

# 2021CI19115

CAUSE NO. \_\_\_\_\_

STATE OF TEXAS,  
*Plaintiff,*

v.

SAN ANTONIO INDEPENDENT  
SCHOOL DISTRICT and PEDRO  
MARTINEZ, *in his official capacity,*  
*Defendants.*

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IN THE DISTRICT COURT

Bexar County - 45th District Court

BEXAR COUNTY, TEXAS

\_\_\_ JUDICIAL DISTRICT

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**STATE OF TEXAS'S ORIGINAL VERIFIED PETITION AND APPLICATIONS FOR  
TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION**

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*[W]e are a nation of laws, not of men. We depend upon compliance with the rule of law to bring order from chaos, consistency of result for all persons, and predictability in the result of the manner in which we conduct our daily affairs.<sup>1</sup>*

1. The State of Texas files this original complaint against San Antonio Independent School District (“San Antonio ISD”) and San Antonio ISD Superintendent Pedro Martinez.

**NATURE OF THE CASE**

2. Defendant San Antonio ISD and Superintendent Pedro Martinez are deliberately violating state law. In flouting GA-39’s ban on vaccination mandates, Defendants challenge the policy choices made by the State’s commander in chief during times of disaster.<sup>2</sup> But the Texas Legislature made the Governor—not some patchwork of county judges, city mayors, or superintendents—the leader of the State’s response to and recovery from a statewide emergency.<sup>3</sup>

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<sup>1</sup> *Weaver v. Credigy Receivables, Inc.*, 10-04-00331-CV, 2005 WL 23681, at \*2 (Tex. App.—Waco Jan. 5, 2005, no pet.) (J. Gray, dissenting).

<sup>2</sup> See Tex. Gov’t Code § 418.015(c).

<sup>3</sup> *Id.* § 418.011.

3. GA-39 is a statewide order, issued using statewide emergency powers, with a statewide legal effect. It has the force and effect of state law, and state law preempts inconsistent local law.<sup>4</sup> San Antonio ISD and Superintendent Martinez must recognize the fact that they are not above the law. San Antonio ISD’s vaccination mandate should be immediately enjoined.

### PARTIES

4. Plaintiff is the State of Texas, which as a sovereign entity “has an intrinsic right to enact, interpret, and enforce its own laws.”<sup>5</sup> This includes a right to “reassert the control of the state” and “enforce existing policy” as declared by the Texas Legislature.<sup>6</sup> Injuries to this right are sufficient to both create standing to sue and show irreparable harm.<sup>7</sup>

5. Defendant San Antonio ISD is an independent school district organized and existing under the laws of the State of Texas.

6. Defendant Pedro Martinez is the Superintendent of San Antonio ISD.

### EXPEDITED ACTION

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

### JURISDICTION AND VENUE

8. 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; section 24.007 of the Texas Government Code; sections 37.001 and 37.003 of the

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<sup>4</sup> *State v. El Paso Cty.*, 618 S.W.3d 812 (Tex. App.—El Paso 2020, no pet.).

<sup>5</sup> *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015).

<sup>6</sup> *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

<sup>7</sup> *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.—Austin 2018, pet. denied).

Texas Uniform Declaratory Judgments Act; and section 65.021 of the Texas Civil Practice and Remedies Code.

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

### BACKGROUND

#### **A. An Overview of the Texas Disaster Act**

10. The Texas Disaster Act of 1975 (“Disaster Act” or “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.”<sup>8</sup>

11. Another key purpose of the Disaster Act is to “clarify and strengthen the roles” of various governmental actors, including both state and local governments in preparing for, responding to, and recovering from disasters.<sup>9</sup> And the Disaster Act makes the sitting Texas Governor the leader and focal point of the State’s emergency response.<sup>10</sup>

12. Under the Disaster Act, the Governor is “responsible for meeting . . . the dangers to the state and people presented by disasters”<sup>11</sup> and is the “commander in chief” of the State’s response to a disaster.<sup>12</sup>

13. The Disaster Act gives the Governor the broad powers necessary to accomplish this weighty task.<sup>13</sup> Relevant here, the Governor is given the powers to: (1) control ingress to and egress

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<sup>8</sup> Tex. Gov’t Code § 418.002(1), (3).

<sup>9</sup> *Id.* § 418.002(4).

<sup>10</sup> *See, e.g., id.* §§ 418.011–.026.

<sup>11</sup> *Id.* § 418.011.

<sup>12</sup> *Id.* § 418.015(c).

<sup>13</sup> *See id.* §§ 418.011–.026.

from a disaster area and control the movement of persons and occupancy of premises in a disaster area;<sup>14</sup> (2) issue executive orders that “have the force and effect of law”;<sup>15</sup> and (3) suspend statutes, orders, or rules that “would in any way prevent, hinder, or delay necessary action in coping with a disaster.”<sup>16</sup>

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

15. 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.<sup>17</sup>

16. Second, section 418.108 authorizes “the presiding officer of the governing body of a political subdivision [to] declare a local state of disaster.”<sup>18</sup> 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.”<sup>19</sup>

17. 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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<sup>14</sup> *Id.* § 418.018(c).

<sup>15</sup> *Id.* § 418.012.

<sup>16</sup> *Id.* §§ 418.016(a), 418.017(a).

<sup>17</sup> *Id.* § 418.1015(b); *see also id.* § 418.015(c) (“[T]he governor is the commander in chief of state agencies, boards, and commissions having emergency responsibilities.”).

<sup>18</sup> *Id.* § 418.108(g).

<sup>19</sup> *Id.*

18. Rather, a local official's power to issue emergency orders is derivative and subservient to the Governor's power. The Disaster Act grants local officials derivative use of a Governor's powers only when they are acting in their capacities as local "emergency management director[s.]"<sup>20</sup> When acting in this capacity, the local official is a "designated agent" of the Governor and thus is subject to the Governor's control.<sup>21</sup>

#### **B. Executive Order GA-38**

19. On August 25, 2021, Governor Abbott issued Executive Order GA-39.<sup>22</sup> GA-39 "supersedes only paragraph No. 2 of Executive Order GA-38, and does not supersede or otherwise affect the remaining paragraphs of Executive Order GA-38."<sup>23</sup> The order provides in relevant part: "No governmental entity can compel any individual to receive a COVID-19 vaccine."<sup>24</sup> Notably, this replaces the following language in GA-38: "No governmental entity can compel any individual to receive a COVID-19 vaccine administered under an emergency use authorization."<sup>25</sup> This change prohibits *any* government vaccine mandate, regardless of FDA approval status. GA-39 further provides: "State agencies and political subdivisions shall not adopt or enforce any order, ordinance, policy, regulation, rule, or similar measure that requires an individual to provide, as a condition of receiving any service or entering any place, documentation regarding the individual's vaccination status for any COVID-19 vaccine."<sup>26</sup> Further, the Texas Health and Safety Code prohibits the issuance or requirement of "vaccine passports."<sup>27</sup>

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<sup>20</sup> *Id.* § 418.1015(b).

<sup>21</sup> *Id.*

<sup>22</sup> The Governor of the State of Tex., Executive Order GA-39, available at <https://tinyurl.com/EO-GA-39> (Exhibit A).

<sup>23</sup> GA-39 at 3.

<sup>24</sup> *Id.*

<sup>25</sup> GA-38 at 2.

<sup>26</sup> GA-39 at 2.

<sup>27</sup> Tex. Health and Safety Code § 161.0085.

20. Simply stated, GA-39 supersedes any vaccine requirement imposed by any government entity in Texas, except to the extent otherwise provided therein.<sup>28</sup> GA-39 also suspends several statutes, including “any conflicting order issued by local officials in response to the COVID-19 disaster.”<sup>29</sup> Specifically, GA-39 “suspend[s] 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.”<sup>30</sup>

21. GA-39 is clear and unequivocal: Receiving a COVID-19 vaccine is “strongly encouraged for those eligible to receive one . . . .”<sup>31</sup> But, the Governor has endeavored to “achiev[e] the least restrictive means of combatting the evolving threat to public health” by making COVID-19 vaccines “voluntary for Texans[.]”<sup>32</sup>

### C. Defendants’ Vaccine Mandate

22. Defendant San Antonio ISD, through the actions of Superintendent Martinez, has implemented a vaccine mandate for all school employees.<sup>33</sup> In a letter sent to San Antonio ISD employees, Superintendent Martinez explained:

We strongly believe that the best path forward as a school district is to require all staff to become vaccinated against COVID-19. And the timing is now. This is a profound moment where we can choose to lead by example.

I want to thank the vast majority of you, about 90%, who already are vaccinated. *For those of you who are not yet vaccinated against COVID-19, you must be fully vaccinated*

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<sup>28</sup> See generally GA-39.

<sup>29</sup> GA-39 at 2.

<sup>30</sup> *Id.*

<sup>31</sup> GA-39 at 1.

<sup>32</sup> *Id.*

<sup>33</sup> Letter from Superintendent Martinez to San Antonio ISD employees, available at <https://www.saisd.net/page/article/881> (Exhibit B).

by Friday, Oct. 15. Please note that it takes *five weeks* after the administration of the first dose to be considered fully vaccinated.<sup>34</sup>

23. According to Defendant Martinez’s letter, staff must get the first dose of the mandated vaccine, at the latest, five weeks prior to Oct. 15. Thus, employees are mandated to begin vaccination by, at the latest, September 10, 2021.

24. On August 26, 2021—the day after Governor Abbott issued GA-39—Superintendent Martinez sent SA ISD staff another letter, explaining that SA ISD intended to violate state law by requiring vaccination for employees:

We realize that each day there are news announcements surrounding mask and vaccine mandates, and we want to assure you, we are remaining steadfast in our commitment to protect our SAISD community through these two measures – masks for students and staff, and vaccination against COVID-19 for our staff members.

...

We have not wavered since we implemented our mandates. In fact, we are more committed than ever to the safety of our community.

Please know, this is not about politics. This is a matter of public health and safety, and we are taking a firm stand. Our attorneys can protect the district legally. Our focus will remain on protecting the health of those in our care and the stability of student learning. The mandates were implemented specifically for these two purposes.<sup>35</sup>

25. While Superintendent Martinez claims his decision to violate state law is not political, he sent this letter 3 days after he announced he was a candidate for Chicago Public Schools CEO.<sup>36</sup> Superintendent Martinez makes it clear that he will continue to violate state law

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<sup>34</sup> *Id.* (emphasis added).

<sup>35</sup> Letter from Superintendent Martinez to San Antonio ISD employees after Implementation of GA-39, *available at* <https://www.saisd.net/page/article/891> (Exhibit C).

<sup>36</sup> Superintendent Martinez CEO Candidacy Announcement, *available at* <https://www.saisd.net/page/article/888> (Exhibit D).

and devote his district’s resources to paying two different outside law firms to defend his unlawful political maneuvering.

## CLAIMS

### **A. Count I—Defendants’ vaccine mandate is preempted by GA-38 and constitutes an *ultra vires* action.**

26. Plaintiff repeats and realleges every preceding allegation as if fully set forth herein.

27. Texas, as a sovereign entity, “has an intrinsic right to enact, interpret, and enforce its own laws.”<sup>37</sup> This includes a right to “reassert the control of the state” and “enforce existing policy” as declared by the Texas Legislature.<sup>38</sup> Injuries to this right are sufficient to both create standing to sue and to show irreparable harm.<sup>39</sup>

28. This interest 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.<sup>40</sup> 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.”<sup>41</sup>

29. Defendants’ vaccine mandate implicates these important State interests. Defendants’ vaccine mandate violates GA-39 and undermines the State’s need for a clear and consistent response to the COVID-19 pandemic.

30. Defendants’ vaccine mandate is expressly preempted by GA-39.

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<sup>37</sup> *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015).

<sup>38</sup> *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

<sup>39</sup> 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.—Austin 2018, pet. denied).

<sup>40</sup> *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.”).

<sup>41</sup> *Yett*, 115 Tex. at 219–20.



31. The Disaster Act gives the Governor 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. For as long as it remains in effect, GA-39 has the same preclusive effect as any other state law. GA-39 preempts and invalidates any COVID-19 vaccine requirement imposed by governmental entities for COVID-19 vaccines.<sup>42</sup>

32. Defendants have no legal authority to require any person to receive a COVID-19 vaccination. Defendants' enforcement of a COVID-19 vaccine mandate violates GA-39 and constitutes an *ultra vires* act. The Defendants' letter to San Antonio ISD employees suggests that employment is contingent upon these employee's vaccination status starting Oct. 15, 2021 (but requiring action by Sep. 10, 2021).<sup>43</sup> Such enforcement is an ongoing unlawful act that can be redressed by prospective injunctive relief.

33. The Disaster Act gives the Governor the power to issue emergency orders that have "the force and effect of law." Governor Abbott used this power to issue GA-39, which was effective "on a statewide basis." A statewide order, issued using statewide power, having a statewide effect, is a "state law."

34. Pursuant to Texas' Declaratory Judgment Act and *ultra vires* and preemption principles, the enactment and enforcement of Defendants' vaccine mandate constitutes and *ultra vires* act because Governor Abbott suspended any statutes that might have allowed Defendants to issue this policy, and the State requests a declaration to that effect from this court.

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<sup>42</sup> GA-39 at 2.

<sup>43</sup> See Exhibit B; Exhibit C.

35. The enactment and enforcement of Defendants' vaccine mandate is invalid, unlawful, and constitutes an *ultra vires* act because this policy is preempted and otherwise barred by GA-39, and the State requests a declaration to that effect from this Court.

### **B. Count II—Declaratory Judgments**

36. Plaintiff repeats and realleges every preceding allegation as if fully set forth herein.

37. Pursuant to the Declaratory Judgments Act, Texas Civil Practice and Remedies Code § 37.001 *et seq.*, the State of Texas requests declaratory relief against Defendants.

38. The State of Texas seeks a declaration that the Defendants' COVID-19 vaccine mandate is void as a violation of GA-39, preempted by the same.

39. The State of Texas also seeks a declaration that the Defendants' COVID-19 vaccine mandate constitutes an *ultra vires* action.

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

40. 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, especially given that San Antonio ISD employees cannot reverse the mandated decision to get vaccinated in order to preserve their employment.

41. 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.<sup>44</sup> "A temporary injunction's purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits."<sup>45</sup> The applicant must prove three elements to obtain a temporary injunction: (1) a cause

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<sup>44</sup> *Texas Aeronautics Comm'n v. Betts*, 469 S.W.2d 394, 398 (Tex. 1971).

<sup>45</sup> *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

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.<sup>46</sup> These requirements are readily met here.

#### **A. The State is Likely to Succeed on the Merits**

42. Texas, as a sovereign entity, “has an intrinsic right to enact, interpret, and enforce its own laws.”<sup>47</sup> This includes a right to “reassert the control of the state” and “enforce existing policy” as declared by the Texas Legislature.<sup>48</sup> Injuries to this right are sufficient to both create standing to sue and show irreparable harm.<sup>49</sup>

43. 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.<sup>50</sup> 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.”<sup>51</sup>

44. Defendants’ vaccine mandate implicates these important State interests. Defendants’ vaccine mandate violates GA-39 and undermines the State’s need for a clear and consistent response to the COVID-19 pandemic.

45. Defendants’ vaccine mandate is expressly preempted by GA-39.

46. The Disaster Act gives 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

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<sup>46</sup> *Id.*

<sup>47</sup> *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015).

<sup>48</sup> *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

<sup>49</sup> *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.—Austin 2018, pet. denied).

<sup>50</sup> *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.”).

<sup>51</sup> *Yett*, 115 Tex. at 219–20.

law. For as long as it remains in effect, GA-39 has the same preclusive effect as any other state law. With minimal exceptions not relevant here, GA-39 preempts and invalidates any vaccine requirement imposed by governmental entities.<sup>52</sup>

47. Defendants have no legal authority to require any person to receive a vaccination. Defendants' enforcement of a vaccine mandate violates GA-39 and constitutes an *ultra vires* act. The Defendants' letter to San Antonio ISD employees suggests that employment is contingent upon these employee's vaccination status starting Oct. 15, 2021 (but requiring action by Sep. 10, 2021).<sup>53</sup> Such enforcement is an ongoing unlawful act that can be redressed by prospective injunctive relief.

48. To the extent Defendants rest the defense of their unlawful actions on the proposition that GA-39 is itself unlawful, this proposition is simply incorrect as a matter of law. The Disaster Act authorizes the Governor to declare a "state of disaster" for the entire State.<sup>54</sup> Governor Abbott has done so (most recently on July 30, 2021)<sup>55</sup> and explains in GA-39 that COVID-19 "poses an imminent threat of disaster *for all Texas counties.*"<sup>56</sup>

49. The Disaster Act gives the Governor the power to issue emergency orders that have "the force and effect of law." Governor Abbott used this power to issue GA-39, which was effective "on a statewide basis." A statewide order, issued using statewide power, having a statewide effect, is effectively a "state law."

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<sup>52</sup> GA-39 at 2.

<sup>53</sup> See Exhibit B; Exhibit C.

<sup>54</sup> Compare Tex. Gov't Code § 418.014, *with id.* § 418.018 (stating that local official can only declare "a *local* state of disaster") (emphasis added).

<sup>55</sup> See The Governor of the State of Tex., Renewal of COVID-19 Disaster Declaration for August 2021, *available at* <https://tinyurl.com/July-30-Disaster-Renewal> (Exhibit E).

<sup>56</sup> GA-39 at 1 (emphasis added).

50. The content of state law responding to a disaster like COVID-19 may change over time, as the disaster itself and our ability to cope with the disaster evolve, but that does not change the preclusive effect of the state law.

51. The Texas Supreme Court recognizes that this adjustment of disaster-related restrictions over time is fully authorized by the Disaster Act itself. As the Court put it:

If the plaintiffs were correct that each order issued by the Governor during a disaster must be motivated by a desire to alleviate the threat of the pandemic, then the Governor would be powerless to amend or rescind his orders based on other important goals, such as promoting economic welfare, protecting constitutional rights, or ensuring the integrity of elections. He would likewise be incapable of amending an order that may have an undesirable practical consequence unrelated to the disaster. His pandemic orders would operate as a one-way ratchet, moving only in the direction of alleviating the disaster. Nothing in the Disaster Act supports this view of the Governor’s authority.<sup>57</sup>

52. The Court went on to explain that “[t]he Act explicitly authorizes the Governor to amend or rescind his prior orders” and there is no limitation on the Governor’s ability “to consider valid policy goals, such as encouraging economic recovery [or] preserving constitutional rights . . . when undertaking such amendment.”<sup>58</sup>

53. Defendants’ contention that they have authority to violate GA-39 based on generalizations made by the Equal Employment Opportunity Commission misses the mark.<sup>59</sup> Defendants reference the EEOC’s guidance entitled “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws[,]” which examines—as the name explicitly states—COVID-19 in the context of federal laws.<sup>60</sup> But this guidance does nothing to

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<sup>57</sup> *Abbott v. Anti-Defamation League*, 610 S.W.3d 911, 918 (Tex. 2020).

<sup>58</sup> *Id.*

<sup>59</sup> Ex. B.

<sup>60</sup> Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, available at <https://tinyurl.com/EEOC-Federal-COVID-19-Guidance> (Exhibit H).

excuse Defendants' violation of GA-39 because Plaintiff's claims are unrelated to the ADA, the Rehabilitation Act, or any other EEO laws—rather, Plaintiff claims that Defendants have violated *state* law.

54. The Governor has authority under the Disaster Act to ensure consistency in the State's collective response to the disaster. Consider how the Disaster Act distributes power to local officials under Subchapter E.<sup>61</sup> Per section 418.1015(a) of the Texas Government Code, 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" of a joint board. 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."<sup>62</sup> A mayor is a city's presiding officer,<sup>63</sup> and a county judge is a county's presiding officer.<sup>64</sup>

55. The Disaster Act gives mayors, county judges, and joint board chief administrative officers 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 the Disaster Act as a whole, which reflects the Legislature's overall intent to make the Governor the leader of the State's emergency response.<sup>65</sup>

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<sup>61</sup> Tex. Gov't Code § 418.101 *et seq.*

<sup>62</sup> *Id.* § 418.1015(b).

<sup>63</sup> Tex. Local Gov't Code § 22.037.

<sup>64</sup> *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.").

<sup>65</sup> *See id.* §§ 418.011–.026.

56. The Eighth (El Paso) Court of Appeals of Texas’s opinion in *State v. El Paso County*<sup>66</sup> is instructive. *El Paso County* adopted the State’s arguments and enjoined El Paso’s conflicting local emergency order. In *El Paso County*, El Paso County Judge Ricardo A. Samaniego issued a local emergency order (“CE-13”) in response to the COVID-19 pandemic that conflicted with GA-32.<sup>67</sup>

57. The State intervened in a state court action challenging CE-13 and moved to enjoin this order based on the similar arguments made here.<sup>68</sup> The district court denied the State’s motion.<sup>69</sup> The Eighth Court of Appeals reversed and adopted the State’s arguments.<sup>70</sup> Below are three notable points from the Court of Appeals’ decision.

58. 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 CE-13.”<sup>71</sup> 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.<sup>72</sup>

59. Second, the court found that GA-32 was a state law, which “eclipse[s] inconsistent local law[s]” like CE-13.<sup>73</sup> 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

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<sup>66</sup> 618 S.W.3d 812 (Tex. App.— El Paso 2020, no pet.).

<sup>67</sup> *Id.* at 816–18.

<sup>68</sup> *Id.* at 818.

<sup>69</sup> *Id.*

<sup>70</sup> *See id.* at 818–27.

<sup>71</sup> *Id.* at 818–19.

<sup>72</sup> *Id.* at 819.

<sup>73</sup> *See id.* at 822 (citing various cases).

opposite direction?<sup>74</sup> The court explained that one of these orders must control.<sup>75</sup> 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.”<sup>76</sup> The court explained that local officials “can point to no similar power” afforded to them under the TDA.<sup>77</sup> 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.”<sup>78</sup> The court commented that any alternative holding could lead to a “chao[itic]” mess of 254 separate county-level responses to a statewide disaster.<sup>79</sup>

60. Third, the court rejected El Paso’s challenge to Governor Abbott’s suspension power, which is codified in section 418.016.<sup>80</sup> El Paso argued that CE-13 was not a “regulatory statute” and did not address “state business,” and thus it fell beyond section 418.016’s reach.<sup>81</sup> The court explained that CE-13 fit within the “classic definition of regulation,” which is “to control or supervise by means of rules and regulations.”<sup>82</sup> 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.<sup>83</sup> The court found that CE-13, which closed-down bars, restaurants, and other businesses closely regulated by

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<sup>74</sup> *Id.* at 822.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 828.

<sup>80</sup> *Id.* at 823–24

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (quotations omitted).

<sup>83</sup> *Id.*



the State, affected the conduct of “state business” and thus could be lawfully suspended by Governor Abbott.<sup>84</sup>

61. *El Paso County* involved issues similar 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.

62. Simply stated, any alternative conclusion would have absurd and potentially disastrous results. It would make school board trustees, superintendents, and other local officials—individuals who the TDA does not even meaningfully contemplate—into the true leaders of the State’s response to a statewide emergency. This is not what the Legislature intended when it enacted the TDA. The Defendants’ policy does not and cannot supersede state law.

**B. The State will be Irreparably Injured Absent an Injunction.**

63. This litigation implicates important State interests, namely, the sanctity of its laws. Local officials do not have *carte blanche* to ignore a State law just because they disagree with it. But that is precisely what the Defendants have done here. San Antonio ISD issued a vaccine mandate in open defiance of GA-39, which is a statewide order with a statewide legal effect. The Defendants’ blatant violation undermines State law and irreparably injures the State. The Supreme Court of Texas recently held as much in *State v. Hollins*.<sup>85</sup>

64. 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.’”<sup>86</sup> The Court noted that an *ultra vires* suit is a

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<sup>84</sup> *Id.*

<sup>85</sup> 620 S.W.3d 400, 409–10 (Tex. 2020).

<sup>86</sup> *Id.* at 410 (quoting *Yett*, 115 Tex. at 842).

necessary tool to reassert the State’s control over local officials who are misapplying or defying State laws.<sup>87</sup> 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.”<sup>88</sup>

65. 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.”<sup>89</sup> 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.”<sup>90</sup>

66. The State of Texas has an interest that justifies suit and the State will suffer an irreparable injury absent judicial relief.

67. Further, this COVID-19 vaccine mandate requires San Antonio ISD employees to engage in irreversible medical treatment by September 10, 2021 at the latest. It is crucial that this Court maintain the status quo during the pendency of this action so that San Antonio ISD employees who wish not to receive the COVID-19 vaccination, as is their right under GA-39, are not required to vaccinate in order to save their employment.

### **C. A Temporary Injunction is Necessary to Preserve the Status Quo**

68. This factor also favors the State. “The status quo is the last actual, peaceable, noncontested status which preceded the pending controversy.”<sup>91</sup> Here, that would be the parties’

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Sharma v. Vinmar Intern., Ltd.*, 231 S.W.3d 405, 419 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

status before Defendants implemented a vaccine mandate in violation of GA-39. Indeed, the Texas Supreme Court has been clear in recent cases involving GA-38:

This case, and others like it, are not about whether people should wear masks or whether the government should make them do it. Rather, these cases ask courts to determine which government officials have the legal authority to decide what the government's position on such questions will be. The status quo, for many months, has been gubernatorial oversight of such decisions at both the state and local levels. That status quo should remain in place while the court of appeals, and potentially this Court, examine the parties' merits arguments to determine whether plaintiffs have demonstrated a probably right to the relief sought.<sup>92</sup>

So too with vaccine mandates in violation of GA-39.

### PRAYER

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

- A. Grant a temporary restraining order, which will remain in force until a temporary injunction hearing can be held, restraining Defendants and any of their officers, agents, servants, employees, attorneys, representatives, or any other persons in active concert or participation with them from enforcing Defendants' COVID-19 vaccine mandate for as long as GA-39 (or a future executive order containing the same prohibitions) remains in effect;
- B. Grant temporary and permanent injunctions prohibiting Defendants and any of their officers, agents, servants, employees, attorneys, representatives, or any other persons in active concert or participation with them from enforcing Defendants' COVID-19 vaccine mandate for as long as GA-39 (or a future executive order containing the same prohibitions) remains in effect;
- C. Declare that Defendants' COVID-19 vaccine mandate is void as a violation of GA-39, preempted by the same;
- D. Declare that Defendants' COVID-19 vaccine mandate constitutes an *ultra vires* action;
- E. Award attorneys' fees and costs; and

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<sup>92</sup> *In re Greg Abbott, In His Official Capacity as Governor of the State of Texas v. City of San Antonio and County of Bexar*, No. 04-21-00342-CV (Texas Supreme Court Aug. 26, 2021, order); see also *In re Greg Abbott, In His Official Capacity as Governor of The State of Texas [Fort Bend County]*, No. 01-21-00440-CV (Tex. App.—Houston [1st Dist.] Aug. 16, 2021, order) (citing *In re Greg Abbott, In His Official Capacity as Governor of The State of Texas [Dallas County]*, No. 21-0686 (Tex. Aug. 15, 2021, order), available at <https://tinyurl.com/SCOTX-Jenkins-Stay> and *In re Greg Abbott, In His Official Capacity as Governor of The State of Texas [Bexar County]*, No. 21-0687 (Tex. Aug. 15, 2021, order), available at <https://tinyurl.com/SCOTX-Bexar-Stay>), available at <https://tinyurl.com/1COA-Fort-Bend-Stay>.

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

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing instrument has been served electronically through the electronic-filing manager in compliance with Texas Rule of Civil Procedure 21a on September 9, 2021 to Counsel for Plaintiff and Counsel for Defendants.

/s/ Aaron Reitz

Aaron Reitz

Counsel for the State of Texas

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