No. 04-21-00342-CV

In the Court of Appeals for the Fourth Judicial District San Antonio, Texas

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS,

Appellant,

v.

CITY OF SAN ANTONIO AND COUNTY OF BEXAR,

Appellees.

On Appeal from the
45th Judicial District Court, Bexar County

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ORAL ARGUMENT CONDITIONALLY REQUESTED

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Statement of the Case

Nature of the Case: The City of San Antonio and Bexar County ("Plaintiffs") sued Appellant Governor Greg Abbott to enjoin the enforcement of the provisions of Executive Order GA-38 disallowing local governmental entities from requiring individuals to wear face coverings. CR.4-15.

Course of Proceedings: The trial court issued a temporary restraining order prohibiting enforcement of GA-38's face-covering provisions. CR.33-34. The Supreme Court stayed the TRO. Order, *In re Abbott*, No. 21-0687 (Tex. Aug. 15, 2021). Plaintiffs then moved for a temporary injunction. CR.13-14, 77. The Governor filed a plea to the jurisdiction and response to that motion. CR.37-75. The trial court subsequently held an evidentiary hearing on the motion. CR.101.

Trial Court: 45th Judicial District Court, Bexar County
The Honorable Antonia Arteaga

Trial Court Disposition: The trial court granted Plaintiffs' motion for temporary injunction and implicitly denied the Governor's plea to the jurisdiction. CR.101-02. The Governor filed a notice of appeal, Tex. Civ. Prac. & Rem. Code § 51.014(a)(4), (8), which superseded the temporary injunction. CR.105; *see* Tex. Civ. Prac. & Rem. Code § 6.001(b); Tex. R. App. P. 24.2(a)(3), 29.1(b). Plaintiffs moved under Rule 29.3 to reinstate the temporary injunction pending appeal. This Court issued a temporary order, which the Supreme Court subsequently stayed. *See* Order, *In re Abbott*, No. 21-0720 (Tex. Aug. 26, 2021).

Statement Regarding Oral Argument

This case presents a matter of crucial statewide importance: when the Governor and local governmental entities issue conflicting orders in response to a statewide disaster, whose orders control? Although this appeal warrants oral argument, it should also be resolved as expeditiously as possible. The Governor thus defers to the Court as to whether oral argument would be appropriate.

Issue Presented

Did the trial court abuse its discretion, and exceed its jurisdiction, in granting Plaintiffs' request for a temporary injunction?

Introduction

Plaintiffs' claims rest on an untenable premise: when the Governor and localities issue contradictory emergency orders during a statewide disaster, the local orders control. The Texas Disaster Act of 1975 mandates the opposite. It makes the Governor the "commander in chief" of the State's response to a disaster, Tex. Gov't Code § 418.015(c), and empowers him to promulgate executive orders that have the "force and effect of law," *id.* § 418.012.

On July 29, Governor Abbott issued Executive Order GA-38, which aims to strike a balance between "the ability of Texans to preserve livelihoods" and "protecting lives" through "the least restrictive means of combatting the evolving threat to public health." CR.68, 70. The Disaster Act limits local officials to acting as the Governor's agents in addressing the disaster. And GA-38 suspends the authority of local officials to issue orders that contradict GA-38. The trial court's temporary injunction unlawfully blocks provisions of GA-38 critical to maintaining a uniform, coherent response to the COVID-19 pandemic.

The trial court erred in granting that injunction because Plaintiffs are unlikely to succeed on the merits of their claims, the injunction departs from the status quo as recognized by the Supreme Court in three separate orders handed down over the past month, and Plaintiffs failed to establish jurisdiction. For each of those reasons, the temporary injunction should be dissolved.

Statement of Facts

I. The Disaster Act

The Texas Disaster Act of 1975 "provide[s] an emergency management system embodying all aspects of predisaster preparedness and postdisaster response." Tex. Gov't Code § 418.002(7). This comprehensive regime "provide[s] a setting conducive to the rapid and orderly restoration and rehabilitation of persons and property affected by disasters," *id.* § 418.002(3), by "clarify[ing] . . . the roles of the governor, state agencies, the judicial branch of state government, and local governments in . . . response to, and recovery from[,] disasters," *id.* § 418.002(4).

True to its stated purpose, the Act charges the Governor with determining whether (and declaring that) a disaster has occurred. *Id.* § 418.014(a). "During a state of disaster and the following recovery period," the Governor "is the commander in chief" of the State's disaster response, *id.* § 418.015(c), "responsible for meeting . . . the dangers to the state and people presented by disasters," *id.* § 418.011, .011(1).

The Act vests the Governor with the powers necessary to meet that responsibility. He may issue executive orders that have "the force and effect of law." *Id.* § 418.012. He may suspend "any regulatory statute prescribing the procedures for [the] conduct of state business" if these "provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster." *Id.* § 418.016(a). He "may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area." *Id.* § 418.018(c). And he may "use all available resources"—state and local—"that are reasonably

necessary to cope with a disaster," *id.* § 418.017(a), including "temporarily reassign[ing] resources, personnel, or functions" of state executive departments or agencies, *id.* § 418.017(b).

The Act also enables certain local officials to exercise the Governor's powers subject to his direction and control. Under the Act, the "presiding officer of the governing body" of an incorporated city or county is deemed the "emergency management director" for that political subdivision. *Id.* § 418.1015(a). That director must "serve[] as the governor's designated agent in the administration and supervision of duties under this chapter." *Id.* § 418.1015(b). Such a director "may exercise the powers granted to the governor under this chapter on an appropriate local scale." *Id.* The presiding officer of a political subdivision may also "declare a local state of disaster." *Id.* § 418.108(a). Consistent with that officer's role as the Governor's agent, *id.* § 418.1015(b), declaring such a local disaster triggers local or interjurisdictional emergency aid plans, allows the officer to evacuate the affected area, and enables the officer to control the movement of persons and occupancy of premises in that area, *id.* § 418.108(d), (f), (g).

II. Executive Orders GA-36 and GA-38

To discharge his statutory responsibilities under the Disaster Act, Governor Abbott has issued a series of orders over the course of the last year-and-a-half to mitigate the risks from COVID-19 and to provide for a speedy and uniform statewide recovery. *See* Order at 1, *In re Abbott*, No. 21-0720 (Tex. Aug. 26, 2021). Relevant here, the Governor issued Executive Order GA-36 on May 18, 2021. *See* The Governor of the State of Tex., Executive Order GA-36, 46 Tex. Reg. 3325 (May 18, 2021). GA-

36 provided, with a few delineated exceptions, that 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 an-other person wear a face covering." *Id.*[1]

Executive Order GA-38, issued on July 29, contains this same prohibition. CR.71. Like GA-36 and earlier executive orders, GA-38 strikes a balance between "the ability of Texans to preserve livelihoods" and "protecting lives" through "the least restrictive means of combatting the evolving threat to public health." CR.68, 70. The Executive Order "strongly encourage[s] [Texans] as a matter of personal responsibility to consistently follow good hygiene, social-distancing, and other mitigation practices," but it also provides that "no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering." CR.68, 70. This provision expressly "supersede[s] any conflicting local order in response to the COVID-19 disaster" and "suspend[s]" "all relevant laws . . . to the extent necessary to preclude any such inconsistent local orders." CR.71.

To ensure "uniformity" in the State's response to the COVID-19 pandemic, GA-38 also provides, with limited exceptions inapplicable here, that "[n]o governmental entity . . . may require any person to wear a face covering or to mandate that

[1] Before GA-36, GA-34 provided that in areas without high hospitalization rates, "no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering." The Governor of the State of Tex., Executive Order GA-34, 46 Tex. Reg. 1567, 1568 (Mar. 12, 2021). Even in areas with high hospitalizations, local governments could not "impose a penalty of any kind for failure to wear a face covering." *Id.* GA-34 was first issued in *March*. *Id.*

another person wear a face covering." *Id.* This provision explicitly "supersede[s] any face-covering requirement imposed by any local governmental entity or official, except as explicitly provided." *Id.* GA-38 further suspends sections 418.1015(b) and 418.108 of the Government Code—sections designating local officials as the Governor's agents and allowing for local emergency declarations—"[t]o the extent necessary to ensure that local governmental entities or officials do not impose any such face-covering requirements." *Id.*

III. Litigation History

A. Although GA-38 had at that point existed for more than ten days—and GA-36 had been in place for months—Plaintiffs sought a temporary restraining order on August 10, seeking to prohibit the Governor from enforcing GA-38 "to the extent it prohibits the City or County from adopting a mask mandate." CR.14. They also sought a temporary injunction and declaratory judgment that the Governor's "suspension of laws allowing local governments to impose mask requirements is *ultra vires* and outside the scope of his authority" under the Disaster Act. CR.9 (emphasis omitted). Further, they sought a declaration that the Disaster Act itself "is unconstitutional under the Suspension Clause and the Separation of Powers Clause of the Texas Constitution." CR.12.

The trial court issued a TRO forbidding the Governor to enforce sections (3)(b), (3)(g), 4 and 5(a) of GA-38 "to the extent those provisions (1) prohibit [Plaintiffs] from requiring City and County employees or visitors to City- and County-owned facilities to wear masks or face coverings; or (2) prohibit the San Antonio and Bexar County Public Health Authority from requiring masks in public schools in the City

and County." CR.33. The Governor sought mandamus and emergency temporary relief from that order, and the Supreme Court quickly granted temporary relief, reasoning that the TRO upended, rather than preserved, the status quo. Order, *In re Abbott*, No. 21-0687 (Tex. Aug. 15, 2021). But the Court allowed the trial court to proceed with a hearing on Plaintiffs' motion for temporary injunction. *Id.*

B. At that hearing, Plaintiffs called four witnesses. 1.RR.4. Those witnesses asserted that the COVID-19 pandemic has recently worsened due to the spread of the Delta variant. *See, e.g.*, 1.RR.41. They testified that imposing a mask mandate in their communities would help slow the spread of COVID-19. 1.RR.58. But they could not testify as to the degree of voluntary mask compliance within their jurisdictions after July 29, when the Governor issued GA-38, or even whether there have been any efforts to track that data. 1.RR.64.

The Governor's primary response—consistent with his position in this and other litigation—is that this case presents a pure question of law. 1.RR.144. And to that end, Plaintiffs' witnesses did not dispute that they lack the authority to violate state law. 1.RR.62, 82, 120.

C. After the hearing, the trial court granted Plaintiffs' motion.[2] CR.101-02. The order is similar in scope to the order that the Supreme Court previously stayed. It enjoins the Governor from enforcing GA-38 to the extent that GA-38 (1) prohibits

[2] The same day of the hearing, Plaintiffs filed a "First Supplemental Petition" purporting to add claims against the State of Texas. CR.86-87. The trial court's injunction enjoins only the Governor, however, CR.101-02, and the State did not file a plea to the jurisdiction before the trial court issued its temporary injunction. The State is therefore not a party to this appeal.

the City and County from requiring their employees or visitors to their facilities to wear masks or (2) prohibits City and County officials from requiring masks in public schools. CR.101-02.

After the Governor superseded the temporary injunction by filing a notice of accelerated interlocutory appeal, CR.113, Plaintiffs filed an emergency motion under Texas Rule of Appellate Procedure 29.3 asking for an order preserving the temporary injunction's effect pending appeal. This Court granted that motion, concluding that GA-38 altered the status quo and that the temporary injunction restored the status quo. Order, *Abbott v. City of San Antonio and County of Bexar*, No. 04-21-00342-CV (Tex. App.—San Antonio Aug. 19, 2021). Calling the circumstances of the case "unique, and quite frankly, unprecedented," the Court concluded that reinstating the temporary injunction was necessary to preserve the parties' rights and prevent irreparable harm. *Id.* at 7.

The Supreme Court, however, subsequently stayed this Court's order, noting that "[t]his case, and others like it, are not about whether people should wear masks or whether the government should make them do it." Order at 1, *In re Abbott*, No. 21-0720 (Tex. Aug. 26, 2021). Instead, "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." *Id.* The Court concluded that the "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 probable right to the relief sought." *Id.*

The parties then agreed to an expedited briefing schedule on the merits of the Governor's appeal. The Governor now seeks the dissolution of the temporary injunction.

Summary of the Argument

I. The trial court abused its discretion in granting a temporary injunction. Plaintiffs did not establish probable success on the merits because GA-38 is a valid exercise of the Governor's authority under the Disaster Act. This is so for four reasons: *First*, the Act designates the Governor—not individual cities or counties—as the State's "commander in chief" in addressing statewide disasters like the COVID-19 pandemic. GA-38's prohibition on face-covering mandates fits well within the Act's grant of authority to the Governor to control "ingress and egress" to, "movement" throughout, and the "occupancy of premises" in the disaster area, which spans the entire State. *Second*, localities are agents of the Governor during the disaster. It is a bedrock principle that agents cannot contravene the objectives of their principal. Thus, Plaintiffs lack the authority to issue orders that contradict those the Governor has issued. *Third*, the Governor has suspended the statutory authority that Plaintiffs could rely upon to issue local orders in response to the COVID-19 pandemic. *Fourth*, and finally, because the Act places concrete limits on the Governor's authority to suspend statutes, the Act itself does not violate the Texas Constitution's nondelegation doctrine.

Moreover, a temporary injunction is supposed to preserve the status quo, not upend it. The Supreme Court has cautioned that the status quo in this context is "gubernatorial oversight" of decisions like whether to impose mask mandates "at

both the state and local levels." The trial court abused its discretion by altering the status quo and failing to properly balance the equities before enjoining an executive order designed to maintain statewide uniformity in response to a statewide disaster.

II. The trial court also erred in three key respects in implicitly denying the Governor's plea to the jurisdiction. *First*, the Governor maintains immunity from suit because Plaintiffs failed to establish that he has acted outside his statutory authority. *Second*, Plaintiffs did not establish their standing to sue the Governor. The Governor does not enforce GA-38, and Plaintiffs' injuries cannot be redressed by an order against him. *Third*, and finally, the injunction should never have issued because the trial court lacks the statutory authority to enjoin the Governor.

Standard of Review

To establish their right to a temporary injunction, Plaintiffs had to 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." *State v. Hollins*, 620 S.W.3d 400, 405 (Tex. 2020) (per curiam). This Court reviews a trial court's temporary injunction for an abuse of discretion. *E.g.*, *Henry v. Cox*, 520 S.W.3d 28, 33 (Tex. 2017). Nevertheless, "to the extent the district court's ruling rests on questions of law, whether in the context of an abuse of discretion analysis or otherwise," this Court reviews that ruling de novo. *Tex. Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 438 (Tex. App—Austin 2018, pet. denied); *see Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding) (noting that a "clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion").

The Court may vacate the injunction based on any issue raised by appellants: regardless of the merits, a temporary injunction in a case where a plaintiff has not established jurisdiction is necessarily improper because "[a] plea to the jurisdiction challenges the trial court's authority to determine the subject matter of a specific cause of action." *Rea v. State*, 297 S.W.3d 379, 383 (Tex. App.—Austin 2009, no pet.) (citing *Bland ISD v. Blue*, 34 S.W.3d 547, 553-54 (Tex. 2000)). Although a court must assure itself that jurisdiction exists before *granting* an injunction, an appellate court may *direct the dissolution of* a temporary injunction for lack of likelihood of success on the merits without resolving jurisdictional challenges. *In re Abbott*, No. 21-0667, 2021 WL 3641471, at *4 n.8 (Tex. Aug. 17, 2021) (orig. proceeding).

ARGUMENT

I. The Trial Court Abused Its Discretion in Issuing a Temporary Injunction Against the Governor.

A. The Legislature deputized the Governor, not localities, to manage statewide disasters.

The trial court's order effectively concludes that local officials' views of how best to manage the COVID-19 pandemic should trump the Governor's. CR.101-02. That conclusion cannot be reconciled with the language of the Disaster Act. The Governor—not any local official—"is the commander in chief" of the State's disaster response. Tex. Gov't Code § 418.015(c). And "*[t]he governor* may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area." *Id.* § 418.018(c) (emphasis added).

GA-38's prohibition on local governments implementing face-covering mandates falls comfortably within this broad statutory language. Regulating the wearing of face coverings qualifies as an exercise of the Governor's power to "control ingress and egress to and from a disaster area," "the movement of persons," and the "occupancy of premises in the area." *Id.* GA-38 "renew[s] the COVID-19 disaster declaration for *all* Texas counties," including Bexar County. CR.68 (emphasis added). And a prohibition on face-covering mandates controls "ingress and egress" to, the "occupancy of premises" in, and "the movement of persons" through the locations into which the order permits a mask mandate, CR.68-69, because it authorizes the entry of individuals that would be prohibited under Plaintiffs' preferred regime.

Plaintiffs cannot rely on similar language in section 418.108(g), which permits certain local officials to "control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge or mayor," to supersede an order issued by the Governor under section 418.018. "Texas is faced with a statewide disaster, not simply a local one." *State v. El Paso County*, 618 S.W.3d 812, 823 (Tex. App.—El Paso 2020, no pet.). And in such a scenario, "the Legislature inserted a tie breaker and gave it to the governor in that his or her declarations under [s]ection 418.012 have the force of law." *Id.* at 822.

Thus, to the extent Plaintiffs seek to pass contradictory measures, GA-38 validly preempts them. *Id.* at 826. It is well-established that an ordinance that is essentially and directly repugnant to state law "must fail." *City of Beaumont v. Fall*, 291 S.W. 202, 206 (Tex. [Comm'n Op.] 1927); *see also City of Brookside Vill. v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982) ("[A]n ordinance which conflicts or is inconsistent

with state legislation is impermissible."). Here, the Governor's executive orders carry the force and effect of law. Tex. Gov't Code § 418.012. Specifically, the statewide emergency orders, which are issued using statewide powers and which have a statewide legal effect, are "state laws." And traditional preemption principles dictate that when a state law conflicts with a local law, the state law controls. *See, e.g.*, *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 18-19 (Tex. 2016).

The text of the Disaster Act and the Legislature's purpose—the focus of preemption analysis—supports this conclusion. *See id.* at 8. "Deciding whether uniform statewide regulation or nonregulation is preferable to a patchwork of local regulations is the Legislature's prerogative." *City of Laredo v. Laredo Merchants Ass'n*, 550 S.W.3d 586, 592-93 (Tex. 2018). Here, numerous local officials—city mayors and county officials, among others—want to issue orders that conflict with the Governor's GA-38 on the same core issues. One of those orders must control. Of these officials, the Governor is the only one with the authority to issue (1) statewide emergency orders (2) that explicitly carry the force and effect of law. Tex. Gov't Code §§ 418.012, .014–.015. Also, the Governor is the only public official explicitly responsible for meeting the dangers to the State and its people presented by a disaster. *Id.* § 418.011. Further, the Governor is the only one whom the Disaster Act empowers to suspend laws, use a political subdivision's resources, and control the movement of persons and occupancy of premises on a statewide level. *Id.* §§ 418.016(a), .017, .018.

In the context of public officials' orders targeted to the subject of a declared disaster, the Act is what controls, not general-authority statutes like the ones cited in

Plaintiffs' petition. *See, e.g.*, CR.7. Any other conclusion would lead to absurd results. A finding that GA-38 carries no preemptive effect would create mass confusion and a collapse of the State's unified response to the challenges posed by the pandemic by turning dozens of state and local emergency orders into a flurry of non-binding recommendations. The State's unified response to the disaster would splinter into a patchwork of disjointed officials all plotting different paths, with no single leader directing the effort. *El Paso County*, 618 S.W.3d at 822 ("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."). And such a construction of the statutory scheme could bring a cascade of effects far beyond the confines of the present controversy over face-covering mandates, importing this disjointedness to other aspects of how the State responds to this and future disasters. This is not what the Legislature designed through the Act.

B. Plaintiffs act as the Governor's agents under the Disaster Act.

Plaintiffs' attempt to arrogate to themselves the power to manage the response to a statewide disaster falters for an additional reason: section 418.108, which allows certain officials to address locally declared disasters, requires Plaintiffs to do so as the Governor's agents. It is black-letter law that an agent is subject to the control of the principal, *see id.* at 820-21, meaning that Plaintiffs are bound by GA-38.

To make clear the chain-of-command and scope of local officials' power during a statewide disaster like this pandemic, the Disaster Act states that the "presiding officer of the governing body of an incorporated city or a county . . . is designated as

the emergency management director," Tex. Gov't Code § 418.1015(a), and that those "emergency management director[s] serve[] as the governor's designated agent[s] in the administration and supervision of duties under this chapter," *id.* § 418.1015(b).

Giving the word "agent" its usual meaning, *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011), local officials cannot countermand the Governor's emergency orders because "an agent is subject to the control of the principal, and not vice versa," *El Paso County*, 618 S.W.3d at 820-21; *see also Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 697 (Tex. 2017); *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 590 (Tex. 2017); Restatement (Third) of Agency § 1.01 cmt. f (2006).

The statute's "structure, subject matter, [and] context" demonstrate that local officials' emergency power under section 418.108(g) is subordinate to the Governor's. *State v. Atwood*, 16 S.W.3d 192, 195 (Tex. App.—Beaumont 2000, pet. ref'd). Consider, for example, section 418.108(i), which expressly limits local officials' emergency power. Under that provision, a local official may not "include a restriction that exceeds a restriction authorized by section 352.051 [of the] Local Government Code" that lasts more than "60 hours." Tex. Gov't Code § 418.108(i)(1). That limit does not apply to the Governor, who is empowered to grant an extension. *See id.* § 418.108(i)(1), (2).

Or take section 418.108(h), which explains that "[f]or purposes of [s]ubsections (f) and (g)," "to the extent of a conflict between decisions of the county judge

and the mayor, the decision of the county judge prevails." *Id.* § 418.108(h)(2). Subsections (f) and (g) grant local officials authority to order evacuations and "control ingress to and egress from a disaster area," *id.* § 418.108(f), (g)—powers that are also available to the Governor, *see id.* §§ 418.018(a), (c), 418.020(e); *El Paso County*, 618 S.W.3d at 820-23. Still, subsection (h) deals only with conflict between a county judge and a mayor—not with the Governor. That is because it would be superfluous: as the principal, the Governor's decisions necessarily prevail.

The Governor's duties confirm this result. The Governor is "the commander in chief of state agencies, boards, and commissions having emergency responsibilities." Tex. Gov't Code § 418.015(c). To that end, the "governor may use all available resources of state government and of political subdivisions that are reasonably necessary to cope with a disaster." *Id.* § 418.017(a). These provisions establish the Governor's authority over local officials exercising emergency responsibilities under section 418.1015: it has long been the law that a "county is merely an arm of the state .... [T]he state may use, and frequently does use, a county as its agent in the discharge of the State's functions and duties." *Childress County v. State*, 92 S.W.2d 1011, 1015 (Tex. 1936); *accord El Paso County*, 618 S.W.3d at 820-23. The Texas Disaster Act does not countenance local officials attempting to substitute their views about how to handle a disaster for those of the State's commander in chief.

Finally, the Act clarifies that "[t]he *governor* is responsible for meeting ... the dangers to the state and people presented by disasters"—and is accountable to voters for failing to do so. Tex. Gov't Code § 418.011(1) (emphasis added). By statute, he has powers necessary to satisfy this responsibility, some of which overlap with the

emergency powers of local officials. If local officials could supersede any of the Governor's emergency orders merely by claiming that a statewide disaster is also a local one, the Governor would quickly find himself unable to discharge his statutory duties. Because the Act cannot reasonably be read to task the Governor with a duty and simultaneously empower local officials to frustrate it, there "ha[s] to be a tie-breaker"—in this instance, the Governor. *See El Paso County*, 618 S.W.3d at 822; *cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) (holding that to "take Care that the Laws be faithfully executed," the President must be able to supervise the officers who execute them). After all, under the Act, it is the "*legislature by law*"—not localities—that may terminate the Governor's use of his emergency powers. Tex. Gov't Code § 418.014(c) (emphasis added).

By its text and structure, the Disaster Act prevents local officials from issuing orders that conflict with those of the Governor because they have the authority to act only as his agents. For this additional reason, section 418.108 does not give Plaintiffs the power to issue any orders contrary to GA-38.

C. GA-38 suspends the statutory provisions upon which Plaintiffs rely to craft local rules for a statewide disaster.

Section 418.108 also cannot give local officials authority to make local rules to manage a statewide disaster because GA-38 validly suspends that provision under these circumstances. In order to "ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with" the Gov-

ernor's Executive Order, GA-38 invokes the Governor's statutory power under section 418.016(a) of the Government Code to suspend section 418.108 of the Government Code. CR.71-72.

The trial court's order, which effectively rules that the Governor lacked the statutory authority to suspend section 418.108, *see* CR.101-02, cannot be squared with the relevant statutory text. The Disaster Act supplies the Governor with the power to "suspend the provisions of any regulatory statute prescribing the procedures for [the] 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 § 418.016(a).

Section 418.108 qualifies as a law addressing the conduct of "state business"—particularly when invoked to justify a temporary injunction that permits local officials to deviate from the State's response to a statewide disaster. Because the Disaster Act "does not define the term[] . . . 'state business,'" the starting point is that term's "common, ordinary meaning." *El Paso County*, 618 S.W.3d at 823 (citing *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014)). Texas courts "[e]schew[] a hyper-technical definition of the term 'state business.'" *Id.* at 824. And "common dictionary meanings," *id.*, of the term "business" in the context of the phrase "state business" include "purposeful activity: activity directed toward some end." Webster's Third International Dictionary 302 (1961); *see also, e.g.*, *Business*, Oxford Dictionaries, https://tinyurl.com/2xwhk38v (online ed.). GA-38's face-covering mandate prohibition easily "fits the classic definition of" state business, *El Paso County*, 618 S.W.3d at 824: it is a regulation aimed at achieving the

Governor's goal of striking a balance between "the ability of Texans to preserve livelihoods" and "protecting lives" through "the least restrictive means of combatting the evolving threat to public health" statewide. CR.68, 70.

It is of no moment that GA-38's face-covering mandate prohibition applies at the local level (albeit at every local level in the State). As the Eighth Court explained, the term "state business" does not "mean only the activities of state agencies and actors." *El Paso County*, 618 S.W.3d at 824. To the contrary, "state business" often occurs at a local level because "the state may use . . . a county as its agent in the discharge of the State's functions and duties." *Childress County*, 92 S.W.2d at 1015. Thus, "had the Legislature meant to so limit the term, it would have said 'official state business,' as it has done in many other statutes." *El Paso County*, 618 S.W.3d at 824 (collecting statutes); *see id.* at 824 (looking at other uses of the term). It did not do so in the Disaster Act, which uses "state agency" when it means "state agency." *See, e.g.*, Tex. Gov't Code §§ 418.013(b), .0155(b), .016(e). Therefore, a rule limiting the Governor's authority to suspending actions by state agencies would ignore a cardinal rule of statutory construction that "when the legislature uses certain language in one part of the statute and different language in another, the Court assumes different meanings were intended." *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 564 (Tex. 2016) (cleaned up).

Plaintiffs have argued that the Disaster Act "says nothing about the suspension of laws authorizing local governments to adopt public-health measures in their jurisdictions," pointing to multiple provisions of the Texas Health and Safety Code. *See* CR.10-11 (citing Tex. Health & Safety Code §§ 121.003, .021, .024, 122.006). But

that argument ignores that those provisions say nothing about whether the Governor, in times of emergency, may suspend that authority or whether the health and safety of Texans statewide is "state business." It plainly is. Giving that term a contrary reading would hamper the broad authority the Legislature granted to the Governor to act in times of crisis. *See El Paso County*, 618 S.W.3d at 824. The Governor's suspension of the provisions of Chapters 121, 122 and 341 of the Health and Safety Code—including the specific provisions that Plaintiffs rely upon—is thus a valid exercise of his authority under the Disaster Act. CR.71; *see* Tex. Gov't Code § 418.016(a).

For like reasons, a series of laws permitting local face-covering mandates would "prevent, hinder, or delay necessary action in coping with a disaster" because the Governor may consider a variety of factors—not just preventing transmission of COVID—in crafting a statewide response to a disaster. Tex. Gov't Code § 418.016(a). In *Abbott v. Anti-Defamation League Austin, Southwest, & Texoma Regions*, the Texas Supreme Court held that the Governor is not required to prevent the transmission of COVID-19 at all costs but may instead consider a variety of policy goals when determining what statutes to suspend. 610 S.W.3d 911, 918 (Tex. 2020) (per curiam). In that case, the plaintiffs argued that a gubernatorial order restricting the number of delivery locations for mail-in ballots was improper because it was likely to increase the spread of COVID-19. *Id.* at 915. The Court rejected this argument as unduly myopic: addressing this disaster requires more than just "a desire to alleviate the threat of the pandemic." *Id.* at 918. Were it otherwise, the Governor's "pandemic orders would operate as a one-way ratchet." *Id.* Instead, the Governor may

also consider "other important goals, such as promoting economic welfare [and] protecting constitutional rights." *Id.*

Executive Order GA-38 is consistent with *Anti-Defamation League Austin*. It attempts to "balance a variety of competing considerations," *id.*: principally, "the ability of Texans to preserve livelihoods" and "protecting lives" through "the least restrictive means of combatting the evolving threat to public health." CR.68, 70. And the Governor has decided that allowing hundreds of different localities to craft their own rules would eviscerate any uniformity in the State's response to the COVID-19 disaster. This is a judgment call that is subject to good-faith disagreement. But that is why the "the only question that [the courts] are capable of answering is, under the text of the statute, who is the proverbial captain of the ship to make the difficult decisions" regarding state efforts to "meet disaster dangers" posed by "the COVID-19 pandemic[?]" *El Paso County*, 618 S.W.3d at 818-19. As described above, the Governor has that obligation—not local officials, or even a trial court.

D. The Disaster Act is constitutional.

In the alternative, Plaintiffs suggest that section 418.016 unconstitutionally delegates to the Governor the authority to suspend laws. CR.12-13. Unlike the federal constitution, the Texas Constitution has an express separation-of-powers clause. Tex. Const. art. II, § 1. Unsurprisingly, the Texas Constitution vests "[l]egislative power" in the Legislature. *See id.* art. III, § 1. It also provides that "[n]o power of suspending laws in this State shall be exercised except by the Legislature." *Id.* art. I, § 28.

The Texas Supreme Court has recognized, however, that (1) the government cannot function if the Legislature—which usually meets for only a few months every two years—cannot delegate tasks to the Executive, and (2) "[d]efining what legislative power is or when it has been delegated is no easy task." *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000). Generally, legislative power is "the power to make rules and determine public policy." *Id.* Whether a delegation of legislative power is unconstitutional devolves to "a debate not over a point of principle but over a question of degree." *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 466 (Tex. 1997) (quoting *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting)). The Legislature may delegate legislative power to another branch "as long as the Legislature establishes reasonable standards to guide the agency in exercising those powers." *FM Props.*, 22 S.W.3d at 873; *see Boll Weevil*, 952 S.W.2d at 467 (noting that "the nondelegation doctrine [is] sparingly applied").

The Disaster Act satisfies the nondelegation doctrine because it contains adequate standards to guide the Governor in its application. Section 418.002 sets forth in detail the Act's several purposes, and section 418.003 describes limitations. Definitions are provided to interpret the Act, including "Disaster," which includes an "epidemic" like COVID-19. Tex. Gov't Code § 418.004(1). Section 418.011 pronounces the Governor's responsibilities to include "meeting" "dangers to the state and people presented by disasters." *Id.* at 418.011(1). Section 418.012 allows the Governor to issue executive orders with the force and effect of law. A state of disaster may be declared if the Governor "finds a disaster has occurred or that the occurrence

or threat of disaster is imminent." *Id.* § 418.014(a). The provision describes how long a state of disaster continues, *id.* § 418.014(b), limits a state of disaster to not more than 30 days unless renewed by the Governor, *id.* § 418.014(c), and announces that the Legislature by law may terminate a state of disaster at any time, *id.* Subsections 418.014(d)-(e) describe what the declaration must include and how to disseminate it.

Section 418.016(a) further permits the Governor to suspend certain regulatory laws and rules. In effect, the Legislature decreed that certain regulatory laws or rules can be suspended based on a factual determination by the Governor about the effects of a rapidly unfolding disaster. If such a law or rule thwarts or diminishes the government's ability to mitigate the disaster, the Governor may suspend it. This standard protects against arbitrary executive action and ensures that any executive order is focused on ameliorating the disaster through a coordinated response. The Legislature's consent to such suspensions is subject to its power to terminate a state of disaster under section 418.014(c).

The Disaster Act is similar to the Pink Bollworm Act, which withstood a challenge under article I, section 28. *See Williams v. State*, 176 S.W.2d 177, 184-85 (Tex. Crim. App. 1943) (citing *Sproles v. Binford*, 286 U.S. 374 (1932)). That Act empowered the Governor and the Agriculture Commissioner to designate zones where growing cotton would be permitted. *Id.* at 183. The Court upheld the statute on the ground that article I, section 28 still allows the Legislature to delegate "the power to grant exceptions . . . of a fact-finding and administrative nature." *Id.* at 185. So, too, with section 418.016(a), which allows the Governor to determine, based on the facts

at hand in each disaster, whether a particular statute would "prevent, hinder, or delay necessary action in coping with a disaster." And of course, the Legislature's consent to such suspensions is subject to its power to terminate a state of disaster under section 418.014(c). The Legislature notably did not do so in this instance—even though GA-36 contained a similar provision and was promulgated while the Legislature was in session. *See supra* pp. 3-4. Nor did the Legislature take such action after the *El Paso County* decision, which was issued two months before the 87th Texas Legislature convened for its regular session.[3]

Thus, the Disaster Act is not an impermissible delegation of legislative powers. Instead, it sets out its legislative purpose and provides reasonable standards to guide the Governor in exercising his delegated duties in a state of disaster, including the suspension of regulatory statutes or rules.

E. The injunction disrupted the status quo.

A temporary injunction is "an extraordinary remedy" meant "to preserve the status quo of the litigation's subject matter pending a trial on the merits." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The status quo is "the last, actual, peaceable, non-contested status which preceded the pending controversy." *Clint ISD v. Marquez*, 487 S.W.3d 538, 556 (Tex. 2016).

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[3] This inaction is particularly notable as a number of bills were proposed to amend the Disaster Act during the Session. *E.g.*, H.B. 3, 87th Leg., R.S. (Tex. 2021). None passed. Where a court or executive agency's "construction has been brought to [the Legislature's attention through legislation specifically designed to supplant it," and that legislation was rejected, courts will typically deem the Legislature to have accepted that interpretation. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985) (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 599-601 (1983).

Here, the status quo was not the moment that Plaintiffs decided to require face-covering mandates for Plaintiffs' employees and visitors to Plaintiffs' facilities. Instead, the status quo existed at least since May when the Governor issued GA-36, which as a general matter prohibited localities from imposing any manner of face-covering requirements. *See supra* pp. 3-4. At that moment, there was no active dispute between the parties. But rather than immediately sue, Plaintiffs waited months, failing to seek injunctive relief until August 10. *See* CR.4. Accordingly, the trial court's temporary injunction, which permits Plaintiffs to issue face-covering mandates in violation of GA-38, upends, rather than preserves, the status quo. As the Supreme Court recently put it in staying the reinstatement of the very temporary injunction that is the subject of this appeal, the "status quo, for many months, has been gubernatorial oversight of such decisions at both the state and local levels." Order at 1, *In re Abbott*, No. 21-0720 (Tex. Aug. 26, 2021); *see also* Order, *In re Abbott*, No. 21-0687 (Tex. Aug. 15, 2021) ("The trial court's temporary restraining order alters the status quo preceding this controversy, and its effect is therefore stayed pending that court's hearing and decision on plaintiffs' request for a temporary injunction."); Order, *In re Abbott*, No. 21-0686 (Tex. Aug. 15, 2021) (same).

Because the trial court departed from the status quo, the court was required to hold Plaintiffs to the elevated standard of proof required of a mandatory injunction. *See Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1981). The court abused its discretion in failing to do so.

F. The trial court did not properly balance the equities.

The questions before the Court are pure questions of law, and resorting to the evidentiary record that Plaintiffs have built cannot save the trial court's temporary injunction. *See El Paso County*, 618 S.W.3d at 819. But even if the Court were to consider that record, the evidence diminishes Plaintiffs' claim that, absent an injunction, they would suffer "a probable, imminent, and irreparable injury in the interim." *Butnaru*, 84 S.W.3d at 204. A San Antonio public health official conceded that the City and County can continue to advocate the wearing of masks after GA-38's issuance. 1.RR.64. More importantly, no official could testify as to the degree of voluntary mask compliance within his or her jurisdiction after July 29, when the Governor issued GA-38. 1.RR.64. The City and County's witnesses could not even cite any efforts to track that data. *Id.* And they could not point to any specific survey or speak with any authority as to the percentage of students voluntarily wearing masks in schools. 1RR.64-65. All of this undermines Plaintiffs' claim that GA-38 poses an imminent injury, especially in light of the status quo that has existed between these parties for months. *See supra* pp. 3-4.

The trial court also failed to properly weigh the countervailing interests against Plaintiffs' request for injunctive relief. *See NMTC Corp. v. Conarroe*, 99 S.W.3d 865, 868 (Tex. App.—Beaumont 2003, no pet.) ("An application for injunction is a request that a court exercise its equitable jurisdiction, and in exercising that power the court balances competing equities."). Here, "[a]s a sovereign entity, the State has an intrinsic right to enact, interpret, and enforce its own laws." *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015). This is neither the first time that localities have sought

to impose their views of the appropriate response to COVID-19, nor will it be the last. The temporary injunction calls into question the Governor's ability to address the pandemic. And it prevents the Governor from carrying out his duties as commander-in-chief, frustrating the State's interests in enforcing state law. It therefore inflicts irreparable harm. *See Hollins*, 620 S.W.3d at 410. Those interests tilted the scales even further against issuance of the extraordinary injunctive relief that Plaintiffs sought and obtained.

II. The Trial Court Lacked Jurisdiction to Enjoin GA-38.

The temporary injunction should also be dissolved because the trial court exercised jurisdiction it did not have. "Because a trial court cannot reach the merits of a case without subject matter jurisdiction, a trial court that rules on the merits of an issue without explicitly rejecting an asserted jurisdictional attack has implicitly denied the jurisdictional challenge." *Thomas v. Long*, 207 S.W.3d 334, 339-40 (Tex. 2006) (citation omitted). As such, the "grant of the injunctive relief serves as an implicit denial of the plea to the jurisdiction." *DFPS v. ASI Gymnastics, Inc.*, No. 05-09-01469-CV, 2010 WL 2764793, at *1 n.2 (Tex. App.—Dallas July 14, 2010, no pet.); *Beaumont ISD v. Guillory*, No. 09-15-00531-CV, 2016 WL 2766078, at *5 (Tex. App.—Beaumont May 12, 2016, no pet.) ("By entering the temporary injunction order, the trial court implicitly denied BISD's plea to the jurisdiction."). And in an appeal of a temporary injunction, a count "may always consider whether the injunction is void for lack of subject matter jurisdiction." *Occidental Chem. Corp. v. ETC NGL Transp., LLC*, 425 S.W.3d 354, 359 n.3 (Tex. App.—Houston [1st Dist.] 2011, pet. dism'd). Jurisdiction was lacking here for at least three reasons.

A. Plaintiffs did not establish that the Governor acted *ultra vires*.

As an initial matter, public officials sued in their official capacities are protected by the same immunity as the governmental unit they represent. *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 843-44 (Tex. 2007) (holding that "an official sued in his official capacity would assert sovereign immunity[,]" and that "[w]hen a state official files a plea to the jurisdiction, the official is invoking the sovereign immunity from suit held by the government itself"). The Governor, named in his official capacity, is thus entitled to sovereign immunity. *See Machete's Chop Shop, Inc. v. Tex. Film Comm'n*, 483 S.W.3d 272, 278, 286 (Tex. App.—Austin 2016, no pet.).

"To fall within th[e] *ultra vires* exception, a suit . . . must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009). If the plaintiff has not actually alleged such an action, the claims remain barred by sovereign immunity. *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 11 (Tex. 2011); *Hall v. McRaven*, 508 S.W.3d 232, 240-41 (Tex. 2017) (holding that the official-capacity defendant acted within his legal authority and was therefore still entitled to sovereign immunity).

For the reasons explained above, *supra* pp. 10-20, Plaintiffs did not plead viable *ultra vires* claims. Merely "asserting legal conclusions or labeling a defendant's actions as 'ultra vires,' 'illegal,' or 'unconstitutional' does not suffice to plead an ultra vires claim—what matters is whether the *facts* alleged constitute actions beyond the governmental actor's statutory authority, properly construed." *TxDOT v. Sunset*

Transp., Inc., 357 S.W.3d 691, 702 (Tex. App.—Austin 2011, no pet.). Because Plaintiffs have not established that the Governor acted outside his statutory authority, they cannot proceed with their claims against him.

B. Plaintiffs do not have standing to sue the Governor.

Plaintiffs' claims suffer another jurisdictional defect: lack of standing to sue the Governor. The Texas Supreme Court has already held that a plaintiff seeking to enjoin enforcement of an executive order cannot sue the Governor. In *In re Abbott*, the plaintiffs were judges who challenged GA-13, an executive order that "change[d] the rules applicable to judges' decisions regarding pretrial bail" in response to the COVID-19 disaster. 601 S.W.3d. 802, 805 (Tex. 2020) (orig. proceeding) (per curiam). The plaintiffs argued that they had standing to sue the Governor because he had "the power to enforce GA-13 against the judiciary" under the Disaster Act. *Id.* at 811. The Supreme Court disagreed, concluding that there was "no credible threat of prosecution." *Id.* at 812 (quotation marks omitted). The Court noted that "[t]he State . . . readily concedes that the Governor cannot initiate such prosecutions" and that "the State in its briefing disclaims any intention by the Governor or the Attorney General to affirmatively enforce GA-13." *Id.* Although the Court recognized that the executive order was not "toothless," it focused its analysis on the State's acknowledgment "that GA-13's enforcement will not come in the form of criminal prosecutions by the Governor or the Attorney General." *Id.* Because the Governor disavowed any authority to initiate prosecutions for violations of the executive order, the Court concluded that the plaintiffs lacked standing and that the trial court, therefore, lacked subject-matter jurisdiction to enjoin the Governor. *Id.* at 812-13.

Under GA-38, imposition of a face-covering requirement by a local governmental entity or official constitutes a "failure to comply with" the executive order, an offense punishable by a fine up to $1,000. CR.71. But Governor Abbott would not prosecute that offense. As the Supreme Court recognized, the Governor "cannot initiate such prosecutions." *In re Abbott*, 601 S.W.3d. at 812. Although Texas law "empowers the governor to promulgate executive orders, it does not empower the governor to enforce them." *6th Street Bus. Partners LLC v. Abbott*, No. 1:20-CV-706-RP, 2020 WL 4274589, at *3 (W.D. Tex. July 24, 2020). Without a showing that the Governor has an enforcement role, Plaintiffs have not established their standing to sue him.

Moreover, an injunction prohibiting the Governor from enforcing GA-38—something he cannot do—would not redress any of the harms that Plaintiffs allege. *See In re Abbott*, 601 S.W.3d at 807 (explaining that, to have standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct *and likely to be redressed by the requested relief*" (emphasis added)); *see also Tex. Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020) ("Because the plaintiffs have pointed to nothing that outlines a relevant enforcement role for Governor Abbott, the plaintiffs' injuries likely cannot be fairly traced to him."). Therefore, Plaintiffs lack standing to sue the Governor for injunctive relief. And this redressability requirement applies with equal force to Plaintiffs' request for declaratory judgments. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) ("A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought.").

C. Only the Supreme Court can enjoin the Governor.

Finally, only the Texas Supreme Court, not a trial court, has jurisdiction to enjoin executive officers, including the Governor. "[D]istrict courts generally have no jurisdiction over executive officer respondents." *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672 (Tex. 1995). And the Texas Government Code provides that "[o]nly the supreme court has the authority to issue a writ of mandamus or injunction . . . against any of the officers of the executive departments of the government of this state." Tex. Gov't Code § 22.002(c). Governor Abbott is an "officer[] of the executive departments of the government of this state." *See* Tex. Const. art. IV, § 1.

For that reason, the trial court had no power to enjoin him. Several cases from the courts of appeals support that conclusion. For example, in *In re B.N.A.*, the trial court issued an order that required the Office of the Attorney General to remit child-support payments to a private entity and enjoined the Attorney General from taking any additional action in the case. 278 S.W.3d 530, 533 (Tex. App.—Dallas 2009, no pet.). The Fifth Court of Appeals concluded that the order was void under section 22.002(c) because "[t]he trial court lacked jurisdiction [to] compel the OAG to remit child support payments to [the private entity] and to enjoin the Attorney General from taking action in the case." *Id.* The court therefore vacated those portions of the trial court's order. The same reasoning applies with equal force here.

PRAYER

The temporary injunction should be dissolved. The Governor further requests any additional relief to which he may be entitled.

Respectfully submitted.

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Microsoft Word reports that this brief contains 8,305 words, excluding exempted text.

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