

CAUSE NO. D-1-GN-21-003896

HARRIS COUNTY, TEXAS,	§	
	§	IN THE DISTRICT COURT
Plaintiff	§	
	§	
v.	§	
	§	TRAVIS COUNTY, TEXAS
GREG ABBOTT, in his Official Capacity	§	
as Governor of Texas, and KEN	§	
PAXTON, in his Official Capacity as	§	
Texas Attorney General	§	
Defendants	§	<u>345th</u> JUDICIAL DISTRICT

PLAINTIFF’S ORIGINAL PETITION, APPLICATION FOR A TEMPORARY AND PERMANENT INJUNCTION, AND APPLICATION FOR A TEMPORARY RESTRAINING ORDER

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

This is a case about harmful overreach by the Governor of Texas during a global pandemic. At the start of the COVID-19 crisis, Governor Gregg Abbott issued a disaster declaration triggering his authority under the Texas Disaster Act, which places on him a duty to meet “the dangers to the state and people presented by disasters,” and authorizes him to issue certain executive orders to meet that duty. Tex. Gov’t Code § 418.011. Early on in the crisis, Governor Abbott and County Judges and Mayors across the state issued emergency orders to contain the spread of the virus, including limiting building occupancy, mandating masks, and mandating testing at certain facilities.

In the months following the initial stages of the pandemic, as the country became increasingly polarized about governmental mandates during the pandemic, the Governor changed course. He began misusing his Disaster Act authority to issue executive orders designed not to prevent the spread of COVID-19, but instead to tie local officials’ hands. He prohibited local officials from enacting protective measures. He declared that his orders superseded local orders.

He decreed that he has the authority to unilaterally suspend laws that were in place long before he was elected. Local government officials and entities across the state were threatened with penalties and fines if they enacted protective measures inconsistent with the Governor's orders. The Governor touted his prohibitions as a victory for individuals against government overreach, vowing that no governmental entity or official in Texas will mandate masks or vaccines.

The Governor's race away from COVID-19 protectionary measures brings us to GA-38, his latest executive order, in which he purports to prohibit local officials from mandating masks, vaccines, occupancy limits, and just about any other meaningful measure to stop the spread of COVID-19. He declares that local officials who fail to comply with the order commit an "offense" and will be subject to monetary fines.

Despite Governor Abbott's dangerous rhetoric and actions that are preventing our local officials from protecting our citizens, the pandemic is not over. COVID-19 is ravaging our community. To date, there are 441,301 confirmed COVID-19 cases, 29,453 active COVID-19 cases, and 5,111 COVID-19 deaths in Harris County. For the period of July 25, 2021 to August 8, 2021, Harris County Public Health identified 18,549 new COVID-19 cases, which is a 332% increase in case since July 2021. Harris County has over 4,000,000 residents and 15,000 employees, and it's the job of the Harris County Commissioners Court and Harris County Public Health to keep their residents and employees safe. Despite GA-38, Harris County has kept in place its policy requiring employees to wear masks in County buildings.

Harris County and other local governments and officials across the state have worked as best as they can to navigate the Governor's prohibitions. But as the Delta variant spreads, hospitalizations are up, ICU capacity is critically low, and schools are reopening. In the midst of this, the Governor and the Attorney General of Texas have made clear that they do not intend to

use proven measures to reduce the spread of COVID-19 in our community, even as students head to classrooms to start off the school year. Instead, they intend to enforce GA-38, stating that “any local government official that defies [GA-38] will be taken to court.”¹ Harris County runs the risk of enforcement against its officials and employees as a result of its efforts to safeguard its employees and residents during this crisis. And the County seeks adjudication of its and the Governor’s rights under the Disaster Act and GA-38 so that the County can issue more substantial mandates to stop the spread of COVID-19. The time has come for court intervention.

Texas is not, and has never been, a dictatorship. The Governor serves under the authority granted to him by the Texas Constitution and the statutes of the legislature, and nothing more. The Governor is acting *ultra vires*, as the Texas Disaster Act does not permit him to suspend laws, cast aside local officials’ mandates, and tie local officials’ hands as he purports to in GA-38. And, in the alternative, if the Disaster Act does grant the Governor the ability to make law that supersedes all other laws, and cast aside any Texas statute, the Act violates the Texas Constitution’s Separation of Powers and Suspension clauses and is unconstitutionally vague and overbroad.

The Legislature wrote the Disaster Act to give the Governor powers to effectively mitigate a disaster, but was careful to ensure a Governor could not slyly use a disaster to usurp and consolidate power in his office. The Governor is actively disregarding it and daring the Legislature and the Courts to allow him to convert the cherished limited government of Texas into a dictatorship. Fortunately, for the millions of Texans facing the COVID-19 pandemic and hoping their local leaders respond to the disaster the Governor has chosen to ignore, Texas still operates under the rule of law, not under the whims of a single person.

¹ Joint Press Release; “Governor Abbott, Attorney General Paxton Aligned in Defense of Executive Order Prohibiting Mask Mandates”, August 11, 2021.

Harris County, Texas files this lawsuit, by and through Harris County Attorney Christian D. Menefee, against Greg Abbott, in his official capacity as Governor of Texas, and Ken Paxton, in his official capacity as Attorney General for the State of Texas, asserting that the Governor is acting *ultra vires*, and seeking an injunction against enforcement of GA-38. Harris County seeks a temporary restraining order and temporary injunction, and would respectfully show the following:

I. DISCOVERY CONTROL PLAN

1. Plaintiff intends to conduct discovery under Level 3, pursuant to Rule 190.4 of the Texas Rules of Civil Procedure.

II. PARTIES

2. Harris County, Texas is the largest county in Texas and operates through the Harris County Commissioners Court, the County's principal governing body. Commissioners Court authorized Harris County Attorney Christian D. Menefee to file this suit on behalf of the County.

3. Defendant Greg Abbott ("the Governor" or "Governor Abbott") is the Governor of Texas and is sued in his official capacity. Harris County alleges he committed the *ultra vires* act of issuing certain prohibitions in GA-38 that are outside of his legal authority. He may be served at 1100 San Jacinto Blvd., Austin, Texas 78701.

4. Defendant Ken Paxton (the "Attorney General" or "Attorney General Paxton") is the Attorney General of Texas and is sued in his official capacity. He may be served at 300 West 15th Street, Austin, Texas, 78701.

III. JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over the matter pursuant to Art. V, §8 of the Texas Constitution and Tex. Civ. Prac. & Rem. Code § 37.003.

6. This Court has personal jurisdiction over each Defendant because the Defendants

reside in Texas. Venue is proper in Travis County pursuant to Tex. Civ. Prac. & Rem. Code §§ 15.002 and 65.023 because Defendants' residence and principal place of business is in Travis County, Texas.

IV. FACTS

7. For over a year, Texas and the world have faced the disastrous pandemic of COVID-19. The highly contagious and lethal virus has infected millions of Texans and killed over 51,000 Texans as of this date – the second most of any state in the country. The COVID-19 pandemic is unlike anything modern society has experienced. The virus and its variants differ from other viruses because of the lack of individual human immunity, its transmissibility, and its ability to cause severe illness and death. *See* Ex. 1. at ¶ 3.

8. On August 5, 2021, County Judge Lina Hidalgo changed Harris County's COVID-19 Threat Level to 1 – Severe. This decision was made to mitigate the effects of the Delta variant that is now estimated to be the prominent variant across the County. *Id.* at ¶ 4.

9. Studies indicate that individuals infected with the Delta variant have viral loads estimated to be around 1,000 times higher than those in people infected with the original COVID-19 strain. The Delta variant is highly transmissible, meaning it is easily spread from person to person compared to other strains of the virus, and the higher viral loads likely contributes to the higher infection rate of this variant. Vaccinated individuals are less likely to be infected with the Delta variant, but if they become infected, they are contagious and infect others. *Id.* at ¶ 5.

10. Based on data from Harris County Public Health, Houston Health Department, and the South East Texas Regional Advisory Council, August 10, 2021:

- a. For the period of July 25 - August 8, 2021, Harris County had 1,456 patients hospitalized. This is a 180% increase over the 520 hospitalized in early July 2021 (July 4-July 18);

- b. For the period of July 25 - August 8, Harris County had 315 ICU beds filled. This is a 152% increase over the 125 beds filled in early July 2021 (July 4-July 18);
- c. For the period of July 25 - August 8, Harris County Public Health identified 18,549 cases. This is a 332% increase over the 5,578 cases in early July 2021 (July 4-July 18);
- d. There are 441,301 confirmed cases of COVID-19, 29,453 active cases, and 5,111 deaths due to COVID-19 in Harris County;
- e. The 7-day rate of new COVID-19 cases is 249.71 per 100,000 persons meeting the indicator for Threat Level 1. This threat level signifies a severe and uncontrolled level of COVID-19 transmission in Harris County;
- f. In the last 14 days, on average, 20.83% of all ICU hospital beds available in Harris County have been occupied by COVID-19 patients and Harris County hospital ICUs are admitting an average of 12.66 additional COVID-19 patients a day to available ICU beds;
- g. In the last 14 days, on average, 8.19% of all available general hospital beds have been occupied by COVID-19 patients and Harris County hospital general wards are admitting an average of 48.65 additional COVID-19 patients a day to general ward beds; and
- h. The 14-day average test positivity rate is 19%, meaning 19% of all COVID-19 lab results collected in the last 14 days and reported to Harris County Public Health and Houston Health Department were positive.

Id. at ¶ 7.

11. Face coverings reduce transmission of COVID-19. Importantly, the Center for Disease Control released the Morbidity and Mortality Weekly Report (MMWR) coming out of Kansas. The report showed that after the Kansas governor's executive order, COVID-19 incidence (calculated as the 7-day rolling average number of new daily cases per 100,000 population) decreased (mean decrease of 0.08 cases per 100,000 per day; net decrease of 6%) among counties with a mask mandate (mandated counties) but continued to increase (mean increase of 0.11 cases per 100,000 per day; net increase of 100%) among counties without a mask mandate (nonmandated counties). *Id.* at ¶ 12.

12. The Texas Disaster Act—Chapter 418 of the Government Code—grants certain

authority to the Governor, County Judges, and Mayors when the Governor declares a statewide disaster. The Act works to “authorize and provide for cooperation in disaster mitigation, preparedness, response, and recovery.” Tex. Gov’t Code § 418.002. And one of its core purposes is to “clarify and strengthen the roles of the governor, state agencies, the judicial branch of state government, *and local governments* in prevention of, preparation for, response to, and recovery from disasters.” *Id.* (emphasis added).

13. The Act authorizes, for example, the Governor to issue “executive orders, proclamations, and regulations,” which “have the force and effect of law.” Tex. Gov’t Code § 418.012. He may also “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 § 418.018. But this power is not unfettered—the Governor is “responsible for meeting the dangers to the state and people presented by disasters.” *Id.* at § 418.011.

14. Similarly, the Act designates County Judges and Mayors as the “emergency management director” for their political subdivision during statewide disasters, and authorizes them to exercise the same powers granted to the Governor “on an appropriate local scale.” Tex. Gov’t Code § 418.1015. Moreover, it authorizes County Judges and Mayors to declare local disasters, and, like the Governor in statewide disasters, “control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area.” *Id.* at § 418.108.

15. In response to the COVID-19 pandemic, the Governor, Judge Lina Hidalgo, and numerous other County Judges and Mayors issued statewide and local disaster declarations pursuant to their authority under the Disaster Act.

16. On March 13, 2020, Governor Abbott issued a statewide disaster declaration. He

has renewed the declaration every month since then, most recently in July 2021.

17. On March 11, 2020, Judge Hidalgo issued a local disaster declaration for Harris County. She renewed the disaster declaration several times, most recently on August 25, 2020. *See* Ex. 2.

18. Once the Governor's statewide disaster declaration, he began utilizing his power under the Disaster Act to issue executive orders. On March 19, 2020, he issued GA-08, his first Executive Order related to COVID-19.² This order required Texans to avoid dining at restaurants and bars and attending social gatherings of more than ten people, among other restrictions. Over the following year, the Governor's executive orders would transform from mandating measures to protect people from the spread of COVID-19, to doing nothing more than prohibiting local officials' from taking action to stop the spread.

19. As the Governor abdicated his responsibility to enact measures to keep people safe, local officials—who had since the start of the pandemic enacted protective measures at the local level—filled the void.

20. Harris County has over 4,000,000 residents and 15,000 employees. Among these employees are many public-facing workers, including first responders, and workers in hospitals and libraries. Every day, these individuals go to work at one of the many County-owned buildings that are open to the public, including hospitals, libraries, and other facilities. The County Judge and Commissioners Court have determined that it is necessary for employees to wear masks to prevent additional spread of COVID-19, and enacted policies to effectuate that goal.

21. Most recently in Harris County, on May 25, 2021, the Harris County

² Judge Hidalgo also issued executive orders related to COVID-19, pursuant to the authority granted her under Chapter 418, most recently on March 9, 2021, when she issued her Seventh Order Requiring Fever and Health Screen and Requiring Face Coverings in County Buildings. *See* Ex. 3.

Commissioner’s Court issued an order mandating that employees wear masks in County buildings unless they meet one of a few exceptions. *See* Ex. 4– Order of May 25, 2021, at § 2 (“Harris County employees entering County buildings for any purpose associated with their official job duties are required to wear face coverings unless . . .”). This order remains in effect today. *Id.*

22. On July 29, 2021, Governor Abbott signed GA-38, his most recently issued executive order. *See* Ex. 5. In GA-38, the Governor purports to decree that “[n]o governmental entity, including a county, city, school district, and public health authority, and no governmental official may require **any person** to wear a face covering or to mandate that another person wear a face covering,” unless done pursuant to one of a few exceptions, none of which are relevant to this case *Id.* at § 4.a. The Governor makes no showing that this prohibition is in furtherance of responding to the COVID-19 disaster.

23. GA-38 purports to “supersede any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts services allowed by this executive order or allows gatherings restricted by this executive order.” *Id.* at § 5.a. It also purports to “supersede any face-covering requirement imposed by any local governmental entity or official.” *Id.* at § 4.b.

24. GA-38 further purports to suspend several laws to “the extent necessary to ensure that local governmental entities or officials do not impose any such face-covering requirements,” including:

- Sections 418.1015(b) and 418.108 of the Texas Government Code;
- Chapter 81, Subchapter E of the Texas Health and Safety Code;
- Chapters 121, 122, and 341 of the Texas Health and Safety Code;
- Chapter 54 of the Texas Local Government Code; and

- any other statute invoked by any local governmental entity or official in support of a face-covering requirement.

Id. at § 4.b.

25. In yet another broad suspension of laws, GA-38 purports to “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.” *Id.* at § 5.a.

26. None of these statutes listed in GA-38 are regulatory statutes that prescribe the conduct of state business, and the Governor does not claim they are such in his order. Strict compliance with the statutes above would not in any way prevent, hinder, or delay necessary action in coping with COVID-19. The Governor does not claim or attempt to show that compliance with any of the statutes would in any way prevent, hinder, or delay necessary action in coping with COVID-19.

27. Importantly, GA-38 purports to bring stiff penalties for local governmental entities/officials who enact mandates prohibited therein: “the imposition of any conflicting or inconsistent limitation by a local governmental entity or official constitutes a ‘failure to comply with’ this executive order that is subject to a fine up to \$1,000.” *Id.* at § 4.b.

28. As Harris County’s May 25, 2021 order requires employees to wear face coverings in County-owned buildings, County officials face the threat of fines from the Defendants for exercising their authority to protect the employees and residents of Harris County from additional spread of COVID-19.

29. Harris County’s public health officials are responsible for the health and safety of the community, including suppressing the spread of diseases. Harris County’s public health

considers requiring the use of masks as one of the tools available to accomplish this charge. *See* Ex. 1, ¶ 6. Harris County thus seeks a declaration that in prohibiting local governments from mandating masks in GA-38, Governor Abbott exceeded his authority under the Disaster Act, and/or violated the Texas Constitution.

V. CAUSES OF ACTION

DECLARATORY JUDGMENT—GOVERNOR ABBOTT’S ACTIONS IN GA-38 ARE *ULTRA VIRES* AND GA-38 IS UNCONSTITUTIONAL, INVALID, AND UNENFORCEABLE.

30. Harris County incorporates by reference and re-alleges the facts and allegations contained in the foregoing paragraphs 1 through 29, as if set forth verbatim herein.

31. The Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code § 37.001, *et. seq.* (“UDJA”) is properly used to settle and afford relief from uncertainty and insecurity with respect to rights under a statute and must be liberally construed to achieve that purpose.

32. Harris County is responsible for protecting the health and safety of its employees and residents, especially in these unprecedented times with the highly transmittable COVID-19 virus. GA-38 directly impacts Harris County’s ability to issue and enforce policies and procedures in Harris County that address the COVID-19 health crisis. For this reason, Harris County is entitled to relief under the UDJA to ascertain the validity of GA-38, and its rights and obligations, if any, under the Governor’s order. Additionally, Harris County is entitled to relief under the UDJA to understand its rights and obligations, if any, under GA-38 because it is charged with implementing the Governor’s order throughout the county, if valid. Moreover, Harris County currently has a policy mandating employees to wear masks in County buildings. Should the Attorney General take action to enforce GA-38, and should a court determine that Harris County’s policy is in violation of that order, the County, the officials who enacted the policy, and the employees who enforce the policy could be subject to fines and other penalties.

33. The penalties for running afoul of GA-38 are severe. GA-38 provides that a failure to comply with the order is an “offense” punishable by fine up to \$1,000. The likelihood of state enforcement against Harris County is high. Yesterday, the Attorney General joined the Governor in stating that “any local government official that defies [GA-38] will be taken to court.” Moreover, over the past year, the Texas Attorney General has repeatedly sued local governmental entities that he claims have instituted measures inconsistent with the Governor’s executive orders.³

34. Pursuant to the UDJA, Harris County seeks a declaratory judgment from the Court that:

- a. The Governor acted *ultra vires* in issuing Executive Order GA-38 because the Governor’s suspension of laws exceeds his authority under the Texas Disaster Act;
- b. The Governor acted *ultra vires* in issuing Executive Order GA-38 because his mask mandate prohibition as to “any person” impermissibly purports to supersede Harris County Commissioners Court’s broad authority to set and enforce policies, rules, and regulations over County employees;
- c. Executive Order GA-38 violates the Texas Constitution’s Separation of Powers and Suspension Clauses;
- d. Executive Order GA-38 is unconstitutional, invalid, and unenforceable because it is vague and overbroad in violation of Fifth and Fourteenth Amendment Due Process Clauses and the Due Course of Law Clause of the Texas Constitution; and
- e. Executive Order GA-38’s \$1,000.00 fine is invalid and unenforceable.

³ See *State v. El Paso County*, 618 S.W.3d 812 (Tex. App.—El Paso 2020, no pet.), mandamus dismissed (Nov. 20, 2020) (State sued County of El Paso regarding County Judge’s executive orders requiring business closures that were not in Governor’s executive order); *State v. City of Austin*, 03-20-00619-CV, 2021 WL 1313349 (Tex. App.—Austin Apr. 8, 2021, no pet.) (State sued City of Austin, Travis County, Mayor, and County Judge alleging that local emergency orders requiring restaurants to cease in-person dining at 10:30 pm on New Year’s Eve were in conflict with Governor’s executive orders suspending 418.1015); *State v. City of Austin, et al.*, 03-21-00144-CV, 2021 WL 2406880, at *1 (Tex. App.—Austin June 11, 2021, no pet. h.) (State sued City of Austin, Travis County, Mayor, County Judge, and Health Authority seeking to strike down local health authority rules that required the wearing of masks and other hygiene and sanitation measures, including hand-washing, in public places. District Court denied State’s request for a temporary injunction. Parties voluntarily dismissed appeal).

Notably, in the only ruling where a Court has considered whether the Governor has the authority under the Disaster Act to suspend Chapters 121, 122, and 341 of the Health and Safety Code, and Chapter 54 of the Local Government Code, it has ruled against the State. See Ex. 6, Order Denying Temporary Injunction in *State v. City of Austin, et al.*, D-1-GN-21-001046, (98th District Court, Travis County), March 26, 2021).

35. Each of these claims is addressed in greater detail below.

A. The Governor acted *ultra vires* in issuing Executive Order GA-38 because the Governor's suspension of laws exceeds his authority under the Texas Disaster Act.

36. Harris County incorporates by reference and re-alleges the facts and allegations contained in the foregoing paragraphs 1 through 35 as if set forth verbatim herein.

37. The Disaster Act provides the Governor with extremely limited authority to suspend certain laws. It provides:

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. Code § 418.016(a) (emphasis added).

38. Thus, the Governor cannot suspend a law purpose to this provision unless (1) it is a “regulatory statute proscribing procedures,” (2) it proscribes procedures for “conduct of state business or the order or rules of a state agency,” and (3) it *requires* compliance, and “strict compliance [with the law] would in any way prevent, hinder, or delay necessary action in coping with a disaster.” The Governor’s attempt to suspend laws in GA-38 fails to meet these requirements.

39. The Governor exceeded his Disaster Act authority in GA-38 because none of the local authorities subject to and affected by GA-38, from counties to school districts, are “state agencies.”

40. The Governor further exceeded his Disaster Act authority in GA-38 because the statutes he purports to unilaterally suspend, such as Chapters 81, 121, and 122 of the Health and Safety Code, Chapter 54 of the Local Government Code, and Sections 418.015(b) and 418.108 of the Government Code, are not *regulatory* statutes. Moreover, he has not and cannot show that they require compliance that would “prevent, hinder, or delay necessary action in coping with a

disaster.” Tex. Gov. Code § 418.016(a).

41. In fact, the Governor is actually attempting to block the efforts of Harris County and other local government to respond to the pandemic and protect their residents’ health and safety by instituting mask mandates.

42. The statutes that the Governor seeks to suspend, such as Chapters 81, 121, and 122 of the Health and Safety Code, Chapter 54 of the Local Government Code, and Sections 418.015(b) and 418.108 of the Government Code, are not *regulatory* statutes prescribing the procedures of state business. Moreover, the Governor’s suspension of “any other statute invoked by any local governmental entity or official in support of a face-covering requirement” by its own terms is intended to apply to “any” statute, not just regulatory statutes. The Governor cannot justify this broad suspension of laws.

43. Therefore, the Disaster Act provides the Governor no authority to suspend the powers set forth in Chapters 81, 121, or 122 of the Texas Health & Safety Code, Chapter 54 of the Local Government Code, much less other sections of the Disaster Act itself.

44. Rather, the statutory provisions and rules relied on by local officials are used to prevent further transmission of the disease. These statutes are not delaying action but instead are affirmatively used to take action to respond to and mitigate the COVID-19 disaster, including the current Delta variant that is ravaging Harris County.

45. GA-38 actually does the opposite of the Disaster Act’s intention. Despite the thousands of new COVID cases every day, and ICUs at critical capacity, the Governor apparently believes COVID mitigation measures are no longer necessary. He is free to not use the power granted to him in the Disaster Act. But, he is not free to unilaterally suspend swaths of laws enacted by the Legislature to require similar inaction from local officials, (especially while reasserting the

existence of a statewide public health disaster as the basis for an attempted suspension of laws).

B. The Governor acted *ultra vires* in issuing Executive Order GA-38 because his mask mandate prohibition as to “any person” impermissibly purports to supersede Harris County Commissioners Court’s authority to set and enforce policies, rules, and regulations over County employees.

46. Harris County incorporates by reference and re-alleges the facts and allegations contained in the foregoing paragraphs 1 through 45 as if set forth verbatim herein.

47. The Texas Constitution grants the court express and implied authority over “all county business”:

The county commissioners so chosen, with the county judge, as presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of the State, or as may be hereafter prescribed.

Harris County Flood Control Dist. v. Mann, 140 S.W.2d 1098, 1104–05 (Tex. 1940) (quoting Tex. Const. art. V, § 18).

48. In its role as the County’s principal governing body, the Harris County Commissioners Court controls various legislative, executive, and administrative functions. *See, e.g., Avery v. Midland County, Tex.*, 390 U.S. 474, 476 (1968) (“The Commissioners Court is assigned by the Texas Constitution and by various statutory enactments with a variety of functions. According to the commentary to Vernon’s Texas Statutes, the court: ‘is the general governing body of the county . . .’”); *Comm’rs Ct. of Titus Cnty. v. Agan*, 940 S.W.2d 77, 79 (Tex. 1997) (“Our Constitution establishes the Commissioners Court as the county’s principal governing body.”). These powers include those explicitly granted by the Texas Constitution or by state law, and those necessarily implied from those authorities. *Griffin v. Birkman*, 266 S.W.3d 189, 193 (Tex. App.—Austin 2008, pet. denied).

49. The Texas Constitution and state statute, taken together, grant the Harris County Commissioners Court broad authority act as any other employer and building owner—it employs

people, sets their compensation and other allowances, sets conditions of employment, and sets requirements for County employees (and other individuals) to gain entry in County buildings. *See, e.g.,* TEX. LOC. GOV'T CODE §§ 151.001–.004; TEX. LOC. GOV'T CODE §§ 152.011–.013; Tex. Att'y Gen. Op. No. KP-0322 (2020). That authority empowers the Harris County Commissioner Court to, as an employer, to establish a policy requiring county employees to wear masks while physically present in county buildings and facilities.

50. In GA-38, the Governor purports (1) to prohibit Harris County and other local governments from requiring “any person” to wear a mask, (2) that his order “shall supersede any face-covering requirement imposed by any local governmental entity or official,” and (3) to suspend *any* “statute invoked by any local governmental entity or official in support of a face-covering requirement.” Taken together, these provisions read as prohibiting Harris County from enacting a policy to require its employees to wear masks in County buildings. The Disaster Act gives the Governor no such authority to set aside the Harris County Commissioners Courts’ broad, constitutionally-derived, powers to govern its employees and County-owned buildings.

51. GA-38 is unconstitutional, invalid, and unenforceable because it contravenes the Texas Constitution’s Separation of Powers clause and the Suspension Clause.

52. Harris County incorporates by reference and re-alleges the facts and allegations contained in the foregoing paragraphs 1 through 51 as if set forth verbatim herein.

53. Article II, Section 1 of the Texas Constitution provides:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another; and those which are Judicial to another; and *no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.*

Tex. Const. art. II, § 1 (emphasis added).

54. Moreover, Article I, Section 28 provides that “[n]o power of suspending the laws of this state shall be exercised, except by the Legislature.” Tex. Const. Art. I, § 28. The 1876 Texas Constitution was written precisely to prevent an overreaching Governor from interfering with the authority of local officials.

55. As previously discussed, the Disaster Act provides the Governor with very *limited* suspension authority, but he has misused that authority to suspend multiple nonregulatory laws, including a catch-all nondescript category of laws that are not specifically identified by name in the order.

56. The Legislature’s clear limitations on the suspension power confirm that the Governor cannot use the suspension power to simply use a disaster as pretext to suspend statutes *carte blanche*. If this were the case, the Legislature’s limitations on suspension power throughout the Disaster Act would be rendered meaningless, resulting in an absurd and illogical reading of the Disaster Act. *See In re ReadyOne Industries, Inc.*, 394 S.W.3d 697, 701 (Tex. App.—El Paso 2012, orig. proceeding) (when general and specific words are grouped together in a statute, the meaning of the general words is limited by conditions imposed by specific words). Permitting the Governor to exercise the limited suspension authority in the way he has is tantamount to allowing him to suspend *any* law during a disaster, and effectively makes him a replacement of the Legislature during a disaster.

57. Thus, if the Court believes the Disaster Act authorizes the Governor to suspend laws in the way he purports to in GA-38, then Harris County would respectfully submit that the Act contravenes the Texas Constitution’s Separation of Powers and Suspension clauses.

C. GA-38 is unconstitutional, invalid, and unenforceable because it is vague and overbroad and violates the Texas Constitution’s Due Process and Due Course of Law Clauses.

58. Harris County incorporates by reference and re-alleges the facts and allegations

contained in the foregoing paragraphs 1 through 57 as if set forth verbatim herein.

59. GA-38 violates the Due Process Clauses of the Fifth and Fourteenth Amendments of the Texas Constitution, as well as the Due Course of Law Clause in Art. I, § 19, because it is too vague and too broad to be enforceable.

60. GA-38 vaguely states that it suspends “any other statute invoked by any local governmental entity or official in support of a face-covering requirement.” GA-38 fails, however, to identify these “other” suspended statutes. Harris County and other local governments have no notice or information about “other” existing policies or rules that are purportedly suspended by the Governor’s order. GA-38, therefore, violates the Due Process and Due Course of Law Clauses of the Texas Constitution because it fails to define a violation of the order with sufficient definiteness that Harris County can understand what conduct is prohibited.

61. The Governor’s order does not contain any level of specificity or clarity as to what laws may have been suspended by GA-38, or what actions or orders may “conflict with” the Governor’s pronouncements, leaving local governments and officials to guess whether they will face enforcement actions and fines if they take particular actions to contend with the COVID-19 pandemic in their respective regions.

62. GA-38 is simply a standardless sweep that impermissibly attempts to suspend “any other relevant statutes” whether regulatory or otherwise.

D. GA-38’s \$1,000.00 fine is invalid and unenforceable.

63. Harris County incorporates by reference and re-alleges the facts and allegations contained in the foregoing paragraphs 1 through 62, as if set forth verbatim herein.

64. GA-38’s attempt to impose a \$1,000 fine for violators is also without legal authority. The Governor purports to rely on Tex. Gov’t Code § 418.173 for this fine. The actual text of the statute is as follows:

(a) A state, local, or interjurisdictional emergency management plan may provide that failure to comply with the plan or with a rule, order, or ordinance adopted under the plan is an offense.

(b) The plan may prescribe a punishment for the offense but may not prescribe a fine that exceeds \$1,000 or confinement in jail for a term that exceeds 180 days.

65. A fine can only be imposed under that statute if it is prescribed by an emergency management plan. As of the date of the signing of GA-38, no emergency plan requires local officials to ban the wearing of masks or taking other safety measures. Neither does any rule, order, or ordinance adopted under any emergency management plan.

66. Therefore, the Governor's desire to impose a \$1,000 fine is unauthorized and without legal support. GA-38's fine for local governments who violate the order is invalid and unenforceable.

VI. APPLICATION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

67. Harris County seeks a temporary restraining order and temporary injunction from the Court restraining Defendants Governor Abbott and Attorney General Paxton from (1) enforcing GA-38 against any local governmental entity, or employee or official of a local governmental entity in Harris County; and (2) suspending Texas Government Code §§ 418.1015 and 418.108; Chapter 81, Subchapter E of the Texas Health and Safety Code; Chapters 121, 122, and 341 of the Texas Health and Safety Code; Chapter 54 of the Texas Local Government Code; and any other statute that is not a regulatory statute and/or that is not on the suspension list required by § 418.015.

68. Harris County is entitled to injunctive relief if it shows "(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 applicant “need not prove that she will ultimately prevail in the litigation; rather, the applicant must show she has a cause of action for which relief may be granted.” *Topheavy Studios, Inc. v. Doe*, 03-05-00022-CV, 2005 WL 1940159, at *3 (Tex. App.—Austin Aug. 11, 2005, no pet.).

69. This Petition details Harris County’s causes of action against the Defendants related to the issuance and enforcement of GA-38, shows why the Governor’s issuance of GA-38 and any enforcement of that order are *prima facie* violations of the law, and supports that the County has a probable right of relief. The Governor has superseded and suspended laws in contravention of his limited suspension authority under the Disaster Act. And, if one were to accept the Defendants’ anticipatedly broad reading of the Act, the Act would then run afoul of the Texas Constitution’s Separation of Powers and Suspension clauses.

70. If the Court does not grant the temporary relief sought by the Plaintiff, the consequences will be dire.

71. Studies over the last year have shown that mask mandates are very effective at reducing transmission of COVID-19. *Id.* at ¶ 8 (study finding that counties with mask mandates reduced COVID transmission while counties without mask mandates suffered from increased transmission).

72. Without the ability to immediately require mask mandates in public places especially schools with children ineligible to be vaccinated, Harris County residents, most notably children in schools, will suffer from increased transmission of COVID-19. This is particularly critical at this moment, when Harris County is suffering through a sharp rise in cases due to the highly transmissible Delta variant, which has required Harris County Judge Lina Hidalgo to raise the County’s threat level to 1 – Severe. *Id.* at ¶ 4-5.

73. The number of patients hospitalized and in ICE beds has increased sharply in Harris

County in recent weeks due to the Delta variant. If the Plaintiff lacks the ability to take immediate action, without the threat of unlawful enforcement from Defendants, the harm suffered by Harris County and the public at large will be irreparable.

74. There is no adequate remedy at law to avoid the preventable and unnecessary hospitalizations, suffering, and deaths that will be caused without the temporary restraining order.

75. Lastly, the public interest in safe, healthy, environments and avoiding loss of life supports granting the TRO. A trial court is “bound to take into account other considerations evident on the face of the pleadings and in the evidence adduced at the temporary-injunction hearing -- for example, the issue of comparative injury or a balancing of the ‘equities’ and hardships, including a consideration of the important factor of the public interest.” *Methodist Hosps. of Dall. v. Tex. Indus. Accident Bd.*, 798 S.W.2d 651, 660 (Tex. App. - Austin 1990, writ dism’d w.o.j.) (superseded by statute on other grounds) (citing *Mitchell v. City of Temple*, 152 S.W.2d 1116, 1117 (Tex. Civ. App. - Austin 1941, writ ref’d w.o.m.). Without question, the public interest during this time of a highly contagious delta variant leads to granting the requested temporary relief immediately.

76. The penalties for running afoul of GA-38 are severe. GA-38 provides that a failure to comply with the order is an “offense” punishable by fine up to \$1,000. The likelihood of state enforcement against Harris County is high. Yesterday, the Attorney General joined the Governor in stating that “any local government official that defies [GA-38] will be taken to court.” Moreover, over the past year, the Texas Attorney General has repeatedly sued local governmental entities that he claims have instituted measures inconsistent with the Governor’s executive orders.

77. Harris County is exempt by law from the requirement to file a bond for a request for an injunction. *See* Tex. Civ. Prac. & Rem. Code § 6.001(c).

VII. PERMANENT INJUNCTIVE RELIEF

78. Additionally, Plaintiff seeks permanent injunctive relief against Defendants as follows:

- a. Enjoining the Defendants from enforcing GA-38 against any local governmental entity, or employee or official of a local governmental entity in Harris County;
- b. Enjoining the Defendants from seeking to fine any local governmental entity, or employee or official of a local governmental entity in Harris County, for alleged violations of GA-38; and
- c. Enjoining the Defendants from suspending Texas Government Code §§ 418.1015 and 418.108; Chapter 81, Subchapter E of the Texas Health and Safety Code; Chapters 121, 122, and 341 of the Texas Health and Safety Code; Chapter 54 of the Texas Local Government Code; and any other statute that is not a regulatory statute and/or that is not on the suspension list required by § 418.015.

VIII. RULE 47 CLAIM FOR RELIEF

79. Pursuant to Rule 47 of the Texas Rules of Civil Procedure, Plaintiff seeks only non-monetary relief.

IX. PRAYER

For these reasons, Harris County, Texas respectfully requests the Court grant the following relief:

- a. Declaratory judgment that the Governor's actions in enacting GA-38 and seeking to suspend Chapters 81, 121, and 122 of the Health and Safety Code, Chapter 54 of the Local Government Code, and Sections 418.015(b) and 418.108 of the Government Code GA-38 are *ultra vires*;
- b. Declaratory judgment that GA-38 is unconstitutional, invalid, and unenforceable;
- c. A temporary restraining order barring the enforcement of GA-38;
- d. A temporary injunction barring enforcement of GA-38;
- e. A permanent injunction barring enforcement of GA-38; and
- f. All other relief to which Plaintiff is justly entitled.

Respectfully submitted,

/s/ Christian D. Menefee

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