

No. _____

In the Supreme Court of Texas

THE STATE OF TEXAS,
Petitioner,

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT
AND JAIME AQUINO, IN HIS OFFICIAL CAPACITY,
Respondents.

On Petition for Review
from the Fourth Court of Appeals, San Antonio
Case No. 04-21-00419-CV

PETITION FOR REVIEW

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STATEMENT OF THE CASE

Nature of the Case: On August 25, 2021, the Governor issued Executive Order GA-39, which provides that “no governmental entity can compel any individual to receive a COVID-19 vaccine.” The Governor of the State of Tex., Executive Order GA-39, 46 Tex. Reg. 5655, 5655 (2021). In September 2021, the State of Texas sued the San Antonio Independent School District and the superintendent (collectively, defendants) for imposing a vaccine mandate on school district employees in violation of GA-39. CR.11-13.

Trial Court: 45th Judicial District Court, Bexar County
The Honorable Mary Lou Alvarez

Disposition in the Trial Court and Subsequent Proceedings: The trial court denied the State’s application for a temporary injunction. CR.506. The State appealed, CR.507, and sought an emergency temporary order under Texas Rule of Appellate Procedure 29.3 to enjoin defendants’ mandate. The court of appeals denied that motion. The State then filed a petition for writ of mandamus and an emergency motion for temporary relief in this Court. The Court stayed the school district’s vaccination mandate pending further order of the Court. *In re State*, No. 21-0873, 2021 WL 4785741, at *1 (Tex. Oct. 14, 2021) (per curiam). The State’s mandamus petition remains pending.

Parties in the Court of Appeals: The State of Texas was the appellant. San Antonio Independent School District and then-superintendent Pedro Martinez were the appellees.

Disposition in the Court of Appeals: The Fourth Court of Appeals affirmed the trial court’s denial of a temporary injunction. *State v. San Antonio ISD*, No. 04-21-00419-CV, 2022 WL 3045756, at *6 (Tex. App. — San Antonio July 27, 2022, pet. filed) (mem. op.) (Rios, J., joined by Alvarez and Valenzuela, JJ.).

STATEMENT OF JURISDICTION

The Court has jurisdiction under Texas Government Code section 22.001(a).

ISSUE PRESENTED

The Texas Disaster Act grants the Governor broad authority to manage a statewide disaster like the COVID-19 pandemic. Consistent with that authority, the Governor issued GA-39, which prohibits local governmental entities from requiring individuals to receive COVID-19 vaccinations. San Antonio Independent School District sought to impose a vaccine mandate notwithstanding GA-39. The trial court refused to issue an injunction, and the court of appeals affirmed.

The issue presented is whether the court of appeals erred in affirming the trial court's denial of the State's application for a temporary injunction.

TO THE HONORABLE SUPREME COURT OF TEXAS:

Since March 2020, the Governor has overseen the State's response to the COVID-19 pandemic. That oversight accords with the Texas Disaster Act of 1975, which charges the Governor with meeting "the dangers to the state and people presented by disasters," Tex. Gov't Code § 418.011, and empowers him to issue executive orders that have the "force and effect of law," *id.* § 418.012. Together, these provisions ensure that, during a statewide disaster, the Governor's statewide orders trump orders issued by local governments that conflict with his statewide orders.

Consistent with that authority, the Governor has "strongly encouraged" eligible Texans to receive COVID-19 vaccines but has prohibited localities from compelling people to be vaccinated. Defendants disagree with that policy decision and have sought to impose a local vaccination mandate on their employees, GA-39 notwithstanding. The State moved to enjoin that local mandate, but the trial court and the court of appeals refused to issue injunctive relief.

This case, like several others pending before the Court, raises an important question: when the Governor issues orders under the Disaster Act, and local officials issue conflicting orders, whose orders control? The correct answer is the Governor's, and the Court should grant review to say so for three reasons. *First*, the scope of the Governor's statutory power to manage disasters is a matter of significant importance to the jurisprudence of the State. *Second*, multiple courts of appeals have ruled on the Disaster Act's scope, resulting in a split of authority. The Court should not allow the Governor's Disaster Act powers to take precedence over local officials' orders in one part of the State but not in others. *Third*, the court of appeals adopted an

unduly narrow interpretation of the Governor’s preemptive powers under the Disaster Act that is inconsistent with the statute’s text and context.

The Court should grant the petition for review, reverse the court of appeals’ judgment, and render a temporary injunction prohibiting defendants from imposing a vaccination mandate pending final trial on the merits.

STATEMENT OF FACTS

The court of appeals correctly stated the nature of the case. *See supra* p. vii.

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).

The Act charges the Governor with determining whether (and declaring that) a disaster has occurred. *Id.* § 418.014(a). The Governor is “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 with “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).

II. GA-39 and Defendants’ Vaccine Mandate

On April 5, 2021, the Governor issued Executive Order GA-35, which “strongly encouraged” eligible Texas citizens to be vaccinated but provided that no governmental entity “can compel any individual to receive a COVID-19 vaccine administered under an emergency use authorization.” The Governor of the State of Tex., Executive Order GA-35, 46 Tex. Reg. 2515, 2515 (2021). On July 29, the Governor issued GA-38, which contained a similar prohibition. The Governor of the State of Tex., Executive Order GA-38, 46 Tex. Reg. 4913, 4914 (2021).

Defendants disregarded those orders. They issued a letter to school district staff on August 16, 2021, explaining that the school district would “require all staff to become vaccinated against COVID-19.” CR.9. And they warned that any unvaccinated employees must be fully vaccinated by October 15, 2021. CR.9-10.

The Food and Drug Administration fully approved the Pfizer-BioNTech coronavirus vaccine on August 23, 2021, making it authorized for more than emergency use. CR.26. Two days later, the Governor issued Executive Order GA-39, which clarified that “no governmental entity can compel any individual to receive a

COVID-19 vaccine,” regardless of whether it has received full authorization or emergency-use authorization from the FDA. 46 Tex. Reg. at 5655. GA-39 suspended any “relevant statutes” to the extent necessary to “ensure that no governmental entity can compel any individual to receive a COVID-19 vaccine.” *Id.*

The next day, defendants sent a follow-up letter to staff reiterating that the school district would continue to require employees to be vaccinated. CR.10 (“We have not wavered since we implemented our mandate[.]”). And defendants have since signaled that staff who refuse to be vaccinated will face termination, stating at least three times in their own trial court pleadings that “anyone who does not wish to receive the vaccination may seek employment elsewhere.” CR.41, 59, 72.

III. Litigation History

On September 9, the State sued defendants for violating GA-39, seeking a temporary restraining order and temporary injunction.² CR.11-13. The State argued that defendants’ vaccine mandate is *ultra vires* and invoked this Court’s admonition that “[w]hen the State files a suit to enjoin *ultra vires* actions by a local official . . . a showing of likely success on the merits . . . is sufficient to satisfy the irreparable-injury requirement for a temporary injunction.” RR.45 (quoting from *State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020) (per curiam)). Defendants filed a plea to the jurisdiction, arguing that the Attorney General lacks authority to enforce GA-39. CR.25-28.

² The State also filed a lawsuit against defendants on August 18, 2021, for violating the vaccine mandate prohibition in GA-38. CR.25. The State non-suited that case on August 23, after the Pfizer-BioNTech coronavirus vaccine received full FDA authorization. CR.26.

The trial court denied the plea. *See* CR.504. Defendants appealed, CR.500, which automatically stayed all proceedings in the trial court. *See* Tex. Civ. Prac. & Rem. Code § 51.014(a)(8), (b).

After the State sought a temporary order, defendants filed an unopposed motion to dismiss their appeal without prejudice, which allowed the case to return to the trial court for a hearing on the State’s application for a temporary injunction. At the hearing, defendants made clear that “[n]ow that the Pfizer vaccine has been fully approved by the FDA, SAISD is requiring all employees who want to continue with their employment at SAISD [to] be fully vaccinated by October 15th, 2021.” RR.28.

The trial court denied the State’s application. CR.506. The State filed a notice of appeal, CR.507, and sought emergency temporary relief, which the court of appeals denied on October 5. This Court then granted the State’s motion for a temporary order to preserve the status quo, noting that “the Governor asserted his authority to control vaccine mandates at the state level in April, months before the School District implemented its mandate” and concluding that the “status quo between these parties is not local control over vaccine mandates.” *In re State*, 2021 WL 4785741, at *1.

The parties subsequently submitted briefing on the merits of the State’s appeal. On July 27, 2022, the court of appeals affirmed the trial court’s judgment. *San Antonio ISD*, 2022 WL 3045756, at *6. The court held that the “grant of power in Section 418.012 [of the Disaster Act] is simply that—a grant of power. It does not make an executive order superior to a local order, nor does it make an executive order inferior to a local order.” *Id.* at *3 (cleaned up) (quoting *Abbott v. Jenkins*, No. 05-21-

00733-CV, 2021 WL 5445813, at *10-11 (Tex. App.—Dallas Nov. 22, 2021, pet. filed) (mem. op.)). And adopting reasoning from its prior decision (which is currently the subject of a separate petition for review), the court held that the Governor’s authority to suspend statutes under the Disaster Act does not allow him to suspend “‘grant-of-authority statute[s] giving local authorities leeway to act in their best independent judgment within the confines of their own jurisdiction.’” *Id.* at *5 (quoting *Abbott v. City of San Antonio*, No. 04-21-00342-CV, 2021 WL 5217636, at *4 (Tex. App.—San Antonio Nov. 10, 2021, pet. filed)).

SUMMARY OF THE ARGUMENT

I. This case and others before the Court present a question of law that is vitally important to the jurisprudence of the State. The issue presented implicates the Governor’s power to respond not just to the COVID-19 pandemic, but to future disasters confronting the State. This Court has yet to clarify the extent of the Governor’s emergency powers. The Disaster Act bestows the Governor with many extraordinary powers to respond to both this pandemic and a wide range of potential future disasters, including the power to preempt the orders of local officials and the power to suspend state laws. Throughout the pandemic, the Governor has repeatedly exercised those powers, and his actions have been repeatedly challenged. This Court should clarify the extent of the Governor’s authority to manage disasters.

II. The courts of appeals are split on the Governor’s Disaster Act powers. The Fourth Court of Appeals in this case (and a prior one) and the Third and Fifth Courts of Appeals in similar cases held that local officials’ orders effectively supersede the Governor’s. By contrast, the Eighth Court of Appeals largely agreed with the State’s

interpretation of the Disaster Act. This Court should not allow the Governor’s Disaster Act powers to trump those of local officials in one part of the State but not in another part of the State.

III. This case also warrants review because the court of appeals’ analysis distorts and improperly minimizes the Governor’s role under the Disaster Act. GA-39 is a valid exercise of the Governor’s authority. The Governor’s orders carry the “force and effect of law,” and thus, those orders preempt inconsistent local orders. Moreover, the Governor has properly suspended the statutory provisions on which defendants could rely to issue a local vaccine mandate. The State also met its burden to establish irreparable harm. When a local governmental official violates state law, the State suffers an irreparable injury. The State met each element of its temporary injunction burden, and the injunction the State requested should have been granted.

ARGUMENT

I. This Case Implicates the Governor’s Power To Respond to Disasters.

This Court has, and should exercise, jurisdiction when a case “present[] a question of law that is important to the jurisprudence of the state.” Tex. Gov’t Code § 22.001(a). This case does. It implicates the Governor’s power to respond to the COVID-19 pandemic under the Texas Disaster Act. This Court has yet to clarify the extent of the Governor’s power under that statute, and it should do so here.

The Disaster Act broadly defines the term “disaster” to include “the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause.” *Id.* § 418.004(1). This

includes epidemics like the COVID-19 pandemic, as well as fires, floods, earthquakes, storms, oil spills, droughts, explosions, riots, cybersecurity events, and other types of calamities. *Id.* If a disaster occurs, the Governor may declare so by executive order or proclamation. *Id.* § 418.014(a). Once he does, the Disaster Act gives him many powers that he ordinarily does not possess. As discussed above, 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). In other words, the Disaster Act gives the Governor the authority to preempt local laws, suspend statutes, control the occupancy of buildings, and use all available resources to do so. The extent to which the Governor may use these powers, both during the present pandemic and in future disasters, is a significant, and currently unresolved, question of Texas law.

The Governor has repeatedly exercised his Disaster Act powers throughout the COVID-19 pandemic. He has issued many executive orders with the “force and effect of law” and suspended various statutes to address the pandemic. For example, in March of last year, the Governor issued Executive Order GA-34, which prevented local governments from requiring individuals to wear face coverings in areas without high COVID-19 hospitalization rates. *See* The Governor of the State of Tex.,

Executive Order GA-34, 46 Tex. Reg. 1567, 1568 (2021). Later, he issued GA-36 and GA-38, which more broadly prohibit local government entities from requiring individuals to wear face coverings. Relying again on substantially the same Disaster Act powers, the Governor issued GA-39, which prohibits local government entities from requiring individuals to receive COVID-19 vaccinations.

Many of these orders, most particularly GA-38, have been repeatedly challenged in court. *See, e.g., Jenkins*, 2021 WL 5445813, at *1 (Dall. Cnty. Judge’s challenge to GA-38); *Abbott v. Harris County*, 641 S.W.3d 514, 523 (Tex. App.—Austin 2022, pet. filed) (Harris County challenge to GA-38); *Abbott v. La Joya ISD*, No. 03-21-00428-CV, 2022 WL 802751, at *3-4 (Tex. App.—Austin Mar. 17, 2022, pet. filed) (mem. op.) (challenge to GA-38 by various school districts); *Abbott v. County of Fort Bend*, No. 01-21-00453-CV (Tex. App.—Houston [1st Dist.] appeal docketed Aug. 23, 2021) (pending challenge to GA-38 by Fort Bend County); *Abbott v. City of El Paso*, No. 08-21-00149-CV (Tex. App.—El Paso appeal docketed Sept. 3, 2021) (pending challenge to GA-38 by the City of El Paso). The multitude of challenges surging through trial and appellate courts across the State demonstrates that this Court’s guidance is needed.

This Court has already granted temporary relief in this case to preserve the status quo. *In re State*, 2021 WL 4785741, at *1; *see also* Order, *In re Abbott*, No. 21-0687 (Tex. Aug. 15, 2021) (staying a TRO prohibiting enforcement of GA-38); Order, *In re Abbott*, No. 21-0720 (Tex. Aug. 26, 2021) (staying temporary injunction prohibiting enforcement of GA-38). In issuing these stay orders, the Court contemplated that it might eventually need to address the merits of the underlying dispute. *See, e.g.,*

Order at 1, *In re Abbott*, No. 21-0720. The passage of time and the proliferation of lawsuits challenging the Governor’s executive orders have only emphasized that this Court’s review is warranted.

II. The Courts of Appeals Are Divided.

Four courts of appeals have issued decisions on the scope of the Governor’s powers under the Disaster Act. Their rulings conflict on a key overarching issue: when the Governor issues an order under the Disaster Act, and local officials issue conflicting orders, whose order controls? Three courts have ruled that local orders control. *San Antonio ISD*, 2022 WL 3045756, at *6; *Jenkins*, 2021 WL 5445813, at *15; *Harris County*, 641 S.W.3d at 525. By contrast, the Eighth Court of Appeals held that the Governor’s orders control over local ones, reasoning that the Legislature surely did not intend “for the chaos of a system that allows for 254 different county responses to a statewide disaster.” *State v. El Paso County*, 618 S.W.3d 812, 822 (Tex. App.—El Paso 2020, no pet.). This split of authority regarding the scope of the Governor’s powers under the Disaster Act should not be allowed to persist.

The court of appeals’ opinion in this case directly conflicts with the Eighth Court of Appeals as to the Governor’s preemption and suspension powers. The Disaster Act permits the Governor to issue executive orders that have “the force and effect of law,” Tex. Gov’t Code § 418.012, and to suspend “the provisions of any regulatory statute prescribing the procedures for conduct of state business . . . if strict compliance with the provisions . . . would in any way prevent, hinder, or delay necessary action in coping with a disaster,” *id.* § 418.016(a). The Eighth Court of Appeals held that because “there must be a final decision-maker, the Legislature

inserted a tie breaker and gave it to the governor in that his or her declarations under Section 418.012 have the force of law” to preempt inconsistent local orders. *El Paso County*, 618 S.W.3d at 822. And the Eighth Court likewise held that the Governor’s authority to suspend statutes related to “state business” may encompass activity that takes place at both the state *and* local levels. *Id.* at 824. Thus, the court’s decision below on the scope of the Governor’s preemption and suspension powers directly conflicts with another appellate court’s. *San Antonio ISD*, 2022 WL 3045756, at *3-6. This Court should resolve that conflict.

III. The Court of Appeals’ Ruling Is Wrong on the Merits.

To obtain a temporary injunction, a party must plead and prove (1) a cause of action against the defendant, (2) a probable right to the relief sought, and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

The State met all of those requirements. GA-39 is a valid exercise of the Governor’s Disaster Act authority: it preempts conflicting local laws and suspends defendants’ authority to contravene his orders. The State therefore showed a probable right to relief. And this Court has made clear that the State may sue to enjoin *ultra vires* conduct by local officials, *Hollins*, 620 S.W.3d at 410, and such conduct irreparably harms the State as a matter of law.

A. The State established probable success on the merits.

1. The Governor's orders preempt inconsistent local ones.

GA-39 is grounded in the Governor's authority under sections 418.011 and 418.012 of the Disaster Act, which charge the Governor with meeting "the dangers to the state and people presented by disasters" and with issuing executive orders with "the force and effect of law." Tex. Gov't Code §§ 418.011(1), .012. Defendants may disagree with the manner in which the Governor responded to the disaster, but that does not render GA-39 invalid. And if that were not enough, the Governor's authority to issue GA-39 is also rooted in section 418.018(c) of the Disaster Act, which provides that the 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). The order's prohibition on local governments implementing vaccine mandates 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.* A prohibition on vaccine mandates controls "ingress and egress" to, the "occupancy of premises" in, and "the movement of persons" through the locations into which defendants have issued a vaccine mandate because it authorizes the entry of individuals that would be prohibited under defendants' preferred regime.

Thus, GA-39 validly preempts defendants' vaccine mandate. The Governor's executive orders carry "the force and effect of law." *Id.* § 418.012. His emergency orders like GA-39 are issued using statewide powers and have a statewide legal effect. *Id.* 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). Indeed, this Court has long established that local laws 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 Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982) (“[A]n ordinance which conflicts or is inconsistent with state legislation is impermissible.”).

The court of appeals minimized the Governor’s preemption authority by noting that the Governor already has the authority to suspend state statutes. *San Antonio ISD*, 2022 WL 3045756, at *3. But the Governor’s preemption and suspension powers are doctrinally different and apply to different types of law, and neither renders the other superfluous. Specifically, the Governor’s preemption power applies to *local orders* that are subordinate to state law, Tex. Gov’t Code § 418.012, whereas the Governor’s suspension power applies to *state statutes* and state agency rules, *id.* § 418.016(a). The Court should grant review to clarify the scope of the Governor’s preemption powers under the Disaster Act.

2. GA-38 validly suspends the statutory provisions upon which defendants could rely to craft local rules for a statewide disaster.

The Act also permits the Governor to suspend “the provisions of any regulatory statute prescribing the procedures for conduct of state business . . . if strict compliance with the provisions . . . would in any way prevent, hinder, or delay necessary action in coping with a disaster.” *Id.* § 418.016(a). The Governor did so in GA-39 by expressly suspending any “relevant statute” to the extent necessary to “ensure that

no governmental entity can compel any individual to receive a COVID-19 vaccine.”
46 Tex. Reg. at 5655.

It is of no moment that the statutes upon which defendants rely to issue their vaccine mandate may be used to regulate activity at the local level. *E.g.*, CR.44 (defendants’ reliance on Texas Education Code § 11.151(b), which provides that local school boards “have the exclusive power and duty to govern and oversee the management of the public schools of the district”). 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. The Legislature could have limited the term and used the phrase “official state business,” as it has done elsewhere. *E.g.*, Tex. Gov’t Code §§ 660.009, .043. It did not do so in the Disaster Act, which uses “state agency” when it means “state agency.” *See, e.g., id.* §§ 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: “[W]hen 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). Because the court of appeals erred in its analysis of the Governor’s suspension power, the Court should grant the State’s petition and correct the Fourth Court’s constrictive reading of the Governor’s authority to suspend statutes during disasters.

B. The State is irreparably harmed by local government action that violates state law.

The State has a “justiciable interest in its sovereign capacity in the maintenance and operation of its municipal corporations in accordance with law.” *Hollins*, 620 S.W.3d at 410. The sovereign “would be impotent to ‘enforce its own laws’ if it could not temporarily enjoin those breaking them pending trial.” *Id.* Thus, “[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.” *Id.* And as explained above, the State has shown likely success on the merits.

PRAYER

The Court should grant the petition for review, reverse the court of appeals’ judgment, and render a temporary injunction prohibiting defendants from imposing a vaccination mandate pending final trial on the merits.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JUDD E. STONE II
Solicitor General

BRENT WEBSTER
First Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

/s/ Michael R. Abrams
MICHAEL R. ABRAMS
Assistant Solicitor General
State Bar No. 24087072
Michael.Abrams@oag.texas.gov

BENJAMIN WALLACE MENDELSON
Assistant Solicitor General

Counsel for Petitioner

CERTIFICATE OF SERVICE

On September 7, 2022, this document was served on Steve Chiscano, lead counsel for Respondents San Antonio Independent School District and Jaime Aquino, via schiscano@gcaklaw.com.

/s/ Michael R. Abrams
MICHAEL R. ABRAMS

CERTIFICATE OF COMPLIANCE

Microsoft Word reports that this document contains 3,976 words, excluding exempted text.

/s/ Michael R. Abrams
MICHAEL R. ABRAMS

No. _____

In the Supreme Court of Texas

THE STATE OF TEXAS,

Petitioner,

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT AND
JAIME AQUINO, IN HIS OFFICIAL CAPACITY,

Respondents.

On Petition for Review
from the Fourth Court of Appeals, San Antonio

APPENDIX

Executive Order GA-35 (April 5, 2021).....	A
Executive Order GA-39 (August 25, 2021).....	B
Plaintiff’s Original Petition (September 9, 2021).....	C
Order Denying Temporary Injunction (October 21, 2021).....	D
Court of Appeals Opinion (July 27, 2022).....	E
Court of Appeals Judgment (July 27, 2022)	F
Texas Gov’t Code § 418.011.....	G
Texas Gov’t Code § 418.012.....	H
Texas Gov’t Code § 418.018.....	I

TAB A:
EXECUTIVE ORDER GA-35
(APRIL 5, 2021)



GOVERNOR GREG ABBOTT

April 5, 2021

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
1:30 PM O'CLOCK

APR 05 2021

Secretary of State

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

Dear Secretary Hughs:

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

Executive Order No. GA-35 relating to COVID-19 vaccines and the protection of
Texans' private health information.

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

Respectfully submitted,

A handwritten signature in black ink that reads "Davidson" with a long horizontal flourish extending to the right.

Gregory S. Davidson
Executive Clerk to the Governor

GSD/md

Attachment

Executive Order

BY THE
GOVERNOR OF THE STATE OF TEXAS

Executive Department
Austin, Texas
April 5, 2021

EXECUTIVE ORDER
GA 35

*Relating to COVID-19 vaccines and the protection
of Texans' private health information.*

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

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

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

WHEREAS, the U.S. Food and Drug Administration (FDA) has granted emergency use authorizations for COVID-19 vaccines that are not yet FDA-approved, pursuant to the Project BioShield Act of 2004, 21 U.S.C. § 360bbb-3; and

WHEREAS, that federal statute expressly recognizes that each individual has “the option to accept or refuse administration of the product” under an emergency use authorization, 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III); and

WHEREAS, receiving one of these COVID-19 vaccines under an emergency use authorization, while strongly encouraged, is always voluntary in Texas and will never be mandated by the government; and

WHEREAS, Texas has administered over 12 million doses of the COVID-19 vaccines, and every person who is at least 16 years old is now eligible to receive a shot if they so choose; and

WHEREAS, millions more Texans have already recovered from COVID-19 and thus acquired some degree of immunity; and

WHEREAS, some Texans are still waiting to receive a COVID-19 vaccine, while others will opt out altogether due to a religious objection, a health concern, or some other reason; and

WHEREAS, an individual's COVID-19 vaccination status is private health information, and no governmental entity should compel disclosure of this information by mandating a so-called “vaccine passport” for COVID-19 or by otherwise conditioning receipt of

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services on an individual's COVID-19 vaccination status; and

WHEREAS, the Constitution does not empower the federal government to mandate nationwide vaccine passports for COVID-19, and Texas will not impose such vaccine passports with the police power that is reserved to the States under our system of federalism; and

WHEREAS, I request that the 87th Legislature address this important privacy issue in the current legislative session; and

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

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

WHEREAS, under Section 418.016(a), the "governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business ... if strict compliance with the provisions ... would in any way prevent, hinder, or delay necessary action in coping with a disaster;" and

WHEREAS, under Section 418.018(c), the "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;"

NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following on a statewide basis effective immediately:

1. I hereby suspend Section 81.082(f)(1) of the Texas Health and Safety Code to the extent necessary to ensure that no governmental entity can compel any individual to receive a COVID-19 vaccine administered under an emergency use authorization.
2. 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 administered under an emergency use authorization. I hereby suspend Section 81.085(i) of the Texas Health and Safety Code to the extent necessary to enforce this prohibition. This paragraph does not apply to any documentation requirements necessary for the administration of a COVID-19 vaccine.
3. Any public or private entity that is receiving or will receive public funds through any means, including grants, contracts, loans, or other disbursements of taxpayer money, shall not require a consumer to provide, as a condition of receiving any service or entering any place, documentation regarding the consumer's vaccination status for any COVID-19 vaccine administered under an emergency use authorization. No consumer may be denied entry to a facility financed in whole or in part by public funds for failure to provide

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SECRETARY OF STATE
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APR 05 2021

documentation regarding the consumer's vaccination status for any COVID-19 vaccine administered under an emergency use authorization.

4. Nothing in this executive order shall be construed to limit the ability of a nursing home, state supported living center, assisted living facility, or long-term care facility to require documentation of a resident's vaccination status for any COVID-19 vaccine.
5. This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster. I hereby suspend Sections 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order.

This executive order does not supersede Executive Orders GA-10, GA-13, or GA-34. This executive order shall remain in effect and in full force unless it is modified, amended, rescinded, or superseded by the governor.



Given under my hand this the 5th
day of April, 2021.

Handwritten signature of Greg Abbott in black ink.

GREG ABBOTT
Governor

ATTESTED BY:

Handwritten signature of Ruth R. Hughs in black ink.

RUTH R. HUGHS
Secretary of State

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APR 05 2021

TAB B:
EXECUTIVE ORDER GA-39
(AUGUST 25, 2021)



GOVERNOR GREG ABBOTT

August 25, 2021

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
2 PM O'CLOCK

AUG 25 2021

Secretary of State

Mr. Joe A. Esparza
Deputy Secretary of State
State Capitol Room 1E.8
Austin, Texas 78701

Dear Deputy Secretary Esparza:

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

Executive Order No. GA-39 relating to prohibiting vaccine mandates and vaccine passports subject to legislative action.

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

Respectfully submitted,


Gregory S. Davidson
Executive Clerk to the Governor

GSD/gsd

Attachment

Executive Order

BY THE
GOVERNOR OF THE STATE OF TEXAS

Executive Department
Austin, Texas
August 25, 2021

EXECUTIVE ORDER
GA 39

*Relating to prohibiting vaccine mandates and vaccine passports
subject to legislative action.*

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

WHEREAS, in each subsequent month effective through today, I have renewed the COVID-19 disaster declaration for all Texas counties; and

WHEREAS, I have issued a series of executive orders aimed at protecting the health and safety of Texans, ensuring uniformity throughout Texas, and achieving the least restrictive means of combatting the evolving threat to public health; and

WHEREAS, COVID-19 vaccines are strongly encouraged for those eligible to receive one, but have always been voluntary for Texans; and

WHEREAS, I issued Executive Orders GA-35 and GA-38, addressing COVID-19 vaccines administered under an "emergency use authorization" by prohibiting vaccine mandates from governmental entities and by prohibiting "vaccine passports" from governmental entities and certain others; and

WHEREAS, subsequently, on August 23, 2021, while the legislature was already convened in a special session, the U.S. Food and Drug Administration (FDA) approved one of the COVID-19 vaccines for certain age groups, such that this vaccine is no longer administered under an emergency use authorization for those age groups; and

WHEREAS, while this COVID-19 vaccine is now FDA-approved for certain age groups, others are not yet approved and still are administered under an emergency use authorization; and

WHEREAS, through Chapter 161 of the Texas Health and Safety Code, as well as other laws including Chapters 38 and 51 of the Texas Education Code, the legislature has established its primary role over immunizations, and all immunization laws and regulations in Texas stem from the laws established by the legislature; and

WHEREAS, in other contexts where the legislature has imposed immunization requirements, it has also taken care to provide exemptions that allow people to opt out of being forced to take a vaccine; and

WHEREAS, given the legislature's primacy and the need to avoid a patchwork of regulations with respect to vaccinations, it is appropriate to maintain the status quo of

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AUG 25 2021

prohibiting vaccine mandates through executive order while allowing the legislature to consider this issue while in session; and

WHEREAS, in this instance, given the legislature's prior actions, maintaining the status quo of prohibiting vaccine mandates and ensuring uniformity pending the legislature's consideration means extending the voluntariness of COVID-19 vaccinations to all COVID-19 vaccinations, regardless of regulatory status; and

WHEREAS, I am also adding this issue to the agenda for the Second Called Session of the legislature that is currently convened so that the legislature has the opportunity to consider this issue through legislation; and

WHEREAS, I will rescind this executive order upon the effective date of such legislation;

NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following on a statewide basis effective immediately:

1. No governmental entity can compel any individual to receive a COVID-19 vaccine. I hereby suspend Section 81.082(f)(1) of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that no governmental entity can compel any individual to receive a COVID-19 vaccine.
2. 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. I hereby suspend Section 81.085(i) of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to enforce this prohibition. This paragraph does not apply to any documentation requirements necessary for the administration of a COVID-19 vaccine.
3. Any public or private entity that is receiving or will receive public funds through any means, including grants, contracts, loans, or other disbursements of taxpayer money, shall not require a consumer to provide, as a condition of receiving any service or entering any place, documentation regarding the consumer's vaccination status for any COVID-19 vaccine. No consumer may be denied entry to a facility financed in whole or in part by public funds for failure to provide documentation regarding the consumer's vaccination status for any COVID-19 vaccine.
4. Nothing in this executive order shall be construed to limit the ability of a nursing home, state supported living center, assisted living facility, or long-term care facility to require documentation of a resident's vaccination status for any COVID-19 vaccine.
5. This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster. Pursuant to Section 418.016(a) of the Texas Government Code, I hereby suspend Sections 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E of the Texas Health and Safety Code, and any

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AUG 25 2021

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.

This executive order 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. This executive order shall remain in effect and in full force unless it is modified, amended, rescinded, or superseded by the governor. This executive order may also be amended by proclamation of the governor.



Given under my hand this the 25th
day of August, 2021.

A handwritten signature in black ink that reads "Greg Abbott".

GREG ABBOTT
Governor

ATTESTED BY:

A handwritten signature in black ink that reads "Joe A. Esparza".
JOE A. ESPARZA
Deputy Secretary of State

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
2PM O'CLOCK

AUG 25 2021

TAB C:
PLAINTIFF'S ORIGINAL PETITION
(SEPTEMBER 9, 2021)

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

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

[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.¹

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.² 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.³

¹ *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).

² See Tex. Gov’t Code § 418.015(c).

³ *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.⁴ 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.”⁵ This includes a right to “reassert the control of the state” and “enforce existing policy” as declared by the Texas Legislature.⁶ Injuries to this right are sufficient to both create standing to sue and show irreparable harm.⁷

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

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

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

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

⁷ *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.”⁸

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.⁹ And the Disaster Act makes the sitting Texas Governor the leader and focal point of the State’s emergency response.¹⁰

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

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

⁸ Tex. Gov’t Code § 418.002(1), (3).

⁹ *Id.* § 418.002(4).

¹⁰ *See, e.g., id.* §§ 418.011–.026.

¹¹ *Id.* § 418.011.

¹² *Id.* § 418.015(c).

¹³ *See id.* §§ 418.011–.026.

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

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.¹⁷

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

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.

¹⁴ *Id.* § 418.018(c).

¹⁵ *Id.* § 418.012.

¹⁶ *Id.* §§ 418.016(a), 418.017(a).

¹⁷ *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.”).

¹⁸ *Id.* § 418.108(g).

¹⁹ *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.]"²⁰ When acting in this capacity, the local official is a "designated agent" of the Governor and thus is subject to the Governor's control.²¹

B. Executive Order GA-38

19. On August 25, 2021, Governor Abbott issued Executive Order GA-39.²² 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."²³ The order provides in relevant part: "No governmental entity can compel any individual to receive a COVID-19 vaccine."²⁴ 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."²⁵ 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."²⁶ Further, the Texas Health and Safety Code prohibits the issuance or requirement of "vaccine passports."²⁷

²⁰ *Id.* § 418.1015(b).

²¹ *Id.*

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

²³ GA-39 at 3.

²⁴ *Id.*

²⁵ GA-38 at 2.

²⁶ GA-39 at 2.

²⁷ 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.²⁸ GA-39 also suspends several statutes, including “any conflicting order issued by local officials in response to the COVID-19 disaster.”²⁹ 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.”³⁰

21. GA-39 is clear and unequivocal: Receiving a COVID-19 vaccine is “strongly encouraged for those eligible to receive one”³¹ 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[.]”³²

C. Defendants’ Vaccine Mandate

22. Defendant San Antonio ISD, through the actions of Superintendent Martinez, has implemented a vaccine mandate for all school employees.³³ 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*

²⁸ See generally GA-39.

²⁹ GA-39 at 2.

³⁰ *Id.*

³¹ GA-39 at 1.

³² *Id.*

³³ 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.³⁴

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.³⁵

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.³⁶ Superintendent Martinez makes it clear that he will continue to violate state law

³⁴ *Id.* (emphasis added).

³⁵ 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).

³⁶ 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.”³⁷ This includes a right to “reassert the control of the state” and “enforce existing policy” as declared by the Texas Legislature.³⁸ Injuries to this right are sufficient to both create standing to sue and to show irreparable harm.³⁹

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.⁴⁰ 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.”⁴¹

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.

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

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

³⁹ 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).

⁴⁰ *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.”).

⁴¹ *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.⁴²

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).⁴³ 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.

⁴² GA-39 at 2.

⁴³ 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.⁴⁴ "A temporary injunction's purpose is to preserve the status quo of the litigation's subject matter pending a trial on the merits."⁴⁵ The applicant must prove three elements to obtain a temporary injunction: (1) a cause

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

⁴⁵ *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.⁴⁶ 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.”⁴⁷ This includes a right to “reassert the control of the state” and “enforce existing policy” as declared by the Texas Legislature.⁴⁸ Injuries to this right are sufficient to both create standing to sue and show irreparable harm.⁴⁹

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.⁵⁰ 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.”⁵¹

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

⁴⁶ *Id.*

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

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

⁴⁹ *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).

⁵⁰ *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.”).

⁵¹ *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.⁵²

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).⁵³ 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.⁵⁴ Governor Abbott has done so (most recently on July 30, 2021)⁵⁵ and explains in GA-39 that COVID-19 "poses an imminent threat of disaster *for all Texas counties.*"⁵⁶

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."

⁵² GA-39 at 2.

⁵³ See Exhibit B; Exhibit C.

⁵⁴ 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).

⁵⁵ 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).

⁵⁶ 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.⁵⁷

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.”⁵⁸

53. Defendants’ contention that they have authority to violate GA-39 based on generalizations made by the Equal Employment Opportunity Commission misses the mark.⁵⁹ 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.⁶⁰ But this guidance does nothing to

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

⁵⁸ *Id.*

⁵⁹ Ex. B.

⁶⁰ 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.⁶¹ 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.”⁶² A mayor is a city’s presiding officer,⁶³ and a county judge is a county’s presiding officer.⁶⁴

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.⁶⁵

⁶¹ Tex. Gov’t Code § 418.101 *et seq.*

⁶² *Id.* § 418.1015(b).

⁶³ Tex. Local Gov’t Code § 22.037.

⁶⁴ *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.”).

⁶⁵ *See id.* §§ 418.011–.026.

56. The Eighth (El Paso) Court of Appeals of Texas’s opinion in *State v. El Paso County*⁶⁶ 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-32.⁶⁷

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.⁶⁸ The district court denied the State’s motion.⁶⁹ The Eighth Court of Appeals reversed and adopted the State’s arguments.⁷⁰ 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.”⁷¹ 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.⁷²

59. Second, the court found that GA-32 was a state law, which “eclipse[s] inconsistent local law[s]” like CE-13.⁷³ 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

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

⁶⁷ *Id.* at 816–18.

⁶⁸ *Id.* at 818.

⁶⁹ *Id.*

⁷⁰ *See id.* at 818–27.

⁷¹ *Id.* at 818–19.

⁷² *Id.* at 819.

⁷³ *See id.* at 822 (citing various cases).

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

60. Third, the court rejected El Paso’s challenge to Governor Abbott’s suspension power, which is codified in section 418.016.⁸⁰ 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.⁸¹ 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.”⁸² 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.⁸³ The court found that CE-13, which closed-down bars, restaurants, and other businesses closely regulated by

⁷⁴ *Id.* at 822.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 828.

⁸⁰ *Id.* at 823–24

⁸¹ *Id.*

⁸² *Id.* (quotations omitted).

⁸³ *Id.*

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

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*.⁸⁵

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.’”⁸⁶ The Court noted that an *ultra vires* suit is a

⁸⁴ *Id.*

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

⁸⁶ *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.⁸⁷ 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.”⁸⁸

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.”⁸⁹ 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.”⁹⁰

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.”⁹¹ Here, that would be the parties’

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *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.⁹²

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

⁹² *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,

/s/ Aaron F. Reitz

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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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TAB D:
ORDER DENYING TEMPORARY
INJUNCTION (AUG. 16, 2021)

CAUSE NO. 2021-CI-19115

STATE OF TEXAS

Plaintiff,

v.

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

Defendant.

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IN THE DISTRICT COURT

45TH JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

ORDER DENYING THE STATE OF TEXAS' APPLICATION FOR TEMPORARY INJUNCTION

On the 1st day of October, 2021, the Court considered the Application for Temporary Injunction filed by Plaintiff the State of Texas ("Plaintiff"). After considering the Application for Temporary Injunction, the First Amended Brief in Opposition to Injunctive Relief filed by Defendants San Antonio Independent School District and Pedro Martinez in his Official Capacity ("Defendants"), the pleadings on file, the evidence presented at the hearing, and argument of counsel, the Court finds Plaintiff failed to present any evidence of 1) a probable right of recovery/successful recovery on the merits and/or 2) imminent harm and, therefore, the Court hereby DENIES Plaintiff's Application for Temporary Injunction.

By agreement of the Parties, the final trial is set for January 19, 2022 at 9 a.m. out of the Presiding Court.

SIGNED October 21st, 2021.



THE HONORABLE MARY LOU ALVAREZ

Mary Lou Alvarez
Presiding Judge
45th District Court
Bexar County, Texas

APPROVED AS TO FORM ONLY:

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TAB E:
COURT OF APPEALS DECISION
(JULY 27, 2022)



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00419-CV

STATE of Texas,
Appellant

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT
and Pedro Martinez, in his Official Capacity,
Appellees

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2021-CI-19115
Honorable Mary Lou Alvarez, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Patricia O. Alvarez, Justice
Irene Rios, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: July 27, 2022

AFFIRMED

In this interlocutory appeal, the State of Texas (“State”) challenges the trial court’s order denying its request for a temporary injunction. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (allowing an interlocutory appeal from an order that refuses a temporary injunction). We affirm.

BACKGROUND

On September 9, 2021, the State sued the San Antonio Independent School District and its superintendent, Pedro Martinez, (collectively, “the District”), seeking a declaratory judgment

regarding the District's policy requiring that all its employees be vaccinated for COVID-19 by October 15, 2021. The State sought declarations that the District's employee vaccine policy (1) violates executive order GA-39, and (2) is an ultra vires action. The State requested a temporary injunction prohibiting the District from enforcing its COVID-19 vaccine mandate policy. The trial court held a hearing on the State's request for a temporary injunction and denied the request. The State filed the instant appeal in this court. The State's notice of appeal was accompanied by a motion for emergency temporary relief, asking this court to issue an order prohibiting the District from enforcing its vaccine mandate during the pendency of this appeal. This court denied the motion.

On October 8, 2021, the State filed a petition for a writ of mandamus and a writ of injunction in the Texas Supreme Court, requesting interim relief prohibiting the District from enforcing its vaccine policy while this appeal was pending. The Texas Supreme Court granted the State the relief it sought. *See In re State*, No. 21-0873, 2021 WL 4785741, at *1 (Tex. Oct. 14, 2021, order) ("Today we stay enforcement of San Antonio Independent School District's policy requiring that all its employees be vaccinated for COVID-19 by October 15."). Thereafter, the parties briefed the merits of the instant appeal.

STANDARD OF REVIEW

"A temporary injunction is an extraordinary remedy and does not issue as a matter of right." *Abbott v. Anti-Defamation League Austin, Southwest, and Texoma Regions*, 610 S.W.3d 911, 916 (Tex. 2020). "To obtain a temporary injunction, a party must plead and prove (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." *In re State*, 2021 WL 4785741, at *1 (citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)). "The applicant must establish each element." *Anti-Defamation League*, 610 S.W.3d at 916. The decision to grant or deny a temporary injunction lies

within the trial court's sound discretion and is subject to reversal only for a clear abuse of that discretion. *Butnaru*, 84 S.W.3d at 204. A trial court abuses its discretion when it acts unreasonably or in an arbitrary manner or without reference to any guiding rules and principles. *Id.* at 211.

DISCUSSION

The State's sole issue on appeal is whether the trial court abused its discretion in denying the State's request for a temporary injunction. We begin by examining the second element: whether the State established at the temporary injunction hearing that it had a probable right to the relief sought—sometimes referred to as the likelihood of success on the merits. *See In re Newton*, 146 S.W.3d 648, 652 (Tex. 2004) (orig. proceeding) (stating a temporary injunction applicant must show “a likelihood of success on the merits” to meet “the standard required for injunctive relief”).

The State's lawsuit was premised on the theory that the District's employee vaccine mandate policy was ultra vires, or outside the District's authority, because executive order GA-39 prohibits vaccine mandates. The State based its lawsuit on two paragraphs of executive order GA-39:

1. No governmental entity can compel any individual to receive a COVID-19 vaccine. I hereby suspend Section 81.082(f)(1) of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that no governmental entity can compel any individual to receive a COVID-19 vaccine.
2. 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. I hereby suspend Section 81.085(i) of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to enforce this prohibition. This paragraph does not apply to any documentation requirements necessary for the administration of a COVID-19 vaccine.¹

¹ The State referred to this paragraph in the injunction hearing. We note an independent school district is not defined as a state agency or a political subdivision in the Texas Disaster Act. *See* TEX. GOV'T CODE ANN. § 418.004(10) (defining an independent school district as a “[l]ocal government entity”). Thus, it appears this paragraph of GA-39 does not apply to the District.

The District argues the Texas Disaster Act does not give the Governor the authority to prohibit the District's vaccine mandate for its employees, and the Governor's vaccine mandate prohibition in GA-39 exceeds the Governor's authority under the Texas Disaster Act. Therefore, the District argues, its vaccine mandate does not constitute an ultra vires action.

As the parties have framed the issue before us, the question is whether—under the parameters and the scope of the Texas Disaster Act—the State met its burden that it is likely to succeed on the merits by showing GA-39 applies to the District and suspends the District's authority to issue a vaccine mandate to protect the health and safety of its students.

“To the extent our review of the trial court's temporary injunction turns on statutory construction, we review these issues de novo.” *Abbott v. Harris County*, 641 S.W.3d 514, 523 (Tex. App.—Austin 2022, pet. filed) (citing *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017)). “In construing statutes, our primary objective is to give effect to the [l]egislature's intent as expressed in the statute's language.” *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). “If the words of a statute are clear and unambiguous, we apply them according to their plain and common meaning.” *Id.* “[O]ur practice when construing a statute is to recognize that the words the [l]egislature chooses should be the surest guide to legislative intent.” *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) (internal quotation marks and alterations omitted).

“[W]e presume the [l]egislature chose the statute's language with care, purposefully choosing each word, while purposefully omitting words not chosen.” *In re Centerpoint Energy Hous. Elec., LLC*, 629 S.W.3d 149, 158–59 (Tex. 2021, orig. proceeding). “We must give effect to all words of a statute and not treat any language as surplusage.” *Abbott v. Jenkins*, No. 05-21-00733-CV, 2021 WL 5445813, at *9 (Tex. App.—Dallas Nov. 22, 2021, pet. filed) (mem. op.) “We must not add words to the statute that are not there, and we must not ignore the words the

[l]egislature has chosen, either, particularly in situations where we are being urged to read grants of authority from statutory silence.” *Abbott v. City of San Antonio*, No. 04-21-00342-CV, 2021 WL 5217636, at *3 (Tex. App.—San Antonio Nov. 10, 2021, pet. filed); *see also Newman v. Obersteller*, 960 S.W.2d 621, 625 (Tex. 1997) (Abbott, J., dissenting) (declaring the legislature’s omission of words from a statute is significant and “[i]t is not the province of [the courts] to expand” a limited statutory provision by making inferences of authority from silence, “no matter the policy rationale behind such an expansion”).

On appeal, the State argues it established that it is likely to succeed on the merits because executive order GA-39 is a valid exercise of the Governor’s authority under the Texas Disaster Act for two reasons. First, the State concomitantly argues, the Texas Disaster Act designates the Governor as the State’s “commander in chief” and GA-39’s prohibition on vaccine mandates fits within the Act’s grant of authority to control “ingress and egress” to, “movement” throughout, and the “occupancy of premises” in the disaster area, which spans the entire State. *See* TEX. GOV’T CODE ANN. §§ 418.015(c), 418.018(c). Relying on section 418.012 of the Texas Disaster Act, the State contends GA-39 has the “force and effect of law” and preempts any “local law” that conflicts with GA-39’s prohibition on vaccine mandates. *Id.* § 418.012. Second, the State maintains, the Governor has validly suspended the statutory authority upon which the District could rely to issue local rules in response to the COVID-19 pandemic. *See id.* § 418.016(a).

A. Preemption

To support its preemption argument, the State relies on sections 418.012, 418.015(c), and 418.018(c) of the Texas Disaster Act. *See* TEX. GOV’T CODE ANN. §§ 418.012, 418.015(c), 418.018(c). While determining the scope of the Governor’s authority under the Texas Disaster Act in analogous cases, our sister courts in Austin and Dallas have addressed the same arguments the State puts forth here. *See Harris County*, 641 S.W.3d at 522–27; *Jenkins*, 2021 WL 5445813,

at *8–11; *see also Abbott v. La Joya Indep. Sch. Dist.*, No. 03-21-00428-CV, 2022 WL 802751, at *3–4 (Tex. App.—Austin Mar. 17, 2022, pet. filed) (mem. op.). We find their analysis instructive and their reasoning persuasive.²

Executive Orders - Section 418.012

Section 418.012 of the Texas Disaster Act states:

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

TEX. GOV'T CODE ANN. § 418.012.

The State argues the Governor has broad authority to issue executive orders that subjugate a local government entity's ability to respond to disasters. According to the State, because the legislature chose to give the Governor's executive orders "the force and effect of law" during a declared disaster, any local government entity's rule, order, or law that conflicts with the Governor's executive order is automatically preempted. *See id.* § 418.012. However, in section 418.016(a) of the Texas Disaster Act—promulgated at the same time as section 418.012—"the [l]egislature has expressly provided the Governor with a limited power to suspend provisions of 'regulatory statute[s] prescribing the procedures for conduct of state business.'" *Harris County*, 641 S.W.3d at 526 (quoting TEX. GOV'T CODE ANN. § 418.016(a)). If we were "[t]o construe the phrase 'force and effect of law' as broadly as the [State] suggest[s]—as granting the [G]overnor absolute power to suspend or prohibit any order or regulation that, in [the Governor's] estimate, is unnecessary or overly restrictive in mitigating the disaster—[we] would render [section 418.016(a)] superfluous." *Id.*

² We recognize the El Paso Court of Appeals has also addressed these same arguments and concluded the Governor has broad powers to prohibit mask mandates under the Texas Disaster Act. *See State v. El Paso County*, 618 S.W.3d 812, 826 (Tex. App.—El Paso 2020, no pet.). However, *El Paso County* is not mandatory authority in our jurisdiction, and we are not bound by its holdings. We respectfully agree with Chief Justice Rodriguez's dissent in that case. *See id.* at 832–40 (Rodriguez, J., dissenting).

Our rules of statutory construction do not support the State’s interpretation of section 418.012 of the Texas Disaster Act. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (“We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone.”); *Jenkins*, 2021 WL 5445813, at *10–11 (“The grant of power in [s]ection 418.012 is simply that—a grant of power. It does not make an executive order superior to a local order, nor does it make an executive [order] inferior to a local order. The [e]xecutive [o]rder by its terms purports to preempt local laws, but [s]ection 418.012 is silent on the issue of whether the [e]xecutive [o]rder can in fact preempt those laws.” (quoting *State v. El Paso County*, 618 S.W.3d 812, 833 (Tex. App.—El Paso 2020, no pet.) (Rodriguez, J., dissenting))); *see also Harris County*, 641 S.W.3d at 526 (concluding the Governor’s executive orders under section 418.012 do not preempt local government orders); *La Joya*, 2022 WL 802751, at *4 (“For the reasons previously set forth in our opinion in *Harris County*, we again conclude that the Governor does not possess absolute authority under the Texas Disaster Act to preempt orders issued by governmental entities and officials.”).

Commander in Chief - Section 418.015(c)

In relevant part, subsection 418.015(c) of the Texas Disaster Act states:

During a state of disaster and the following recovery period, the governor is the commander in chief of state agencies, boards, and commissions having emergency responsibilities.

TEX. GOV’T CODE ANN. § 418.015(c).

Using rules of statutory construction, the *Jenkins* court held the plain language of section 418.015(c) “expressly limits the governor’s commander-in-chief authority to state agencies, state boards, and state commissions.” *Jenkins*, 2021 WL 5445813, at *9; *see also Harris County*, 641 S.W.3d at 525 (“[T]he Act designates the Governor as ‘commander in chief of state agencies,

boards, and commissions having emergency responsibilities,’ not counties.”); *La Joya*, 2022 WL 802751, at *4 (extending the holding in *Harris County* to school districts). We agree.

“[T]he series-qualifier canon [of statutory construction] . . . provides that when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.” *Willacy Cnty. Appraisal Dist. v. Sebastian Cotton & Grain, Ltd.*, 555 S.W.3d 29, 38–39 (Tex. 2018) (internal quotation marks omitted); *see also Howard v. Howard*, 490 S.W.3d 179, 186 n.2 (Tex. App.—Houston [1st Dist.] 2016, pet denied) (internal quotation marks omitted) (“[T]he Supreme Court of Texas has endorsed application of the grammar rule providing that the first adjective in a series of nouns or phrases modifies each noun or phrase in the following series unless another adjective appears.” (citing *Illif v. Illif*, 339 S.W.3d 74, 80 (Tex. 2011))).

Here, the prepositive modifier “state” modifies the list of entities the Governor can assert authority over as commander in chief during a declared disaster. Under the plain and common meaning of the terms used by the legislature, and adhering to the series-qualifier canon of statutory construction, the Texas Disaster Act expressly limits the Governor’s commander-in-chief authority to state agencies, state boards, and state commissions having emergency responsibilities.

The District is not a state agency, a state board, or a state commission. Rather, the Texas Disaster Act defines the District as a “local government entity.” TEX. GOV’T CODE ANN. § 418.004(10). “The [Texas] Disaster Act does not empower the governor to act as the commander in chief of . . . local government entities” *Jenkins*, 2021 WL 5445813, at *9; *see also Harris County*, 641 S.W.3d at 525 (“Based on the plain language of the [Texas] Disaster Act, we do not agree that the provisions designating the Governor as ‘commander in chief’ . . . demonstrate that the [l]egislature intended to empower the governor with broad authority to preempt local orders.”). Because the Governor is not the commander in chief of the District, this provision does not support

the State's contention that GA-39 preempts the District's vaccine mandate. Accordingly, the State's reliance on this provision must fail.

Movement of People - Section 418.018(c)

Section 418.018(c) of the Texas Disaster Act states:

The 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.

TEX. GOV'T CODE ANN. § 418.018(c).

The State briefly makes a conclusory argument that “a prohibition on vaccination mandates controls ‘ingress and egress’ to, the ‘occupancy of premises’ in, and ‘the movement of persons’ through the locations into which [the District and Martinez] seek to impose their mandate—all schools within the school district—because it authorizes the entry of individuals into premises that would be prohibited under [the District and Martinez’s] preferred regime.” The State, however, fails to explain in its brief how this provision is applicable to the District’s vaccine mandate.

Moreover, nothing in the District’s vaccine mandate precludes individuals from entering the schools within the district because they are not vaccinated. Instead, the District’s vaccination mandate specifically applies only to employees as a condition of employment, not as a condition of “ingress and egress,” “occupancy of premises,” or “movement of persons within the school district.” *See id.* § 418.018(c).

B. Suspension

The State does not contest the District’s general authority to issue a vaccine mandate for its employees under sections 7.003 and 11.151 of the Texas Education Code. *See* TEX. EDUC. CODE ANN. § 7.003 (“An educational function not specifically delegated to the agency or board under this code is reserved and shall be performed by school districts”); *id.* § 11.151(b) (“[T]he trustees [of an independent school district] have the exclusive power and duty to govern

and oversee the management of the public schools of the district.”); *id.* § 11.151(d) (“The trustees may adopt rules and bylaws necessary to carry out the powers and duties provided by [s]ubsection (b).”). Instead, the State argues GA-39 suspended those codes under section 418.016(a) of the Texas Disaster Act and divested the District of its authority to issue a vaccine mandate during the declared disaster.

Section 418.016(a) of the Texas Disaster Act states:

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

TEX. GOV'T CODE ANN. § 418.016(a).

We have previously held the Governor’s authority to suspend statutes under section 418.016(a) of the Texas Disaster Act, by the statute’s express terms, is limited to suspension of “regulatory statutes [that] prescribe the procedures for the conduct of state business” *See City of San Antonio*, 2021 WL 5217636, at *4 (internal quotation marks omitted). Section 418.016(a) does not give the Governor authority to suspend “grant-of-authority statutes giving local authorities leeway to act in their best independent judgment within the confines of their own jurisdiction.” *Id.* (alterations omitted); *see also La Joya*, 2022 WL 802751, at *5 (“[T]he term ‘regulatory statute’ does not include statutes that are ‘grant-of-authority statute[s], giving local authorities the leeway to act in their best independent judgment within the confines of their own jurisdiction.’” (quoting *Harris County*, 641 S.W.3d at 528)).

“The provisions of the Texas Education Code relied on by the school district[] . . . are ‘grant-of-authority’ statutes, meaning they empower school districts and district officials to take actions to protect the safety and health of students, staff, and visitors but do not direct or require them to take any particular action, and thus are not ‘regulatory’ statutes.” *La Joya*, 2022 WL

802751, at *5. Because sections 7.003 and 11.151 are “grant-of-authority” statutes, they are not subject to suspension under section 418.016(a) of the Texas Disaster Act and the Governor is, therefore, without authority to suspend them. *See City of San Antonio*, 2021 WL 5217636, at *6.

Moreover, the Governor’s authority to suspend statutes under section 418.016(a) is further limited to regulatory statutes “*prescribing the procedures for conduct of state business.*” *See* TEX. GOV’T CODE ANN. § 418.016(a) (emphasis added). “[T]he Education Code provisions granting broad authority to local school districts . . . to govern and oversee public schools within their districts do not prescribe ‘the procedures for conduct of state business.’” *La Joya*, 2022 WL 802751, at *5.

Finally, “[i]f the [l]egislature had intended [s]ection 418.016(a) to reach the ordinances and business of local governments, [s]ection 418.016(a) would have stated an application to ‘political subdivisions’ or ‘local governmental entities,’ which are terms defined in the [Texas Disaster] Act.” *City of San Antonio*, 2021 WL 5217636, at *5; *see also* TEX. GOV’T CODE ANN. § 418.004(10) (“‘Local government entity’ means a county, incorporated city, independent school district, . . . or other entity defined as a political subdivision under the laws of this state.”).

“In sum, the Texas Disaster Act does not grant the Governor absolute authority to preempt orders issued by local government entities, such as school districts, and the provisions of the Education Code relied on by the school district” to issue its vaccine mandate “are not subject to suspension under [s]ection 418.016(a).” *La Joya*, 2022 WL 802751, at *6. Because the District is not precluded from requiring its employees receive a COVID-19 vaccine as a condition of their employment, the trial court could have reasonably concluded the State was not likely to succeed on the merits of its claims. Therefore, the trial court did not abuse its discretion when it denied the State’s application for a temporary injunction.

Accordingly, the State’s sole issue is overruled.

CONCLUSION

We affirm the trial court's order denying the State's application for a temporary injunction.

Irene Rios, Justice

TAB F:
COURT OF APPEALS JUDGMENT
(JULY 27, 2022)



Fourth Court of Appeals
San Antonio, Texas

JUDGMENT

No. 04-21-00419-CV

STATE of Texas,
Appellant

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT and
Pedro Martinez, in his Official Capacity,
Appellees

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2021-CI-19115
Honorable Mary Lou Alvarez, Judge Presiding

BEFORE JUSTICE ALVAREZ, JUSTICE RIOS, AND JUSTICE VALENZUELA

In accordance with this court's opinion of this date, the trial court's order denying the State of Texas's application for temporary injunction is **AFFIRMED**. We **ORDER** costs of appeal assessed against the State of Texas.

SIGNED July 27, 2022.


Irene Rios, Justice

TAB G:
TEX. GOV'T CODE § 418.011

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 4. Executive Branch (Refs & Annos)
Subtitle B. Law Enforcement and Public Protection
Chapter 418. Emergency Management (Refs & Annos)
Subchapter B. Powers and Duties of Governor (Refs & Annos)

V.T.C.A., Government Code § 418.011

§ 418.011. Responsibility of Governor

[Currentness](#)

The governor is responsible for meeting:

- (1) the dangers to the state and people presented by disasters; and
- (2) disruptions to the state and people caused by energy emergencies.

Credits

Acts 1987, 70th Leg., ch. 147, § 1, eff. Sept. 1, 1987.

[Notes of Decisions \(2\)](#)

V. T. C. A., Government Code § 418.011, TX GOVT § 418.011

Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

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TAB H:
TEX. GOV'T CODE § 418.012

 KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

[Vernon's Texas Statutes and Codes Annotated](#)

[Government Code \(Refs & Annos\)](#)

[Title 4. Executive Branch \(Refs & Annos\)](#)

[Subtitle B. Law Enforcement and Public Protection](#)

[Chapter 418. Emergency Management \(Refs & Annos\)](#)

[Subchapter B. Powers and Duties of Governor \(Refs & Annos\)](#)

V.T.C.A., Government Code § 418.012

§ 418.012. Executive Orders

[Currentness](#)

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

Credits

[Acts 1987, 70th Leg., ch. 147, § 1, eff. Sept. 1, 1987.](#)

V. T. C. A., Government Code § 418.012, TX GOVT § 418.012

Current through legislation effective June 18, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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TAB I:
TEX. GOV'T CODE § 418.018

[Vernon's Texas Statutes and Codes Annotated](#)

[Government Code \(Refs & Annos\)](#)

[Title 4. Executive Branch \(Refs & Annos\)](#)

[Subtitle B. Law Enforcement and Public Protection](#)

[Chapter 418. Emergency Management \(Refs & Annos\)](#)

[Subchapter B. Powers and Duties of Governor \(Refs & Annos\)](#)

V.T.C.A., Government Code § 418.018

§ 418.018. Movement of People

[Currentness](#)

- (a) The governor may recommend the evacuation of all or part of the population from a stricken or threatened area in the state if the governor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.
- (b) The governor may prescribe routes, modes of transportation, and destinations in connection with an evacuation.
- (c) The 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.

Credits

[Acts 1987, 70th Leg., ch. 147, § 1, eff. Sept. 1, 1987.](#)

V. T. C. A., Government Code § 418.018, TX GOVT § 418.018

Current through legislation effective June 18, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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