

CAUSE NO. 2020-DCV-3515

PIZZA PROPERTIES, INC., M&S	§	IN THE DISTRICT COURT OF
GROUP, INC., d/b/a WING DADDY’S,	§	
RUN BULL RUN, LLC d/b/a/ TORO	§	
BURGER BAR, CHARCOALER, LLC,	§	
TRIPLE A RESTAURANT INC., CC	§	
RESTAURANT LP, FD MONTANA,	§	
LLC, WT CHOPHOUSE, LLC,	§	
VERLANDER ENTERPRISES, LLC, and	§	
BAKERY VENTURES I, LTD.,	§	
	§	
<i>Plaintiffs,</i>	§	
	§	
STATE OF TEXAS,	§	
	§	
<i>Intervenor-Plaintiff,</i>	§	
	§	
v.	§	EL PASO COUNTY, TEXAS
	§	
EL PASO COUNTY, TEXAS and	§	
RICARDO A. SAMANIEGO, in his	§	
official capacity as County Judge, El Paso	§	
County, Texas,	§	
	§	
<i>Defendants.</i>	§	34TH JUDICIAL DISTRICT

STATE OF TEXAS’ PLEA IN INTERVENTION

INTRODUCTION

1. The Attorney General of Texas, on behalf of the State, respectfully intervenes in this case under Texas Rule of Civil Procedure 60. The Attorney General intervenes to: (1) prevent Defendants from nullifying Governor Greg Abbott’s COVID-19-related executive order GA-32; (2) preserve the State’s need for a clear and consistent response to the pandemic, which is being undermined by Judge Ricardo Samaniego’s recent emergency order (“EO-13”); and (3) protect the residents of El

Paso County and the Texas Disaster Act (“TDA”) at large from the unlawful and unconstitutional EO-13.

BACKGROUND

I. An Overview of the Texas Disaster Act.

2. The TDA is designed to mitigate the “damage, injury, and loss of life and property” resulting from a disaster and to “provide a setting conducive to the rapid and orderly restoration and rehabilitation of persons and property affected by disasters.”¹

3. The TDA strengthens the role of both state and local governments in preparing for, responding to, and recovering from disasters.² But the TDA makes the sitting Texas Governor the leader and focal point of the State’s emergency response.³

4. Under the TDA, the Governor is “responsible for meeting . . . the dangers to the state and people presented by disasters”⁴ and is the “commander in chief” of the State’s response to a disaster.⁵

5. The TDA gives the Governor the broad powers necessary to accomplish this weighty task.⁶ Relevant here, the Governor is given the powers to: (1) control the movement of persons and occupancy of premises in a disaster area;⁷ (2) issue executive orders that “have the force and effect of law”; and (3) suspend statutes,

¹ TEX. GOV’T CODE § 418.002(1), (3).

² *Id.* at § 418.002(4).

³ *See id.* at §§ 418.011–.026.

⁴ *Id.* at § 418.011.

⁵ *Id.* at § 418.015(c).

⁶ *See id.* at §§ 418.011–.026.

⁷ *Id.* at § 418.018(c).

orders, or rules that “would in any way prevent, hinder, or delay necessary action in coping with a disaster.”⁸

6. The TDA gives local officials far more limited powers than those afforded to the Governor. Local officials generally derive their power from two sources under the TDA.

7. First, section 418.1015(b) provides: “An emergency management director may exercise the powers granted to the governor under this chapter on an appropriate local scale.” Under this section, an emergency management director “serves as the governor’s designated agent” and thus is subject to the Governor’s control.⁹

8. Second, section 418.108 authorizes “the presiding officer of the governing body of a political subdivision [to] declare a local state of disaster.”¹⁰ This section continues: “The county judge or the mayor of a municipality may control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge or mayor and control the movement of persons and the occupancy of premises in that area.”¹¹

9. County judges and mayors do not have independent authority to issue emergency orders carrying the force and effect of law, as this is not one of the powers granted to such local officials under section 418.108.

⁸ *Id.* at § 418.016(a).

⁹ *Id.* at § 418.1015(b); *see also id.* at § 418.015(c) (“[T]he governor is the commander in chief of state agencies, boards, and commissions having emergency responsibilities.”).

¹⁰ *Id.* at § 418.108(g).

¹¹ *Id.*

10. Rather, a local official's power to issue emergency orders is derivative and subservient to the Governor's power. The TDA grants local officials derivative use of a Governor's powers only when they are acting in their capacities as local "emergency management director[s]."¹² When acting in this capacity, the local official is a "designated agent" of the Governor and thus is subject to the Governor's control.¹³

II. An Overview of Governor Abbott's Executive Order GA-32.

11. On October 7, 2020, Governor Abbott issued Executive Order GA-32 to respond to the COVID-19 pandemic.¹⁴ This order has "the force and effect of law," just like any other state law.¹⁵

12. GA-32 states: "Every business establishment in Texas shall operate at no more than 75 percent of the total listed occupancy of the establishment."¹⁶

13. But the order specifies that "[t]here is no occupancy limit" for certain services and businesses, such as: (1) religious services; (2) local government operations; (3) child-care services; (4) youth camps; (5) recreational sports programs; (6) public and private schools; (7) drive-in concerts, movies, and similar events; (8) personal-care and beauty services, such as hair salons and barber shops; and (9) outdoor areas, events, and establishments (with a few enumerated exceptions).¹⁷

14. GA-32 provides additional rules governing what services and businesses can remain open.

¹² *Id.* at § 418.1015(b).

¹³ *Id.*

¹⁴ Ex. A.

¹⁵ TEX. GOV'T CODE § 418.012.

¹⁶ Ex. A, 2.

¹⁷ *Id.* at 2–3.

15. For instance, the order states that indoor and outdoor sporting events “shall remain limited to 50 percent of the normal operating limits.”¹⁸

16. Per GA-32: “Restaurants that have less than 51 percent of their gross receipts from the sale of alcoholic beverages, and whose customers eat or drink only while seated, may offer dine-in services.”¹⁹ Bars and similar establishments may also “offer on-premises services” under certain listed circumstances.²⁰

17. The order states that “[p]eople may visiting nursing homes” and similar establishments “as determined through guidance from the Texas Health and Human Services Commission.”²¹

18. GA-32 does not require persons to “stay at home.” Quite the opposite. The order “strongly encourage[s]” people over 65 “to stay at home as much as possible,” but it leaves Texans free to make this decision for themselves.²²

19. GA-32 expressly preempts and supersedes “any conflicting order issued by local officials in response to the COVID-19 disaster” whenever that local order “restricts services allowed by this executive order, allows gatherings prohibited by this executive order, or expands the list or scope of services as set forth in this executive order.”²³

20. GA-32 further “suspends Sections 418.1015(b) and 418.108 of the Texas Government Code . . . and any other relevant statutes[] to the extent necessary to

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 4.

²⁰ *Id.*

²¹ *Id.* at 5.

²² *Id.* at 4.

²³ *Id.* at 5.

ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order.”²⁴

21. GA-32 is a crucial part of the State’s continuing efforts to reopen safely.²⁵ This order takes aim at one of the TDA’s core purposes: “[T]he rapid and orderly restoration and rehabilitation of persons and property affected by disasters.”²⁶ Judge Samaniego’s impermissibly and unconstitutionally undercuts these reopening efforts.

III. Judge Samaniego’s Recent Order Unlawfully Undermines GA-32.

22. On October 29, 2020, Judge Samaniego issued an emergency order (“EO-13”) that effectively nullified GA-32 and undermined the State’s reopening efforts.

23. At the outset of the order, Judge Samaniego notes that sections 418.1015(b) and 418.018 provide the bases for his authority to issue emergency orders.²⁷ Judge Samaniego acknowledges that, under section 418.1015, he “serv[es] as the Governor’s designated agent.”²⁸ Judge Samaniego then proceeds to undercut Governor Abbott’s response to this pandemic in a manner conflicting with, and expressly prohibited by, GA-32.

24. EO-13 purports to order El Paso County residents “to temporarily stay at home or at their place of residence.”²⁹ GA-32 expressly rejected the idea of such a stay at home order.³⁰

²⁴ *Id.* at 5.

²⁵ *See id.* at 2.

²⁶ TEX. GOV’T CODE § 418.002(3).

²⁷ Ex. B, 1–2.

²⁸ *Id.* at 2.

²⁹ *Id.* at 5.

³⁰ *See* Ex. A, 4.

25. EO-13 imposes a curfew on El Paso County residents “from 10:00 PM to 5:00 AM.”³¹ Such a curfew is not contemplated by, and cannot be reconciled with, GA-32.³²

26. EO-13 provides limited exceptions for people and businesses engaged in “essential services” or “essential activities,”³³ and closes all other businesses and facilities deemed “non-essential.”³⁴ EO-13’s list of essential services and activities cannot be reconciled with the services and activities authorized under GA-32.³⁵

27. Per EO-13: “All public or private gatherings **of any number of people** occurring outside a single household or living unit are prohibited, except as otherwise provided in this Order.”³⁶ This conflicts with GA-32 which, for instance, allows gatherings of up to 10 people.³⁷

28. EO-13 generally restricts all outdoor travel, except for “essential” travel.³⁸ GA-32 contains no such restriction.³⁹

29. EO-13 allows individuals to engage in certain “essential retail.”⁴⁰ But the services deemed “essential retail” cannot be squared with the services GA-32

³¹ Ex. B, 6.

³² See Ex. A.

³³ Ex. B, 5–12.

³⁴ *Id.* at 6.

³⁵ Compare Ex. A, 2–5, with Ex. B, 5–12.

³⁶ Ex. B, 6 (emphasis in original).

³⁷ Ex. A, 4.

³⁸ Ex. B, 6.

³⁹ See Ex. A.

⁴⁰ Ex. B, 9.

allows.⁴¹ And EO-13 limits “essential services” to only “one member of the household.”⁴² GA-32 does not.⁴³

30. These are just a few of the many ways EO-13 is more restrictive than, and thus preempted by, GA-32.

31. EO-13 further creates confusion and injures the State’s need for a clear and consistent response to COVID-19.

32. For instance, GA-32 states that it supersedes more restrictive local emergency orders.⁴⁴ Yet EO-13 provides: “To the extent that there is a conflict between this Order and any executive order of the Governor, the strictest order shall prevail.”⁴⁵

33. Judge Samaniego has no authority under the TDA to preempt or supersede Governor Abbott’s executive orders.

34. It is a Class C misdemeanor, punishable by an up to \$500 fine, if a person violates EO-13’s provisions. This leaves El Paso County residents with no choice but to ignore GA-32 and comply with the stricter EO-13. The TDA does not authorize local officials to nullify a Governor’s emergency orders in such a manner.

STANDARD FOR INTERVENTION

35. “Any party may intervene [in a case] by filing a pleading, subject to being stricken out by the court for sufficient cause on the motion of any party.”⁴⁶ An

⁴¹ See Ex. A.

⁴² Ex. B, 9.

⁴³ See Ex. A.

⁴⁴ Ex. A, 5.

⁴⁵ Ex. B, 16.

⁴⁶ TEX. R. CIV. P. 60.

intervenor is not required to secure a court's permission to intervene in a cause of action.⁴⁷ Rather, an intervenor need only show a "justiciable interest in a pending suit to intervene in the suit as a matter of right."⁴⁸ "A party has a justiciable interest in a lawsuit, and thus a right to intervene, when his interests will be affected by the litigation."⁴⁹ "The interest asserted by the intervenor may be legal or equitable."⁵⁰

36. With respect to the timing of an intervention, there is no pre-judgment deadline for intervention.⁵¹ Texas courts recognize an "expansive" intervention doctrine in which a plea in intervention may be untimely only if it is "filed after judgment,"⁵² though even post-judgment interventions are permissible under certain circumstances.⁵³

37. This intervention was brought shortly after this lawsuit was filed. Texas' intervention is timely.

THE STATE'S INTERESTS

38. Texas, as a sovereign entity, "has an intrinsic right to enact, interpret, and enforce its own laws."⁵⁴ This includes a right to "reassert the control of the state"

⁴⁷ *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 657 (Tex. 1990).

⁴⁸ *In re Union Carbide Corp.*, 273 S.W.3d 152, 154 (Tex. 2008).

⁴⁹ *Jabri v. Alsayyed*, 145 S.W.3d 660, 672 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (citing *Law Offices of Windle Turley v. Ghiasinejad*, 109 S.W.3d 68, 71 (Tex. App.—Fort Worth 2003, no pet.)).

⁵⁰ *Guar. Fed. Sav. Bank*, 793 S.W.2d at 657 (citation omitted).

⁵¹ *Tex. Mut. Ins. Co. v. Ledbetter*, 251 S.W.3d 31, 36 (Tex. 2008) (citing Tex. R. Civ. P. 60; *Citizens State Bank of Sealy v. Caney Invs.*, 746 S.W.2d 477, 478 (Tex. 1988)).

⁵² *Texas v. Naylor*, 466 S.W.3d 783, 788 (Tex. 2015) (quoting *First Alief Bank v. White*, 682 S.W.2d 251, 252 (Tex. 1984)).

⁵³ *Ledbetter*, 251 S.W.3d at 36 (citing *In re Lumbermens Mut. Cas. Co.*, 184 S.W.3d 718, 725–26 (Tex. 2006)).

⁵⁴ *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015).

and “enforce existing policy” as declared by the Texas Legislature.⁵⁵ Injuries to this right are sufficient to both create standing to sue and show irreparable harm.⁵⁶

39. This interest logically extends to issues concerning the applicability of the State’s laws. The State is “the guardian and protector of all public rights” and has authority to sue to redress any violations of those rights.⁵⁷ The State’s interests extend to preventing “an abuse of power by public officers” and to issues concerning the “maintenance and operation of its municipal corporations in accordance with law.”⁵⁸

40. The State’s interests are arguably at their apex when seeking to protect its citizens from “an epidemic of disease which threatens the safety of its members.”⁵⁹

41. EO-13 implicates these, and many other, important State interests. As explained above, EO-13 violates GA-32, the TDA, and undermines the State’s need for a clear and consistent response to the COVID-19 pandemic.

42. EO-13 should be declared invalid and unconstitutional under TEX. CIV. PRAC. & REM. CODE § 37.006(b). EO-13 also constitutes an *ultra vires* act. There are three main reasons why.

⁵⁵ *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

⁵⁶ *See, e.g., Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020); *Texas v. EEOC*, 933 F.3d 433, 447 (5th Cir. 2019); *Texas Ass’n of Bus. v. City of Austin, Texas*, 565 S.W.3d 425, 441 (Tex. App. 2018), *review denied* (June 5, 2020).

⁵⁷ *Yett v. Cook*, 115 Tex. 205, 219 (1926); *see also Alfred L. Snapp & Son, Inc. v. Puerto Rico ex re. Barez*, 458 U.S. 592, 607 (1982) (“a State has a quasi-sovereign interest in the health and wellbeing—both physical and economical—of its residents in general.”).

⁵⁸ *Yett*, 115 Tex. at 219–20.

⁵⁹ *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27–28 (1905).

43. First, EO-13 was expressly preempted by GA-32.⁶⁰ The TDA gave Texas Governors the responsibility to manage a disaster on a statewide level and the power to issue statewide disaster orders carrying the force and effect of law. GA-32 was effectively a state law that carries the same preclusive effect as any other state law. GA-13 expressly superseded more restrictive local ordinances such as EO-13. EO-13 is preempt and invalid as a result.⁶¹

44. Second, Judge Samaniego did not have authority to issue emergency orders more restrictive than Governor Abbott's. GA-32 suspended the sole statutory bases for Judge Samaniego's emergency order (TEX. GOV'T CODE §§ 418.1015(b) and 418.108) to the extent necessary to ensure that local officials "do not impose restrictions in response to the COVID-19 disaster that are inconsistent with [GA-32]."⁶² EO-13 is an *ultra vires* act and an invalid ordinance because Judge Samaniego had no authority to issue this more restrictive order.

45. Third, EO-13's order was unconstitutional and violates separation of powers principles. The Texas Constitution vests lawmaking power in the Texas Legislature.⁶³ The Legislature delegated this authority to sitting Governors during times of emergency.⁶⁴ Local emergency directors such as Judge Samaniego can exercise this gubernatorial power, but they do so only as "the governor's designated

⁶⁰ See Ex. A, 5.

⁶¹ See, e.g., *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 18–19 (Tex. 2016) ("[A local] ordinance which conflicts or is inconsistent with state legislation is impermissible.") (quotations omitted); see also *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013).

⁶² Ex. A, 5.

⁶³ See, e.g., *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

⁶⁴ TEX. GOV'T CODE § 418.012.

agent[s].”⁶⁵ Judge Samaniego was not acting as Governor Abbott’s “designated agent” when he issued an emergency order that expressly conflicted with GA-32. Thus, his order usurps both the Texas Legislature’s ability to control who exercises legislative authority and Governor’s Abbott’s role as the designated individual responsible for meeting disasters on a statewide level.

46. Judge Samaniego will point to section 418.018 as the basis for his lawmaking power (which, again, was suspended under the circumstances). This statute, while allowing county judges and mayors to control the movement of persons and the occupancy of premises, does not grant county judges and mayors the power to issue orders carrying the force and effect of law.⁶⁶ The TDA only gives local officials such authority when they act as local emergency management directors, meaning when they act as designated agents of the Governor.⁶⁷

47. This conclusion is supported by a clear reading of the two statutes’ language. It is further justified by the fact that the TDA clearly contemplated that the Governor would be the leader of the State’s emergency response.⁶⁸ Any other conclusion would lead to the absurd result where the Governor—the individual mainly responsible for guiding the State through a crisis—is unable to do so because his or her executive orders keep getting nullified by local officials. That is precisely what occurred here with Judge Samaniego’s unlawful EO-13.

⁶⁵ *Id.* at § 418.1015(b).

⁶⁶ *See id.* at § 418.108(g).

⁶⁷ *See id.* at § 418.1015(b).

⁶⁸ *See id.* at §§ 418.011–.026.

PRAYER

For the reasons discussed above, the State of Texas respectfully prays that this

Court:

- A. Through counsel below, enter an appearance for the State of Texas in this cause;
- B. Declare EO-13 to be invalid and unconstitutional;
- C. Issue preliminary and permanent injunctions against EO-13; and
- D. Award any further relief that the Court deems just and proper.

Respectfully submitted,

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ATTORNEYS FOR INTERVENOR STATE OF TEXAS

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2020 a true and correct copy of the foregoing document was served via E-Service by File and Serve Texas to all counsel of record. A true and correct copy was also sent via email to:

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/s/ Todd Dickerson
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