

No.

**In the Court of Appeals
for the Third Judicial District
Austin, Texas**

THE STATE OF TEXAS,

Plaintiff/Appellant,

v.

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/Appellees.

On Appeal from the
201st Judicial District Court, Travis County

**APPELLANT’S EMERGENCY MOTION FOR RELIEF
UNDER RULE 29.3 AND TO EXPEDITE APPEAL**

To the Honorable Third Court of Appeals:

Pursuant to Rule 29.3, the State of Texas, by and through Attorney General Ken Paxton, respectfully requests an emergency order protecting this Court’s appellate jurisdiction to resolve the lawfulness of a pair of identical emergency orders issued by Austin Mayor Steve Adler and Travis County Judge Andy Brown. These orders (collectively “Order 24”) conflict with Governor Greg Abbott’s COVID-19-related executive order GA-32, undermine the State’s efforts to provide a clear and

consistent response to this pandemic, and disrupt the Texas Legislature's division of emergency powers as reflected in the Texas Disaster Act of 1975.

This is neither the first time that local officials have exceeded their powers under the Act, nor the first time a court of appeals has been asked to stop such an unlawful order. Late October, El Paso County Judge Ricardo Samaniego issued his Executive Order 13 ("EO-13"), which prohibited individuals and businesses from engaging in numerous activities authorized by GA-32. App. F at 5–16. After an El Paso County trial court refused the State's request for temporary relief, the Eighth Court of Appeals reversed the trial court, concluding that the Act mandated that the Governor's orders prevailed over conflicting orders by local officials, who were the Governor's agents under the Act. *State v. El Paso Cty.*, 08-20-00226-CV, 2020 WL 6737510, at *4, *6-7. (Tex. App.—El Paso, no. pet. h.) (Nov. 13, 2020).

Local officials continue to impose orders that exceed what GA-32 allows. This Court's immediate intervention is necessary to stop this trend and restore the consistent, statewide disaster recovery plan that the Act contemplates. Austin and Travis County authorities will enforce Order 24 as of its effective time, 10:30 p.m. tonight, December 31, 2020, and will continue to do so until it expires by its own terms at 6:00 a.m., January 3, 2021. App. B at 3–4 (County Judge's Order); App. C at 3 (Mayor's Order). The enforcement of Order 24 creates confusion, dislodges restaurants' reasonable, settled expectations, inhibits the State's ability to ensure a consistent response to COVID-19, and encourages additional illegal orders by local executives.

The Act does not permit local officials to nullify a Governor’s emergency orders. This Court should grant immediate, temporary relief, enjoin the enforcement of Order 24, and set this case for briefing and resolution as expeditiously as possible, while preserving the status quo and appellate jurisdiction in the meantime.

Therefore, the State requests an order granting temporary relief as soon as possible, but in any event, no later than Thursday, December 31, 2020, at 9:00 p.m. The State further requests that such an order remain in effect for the duration of this important appeal.

STATEMENT OF FACTS

I. Background

The Texas Disaster Act makes the Governor the leader and focal point of the State’s emergency response and the “orderly restoration and rehabilitation of persons and property affected by disasters.” TEX. GOV’T CODE §§ 418.011–.026. Under the Act, the Governor is “responsible for meeting . . . the dangers to the state and people presented by disasters” and is the “commander in chief” of the State’s response to a disaster, including the power to determine when businesses may reopen after a disaster. *Id.* §§ 418.011, § 418.015(c).

The Act confers broad powers on the Governor to accomplish this task. *See id.* §§ 418.011–.026. Relevant here, the Governor is given the powers to: (1) control the movement of persons and occupancy of premises in a disaster area; (2) issue executive orders that “have the force and effect of law”; and (3) suspend statutes,

orders, or rules that “would in any way prevent, hinder, or delay necessary action in coping with a disaster.” *Id.* §§ 418.018(c), 418.012, 418.016(a).

The Act empowers local officials more limited powers, and local officials act as the Governor’s agents when exercising those powers. The Act makes certain local officials “emergency management director[s],” *id.* § 418.1015(b), which act as a “designated agent” of the Governor, subject to the Governor’s control. *Id.* The Governor “is the commander in chief of state agencies, boards, and commissions having emergency responsibilities.” *Id.* § 418.015(c). The Act does not confer on county judges, mayors, or any other local officials an independent power to issue emergency orders with the force and effect of law.

On October 7, 2020, Governor Abbott issued Executive Order GA-32 to respond to the COVID-19 pandemic pursuant to his authority under the Act. App. A (GA-32). GA-32 provides rules governing what business and services can remain open during the COVID-19 pandemic and under what circumstances. *Id.* The Act gives GA-32 “the force and effect of law,” just like any other state law. TEX. GOV’T CODE § 418.012.

GA-32 expressly permits businesses, including restaurants and bars, to reopen provided they follow capacity guidelines. Businesses generally may reopen provided they operate at no more than 75% of their total occupancy. GA-32 at 2. Restaurants with less than 51% of their gross receipts from the sale of alcohol, and whose customers eat or drink only while seated, may have dine-in services. *Id.* at 4. Bars may also serve patrons on-site under more limited circumstances. *Id.*

GA-32 prohibits local authorities from imposing more stringent restrictions on restaurants and bars in two ways. First, GA-32 expressly preempts “any conflicting order by local officials in response to the COVID-19 disaster” when, as relevant here, such order “restricts services allowed by” GA-32. *Id.* at 5. Second, it suspends “[s]ections 418.1015(b) and 418.108 of the Texas Government Code” —the sections of the Act allowing local officials to exercise the Governor’s powers as the Governor’s agent—“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.” *Id.*

Late December 29, City of Austin Mayor Steve Adler and Travis County Judge Andy Brown issued Order 24, which prohibits “indoor and outdoor dine-in food and beverage service” from 10:30 p.m. through 6:00 a.m. for the City of Austin and Travis County. App. B at 3; App. C at 3. Order 24 is effective from 10:30 p.m. on December 31, 2020, through 6:00 a.m., January 3, 2021. *Id.* Order 24 provides criminal penalties by its own terms, with each violation an offense punishable by a fine of up to \$1,000. App. B at 3–4; App. C at 3. By contrast, GA-32 has no analogous curfew for dine-in services, and expressly permits restaurants and bars (under limited circumstances) to open. App. A at 4.

II. Procedural History

On December 30, the State brought this *ultra vires* action against Mayor Adler, Judge Brown, the City of Austin, and Travis County in the 201st judicial district court, seeking a temporary restraining order against the enforcement of Order 24, a declaration that Order 24 is invalid, and both temporary and permanent injunctions

against Order 24's enforcement. App. D at 17 (original petition). The district court held a hearing on the State's application for a temporary restraining order and temporary injunction today, December 31, at 1:30 p.m. The district court issued a written order denying the motion at approximately 5:20 p.m. App. F. The State has since appealed that ruling. App. G.

The State now files this emergency application for relief under Rule 29.3 and motion for expedited consideration of this appeal. Due to the imminent enforcement of Order 24 and its short duration, this Court's immediate intervention is needed to provide clear guidance to residents and restaurants of Austin and Travis County. The State will file its opening brief on the merits later today, December 31, 2020.

ARGUMENT

I. To Preserve the Status Quo, this Court Should Issue a Temporary Order Prohibiting the Enforcement of Order 24 Pending Resolution of this Appeal.

“When an appeal from an interlocutory order is perfected, the appellate court may make any temporary orders necessary to preserve the parties' rights until disposition of the appeal.” TEX. R. APP. P. 29.3; *see also In re Olson*, 252 S.W.3d 747, 747-48 (Tex. App.—Hous. [14th Dist.] 2008, no pet.). To establish entitlement to that relief, movants must state the relief sought, the legal basis for the relief, and the facts necessary to establish a right to that relief. *See, e.g., Lamar Builders, Inc. v. Guardian Sav. & Loan Ass'n*, 786 S.W. 2d 789, 791 (Tex. App.—Hous. [1st Dist.] 1990, no pet.); *see also McNeeley v. Watertight Endeavors, Inc.*, No. 03-18-00166-CV,

2018 WL 157866, at *1 (Tex. App.—Austin Mar. 23, 2018, no pet.) (per curiam). Such relief is appropriate here.

A. The State is entitled to an order enjoining the enforcement of Order 24 because it is the only way to preserve the State’s sovereign “right to enact, interpret, and enforce its own laws.” *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015); Tex. R. App. P. 29.3. The State will be irreparably harmed if Order 24 is enforced in violation of state law. *State v. Hollins*, No. 20-0729, 2020 WL 5919729, at *7 (Tex. Oct. 7, 2020); indeed, the State would be “impotent to enforce its own laws if it could not temporarily enjoin those breaking them pending trial.” That right is doubly implicated here. Not only does the imminent enforcement of Order 24 threaten the State’s sovereign right to enforce GA-32, but Order 24’s late-night issuance, near-immediate effectiveness, and short duration work together to attempt to stymie the State’s efforts at vindicating that sovereign right in court. Only immediate injunctive relief can enable the State to preserve its interest in providing a clear and consistent response to the COVID-19 pandemic.

This Court’s immediate intervention is also necessary to deter future illegal orders by local officials. Just last month, the Eighth Court of Appeals invalidated El Paso County Judge Ricardo Samaniego’s EO-13 because it restricted individuals and businesses from acting in ways that GA-32 allowed. *El Paso Cty.*, 2020 WL 6737510, at *7-9. EO-13 was the template for Order 24: it imposed a restriction that GA-32 did not allow on a short timeline with the possibility the order would be extended. Without this Court’s guidance, localities will continue to issue short-term orders violating GA-32 with the hopes that their brief duration will frustrate litigation

efforts. That is the opposite of the statewide and consistent disaster response that the Act contemplates.

Courts routinely order Rule 29.3 relief under such circumstances.¹ Indeed, the Supreme Court has held that refusal to grant such relief where necessary to preserve the court’s jurisdiction is an abuse of discretion and subject to a petition for writ of mandamus. *See generally H & R Block, Inc. v. Haese*, 992 S.W.2d 437, 438 (Tex. 1999).

B. The State is also likely to prevail on appeal for at least three reasons. First, GA-32 expressly preempts more restrictive local orders, and a local “ordinance which conflicts or is inconsistent with state legislation is impermissible.”² By imposing a curfew on restaurants and bars that applies even under conditions when GA-32 would permit those establishments to open, Order 24 is a more restrictive order than GA-32. The Act gives the Governor the power to issue emergency orders that have “the force and effect of law.” TEX. GOV’T CODE § 418.012. Governor Abbott used this power to issue GA-32, which is effective “on a statewide basis.”

¹ *E.g., Texas Gen. Land Office v. City of Houston*, No. 03-20-00376-CV, 2020 WL 4726695, at *2 (Tex. App.—Austin July 31, 2020, no pet.) (granting Rule 29.3 relief where “City face[d] a potentially irrevocable loss of its ability to provide aid to the residents of the City”); *WC 1st & Trinity, LP v. Roy F. & JoAnn Cole Mitte Found.*, No. 03-19-00905-CV, 2020 WL 544748, at *4 (Tex. App.—Austin Feb. 3, 2020, no pet.) (“leav[ing] in place the portions of our prior partial stay order prohibiting the alienation of the real property”); *Mulcahy v. Cielo Prop. Grp., LLC*, No. 03-19-00117-CV, 2019 WL 2384150, at *1 (Tex. App.—Austin June 6, 2019, no pet.) (ordering “appellant’s counsel to obtain and maintain possession of the hard drive and all copies of appellee’s confidential business information”); *accord In re Lasik Plus of Tex., P.A.*, No. 14-13-00036-CV, 2013 WL 816674, at *4 (Tex. App.—Houston [14th Dist.] Mar. 5, 2013, orig. proceeding) (refusing Rule 29.3 relief where “the subject matter of this appeal *will not be invaded* if the trial court’s order stands”) (emphasis added).

² *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).

App. A at 2. The Act makes GA-32 a state law. TEX. GOV'T CODE § 418.012. Thus GA-32 preempts Order 24, rendering it invalid.

Second, Governor Abbott suspended the only statutes that would have allowed Mayor Adler or Judge Brown to issue binding emergency orders. Order 24 identifies sections 418.1015(b) and 418.018 of the Government Code as the bases for Judge Brown's authority to issue the Order. App. B at 2; App. C at 2. Governor Abbott, using his suspension power³ granted by the Act, 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].” App. A at 6. Neither Mayor Adler nor Judge Brown had the authority to issue the more restrictive Order 24—or any other order more restrictive than GA-32.

Finally, Mayor Adler and Judge Brown exceeded the scope of their authority as Governor Abbott's designated agents when they issued Order 24. The Act authorized Adler and Brown to “exercise the [G]overnor's powers” only as the Governor's “designated agent[s]” in responding to the COVID-19 pandemic. TEX. GOV'T CODE § 418.1015(b). As agents, neither Adler nor Brown could exercise powers derived from their principal, the Governor, in ways that exceeded the scope of their authority as the Governor's agents. They did so by issuing an order more restrictive than GA-32 despite GA-32's express prohibition on doing so. Order 24 is therefore unlawful because the Governor, as principal of both Adler and Brown,

³ TEX. GOV'T CODE § 418.016(a).

expressly constrained the authority of his agents to issue it. The State is therefore likely to prevail in showing that Order 24 should have been enjoined as *ultra vires*.

II. The Court Should Expedite Its Consideration of Both this Motion and the Appeal.

It is vital that the Court move quickly. Austin and Travis County officials will begin enforcing Adler and Brown's unlawful order tonight, December 31, at 10:30 p.m. Therefore, pursuant to Texas Rule of Appellate Procedure 2, the State requests expedited consideration of both this motion and its appeal, including the entry of an order granting Rule 29.3 temporary relief as soon as possible, but in any event no later than today, December 31, 2020, at 9:00 p.m.

If the Court concludes that is not enough time to fully consider the Rule 29.3 motion, it should at minimum order relief on an administrative basis and require Appellees to respond to this motion immediately. Such a brief, administrative order is warranted when the Court reaches "the tentative opinion that [the moving party] is entitled to the relief sought" and "the facts show that [that party] will be prejudiced in the absence of such relief." *Republican Party of Tex. v. Dietz*, 924 S.W.2d 932, 932 (Tex. 1996) (per curiam) (citing former TEX. R. APP. P. 121). It allows the Court a "meaningful opportunity to consider" relevant issues "upon less hurried deliberation." *Del Valle ISD v. Dibrell*, 830 S.W.2d 87, 87-88 (Tex. 1992) (Cornyn, J., joined by Hecht, J., dissenting); *cf. June Medical Servs., L.L.C. v. Gee*, 139 S. Ct. 661 (2019) (ordering a temporary stay because "the Justices need[ed] time

to review the[stay-related] filings”).⁴ An administrative stay of Order 24 while this Court considers expedited briefing will protect the State’s important interest in preventing localities from infringing state law while this Court considers the Rule 29.3 request.

The State also recognizes that this case should be resolved as expeditiously as possible. To that end, it requests the Court expedite its consideration of the appeal on the merits. Rule 38.6(d) allows this Court to “shorten the time for filing briefs and for submission of the case” in the interests of justice. TEX. R. APP. P. 38.6(d). Such relief is appropriate here.

The State therefore requests that this Court accelerate briefing in this action such that it may be resolved no later than Friday, January 1, 2020.

⁴ The U.S. Supreme Court routinely enters temporary stays while considering important filings. *See, e.g., Trump v. Mazars USA, LLP*, 140 S. Ct. 581 (2019) (temporary stay of seven days); *June Medical Servs.*, 139 S. Ct. 661 (six days); *In re Grand Jury Subpoena*, 139 S. Ct. 914 (2019) (16 days); *In re United States*, 139 S. Ct. 452, 453 (2018) (13 days); *In re Dep’t of Commerce*, 139 S. Ct. 16 (2018) (13 days).

PRAYER

This Court should grant relief under Rule 29.3 enjoining the enforcement of Order 24. The Court should further grant expedited consideration of this appeal. The State respectfully requests an order granting relief as soon as possible, but in any event, no later than today, December 31, at 9:00 p.m.

Respectfully submitted.

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CERTIFICATE OF SERVICE

On December 31, 2020, this document was served electronically on Sameer Birring, counsel for the City of Austin, and Leslie Dippel, counsel for Travis County, via Sameer.Birring@austintexas.gov and Leslie.Dippel@traviscountytexas.gov, respectively.

/s/ Judd Stone
JUDD STONE

CERTIFICATE OF CONFERENCE

On December 31, 2020, counsel for the State conferred with counsel for the Defendant regarding this motion. Counsel was informed that Defendants/Appellees oppose the relief sought.

/s/ Judd Stone
JUDD STONE

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this brief contains 2885 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Judd Stone
JUDD STONE