D-1-GN-20-007712

CAUSE NO. _____

STATE OF TEXAS, *Plaintiff*,	§	IN THE DISTRICT COURT
v.	§	TRAVIS COUNTY, TEXAS
CITY OF AUSTIN, TEXAS, COUNTY OF TRAVIS, TEXAS, STEVE ADLER, in his official capacity as Mayor, City of Austin, Texas, and ANDY BROWN, in his official capacity as County Judge, County of Travis, Texas, *Defendants*.	§	98th _____ JUDICIAL DISTRICT

STATE OF TEXAS'S VERIFIED ORIGINAL PETITION AND APPLICATIONS FOR TEMPORARY AND PERMANENT INJUNCTIVE RELIEF

INTRODUCTION

> *Just as a servant cannot have two masters, the public cannot have two sets of rules to live by, particularly in a pandemic and when those rules carry criminal penalties substantially impacting peoples' lives and livelihood.*[1]

1. This case raises a pressing question: who is ultimately responsible for responding to the COVID-19 pandemic and other emergencies? The Texas Disaster Act ("TDA") charges the Governor—not an assortment of hundreds of county judges and city mayors—with leading the State's response to a statewide emergency.

[1] *State v. El Paso County*, 08-20-00226-CV, 2020 WL 6737510, at *11 (Tex. App.—El Paso Nov. 13, 2020, no pet. h.), mandamus dismissed (Nov. 20, 2020).

Traditional preemption principles and the TDA's plain language dictate that the Governor's emergency orders control over conflicting local orders.

2. Defendants' December 29, 2020 emergency orders shut down indoor and outdoor dine-in food and beverage service during the period 10:30 p.m. through 6:00 a.m. for the City of Austin and Travis County. These are businesses that would remain open under Governor Abbott's emergency orders. Defendants' local orders thus conflict with Governor Abbott's orders. One must prevail, and the only logical and legal option is the Governor's.

3. Defendants will likely counter that they are simply trying to protect their residents during a deadly pandemic. But that is exactly what Governor Abbott is trying to do as well. Disasters like COVID-19 raise difficult questions about how to balance individual health and economic vitality, which can be equally dangerous if ignored. These once-in-a-century pandemics are complicated enough that there can be more than one reasonable approach on how best to respond. But what cannot be meaningfully disputed is that the Texas Legislature intended that the Governor would ultimately decide such issues. The State asks this Court to respect the Legislature's intent, apply the plain rule of law, and enjoin Defendants' preempted emergency orders.

REQUEST FOR AN EXPEDITED HEARING ON THE STATE'S APPLICATIONS FOR A TEMPORARY RESTRAINING ORDER AND A TEMPORARY INJUNCTION

4. Given the important and urgent issues raised in this action, the State requests an expedited setting on its applications for a temporary restraining order and a temporary injunction. The preempted portions of Defendants' emergency

orders, by their terms, will go into effect at 10:30 p.m. on Thursday, December 31, 2020—approximately thirty (30) hours from now at the time of this filing—if not first enjoined. The State contacted Defendants and discussed the relief requested herein prior to making this filing, but were unable to resolve the differences or secure an agreed setting.

PARTIES

5. Plaintiff is the State of Texas.

6. Defendants are: (1) the City of Austin, Texas; (2) the County of Travis, Texas; (3) Steve Adler, in his official capacity as Mayor, City of Austin, Texas; and (4) Andy Brown, in his official capacity as County Judge, County of Travis, Texas.

7. The City of Austin may be served with process through its Mayor, Steve Adler, or its City Clerk, Jannette Goodall, at 301 W. 2nd Street, Austin, Travis County, Texas.

8. Mayor Adler may be served with process at 301 W. 2nd Street, Austin, Travis County, Texas.

9. Travis County may be served with process through Judge Brown at 700 Lavaca, Ste. 2.300, Austin, Travis County, Texas.

10. Judge Brown may be served with process at 700 Lavaca, Ste. 2.300, Austin, Travis County, Texas.

EXPEDITED ACTION

11. The State is seeking non-monetary relief. Discovery is intended to be conducted under Level 1.

JURISDICTION AND VENUE

12. The subject matter in controversy is within the jurisdictional limits of this Court, and the Court has jurisdiction over the action under Article V, Section 8 of the Texas Constitution and section 24.007 of the Texas Government Code, as well as under sections 37.001 and 37.003 of the Texas Uniform Declaratory Judgments and section 65.021 of the Texas Civil Practice and Remedies Code.

13. Venue is proper in Travis County under section 15.002(a)(1), (a)(2), and (a)(3) of the Texas Civil Practices and Remedies Code.

BACKGROUND

I. The TDA Makes the Governor the Leader of the State's Emergency Response.

14. 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."[2]

15. The TDA makes the sitting Texas Governor the leader and focal point of the State's emergency response.[3]

16. 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]

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[2] TEX. GOV'T CODE § 418.002(1), (3).
[3] *See id.* at §§ 418.011–.026.
[4] *Id.* at § 418.011.
[5] *Id.* at § 418.015(c).

17. The TDA gives the Governor the broad powers necessary to accomplish this weighty task.[6] For example, the Governor is given the powers to:

A. control the movement of persons and occupancy of premises in a disaster area;[7]

B. issue executive orders that "have the force and effect of law";[8]

C. suspend statutes, orders, or rules that "would in any way prevent, hinder, or delay necessary action in coping with a disaster";[9]

D. apply for a loan on behalf of a local government if the governor deems it necessary;[10] and

E. "use all available resources . . . of political subdivisions that are reasonably necessary to cope with a disaster."[11]

II. Local Officials have Far More Limited Emergency Powers Under the TDA.

18. The TDA gives local officials far more limited emergency powers than those afforded to the Governor. Local officials derive their emergency power from two main sections.

19. 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.[12]

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[6] *See id.* at §§ 418.011–.026.
[7] *Id.* at § 418.018(c).
[8] *Id.* at 418.012.
[9] *Id.* at § 418.016(a).
[10] *Id.* at § 418.021(a).
[11] *Id.* at § 418.017(a).
[12] *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.").

20. Section 418.108 authorizes "the presiding officer of the governing body of a political subdivision [to] declare a local state of disaster."[13] 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."[14]

21. 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 under section 418.108.

22. 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.]"[15] When acting in this capacity, the local official is a "designated agent" of the Governor and thus is subject to the Governor's control.[16]

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

23. On October 7, 2020, Governor Abbott issued Executive Order GA-32 to respond to the COVID-19 pandemic.[17] This order has "the force and effect of law," just like any other state law.[18]

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[13] *Id.* at § 418.108(g).
[14] *Id.*
[15] *Id.* at § 418.1015(b).
[16] *Id.*
[17] Ex. A.
[18] TEX. GOV'T CODE § 418.012.

24. GA-32 states that "[e]very business establishment in Texas shall operate at no more than 75 percent of the total listed occupancy of the establishment."[19]

25. 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."[20] Bars and similar establishments may also "offer on-premises services" under certain listed circumstances.[21]

26. 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."[22]

27. 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 ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order."[23]

28. GA-32 is a crucial part of the State's continuing efforts to reopen safely.[24] 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

[19] Ex. A at 2.
[20] *Id.* at 4.
[21] *Id.*
[22] *Id.* at 5.
[23] *Id.* at 5.
[24] *See id.* at 2.

disasters."[25] Mayor Adler's and Judge Brown's recent emergency orders impermissibly and unconstitutionally undercut these reopening efforts.

IV. Mayor Adler's and Judge Brown's Orders Unlawfully Undermine GA-32.

29. Late last night, Mayor Adler and Judge Brown issued mirroring emergency orders (collectively, "Order 24") that conflicted with GA-32 and undermined the State's reopening efforts.

30. Order 24 prohibited "indoor and outdoor dine-in food and beverage service" during the period 10:30 p.m. thru 6:00 a.m. for the City of Austin and Travis County.[26]

31. Order 24 stated that it would take effect starting at 10:30 p.m. on December 31, 2020 and continue through 6:00 a.m. on January 3, 2021.[27]

32. Order 24 made violations of its rules a criminal offense punishable by a fine up to $1,000.[28]

33. In short, Order 24 conflicts with GA-32 as it forces restaurants and business to close when they would otherwise be allowed to operate under GA-32.

CLAIMS FOR RELIEF

34. Pursuant to Texas's Declaratory Judgment Act and *ultra vires* and preemption principles, the State alleges as follows.

[25] TEX. GOV'T CODE § 418.002(3).
[26] Ex. B at 3; Ex. C at 3.
[27] Ex. B at 2; Ex. C at 3.
[28] Ex. B at 3; Ex. C at 3–4.

35. The issuance and enforcement of Order 24 is invalid, unlawful, and constitutes an *ultra vires* act because Governor Abbott suspended the only statutes that would have allowed Defendants to issue this emergency order.

36. The issuance and enforcement of Order 24 is invalid, unlawful, and constitutes an *ultra vires* act because Defendants were acting as Governor Abbott's designated agents when they issued the order and, as agents, they could not ignore the will of their principal.

37. The issuance and enforcement of Order 24 is invalid, unlawful, and constitutes an *ultra vires* act because Order 24 was preempted by GA-32, and the State requests a declaration to that effect from this Court.

APPLICATIONS FOR A TEMPORARY RESTRAINING ORDER AND A TEMPORARY INJUNCTION

38. A temporary restraining order serves to provide emergency relief and to preserve the status quo until a hearing may be held on a temporary injunction.[29] "A temporary injunction's purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits."[30] The applicant must prove three elements to obtain a temporary injunction: (1) a cause of action against the adverse party; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.[31] These requirements are readily met here.

[29] *Texas Aeronautics Commission v. Betts*, 469 S.W.2d 394, 398 (Tex. 1971).
[30] *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).
[31] *Id.*

I. The State will Likely Succeed on the Merits.

39. We will first discuss the three main reasons the State will likely succeed on the merits, which are: (1) GA-32 expressly preempts Order 24; (2) Governor Abbott lawfully suspended Mayor Adler's and Judge Brown's sole statutory authority to issue Order 24; and (3) Mayor Adler and Judge Brown were acting as Governor Abbott's "designated agents" when they issued Order 24 and, as agents, they could not ignore the will of their principal. We will then discuss the El Paso Court of Appeals' recent decision in *State v. El Paso County*, which is the only case directly on point and which enjoined a local emergency order in circumstances virtually identical to this case.

A. GA-32 Expressly Preempts Order 24.

40. A local "ordinance which conflicts or is inconsistent with state legislation is impermissible."[32] As shown above, GA-32 expressly preempts more restrictive local emergency orders.[33] Order 24 is more restrictive than GA-32 as it closes businesses that would otherwise be allowed to remain open under GA-32. Thus, the only open issue is whether GA-32 is a "state law." The only logical conclusion is that it is.

41. The TDA makes the Governor "responsible for meeting . . . the dangers *to the state*" presented by disasters.[34]

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[32] *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 18–19 (Tex. 2016) (quotation marks omitted); *see also City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 593 (Tex. 2018); *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013).
[33] *Supra* at pgs. 4–6.
[34] TEX. GOV'T CODE § 418.011(1) (emphasis added).

42. The TDA authorizes the Governor to declare a "state of disaster" for the entire State.[35] Governor Abbott did just that when he declared that COVID-19 "poses an imminent threat of disaster *for all counties in the State of Texas*."[36]

43. The TDA gives Governors the power to issue emergency orders that have "the force and effect of law."[37] Governor Abbott used this power to issue GA-32, which was effective "on a statewide basis."[38]

44. A statewide order, issued using statewide power, having a statewide effect, is a "state law."

45. GA-32 expressly preempts the inconsistent and conflicting provisions of Order 24, rendering them invalid from the outset. Thus, Order 24 should be enjoined.

B. Governor Abbott Suspended Mayor Adler's and Judge Brown's Sole Statutory Authority to Issue Binding Emergency Orders.

46. Sections 418.1015(b) and 418.018 were the sole statutory bases for Mayor Adler's and Judge Brown's authority to issue local emergency orders. Governor Abbott, using his TDA-granted power,[39] suspended these two statutes 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]."[40] Under the circumstances, Mayor Adler and Judge Brown had no authority to issue the more restrictive Order 24. This makes Order 24 invalid and their conduct *ultra vires*.

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[35] *Compare id.* at § 418.014, *with id.* at § 418.018 (stating that local official can only declare "a *local* state of disaster") (emphasis added).
[36] Ex. A at 1 (emphasis added).
[37] TEX. GOV'T CODE § 418.012.
[38] Ex. A at 2.
[39] TEX. GOV'T CODE § 418.016(a).
[40] Ex. A at 5.

C. Mayor Adler and Judge Brown Exceeded Their Authority as Governor Abbott's "Designated Agents" when They Issued Emergency Orders Expressly Conflicting with GA-32.

47. As discussed above, Mayor Adler and Judge Brown were using derived gubernatorial powers and acting as Governor Abbott's agents when they issued Order 24. As Governor Abbott's agents, Mayor Adler and Judge Brown could not lawfully issue an order that expressly conflicted with GA-32.[41] Thus, Mayor Adler and Judge Brown exceeded the scope of their authority, making Order 24 an *ultra vires* act.

D. The El Paso Court of Appeals Adopted the State's Arguments and Enjoined a Local Emergency Order Under Circumstances Virtually Identical to this Case.

48. *State v. El Paso County*[42] is instructive as it analyzed the same issues presented here under virtually identical circumstances. *El Paso County* is the only case to address the novel questions raised by conflicting state and local emergency orders. *El Paso County* adopted the State's arguments and enjoined El Paso's conflicting local emergency order. This Court should do the same here.

49. In *El Paso County*, El Paso County Judge Ricardo A. Samaniego issued a local emergency order ("EO-13") in response to the COVID-19 pandemic that conflicted with GA-32—just like Defendants did here.[43]

50. The State intervened in a state court action challenging EO-13 and moved to enjoin this order based on the same arguments made here.[44] The district

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[41] *See, e.g.*, *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 590 (Tex. 2017); RESTATEMENT (THIRD) OF AGENCY § 101 (2006).
[42] 08-20-00226-CV, 2020 WL 6737510 (Tex. App.—El Paso Nov. 13, 2020, no pet. h.), mandamus dismissed (Nov. 20, 2020). Copies of the decision are also attached as Exs. G–H.
[43] *See generally* Ex. D.
[44] *See generally* Ex. E.

court denied the State's motion without explanation.[45] The El Paso Court of Appeals reversed, effectively adopting the State's arguments.[46] Below are four notable points from the Court of Appeals' decision.

51. First, the court summarized the issue before it as "whether, under the Disaster Act, the Legislature delegated to the governor or a county judge the *final say* for matters covered by the conflicting provisions of GA-32 and [EO-13]."[47] The court explained that the "answer to our question lies in the text of the Disaster Act" and not in some court's views on the "wisdom or efficacy" of the conflicting orders.[48]

52. Second, the court analyzed the interplay between TDA sections 418.1015 and 418.108—the two main sources of local official emergency power.[49] The issue is that section 418.1015(b) makes local officials "the governor's designated agent[s] in the administration and supervision of duties under this chapter," which would mean they are subject to the governor's control.[50] To avoid this provision, El Paso argued that section 418.108 contains stand-alone local emergency power separate from 418.1015.[51] The court questioned El Paso's logic, explaining that section 418.1015(b) made local officials state agents when they administered and supervised duties "under this chapter" (meaning Chapter 418 of the Texas

[45] Ex. F.
[46] *See generally El Paso County*, 2020 WL 6737510.
[47] *Id.* at *4.
[48] *Id* at *4.
[49] *Id.* at *5–6.
[50] *Id.* at *5; TEX. GOV'T CODE § 418.1015(b).
[51] *See El Paso County*, 2020 WL 6737510, at *5–6.

Government Code) and section 418.108 fell under Chapter 418.[52] The court did not resolve this issue; it explained it did not have to due to the following point.[53]

53. Third, the court found that GA-32 was a state law, which "eclipse[s] inconsistent local law[s]" like EO-13.[54] The court pondered: What would happen if, during a hurricane, the governor ordered an evacuation in one direction and the county judge sent people in the exact opposite direction?[55] The court explained that one of these orders must control.[56] The court reasoned that the Legislature intended for section 418.012—which gives the governor's emergency orders the force and effect of law—to act as a sort of "tie-breaker."[57] The court explained that local officials "can point to no similar power" afforded to them under the TDA.[58] Nor was there any indication in the TDA's text suggesting that a local official's "authority over ingress, egress, or occupancy in a local disaster overrides the governor's identical authority for a statewide declared disaster."[59] The court commented that any alternative holding could lead to a "chao[tic]" mess of 254 separate county-level responses to a statewide disaster.[60]

54. Finally, the court rejected El Paso's challenge to Governor Abbott's suspension power, which is codified in section 418.016.[61] El Paso argued that EO-13

[52] *Id.* at *6.
[53] *Id.* at *6.
[54] *See id.* at *6–7 (citing various cases).
[55] *Id.* at *7.
[56] *Id.*
[57] *Id.* at *7.
[58] *Id.* at *7.
[59] *Id.* at *7.
[60] *Id.* at *7.
[61] *Id.* at *8–9.

was not a "regulatory statute" and did not address "state business," and thus it fell beyond section 418.016's reach.[62] The court explained that EO-13 fit within the "classic definition of regulation," which is "to control or supervise by means of rules and regulations."[63] The court found that the Legislature's reference to "state business"—as opposed to "official state business," which is used in many other statutes—signals the Legislature's intent to give the term a broader meaning.[64] The court found that EO-13, which closed-down bars, restaurants, and other businesses closely regulated by the State, affected the conduct of "state business" and thus could be lawfully suspended by Governor Abbott.[65]

55. *El Paso County* involved issues effectively identical to the ones presented here. The El Paso Court of Appeals rightly adopted the State's arguments and enjoined El Paso's conflicting local emergency order. The same result is warranted here.

II. The State will be Irreparably Injured Absent an Injunction.

56. The State's injuries are irreparable. The Texas Supreme Court recently held as much in *State v. Hollins*.[66]

57. There, the Court explained that a century's worth of precedent establishes "the State's 'justiciable interest in its sovereign capacity in the maintenance and operation of its municipal corporation in accordance with law.'"[67]

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[62] *Id.* at *8.
[63] *Id.* at *8 (quotations omitted).
[64] *Id.* at *8.
[65] *Id.* at *9.
[66] No. 20-0729, 2020 WL 5919729, at *7 (Tex. Oct. 7, 2020).
[67] *Id.* at *6 (quoting *Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926)).

The Court noted that an *ultra vires* suit is a necessary tool to reassert the State's control over local officials who are misapplying or defying State laws.[68] The Court reasoned: "[This] tool would be useless . . . if the State were required to demonstrate additional, particularized harm arising from a local official's specific unauthorized actions."[69]

58. The Court continued that "[t]he [State] would be impotent to enforce its own laws if it could not temporarily enjoin those breaking them pending trial."[70] The Court found that, "[w]hen the State files suit to enjoin *ultra vires* action by a local official, a showing of likely success on the merits is sufficient to satisfy the irreparable-injury requirement for a temporary injunction."[71]

59. Per *Hollins*, the irreparable injury requirement favors the State.

60. The El Paso Court of Appeals rightly viewed *Hollins* "as controlling" on the irreparable injury issue.[72]

III. Emergency Injunctive Relief is Necessary to Preserve the Status Quo.

61. "The status quo is the last actual, peaceable, noncontested status which preceded the pending controversy."[73] Here, that would be the parties' status before Order 24. Thus, all three temporary injunction and temporary restraining order factors favor the State.

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[68] *Id.*
[69] *Id.*
[70] *Id.* at *7.
[71] *Id.*
[72] *El Paso County*, 2020 WL 6737510, at *10.
[73] *Sharma v. Vinmar Intern., Ltd.*, 231 S.W.3d 405, 419 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

APPLICATION FOR A PERMANENT INJUNCTION

62. The State also asks the Court to set its request for a permanent injunction for a trial on the merits, and after the trial, issue a permanent injunction as set forth above.

PRAYER

63. For the reasons discussed above, the State respectfully prays that this Court:

A. Through counsel below, enter an appearance for the State in this cause;

B. Issue a temporary restraining order, which will remain in force until a hearing is held, restraining Defendants and any of their officers, agents, servants, employees, attorneys, representatives, or any other persons in active concert or participation with them who receive actual notice of the Order from enforcing Order 24;

C. Declare Order 24 to be invalid and unconstitutional;

D. Set a date and time for a hearing on the State's application for a temporary injunction;

E. Issue preliminary and permanent injunctions that order Defendants to: (1) stop, or order stopped, all enforcement efforts of Order 24; (2) rescind Order 24; and (3) refrain from issuing any new emergency orders more restrictive than, or conflicting with, GA-32; and

F. Award any further relief that the Court deems just and proper.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

SHAWN COWLES
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ATTORNEYS FOR THE STATE OF TEXAS

CAUSE NO. _____

STATE OF TEXAS, *Plaintiff*,	§	IN THE DISTRICT COURT
v.	§	TRAVIS COUNTY, TEXAS
CITY OF AUSTIN, TEXAS, COUNTY OF TRAVIS, TEXAS, STEVE ADLER, in his official capacity as Mayor, City of Austin, Texas, and ANDY BROWN, in his official capacity as County Judge, County of Travis, Texas, *Defendants*.	§	_____ JUDICIAL DISTRICT

DECLARATION OF TODD DICKERSON IN SUPPORT OF THE STATE OF TEXAS'S VERIFIED ORIGINAL PETITION AND APPLICATIONS FOR TEMPORARY AND PERMANENT INJUNCTIVE RELIEF

State of Texas

County of Travis

My name is Todd Dickerson, my date of birth is August 13, 1985 and my address is P.O. Box 12548, Capital Station Austin, Texas 78711, USA. I declare under penalty of perjury that the facts contained in the State of Texas's Original Petition and Application for Temporary and Permanent Injunctive Relief are true and correct.

Executed in Travis County, State of Texas, on the 30th day of December 2020

/s/ Todd Dickerson
Declarant

CAUSE NO. _____

STATE OF TEXAS, *Plaintiff*,	§	IN THE DISTRICT COURT
v.	§	TRAVIS COUNTY, TEXAS
CITY OF AUSTIN, TEXAS, COUNTY OF TRAVIS, TEXAS, STEVE ADLER, in his official capacity as Mayor, City of Austin, Texas, and ANDY BROWN, in his official capacity as County Judge, County of Travis, Texas, *Defendants*.	§	_____ JUDICIAL DISTRICT

CERTIFICATION PURSUANT TO LOCAL RULE 7.3

The undersigned certifies that:

Counsel presenting the application has diligently attempted to notify Defendants' counsel by sending a letter on December 30, 2020 informing them of the State's intention to pursue legal action unless the order at issue are rescinded or modified to comply with Governor Abbott's Executive Order GA-32.

Due to the time constraints, the State has been unable to secure an agreed upon setting for a hearing on its application for a temporary restraining order.

SIGNED on December 30, 2020.

/s/ Todd Dickerson
Attorney for the State of Texas

GOVERNOR GREG ABBOTT

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
3PM O'CLOCK
OCT 07 2020
Secretary of State

October 7, 2020

The Honorable Ruth R. Hughs
Secretary of State
State Capitol Room 1E.8
Austin, Texas 78701

Dear Secretary Hughs:

Pursuant to his powers as Governor of the State of Texas, Greg Abbott has issued the following:

> Executive Order No. GA-32 relating to the continued response to the COVID-19 disaster as Texas reopens.

The original executive order is attached to this letter of transmittal.

Respectfully submitted,

Gregory S. Davidson
Executive Clerk to the Governor

GSD/gsd

Attachment

EXHIBIT A

Executive Order

BY THE
GOVERNOR OF THE STATE OF TEXAS

Executive Department
Austin, Texas
October 7, 2020

EXECUTIVE ORDER
GA 32

Relating to the continued response to the COVID-19 disaster as Texas reopens.

WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on March 13, 2020, certifying under Section 418.014 of the Texas Government Code that the novel coronavirus (COVID-19) poses an imminent threat of disaster for all counties in the State of Texas; and

WHEREAS, in each subsequent month effective through today, I have renewed the disaster declaration for all Texas counties; and

WHEREAS, I have issued executive orders and suspensions of Texas laws in response to COVID-19, aimed at protecting the health and safety of Texans and ensuring an effective response to this disaster; and

WHEREAS, I issued Executive Order GA-08 on March 19, 2020, mandating certain social-distancing restrictions for Texans in accordance with guidelines promulgated by President Donald J. Trump and the Centers for Disease Control and Prevention (CDC); and

WHEREAS, I issued Executive Order GA-14 on March 31, 2020, expanding the social-distancing restrictions for Texans based on guidance from health experts and the President; and

WHEREAS, I subsequently issued Executive Orders GA-16, GA-18, GA-21, GA-23, and GA-26 from April through early June 2020, aiming to achieve the least restrictive means of combatting the threat to public health by continuing certain social-distancing restrictions, while implementing a safe, strategic plan to reopen Texas; and

WHEREAS, as Texas reopens in the midst of COVID-19, increased spread is to be expected, and the key to controlling the spread and keeping Texas residents safe is for all Texans to consistently follow good hygiene and social-distancing practices, especially those set forth in the minimum standard health protocols from the Texas Department of State Health Services (DSHS); and

WHEREAS, in June 2020, Texas experienced substantial increases in COVID-19 cases and hospitalizations, necessitating targeted and temporary adjustments to the reopening plan to achieve the least restrictive means for reducing the growing spread of COVID-19 and the resulting imminent threat to public health, and to avoid a need for more extreme measures; and

WHEREAS, I therefore issued Executive Orders GA-28 and GA-29 in late June and early

July 2020, respectively, and amended Executive Order GA-28 by proclamation on July 2, 2020; and

WHEREAS, due to improved medical treatments for COVID-19 patients, substantial increases in testing, abundant supplies of personal protective equipment, and Texans' adherence to safe practices like social distancing, hand sanitizing, and use of face coverings, the spread of COVID-19 and the number of new COVID-19 cases and hospitalizations have steadily and significantly declined since late July; and

WHEREAS, I therefore issued Executive Orders GA-30 and GA-31 on September 17, 2020, allowing additional reopening and non-essential medical surgeries and procedures in Texas, except in some areas with high hospitalizations as defined in those orders; and

WHEREAS, as Texas continues to reopen, everyone must act safely, and to that end, this executive order and prior executive orders provide that all persons should follow the health protocols from DSHS, which whenever achieved will mean compliance with the minimum standards for safely reopening, but which should not be used to fault those who act in good faith but can only substantially comply with the standards in light of scarce resources and other extenuating COVID-19 circumstances; and

WHEREAS, in the Texas Disaster Act of 1975, the legislature charged the governor with the responsibility "for meeting … the dangers to the state and people presented by disasters" under Section 418.011 of the Texas Government Code, and expressly granted the governor broad authority to fulfill that responsibility; and

WHEREAS, under Section 418.012, the "governor may issue executive orders … hav[ing] the force and effect of law;" and

WHEREAS, failure to comply with any executive order issued during the COVID-19 disaster is an offense punishable under Section 418.173 by a fine not to exceed $1,000, and may be subject to regulatory enforcement;

NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, and in accordance with guidance from the Commissioner of the Texas Department of State Health Services, Dr. John Hellerstedt, other medical advisors, the White House, and the CDC, do hereby order the following on a statewide basis effective at 12:01 a.m. on October 14, 2020:

Every business establishment in Texas shall operate at no more than 75 percent of the total listed occupancy of the establishment; *provided, however, that*:

1. There is no occupancy limit for the following:
    a. any services listed by the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA) in its Guidance on the Essential Critical Infrastructure Workforce, Version 4.0 or any subsequent version;
    b. religious services, including those conducted in churches, congregations, and houses of worship;
    c. local government operations, including county and municipal governmental operations relating to licensing (including marriage licenses), permitting, recordation, and document-filing services, as determined by the local government;

d. child-care services;
e. youth camps, including but not limited to those defined as such under Chapter 141 of the Texas Health and Safety Code, and including all summer camps and other daytime and overnight camps for youths;
f. recreational sports programs for youths and adults;
g. any public or private schools, and any public or private institutions of higher education, not already covered above;
h. drive-in concerts, movies, or similar events, under guidelines that facilitate appropriate social distancing, that generally require spectators to remain in their vehicles, and that minimize in-person contact between people who are not in the same household or vehicle; and
i. the following establishments that operate with at least six feet of social distancing between work stations: cosmetology salons, hair salons, barber shops, nail salons/shops, and other establishments where licensed cosmetologists or barbers practice their trade; massage establishments and other facilities where licensed massage therapists or other persons licensed or otherwise authorized to practice under Chapter 455 of the Texas Occupations Code practice their trade; and other personal-care and beauty services such as tanning salons, tattoo studios, piercing studios, hair removal services, and hair loss treatment and growth services.

2. In areas with high hospitalizations as defined below, any business establishment that otherwise would have a 75 percent occupancy or operating limit may operate at up to only 50 percent. This paragraph does not apply, however, to business establishments located in a county that has filed with DSHS, and is in compliance with, the requisite attestation form promulgated by DSHS regarding minimal cases of COVID-19.

   "Areas with high hospitalizations" means any Trauma Service Area that has had seven consecutive days in which the number of COVID-19 hospitalized patients as a percentage of total hospital capacity exceeds 15 percent, until such time as the Trauma Service Area has seven consecutive days in which the number of COVID-19 hospitalized patients as a percentage of total hospital capacity is 15 percent or less. A current list of areas with high hospitalizations will be maintained at www.dshs.texas.gov/ga3031.

3. Except as provided below by paragraph No. 5, there is no occupancy limit for outdoor areas, events, and establishments, with the exception of the following outdoor areas, events, or establishments that may operate at no more than 75 or 50 percent, as applicable, of the normal operating limits as determined by the owner:
   a. amusement parks;
   b. water parks;
   c. swimming pools;
   d. museums and libraries; and
   e. zoos, aquariums, natural caverns, and similar facilities.

4. All indoor and outdoor professional, collegiate, and similar sporting events, including rodeos and equestrian events, shall remain limited to 50 percent of the normal operating limits as determined by the owner.

5. For any outdoor gathering in excess of 10 people, including rafting, tubing, and related services, other than those set forth above in paragraph Nos. 1, 3, or 4, the gathering is prohibited unless the mayor of the city in which the gathering is held, or the county judge in the case of a gathering in an unincorporated area, approves of the gathering, and such approval can be made subject to certain conditions or restrictions not inconsistent with this executive order.

6. 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.

7. Bars or similar establishments that hold a permit from the Texas Alcoholic Beverage Commission (TABC), and are not restaurants as defined above in paragraph No. 6, may offer on-premises services only as described by this paragraph. A bar or similar establishment may offer on-premises services at up to 50 percent of the total listed occupancy of the establishment *if*:
   a. the bar or similar establishment is not in an area with high hospitalizations as defined above, and the county judge of the county in which the bar or similar establishment is located files the requisite form with TABC; or
   b. the bar or similar establishment is in an area with high hospitalizations as defined above, but is located in a county that has filed with DSHS, and is in compliance with, the requisite attestation form promulgated by DSHS regarding minimal cases of COVID-19, and the county judge of the county in which the bar or similar establishment is located also files the requisite form with TABC.

   Patrons at bars or similar establishments operating under this paragraph may eat or drink only while seated, except that in an establishment that holds a permit from TABC as a brewer, distiller/rectifier, or winery, customers may sample beverages while standing so long as they are in a group of six people or fewer and there is at least six feet of social distancing or engineering controls, such as partitions, between groups.

   Where applicable, this 50 percent occupancy limit applies only indoors; the limit does not apply to outdoor areas, events, or establishments, although social distancing and other protocols must be followed.

   People shall not visit bars or similar establishments that are located in counties not included in parts (a) or (b) above. A current list of all counties reopening under this paragraph will be maintained on TABC's website.

   The use by bars or similar establishments of drive-thru, pickup, or delivery options for food and drinks remains allowed to the extent authorized by TABC.

8. For purposes of this executive order, facilities with retractable roofs are considered indoor facilities, whether the roof is opened or closed.

9. Staff members are not included in determining operating levels, except for manufacturing services and office workers.

10. Except as provided in this executive order or in the minimum standard health protocols recommended by DSHS, found at www.dshs.texas.gov/coronavirus, people shall not be in groups larger than 10 and shall maintain six feet of social distancing from those not in their group.

11. People over the age of 65 are strongly encouraged to stay at home as much as possible; to maintain appropriate distance from any member of the household who has been out of the residence in the previous 14 days; and, if leaving the home, to implement social distancing and to practice good hygiene, environmental cleanliness, and sanitation.

12. In providing or obtaining services, every person (including individuals, businesses, and other legal entities) should use good-faith efforts and available resources to follow the minimum standard health protocols recommended by DSHS.

13. Nothing in this executive order or the DSHS minimum standards precludes requiring a customer to follow additional hygiene measures when obtaining

services.

14. People may visit nursing homes, state supported living centers, assisted living facilities, or long-term care facilities as determined through guidance from the Texas Health and Human Services Commission (HHSC). Nursing homes, state supported living centers, assisted living facilities, and long-term care facilities should follow infection control policies and practices set forth by HHSC, including minimizing the movement of staff between facilities whenever possible.
15. Public schools may operate as provided by, and under the minimum standard health protocols found in, guidance issued by the Texas Education Agency (TEA). Private schools and institutions of higher education are encouraged to establish similar standards.

Notwithstanding anything herein to the contrary, the governor may by proclamation add to the list of establishments or venues that people shall not visit.

This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a 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. Pursuant to Section 418.016(a) of the Texas Government Code, I hereby suspend Sections 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order, provided that local officials may enforce this executive order as well as local restrictions that are consistent with this executive order.

All existing state executive orders relating to COVID-19 are amended to eliminate confinement in jail as an available penalty for violating the executive orders. To the extent any order issued by local officials in response to the COVID-19 disaster would allow confinement in jail as an available penalty for violating a COVID-19-related order, that order allowing confinement in jail is superseded, and I hereby suspend all relevant laws to the extent necessary to ensure that local officials do not confine people in jail for violating any executive order or local order issued in response to the COVID-19 disaster.

This executive order supersedes Executive Order GA-30, but does not supersede Executive Orders GA-10, GA-13, GA-17, GA-24, GA-25, GA-29, or GA-31. This executive order shall remain in effect and in full force unless it is modified, amended, rescinded, or superseded by the governor. This executive order may also be amended by proclamation of the governor.

Given under my hand this the 7th day of October, 2020.

GREG ABBOTT
Governor

FILED IN THE OFFICE OF THE SECRETARY OF STATE
3PM O'CLOCK
OCT 07 2020

EXHIBIT A

ATTESTED BY:

RUTH R. HUGHS
Secretary of State

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
3 pm O'CLOCK

OCT 0 7 2020

EXHIBIT A

MODIFIED OPERATIONS FOR DINE-IN SERVICES

ORDER NO. 20201229-024

BY

THE MAYOR OF THE CITY OF AUSTIN

WHEREAS, on March 6, 2020, I, Mayor Steve Adler, issued a Declaration of Local Disaster pursuant to Texas Government Code Chapter 418, ratified by City Council Resolution No. 20200312-074, to allow the City of Austin to take measures in response to the COVID-19 pandemic and protect the health and safety of Austin residents;

WHEREAS, on March 13, 2020, Governor Greg Abbott proclaimed a state-wide state of disaster due to the COVID-19 pandemic and has since issued numerous Executive Orders related to the pandemic, including Executive Orders GA-29 on July 2, 2020, GA-31 on September 17, 2020, and GA-32 on October 7, 2020;

WHEREAS, Governor Abbott issued Executive Order GA-32 allowing areas of the State that are not experiencing high rates of hospitalizations to further increase occupancy limits, as well as providing county judges with the option of allowing bars to reopen with an understanding that certain health protocols must continue to be enforced, including the wearing of face coverings and limiting groups to no more than 10 gatherings, subject to certain exceptions;

WHEREAS, since October, the number of new confirmed COVID-19 cases have surged across large portions of the State;

WHEREAS, GA-32 prohibits any outdoor gathering in excess of 10 people, except as specifically exempted in paragraphs 1, 3 and 4 of GA-32, or unless approved by the county judge or mayor, subject to conditions and restrictions not inconsistent with GA-32;

WHEREAS, GA-32 further prohibits bars or similar establishments that hold a permit from the Texas Alcoholic Beverage Commission ("TABC") from operating unless the County Judge opts in and allows bars and similar establishments to operate by filing the requisite form with TABC, and the Travis County Judge has not authorized bars or similar establishments to open in Travis County;

WHEREAS, as of December 28, 2020, Travis County has experienced 48,951 confirmed cases of COVID-19 and 542 deaths as a result of the disease;

WHEREAS, as of December 28, 2020, Williamson County has experienced 19,519 confirmed cases of COVID-19 and 198 deaths as a result of the disease;

WHEREAS, as of December 28, 2020, the average daily admissions at hospitals within the Austin metropolitan statistical area (MSA), as reported by the Austin-Travis County Public Health Authority, has increased by 110% since December 1, 2020, which is having a detrimental effect on MSA's health system;

WHEREAS, as of December 28, 2020, the number of hospitalizations in the MSA was 434 and ICU capacity in the MSA is at 69% of the estimated maximum availability for COVID-19 patients;

WHEREAS, the virus that causes COVID-19 is contagious and spreads through person-to-person contact, especially in group settings;

WHEREAS, wearing a face covering continuously and spacing at least six feet apart when outside of one's household is necessary to reduce the spread of COVID-19;

WHEREAS, Governor Abbott's Executive Order GA-29, Mayor Order No. 20201215-021, and the Health Authority Rules allow for an exception to face covering requirement when eating or dining in a restaurant;

WHEREAS, because the wearing of a face covering and physical distancing is not possible while individuals are seated together and dining at a restaurant or similar establishment, thereby increasing the risk of spreading COVID-19, the need to modify operations at businesses providing dine-in food and beverage service during the hours of 10:30 P.M. and 6:00 A.M. during the term of the Order is necessary to protect the community and slow the spread of the COVID-19 virus;

WHEREAS, the New Year's holiday presents a significant health risk due to the increased potential for large social gatherings at restaurants, hotels, and households;

WHEREAS, restrictions on social gatherings during the New Year's holiday is necessary to help prevent a surge in new cases and corresponding increases in hospitalizations that will overwhelm current hospital and ICU capacity;

WHEREAS, extraordinary emergency measures must be taken to try and mitigate the effects of this public health emergency and to facilitate a response to the public health threat in order to protect the health and safety of the community;

WHEREAS, pursuant to Government Code section 418.108(g), a mayor is authorized to control ingress and egress from a local disaster area, and control the movement of persons and the occupancy of premises in that disaster area; and

WHEREAS, an order that controls ingress and egress from a local disaster area, and controls the movement of persons and the occupancy of premises in that disaster area is needed to protect the health and safety of all individuals in the City of Austin, by modifying dine-in services to slow the spread of the virus.

NOW THEREFORE, I, MAYOR OF THE CITY OF AUSTIN, PURSUANT TO THE AUTHORITY VESTED BY TEXAS GOVERNMENT CODE CHAPTER 418, HEREBY ORDER, EFFECTIVE AS OF 10:30 P.M. ON DECEMBER 31, 2020, AND CONTINUING THROUGH 6:00 A.M. ON JANUARY 3, 2021 THAT IN THE CITY OF AUSTIN:

SECTION 1. That the findings and recitations set out in the preamble to this ORDER are found to be true and correct and they are hereby adopted and made a part hereof for all purposes.

SECTION 2. Modified Operations for Dine-In Food and Beverage Services. Because the wearing of a face covering and physical distancing is not possible while individuals are seated together and dining, thereby increasing the risk of spreading the COVID-19 virus, a business must end indoor and outdoor dine-in food and beverage service at 10:30 P.M. but may continue to operate after 10:30 P.M. using drive-thru, curbside pick-up, take-out, or delivery service. Dine-in food and beverage service may resume beginning at 6:00 A.M. In this section, a business does not include religious services as defined by the Governor in GA-32. Also, all dine-in food and beverage service providers are strongly encouraged to offer only drive-thru, curbside pick-up, take-out, or delivery services between 6:00 A.M. and 10:30 P.M. as recommended in Order No. 20201223-023.

SECTION 3. Criminal Offense. A violation of this Order is a violation of Austin City Code Section 2-6-24 and a criminal offense. A violation of this Order may be punishable through criminal enforcement, except as limited by state order. Peace officers, City of Austin Code Department inspectors, and the Office of the Austin Fire Marshal are hereby authorized to enforce this Order. A criminal violation of this Order is a misdemeanor punishable by a fine not to exceed $1,000, but not by confinement. A criminal violation of this Order may be enforced by the filing of a probable cause affidavit alleging the violation with the appropriate court or by issuing a citation to the person violating that contains written notice of the time and place the person must appear before a magistrate of this state, the name and address of the person charged, and the offense charged. Enforcement of this Order is substantially reliant on self-regulation and a community commitment to public health and safety under the threat of COVID-19. If there is not widespread compliance with this Order, the City will increase enforcement efforts, as allowed by law.

SECTION 4. Savings Clause. If any provision of this Order or its application to any person or circumstance is held to be invalid, then the remainder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable.

SECTION 5. Posting. The Austin Public Health Department and the City Clerk will post this Order on their websites. In addition, the owner, manager, or operator of any facility that is likely to be impacted by this Order is strongly encouraged to post a copy of this Order onsite and to provide a copy to any member of the public asking for a copy.

SECTION 6. This Order does not supersede Order 20201215-021. If this Order conflicts with Order 20201215-021, this Order shall prevail.

[SIGNATURES ON NEXT PAGE]

ORDERED this the 29th day of December 2020, in the City of Austin, Travis County, Texas, in witness whereof I subscribe my name and cause to be affixed the seal of the City of Austin.

Mayor, City of Austin

Filed with me, the City Clerk of the City of Austin, this 29th day of December 2020, by Mayor Steve Adler, whose signature I hereby attest under my hand and the seal of the City of Austin.

City Clerk

CITY OF AUSTIN TEXAS TRAVIS COUNTY

5 pgs 2020254313

ORDER BY THE COUNTY JUDGE OF TRAVIS COUNTY

County Judge Order 2020-24,

Relating to COVID-19 and the implementation of Modified Operations

Whereas, on March 6, 2020, a Declaration of Local Disaster was issued by the Travis County Judge to allow the County of Travis ("County" or "Travis County"), Texas, to take measures to reduce the possibility of exposure to COVID-19 and promote the health and safety of Travis County residents, and

Whereas, on March 13, 2020, a Declaration of State of Disaster was issued by Governor Greg Abbott to take additional steps to prepare for, respond to, and mitigate the spread of COVID-19 to protect the health and welfare of Texans, and

Whereas, on October 7, 2020 the Governor issued Executive Order GA-32 ("GA-32"), related to the reopening of services and business, with reduced occupancy limits and gathering restrictions for individuals and businesses, as well as continuing recommended health protocols and social distancing measures to attempt to mitigate increased transfer of COVID-19 associated with the expanding commercial and social interactions, and

Whereas, GA-32 prohibits any outdoor gathering in excess of 10 people, except as specifically exempted in paragraphs 1, 3 and 4 of GA-32, or unless approved by the county judge or mayor, subject to conditions and restrictions not inconsistent with GA-32, and

Whereas, GA-32 further prohibits bars or similar establishments that hold a permit from the Texas Alcoholic Beverage Commission ("TABC") from operating unless the County Judge opts in and allows bars and similar establishments to operate by filing the requisite form with TABC, and the Travis County Judge has not authorized bars or similar establishments to open in Travis County, and

Whereas, on December 15, 2020, the County Judge issued Order 2020-21, effective December 16, 2020, prohibiting any gatherings in excess of 10 people, requiring face coverings, except as permitted by the Governor's orders, and for businesses that provide goods or services directly to the public to develop and implement a Health and Safety Policy related to preventing the transmission of the COVID-19 virus, and

Whereas, as of December 28, 2020, Travis County has experienced 48,951 confirmed cases of COVID-19 and 542 deaths as a result of the disease,

Whereas, as of December 28, 2020, Williamson County has experienced 19,519 confirmed cases of COVID-19 and 198 deaths,

Whereas, as of December 29, 2020, the number of hospitalizations in Austin-Travis County was 434, and the ICU capacity in Austin/Travis County is at 69% of the estimated

EXHIBIT C

maximum availability for COVID-19 patients, which is having a detrimental effect on the area's health system, and

Whereas, on December 29, 2020, the 7-day rolling average of new hospitalizations in Travis County was 63, and

Whereas, on December 23, 2020, the County entered the Stage 5 Risk Level based on the recommendations of the Health Authority due to the continued increase in the 7-day rolling average of new hospitalizations and other contributing indicators, and

Whereas, Dr Mark Escott, the interim Health Authority for Austin/Travis County, continues to encourage people to stay home except when necessary, and to wear face coverings to provide for the safety of the public while businesses are reopening and when individuals are outside their household, and

Whereas, the virus that causes COVID-19 is contagious and spreads through person-to-person contact, especially in group settings, and

Whereas, wearing a face covering continuously and spacing at least six feet apart when outside of one's household is necessary to reduce the spread of COVID-19,

Whereas, Governor Abbott's Executive Order GA-29, County Judge Order No 2020-21, and the Health Authority Rules allow for an exception to the face covering requirement when a person is seated at a restaurant to eat or drink, and

Whereas, because the wearing of a face covering and physical distancing is not possible while individuals are seated together and dining at a restaurant or similar establishment, thereby increasing the risk of spreading COVID-19, the need to modify operations at businesses providing dine-in food and beverage service during the hours of 10 30 P M and 6 00 A M for the term of this Order is necessary to protect the community and slow the spread of the COVID-19 virus, and

Whereas, the New Year's holiday presents a significant health risk due to the increased potential for large social gatherings at restaurants, hotels and households, and

Whereas, restrictions on social gatherings during the New Year's holiday is necessary to help prevent a surge in new cases and corresponding increases in hospitalizations that will overwhelm current hospital and ICU capacity, and

Whereas, the County Judge has determined that extraordinary emergency measures must be taken to try and mitigate the effects of this public health emergency and to facilitate a response to the public health threat in order to protect the health and safety of the community, and

Whereas, pursuant to Government Code section 418 108(g), a County Judge is authorized to control ingress and egress from a local disaster area, and control the movement of persons and the occupancy of premises in that disaster area, and

Whereas, an order that controls ingress and egress from a local disaster area, and controls the movement of persons and the occupancy of premises in that disaster area is needed for the duration of this Order to protect the health and safety of all individuals in the County of Travis, by modifying dine-in services to slow the spread of the virus, and

Whereas, this Order shall cover all individuals currently living within Travis County, including but not limited to all of the cities and municipalities within the boundaries of Travis County and specifically listed in **Exhibit A**

NOW THEREFORE, I, COUNTY JUDGE OF TRAVIS COUNTY, PURSUANT TO THE AUTHORITY VESTED BY TEXAS GOVERNMENT CODE CHAPTER 418, HEREBY FIND AND ORDER THAT

Effective as of 10 30 P M on December 31, 2020, and continuing through 6 00 A M on January 3, 2021 ("Effective Date"), that in the County of Travis

SECTION 1 That the findings and recitations set out in the preamble to this ORDER are found to be true and correct and they are hereby adopted and made a part hereof for all purposes

SECTION 2 **Modified Operations for Dine-In Food and Beverage Services** Because the wearing of a face covering and physical distancing is not possible while individuals are seated together and dining, thereby increasing the risk of spreading the COVID-19 virus, a business must end indoor and outdoor dine-in food and beverage service at 10 30 P M but may continue to operate after 10 30 P M using drive-thru, curbside pick-up, take-out, or delivery services Dine-in food and beverage service may resume beginning at 6 00 A M Also, all dine-in food and beverage service providers are strongly encouraged to offer only drive-thru, curbside pick-up, take-out, or delivery services between 6 00 A M and 10 30 P M as recommended in Order No 2020-23

SECTION 3 The businesses described in Section 2 of this Order do not include religious services as defined by the Governor in GA-32

SECTION 4 The Austin Public Health Department and the Travis County Clerk will post this Order on their websites In addition, the owner, manager, or operator of any facility that is likely to be impacted by this Order is strongly encouraged to post a copy of this Order onsite and to provide a copy to any member of the public asking for a copy

SECTION 5 **Savings Clause** If any provision of this Order or its application to any person or circumstance is held to be invalid, then the remainder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect To this end, the provisions of this Order are severable

SECTION 6 **ENFORCEMENT** A violation of this Order may be punishable through civil or criminal enforcement, except as limited by state order The Travis County Sheriff's Office, the Travis County Fire Marshal's Office, and other peace officers are hereby authorized to enforce this Order and the Governor's Executive Orders A criminal violation of this Order is

a misdemeanor punishable by a fine not to exceed $1,000, but not by confinement Criminal violations of this Order may be enforced by the filing of a probable cause affidavit alleging the violation with the appropriate court or by issuing a citation to the person violating the Order, which contains written notice of the name and address of the person charged, and the offense charged

SECTION 7 This Order does not supersede Order 2020-21 issued on December 15, 2020 To the extent there is a conflict between this Order and Order 2020-21, this Order shall prevail

SECTION 8 This Order incorporates by reference the following
a **Exhibit A-** List of cities within Travis County

ORDERED this the 29 day of December, 2020, in the County of Travis, Texas

Andy Brown, County Judge
County of Travis, Texas

Filed with the Clerk of Travis County, this 29 day of December, 2020

Dana DeBeauvoir, County Clerk

EXHIBIT C

Exhibit A

List of Cities and Municipalities within Travis County Jurisdiction covered by the Order

- City of Austin
- City of Bee Cave
- City of Cedar Park
- City of Creedmoor
- City of Elgin
- City of Jonestown
- City of Lago Vista
- City of Lakeway
- City of Leander
- City of Manor
- City of Mustang Ridge
- City of Pflugerville
- City of Rollingwood
- City of Round Rock
- City of Sunset Valley
- City of West Lake Hills
- Village of Briarcliff
- Village of Point Venture
- Village of San Leanna
- Village of The Hills
- Village of Volente
- Village of Webberville

Filed 10/30/2020 4:10 PM
Norma Favela Barceleau
District Clerk
El Paso County
2020DCV3515

CAUSE NO. 2020-DCV-3515

PIZZA PROPERTIES, INC., M&S 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.,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
STATE OF TEXAS,	§	
Intervenor-Plaintiff,	§	
v.	§	EL PASO COUNTY, TEXAS
EL PASO COUNTY, TEXAS and RICARDO A. SAMANIEGO, in his official capacity as County Judge, El Paso County, Texas,	§	
Defendants.	§	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.

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[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.

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[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]

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[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.

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[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

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[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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Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

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Deputy First Assistant Attorney General

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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:

Joe Anne Bernal
County Attorney for
El Paso County, Texas
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/s/ Todd Dickerson
TODD DICKERSON
Assistant Attorney General

Filed 11/2/2020 12:00 AM
Norma Favela Barceleau
District Clerk
El Paso County
2020DCV3515

CAUSE NO. 2020-DCV-3515

PIZZA PROPERTIES, INC., M&S 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., *Plaintiffs*,	§	IN THE DISTRICT COURT OF
STATE OF TEXAS, *Intervenor-Plaintiff*,	§	
v.	§	EL PASO COUNTY, TEXAS
EL PASO COUNTY, TEXAS and RICARDO A. SAMANIEGO, in his official capacity as County Judge, El Paso County, Texas, *Defendants*.	§	34TH JUDICIAL DISTRICT

INTERVENOR-PLAINTIFF STATE OF TEXAS'S MOTION FOR A TEMPORARY INJUNCTION

INTRODUCTION

1. Judge Ricardo Samaniego's recent emergency order ("EO-13"): (1) conflicts with Governor Greg Abbott's COVID-19-related executive order GA-32; (2) undermines the State's need for a clear and consistent response to this pandemic; and (3) disrupts the Texas Legislature's division of emergency powers as reflected in the Texas Disaster Act ("TDA"). EO-13 is patently unlawful and reflects a clear abuse of

EXHIBIT E

power by Judge Samaniego. El Paso authorities have begun citing businesses consistent with Judge Samaniego's unlawful order. This order should be immediately enjoined.

FACTUAL BACKGROUND

I. An Overview of the Texas Disaster Act.

2. 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. TDA strengthens the role of both state and local governments in preparing for, responding to, and recovering from disasters.[2]

4. TDA makes the sitting Texas Governor the leader and focal point of the State's emergency response.[3]

5. Under 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, including the State's response to rehabilitating persons and reopening businesses that have suffered from a disaster.[5]

6. TDA gives the Governor broad powers necessary to accomplish this weighty task.[6] Relevant here, the Governor is given the powers to: (1) control the

[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.

movement of persons and occupancy of premises in a disaster area;[7] (2) issue executive orders that "have the force and effect of law"[8]; and (3) suspend statutes, orders, or rules that "would in any way prevent, hinder, or delay necessary action in coping with a disaster."[9]

7. TDA gives local officials far more limited powers than those afforded to the Governor. Per Defendants, local officials generally derive their power from two sources under TDA.

8. 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."[10] Under this section, an emergency management director "serves as the governor's designated agent" and thus is subject to the Governor's control.[11]

9. Second, section 418.108 authorizes "the presiding officer of the governing body of a political subdivision [to] declare a local state of disaster."[12] 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."[13]

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[7] *Id.* at § 418.018(c).
[8] *Id.* at § 418.012.
[9] *Id.* at § 418.016(a).
[10] *Id.* § 418.1015(b).
[11] *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.").
[12] *Id.* at § 418.108(g).
[13] *Id.*

EXHIBIT E

10. 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.

11. Rather, a local official's power to issue emergency orders is derivative of and subservient to the Governor's power. 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.]"[14] When acting in this capacity, the local official is a "designated agent" of the Governor and thus is subject to the Governor's control.[15]

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

12. On October 7, 2020, Governor Abbott issued Executive Order GA-32 to respond to the COVID-19 pandemic.[16] This order has "the force and effect of law," just like any other state law.[17]

13. GA-32 states: "Every business establishment in Texas shall operate at no more than 75 percent of the total listed occupancy of the establishment."[18]

14. However, 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)

[14] *Id.* at § 418.1015(b).
[15] *Id.*
[16] Ex. A.
[17] TEX. GOV'T CODE § 418.012.
[18] Ex. A at 2.

personal-care and beauty services, such as hair salons and barber shops; and (9) outdoor areas, events, and establishments (with a few enumerated exceptions).[19]

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

16. For instance, the order states that indoor and outdoor sporting events "shall remain limited to 50 percent of the normal operating limits."[20]

17. 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."[21] Bars and similar establishments may also "offer on-premises services" under certain listed circumstances.[22]

18. The order states that "[p]eople may visit nursing homes" and similar establishments "as determined through guidance from the Texas Health and Human Services Commission."[23]

19. 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.[24]

20. 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

[19] *Id.* at 2–3.
[20] *Id.* at 3.
[21] *Id.* at 4.
[22] *Id.*
[23] *Id.* at 5.
[24] *Id.* at 4.

this executive order, or expands the list or scope of services as set forth in this executive order."[25]

21. 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 ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order . . . ."[26]

22. The Governor has therefore suspended Judge Samaniego's powers under TDA.

23. GA-32 is a crucial part of the State's continuing efforts to reopen safely.[27] It aims to fulfill one of TDA's core purposes: "[T]he rapid and orderly restoration and rehabilitation of persons and property affected by disasters."[28] However, EO-13 impermissibly and unconstitutionally undercuts these reopening efforts.

III. Judge Samaniego's Recent Order Unlawfully Conflicts With, And Is Therefore Preempted By, GA-32.

24. On October 29, 2020, Judge Samaniego issued EO-13 that purports to nullify GA-32 and undermine the State's reopening efforts.

25. At the outset of EO-13, Judge Samaniego notes that sections 418.1015(b) and 418.018 of the Government Code provide the bases for his authority to issue emergency orders.[29] Judge Samaniego acknowledges that, under section 418.1015, he

[25] *Id.* at 5.
[26] *Id.* at 5.
[27] *See id.* at 2.
[28] TEX. GOV'T CODE § 418.002(3).
[29] Ex. B at 1–2.

"serv[es] as the Governor's designated agent."[30] Judge Samaniego then proceeds to undercut Governor Abbott's response to this pandemic in a manner conflicting with, and expressly prohibited by, GA-32.

26. EO-13 purports to order El Paso County residents "to temporarily stay at home or at their place of residence."[31] GA-32 expressly rejected the idea of such a stay at home order.[32]

27. EO-13 imposes a curfew on El Paso County residents "from 10:00 PM to 5:00 AM."[33] Such a curfew is not contemplated by, and cannot be reconciled with, GA-32.[34]

28. EO-13 provides limited exceptions for people and businesses engaged in "essential services" or "essential activities,"[35] and closes all other businesses and facilities deemed "non-essential."[36] EO-13's list of essential services and activities cannot be reconciled with the services and activities authorized under GA-32.[37]

29. 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."[38] This conflicts with GA-32, which, for instance, allows gatherings of up to 10 people.[39]

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[30] *Id.* at 2.
[31] *Id.* at 5.
[32] *See* Ex. A at 4.
[33] Ex. B at 6.
[34] *See* Ex. A.
[35] Ex. B at 5–12.
[36] *Id.* at 6.
[37] *Compare* Ex. A at 2–5, *with* Ex. B at 5–12.
[38] Ex. B at 6.
[39] Ex. A at 4.

EXHIBIT E

30. EO-13 generally restricts all outdoor travel, except for "essential" travel.[40] GA-32 contains no such restriction.[41]

31. EO-13 allows individuals to engage in certain "essential retail."[42] But the services deemed "essential retail" cannot be squared with the services GA-32 allows.[43] And EO-13 limits "essential services" to only "one member of the household."[44] GA-32 does not.[45]

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

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

34. For example, GA-32 states that it supersedes more restrictive local emergency orders.[46] 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."[47]

35. Judge Samaniego has no authority under TDA to contradict or supersede Governor Abbott's executive orders.

36. In any event, Governor Abbott has suspended Judge Samaniego's powers under the TDA, including the power to issue orders.

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[40] Ex. B at 6.
[41] *See* Ex. A.
[42] Ex. B at 9.
[43] *See* Ex. A.
[44] Ex. B at 9.
[45] *See* Ex. A.
[46] Ex. A at 5.
[47] Ex. B at 16.

EXHIBIT E

37. It is a Class C misdemeanor, punishable by a fine of up to $500, if a person violates EO-13's provisions. This leaves El Paso County residents with little choice but to ignore GA-32 and comply with the stricter EO-13. TDA does not authorize local officials to nullify a Governor's emergency orders in such a manner.

PROCEDURAL BACKGROUND

38. Plaintiffs consist of 10 El Paso County-based businesses.[48] Defendants are El Paso County, a political subdivision of the State of Texas, and Judge Samaniego, the County Judge of El Paso County.[49]

39. Plaintiffs filed this action against Defendants on October 30, 2020 and sought to have EO-13 declared invalid and illegal as an invalid act on behalf of Judge Samaniego.[50]

40. The State intervened that same day and also asserted claims against Defendants.[51] As described in the plea, EO-13 is invalid and unconstitutional under TEX. CIV. PRAC. & REM. CODE § 37.006(b) and constitutes an *ultra vires* act. This is because: (1) GA-32 expressly preempts EO-13; (2) Governor Abbott suspended the only statutes that would have allowed Judge Samaniego to issue binding emergency orders; and (3) Judge Samaniego exceeded the scope of his authority as Governor Abbott's "designated agent" when he issued an emergency order expressly conflicting with GA-32.[52]

[48] Plaintiffs' Original Petition, ¶¶ 2–11.
[49] *Id.* at ¶¶ 12–13.
[50] *Id.* at ¶¶ 21–23.
[51] *See generally* State of Texas' Plea in Intervention ("State's Plea").
[52] *See id.* at ¶¶ 41–47.

41. The State's *ultra vires* and declaratory judgment claims are not barred by governmental immunity.[53]

ARGUMENT

42. "A temporary injunction's purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits."[54] The applicant must prove three elements to obtain a temporary injunction: (1) a cause of action against the adverse party; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.[55] These requirements are readily met here.

I. The State is Likely to Succeed on the Merits.

A. GA-32 Expressly Preempts EO-13.

43. A local "ordinance which conflicts or is inconsistent with state legislation is impermissible."[56] As shown above, GA-32 expressly preempts more restrictive local emergency orders, and EO-13 is far more restrictive than GA-32. Thus, the only open issue is whether GA-32 should be considered a "state law."

44. GA-32 carries the same preemptive effect as any other state law, as will be shown below.

45. TDA makes the Governor "responsible for meeting . . . the dangers *to the state*" presented by disasters.[57]

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[53] *See, e.g.*, *Hall v. McRaven*, 508 S.W.3d 232, 238 (Tex. 2017); *City of Dallas v. Albert*, 354 S.W.3d 368, 378 (Tex. 2011).
[54] *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).
[55] *Id.*
[56] *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 18–19 (Tex. 2016) (quotation marks omitted); *see also City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 593 (Tex. 2018); *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013).
[57] TEX. GOV'T CODE § 418.011(1) (emphasis added).

46. TDA authorizes the Governor to declare a "state of disaster" for the entire State.[58] Governor Abbott did that when he declared that COVID-19 "poses an imminent threat of disaster *for all counties in the State of Texas*."[59]

47. TDA gives the Governor the power to issue emergency orders that have "the force and effect of law."[60] Governor Abbott used this power to issue GA-32, which was effective "on a statewide basis."[61]

48. A statewide order, issued using statewide power, having a statewide effect, is a "state law."

49. GA-32 expressly preempts EO-13, rendering it invalid from the outset. Therefore, EO-13 should be enjoined.

B. Governor Abbott Suspended the Only Statutes that Would have Allowed Judge Samaniego to Issue Binding Emergency Orders.

50. Judge Samaniego identifies sections 418.1015(b) and 418.018 of the Government Code as the bases for his authority to issue local emergency orders.[62] Governor Abbott, using his TDA-granted suspension power,[63] suspended these two statutes 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]."[64] Judge Samaniego had no authority to issue the more restrictive EO-13—or any other order—under these circumstances.

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[58] *Compare id.* at § 418.014, *with id.* at § 418.018 (stating that local official can only declare "a *local* state of disaster") (emphasis added).
[59] Ex. A at1 (emphasis added).
[60] TEX. GOV'T CODE § 418.012.
[61] Ex. A at 2.
[62] Ex. B at 1–2.
[63] TEX. GOV'T CODE § 418.016(a).
[64] Ex. A at 5.

51. Defendants argue TDA "does not give the Governor the authority to suspend the power of the County Judge in times of emergency."[65] Section 418.016(a) of TDA authorizes Governor Abbott's suspension power. This statute reads:

> The governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster.[66]

52. Defendants claim sections 418.1015(b) and 418.018 are not "regulatory statute[s] that prescribe[] the conduct of state business . . . ."[67] They do not argue the term "regulatory" imposes any meaningful limits here.[68] Thus, the focus is on whether sections 418.1015(b) and 418.018 "prescribe[] the conduct of state business or the orders of rules of a state agency."[69]

53. Indeed, this analysis *must* focus on TDA. Texas counties, as subdivisions of the State, have only those powers specifically conferred on them by statute or constitution.[70] There is no constitutional basis for any powers Defendants assert here, leaving them with only what was granted under the TDA.

54. TDA makes *all* levels of an emergency response matters of "state business." A look at how TDA distributes power to local officials, and specifically at Subchapter E of TDA,[71] confirms this point.

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[65] Defendants' Answer and Plea to the Jurisdiction to Plaintiffs' Original Petition ("Defendants' Plea") at 6–7.
[66] TEX. GOV'T CODE § 418.016(a).
[67] Defendants' Plea at 6–7.
[68] *See id.*
[69] *See* TEX. GOV'T CODE § 418.016(a).
[70] *See*, Tex. Const. art. IX, § 1; *Guynes v. Galveston County*, 861 S.W.2d 861, 863 (Tex. 1993); *Avery v. Midland County*, 406 S.W.2d 422, 426 (Tex. 1966), *rev'd on other grounds*, 390 U.S. 474 (1968).
[71] TEX. GOV'T CODE § 418.101 *et seq.*

55. Section 418.1015 is the second statute listed in Subchapter E. This statute governs "emergency management directors." Per section 418.1015(a), the designated "emergency management directors" are: (1) the "presiding officer" of an incorporated city; (2) the "presiding officer" of a county; and (3) the "chief administrative officer" ("CAO") of a joint board.

56. Section 418.1015(b) states that an emergency management director (1) "serves as the governor's designated agent in the administration and supervision of duties under this chapter" and (2) "may exercise the powers granted to the governor under this chapter on an appropriate local scale."[72]

57. A mayor is a city's presiding officer,[73] and a county judge is a county's presiding officer.[74] TDA gives mayors, county judges, and joint board CAOs derivative gubernatorial emergency powers. And when these local officials exercise such powers, they do so only as the Governor's "designated agent." This is the plain reading of section 418.1015. It is also supported by TDA as a whole, which reflects the Legislature's overall intent to make the Governor the leader of the State's emergency response.[75]

58. Next is section 418.108 (titled "Declaration of Local Disaster"), which is listed near the end of Subchapter E.

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[72] *Id.* at § 418.1015(b).
[73] TEX. LOC. GOV'T CODE § 22.037.
[74] *See, e.g.*, *County judge*, 36 TEX. PRAC., COUNTY AND SPECIAL DISTRICT LAW § 22.5 (2d ed.) ("The county judge is considered by many the highest ranking county official."); Ex. B (wherein County Judge Samaniego effectively acknowledges he is El Paso County's presiding officer).
[75] *See id.* at §§ 418.011–.026.

59. Defendants contend that section 418.108 gives county judges and mayors independent emergency powers. They are mistaken.

60. Section 418.108 distinguishes between, and resolves conflicts among, emergency management directors.[76] Section 418.108 does not use the catchall term "emergency management directors," instead referring to them by their offices: mayors, county judges, and CAOs. True, section 418.1015 refers to mayors and city judges as city and county "presiding officers." But this term is synonymous with "mayor" and "county judge," as explained above.

61. After resolving a conflict about which emergency management director has exclusive authority over an airport (the joint board CAO does),[77] section 418.108(f)–(g) then states:

> (f) The county judge or the mayor of a municipality may order the evacuation of all or part of the population from a stricken or threatened area under the jurisdiction and authority of the county judge or mayor if the county judge or mayor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.
>
> (g) 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.[78]

62. Defendants read these provisions as an independent grant of local emergency power. But that interpretation makes these provisions superfluous.

[76] *See id.* at § 418.108(e)–(g).
[77] *See id.* at § 418.108(e).
[78] *Id.* at § 418.108(f)–(g).

Mayors and county judges already have these powers under section 418.1015(b).[79] It would be meaningless to give the same officials the same powers a second time.

63. The only plausible reading of section 418.018(f)–(g) is that it distinguishes which executive management directors can use the Governor's power to restrict movement. Under these sections, mayors, and county judges can derivatively use this power. However, the CAO of a joint board, which is referenced in section 418.018(e) but not in section 418.018(f)–(g), cannot.

64. The powers listed in section 418.018(f)–(g) mirror the "movement" emergency powers granted to the Governor.[80] That only makes sense. *All* local emergency authority is derived from the Governor's emergency powers, as established in section 418.1015(b).

65. The next subsection (section 418.018(h)) further undermines Defendants' proposed interpretation. This subsection states that, when a county judge's and mayor's "jurisdiction and authority" conflict, "the decision of the county judge prevails."[81] This subsection does not address conflicts between a local official's and a Governor's use of emergency powers. It does not have to because section 418.1015(b) resolves the issue by making local officials "the governor's designated agent[s]" whenever they exercise their derivative emergency powers. And it is well settled that an agent must "act on the principal's behalf and [is] subject to the principal's control."[82]

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[79] *See also id.* at § 418.018.
[80] *Compare id.* at § 418.108(g)–(f), *with* § 418.018.
[81] *Id.* at § 418.108(h).
[82] RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006).

66. Defendants' proposed interpretation would also lead to absurd results.

67. Under Defendants' proposal, mayors and county judges would have two "hats." While wearing the hat of a "mayor" or "county judge" under section 418.018, these officials would have emergency powers independent of the Governor's powers. But if they changed their hat to an "emergency management director" and exercised the same powers, these local officials would become "the governor's designated agent[s]" and thus would be subject to his or her control.[83]

68. To find for Defendants here, this Court would also need to believe that the Legislature intentionally made the Governor the leader of the State's emergency response,[84] while simultaneously creating a loophole leaving mayors and county judges free to undermine the State's emergency response at their whim.

69. The Court would then need to ignore common sense and TDA at large and conclude that, somehow, laws governing the State's response to a disaster do not address matters of "state business."[85]

70. Governor Abbott lawfully suspended sections 418.1015(b) and 418.018. Under the circumstances, Judge Samaniego had no legal authority to issue EO-13, which makes his order invalid, and his conduct *ultra vires*.

[83] TEX. GOV'T CODE § 418.1015(b).
[84] *See id.* at §§ 418.011–.026.
[85] *See* TEX. GOV'T CODE § 418.016(a).

C. Judge Samaniego Exceeded the Scope of His Authority as Governor Abbott's "Designated Agent" when He Issued an Emergency Order Expressly Conflicting with GA-32.

71. As discussed above, Judge Samaniego was using derived gubernatorial powers and acting as Governor Abbott's agent when he issued EO-13. Judge Samaniego could not lawfully issue an order expressly conflicting with GA-32. Thus, Judge Samaniego exceeded the scope of his authority, making EO-13 unlawful.

II. The State will be Irreparably Injured Absent an Injunction.

72. The State's injuries are irreparable. The Texas Supreme Court recently held as much in *State v. Hollins*.[86]

73. There, the Court explained that a century's worth of precedent establishes "the State's 'justiciable interest in its sovereign capacity in the maintenance and operation of its municipal corporation in accordance with law.'"[87] The Court noted that an *ultra vires* suit is a necessary tool to reassert the State's control over local officials who are misapplying or defying State laws.[88] The Court reasoned: "[This] tool would be useless . . . if the State were required to demonstrate additional, particularized harm arising from a local official's specific unauthorized actions."[89]

74. The Court continued that "[t]he [State] would be impotent to enforce its own laws if it could not temporarily enjoin those breaking them pending trial."[90] The

[86] No. 20-0729, 2020 WL 5919729, at *7 (Tex. Oct. 7, 2020).
[87] *Id.* at *6 (quoting *Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926)).
[88] *Id.*
[89] *Id.*
[90] *Id.* at *7.

Court found that, "[w]hen the State files suit to enjoin *ultra vires* action by a local official, a showing of likely success on the merits is sufficient to satisfy the irreparable-injury requirement for a temporary injunction."[91]

75. Per *Hollins*, the irreparable injury requirement favors the State.[92]

III. A Temporary Injunction is Necessary to Preserve the Status Quo.

76. This factor also favors the State. "The status quo is the last actual, peaceable, noncontested status which preceded the pending controversy."[93] Here, that would be the parties' status before Judge Samaniego's EO-13.

CONCLUSION

77. As shown above, all three temporary injunction factors are strongly in the State's favor.

78. Thus, the State asks this Court to grant this motion and order Defendants to, during the pendency of this suit: (1) stop, or order stopped, all enforcement efforts of EO-13; (2) rescind EO-13; and (3) refrain from issuing any new emergency orders more restrictive than, or conflicting with, GA-32.

79. The State respectfully requests that it be heard regarding this motion within 24 hours of its filing because of the ongoing irreparable injury and the highly time-sensitive circumstances.

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[91] *Id.*

[92] *See* State's Plea at ¶¶ 38–47 (listing additional ways Defendants' challenged conduct has irreparably injured the State).

[93] *Sharma v. Vinmar Intern., Ltd.*, 231 S.W.3d 405, 419 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Respectfully submitted.

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ATTORNEYS FOR INTERVENOR-PLAINTIFF STATE OF TEXAS

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 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.

/s/ Todd Dickerson
TODD DICKERSON
Assistant Attorney General

EXHIBIT E

Filed 11/6/2020 2:28 PM
Norma Favela Barceleau
District Clerk
El Paso County
2020DCV3515

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS
34TH JUDICIAL DISTRICT

PIZZA PROPERTIES, INC., M&S GROUP, INC., d/b/a WING DADDY'S, RUN BULL RUN, LLC d/b/a TORO BURGER BAR, CHARCOALER, LLC, TRIPLE A RESTAURANTS, INC., CC RESTAURANT LP, FD MONTANA LLC, WT CHOPHOUSE, LLC, VERLANDER ENTERPRISES, LLC, and BAKERY VENTURES I, LTD.,

Plaintiffs,

Cause No. 2020DCV3515

STATE OF TEXAS

Intervenor-Plaintiff's,

VS

EL PASO COUNTY, TEXAS, AND RICARDO SAMANIEGO, IN HIS OFFICIAL CAPACITY AS COUNTY JUDGE, EL PASO COUNTY.TEXAS

DEFENDANTS,

ORDER

THE PLAINTIFFS' AND INTERVENOR-PLAINTIFF'S REQUEST FOR A TEMPORARY INJUNCTION IS DENIED.

SIGNED AND ENTERED THIS 6TH DAY OF NOVEMBER, 2020.

William E. Moody
JUDGE WILLIAM E. MOODY

EXHIBIT F

EXHIBIT F

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

STATE OF TEXAS, PIZZA PROPERTIES, INC., M&S GROUP, INC., d/b/a WING DADDY'S, RUN BULL RUN, LLC d/b/a TORO BURGER BAR, CHARCOALER, LLC, TRIPLE A RESTAURANTS, INC., CC RESTAURANT LP, FD MONTANA LLC, WT CHOPHOUSE, LLC, VERLANDER ENTERPRISES, LLC, and BAKERY VENTURES I, LTD.,	§	No. 08-20-00226-CV
	§	On Appeal from the
	§	34th District Court
	§	El Paso County, Texas
	§	Cause No. 2020DCV3515
Appellants,		
V.	§	
EL PASO COUNTY, TEXAS and RICARDO A. SAMANIEGO, IN HIS OFFICIAL CAPACITY AS COUNTY JUDGE, EL PASO COUNTY, TEXAS,	§	
Appellants.	§	

C O R R E C T E D O P I N I O N

On March 13, 2020, Texas Governor Greg Abbott issued a proclamation under the Texas Disaster Act of 1975 (the Disaster Act)[1] certifying that "COVID-19 poses an imminent threat of

[1] *See generally* TEX.GOV'T CODE ANN. ch. 418.

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disaster" in all 254 Texas counties; he has renewed that declaration each month since.[2] Likely no citizen of this state has escaped the impact of the virus, either from its health effects, economic impact, or the disruption of society. And since March, the Governor has issued twenty-five emergency orders that pertain to the novel coronavirus COVID-19 pandemic.[3] Those orders cover a broad range of issues, including data collection and reporting, hospital capacity, mitigation efforts, air transportation, jails, face coverings, and more recently, the safe re-opening for segments of Texas society.[4] Some of the orders have set uniform state mandates, and some have allowed for local flexibility to suit local conditions.[5]

The impact of the virus has been particularly acute in El Paso County, a major transportation hub, sharing an international border with Mexico. In October 2020, El Paso County experienced a dramatic upswing in the COVID-19 pandemic. The capacity of El Paso County hospitals reached their limits, with some 51% of the census being classified as COVID-19 cases. Area Intensive Care Units exceeded capacity, and hospitals are now forced to establish temporary alternate care sites and airlift patients to other cities. Despite efforts to encourage voluntary compliance, warnings, and enforcement, El Paso County continues to experience a surge of new cases. As of the time of this opinion, El Paso County has routinely experienced a thousand or more new cases per day. And many families have sadly lost loved ones.

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[2] The Governor of the State of Tex., Proclamation No. 41-3720, 45 Tex. Reg. 2087, 2095 (2020).

[3] EXECUTIVE ORDERS BY GOVERNOR GREG ABBOTT, https://lrl.texas.gov/legeLeaders/governors/displayDocs.cfm?govdoctypeID=5&governorID=45 (last visited Nov. 11, 2020) (linking to GA orders GA-01 to GA-32, with GA-18 to GA-32 addressing COVID-19 disaster).

[4] *Id.*

[5] For instance, GA-29 contains a mandate for face coverings, but allows for counties to be exempted if they have met certain criteria and the local county judge has affirmatively opted out of the requirement. EXECUTIVE ORDER GA-29, found at https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-29.pdf.

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In the face of this upswing in cases, the strain on the medical system, and the rising mortality numbers, local leaders responded. On October 7, 2020, El Paso County Judge Ricardo Samaniego requested that Governor Abbott exempt El Paso County from an anticipated further opening of businesses and bars. Governor Abbott's order, GA-32, also dated October 7, 2020, allowed bars to open with occupancy limits, but did so only if the local county judge filed a requisite form with the Texas Alcohol and Beverage Commission. On October 22, 2020, County Judge Samaniego notified Governor Abbott of the surge of COVID-19 cases and the strain on hospital resources. Our record shows that the State of Texas has surged emergency relief, including personnel, testing, and equipment to the area.

The dispute here arises from County Judge Samaniego enacting County Emergency Order No. 13 (CE-13 or the Order). The Order, effective as of Thursday, October 29, 2020, at 11:59 p.m., was set to expire on Wednesday, November 11, 2020 at 11:59 p.m. *See* ORDER NO. 13, https://www.epcounty.com/documents/Order-No-13.pdf (last visited Nov. 12, 2020). We take judicial notice that County Judge Samaniego extended the Order to December 1, 2020.[6] CE-13 applies to all incorporated and unincorporated areas of El Paso County.

[6] *See* ORDER NO. 14, http:/epcounty.com/documents/Order-No-14.pdf (last visited Nov. 12, 2020). The extension is titled as Order No.14. Both orders contain a findings section that explains the judge's rationale, followed by sections one through six that contain the core prohibitions that give rise to this dispute (a stay at home order, a cease operation for "non-essential businesses," a prohibited activities section, and a travel restriction). The balance of the orders contains definitional sections and provisions related to posting, enforcement, and application. County Emergency Order 14 contains updated data and additional recitations in its findings section. The core prohibitions in County Emergency Order 13 and 14 are identical with one exception. The newest order contains a stair-step formula wherein affected businesses might resume limited operation based on defined hospital data. Because this new provision still materially differs from provisions of the Governor's Order, the change would not affect the core dispute raised in this appeal. We view it as immaterial to our resolution of the case, and we treat County Emergency Order 13 and 14 as the functional equivalent of each other for the purposes of this order. We agree with the parties' assessment that because the controversy is capable of repetition but evading review during the ongoing pandemic, the justiciable controversy remains and was not mooted by the expiration of Order 13 and later issuance of Order 14. *See Matthews ex rel. M.M. v. Kountze Indep. Sch. Dist*., 484 S.W.3d 416, 418 (Tex. 2016) (explaining that cessation of challenged conduct does not deprive a court of the power to hear or determine claims for prospective relief; otherwise, this would defeat the public interest in having the legality of the challenged conduct settled). We stayed enforcement of the substantive provisions of CE-13 and CE-14 by granting Appellants' Emergency Motion for Relief under TEX.R.APP.P. 29.3 on November 12, 2020.

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CE-13 includes several provisions relevant here. Section 1 requires all individuals living within El Paso County to temporarily stay at home or at their place of residence. Section 3 of the Order includes a curfew on all persons from 10 p.m. to 5 a.m. Section 5 prohibits "[a]ll public or private gatherings **of any number of people** occurring outside a single household or living unit." (emphasis original). Section 5 also requires nursing homes, retirement, and long-term care facilities to prohibit non-essential visitors from visiting their facilities unless to provide critical assistance.

Specific sections exempt from these restrictions, however, persons performing "Essential Activities" or who work in an "Essential Business," "Essential Governmental Function," or "Critical Infrastructure," all as defined in the Order. Dovetailing with these exemptions, Section 4 of CE-13 requires all businesses that are not defined as essential businesses to cease activities at any facility located in the County, save and except those to preserve the business premises or inventory, or facilitate work-from-home arrangements. Essential businesses include healthcare operations, food service providers (including grocery stores, warehouse stores, "big box" stores, and liquor stores), laundromats, automobile dealerships, hardware stores, and transportation services. But others, such as barber shops, nail salons, gyms, and massage therapists are not deemed essential under the Order.[7] When patronizing an essential business, only one person per family unit may do so, unless an additional person is needed as a caretaker.

[7] Apart from these food service and transportation categories, other categories of essential businesses exempted from the stay-at-home orders include: Providers of Basic Necessities to Economically Disadvantaged Populations, Essential Services Necessary to Maintain Essential Operations of Residences or Other Essential Businesses, Professional Services (such as legal or accounting services when necessary to assist in compliance with legally mandated activities, or businesses that supply other essential businesses with support or supplies needed to operate), Petroleum Refineries, Media, Financial Institutions, Mail and Delivery Services, Educational Institutions, Suppliers for Essential Businesses/Critical Infrastructure/Essential Government Functions, Food Delivery Services, Home-Based Care and Services, Residential Facilities and Shelters, Information Technology Services, Childcare Facilities, Animal Shelters and Other Businesses that Maintain Live Animals, Vector and Pest Control, and Funeral and Post-Mortem Services. The Order also exempted voting for the recent November 3rd election.

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Restaurants are also defined as an essential business, but the Order limits them to providing delivery or curbside take-out-service. In-premises dining is banned.

Violation of the Order is considered a Class C Misdemeanor punishable by a fine not to exceed $500.

Several of the provisions of the Order, however, directly conflict with an executive order issued by the Governor of the State of Texas. Governor Abbott's Executive Order GA-32, issued on October 7, 2020, allows businesses to operate at either 75% or 50% of indoor occupancy, depending on local hospitalization rates.[8] Several specific businesses that are restricted under CE-13 are expressly allowed to operate under GA-32 when they utilize six foot spacing between work stations (e.g., cosmetology salons, hair salons, barber shops, nail salons, massage establishments where licensed massage therapists practice, tanning salons, tattoo studios, piercing studios, and hair loss treatment and growth services). Under GA-32, restaurants can offer dine-in services, subject to occupancy limits. Under GA-32, people may visit nursing homes and like facilities, subject to Texas Health and Human Services Guidance. People may also gather without occupancy limits in a variety of places or activities, such as recreational sports programs. Outside of those specified gathering places or activities, persons are not to gather in "groups of larger than 10 and shall maintain six feet of social distancing from those not in their group." None of these activities would be allowed under CE-13.

The Governor's order contains a preemption clause countermanding any conflicting local government actions:

> This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a 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

[8] EXECUTIVE ORDER GA 32, https://gov.texas.gov/uploads/files/press/EO-GA-32_continued_response_to_COVID-19_IMAGE_10-07-2020.pdf (last visited Nov. 12, 2020).

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> executive order. . . . I hereby suspend [any relevant statute] to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order . . . .

The El Paso County Order, however, contains its own directive on how conflicts in the orders should be resolved. Under Section 16 of CE-13, "To the extent that there is a conflict between this Order and any executive order of the Governor, the strictest order shall prevail." Both GA-32 and CE-13 were issued pursuant to the Texas Disaster Act of 1975. TEX.GOV'T CODE ANN. ch. 418.

Appellants here are entities that operate area restaurants. They filed suit to enjoin enforcement of CE-13 on the basis that the County Judge acted *ultra vires* and without legal authority. The restaurants agree to fully abide by the Governor's occupancy directives in GA-32. Their sole dispute is whether they must comply with CE-13 or GA-32. The State of Texas intervened in the suit seeking to invalidate CE-13 in its entirety because it conflicts with GA-32. A trial court heard and denied the temporary injunction request. The restaurants and the State brought an immediate appeal. *See* TEX.CIV.PRAC.& REM.CODE ANN. § 51.014(a)(4) (allowing appeal from interlocutory order denying temporary injunction).

INJUNCTION STANDARD OF REVIEW

The movants for a temporary injunction "must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable imminent, and irreparable injury in the interim." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). We review a trial court's order denying a temporary injunction for an abuse of discretion. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). But the court has no "discretion" to incorrectly analyze or apply the law. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) ("[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion . . . .").

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DISCUSSION

The United States Supreme Court wrote more than a century ago that the authority to respond to public health crises must be "lodged somewhere." *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). The protection of the "health, safety, and comfort of citizens" rests with the legislature whose core police powers allow it "to regulate the use of property and the carrying on of business." *Houston & T.C. Ry. Co. v. City of Dallas*, 84 S.W. 648, 653 (Tex. 1905). The Disaster Act is one embodiment of that power. But through that Act, the Legislature empowered other state actors to meet disaster dangers, because "[t]here is little room for argument that the public interest requires that someone in government needs the authority to act in case of an imminent threat which may affect the safety of the lives and property of the populace." *Salmon v. Lamb*, 616 S.W.2d 296, 298 (Tex.Civ.App.--Houston [1st Dist.] 1981, no writ) (stating also that power is lodged with the Governor under the Disaster Act).

The single issue in this case is whether, under the Disaster Act, the Legislature delegated to the governor or a county judge the *final say* for matters covered by the conflicting provisions of GA-32 and CE-13. The disaster at issue is the COVID-19 pandemic. And to make this point clear--the issue before this Court is not the wisdom or efficacy of the actions taken by either the Governor or the County Judge. A court is ill-equipped, nor empowered to make such difficult policy decisions. Rather, the only question that we are capable of answering is, under the text of the statute, who is the proverbial captain of the ship to make the difficult decisions embodied in these competing orders. Or as Justice Guzman recently wrote respecting the Disaster Act's application to an election question in the era of COVID-19:

> [T]he Texas Constitution commits the balancing of competing interests and policy objectives to the executive and legislative branches of government. The judiciary's function is only to say what the law is, not what it should be. In our constitutional role, judges are not empowered to substitute our policy choices, preferences, or

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> rules for those of the coordinate branches. So long as the law as written complies with the federal and state constitutions, our duty is to enforce it.

Abbott v. The Anti-Defamation League Austin, No. 20-846, 2020 WL 6295076, at *8 (Tex. Oct. 27, 2020) (per curiam) (Guzman, J. concurring) (footnotes omitted).

The answer to our question lies in the text of the Disaster Act. Statutory construction is a legal question that we review *de novo*. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). Our primary focus in statutory interpretation is to give effect to legislative intent, considering the language of the statute, as well as its legislative history, the objective sought, and the consequences that would flow from alternate constructions. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000). We seek that intent "first and foremost" in the statutory text. *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 85 (Tex. 2006); *see also Bosque Disposal Sys., LLC v. Parker County Appraisal Dist.*, 555 S.W.3d 92, 94 (Tex. 2018) ("[T]he Legislature expresses its intent by the words it enacts and declares to be the law."); *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86 (Tex. 2017) ("The text is the alpha and the omega of the interpretive process."). We consider the words in context, and not in isolation. *In re Office of the Atty. Gen. of Texas*, 456 S.W.3d 153, 155 (Tex. 2015) (per curiam) ("Given the enormous power of context to transform the meaning of language, courts should resist rulings anchored in hyper-technical readings of isolated words or phrases."). We must presume that every word in a statute has been used for a purpose and that every word excluded was excluded for a purpose. *Emeritus Corp. v. Blanco*, 355 S.W.3d 270, 276 (Tex.App.--El Paso 2011, pet. denied).

A. Structure of the Disaster Act

The Disaster Act is divided into several subchapters, the first consisting of sixteen sections that define the powers and duties of the governor. "The governor is responsible for meeting . . . the dangers to the state and people presented by disasters . . . ." TEX.GOV'T CODE ANN. § 418.011.

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To do so, "the governor may issue executive orders, proclamations, and regulations and amend or rescind them. Executive orders, proclamations, and regulations have the force and effect of law." *Id*. at § 418.012. The governor may declare a state of disaster within a defined geographic area, but the governor must renew the declaration after thirty days. *Id*. at § 418.014 (a)(d)(2). The legislature retains the right to terminate that declaration at any time. *Id*. at § 418.014 (c). "During a state of disaster and the following recovery period, the governor is the commander in chief of state agencies, boards, and commissions having emergency responsibilities." *Id*. at § 418.015(c).

Additionally, the governor "may use all available resources of state government and of political subdivisions that are reasonably necessary to cope with a disaster." *Id*. at § 418.017. The governor is tasked with seeking federal aid for individuals, the state, and on behalf of local governmental units. *Id*. at §§ 418.021, 418.022. And central to our discussion here, the governor is explicitly given the power to "control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area." *Id*. at § 418.018(c).

Far less defined in the Disaster Act is the role of county judges. *Compare* TEX.GOV'T CODE ANN. §§ 418.011-.026 (detailing the governor's powers and responsibilities under the Act), *with id.* §§ 418.1015, 418.108 (detailing local officials' powers under the Act). Two provisions allocate authority to county judges. In one of those provisions, county judges are deemed to be the "emergency management director" for their county. As the emergency management director, the county judge can exercise the powers granted to the governor, but at the county level:

> (b) An emergency management director serves as the governor's designated agent in the administration and supervision of duties under this chapter. An emergency management director may exercise the powers granted to the governor under this chapter on an appropriate local scale.

Id. at § 418.1015.

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Second, the Disaster Act also contemplates that a county judge or mayor may have to issue a local disaster declaration. After doing so, a county judge or mayor has the express power to manage ingress, egress, and occupancy, mirroring the similar grant to the governor:

> 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.

Id. at § 418.108(g).

B. Reconciling the Governor's and County Judge's Powers

The State offers three reasons why under the text of the Disaster Act we must find that GA-32 prevails over CE-13. First, it argues the county judge is expressly referred to as the "agent" of the governor, and agents do not control principals. Instead, agency law dictates just the opposite. Second, it argues the Legislature delegated to the governor the authority to issue orders and decrees that have the "force of law." The county judge is not accorded similar authority, and consequently GA-13 has become state law, necessarily ousting any conflicting portions of CE-13. Finally, it argues the Disaster Act specifically gives the governor the authority to suspend regulatory statutes for the conduct of state business, and the governor's suspension of the statute that authorized the conflicting county edicts is an exercise of that right. We mostly agree with the State.

Section 418.1015(b) makes County Judge Samaniego the "emergency management director" for El Paso County. The statute allows County Judge Samaniego, as the emergency management director, to exercise the powers granted to the governor at the county level. But when the county judge does so, it is "as the governor's designated *agent* in the administration and supervision of duties under this chapter." *Id*. at § 418.1015 (emphasis added). And black letter law teaches that an agent is subject to the control of the principal, and not vice versa. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 590 (Tex. 2017), *quoting* RESTATEMENT (THIRD) OF AGENCY

§ 1.01 cmt. *f* (2006) ("Further, a 'principal's right of control presupposes that the principal retains the capacity throughout the relationship to assess the agent's performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent's authority.'"); *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013), *citing* 1 RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. *f* (2006) ("An essential element of agency is the principal's right to control the agent's actions."); RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."). We presume the Legislature "chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). Given the commonly understood meaning of "agent", the County cannot rely on Section 418.1015(b) as the source of authority for CE-13.

But the County contends it is not drawing its authority from Section 418.1015(b) or as County Judge Samaniego's role as the emergency management director for El Paso County. Instead, it hinges its claim on a claimed stand-alone authority given to county judges under Section 418.108. Under that section, the County argues a county judge is given the authority to declare a local disaster, and after doing so, the county judge "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." *Id*. at § 418.108(g). Whether the grant of authority under Section 418.108 is truly stand alone is debatable. Section 418.1015 describes the county judge as the governor's agent "in the administration and supervision of duties under this chapter" and "this chapter" would include Section 418.108.

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But even if Section 418.108 is stand alone, the argument does not help the County, because the governor is also accorded the exact same express power to control ingress, egress, and occupancy. *Id*. at § 418.018 (the governor is explicitly given the power to "control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area."). And the disaster at issue is not just a local disaster, but a state-wide disaster (albeit with disparate impacts in different parts of the state). The question in that context is who between the governor and a county judge, both of whom are delegated and here exercised the same express powers over ingress, egress, and occupancy, have the ultimate say. The answer to that question lies in Section 418.012 and Section 418.016 of the Act.

Section 418.012 is a delegation of power from the Legislature to the governor:

> Under this chapter, the governor may issue executive orders, proclamations, and regulations and amend or rescind them. Executive orders, proclamations, and regulations have the force and effect of law.

Id. at § 418.012. [9] GA-32 invokes this provision. In doing so, it makes various declarations regarding occupancy, the size of group meetings, activities that person may engage in, and the conduct of business. And as such, those declarations become state law. Moreover, state law will eclipse inconsistent local law. *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003) ("Though they are creatures of the Texas Constitution, counties and commissioners courts are subject to the Legislature's regulation."); *Childress County v. State*, 92 S.W.2d 1011, 1015 (Tex. 1936) ("The county is merely an arm of the state. It is a political subdivision thereof. In

[9] On appeal, the County does not challenge the ability of the legislature to delegate power to the governor under Section 418.012. "The Texas Legislature may delegate its powers to agencies established to carry out legislative purposes, as long as it establishes reasonable standards to guide the entity to which the powers are delegated. Requiring the legislature to include every detail and anticipate unforeseen circumstances would . . . defeat the purpose of delegating legislative authority." *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995) (internal quotations and citations omitted); *see also Williams v. State*, 176 S.W.2d 177, 183 (Tex.Crim.App. 1943) (discussing and collecting authority on the proper delegation of legislative powers).

view of the relationship of a county to the state, the state may use, and frequently does use, a county as its agent in the discharge of the State's functions and duties."); *El Paso County v. El Paso County Emergency Serv. Dist. No. 1*, 08-19-00105-CV, 2020 WL 91208, at *4 (Tex.App.--El Paso Jan. 8, 2020, no pet.) ("Although created by the Texas Constitution, [county commissioner's courts] are subject to directives enumerated by the legislature and may undertake only that authority explicitly granted by either the Texas constitution or the legislature."); *Orndorff v. State ex rel. McGill*, 108 S.W.2d 206, 210 (Tex.Civ.App.--El Paso 1937, writ ref'd) ("Counties and their commissioners' courts are, therefore, not only the creatures of the State Constitution, but they are under the continuous control and domination, within constitutional bounds, of the State Legislature.").

And how could it be otherwise? If the disaster *de jure* was a hurricane on the gulf coast, there would have to be a tie-breaker if the governor intended for people to evacuate in one direction but a local county judge thought it better to send people in the exact opposite direction. Pick whatever type of disaster you might--from toxic chemical releases, earthquakes, oil pipelines leaks, to pandemics--and there could be good faith differences of opinion on the proper response. Because there must be a final decision-maker, the Legislature inserted a tie breaker and gave it to the governor in that his or her declarations under Section 418.012 have the force of law. El Paso County can point to no similar power accorded to county judges. And while it is not for us to judge the wisdom of the Legislature's choice, the idea of one captain of the ship has intuitive appeal. Did the Legislature really intend for the chaos of a system that allows for 254 different county responses to a statewide disaster? It certainly allowed county judges to lead local disasters, but that is not what Texas is facing.

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Nor does anything in the text of the Disaster Act suggest that a county judge's grant of authority over ingress, egress, or occupancy in a local disaster overrides the governor's identical authority for a statewide declared disaster. The County and amicus's responses to the contrary are unavailing. The County focuses on Section 418.108(g), which authorizes either the county judge or the mayor of a city to declare a *local* emergency, and to the extent there is a conflict in their decisions, the county judge prevails. TEX.GOV'T CODE ANN. § 418.108(g), (h). The County argues the absence of a similar provision expressly referencing the governor and county judge implies there is no hierarchy between the two. But we could just as easily assume that because Section 418.108(h) gives a county judge conflict power over a mayor, but not the governor, the Legislature never intended a county judge to supersede gubernatorial decrees. And Texas is faced with a statewide disaster, not simply a local one. Amici Travis and Fort Bend County suggest that because the county judge's grant of power over ingress, egress, and occupancy is more recent, and more specific, we should use canons of statutory construction favoring those type of provisions over the original, broader provisions. But we resort to those kinds of canons of construction only where the text of a statute is unclear. *Greater Houston P'ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015). And the express statement that the declarations of the governor have the force of law is clear and unambiguous.[10]

So not only are the various detailed provisions of GA-32 effectively provisions of state law, but so too is its mandate that it prevails over conflicting local declarations to the contrary. The County suggests that GA-32 and CE-13 do not conflict because a court could simply enforce

[10] That clarity in Section 418.012 also answers the County's reliance on language deleted from the draft bill as the Disaster Act wound its ways through the legislative approval process. "[R]ejection of language [from draft bills] is not a statement about legislative purpose or the meaning of the statute." *Robinson v. Budget Rent-A-Car Sys., Inc.*, 51 S.W.3d 425, 429 (Tex. App.--Houston [1st Dist.] 2001, pet. denied) (explaining multiple reasons why language might be deleted from a draft bill).

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the more stringent guideline. But to do so would ignore that portion of Governor Abbott's order that states, "This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster[.]" The County Judge apparently understood that when he made a request for the Governor to modify GA-32. Moreover, there are provisions in the orders that so directly conflict that to enforce one, negates the other. For instance, GA-32 allows visitors to nursing homes and long-care facilities (subject to guidelines) while CE-13 disallows all but visitors who provide critical assistance. GA-32 states that restaurants "may offer dine-in services" (subject to variable occupancy limits) while CE-13 says they cannot. GA-32 allows gatherings of no more than ten persons while CE-13 allows no gatherings. We conclude the nature of the Governor's executive order as having the force of law means its provisions control.

C. The Governor's Authority to Suspend Provisions

Under the Disaster Act, a governor is also given the explicit power to "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster." TEX.GOV'T CODE ANN. § 418.016(a). The Governor invoked that power to invalidate Section 418.108 to the extent any local leader relies on that statute to enact conflicting rules. The County responds that Section 418.108 is not a "regulatory statute" and CE-13 does not address "state business." We find neither contention persuasive.

The Disaster Act does not define the terms "regulatory statute" or "state business." Generally, when a statute uses an undefined word, a court should apply the word's common, ordinary meaning. *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014). To determine its common, ordinary meaning, courts may look to a wide variety of sources, including

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dictionary definitions, treatises and commentaries, prior constructions of the word in other contexts, and the use and definitions of the word in other statutes and ordinances. *Id.*

Common dictionary meanings for the term "regulate" include "to control or supervise by means of rules and regulations." *See Regulate*, OXFORD DICTIONARIES (online ed.), http://www.oxforddictionaries. com/us/definition/american_english/regulate?q=regulate; *see also Regulate*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1913 (2002) (defining "regulate" as "to govern or direct according to rule"); *Regulate*, BLACK'S LAW DICTIONARY, (10th ed.) ("To control (an activity or process) esp. through the implantation of rules."). Section 418.108 does that by authorizing the county judge to order evacuations and "control the movement of persons and the occupancy of premises." Certainly CE-13, promulgated pursuant to 418.108, fits the classic definition of regulation. It tells restaurants how they may conduct their business, tells persons how they may congregate, and tells some businesses that they cannot engage in commerce at all.

The County also narrowly cabins the meaning of the phrase "state business" by effectively defining the term to mean only the activities of state agencies and actors. But had the Legislature meant to so limit the term, it would have said "official state business," as it has done in many other statutes. *Cf. e.g.* TEX.GOV'T CODE ANN. § 660.009 (use of term "official state business" for authorized travel reimbursement); TEX.GOV'T CODE ANN. § 660.043 (use of phrased "official state business" to determine when vehicle mileage can be reimbursed); *see also* TEX.GOV'T CODE ANN. § 1232.003 (tying phrase "state agency" to "state business" to define when buildings and equipment are subject to public financing). In Section 418.016, the Legislature chose not to limit the term "state business" to only official state business, and we thus give it a broader meaning. *See id.* § 418.016.

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And to be sure, many of the businesses that CE-13 prohibits are industries closely regulated by the State of Texas, both as to their licensure and method of operation. *See, e.g*. TEX.OCC. CODE ANN. § 1601.251 (state license required for barbers); TEX.OCC. CODE ANN. § 1601.301 (permit required for operating barbershop); TEX.OCC. CODE ANN. § 1601.552 (reference to state commission's sanitation rules); TEX.OCC.CODE ANN. § 1602.251 (license required to practice cosmetology); TEX.OCC. CODE ANN. § 1602.301 (license required to operated beauty shop and obligation to follow commission rules); TEX.OCC. CODE ANN. § 455.151 (license required to practice massage therapy); TEX.OCC. CODE ANN. § 455.054 (state standards for sanitary and hygienic conditions for massage therapy). Restaurants are also subject to state regulation, particularly if they sell alcoholic beverages. *See, e.g.* TEX.ALCO.BEV.CODE ANN. § 61.01 (obligation to obtain licenses and permits under the Alcoholic beverages code); TEX.HEALTH & SAFETY CODE ANN. § 437.003 (counties may require permits for food services to "enforce state law and rules adopted under state law").

Eschewing a hyper-technical definition of the term "state business," we conclude it would encompass the activities inherent in many of the industries and professions directly affected by the CE-13. The County dis-employs several state licensed professions and effectively deems that the regulations the state has in place for these professions are inadequate to guard against the spread of COVID-19. That intrusion into the state's sphere of influence makes CE-13 a regulation of state business. As such, the Legislature gave the governor the express authority to suspend Section 418.108, at least as it has been invoked here by the County.

Section 418.016(a) also requires that before the governor can suspend a regulatory statute, it must in some way "prevent, hinder, or delay necessary action in coping with a disaster." TEX.GOV'T CODE ANN. §418.016(a). GA-32 explicitly references "reopening Texas" as a part of

the Governor's planned response to this disaster. It necessarily recognizes that Texas must address the health of its citizens, and the health of its economy. As the Texas Supreme Court recently noted, the Governor under the Disaster Act "must necessarily balance a variety of competing considerations," which might include encouraging economic recovery and preserving constitutional rights. *Anti-Defamation League Austin*, 2020 WL 6295076, at *4. GA-32 is one means of achieving that balance. But CE-13 tips the balance differently by restricting economic activity (for some businesses) and by restricting associational opportunities of Texans. It also injects uncertainty into how people and businesses conduct their affairs, being subject to conflicting orders. The Governor was accordingly within his right to suspend Section 418.108 pursuant to Section 418.016.

D. Application

Returning to the injunction standard, the State and private litigants here need to show a probable right to the relief sought, and a probable imminent, irreparable injury. *Butnaru*, 84 S.W.3d at 204. A probable right of relief is established here if the County issued an order that conflicts with the Governor's order, given that we conclude the Governor's order would prevail. And it is clear that CE-13 order conflicts in several respects.

Section 1 of CE-13 imposes a stay at home order for all residents except for what the County has deemed essential business, essential travel, essential governmental functions, or critical infrastructure. But under GA-32, persons could additionally leave their residence to participate in several specified activities spelled out in Section 1(a)-(i) and outdoor activities in paragraph 3(a)-(e). GA-32 would also necessarily permit travel to patronize the businesses that CE-13 closes down. GA-32 says restaurants whose gross receipts are fifty percent or less from alcohol sales "may offer dine-in services" while CE-13 flatly disallows in-restaurant dining.

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Section 3 of CE-13 imposes a stay at home curfew from 10:00 p.m. to 5:00 a.m., except for essential travel, essential business, government service, or critical infrastructure. To the extent the curfew restricts travel to, or participation in activities or business that GA-32 allows, it conflicts with GA-32. While GA-32 does not specifically prevent curfews, as drafted, the curfew is overbroad. Section 4 of CE-13 prohibits businesses from operating if they are deemed by the County to be non-essential; many of those prohibited businesses are expressly allowed to operate under GA-32. Section 5 of CE-13 prohibits public or private gatherings of any number of persons. But GA-32 allows gatherings for designated activities, as with sporting events, and up to ten persons for other reasons. Section 6 of CE-13 restricts all travel except for essential travel, essential business, government service, or critical infrastructure. To the extent the curfew restricts travel or participation that GA-32 allows, it also conflicts with GA-32. The State has shown a probable right to relief.

The State and the restaurants must also show irreparable injury. The State relies on the Texas Supreme Court's recent decision in *State v. Hollins*, No. 20-0729, 2020 WL 5919729 (Tex. Oct. 7, 2020) (per curiam). There, the Texas Supreme Court held that a Harris County election official who exceeded his authority in soliciting mail-at-home ballots acted *ultra vires*, and importantly here, the State had an intrinsic right to enforce state law. *Id*. at *6. The court concluded:

> As a result of sovereign immunity, the only remedies available in an *ultra vires* action are injunctive and declaratory relief. The sovereign would be impotent to "enforce its own laws" if it could not temporarily enjoin those breaking them pending trial. When the State files suit to enjoin *ultra vires* action by a local official, a showing of likely success on the merits is sufficient to satisfy the irreparable-injury requirement for a temporary injunction.

Id. at *6. The *Hollins* court expressly disagreed with the lower court's view that the State had not established irreparable injury. Despite the dissenting opinion's effort to distinguish *Hollins*, we

view the case as controlling, and not limited only to election contests. Everything said by the court in *Hollins* about irreparable injury would equally apply here, and perhaps more so. The State is not only safeguarding its theoretical interests in the hierarchy of a governmental structure, but it also vindicates the interests of the innumerable small business owners and their employees (the barbers, hair stylists, cosmetologists, licensed massage therapists, booksellers, and other small shop owners) who have been put out of work by the County's order. True, restaurants can at least try and keep their business afloat with take-out and curbside delivery. But lost in this debate are the several professions completely barred from earning any living at all. The County's order works an irreparable injury.

Lest we be mis-read, our analysis does not mean every order of a county judge respecting the pandemic must be stricken, or even that a county is ousted from assisting in responding to the disaster. To state the obvious, the County plays a central role in enforcing the Governor's executive orders that already restricts group gatherings, restricts business activities, and imposes health and safety guidelines on those businesses that are allowed to operate. The Governor's order only pre-empts conflicting local orders. GA-32 supersedes any conflicting order by a local official "to the extent that such a local order restricts services allowed by this executive order[.]" And it suspends Section 418.108 "to the extent necessary to ensure local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with [GA-32]." And here, there are inconsistent and conflicting provisions. Nonetheless, our decision here would not bar the County taking actions that are not in conflict with GA-32.

We therefore sustain the State's issue on appeal and hold that the trial court erred in not issuing a temporary injunction that would enjoin enforcement of CE-13. On remand, we instruct the trial court to enter a temporary injunction barring enforcement of CE-13 (and its counterpart

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provisions in CE-14), but allow for the possibilities that parties might identify some stand-alone restrictions in CE-13 that would not be inconsistent with GA-32. None of the briefing before us has attempted to tease out any discrete restriction which might compliment or otherwise not conflict with GA-32, and it would be inappropriate for us to attempt to do so here. We make clear, however, that we reject the County's paradigm that the Governor's order can set a ceiling for occupancy and the County can then set a floor, with the public required to abide by the more restrictive provision. If conduct is allowed under the Governor's order, that County cannot prohibit it. If activities are prohibited by the Governor's order, the County cannot allow them.

CONCLUSION

Just as a servant cannot have two masters, the public cannot have two sets of rules to live by, particularly in a pandemic and when those rules carry criminal penalties substantially impacting peoples' lives and livelihood. Much of the Disaster Act is premised on promoting cooperation between levels of government for the benefit of Texas citizens. The lack of a clear organizational chart with a defined leader and chain of command is antithetical to promoting cooperation. Now that this Court has done its job to define that organizational chart, we leave it to the political leaders of the State and this region, whose motives are all beyond reproach, to cooperatively lead us through this unparalleled disaster.

JEFF ALLEY, Chief Justice

November 13, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.
Rodriguez, J., dissenting

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COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

STATE OF TEXAS, PIZZA PROPERTIES, INC., M&S GROUP, INC., d/b/a WING DADDY'S, RUN BULL RUN, LLC d/b/a TORO BURGER BAR, CHARCOALER, LLC, TRIPLE A RESTAURANTS, INC., CC RESTAURANT LP, FD MONTANA LLC, WT CHOPHOUSE, LLC, VERLANDER ENTERPRISES, LLC, and BAKERY VENTURES I, LTD.,	§	No. 08-20-00226-CV
	§	On Appeal from the
	§	34th District Court
	§	El Paso County, Texas
	§	Cause No. 2020DCV3515
Appellants,		
V.	§	
EL PASO COUNTY, TEXAS and RICARDO A. SAMANIEGO, IN HIS OFFICIAL CAPACITY AS COUNTY JUDGE, EL PASO COUNTY, TEXAS,	§	
Appellants.	§	

CORRECTED DISSENT

The Attorney General and a group of local restaurants contend that during a disaster, if a local order from a county judge and an executive order from the Governor conflict, the Governor's order must control as a matter of natural order and common sense. But these are uncommon times, Texas is an uncommon state, and here in Texas, we are ruled by law.

The Governor does not rule Texas outright; he serves at the pleasure of the people, who

hold the true power in a democracy, and he exercises only those authorities granted to him by laws passed by the people through a democratic process. The limit of the Governor's power is not set by whether the Governor thinks it's common sense that he himself should exercise a power, nor is it set by the fact that the Restaurants in this lawsuit agree with him and echo his sentiments. The limit of the Governor's power is set by what the law in fact proscribes in the words of our constitution and the text of the Texas Disaster Act. As courts who must referee disputes about where the limits of lawful authority lie, we must be wary of creating authority that does not exist, particularly when a person asserts the power to unilaterally declare an emergency and then unwind democratically-enacted laws and countermand democratically-elected local officials in the name of crisis management.

In a flurry of fast-moving filings that have leapfrogged between the trial court, this Court, and the Texas Supreme Court, Appellants have urged us to endorse this sweeping idea of absolute gubernatorial control over all levers of government during the COVID-19 pandemic, and to do so quickly, since the dignity of the State has been offended, businesses are losing money, and El Paso County's intransigence in issuing an order that shuts the County down when the Governor has declared Texas is open undermines state supremacy and the Governor's uniform coronavirus economic recovery plan. To do anything other than immediately stop the County and bring them back in line with the Governor's will, Appellants contend, would, in their view, fly in the face of common sense.[1]

[1] The Attorney General wanted us to act so quickly, in fact, that after we agreed to his extraordinary request for an expedited appeal and promised him a decision resolving the central question regarding by Friday, he tried on Tuesday night to mandamus us into immediately granting him the relief that the trial court denied him, contending this Court acted unlawfully by giving the Governor only part of what he wanted, and not exactly what he wanted exactly when he wanted it. The Texas Supreme Court correctly recognized this Court, as part of a separate branch of government charged with judicial review and checking executive actions if needed, does not answer to the Attorney General when it comes to managing our own docket or exercising our discretionary emergency injunction powers, and the high court denied the Attorney General's request, finding our unprecedently fast scheduling arrangement to be reasonable under the circumstances. *See In re State*, No. 20-0903 (Tex. Nov. 11, 2020)(order denying emergency relief).

The County has resisted the Governor's order at every turn and questioned his authority to dictate county-level decision-making, arguing the Texas Disaster Act gives various officials at various levels of government their respective spheres of influence, and that by using an emergency power to suspend laws, he has consolidated power over Texas' 254 counties and more than 12,000 cities. The Governor insists on imposing a one-size-fits-all coronavirus recovery plan across the State over the objections of local leaders, but he has crossed a legal line. The Governor is claiming authority that is not his, and used a power the Legislature gave him in an unlawful way that was never authorized or even contemplated.

We chose to defer a ruling on the Attorney General's initial request for emergency relief and instead issue an expedited decision on the merits not just to resolve everything in tandem, but to give the Court a chance to absorb the issues and take a closer look at the law. And the longer I contemplate the law, the more it becomes apparent the County's legal position is not nearly as audacious or outlandish as the Attorney General would have us believe. In each filing, the Attorney General supports his position by citing fragments from the Texas Disaster Act without context and directing the Court's attention to broad generalized provisions that do not directly or wholly answer the question before us.

In putting those fragments together, reading them in context, and taking the time to study how those fragments fit in with the detailed, lengthy, comprehensive continuity-of-government plan laid out in the Texas Disaster Act, what becomes clear is the Governor's authority over El Paso County is not clear at all. On the contrary, the Texas Disaster Act instructs the Governor to

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By doing so, the high court gave us the breathing room necessary to do our important work of serving as first-line reviewers of trial court decisions, which, in turn, helps the justices of the Texas Supreme Court by giving them a fully-developed record and an initial read on the situation, whether they agree with our ultimate outcome or not. *Cf. In re Salon a La Mode*, No. 20-0340, 2020 WL 2125844, at *2 (Tex. May 5, 2020)(applicants seeking relief from local emergency orders could not proceed immediately to the Texas Supreme Court; orderly process required them to first present an application to a district court and proceed to the Texas Supreme Court only as a court of last resort).

meet disasters and to make executive orders that have "*the force and effect of law*." [Emphasis added]. TEX.GOV'T CODE ANN. § 418.012. But the Legislature never gave the Governor the authority, in making executive orders, to directly override local elected officials during a disaster and veto their decisions, much less suspend their power.

The provision of the Texas Disaster Act the Governor relies on to suspend law during a declared disaster applies only when suspending a law is necessary to clear state-level regulatory hurdles for disaster recovery at state-level agencies, boards, or commissions. Even so, the Governor may only invoke that limited power if strict compliance with a procedural law setting the ordinary course of state business would impede the disaster response effort.

In my view, the Governor has taken a law that was meant to help him assist local authorities by sweeping away bureaucratic obstacles in Austin, and used it in reverse to treat local authorities as a bureaucratic obstacle to the coronavirus response plan he has chosen from Austin. This is truly extraordinary and completely flips the structure of the Texas Disaster Act on its head. The way the Attorney General interprets the law is not the way the law is written.

The major assumption underpinning the Appellants' case—namely, the Governor's order automatically trumps a local order because that is the natural order of things—makes common sense only if we ignore Texas' constitutional history and the plain text and structure of the Texas Disaster Act. We must not make decisions based on what we believe the law ought to be, but on what the text of the law in fact says. Because I strongly disagree with the Attorney General's read of the powers given to the Governor under the Texas Disaster Act, I must dissent.

DISCUSSION

To prevail on appeal and have this Court overturn the trial court's decision to deny a

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temporary injunction and impose a temporary injunction on appeal,[2] the Attorney General and the Restaurants must show (1) that they have a probable right to relief on the merits at trial and (2) that they would suffer irreparable harm if the County's order were allowed to stand. I do not believe that we have the authority to overrule the trial court's injunction decision in this appeal because the Attorney General's application for an injunction did not satisfy the first step of the temporary injunction test and show that the State would probably prevail at trial. In the alternative, I would find that the trial court's decision implicitly finding the equities weighed in favor of the County at the time of the injunction decision and fell within the zone of reasonable disagreement.

HISTORICAL AND CONSTITUTIONAL BACKGROUND

This is not the first time the issue of whether the Governor can countermand decisions made by local authorities has arisen in Texas history. On the contrary, concerns about the

[2] This appeal concerns the trial court's decision not to enjoin El Paso County Emergency Order No. 13, which by its own terms expired this past Wednesday at midnight. On November 12, 2020 at 12:00 a.m. MDT, a new order, El Paso County Emergency Order No. 14, took effect and was set to expire on Tuesday, December 1, 2020, at 12:00 a.m. MDT.

As I stated in my dissent to yesterday's order granting temporary relief, which I repeat again here, I believe we still have jurisdiction over the question of whether Emergency Order No. 13 violated Executive Order GA-32 because the declaratory judgment trial is still pending in the 34th District Court, and while the Emergency Order No. 13 has now expired, the controversy over the larger question of whether the Executive Order supersedes local orders is a controversy that was capable of repetition, yet evading review.

However, I do not believe we have jurisdiction to enjoin Emergency Order No. 14 at this time. Each trial court decision granting or denying a temporary injunction is a separately appealable event. *See* TEX.CIV.PRAC. & REM.CODE ANN. § 51.014(a)(4). When a temporary injunction order is appealed, the courts of appeals are limited to addressing the narrow question of whether the specific order that was appealed was valid at that moment in the litigation when it was rendered, and on interlocutory review, we must consider only the specific record relating to the specific order that is being appealed in making that determination. *Murphy v. McDaniel*, 20 S.W.3d 873, 877 (Tex.App.—Dallas 2000, no pet.); *see also Fuentes v. Union de Pasteurizadores de Juarez, S.A. de C.V.*, 527 S.W.3d 492, 502 (Tex.App.—El Paso 2017, no pet.)(refusing to consider brief attachments that detailed post-appeal trial court proceedings).

El Paso County Emergency Order No. 14 is a completely new order issued under vastly different circumstances than those Judge Moody considered at the hearing on November 4, 2020 that served as the basis of his injunction decision on November 6, 2020, regarding Emergency Order No. 13. Further, requests for temporary injunctions are usually presented to the trial court first, especially since the trial the State and the Restaurants are demanding is still pending. *In re Salon a La Mode*, No. 20-0340, 2020 WL 2125844, at *2 (Tex. May 5, 2020)(orderly process requires a litigant to first present an application for injunctive relief to a district court before proceeding to the appellate courts). The substantial differences in time, circumstances and the provisions of Emergency Order No. 14 from Emergency Order No. 13 mandate the Attorney General begin anew in the trial court.

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Governor's power over local officials were a pivotal reason why the 1876 Texas Constitution structured state executive power in a way that deviates substantially from the way executive power is structured in the federal constitution.

History teaches us that the libertarian-minded farmers and Grangers who framed Texas' current constitution did not believe in a unitary executive-type ideology that elevated the Governor above all others. Far from it. Unlike the federal constitution, which vests the executive power in the Presidency and makes the President the ultimate official responsible for overseeing a hierarchical federal administrative bureaucracy under a unitary executive theory,[3] Texas is the classic example of a plural executive setup, where executive power is not vested in a single person but is divided among six separately elected officials: the Governor, the Lieutenant Governor, the Secretary of State, the Comptroller of Public Accounts, the Commissioner of the General Land Office, and the Attorney General. *See* TEX.CONST. Art. IV, §§ 1 & 2.

This structural arrangement was not an accident, but rather a deliberate attempt to decentralize government power in response to the well-known gubernatorial abuses and scandals of the day. During the Reconstruction era in Texas, "the military removed the moderate Republican governor from office and handed the state government over to carpetbaggers and scalawags." *See* A. J. Thomas, Jr. & Ann Van Wynen Thomas, *The Texas Constitution of 1876*, 35 TEX.L.REV. 907, 912 (1957). "This government immediately swept out of office all local and state officials who were not of the radical wing of the Republican Party" and adopted a state constitution in 1869 that conformed with the political goals of the Radical Republicans. *Id*. Historians have described the Reconstruction regime in Texas as being "one of oppression, corruption, graft and blackmail"

[3] *See* Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV.L.REV. 1153, 1165 (1992)(describing the strong unitary executive constitutional theory that the Vesting Clause of Article II of the United States Constitution creates "a hierarchical, unified executive department under the direct control of the President").

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in which the Governor, by declaring martial law under sweeping powers granted to him by the Legislature, used police and militia forces "so often to enforce the arbitrary will of the governor that" the police force and the militia "became an emblem of despotic authority." *Id.* The Reconstruction Legislature "vested extraordinary powers in the governor[,]" including the "extension of the executive's appointing power to the governing bodies of the towns and cities," which was perceived as a "flagrant violation of the principle of local self-government[.]" *Id.* at 913.

Against this historical backdrop, conventioneers to the 1876 Constitutional Convention sought to limit the Governor's power as much as possible:

> The convention was determined to cut down on the governor's power to prevent a future renewal of executive despotic control over state or local administrations. It decentralized the executive authority by vesting power in other executive officers, most of whom were to be elected. It reduced the term of the governor from four years to two years; debarred the governor from holding any other office or commission, civil, military or corporate, while in office; and prohibited him from practicing any profession for profit while in office. It also reduced the salary of the governor and limited his powers by setting forth his duties in great detail.

35 TEX.L.REV. at 914.

We should bear these historical and constitutional considerations in mind as we interpret a comprehensive statutory scheme that sets out the powers and responsibilities wielded by various actors at various levels of state government in times of crisis while the machinery of civil government still remains functional.[4]

[4] The top-down, hierarchical, direct command authority the Attorney General asserts the Governor has appears to be closer to the authority the Governor would possibly exert as a military commander under a state of martial law. But the Governor's powers as exercised under the Act are different from those he may exercise inherently as the military commander-in-chief of Texas under martial law. The latter question has never been litigated.

"Marshal law [sic] can only exist and military power can only be exercised . . . when the civil arm of the government becomes powerless because of invasion, insurrection, or anarchy. Marshal law and military power over the citizen and his property are based upon and limited by necessity. Whenever this necessity ceases, such military power must end." *Rose Mfg. Co. v. W. Union Tel. Co.*, 251 S.W. 337, 339 (Tex.Civ.App.—Dallas 1923, writ ref'd).

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TEX. CONST. Art. I, § 28 checks the ability of the Governor to suspend laws, stating: "No power of suspending laws in this State shall be exercised except by the Legislature." As such, the Governor does not have the power to suspend laws under the Texas Constitution; that power was explicitly taken away from the Office of the Governor in 1876. Because the Governor does not possess the inherent constitutional authority to suspend laws, his power to suspend laws by decree can only exist as a matter of legislative grace under the terms and conditions set by the Texas Disaster Act. The statutory text of the Act as written sets the parameters of the Governor's power here, and the Governor's actions must comport with the conditions set on him by the Legislature. If they do not, he acts without any authority and his actions are *ultra vires* and without legal effect. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952)(Jackson, J., concurring)(when the President of the United States "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter").

OVERVIEW OF THE TEXAS DISASTER ACT AND PRINCIPLES OF STATUTORY CONSTRUCTION

The Texas Disaster Act of 1975 appears as Chapter 418 in the Texas Government Code.

The Texas Disaster Act does not limit the Governor's ability to declare martial law or rely on any inherent constitutional authority he may have. *See* TEX.GOV'T CODE ANN. § 418.003(6). However, because the civil arm of state government remains intact and operational currently, the Governor's authority remains limited by the Texas Disaster Act. As I explain below, the Act, by its text, does not create the military-style command hierarchy the Attorney General envisions.

I note that even in a hypothetical universe where the COVID-19 pandemic reaches a point where the civil arms of the government were to fail due to the death or illness of all civil authorities in an area, even then under martial law, the Governor's authority is not limitless. His actions must comply with the law, and his actions would still be subject to judicial review. *See Constantin v. Smith*, 57 F.2d 227, 239 (E.D. Tex. 1932)(holding under the Texas Constitution that even in emergencies, "courts may not be closed, or their processes interfered with by military orders" nor can they "be ousted by the agencies detailed to aid them" or "their functions be transferred to tribunals unknown to the Constitution").

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The Act is a comprehensive, detailed continuity-of-government framework that carefully allocates powers, duties, and responsibilities across various levels of state government and multiple agencies. One of the stated purposes of the Act includes "clarify[ing] and stengthen[ing] the roles of the governor, state agencies, the judicial branch of state government, and local government in prevention of, preparation for, response to, and recovery from disasters." TEX.GOV'T CODE ANN. § 418.002(4). As such, fidelity to the text is paramount.

Since the provisions of the Texas Disaster Act at issue in this appeal have never been interpreted—indeed, there has never been a need to interpret them because the Governor has never before tried to restrict the power of local leaders during a disaster in this way[5]—we must resort to the usual standards of statutory construction. We must not add words to the statute that are not there, and we must not ignore the words the Legislature has chosen, either, particularly in situations where we are being urged to read grants of authority from statutory silence. *See Newman v. Obersteller*, 960 S.W.2d 621 (Tex. 1997)(Abbott, J., dissenting)(the Legislature's omission of words from a statute is significant and "[i]t is not the province of this Court to expand" a limited statutory provision by making inferences of authority from silence, "no matter the policy rationale behind such an expansion").

PROBABLE RIGHT TO RELIEF

The Attorney General and the Restaurants contend they will probably succeed on the merits at trial because the Governor validly asserted control over local governments in three ways: (1) by issuing orders that directly control the acts of county judges and city mayors, who are the

[5] Both the State and the County submitted supplemental briefing to the trial court indicating that during the 1918 Spanish flu pandemic, the Governor of Texas did not issue a single executive order. The County also submitted a historical article showing various Texas cities handled the pandemic at the local level using many of the same techniques infectious disease specialists are encouraging us to use today until a COVID-19 vaccine or treatment can be found.

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Governor's "designated agents" during an emergency response under Section 418.1015(b); (2) by issuing statewide executive orders that preempt conflicting local emergency orders; and (3) by suspending statutes that would allow local officials the authority to issue local emergency orders.

However, none of these three scenarios provide the Governor with the authority to suspend certain fundamental disaster management powers granted to cities and counties.

The Power to Make Executive Orders with the Force of Law

Turning to the State's second point first, the Governor does, indeed, have the power to issue executive orders that have "the force and effect of law" during a declared disaster. *See* TEX. GOV'T CODE ANN. § 418.012. The Attorney General's argument inherently assumes this grant of power imbues the Governor's executive orders, which are not laws but executive decrees that have the force of law, with a higher footing than legislative acts undertaken by counties and cities, which also have the force of law, simply by virtue of the fact that the Governor is the Governor. I vehemently disagree.

There are three problems with this assumption from a textualist perspective.

First, although the Legislature provided the Governor with the ability to issue executive orders given the force and effect of law, it did not explicitly state in this provision that executive orders issued by the Governor preempt contrary laws issued by local entities. This is extremely significant. Laws conflict with one another frequently, but there is no legal principle that automatically elevates certain laws above others as a matter of course. Certain laws preempt other laws not because there is an inherent hierarchy in government that says a law passed by a higher part of government necessarily preempts a law passed by a lower part of government. Laws preempt other laws because constitutions and other foundational texts create conflict-of-law schemes that establish priority ranks among different types of valid laws.

For example, federal laws preempt conflicting state laws not because we have a notion that the federal government automatically trumps state government as a matter of mere hierarchy (after all they are two sovereigns alike in dignity), but because the text of the Supremacy Clause in Article VI of the United States Constitution explicitly makes federal law "the supreme law of the land." U.S. CONST. Art. VI. Likewise, laws passed by the Texas Legislature preempt ordinances passed by Texas home-rule municipalities, which have inherent authority to self-govern, not because the State trumps cities as a matter of inherent hierarchy, but because the Texas Constitution prohibits cities from using their inherent authority to pass ordinances that are inconsistent with the general laws enacted by the Texas Legislature. *See* TEX.CONST. Art. XI, § 5; *S. Crushed Concrete, L.L.C. v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013).

By contrast, here, there is nothing in the Texas Constitution giving executive orders the ability to preempt laws passed by counties and cities,[6] and there is nothing in Section 418.012 that provides for that, either. The grant of power in Section 418.012 is simply that—a grant of power. It does not make an executive order superior to a local order, nor does it make an executive inferior to a local order. The Executive Order by its terms purports to preempt local laws, but Section 418.012 is silent on the issue of whether the Executive Order can in fact preempt those laws.

Second, the Attorney General's argument that the grant of authority *per se* implies the Governor may countermand a law passed by local governments, even though the statute does not explicitly grant the Governor that authority. This argument of implied authority is belied by the fact that other provisions of the Texas Disaster Act clearly show the Legislature knows how to write priority-of-law provisions and make local actions subject to gubernatorial approval when it chooses to.

[6] On the contrary, the Texas Constitution explicitly states the Governor *cannot* suspend laws of his own accord. TEX.CONST. Art. 1, § 28.

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For example, Section 418.108(h)(2) of the Texas Disaster Act states that when a city mayor and a county judge both use their inherent statutory authority to manage certain disaster relief activity in their jurisdictions, and orders issued by a mayor are in conflict with orders issued by a county judge, the orders of the county judge control over those of the mayor, even inside the boundaries of incorporated territory. *See* TEX.GOV'T CODE ANN. § 418.108(h)(1)-(2). That section clearly resolves contemplated conflicts among two actors with concurrent jurisdiction and sets up an explicit chain of command. Likewise, Section 418.108(i), which addresses a local government's ability to ban fireworks, allows local governments to institute bans for up to 60 hours, but if those governments enact bans beyond 60 hours, the Governor must approve. TEX.GOV'T CODE ANN. § 418.108(i)(1)-(2). This section explicitly creates a gubernatorial veto over local disaster management authority after a certain point in time. Other provisions in the Texas Disaster Act show the Legislature contemplated there may be situations in which the Governor may have indirect or proxy control of the emergency management process, *see, e.g.,* TEX.GOV'T CODE ANN. § 418.041(b)(giving the governor the ability to appoint the chief of the Texas Division of Emergency Management), and situations in which he serves in only an advisory role to local governments. *See, e.g.,* TEX.GOV'T CODE ANN. § 418.103 (the Governor shall recommend that municipal corporations establish and maintain emergency management programs of their own); *id*. at § 418.104 (the Governor may recommend that political subdivisions establish an interjurisdictional agency with other political subdivisions); *id*. at § 418.121(c)(the Governor shall from time to time make recommendations to local governments as may facilitate measures to mitigate the harmful consequences of disasters).

Under the *in pari materia* rule, the surest way to interpret a statute contained within a comprehensive act is to interpret that statute in context of the act's other provisions, since all

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related statutory provisions are not separate text fragments existing in isolation but "are to be taken together, as if they were one law." *Worsdale v. City of Killeen*, 578 S.W.3d 57, 69 & n.81 (Tex. 2019). Given that other provisions of the Act contain specific prioritization schemes, veto powers, chains of command, and assignments of duties that are explicit in the text, we should be extremely hesitant to infer power from silence in one isolated statutory provision. The text is the text, and "policy arguments cannot prevail over the words of the statute." *In re Allen*, 366 S.W.3d 696, 708 (Tex. 2012)(orig. proceeding). "Although legal texts are sometimes incomplete because they fail to address matters that ought to have been addressed," courts may not "remedy the incompleteness with rules of their own creation." *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 98 (2012).

Third, and most importantly, the Legislature *did* give the Governor the explicit ability to preempt laws by executive order—the Legislature merely placed extensive conditions on when the Governor may do so. *See* TEX.GOV'T CODE ANN. § 418.016 (allowing the Governor to suspend laws and regulations under certain circumstances that will be more fully discussed below). Although the Legislature referred to Section 418.016 as granting "suspension" power, that section and its multiple subsections, along with other separate sections of the Act, give the Governor the explicit ability to effectively preempt laws and regulations by executive action, but they also limit his power. Those sections create the roadmap we must use in determining the preemption issue.

Although the specific subsection of Section 418.016 at issue in this appeal—Subsection (a)—allows the Governor to suspend "regulatory statutes" under certain circumstances, that is not the only suspension/preemption power the Legislature gave the Governor in the Act. Subsection (e) allows the Governor to waive or suspend a deadline imposed on a political subdivision by a statute or the orders or rules of a state agency at the political subdivision's request if the waiver or

suspension is reasonably necessary to cope with a disaster. *See* TEX.GOV'T CODE ANN. § 418.016(e). Subsection (f) even allows the governor to suspend certain transportation regulations when there is not a disaster going on in Texas, but a disaster taking place in a neighboring jurisdiction and Texas must come to that jurisdiction's assistance. *See* TEX.GOV'T CODE ANN. § 418.016(f). Elsewhere in the Act, the Governor may suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles. *See* TEX.GOV'T CODE ANN. § 418.019. He may also temporarily suspend or modify laws and regulations if the suspension or modification is essential to provide temporary housing or emergency shelter for disaster. TEX.GOV'T CODE ANN. § 418.020(c).

By my count, the Legislature has given the Governor the ability to preempt laws in at least six different parts of the Texas Disaster Act, though each preemption provision has specific limits and conditions triggering use. The fact the Legislature has set out broad but reasonable conditions on the Governor's ability to preempt laws in multiple portions of the Texas Disaster Act makes it even more difficult to conclude the silence in the Legislature's grant of general authority to make executive orders bears the weight the Attorney General asserts it does. A silence can be pregnant—but not that pregnant.

It would be anomalous under the rules of statutory construction to say the Governor's authority to suspend any laws contrary to his disaster relief goals is recognized by six specific on-point statutes that contain restrictions on use, only to say that a more general statute undoes all six of those restrictions simply because it gives the Governor's executive orders "*the force and effect of law*." [Emphasis added]. Reading Section 418.012 as granting the Governor plenary power to nullify contradictory laws by edict would render at least six provisions of the Texas Disaster Act redundant at best or nugatory at worst. It ignores overall statutory context and reads a broad

priority-of-laws provisions into textual silence while jettisoning six specific priority-of-laws provisions from the Act entirely.

The more natural reading of Section 418.012 which preserves and harmonizes all sections is the specific preemption provisions qualify and limits the Governor's general ability to issue executive orders that have the force of law. *See In re ReadyOne Industries, Inc*., 394 S.W.3d 697, 701 (Tex.App.—El Paso 2012, orig. proceeding)(when general and specific words are grouped together in a statute, the meaning of the general words is limited by conditions imposed by specific words).

In short, I am not at all persuaded Section 418.012 alone gives the Governor the unfettered, boundless ability to preempt any other law. Here, the specific limits of Section 418.016(a), which the Governor relied on as authority in issuing his executive order countermanding local officials, set the scope of our review in this appeal.

Direct Control Through Agency?

The Attorney General also contends the Governor has direct supervisory authority over County Judge Samaniego because County Judge Samaniego, as the emergency district manager for El Paso, has the ability to exercise emergency powers provided to the Governor under the Act at the county level because he is the Governor's agent. Further, as the Governor's agent, County Judge Samaniego owes the Governor fiduciary duty to act in accordance with the wishes and in the best interest of the Governor. *See* TEX.GOV'T CODE ANN. § 418.1015(a)-(b).

The issue of whether County Judge Samaniego is the Governor's agent when acting in his capacity as an emergency management director is a red herring. The Attorney General insists, under Section 418.1015(b), the Governor can withdraw County Judge Samaniego's authority to act as his agent for the purposes of exercising powers reserved to the Governor at the county level.

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Even so, County Judge Samaniego still has some inherent authority that does not hinge on the Governor's approval, and County Judge Samaniego can reasonably rely on another standalone grant of inherent authority in Section 418.108 to issue his order.

Section 418.108, which deals with the specific ability of mayors and county judges to declare and manage disaster areas at the local level, contains a subsection specifically permitting County Judge Samaniego to "control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge . . . and control the movement of persons and the occupancy of premises in that area." TEX.GOV'T CODE ANN. § 418.108(g).[7] Unlike Section 418.1015(b), which directly ties the exercise of a county judge's power to gubernatorial authority, none of the subsections contained in Section 418.108 frame a county judge's authority in relation to the Governor; they describe the powers of local authorities to act on their own. Curiously, the Governor is not mentioned in Section 418.108 at all. That omission is significant and clearly indicates the Legislature did not intend to tether this power of local officials to the Governor.

Section 418.108 solely addresses the inherent authority county judges and mayors possess to manage disaster areas under their jurisdiction and to declare disasters and act autonomously under certain enumerated circumstances without the need to seek preapproval from the Governor. Reading Subsection (g) in the context of Section 418.108, as a whole, and comparing Section

[7] The majority correctly notes that TEX.GOV'T CODE ANN. § 418.012 gives the Governor this same power, and raises the question of what happens when both the Governor and a local official try to exercise this power at the same time in different ways. There is no explicit answer to that.

However, since I find the numerous preemption provisions in the Act set the conditions by which the Governor's administrative acts may preempt laws generally, my answer is this: the Governor's executive order would prevail whenever a preemption provisions allows him to prevail. Otherwise, as amicus curiae Travis County points out, the Code Construction Act requires that if a general provision conflicts with a local provision, the provisions shall be construed, if possible, so that effect is given to both. TEX.GOV'T CODE ANN. § 311.026(a). If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail. *Id*. at § 311.026(b). Alternatively, because the provision giving local authorities the same power as the Governor came later in time, the local provision would control under the last-in-time rule. *Id.* at § 311.025.

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418.108 to Section 418.1015, it appears the County is correct. County Judge Samaniego issued his order under his own freestanding, autonomous inherent statutory authority granted by Section 418.108(g), unfettered by any concerns he was acting as the Governor's agent.

The County's order is prima facie valid.

The Governor's Power to Suspend Law During a Disaster

In light of the County order's prima facie validity, all threads of argument here collapse down into a single question: in order to preemptively countermand the County's order, could the Governor by executive order invoke Section 418.016(a) to lawfully suspend the statute granting county judges and mayors the inherent authority to autonomously manage certain disasters within their own jurisdictions?

The answer is no.

Per the terms of the Act, the Governor may "suspend the provisions of any regulatory statute prescribing the procedure for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster." TEX.GOV'T CODE ANN. § 418.016(a). There are two discrete questions that must be answered before the Governor's order can be held to be preemptive and controlling over the County's order: (1) whether Section 418.108 granting cities and counties the ability to manage emergencies at the local level is a "**regulatory statute**" that prescribes "**the procedure for conduct of state business**" falling within the ambit of the Governor's suspension power, and, if so, (2) whether the Governor's determination that suspension of that statute was "**in any way**" necessary to "**prevent, hinder, or delay necessary action in coping with a disaster**" was valid. [Emphasis added]. We need not answer the second question, because the Attorney General fails to show how the Governor can satisfy the requirements of the

first question.

The State must show that in addition to being regulatory, the statute is procedural and deals with state business. Section 418.108, standing alone, is not a statutory provision that establishes a procedural rule. It is a statutory grant of power to local authorities. The Attorney General argues Section 418.108 is procedural and regulatory in the sense that it appears in the context of an act that sets out emergency procedures statewide. The Attorney General asserts as to what constitutes "state business," that in the context of a statewide disaster like COVID-19, the Governor may suspend any statute dealing with local authority anywhere in Texas because during a disaster, all business, even actions taken by local governments, is in essence state business. The Attorney General punctuates his argument by stating the Act makes the Governor the "commander in chief" of statewide disaster management. *See* TEX.GOV'T CODE ANN. § 418.015(c).

The Attorney General's interpretation of the suspension statute, while rhetorically appealing, falters under close textual scrutiny and a complete contextual reading of how the suspension provision interacts with other provisions in the Act. In interpreting what words and phrases like **regulatory**, **procedural**, and **state business** mean, we of course can reference dictionaries and common meanings of those words. But "[g]iven the enormous power of context to transform the meaning of language, courts should resist rulings anchored in hyper-technical readings of isolated words or phrases." *In re Office of the Attorney Gen.*, 456 S.W.3d 153, 155–56 (Tex. 2015). "The import of language, plain or not, must be drawn from the surrounding context, particularly when construing everyday words and phrases that are inordinately context-sensitive." *Id.* at 155-56. Here, the surest way of ascertaining how the Legislature meant to use those words in the Act is to look at all provisions of the Act as a whole and see where this specific suspension statute fits in.

First, we look at the Governor's ability to suspend regulatory statutes with the provision of the Act setting out his duties and powers as commander-in-chief. TEX.GOV'T CODE ANN. § 418.015(c). On this point, the Attorney General's characterization of the Governor as "commander in chief" during a declared disaster is incomplete. The Texas Disaster Act states that during a declared disaster, the Governor is "commander in chief" not of emergency management broadly and at every level, but "***of state agencies, boards, and commissions having emergency responsibilities***[.]" [Emphasis added]. *Id.* That is a significant difference in scope. Most notably, the statute does not say the Governor is commander-in-chief of state agencies, boards, commissions having emergency responsibilities, *and political subdivisions*, which are defined in the definitional portions of the Act as being cities and counties that are conceptually separate from state agencies, boards, and commissions. *See* TEX.GOV'T CODE ANN. § 418.004(6).

The reference to state agencies, boards, and commissions in the grant of commander-in-chief power, in turn, provides context clues as to the meaning of the Governor's ability to suspend "the provisions of any *regulatory* statute prescribing the procedures for conduct of state business *or* the orders or rules of a *state agency*" in Section 418.016(a). [Emphasis added]. Likewise, so does Section 418.0155, which requires the Governor to compile a master list of "regulatory statutes and rules that may require suspension during a disaster." TEX.GOV'T CODE ANN. § 418.0155(a). Subsection (b) of this provision states "[o]n request by the governor's office, a state agency that would be impacted by the suspension of a statute or rule on the list . . . shall review the list for accuracy and shall advise the governor's office regarding any statutes or rules that should be added to the list." TEX.GOV'T CODE ANN. § 418.0155(b).

If everything during an emergency is a matter of state business such that the Governor has the power to suspend the enabling statutes of local governments, then why is it that another statute

requiring him to keep a master list of suspendable "regulatory statutes" allows him to request input about the master list from "*a state agency* that would be impacted by the suspension of a statute?" [Emphasis added]. Why not state the Governor can seek advice from *any* entity (such as a political subdivision) that may be affected by his suspension of a statute?

The answer is simple: the Legislature never envisioned the Governor's suspension powers would impact anything other than a state agency that manages the procedural aspects of state-level business because the Legislature did not intend for the Governor to be able to act unilaterally as he has done here. When the preemption provision at issue here is read in context, the context suggests that rather than placing the Governor at the apex of state emergency management with local authorities under his direct control for all purposes, the Act makes the Governor the direct commander of the state-level administrative bureaucracy (the "regulatory" realm of "state agencies, boards, and commissions") during an emergency. Further, it gives him the ability to suspend statutes like agency enabling statutes (statutes that proscribe the conduct of state business) *or* those agencies' normal procedures if strict compliance with the provisions, orders, or rules (i.e. following the ordinary bureaucratic processes and timelines of "state business") would "*in any way prevent, hinder, or delay necessary action in coping with a disaster*." TEX.GOV'T CODE ANN. § 418.016. In other words, the suspension statute gives the Governor the ability to clear state-level bureaucratic logjams, expedite administrative action at state-level agencies, and depart from the regular order of state-level business if doing so would help facilitate a disaster response.

This reading is not only more natural, complete, and grounded in the text, it is consistent with other provisions of the Act indicating the Governor's job during a disaster is not necessarily to tie the hands of local officials he potentially disagrees with and usurp their authority. But rather

to serve as a conduit for aid to local officials,[8] a connection point between different jurisdictions,[9] a facilitator who leverages state resources to mitigate and recover from disasters,[10] and someone who makes suggestions on how to improve local emergency response processes.[11]

The Attorney General's broad reading of "state business" creates yet another statutory interpretation problem. If the Governor can suspend the grant of autonomous disaster-management power to cities and counties because the Texas Disaster Act as a whole is "regulatory," all emergency-management activities are "state business," and the grant of authority to counties and cities appears in the Texas Disaster Act, then what are we to make of the fact that the Texas Disaster Act grants the Governor other specific preemption powers in at least five others places in the Act? Are those other grants of preemption power superfluous? Could the Governor use this suspension power to suspend the "regulatory" Texas Disaster Act in its entirety save for the provision allowing him to pass executive orders with "the force and effect of law," and then write a new set of rules for emergency management?

Of course not. Just because a textual reading comports with dictionary definitions of words read in isolation does not mean the grant of preemption powers at issue in this case is without limitation. A reading as broad as the Attorney General advocates renders at least five other preemptive provisions redundant. It also begins to skirt some serious nondelegation issues. If there is no effective limitation on the Governor's discretion to suspend laws during a disaster he himself

[8] *See* TEX.GOV'T CODE ANN. § 418.021 (giving the governor that authority to apply for federal aid on behalf of a local government).
[9] *See* TEX.GOV'T CODE ANN. § 418.041(b) (giving the Governor the power to appoint a chief of the Texas Division of Emergency Management).
[10] *See* TEX.GOV'T CODE ANN. § 418.017 (allowing the Governor, inter alia, to use all available resources of state government, reassign executive department personnel, and commandeer or use private property).
[11] *See* TEX.GOV'T CODE ANN. § 418.121(a), (c) (giving the Governor the responsibility to "consider steps that could be taken to mitigate the harmful consequences of disasters" and to "from time to time *make recommendations* to the legislature, *local governments*, and other appropriate public and private entities as may facilitate measures to mitigate the harmful consequences of disasters")[Emphasis added].

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declares, that raises the serious question of whether the Legislature has unconstitutionally abdicated legislative power to the Governor in contravention of the Texas Constitution. *Cf. In re Hotze*, No. 20-0430, 2020 WL 4046034, at *2 (Tex. July 17, 2020)(Devine, J., concurring)(voicing nondelegation concerns about portions of the Texas Disaster Act giving Governor quasi-legislative authority). By reading the conditions in the suspension clause at issue to be more restrictive in lieu of endorsing a broad, nearly limitless reading that begins to look more and more like a wholesale delegation of legislative power, we preserve authority rather than extinguishing it, and avoid a potential constitutional crisis and a nondelegation problem in a very necessary, useful disaster statute. *See Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454, 466 (Tex. 1997)(narrowing quasi-legislative statutes so that an executive official does not exercise "unguided discretion" helps avoid making a law constitutional under the nondelegation doctrine).

The implausibility of the Attorney General's reading of this preemption power only bolsters my conclusion the suspension provision in Section 418.016 is meant to be used to reduce bureaucratic delays at the state agencies, boards, and commissions over which the Governor asserts direct control. The suspension power does not extend to Section 418.108, the provision which gives county judges and mayors the ability to perform some disaster management activities with autonomy at the local level.

The State cannot establish a probable right to relief because the Governor's attempted suspension of the inherent authority of 254 county judges and more than 12,000 Texas' mayors is an *ultra vires* act. Section 418.108 is not a regulatory statute addressing state-level bureaucratic businesses or agency rulemaking, nor is it a procedural statute—it is a grant-of-authority statute giving local authorities the leeway to act in their best independent judgment within the confines of their own jurisdictions. As such, the Governor's attempted suspension of Section 418.108 to the

extent necessary to countermand mayors and county judges who issued orders that did not adhere to his disaster recovery goals exceeded the scope of statutory authority grant to him by the Legislature. And since the Governor possesses no inherent authority to suspend statutes under the Texas Constitution, the Governor's actions were done without proper authority and were void.[12]

The County's order controls.

IRREPARABLE HARM

We must not lose sight of the fact that while we are opining on a matter that has statewide implication, we are also considering an interlocutory appeal that turns on the facts presented to the trial court at a given point in time from which the trial judge made his decision, as viewed through the prism of the abuse of discretion standard.

There are two steps to the temporary injunction analysis, and the State and the Restaurants must satisfy both before being able to prove to us the trial court abused its discretion by not granting their injunction application. Even if a temporary injunction applicant can establish a probable right to relief, the temporary injunction applicant must also show that it would suffer irreparable harm if an injunction were not granted pending trial.

Dignitary Harm to the State

Although the State did not object to the trial court taking judicial notice of on-the-ground conditions in El Paso as a result of the COVID-19 crisis, the Attorney General argues the trial court could not consider undisputed local conditions or balance equities in deciding whether to grant an injunction here, since the State as sovereign had an automatic right to relief and is excused

[12] Even if Section 418.108 fell within the ambit of the Governor's suspension power, the Governor cannot suspend laws for any reason. Under the statute, the Governor's suspension of local authority must have been done for a proper purpose to be valid. It is unclear whether this could possibly be tried as a question of fact in the declaratory judgment action or how much deference the Governor receives in making his assessments of appropriateness, other than the placement of statutory restrictions intentionally indicate the Governor may not suspend a law simply by *ipse dixit*.

from the general requirement of showing the County's conduct would cause the State irreparable harm. In support of their argument that dignitary harm to the State alone entitles the State to an injunction here, the Attorney General cites a recent per curiam case in which the Texas Supreme Court overturned an injunction denial and issued an injunction prohibiting a county clerk from sending mail-in ballot applications to county citizens who did not fall within the categories of persons who were, in fact, authorized to vote by mail-in ballot. *See State v. Hollins*, No. 20-0729, 2020 WL 5919729, at *4-*6 (Tex. Oct. 7, 2020). That case is readily distinguishable from this one.

In *Hollins*, the Texas Supreme Court concluded the Election Code did not explicitly authorize a county clerk to send out mail-in ballot applications to persons who did not fall within the five categories of voters eligible to vote by mail, meaning the county clerk had no inherent authority to engage in that conduct. *Id*., at *2. The Election Code also made the county clerk clearly subordinate to the Secretary of State, who was explicitly identified in the Code as the top official ultimately responsible for statewide election regulation and who, by statute, had a mandatory duty under statute to ensure uniformity of the election process across Texas. *See id.* (noting that TEX.ELEC.CODE ANN. § 31.003 explicitly requires the Secretary to "obtain and maintain uniformity in the application, operation, and interpretation" of the Election Code and requiring him to "prepare detailed and comprehensive written directives and instructions" to local officials). Because the county clerk had no inherent authority to act, because the Secretary was the ultimate authority overseeing elections who had a statutory duty to maintain uniformity, and because the county clerk's actions were clearly ultra vires and in derogation of the statutory uniformity requirement, injunctive relief should have been granted because there was only reasonable outcome. Thus, the trial court's duty to grant the temporary injunction pending trial was essentially ministerial because the county clerk's duty was essentially ministerial.

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Hollins is distinguishable from the case at hand. First, the structure of the Texas Disaster Act is not as hierarchical as the Election Code. Unlike the Election Code, which explicitly vests ultimate regulatory authority over local officials in one executive, the Texas Disaster Act does not make the Governor the sole official responsible for addressing a disaster. Second, unlike the Election Code which requires uniformity of action across the entire State, the Texas Disaster Act does not require any specific response during a disaster, but instead creates a flexible framework for cooperation among various officials at the state and local levels. The Secretary's actions in *Hollins* were necessitated by a mandatory duty to maintain uniformity statewide, which, in turn, made resolution of the injunction appeal ministerial because there was only one possible outcome. Here, the Act does not create mandatory statutory duties that require any specific response as a preordained outcome. To put it another way, the Act does not create clear, measurable ministerial duties in this situation.

Finally, unlike *Hollins*, which involved a county official exercising authority that had not been conferred by statute, Section 418.108, as we have stated before, explicitly confers emergency authority onto the County Judge without reference to any preclearance requirements from the Governor. The County Judge clearly had the authority to issue his order.

The State is correct that it can file an injunction to restrain violations of the law when the status quo involves ongoing violations of the law. But Texas Supreme Court case law also establishes that generally, when the determination of whether the status quo is a violation of the law "is the central question of the suit," that question should be determined with a full trial on the merits. *See Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 555-56 (Tex. 2016). Against that longstanding backdrop, we read *Hollins* as standing for the proposition the State's request for injunctive relief based on general law enforcement grounds must be granted when statutes clearly

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dictate only one possible legal outcome, making the trial court's decision on injunctive relief ministerial rather than discretionary. Otherwise, the issue should be resolved at trial on the merits, with temporary injunctive relief pending trial available—as in other situations—as a matter of a trial judge's discretion.

Here, even if my reading of the law is incorrect and a conflict-of-laws scheme is implied onto textual silence under a theory the Legislature simply forgot to include a conflicts provision and we can correct the Legislature's mistake by copy-editing the statute, the various portions of the Texas Disaster Act do not create clear ministerial duties. It is clear to me that the law here does not require any specific outcome as it did in *Hollins*. As such, the State has failed to show the existence of a ministerial duty and that it was violated. My view is the trial court did not err, to the extent, it concluded, it retained discretion to decide the issue of irreparable harm.

The trial court was free to weigh seven days' worth of dignitary harm to the State prior to the expiration of the County's order against other then-existing equities at the snapshot in time it made its decision. Since this harm is abstract and not tangible, the trial court had leeway to decide how likely it was any dignitary harm caused to the State over seven days would be in-fact irreparable.

Economic Harm to the Restaurants

The case presented by the Restaurants with respect to harm is far more compelling than the State. Unlike the dignitary abstract harm allegedly suffered by the State, the economic harm to the Restaurants as the result of the County Judge's order is tangible, quantifiable, and undeniable.

Under the County's order, the Restaurants are designated as one of twenty types of essential businesses exempt from the shut-down order, and they may continue to sell food through delivery and carry-out, but not through dine-in service. If the injunction were granted and the County's

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order suspended, then the Restaurants would have been able to offer dine-in service up to 50% capacity under the Governor's Executive Order. Thus, the precise question before us in this appeal as to these litigants is whether at the time the trial court rendered its decision, the Restaurants established the harm they would suffer from their inability to offer dine-in services up to 50% capacity for seven days before the County's order expired would be irreparable for them.

That is a discretionary question that lies with the trial court in my view; we can only overturn the trial court's decision only if it falls outside the zone of reasonable disagreement. Here, we do not have an evidentiary record showing what kind of losses the Restaurants would be projected to suffer over the course of five days if their dine-in capacity was reduced from 50% to 0%. The Restaurants base their argument almost entirely around the proposition the Governor's order legally countermanded the County's order. Although the Restaurants failed to put on any evidence showing the projected amount of harm to their businesses as a specific dollar amount, it can be reasonably presumed the amount of revenue represented by a shift of dine-in business from 0% dine-in to 50% is substantial. The underlying assumption, of course, is the Restaurants were operating at full 50% dine-in capacity during operating hours. Still, because there is no evidentiary record here, it is difficult, if not impossible, to conclude the Restaurants established the harm they would suffer if the last seven days of the County's order were not enjoined was irreparable as a matter of law. The trial court would still have to balance the equities.

The County's Equitable Interests

We weigh the seven days' worth of intangible harm to the State's general dignity and the seven days' worth of lost 0%-50% capacity dine-in profit from the Restaurants as a result of allowing the County's order to stand until it expired against the harm the County would suffer if the order was enjoined before it expired. If the trial judge's weighing of those equities fell outside

the zone of reasonable disagreement, we must reverse his decision and impose an injunction pending trial on the merits.

Here, clearly the trial court's weighing of the equities fell within the zone of reasonable disagreement. The statistics, which are undisputed, paint a grim picture. In the lead-up to the trial court's injunction decision, El Paso County was on the brink of a cascading hospital failure that affected the care that both COVID and non-COVID patients received.

Considering the undisputed facts in the record, in my view, the trial court did not abuse its discretion by refusing to enjoin the County's order before it expired on its own terms.

CONCLUSION

The late textualist Justice Antonin Scalia and his writing partner Bryan A. Garner have stated that it is a "false notion that the quest in statutory interpretation is to do justice," since when a judge deviates from the text in a desire to see that justice is done in the specific dispute before them, "the law becomes subject to personal preferences and hence shrouded in doubt." READING LAW at 347-48. Though the Legislature has told courts that they may consider multiple things in constructing its acts, including the effects a particular statutory interpretation would have, Texas courts have nevertheless adopted a strict textualist approach to statutory construction under the theory that while we may have legal permission from the Legislature and by tradition to consider many factors in our decisions, "not all that is lawful is beneficial." *See Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136 (Tex. 2018).

For this reason, it is critical we read the Texas Disaster Act as carefully as we can, and to apply textualist principles with as much fidelity as possible. I staunchly believe, setting aside any questions of political rightness or justness of outcome, that under the principles of textualism, the grant of authority allowing the Governor to issue executive orders with "the force and effect of

law" during a disaster does not inherently, silently, unilaterally give the Governor authority to overrule laws by executive order simply by stating "all local laws are preempted." There are clear methods by which the Governor may issue executive order preempting laws in the Texas Disaster Act. Because his executive order attempting to preempt local laws did not comport with the plain text of the limited preemption powers granted to him by the Legislature, his attempt to suspend the authority of local officials was void.

That, I think, should satisfy our inquiry.

But there are additional factors that are relevant to my analysis: the unintended consequences of the reading the Attorney General advances. Justice Scalia and Bryan Garner have said that under textualism, it is a "half-truth that consequences of a decision provide the key to sound interpretation." READING LAW at 352. While they generally disavow considering the consequences of a particular statutory construction, to the extent I as a judge still have discretion to weigh those consequences other than those deemed relevant by textualism at this historical moment, and to the extent my position as the dissenting justice frees me from any strict formal requirements in writing my decision, I will simply say this.

Amid a cascading hospital crisis as a virus without a clear cure spreads exponentially through the community, El Paso's local government has balkanized. The City Mayor and the County Judge haven taken diametrically opposed approaches to law enforcement. The city police department initially refused to enforce the County's order on the advice of the Attorney General, who (incorrectly in my view) contended the Governor's order preempted the County's order. Meanwhile, the county sheriff's department enforced the County's order based on the County's determination that it still retained emergency authority. Law enforcement personnel in El Paso County are in disarray, and the organs of local government have turned against each other.

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Although I disagree with the interpretive approach taken by the majority, I do agree in one respect: we need to know who oversees what in this time of crisis, and soon. The real problem here is not that the Texas Disaster Act fails to give us guidance of who trumps whom in the event of a stalemate. The real problem is that there is a stalemate in the first place.

The nightly news incessantly reminds us the stakes of this litigation could not be higher and the effect of our judgment more consequential. This is not a bar exam question, an academic discussion, or an intellectual exercise in a law school classroom. This case, and the others that will undoubtedly ensue as more counties reassert their inherent statutory authority to deal with local conditions, are literally matters of life and death. More than one hundred years ago, a pandemic like this one tore across Texas. Each community in Texas decided for themselves how to best manage their affairs until the viral inferno was snuffed out. That history echoes in the background of our decision today. How will this crisis echo one hundred years from now?

Every hospital in El Paso County is at capacity, and it is not an exaggeration to say every other patient in our hospitals right now is a COVID patient, and the County's morgue has been at capacity for days because the County has been unable to process bodies quickly enough, creating a problem of where to store the deceased, whose bodies, in a grim turn of bureaucratic phrase, are backlogged at the Medical Examiner's Office. In the seven days this expedited appeal was pending, the County has gone from having one refrigerated mobile morgue for the overflow of bodies to six refrigerated mobile morgues. Rumor has it the number of refrigerated mobile morgues may possibly go up to ten in the coming days. How many more mobile morgues will come to El Paso before the Texas Supreme Court is able to render a final answer to the deadly riddle of which leader must yield? Will the Governor and the County Judge come to a workable solution first? Only time will tell.

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Perhaps others will see what I see in this statute. Perhaps leaders will live up to the spirit of the Texas Disaster Act and find solutions rather than resorting to a race to the courthouse to have judges break ties over who has more authority while Rome burns around us. Perhaps the Legislature will insert the words into the statute this coming summer which provide more guidance as to what happens when people turn against each other in a crisis. Perhaps not. Until there is a vaccine or a cure for COVID-19, the turmoil facing our community today will be the turmoil another Texas community faces tomorrow.

There is little question the Governor is one of many people who has a part to play in coordinating our response to this unprecedented pandemic, but is he the sole arbiter? No reasonable Texan would disagree the goal of promoting and reopening the economy is, without any doubt, legitimate and necessary disaster relief. But my job, as a justice of a court of appeals, is to read and apply the law, to call balls and strikes. The Governor's goal may be legitimate, but the manner in which he has pursued it, is not. The Attorney General maintains, in times of emergency, the Governor is the ultimate decision-maker, that he is a unitary executive with power over all levels of government, that he alone may decide the fates of people in 254 counties and 12,000 cities, that local elected leaders may act only because he gives them the authority, and he can take away that authority if he believes their approach as to how they address disaster relief is, in his view, wrong. The only way any of that can be true is if courts ignore critical Texas constitutional history, disregard the structure and purpose of the Texas Disaster Act, read words into a statute that are simply not there, and discard important restrictions and qualifications on the Governor's power in the name of expediency and a belief that his noble ends justify its unlawful means.

Because the Governor's attempt to suspend the inherent disaster-management authority of county and city leaders violates the small government ethos the Framers wove into the Texas

Constitution, the cooperative spirit of the Texas Disaster Act, and, most importantly of all, the plain text of the Texas Disaster Act, I respectfully dissent.

YVONNE T. RODRIGUEZ, Justice

November 13, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.

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