

city mayors, and local health officials—with leading the State’s response to a statewide emergency. Traditional preemption principles and the TDA’s plain language dictate that the Governor’s emergency orders control over conflicting local orders.

2. Over the last few months, Defendants issued four COVID-19-related emergency orders that impose facemask requirements on residents and place significant limits on businesses and their operations. These facemask and business restrictions were recently superseded and preempted by GA-34, which frees Texas businesses and residents of such burdens.

3. Defendants insist that they will continue enforcing their business and facemask requirements despite the fact that GA-34 nullified these provisions. Defendants know this is wrong. The Supreme Court of Texas recently overturned Defendants’ last attempt to undermine Governor Abbott’s emergency orders in such a manner. The same result is warranted here. This Court should immediately enjoin Defendants’ unlawful and invalid business and facemask restrictions.

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

4. 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. The State contacted Defendants and discussed the relief requested herein prior to making this filing, but the parties were unable to resolve their differences or secure an agreed setting.

PARTIES

5. Plaintiff is the State of Texas.

6. Defendants are: (1) the City of Austin, Texas; (2) the County of Travis, Texas; (3) Steve Adler, in his official capacity as Mayor, City of Austin, Texas; (4) Andy Brown, in his official capacity as County Judge, County of Travis, Texas; and (5) Mark E. Escott, in his official capacity as Interim Medical Director and Health Authority for the City of Austin and County of Travis.

7. The City of Austin may be served with process through its Mayor, Steve Adler, or its City Clerk, Jannette Goodall, at 301 W. 2d Street, Austin, Travis County, Texas.

8. Mayor Adler may be served with process at 301 W. 2nd Street, Austin, Travis County, Texas.

9. Travis County may be served with process through Judge Brown at 700 Lavaca, Ste. 2.300, Austin, Travis County, Texas.

10. Judge Brown may be served with process at 700 Lavaca, Ste. 2.300, Austin, Travis County, Texas.

11. Mark E. Escott may be served with process at 517 S. Pleasant Valley Road, Austin, Travis County, Texas.

EXPEDITED ACTION

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

JURISDICTION AND VENUE

13. 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 and section 24.007 of the Texas Government Code, as well as under sections 37.001 and 37.003 of the Texas Uniform Declaratory Judgments Act and section 65.021 of the Texas Civil Practice and Remedies Code.

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

BACKGROUND

I. The TDA Makes the Governor the Leader of the State’s Emergency Response.

15. The 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.”²

16. The TDA makes the sitting Texas Governor the leader and focal point of the State’s emergency response.³

17. Under the TDA, the Governor is “responsible for meeting . . . the dangers to the state and people presented by disasters”⁴ and is the “commander in chief” of the State’s response to a disaster.⁵

² TEX. GOV’T CODE § 418.002(1), (3).

³ See *id.* at §§ 418.011–.026.

⁴ *Id.* at § 418.011.

⁵ *Id.* at § 418.015(c).

18. The TDA gives the Governor the broad powers necessary to accomplish this weighty task.⁶ For example, the Governor is given the powers to:

- A. control the movement of persons and occupancy of premises in a disaster area;⁷
- B. issue executive orders that “have the force and effect of law”;⁸
- C. suspend statutes, orders, or rules that “would in any way prevent, hinder, or delay necessary action in coping with a disaster”;⁹
- D. apply for a loan on behalf of a local government if the governor deems it necessary;¹⁰ and
- E. “use all available resources . . . of political subdivisions that are reasonably necessary to cope with a disaster.”¹¹

II. Local Officials have Far More Limited Emergency Powers Under the TDA.

19. The TDA gives local officials far more limited emergency powers than those afforded to the Governor. Local officials derive their emergency power from two main sections.

20. 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.¹²

⁶ See *id.* at §§ 418.011–.026.

⁷ *Id.* at § 418.018(c).

⁸ *Id.* at 418.012.

⁹ *Id.* at § 418.016(a).

¹⁰ *Id.* at § 418.021(a).

¹¹ *Id.* at § 418.017(a).

¹² *Id.* at § 418.1015(b); see also *id.* at § 418.015(c) (“[T]he governor is the commander in chief of state agencies, boards, and commissions having emergency responsibilities.”).

21. Section 418.108 authorizes “the presiding officer of the governing body of a political subdivision [to] declare a local state of disaster.”¹³ 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.”¹⁴

22. 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 under section 418.108.

23. Rather, a local official’s power to issue emergency orders is derivative and subservient to the Governor’s power. The TDA grants local officials derivative use of a Governor’s powers only when they are acting in their capacities as local “emergency management director[s].”¹⁵ When acting in this capacity, the local official is a “designated agent” of the Governor and thus is subject to the Governor’s control.¹⁶

III. An Overview of Governor Abbott’s Executive Order GA-34.

24. On March 2, 2021, Governor Abbott issued Executive Order GA-34 to respond to the COVID-19 pandemic.¹⁷ This order took effect at 12:01 a.m. on March 10, 2021.¹⁸ GA-34 has “the force and effect of law,” just like any other state law.¹⁹

25. There are three GA-34 provisions relevant here.

¹³ *Id.* at § 418.108(g).

¹⁴ *Id.*

¹⁵ *Id.* at § 418.1015(b).

¹⁶ *Id.*

¹⁷ Ex. A.

¹⁸ *Id.* at 2.

¹⁹ TEX. GOV’T CODE § 418.012.

26. First, the order states that “in all counties not in an area with high hospitalizations,” (1) “[t]here are no COVID-19-related operating limits for any business or other establishment,” and (2) “no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering.”²⁰ An “[a]rea with high hospitalizations” is defined as a “Trauma Service Area that has had seven consecutive days in which the number of COVID-19 hospitalized patients as a percentage of total hospital capacity exceeds 15 percent”²¹ Currently, there are no “high hospitalization areas” in Texas.²²

27. Second, GA-34 allows county judges (not city mayors) in high hospitalization areas to employ “COVID-19-related mitigation strategies” within certain circumscribed limits.²³ This provision is irrelevant to this Petition as there are no high hospitalizations areas in Texas at the moment.

28. Finally, GA-34 expressly preempts and supersedes “any conflicting order issued by local officials in response to the COVID-19 disaster” whenever that local order “restricts services allowed by this executive order.”²⁴ GA-34 further suspends “any other relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions in response to this COVID-19 disaster that are inconsistent with this executive order.”²⁵

²⁰ Ex. A at 2.

²¹ *Id.*

²² *Executive Orders GA-32 and GA-4*, TEX. DSHS, <https://www.dshs.texas.gov/ga3031/> (last visited March 9, 2021).

²³ Ex. A at 2.

²⁴ *Id.* at 3.

²⁵ *Id.*

29. GA-34 is a crucial part of the State’s continuing efforts to reopen safely.²⁶ This order takes aim at one of the TDA’s core purposes: “[T]he rapid and orderly restoration and rehabilitation of persons and property affected by disasters.”²⁷ Defendants’ emergency orders impermissibly and unconstitutionally undercut these reopening efforts.

IV. Defendants’ Emergency Orders Unlawfully Undermine GA-34.

30. Recently, Defendants publicly announced their intent to enforce their local emergency orders in a manner that would unlawfully undermine GA-34.²⁸ Prior to filing, attorneys from the Office of the Attorney General of Texas asked Defendants to rescind their public statements on this issue and to come into full compliance with GA-34. Defendants refused to do so.

31. At least four of Defendants’ emergency orders are at issue here (collectively, “Defendants’ Emergency Orders”).

A. City of Austin Order No. 20210216-026 (“Order 26”).

32. The City of Austin issued Order 26 on February 16, 2021.²⁹ Order 26 remains effective through April 21, 2021.³⁰ A person who violates Order 26 can be charged with a criminal misdemeanor punishable by a fine up to \$1,000.³¹

²⁶ See *id.* at 2.

²⁷ TEX. GOV’T CODE § 418.002(3).

²⁸ See, e.g., *Austin to Keep Mask Mandate, but has Little in the Means of Enforcement*, KXAN (Mar. 9, 2021, 11:25 AM), <https://www.kxan.com/news/local/austin/masks-still-required-austin-will-keep-rules-despite-texas-mandate-lift/>; *Austin Mayor Steve Adler on Mask Mandate Being Lifted, City’s Decision to Continue to Require Masks*, KVUE (Mar. 10, 2021, 6:56 AM), <https://www.kvue.com/video/news/health/coronavirus/austin-mayor-steve-adler-on-mask-mandate-being-lifted-citys-decision-to-continue-to-require-masks/269-cd7e0962-728e-442c-9d51-5c489363f59b>.

²⁹ Ex. B at 9.

³⁰ *Id.* at 2.

³¹ *Id.* at 8.

33. Order 26 requires individuals and businesses to practice “social distancing, hygiene, and face covering behaviors” unless excepted by the order “or otherwise provided by the Governor’s Executive Orders GA-29, GA-31, GA-32 *and any other executive order in effect . . .*”³² Thus, Order 26 explicitly defers to Governor Abbott’s emergency orders, including GA-34, on facemask issues. As such, Order 26 should not be held to impose a facemask requirement on residents or businesses in the City of Austin.

34. Order 26 also places certain operating limits on businesses—such as occupancy limits at outdoor establishments, construction-related restrictions, and other hygiene-related requirements.³³ These restrictions are barred by GA-34’s explicit statements that (1) “there are no COVID-19-related operating limits for any business or other establishment,” and (2) any local orders more restrictive than GA-34 are superseded.³⁴

B. City of Austin’s December 15, 2020 Health Authority Rules (the “Austin Health Rules”).

35. On December 15, 2020, the City of Austin Interim Medical Director and Health Authority, Dr. Mark Escott, issued a set of COVID-19-related health rules.³⁵ The Austin Health Rules are effective until April 15, 2021.³⁶ The Austin Health Rules are seemingly punishable by a fine up to \$2,000.³⁷

³² *Id.* at 2 (emphasis added).

³³ *See id.* at 3; *id.* at Ex. A, 6–7; *id.* at Ex. D, 1–3.

³⁴ *See* Ex. A at 2–3.

³⁵ Ex. C.

³⁶ *Id.* at Cover Page.

³⁷ *See* Ex. D.

36. The Austin Health Rules generally require individuals to wear facemasks.³⁸ These rules also prohibit social gatherings of ten people or more, require social distancing, and place certain limits on construction sites.³⁹ The Austin Health Rules’ facemask and business-related restrictions don’t survive GA-34.

C. Travis County’s Order 2021-02.

37. On February 16, 2021, Travis County issued Order 2021-02.⁴⁰ This order remains effective until April 21, 2021.⁴¹ A person who violates Order 2021-02 may be punished by a fine up to \$1,000—although violations of the order’s facemask requirements are capped at \$250 (for individuals, not businesses).⁴²

38. Order 2021-02 states that it “incorporate[s] and adopt[s] the most recent orders issued by Governor Greg Abbott, including GA-32 . . . *and any subsequent orders or proclamations by the Governor relating to the COVID-19 disaster.*”⁴³ Thus, by its own terms, Order 2021-02 defers to GA-34.

39. Order 2021-02 imposes facemask requirements and other business-related restrictions.⁴⁴ To the extent Travis County tries to claim these are standalone provisions, they are incompatible with, and thus barred by, GA-34.

³⁸ Ex. C at 2–3.

³⁹ *Id.* at 3–6.

⁴⁰ Ex. E at 7.

⁴¹ *Id.* at 2.

⁴² *Id.* at 6.

⁴³ *Id.* at 2 (emphasis added).

⁴⁴ *See id.* at 3–5; *id.* at Ex. A, 5–7; *id.* at Ex. C.

D. Travis County’s March 9, 2021 Public Nuisance Order.

40. On March 9, 2021, the Travis County Commissioner’s Court issued a Public Nuisance Order, which remains effective until April 15, 2021.⁴⁵ A violation of this order is punishable by a fine up to \$500.⁴⁶

41. Travis County’s Public Nuisance Order contains two main provisions. First, it sets “minimum standards” for businesses and other establishments.⁴⁷ The term “minimum standards” refers to facemask requirements and other hygiene-related rules.⁴⁸ Second, it states that any business or establishment “that does not comply with Minimum Health Standards described in this Order” will be deemed a public health nuisance.⁴⁹ In doing so, Travis County’s Public Nuisance Order imposes operating limits and facemask requirements that have been preempted by GA-34.

CLAIMS FOR RELIEF

42. Pursuant to Texas’s Declaratory Judgment Act and *ultra vires* and preemption principles, the State alleges as follows.

43. The enforcement of Defendants’ Emergency Orders constitutes an *ultra vires* act because Governor Abbott suspended the statutes that would have allowed Defendants to issue these emergency orders.

44. The enforcement of Defendants’ Emergency Orders is invalid, unlawful, and constitutes an *ultra vires* act because Defendants’ Emergency Orders were

⁴⁵ Ex. F at 6.

⁴⁶ *Id.* at 6.

⁴⁷ *Id.* at 4–5.

⁴⁸ *Id.*

⁴⁹ *Id.* at 5.

preempted by GA-34, and the State requests a declaration to that effect from this Court.

**APPLICATIONS FOR A TEMPORARY RESTRAINING ORDER
AND A TEMPORARY INJUNCTION**

45. 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.⁵⁰ “A temporary injunction’s purpose is to preserve the status quo of the litigation’s subject matter pending a trial on the merits.”⁵¹ The applicant must prove three elements to obtain a temporary injunction: (1) a cause 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.⁵² These requirements are readily met here.

I. The State will Likely Succeed on the Merits.

46. We will first discuss the two main reasons the State will likely succeed on the merits, which are (1) GA-34 expressly preempts Defendants’ Emergency Orders, and (2) Governor Abbott lawfully suspended Defendants’ statutory authority to issue the local emergency orders in question. We will then discuss the El Paso Court of Appeals’ recent decision in *State v. El Paso County* and the Supreme Court of Texas’s recent order in *State v. City of Austin*, which both enjoined more restrictive local emergency orders in circumstances virtually identical to this case.

⁵⁰ *Texas Aeronautics Commission v. Betts*, 469 S.W.2d 394, 398 (Tex. 1971).

⁵¹ *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002).

⁵² *Id.*

A. GA-34 Expressly Preempts Defendants’ Emergency Orders.

47. A local “ordinance which conflicts or is inconsistent with state legislation is impermissible.”⁵³ GA-34 expressly preempts more restrictive local emergency orders. This is evidenced by GA-34, Section 1, which states “there are no COVID-19-related operating limits for any business or other establishment” and that “no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering.”⁵⁴ It is also evidenced by GA-34, Section 9, which states that GA-34 supersedes any conflicting local emergency orders and which suspends any statutes that would allow local officials to issue emergency orders more restrictive than GA-34.⁵⁵

48. Defendants’ Emergency Orders conflict with GA-34—they impose facemask requirements and business restrictions in a manner at odds with, and expressly prohibited by, GA-34. Thus, the only open issue is whether GA-34 is a “state law.” The only logical conclusion is that it is.

49. The TDA makes the Governor “responsible for meeting . . . the dangers *to the state*” presented by disasters.⁵⁶

⁵³ *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 18–19 (Tex. 2016) (quotation marks omitted); see also *City of Laredo v. Laredo Merchants Ass’n*, 550 S.W.3d 586, 593 (Tex. 2018); *S. Crushed Concrete, LLC v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013).

⁵⁴ Ex. A at 2.

⁵⁵ *Id.* at 3.

⁵⁶ TEX. GOV’T CODE § 418.011(1) (emphasis added).

50. The TDA authorizes the Governor to declare a “state of disaster” for the entire State.⁵⁷ Governor Abbott did just that when he declared that COVID-19 “poses an imminent threat of disaster *for all counties in the State of Texas.*”⁵⁸

51. The TDA gives Governors the power to issue emergency orders that have “the force and effect of law.”⁵⁹ Governor Abbott used this power to issue GA-34, which was effective “on a statewide basis.”⁶⁰

52. A statewide order, issued using statewide power, having a statewide effect, is a “state law.”

53. GA-34 expressly preempts the inconsistent and conflicting provisions of Defendants’ Emergency Orders. Thus, Defendants’ Emergency Orders are invalid and should be enjoined.

B. Governor Abbott Suspended Defendants’ Statutory Authority to Issue Emergency Orders Under the Circumstances.

54. Governor Abbott, using his TDA-granted power,⁶¹ suspended “any . . . relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions in response to this COVID-19 disaster that are inconsistent with this executive order”⁶² Under the circumstances, Defendants had no authority to issue and enforce local emergency orders more restrictive than, and inconsistent with,

⁵⁷ Compare *id.* at § 418.014, with *id.* at § 418.018 (stating that local official can only declare “a *local* state of disaster”) (emphasis added).

⁵⁸ Ex. A at 1 (emphasis added).

⁵⁹ TEX. GOV’T CODE § 418.012.

⁶⁰ Ex. A at 2.

⁶¹ TEX. GOV’T CODE § 418.016(a).

⁶² Ex. A at 3.

GA-34. This makes Defendants’ Emergency Orders invalid and their conduct *ultra vires*.

C. The El Paso Court of Appeals Adopted the State’s Arguments and Enjoined a Local Emergency Order Under Circumstances Virtually Identical to this Case.

55. *State v. El Paso County*⁶³ is instructive as it analyzed the same issues presented here under virtually identical circumstances. *El Paso County* adopted the State’s arguments and enjoined El Paso’s conflicting local emergency order. This Court should do the same here.

56. In *El Paso County*, El Paso County Judge Ricardo A. Samaniego issued a local emergency order (“EO-13”) in response to the COVID-19 pandemic that conflicted with GA-32.⁶⁴

57. The State intervened in a state court action challenging EO-13 and moved to enjoin this order based on the same arguments made here.⁶⁵ The district court denied the State’s motion without explanation.⁶⁶ The El Paso Court of Appeals reversed and adopted the State’s arguments.⁶⁷ Below are four 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*

⁶³ 08-20-00226-CV, 2020 WL 6737510 (Tex. App.—El Paso Nov. 13, 2020, no pet. h.), mandamus dismissed (Nov. 20, 2020). Copies of the decision are also attached as Exs. G–H.

⁶⁴ See generally Ex. G.

⁶⁵ See generally Ex. H.

⁶⁶ Ex. I.

⁶⁷ See generally *El Paso County*, 2020 WL 6737510. For the Court’s convenience, copies of the majority opinion and dissent from this case are attached as Exs. J–K.

say for matters covered by the conflicting provisions of GA-32 and [EO-13].”⁶⁸ 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.⁶⁹

59. Second, the court found that GA-32 was a state law, which “eclipse[s] inconsistent local law[s]” like EO-13.⁷⁰ 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 opposite direction?⁷¹ The court explained that one of these orders must control.⁷² 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.”⁷³ The court explained that local officials “can point to no similar power” afforded to them under the TDA.⁷⁴ 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.”⁷⁵ The court commented that any alternative holding could lead to a “chao[ti]c” mess of 254 separate county-level responses to a statewide disaster.⁷⁶

60. Third, the court found that EO-13 conflicted with GA-32 on numerous grounds. For instance, the court noted that EO-13 “imposes a stay at home curfew

⁶⁸ *Id.* at *4.

⁶⁹ *Id.*

⁷⁰ *See id.* at *6–7 (citing various cases).

⁷¹ *Id.* at *7.

⁷² *Id.*

⁷³ *Id.* at *7.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

from 10:00 p.m. to 5:00 a.m., except for essential travel, essential business, government service, or critical infrastructure.”⁷⁷ The court found that “[t]o the extent [EO-13’s] curfew restricts travel or participation that GA-32 allows, it also conflicts with GA-32.”⁷⁸

61. Finally, the court rejected El Paso’s challenge to Governor Abbott’s suspension power, which is codified in section 418.016.⁷⁹ El Paso argued that EO-13 was not a “regulatory statute” and did not address “state business,” and thus it fell beyond section 418.016’s reach.⁸⁰ The court explained that EO-13 fit within the “classic definition of regulation,” which is “to control or supervise by means of rules and regulations.”⁸¹ 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.⁸² The court found that EO-13, which closed-down bars, restaurants, and other businesses closely regulated by the State, affected the conduct of “state business” and thus could be lawfully suspended by Governor Abbott.⁸³

62. *El Paso County* involved issues effectively identical 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.

⁷⁷ *Id.* at *10.

⁷⁸ *Id.*

⁷⁹ *Id.* at *8–9.

⁸⁰ *Id.* at *8.

⁸¹ *Id.* (quotations omitted).

⁸² *Id.*

⁸³ *Id.* at *9.

D. The Supreme Court of Texas Effectively Adopted the State’s Arguments and Enjoined One of Defendants’ Emergency Orders Under Circumstances Virtually Identical to this Case.

63. In *State v. City of Austin*, the Supreme Court of Texas recently enjoined one of Defendants’ more restrictive local emergency orders (“Order 24”) based on the same arguments made here.

64. On December 29, 2020, the City of Austin and Travis County issued “Order 24,” which restricted dine-in food and beverage service during the period 10:30 p.m. through 6:00 a.m.⁸⁴ These were businesses that would remain open under Governor Abbott’s emergency orders. The State sued the following day, raising many of the same arguments made here.⁸⁵

65. On December 31, 2020, the district court held oral arguments on the State’s application for emergency injunctive relief. The court denied the State’s request later that night without any meaningful explanation.⁸⁶

66. The State then appealed to the Third Court of Appeals and, a few hours later, the Third Court also denied the State’s request without any meaningful explanation.

67. The following morning, the State sought mandamus relief before the Supreme Court of Texas. Later that evening, the Supreme Court of Texas granted the State’s request and directed the Third Court to enjoin the City of Austin’s and Travis County’s Order 24.⁸⁷

⁸⁴ Ex. L at ¶¶ 29–33.

⁸⁵ See generally Ex. L.

⁸⁶ See Ex. M.

⁸⁷ See Ex. N.

68. In sum, The State is likely to succeed on the merits here because: (1) the TDA’s language is in the State’s favor; (2) traditional legal preemption principles are in the State’s favor; and (3) the only courts to consider the issues raised here, which includes the Supreme Court of Texas, have effectively adopted the State’s arguments and enjoined the more restrictive local emergency orders.

II. The State will be Irreparably Injured Absent an Injunction.

69. The State’s injuries are irreparable. The Supreme Court of Texas recently held as much in *State v. Hollins*.⁸⁸

70. 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.’”⁸⁹ The Court noted that an *ultra vires* suit is a necessary tool to reassert the State’s control over local officials who are misapplying or defying State laws.⁹⁰ 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.”⁹¹

71. 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.”⁹² The Court found that, “[w]hen the State files suit to enjoin *ultra vires* action by a local

⁸⁸ No. 20-0729, 2020 WL 5919729, at *7 (Tex. Oct. 7, 2020).

⁸⁹ *Id.* at *6 (quoting *Yett v. Cook*, 281 S.W. 837, 842 (Tex. 1926)).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at *7.

official, a showing of likely success on the merits is sufficient to satisfy the irreparable-injury requirement for a temporary injunction.”⁹³

72. Per *Hollins*, the irreparable injury requirement favors the State.

73. The El Paso Court of Appeals rightly viewed *Hollins* “as controlling” on the irreparable injury issue.⁹⁴

III. Emergency Injunctive Relief is Necessary to Preserve the Status Quo.

74. “The status quo is the last actual, peaceable, noncontested status which preceded the pending controversy.”⁹⁵ Since early January 2021, Defendants have recognized that Governor Abbott’s emergency orders controls. This is reflected in the City of Austin’s Order 26 and Travis County’s Order 2021-02, which were issued in mid-February 2021 and which incorporated Governor Abbott’s then-existing and future emergency orders. Yet Defendants inexplicably reversed course a few days ago and declared their intent to renew their already-defeated efforts to undermine Governor Abbott’s COVID-19 response. The State is merely asking this Court to bring Defendants back to their mid-February 2021 position, when they rightfully acknowledged the supremacy of Governor Abbott’s emergency orders. The status quo factor favors the State.

⁹³ *Id.*

⁹⁴ *El Paso County*, 2020 WL 6737510, at *10.

⁹⁵ *Sharma v. Vinmar Intern., Ltd.*, 231 S.W.3d 405, 419 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

APPLICATION FOR A PERMANENT INJUNCTION

75. The State also asks the Court to set its request for a permanent injunction for a trial on the merits, and after the trial, issue a permanent injunction as set forth above.

PRAYER

76. For the reasons discussed above, the State respectfully prays that this Court:

- A. Through counsel below, enter an appearance for the State in this cause;
- B. Issue a temporary restraining order, which will remain in force until a hearing is held, restraining Defendants and any of their officers, agents, servants, employees, attorneys, representatives, or any other persons in active concert or participation with them who receive actual notice of the Order from enforcing Defendants' Emergency Orders' facemask requirements, business limits, and any other provisions found to be more restrictive than GA-34;
- C. Set a date and time for a hearing on the State's application for a temporary injunction;
- D. Declare Defendants' Emergency Orders to be invalid and unconstitutional;
- E. Issue preliminary and permanent injunctions that order Defendants to: (1) stop, or order stopped, all enforcement efforts of Defendants' Emergency Orders; (2) rescind Defendants' Emergency Orders; and (3) refrain from issuing any new emergency orders more restrictive than, or conflicting with, GA-34; and
- F. Award any further relief that the Court deems just and proper.

Respectfully submitted,

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