party in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made. *See Ward v. Coleman*, 423 F. Supp. 1352, 1357 (W.D. Okla. 1976) (“The essence of strict liability is the shifting of accidental loss, as between non-negligent parties, to the one most able to insure against the risk and bear the cost. In the [Clean Water Act of 1972], Congress has chosen to shift the cost of damage done to the environment from the public to the owner or operator of the facility from which a harmful discharge emanated.”).

categorizes past violations as either “major,” “moderate,” or “minor.” Because TCEQ relies foremost on civil enforcement, an environmental *crime* in a company’s past, even so much as a misdemeanor, automatically is categorized by TCEQ’s rules as a “major violation”:

Major violations are: . . . Any violation included in a criminal conviction, which required the prosecutor to prove a culpable mental state or level of intent to secure the conviction.

TEX. ADMIN. CODE. 60.2(d)(1)(E). Even a single “major violation” on a company’s rap sheet can lead to an enhancement of 25 percent when TCEQ calculates a civil penalty. *Id.*

ARGUMENT

I. THE HOUSTON ORDINANCE TURNS STATE-LAW TORTS INTO LOCAL-LAW CRIMES.

City ordinances that conflict with TCEQ rules and orders are expressly preempted. *See* TEX. HEALTH & SAFETY CODE 382.113(a)(2) (“An ordinance enacted by a municipality must be consistent with . . . the commission’s rules and orders.”). The Houston ordinance conflicts with TCEQ’s rules and orders because it displaces state law’s preference for civil, strict liability enforcement of environmental laws. The ordinance imposes fines up to \$2000.00 on violators, *see* HOUSTON CITY CODE sec. 21-162, and under the Houston municipal code, City prosecutors may only assess fines that high if they can prove a culpable mental state:

When in this Code or in any ordinance of the city an act is prohibited or is made or declared to be unlawful or an offense or a misdemeanor, or wherever in such Code or ordinance the doing of any act is required or the failure to do any act is declared to be unlawful and the offense is punishable by a fine exceeding \$500.00, yet no culpable mental state is prescribed as an element necessary for conviction of that unlawful act, then a person shall be considered to have committed an unlawful act if it can be shown that *he acted with knowledge* with respect to the nature of his conduct or to circumstances surrounding his conduct.

HOUSTON CITY CODE sec. 1-6(b) (emphasis added).

This is not a quirk of Houston's municipal code that the City can easily fix. Houston had little choice but to require a culpable mental state in its clean air ordinance, and all other such ordinances, because the Texas Legislature does not trust local officials with strict liability:

An offense defined by municipal ordinance or by order of a county commissioners court *may not dispense with the requirement of a culpable mental state* if the offense is punishable by a fine exceeding [\$500.00].

TEX. PEN. CODE 6.02(f) (emphasis added).

The Executive Branch has a longstanding policy of preferring civil strict liability to the criminal enforcement of environmental laws. Because the Texas Legislature has forbidden cities like Houston to create strict liability offenses (except for insignificant fines under \$500), the City cannot assimilate TCEQ's rules wholesale into the City's code without interfering with TCEQ's enforcement authority. This interference is manifest in at least four ways:

A. First, as discussed, the ordinance displaces the Executive Branch's judgment that the vast majority of minor violations should be handled outside the criminal justice system. One of the most important choices a sovereign makes when enforcing anti-pollution and other laws is whether to pursue civil or criminal penalties against the offender. Henry Klementowicz et al., *Environmental Crimes*, 48 AM. CRIM. L. REV. 541, 544 (2011). Once the executive branch makes this decision under state law, it cannot be second guessed by cities.

B. Second, the Houston ordinance will undermine TCEQ's efforts to achieve voluntary remediation and compliance. In the experience of TCEQ enforcement officials, Houston's decision to displace civil enforcement with criminal law is a clumsy approach to a complex problem. TCEQ's civil enforcement regime gives its investigators the flexibility to negotiate with offending facilities and achieve pre-enforcement voluntary remediation and compliance. The City of Houston's code enforcers, by contrast, look immediately to criminal enforcement, issuing citations, collecting fines, and walking away. The City's approach preempts the negotiations between government and polluter that are often the most effective way of achieving remediation and long-term compliance.

C. Third, the ordinance disrupts TCEQ's ability to properly assess a facility's compliance history and to calculate appropriate civil penalties. TCEQ imposes stiff penalties on offending facilities with past convictions for environmental crimes, even misdemeanors like those provided by the

City's ordinance. TEX. ADMIN. CODE. 60.2(d)(1)(E) (defining as a "major violation" any past violations requiring "the prosecutor to prove a culpable mental state.")). But under the City's ordinance, even the most minor citations automatically will count as a "major violation" on a facility's record. *See* HOUSTON CITY CODE sec. 1-6(b) (requiring the City to prove that a polluter "acted with knowledge with respect to the nature of his conduct"). The City's approach to enforcement throws into disarray TCEQ's matrix for assessing civil penalties. Under TCEQ rules, it is something extraordinary to find an environmental crime in a company's past; the City's ordinance would make such offenses the norm.

D. Fourth, for the reasons just explained, the ordinance will cause the most harm to small and local businesses. A large chemical refinery will have a long and robust history of compliance with the environmental laws, so while it may have many civil and even some criminal violations in its past, its report card will not suffer much because the number of violations will be overwhelmed by the number of passing inspections. If the City of Houston issues a citation (requiring a culpable mental state) to that large refinery, the refinery will be, in many cases, able to bear a single "major" violation on its record.

But a single "major" violation in the compliance history of a small dry cleaner could have serious and disproportionate consequences. Even a single "major" violation could be enough to land a small business in the "unsatisfactory" compliance classification. Once that happens, the facility not only

will be subject to higher civil penalties in the future, it also will be excluded from participating in any number of TCEQ programs designed to reduce or eliminate the regulatory burdens that drive away businesses and kill jobs. *See, e.g.*, TEX. WATER CODE 5.754(h) (providing for flexible permitting unless a facility has an “unsatisfactory” rating). The City’s approach conflicts with state law by causing major trouble for minor offenders. TEX. HEALTH & SAFETY CODE 382.113(a)(2).

CONCLUSION

The judgment of the lower court should be reversed.

Respectfully submitted.

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Certificate of Compliance

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 1888 words, according to the word count of the word-processing software used to prepare this brief.

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Certificate of Service

I certify that this document has been filed with the clerk of the court and served by ECF on August 4, 2015, on all parties:

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