



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 17, 2021

The Honorable Dee Hobbs
Williamson County Attorney
405 M.L.K. Street #7
Georgetown, Texas 78726

Opinion No. KP-0386

Re: Whether Executive Order GA-38 creates a right, privilege, power, or immunity with regard to Texans' ability to not wear a face covering (RQ-0429-KP)

Dear Mr. Hobbs:

You ask whether Executive Order GA-38 creates a right, privilege, power, or immunity with regard to Texans' ability to not wear a face covering.¹

I. Executive Order GA-38 prohibits a governmental entity, including a county, city, school district, or public health authority, from requiring any person to wear a face covering or to mandate that another person wear a face covering.

The Governor declared a state of disaster in Texas due to COVID-19 on March 13, 2020, and that declaration is ongoing.² The Legislature authorized the Governor, upon declaring a disaster, to "issue executive orders, proclamations, and regulations and amend or rescind them." TEX. GOV'T CODE § 418.012. The Governor's executive orders issued pursuant to his emergency powers under chapter 418 of the Government Code "have the force and effect of law." *Id.* Pursuant to that authority, the Governor has issued multiple executive orders, proclamations, and other statements, relating to the COVID-19 disaster declaration.

¹See Letter from Honorable Dee Hobbs, Williamson Cnty. Att'y, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (Sept. 2, 2021), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2021/pdf/RQ0429KP.pdf>.

²Office of the Governor, Proclamation 41-3730, 45 Tex. Reg. 2094 (2020).

On July 29, 2021, the Governor issued Executive Order GA-38.³ GA-38 provides, in relevant part:

No governmental entity, including a county, city, school district, and public health authority, and no governmental official may require any person to wear a face covering or to mandate that another person wear a face covering; provided, however, that:

- i. state supported living centers, government-owned hospitals, and government-operated hospitals may continue to use appropriate policies regarding the wearing of face coverings; and
- ii. the Texas Department of Criminal Justice, the Texas Juvenile Justice Department, and any county and municipal jails acting consistent with guidance by the Texas Commission on Jail Standards may continue to use appropriate policies regarding the wearing of face coverings.

Exec. Order GA-38 at 4 (emphasis in original). Executive Order GA-38 further provides that “the imposition of any such face-covering requirement by a local governmental entity or official constitutes a ‘failure to comply with’ this executive order that is subject to a fine up to \$1,000.” *Id.* Executive Order GA-38 “supersede[s] any face-covering requirement imposed by any local governmental entity or official except as explicitly provided” under paragraphs (i) and (ii). *Id.*

Multiple lawsuits are currently pending in Texas state and federal courts that address the validity of Executive Order GA-38 and its prohibiting governmental entities from imposing a mask requirement. *See, e.g., In re Abbott*, No. 21-0720 (Tex. filed Aug. 23, 2021). It is the policy of this office to refrain from issuing an Attorney General opinion on a question that we know to be the subject of pending litigation. *See* Tex. Att’y Gen. Op. Nos. KP-0382 (2021) at 2, GA-0502 (2007) at 3–4, MW-205 (1980) at 1, V-291 (1947) at 5–6. We therefore assume without deciding the validity and enforceability of Executive Order GA-38 and answer your question concerning the rights that flow from that order, presuming its validity. *See Hegar v. Tex. Small Tobacco Coal.*, 496 S.W.3d 778, 785 (Tex. 2016) (explaining statutes are entitled to a presumption of constitutionality); *Vandygriff v. Frist Sav. & Loan Ass’n of Borger*, 617 S.W.2d 669, 673 (Tex. 1981) (explaining administrative orders are entitled to a presumption of validity until proven

³*See* GOVERNOR OF THE STATE OF TEXAS, EXECUTIVE ORDER 38 (July 29, 2021), https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf.

otherwise). The courts will ultimately decide the question of which government officials have the legal authority to impose or prohibit the imposition of requirements related to face coverings.⁴

II. Executive Order GA-38 creates immunity for Texans to be free from enforcement of local governmental mandates that require face coverings in most settings.

Given the executive order's prohibition on most local governmental face covering mandates, you ask whether it creates a right, privilege, power, or immunity with regard to Texans' ability to not wear a face covering.⁵ Request Letter at 1. In other contexts, courts have recognized the ability of executive orders to create rights and immunities. See *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 273 n.5 (1974) ("concluding that the Executive Order is valid and may create rights protected against inconsistent state laws"). We therefore consider whether Executive Order GA-38 does so here.

You frame your question in the context of section 39.03 of the Penal Code, which makes it an offense for a "public servant acting under color of his office or employment" to intentionally deny or impede "another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful." TEX. PENAL CODE § 39.03(a)(2). Whether the elements of a specific criminal offense are met in a particular case depends on factual determinations, which are beyond the scope of the opinion process. See Tex. Att'y Gen. Op. No. KP-0138 (2017) at 3 ("[T]his office does not determine as a matter of law whether particular actions constitute a criminal offense[.]"). We can, however, provide legal guidance as to the interpretation of the statute at issue. See Tex. Att'y Gen. Op. No. GA-0633 (2008) at 2 (declining to opine on whether entities violate state law but providing guidance as to the meaning of the statutes at issue).

Section 39.03 of the Penal Code does not define the term "immunity." When a statute uses a word that it does not define, courts determine and apply the word's common, ordinary meaning, looking to a wide variety of sources, including dictionary definitions. *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014). The common understanding of the term "immunity" in a legal context is "freedom or exemption from a charge, duty, obligation, office, tax, imposition, penalty, or service." WEBSTER'S THIRD NEW INT'L DICTIONARY 1130 (2002).

Executive Order GA-38 makes it unlawful for a governmental official to require any person to wear a face covering or to mandate that another person wear a face covering, with limited exceptions. Exec. Order GA-38 at 4. It thereby protects Texans facing enforcement of a face covering mandate, freeing them from any charge, imposition, or penalty for refusing to comply with a face covering mandate that is unlawful under the order. A court is therefore likely to conclude that Executive Order GA-38 creates immunity for Texans to be free from enforcement

⁴As the Texas Supreme Court recently recognized, these cases "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." *In re Abbott*, No. 21-0720, (Tex. Aug. 26, 2021) (order granting relator's emergency motion for temporary relief).

⁵By its terms, Executive Order GA-38 remains "in effect and in full force unless it is modified, amended, rescinded, or superseded by the governor." Exec. Order GA-38 at 5. Any rights established pursuant to GA-38 are likewise subject to modification and revocation by subsequent executive orders or proclamations.

of local governmental mandates that require face coverings. Furthermore, a court could find under certain facts that a governmental official intentionally denying that immunity to an individual by enforcing an unlawful face covering mandate is in violation of section 39.03 of the Penal Code.

S U M M A R Y

Executive Order GA-38 generally prohibits a governmental entity, including a county, city, school district, or public health authority, from requiring any person to wear a face covering or to mandate that another person wear a face covering.

Section 39.03 of the Penal Code makes it an offense for a “public servant acting under color of his office or employment” to intentionally deny or impede “another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful.”

Executive Order GA-38 creates immunity for Texans to be free from enforcement of most local governmental mandates that require face coverings. A court could find under certain facts that a governmental official intentionally denying that immunity to an individual by enforcing an unlawful face covering mandate is in violation of section 39.03 of the Penal Code.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

KEN PAXTON
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