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Via E-Filing

Mr. Blake Hawthorne, Clerk
Supreme Court of Texas

Re: No. 20-0631, *In re Henry*

Dear Mr. Hawthorne:

The State of Texas, by and through Attorney General Ken Paxton, submits this letter brief as amicus curiae in the above matter.[1] In the view of the State of Texas, the petition for a writ of mandamus should be granted.

I. Introduction and Summary

The trial court's order effectively prevents one of Texas's largest school districts from resuming in-person, on-campus operations and teacher training days before the start of the new school year. Trial courts should not grant such extraordinary relief until they have assured themselves of their own jurisdiction and confirmed that the plaintiff's claims are sound. Here, the trial court did neither. It reached outside its jurisdiction to usurp a school district's authority to direct its own operations, effectively prioritizing the trial court's own policy views over the district's. This Court properly stayed that order last night, and now should grant mandamus relief.

The trial court's order rests on at least three core legal errors. First, the Cypress-Fairbanks American Federation of Teachers ("the union") has no private right of action to enforce the Joint Control Order, so the trial court had no authority to grant relief. Second, because the union does not allege ultra vires conduct, Relator's governmental immunity forecloses this action. Third, the Joint Control Order the union

[1] No fee has been or will be paid for the preparation of this brief.

seeks to enforce is invalid; the Harris County and City of Houston local health authorities lack the power to enforce prophylactic restrictions on access to real property.

Relator has no adequate appellate remedy. To the extent the order below is properly characterized as a temporary restraining order, it is not appealable. And to the extent the order below is better characterized as a temporary injunction, there is little likelihood that Relator can win appellate relief in time to obviate the disruption the order causes. Relator chose to require some district staff to report to campus for in-person orientation and training as early as last Friday, August 14, and more staff are expected to report to campus today. These exigent circumstances make mandamus relief appropriate.

II. Argument

This Court has oft and recently stated that "[a] writ of mandamus will issue if a trial court abuses its discretion and no adequate remedy by appeal exists." *In re C.J.C.*, No. 19-0694, 2020 WL 3477006, at *4 (Tex. June 26, 2020) (orig. proceeding) (citing *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding)). Both conditions are satisfied here. The trial court abused its discretion by issuing an order outside its jurisdiction to enforce an invalid local edict. *See In re Prudential*, 148 S.W.3d at 135 (holding that a trial court abuses its discretion when it applies the wrong law or misapplies the law to the facts). And Relator has no adequate remedy by appeal. Temporary restraining orders are not appealable, and even if the order below is better characterized as a temporary injunction, the exigent need for immediate relief allows Relator to seek relief in this Court in the first instance. Mandamus is thus available and appropriate under these circumstances.

A. The trial court abused its discretion.

The trial court's order is unlawful for at least three reasons. First, the union lacks a private cause of action to enforce the Joint Control Order, so the trial court had no jurisdiction to grant relief. Second, governmental immunity bars the relief sought. Third, the Joint Control Order the union seeks to enforce is not authorized under Chapter 81 of the Texas Health and Safety Code or any other authority, and therefore is invalid. Because the order below exceeds the trial court's authority and rests on errors of law, mandamus is appropriate. *See In re Prudential*, 148 S.W.3d at 135;

In re Silver, 540 S.W.3d 530, 538 (Tex. 2018) ("[A] court may abuse its discretion if its legal decision is incorrect.").

1. The union lacks a private right of action.

"The fact that a person has suffered harm from the violation of a statute does not automatically give rise to a private cause of action in favor of that person." *Witkowski v. Brian, Fooshee & Yonge Props.*, 181 S.W.3d 824, 831 (Tex. App.—Austin 2005, no pet.) (citing *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688 (1979)). Rather, a party wishing to sue must have a right of action granted by governing statutory or constitutional authority, and that right of action must give *the plaintiff*—not someone else—a right to sue. *See id.*; *see also Brown v. De la Cruz*, 156 S.W.3d 560, 563 (Tex. 2004). No authority gives the union the right to sue to challenge alleged violations of the Joint Control Order, so the trial court had a clear duty to deny relief.

In particular, the union has not identified any express statutory right of action. The Joint Control Order claims that it derives its authority from two statutes and two administrative provisions. But none of those authorities create any private right of action. Section 81.082 of the Health and Safety Code gives certain local health authorities the power to implement "control measures" addressing communicable diseases under certain circumstances. That statute says nothing about a right of action, and gives no indication that the Legislature would allow a private plaintiff such as a labor union to bring lawsuits over such "control measures." That same is true for section 121.024 of the Health and Safety Code. That statute describes duties of a "health authority"; it says nothing about a right of action.

Nor does the Texas Administrative Code provide an express right of action. As an initial matter, the United States Supreme Court has held that federal administrative agencies cannot create rights of action by rule that are not found in the statute. *See Alexander v. Sandoval*, 532 U.S. 275, 291 (2001). Even if Texas administrative agencies could do what federal administrative agencies cannot, sections 85.1(g) and 97.6(h) of Title 25 of the Texas Administrative Code do not even purport to try. The former, like section 121.024 of the Health and Safety Code, states the "dut[ies]" a "health authority" "shall perform." The latter "empower[s]" a "health authority" "to close any public . . . school" under certain specified conditions, but says nothing about private rights of action.

The union further has not identified any implied right of action. This Court has permitted plaintiffs to bring suit in very narrow circumstances when they can show that the Legislature "clearly implied" a right of action in the language of the statute. *Brown*, 156 S.W.3d at 563. Here, the union cannot do so, and indeed, the language of the Health and Safety Code suggests that the Legislature does not wish for private plaintiffs like the union to bring this action.

In particular, Chapter 81 of the Health and Safety Code provides for its own enforcement via governmental action, not private suits. The Legislature specified that "the [Department of State Health Services] or health authority may petition the county or district court" if, *inter alia*, "a person fails or refuses to comply with the orders of the department or health authority [relating to contaminated property]." Tex. Health & Safety Code § 81.084(h). And Chapter 81 also provides criminal penalties in limited circumstances to enforce certain orders issued by a local health authority under its Subchapter E authority. *See id.* §§ 81.087, .088, .089, .090. Neither the Harris County local health authority nor the City of Houston local health authority has taken any enforcement action here.

By expressly providing specific "method[s] of enforcing" Subchapter E control measures, the Legislature evinced its intent "to preclude others." *Sandoval*, 532 U.S. at 290; *see Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979) ("[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."); *Witkowski*, 181 S.W.3d at 831 ("When a statute explicitly provides certain rights of enforcement, but is silent as to the right sought to be enforced, we may presume that the Legislature intended for that right to not be included."). Here, the Legislature created various governmental enforcement mechanisms while excluding any private right of action. That is a firm indication that it did not intend private lawsuits like the union's. As this Court has long recognized, "[m]odern legislatures may delegate enforcement to executive departments, administrative agencies, regulatory commissions, local governments and districts, as well as the criminal or civil courts," and "with such a myriad of tools at the Legislature's disposal, we cannot always assume that [the courts] must be the hammer." *Brown*, 156 S.W.3d at 566-67.

In any event, even if a statutory right "is unenforceable by any public official, attorney, or agency," that alone does not "justify an implied private cause of action." *Brown*, 156 S.W.3d at 566. Texas courts "cannot presume" delegation to the

courts. *Id.* And the Court has emphatically rejected the theory that "when a legislative enforcement scheme fails to adequately protect intended beneficiaries, the courts must imply a private cause of action to effectuate the statutory purposes." *Id.* at 567; *accord Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (explaining that federal courts have "abandoned" any "common law powers to create causes of action").

Because the union has no express or implied right of action, the trial court had no jurisdiction to award relief. Because the trial court lacked authority to adjudicate the union's claims when it granted relief, mandamus is appropriate.[2]

2. Governmental immunity bars the union's claims.

As set out above, the trial court wrongly granted relief even though the union lacks a private right of action, and mandamus should be granted on that basis. In any event, the trial court lacked jurisdiction for a second, independent reason: governmental immunity bars the union's suit. Because the union brought an ultra vires suit against Superintendent Mark Henry, it bears the burden of demonstrating that Henry "acted without legal authority or failed to perform a purely ministerial act." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (2008). Because the union's application for relief falls well short of that burden, Henry's immunity remains intact, and the trial court lacked jurisdiction. *See Hous. Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 161 (Tex. 2016).

In particular, even if the Joint Control Order were valid (which it is not, as explained below), its terms do not preclude the activities the union seeks to enjoin. The union asserts that Henry's actions violate the Joint Control Order's prohibition of "[a]ll school sponsored events and activities" from taking place in person until schools resume on-campus instruction. But the Order describes those "events and activities" as including "clubs, sports, extracurricular activities, fairs, exhibitions,

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[2] The union's filing offers no response to this point, even though Relator's mandamus petition argues explicitly that the union has no private right of action. The union neither defends the trial court's jurisdiction nor makes any attempt to explain what gives it the right to sue to challenge a school district's compliance with the Joint Control Order. That silence only underscores the clear error below.

[and] academic and/or athletic competitions." Pet. & App. 52.[3] These listed activities have one thing in common—they are engaged in by students, not teachers. Under the principle of *ejusdem generis*, the general phrase "school sponsored events and activities" is limited by the specific list of events and activities that follows. *See Hilco Elec. Coop. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003). Because on-campus professional development for teachers is not a student-based activity, the Joint Control Order has nothing to say about it.

The rest of the Joint Control Order reinforces this result. *See, e.g., El Paso Healthcare Sys., Ltd. v. Murphy*, 518 S.W.3d 412, 418 (Tex. 2017) (reading provisions as a whole and in context). The Order prevents school districts from opening schools "to students" for on-campus instruction but does not prohibit opening schools "to teachers" for other reasons. Pet. & App. 51. The Order also requires districts to submit plans for "resuming in-person instruction and extracurricular activities," again placing the focus on student activities, not teacher training and development. Pet. & App. 52. Common sense also suggests that teachers will have difficulty effectively implementing COVID-related measures if their first day on campus is the same day the students return, as the union's interpretation would require.

In any event, even if Henry has misinterpreted the Joint Control Order, that misinterpretation is not the type of ultra vires act that stands outside the protection of governmental immunity. After all, the Joint Control Order is not an organic law that defines the scope of Henry's authority, but rather an ancillary regulation collateral to the Legislature's pronouncements. *See Hall v. McRaven*, 508 S.W.3d 232, 242-43 (Tex. 2017) (distinguishing between misinterpretations of organic law and collateral regulations). Here, the Texas Legislature has given superintendents wide-ranging authority. *See* Tex. Educ. Code § 11.201(d). The union does not allege that Henry's actions exceeded the authority the Legislature gave him. It insists only that he has incorrectly interpreted and applied the Joint Control Order. Under *Hall*, that is not an ultra vires act. 508 S.W.3d at 242-43.

Because the union has not identified any ultra vires act by Henry, governmental immunity bars this lawsuit. The trial court necessarily abused its discretion by granting the union relief in a suit over which it lacked jurisdiction.

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[3] All page numbers referenced in the parties' filings are PDF page numbers.

3. The Joint Control Order is invalid.

Finally, the order below is unlawful because it purports to compel a governmental entity to comply with an invalid local edict. The local health authorities of Harris County and the City of Houston lacked authority to promulgate the Joint Control Order, so it has no legal effect.

As set out above (at 3), the Joint Control Order claims to derive its authority from two statutes and two administrative regulations. But none of the cited provisions confer the authority the local health authorities and the union claim:

Section 81.082. Section 81.082 does not authorize the Joint Control Order. That statute grants local health authorities "supervisory authority and control over the administration of communicable disease control measures in the health authority's jurisdiction unless specifically preempted." But the available "control measures" are restricted in various ways. For example, section 81.084 restricts local health authorities' powers as to "property." The Legislature has determined that a local health authority may quarantine property only when there is "reasonable cause to believe that property . . . is or may be infected or contaminated with a communicable disease." Tex. Health & Safety Code § 81.084(a). And any such quarantine of property must be limited in duration to "the period necessary for a medical examination or technical analysis of samples taken from the property to determine if the property is infected or contaminated." *Id.* If the property is not contaminated, the quarantine must be removed. *Id.* § 81.084(c). And if the property is contaminated, the quarantine must be removed if "technically feasible" disinfection or decontamination methods are "effective." *Id.* § 81.084(d).

Similarly, section 81.085 authorizes a local health authority to impose an "area quarantine" when the local health authority has "reasonable cause" to believe that "individuals or property in the area may be infected or contaminated with a communicable disease." *Id.* § 81.085(a). But the local health authority must first consult with the Department of State Health Services before implementing any such quarantine. *Id.* § 81.085(b). And it must "consult with the governing body of each county and municipality in the health authority's jurisdiction that has territory in the affected area as soon as practicable." *Id.*

Here, the Joint Control Order describes its reach as including "all public and non-religious private schools . . . offering instruction to students in any and all grades . . . in Houston and Harris County." Pet. & App. 51. It thus purports to exercise "control measures" as to real property; it orders that certain properties "must not re-open." *Id.* But it does not identify any property that "is or may be infected or contaminated." *See id.* at 51-52. It says nothing about any property in the Cypress-Fairbanks Independent School District. *See id.* That is, it wields control measures as to property without acknowledging or complying with section 81.084's restrictions on such control measures.

Nor does the Joint Control Order indicate compliance with the requirements in section 81.085. If the Joint Control Order rests on a belief that its edicts are justified as an "area quarantine," it must indicate that the local health authorities consulted with the Department of State Health Services and the municipalities affected. Tex. Health & Safety Code § 81.085(b). Neither the Joint Control Order nor the union alleges any such consultation occurred, and neither gives any assurance that the local health authorities complied with their statutory obligations.

If some other "control measure" in section 81.082 might authorize the Joint Control Order, neither that Order, nor the union, nor the trial court identified it. Indeed, the trial court appeared to take as a given that the Joint Control Order is valid merely because it "does not conflict with the Executive Order No. GA-28." But that does not resolve whether the Joint Control Order was properly promulgated in the first place.

Section 121.024. Nor does section 121.024 of the Texas Health and Safety Code authorize the Joint Control Order. That statute generally recognizes the duties of a local health authority. Unlike Chapter 81, section 121.024 does not address any specific powers or restrictions on those powers. Chapter 81 does, so it governs. *See* Tex. Gov't Code § 311.026(b) ("special or local provision prevails" over "general provision"); *see also In re Lee*, 411 S.W.3d 445, 455 (Tex. 2013) (orig. proceeding) ("specific statutory language . . . trumps [a] more general mandate").

Section 85.1(g). Section 85.1(g) of Title 25 of the Texas Administrative Code carries no relevance for the same reasons discussed above as to section 121.024. Section 85.1(g) simply recognizes the general duties of local health authorities and does not

trump the specific provisions in Chapter 81. *See* Tex. Gov't Code § 311.026(b); *In re Lee*, 411 S.W.3d at 455.

Section 97.6(h). Finally, the Joint Control Order is not authorized by section 97.6(h) of Title 25 of the Texas Administrative Code. While section 97.6(h) purports to generally allow local health authorities to close schools, the Legislature has limited that grant of authority. *See R.R. Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992) ("[A]n agency can adopt only such rules as are authorized by and consistent with its statutory authority."). As set out above, sections 81.084 and 81.085 limit local health authorities' power to restrict the use of real property and impose an "area quarantine." *See supra* p. 7. Setting aside those limitations here in favor of a general grant of authority in section 97.6(h) would improperly elevate agency rulemaking over the Legislature's pronouncements.

Summed up, the statutory and administrative provisions the Joint Control Order invokes do not justify the restrictions it seeks to impose on Relator. Because the union seeks to use this action to compel compliance with an invalid local edict, the district court had a duty to deny relief.[4]

B. No adequate remedy by appeal exists.

As set out above, the first mandamus prong is satisfied; the district court clearly abused its discretion in at least three distinct ways. Those errors cannot be remedied through ordinary appeal. That makes mandamus warranted. *See In re Prudential*, 148 S.W.3d at 135-36.

1. Temporary restraining orders are generally not appealable. *See In re Tex. Nat. Res. Conservation Comm'n*, 85 S.W.3d 201, 205 (Tex. 2002) (orig. proceeding); *see*

[4] Relator argues that the trial court's order is unlawful for another reason: GA-28 supersedes the Joint Control Order, for the reasons set out in recent guidance issued by the undersigned Attorney General. *See* Pet. & App. 101, 106-109. This Court need not reach that argument, however, because the trial court's order fails for the numerous independent and antecedent reasons described in this letter brief. The union has no cause of action, the trial court lacked jurisdiction, Relator is protected by governmental immunity, and the local health authorities had no power to promulgate the Joint Control Order. Each of those defects in the order below is dispositive.

also Tex. Civ. Prac. & Rem. Code § 51.014(a) (omitting temporary restraining orders from the list of appealable interlocutory orders). The order below calls itself a "temporary restraining order." Pet. & App. 112. So if the order's characterization of itself is correct, Relator by definition cannot challenge it through ordinary appellate means.

Of course, it is well settled that "the fact that the order is denominated a temporary restraining order is not determinative of whether the order is appealable." *Nikolouzos v. St. Luke's Episcopal Hosp.*, 162 S.W.3d 678, 681 (Tex. App.—Houston [14th Dist.] 2005, no pet.). "Whether an order is a nonappealable temporary restraining order or an appealable temporary injunction depends on the order's characteristics and function, not its title." *Id.* (citing *Qwest Commc'ns Corp. v. AT&T Corp.*, 24 S.W.3d 334, 336 (Tex. 2000)). But even if the order below is better characterized as an appealable temporary injunction, there is little possibility that Relator can win appellate relief in time to obviate the harm the order causes. As the petition explains, Relator required some staff to report to campus for in-person orientation and training "beg[inning] on Friday, August 14, 2020." Pet. & App. 14, 39. The order below is thus already causing ongoing irreparable harm today, and there is little possibility of setting aside that order through an ordinary appeal before even more damage is done.

2. While relators ordinarily must seek mandamus relief in the court of appeals before proceeding in this Court, Relator here is justified in moving in this Court in the first instance. *Cf.* Tex. R. App. P. 52.3(e) (allowing parties to proceed in this Court in the first instance for "a compelling reason"). First, as the mandamus petition sets out, time is of the essence, as Cypress-Fairbanks staff has been directed to report to campus. When time is of the essence, this Court has not hesitated to exercise its mandamus authority. *See, e.g.*, *In re Newton*, 146 S.W.3d 648, 650-51 (Tex. 2004) (orig. proceeding); *Davis v. Taylor*, 930 S.W.2d 581, 582 (Tex. 1996); *Sears v. Bayoud*, 786 S.W.2d 248, 250-51 & n.1 (Tex. 1990).

Second, the issues Relator raises carry statewide importance. All across the State, local school districts are currently working diligently to ensure teacher safety during on-campus orientation and training sessions. If this Court allows the trial court's order below to stand, any number of trial courts may follow suit and further usurp the type of operational decisions best left to the districts themselves.

Third, the union's own litigation strategy undoubtedly played some role in creating the need for expedited consideration. The union first sought judicial relief three days ago—the same day that staff returned to campus at multiple Cypress-Fairbanks facilities. Pet. & App. 39. It would be unjust to fault Relator for seeking emergency relief in this Court when it was the union that waited to sue until staff were already reporting to campus.

III. Conclusion

The trial court's order exceeds its jurisdiction and orders Relator to comply with an unlawful local edict that cannot bind Relator. The Court should grant the petition for a writ of mandamus.

Respectfully submitted.

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