COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

STATE OF TEXAS, PIZZA PROPERTIES, INC., M&S GROUP, INC., d/b/a WING DADDY'S, RUN BULL RUN, LLC d/b/a TORO BURGER BAR, CHARCOALER, LLC, TRIPLE A RESTAURANTS, INC., CC RESTAURANT LP, FD MONTANA LLC, WT CHOPHOUSE, LLC, VERLANDER ENTERPRISES, LLC, and BAKERY VENTURES I, LTD.,	§	No. 08-20-00226-CV
	§	On Appeal from the
	§	34th District Court
	§	El Paso County, Texas
	§	Cause No. 2020DCV3515
Appellants,		
V.	§	
EL PASO COUNTY, TEXAS and RICARDO A. SAMANIEGO, IN HIS OFFICIAL CAPACITY AS COUNTY JUDGE, EL PASO COUNTY, TEXAS,	§	
Appellants.	§	

C O R R E C T E D O P I N I O N

On March 13, 2020, Texas Governor Greg Abbott issued a proclamation under the Texas Disaster Act of 1975 (the Disaster Act)[1] certifying that "COVID-19 poses an imminent threat of

[1] *See generally* TEX.GOV'T CODE ANN. ch. 418.

disaster" in all 254 Texas counties; he has renewed that declaration each month since.[2] Likely no citizen of this state has escaped the impact of the virus, either from its health effects, economic impact, or the disruption of society. And since March, the Governor has issued twenty-five emergency orders that pertain to the novel coronavirus COVID-19 pandemic.[3] Those orders cover a broad range of issues, including data collection and reporting, hospital capacity, mitigation efforts, air transportation, jails, face coverings, and more recently, the safe re-opening for segments of Texas society.[4] Some of the orders have set uniform state mandates, and some have allowed for local flexibility to suit local conditions.[5]

The impact of the virus has been particularly acute in El Paso County, a major transportation hub, sharing an international border with Mexico. In October 2020, El Paso County experienced a dramatic upswing in the COVID-19 pandemic. The capacity of El Paso County hospitals reached their limits, with some 51% of the census being classified as COVID-19 cases. Area Intensive Care Units exceeded capacity, and hospitals are now forced to establish temporary alternate care sites and airlift patients to other cities. Despite efforts to encourage voluntary compliance, warnings, and enforcement, El Paso County continues to experience a surge of new cases. As of the time of this opinion, El Paso County has routinely experienced a thousand or more new cases per day. And many families have sadly lost loved ones.

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[2] The Governor of the State of Tex., Proclamation No. 41-3720, 45 Tex. Reg. 2087, 2095 (2020).

[3] EXECUTIVE ORDERS BY GOVERNOR GREG ABBOTT, https://lrl.texas.gov/legeLeaders/governors/displayDocs.cfm?govdoctypeID=5&governorID=45 (last visited Nov. 11, 2020) (linking to GA orders GA-01 to GA-32, with GA-18 to GA-32 addressing COVID-19 disaster).

[4] *Id.*

[5] For instance, GA-29 contains a mandate for face coverings, but allows for counties to be exempted if they have met certain criteria and the local county judge has affirmatively opted out of the requirement. EXECUTIVE ORDER GA-29, found at https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-29.pdf.

In the face of this upswing in cases, the strain on the medical system, and the rising mortality numbers, local leaders responded. On October 7, 2020, El Paso County Judge Ricardo Samaniego requested that Governor Abbott exempt El Paso County from an anticipated further opening of businesses and bars. Governor Abbott's order, GA-32, also dated October 7, 2020, allowed bars to open with occupancy limits, but did so only if the local county judge filed a requisite form with the Texas Alcohol and Beverage Commission. On October 22, 2020, County Judge Samaniego notified Governor Abbott of the surge of COVID-19 cases and the strain on hospital resources. Our record shows that the State of Texas has surged emergency relief, including personnel, testing, and equipment to the area.

The dispute here arises from County Judge Samaniego enacting County Emergency Order No. 13 (CE-13 or the Order). The Order, effective as of Thursday, October 29, 2020, at 11:59 p.m., was set to expire on Wednesday, November 11, 2020 at 11:59 p.m. *See* ORDER NO. 13, https://www.epcounty.com/documents/Order-No-13.pdf (last visited Nov. 12, 2020). We take judicial notice that County Judge Samaniego extended the Order to December 1, 2020.[6] CE-13 applies to all incorporated and unincorporated areas of El Paso County.

[6] *See* ORDER NO. 14, http:/epcounty.com/documents/Order-No-14.pdf (last visited Nov. 12, 2020). The extension is titled as Order No.14. Both orders contain a findings section that explains the judge's rationale, followed by sections one through six that contain the core prohibitions that give rise to this dispute (a stay at home order, a cease operation for "non-essential businesses," a prohibited activities section, and a travel restriction). The balance of the orders contains definitional sections and provisions related to posting, enforcement, and application. County Emergency Order 14 contains updated data and additional recitations in its findings section. The core prohibitions in County Emergency Order 13 and 14 are identical with one exception. The newest order contains a stair-step formula wherein affected businesses might resume limited operation based on defined hospital data. Because this new provision still materially differs from provisions of the Governor's Order, the change would not affect the core dispute raised in this appeal. We view it as immaterial to our resolution of the case, and we treat County Emergency Order 13 and 14 as the functional equivalent of each other for the purposes of this order. We agree with the parties' assessment that because the controversy is capable of repetition but evading review during the ongoing pandemic, the justiciable controversy remains and was not mooted by the expiration of Order 13 and later issuance of Order 14. *See Matthews ex rel. M.M. v. Kountze Indep. Sch. Dist*., 484 S.W.3d 416, 418 (Tex. 2016) (explaining that cessation of challenged conduct does not deprive a court of the power to hear or determine claims for prospective relief; otherwise, this would defeat the public interest in having the legality of the challenged conduct settled). We stayed enforcement of the substantive provisions of CE-13 and CE-14 by granting Appellants' Emergency Motion for Relief under TEX.R.APP.P. 29.3 on November 12, 2020.

CE-13 includes several provisions relevant here. Section 1 requires all individuals living within El Paso County to temporarily stay at home or at their place of residence. Section 3 of the Order includes a curfew on all persons from 10 p.m. to 5 a.m. Section 5 prohibits "[a]ll public or private gatherings **of any number of people** occurring outside a single household or living unit." (emphasis original). Section 5 also requires nursing homes, retirement, and long-term care facilities to prohibit non-essential visitors from visiting their facilities unless to provide critical assistance.

Specific sections exempt from these restrictions, however, persons performing "Essential Activities" or who work in an "Essential Business," "Essential Governmental Function," or "Critical Infrastructure," all as defined in the Order. Dovetailing with these exemptions, Section 4 of CE-13 requires all businesses that are not defined as essential businesses to cease activities at any facility located in the County, save and except those to preserve the business premises or inventory, or facilitate work-from-home arrangements. Essential businesses include healthcare operations, food service providers (including grocery stores, warehouse stores, "big box" stores, and liquor stores), laundromats, automobile dealerships, hardware stores, and transportation services. But others, such as barber shops, nail salons, gyms, and massage therapists are not deemed essential under the Order.[7] When patronizing an essential business, only one person per family unit may do so, unless an additional person is needed as a caretaker.

[7] Apart from these food service and transportation categories, other categories of essential businesses exempted from the stay-at-home orders include: Providers of Basic Necessities to Economically Disadvantaged Populations, Essential Services Necessary to Maintain Essential Operations of Residences or Other Essential Businesses, Professional Services (such as legal or accounting services when necessary to assist in compliance with legally mandated activities, or businesses that supply other essential businesses with support or supplies needed to operate), Petroleum Refineries, Media, Financial Institutions, Mail and Delivery Services, Educational Institutions, Suppliers for Essential Businesses/Critical Infrastructure/Essential Government Functions, Food Delivery Services, Home-Based Care and Services, Residential Facilities and Shelters, Information Technology Services, Childcare Facilities, Animal Shelters and Other Businesses that Maintain Live Animals, Vector and Pest Control, and Funeral and Post-Mortem Services. The Order also exempted voting for the recent November 3rd election.

Restaurants are also defined as an essential business, but the Order limits them to providing delivery or curbside take-out-service. In-premises dining is banned.

Violation of the Order is considered a Class C Misdemeanor punishable by a fine not to exceed $500.

Several of the provisions of the Order, however, directly conflict with an executive order issued by the Governor of the State of Texas. Governor Abbott's Executive Order GA-32, issued on October 7, 2020, allows businesses to operate at either 75% or 50% of indoor occupancy, depending on local hospitalization rates.[8] Several specific businesses that are restricted under CE-13 are expressly allowed to operate under GA-32 when they utilize six foot spacing between work stations (e.g., cosmetology salons, hair salons, barber shops, nail salons, massage establishments where licensed massage therapists practice, tanning salons, tattoo studios, piercing studios, and hair loss treatment and growth services). Under GA-32, restaurants can offer dine-in services, subject to occupancy limits. Under GA-32, people may visit nursing homes and like facilities, subject to Texas Health and Human Services Guidance. People may also gather without occupancy limits in a variety of places or activities, such as recreational sports programs. Outside of those specified gathering places or activities, persons are not to gather in "groups of larger than 10 and shall maintain six feet of social distancing from those not in their group." None of these activities would be allowed under CE-13.

The Governor's order contains a preemption clause countermanding any conflicting local government actions:

> This executive order shall 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, allows gatherings prohibited by this executive order, or expands the list or scope of services as set forth in this

[8] EXECUTIVE ORDER GA 32, https://gov.texas.gov/uploads/files/press/EO-GA-32_continued_response_to_COVID-19_IMAGE_10-07-2020.pdf (last visited Nov. 12, 2020).

> executive order. . . . I hereby suspend [any relevant statute] 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 . . . .

The El Paso County Order, however, contains its own directive on how conflicts in the orders should be resolved. Under Section 16 of CE-13, "To the extent that there is a conflict between this Order and any executive order of the Governor, the strictest order shall prevail." Both GA-32 and CE-13 were issued pursuant to the Texas Disaster Act of 1975. TEX.GOV'T CODE ANN. ch. 418.

Appellants here are entities that operate area restaurants. They filed suit to enjoin enforcement of CE-13 on the basis that the County Judge acted *ultra vires* and without legal authority. The restaurants agree to fully abide by the Governor's occupancy directives in GA-32. Their sole dispute is whether they must comply with CE-13 or GA-32. The State of Texas intervened in the suit seeking to invalidate CE-13 in its entirety because it conflicts with GA-32. A trial court heard and denied the temporary injunction request. The restaurants and the State brought an immediate appeal. *See* TEX.CIV.PRAC.& REM.CODE ANN. § 51.014(a)(4) (allowing appeal from interlocutory order denying temporary injunction).

INJUNCTION STANDARD OF REVIEW

The movants for a temporary injunction "must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable imminent, and irreparable injury in the interim." *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). We review a trial court's order denying a temporary injunction for an abuse of discretion. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978). But the court has no "discretion" to incorrectly analyze or apply the law. *See Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) ("[A] clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion . . . .").

DISCUSSION

The United States Supreme Court wrote more than a century ago that the authority to respond to public health crises must be "lodged somewhere." *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). The protection of the "health, safety, and comfort of citizens" rests with the legislature whose core police powers allow it "to regulate the use of property and the carrying on of business." *Houston & T.C. Ry. Co. v. City of Dallas*, 84 S.W. 648, 653 (Tex. 1905). The Disaster Act is one embodiment of that power. But through that Act, the Legislature empowered other state actors to meet disaster dangers, because "[t]here is little room for argument that the public interest requires that someone in government needs the authority to act in case of an imminent threat which may affect the safety of the lives and property of the populace." *Salmon v. Lamb*, 616 S.W.2d 296, 298 (Tex.Civ.App.--Houston [1st Dist.] 1981, no writ) (stating also that power is lodged with the Governor under the Disaster Act).

The single issue in this case is 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. The disaster at issue is the COVID-19 pandemic. And to make this point clear--the issue before this Court is not the wisdom or efficacy of the actions taken by either the Governor or the County Judge. A court is ill-equipped, nor empowered to make such difficult policy decisions. Rather, the only question that we are capable of answering is, under the text of the statute, who is the proverbial captain of the ship to make the difficult decisions embodied in these competing orders. Or as Justice Guzman recently wrote respecting the Disaster Act's application to an election question in the era of COVID-19:

> [T]he Texas Constitution commits the balancing of competing interests and policy objectives to the executive and legislative branches of government. The judiciary's function is only to say what the law is, not what it should be. In our constitutional role, judges are not empowered to substitute our policy choices, preferences, or

> rules for those of the coordinate branches. So long as the law as written complies with the federal and state constitutions, our duty is to enforce it.

Abbott v. The Anti-Defamation League Austin, No. 20-846, 2020 WL 6295076, at *8 (Tex. Oct. 27, 2020) (per curiam) (Guzman, J. concurring) (footnotes omitted).

The answer to our question lies in the text of the Disaster Act. Statutory construction is a legal question that we review *de novo*. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). Our primary focus in statutory interpretation is to give effect to legislative intent, considering the language of the statute, as well as its legislative history, the objective sought, and the consequences that would flow from alternate constructions. *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000). We seek that intent "first and foremost" in the statutory text. *Lexington Ins. Co. v. Strayhorn*, 209 S.W.3d 83, 85 (Tex. 2006); *see also Bosque Disposal Sys., LLC v. Parker County Appraisal Dist.*, 555 S.W.3d 92, 94 (Tex. 2018) ("[T]he Legislature expresses its intent by the words it enacts and declares to be the law."); *BankDirect Capital Fin., LLC v. Plasma Fab, LLC*, 519 S.W.3d 76, 86 (Tex. 2017) ("The text is the alpha and the omega of the interpretive process."). We consider the words in context, and not in isolation. *In re Office of the Atty. Gen. of Texas*, 456 S.W.3d 153, 155 (Tex. 2015) (per curiam) ("Given the enormous power of context to transform the meaning of language, courts should resist rulings anchored in hyper-technical readings of isolated words or phrases."). We must presume that every word in a statute has been used for a purpose and that every word excluded was excluded for a purpose. *Emeritus Corp. v. Blanco*, 355 S.W.3d 270, 276 (Tex.App.--El Paso 2011, pet. denied).

A. Structure of the Disaster Act

The Disaster Act is divided into several subchapters, the first consisting of sixteen sections that define the powers and duties of the governor. "The governor is responsible for meeting . . . the dangers to the state and people presented by disasters . . . ." TEX.GOV'T CODE ANN. § 418.011.

To do so, "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." *Id*. at § 418.012. The governor may declare a state of disaster within a defined geographic area, but the governor must renew the declaration after thirty days. *Id*. at § 418.014 (a)(d)(2). The legislature retains the right to terminate that declaration at any time. *Id*. at § 418.014 (c). "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." *Id*. at § 418.015(c).

Additionally, the governor "may use all available resources of state government and of political subdivisions that are reasonably necessary to cope with a disaster." *Id*. at § 418.017. The governor is tasked with seeking federal aid for individuals, the state, and on behalf of local governmental units. *Id*. at §§ 418.021, 418.022. And central to our discussion here, the governor is explicitly given the power to "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 § 418.018(c).

Far less defined in the Disaster Act is the role of county judges. *Compare* TEX.GOV'T CODE ANN. §§ 418.011-.026 (detailing the governor's powers and responsibilities under the Act), *with id.* §§ 418.1015, 418.108 (detailing local officials' powers under the Act). Two provisions allocate authority to county judges. In one of those provisions, county judges are deemed to be the "emergency management director" for their county. As the emergency management director, the county judge can exercise the powers granted to the governor, but at the county level:

> (b) An emergency management director serves as the governor's designated agent in the administration and supervision of duties under this chapter. An emergency management director may exercise the powers granted to the governor under this chapter on an appropriate local scale.

Id. at § 418.1015.

Second, the Disaster Act also contemplates that a county judge or mayor may have to issue a local disaster declaration. After doing so, a county judge or mayor has the express power to manage ingress, egress, and occupancy, mirroring the similar grant to the governor:

> 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.

Id. at § 418.108(g).

B. Reconciling the Governor's and County Judge's Powers

The State offers three reasons why under the text of the Disaster Act we must find that GA-32 prevails over CE-13. First, it argues the county judge is expressly referred to as the "agent" of the governor, and agents do not control principals. Instead, agency law dictates just the opposite. Second, it argues the Legislature delegated to the governor the authority to issue orders and decrees that have the "force of law." The county judge is not accorded similar authority, and consequently GA-13 has become state law, necessarily ousting any conflicting portions of CE-13. Finally, it argues the Disaster Act specifically gives the governor the authority to suspend regulatory statutes for the conduct of state business, and the governor's suspension of the statute that authorized the conflicting county edicts is an exercise of that right. We mostly agree with the State.

Section 418.1015(b) makes County Judge Samaniego the "emergency management director" for El Paso County. The statute allows County Judge Samaniego, as the emergency management director, to exercise the powers granted to the governor at the county level. But when the county judge does so, it is "as the governor's designated *agent* in the administration and supervision of duties under this chapter." *Id*. at § 418.1015 (emphasis added). And black letter law teaches that an agent is subject to the control of the principal, and not vice versa. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 590 (Tex. 2017), *quoting* RESTATEMENT (THIRD) OF AGENCY

§ 1.01 cmt. *f* (2006) ("Further, a 'principal's right of control presupposes that the principal retains the capacity throughout the relationship to assess the agent's performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent's authority.'"); *Hollingsworth v. Perry*, 570 U.S. 693, 713 (2013), *citing* 1 RESTATEMENT (THIRD) OF AGENCY § 1.01, cmt. *f* (2006) ("An essential element of agency is the principal's right to control the agent's actions."); RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."). We presume the Legislature "chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen." *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011). Given the commonly understood meaning of "agent", the County cannot rely on Section 418.1015(b) as the source of authority for CE-13.

But the County contends it is not drawing its authority from Section 418.1015(b) or as County Judge Samaniego's role as the emergency management director for El Paso County. Instead, it hinges its claim on a claimed stand-alone authority given to county judges under Section 418.108. Under that section, the County argues a county judge is given the authority to declare a local disaster, and after doing so, the county judge "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." *Id*. at § 418.108(g). Whether the grant of authority under Section 418.108 is truly stand alone is debatable. Section 418.1015 describes the county judge as the governor's agent "in the administration and supervision of duties under this chapter" and "this chapter" would include Section 418.108.

But even if Section 418.108 is stand alone, the argument does not help the County, because the governor is also accorded the exact same express power to control ingress, egress, and occupancy. *Id*. at § 418.018 (the governor is explicitly given the power to "control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area."). And the disaster at issue is not just a local disaster, but a state-wide disaster (albeit with disparate impacts in different parts of the state). The question in that context is who between the governor and a county judge, both of whom are delegated and here exercised the same express powers over ingress, egress, and occupancy, have the ultimate say. The answer to that question lies in Section 418.012 and Section 418.016 of the Act.

Section 418.012 is a delegation of power from the Legislature to the governor:

> 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.

Id. at § 418.012. [9] GA-32 invokes this provision. In doing so, it makes various declarations regarding occupancy, the size of group meetings, activities that person may engage in, and the conduct of business. And as such, those declarations become state law. Moreover, state law will eclipse inconsistent local law. *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003) ("Though they are creatures of the Texas Constitution, counties and commissioners courts are subject to the Legislature's regulation."); *Childress County v. State*, 92 S.W.2d 1011, 1015 (Tex. 1936) ("The county is merely an arm of the state. It is a political subdivision thereof. In

[9] On appeal, the County does not challenge the ability of the legislature to delegate power to the governor under Section 418.012. "The Texas Legislature may delegate its powers to agencies established to carry out legislative purposes, as long as it establishes reasonable standards to guide the entity to which the powers are delegated. Requiring the legislature to include every detail and anticipate unforeseen circumstances would . . . defeat the purpose of delegating legislative authority." *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex. 1995) (internal quotations and citations omitted); *see also Williams v. State*, 176 S.W.2d 177, 183 (Tex.Crim.App. 1943) (discussing and collecting authority on the proper delegation of legislative powers).

view of the relationship of a county to the state, the state may use, and frequently does use, a county as its agent in the discharge of the State's functions and duties."); *El Paso County v. El Paso County Emergency Serv. Dist. No. 1*, 08-19-00105-CV, 2020 WL 91208, at *4 (Tex.App.--El Paso Jan. 8, 2020, no pet.) ("Although created by the Texas Constitution, [county commissioner's courts] are subject to directives enumerated by the legislature and may undertake only that authority explicitly granted by either the Texas constitution or the legislature."); *Orndorff v. State ex rel. McGill*, 108 S.W.2d 206, 210 (Tex.Civ.App.--El Paso 1937, writ ref'd) ("Counties and their commissioners' courts are, therefore, not only the creatures of the State Constitution, but they are under the continuous control and domination, within constitutional bounds, of the State Legislature.").

And how could it be otherwise? If the disaster *de jure* was a hurricane on the gulf coast, there would have to be a tie-breaker if the governor intended for people to evacuate in one direction but a local county judge thought it better to send people in the exact opposite direction. Pick whatever type of disaster you might--from toxic chemical releases, earthquakes, oil pipelines leaks, to pandemics--and there could be good faith differences of opinion on the proper response. 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. El Paso County can point to no similar power accorded to county judges. And while it is not for us to judge the wisdom of the Legislature's choice, the idea of one captain of the ship has intuitive appeal. Did the Legislature really intend for the chaos of a system that allows for 254 different county responses to a statewide disaster? It certainly allowed county judges to lead local disasters, but that is not what Texas is facing.

Nor does anything in the text of the Disaster Act suggest that a county judge's grant of authority over ingress, egress, or occupancy in a local disaster overrides the governor's identical authority for a statewide declared disaster. The County and amicus's responses to the contrary are unavailing. The County focuses on Section 418.108(g), which authorizes either the county judge or the mayor of a city to declare a *local* emergency, and to the extent there is a conflict in their decisions, the county judge prevails. TEX.GOV'T CODE ANN. § 418.108(g), (h). The County argues the absence of a similar provision expressly referencing the governor and county judge implies there is no hierarchy between the two. But we could just as easily assume that because Section 418.108(h) gives a county judge conflict power over a mayor, but not the governor, the Legislature never intended a county judge to supersede gubernatorial decrees. And Texas is faced with a statewide disaster, not simply a local one. Amici Travis and Fort Bend County suggest that because the county judge's grant of power over ingress, egress, and occupancy is more recent, and more specific, we should use canons of statutory construction favoring those type of provisions over the original, broader provisions. But we resort to those kinds of canons of construction only where the text of a statute is unclear. *Greater Houston P'ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015). And the express statement that the declarations of the governor have the force of law is clear and unambiguous.[10]

So not only are the various detailed provisions of GA-32 effectively provisions of state law, but so too is its mandate that it prevails over conflicting local declarations to the contrary. The County suggests that GA-32 and CE-13 do not conflict because a court could simply enforce

[10] That clarity in Section 418.012 also answers the County's reliance on language deleted from the draft bill as the Disaster Act wound its ways through the legislative approval process. "[R]ejection of language [from draft bills] is not a statement about legislative purpose or the meaning of the statute." *Robinson v. Budget Rent-A-Car Sys., Inc.*, 51 S.W.3d 425, 429 (Tex. App.--Houston [1st Dist.] 2001, pet. denied) (explaining multiple reasons why language might be deleted from a draft bill).

the more stringent guideline. But to do so would ignore that portion of Governor Abbott's order that states, "This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster[.]" The County Judge apparently understood that when he made a request for the Governor to modify GA-32. Moreover, there are provisions in the orders that so directly conflict that to enforce one, negates the other. For instance, GA-32 allows visitors to nursing homes and long-care facilities (subject to guidelines) while CE-13 disallows all but visitors who provide critical assistance. GA-32 states that restaurants "may offer dine-in services" (subject to variable occupancy limits) while CE-13 says they cannot. GA-32 allows gatherings of no more than ten persons while CE-13 allows no gatherings. We conclude the nature of the Governor's executive order as having the force of law means its provisions control.

C. The Governor's Authority to Suspend Provisions

Under the Disaster Act, a governor is also given the explicit power to "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). The Governor invoked that power to invalidate Section 418.108 to the extent any local leader relies on that statute to enact conflicting rules. The County responds that Section 418.108 is not a "regulatory statute" and CE-13 does not address "state business." We find neither contention persuasive.

The Disaster Act does not define the terms "regulatory statute" or "state business." Generally, when a statute uses an undefined word, a court should apply the word's common, ordinary meaning. *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014). To determine its common, ordinary meaning, courts may look to a wide variety of sources, including

dictionary definitions, treatises and commentaries, prior constructions of the word in other contexts, and the use and definitions of the word in other statutes and ordinances. *Id.*

Common dictionary meanings for the term "regulate" include "to control or supervise by means of rules and regulations." *See Regulate*, OXFORD DICTIONARIES (online ed.), http://www.oxforddictionaries. com/us/definition/american_english/regulate?q=regulate; *see also Regulate*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1913 (2002) (defining "regulate" as "to govern or direct according to rule"); *Regulate*, BLACK'S LAW DICTIONARY, (10th ed.) ("To control (an activity or process) esp. through the implantation of rules."). Section 418.108 does that by authorizing the county judge to order evacuations and "control the movement of persons and the occupancy of premises." Certainly CE-13, promulgated pursuant to 418.108, fits the classic definition of regulation. It tells restaurants how they may conduct their business, tells persons how they may congregate, and tells some businesses that they cannot engage in commerce at all.

The County also narrowly cabins the meaning of the phrase "state business" by effectively defining the term to mean only the activities of state agencies and actors. But had the Legislature meant to so limit the term, it would have said "official state business," as it has done in many other statutes. *Cf. e.g.* TEX.GOV'T CODE ANN. § 660.009 (use of term "official state business" for authorized travel reimbursement); TEX.GOV'T CODE ANN. § 660.043 (use of phrased "official state business" to determine when vehicle mileage can be reimbursed); *see also* TEX.GOV'T CODE ANN. § 1232.003 (tying phrase "state agency" to "state business" to define when buildings and equipment are subject to public financing). In Section 418.016, the Legislature chose not to limit the term "state business" to only official state business, and we thus give it a broader meaning. *See id.* § 418.016.

And to be sure, many of the businesses that CE-13 prohibits are industries closely regulated by the State of Texas, both as to their licensure and method of operation. *See, e.g*. TEX.OCC. CODE ANN. § 1601.251 (state license required for barbers); TEX.OCC. CODE ANN. § 1601.301 (permit required for operating barbershop); TEX.OCC. CODE ANN. § 1601.552 (reference to state commission's sanitation rules); TEX.OCC.CODE ANN. § 1602.251 (license required to practice cosmetology); TEX.OCC. CODE ANN. § 1602.301 (license required to operated beauty shop and obligation to follow commission rules); TEX.OCC. CODE ANN. § 455.151 (license required to practice massage therapy); TEX.OCC. CODE ANN. § 455.054 (state standards for sanitary and hygienic conditions for massage therapy). Restaurants are also subject to state regulation, particularly if they sell alcoholic beverages. *See, e.g.* TEX.ALCO.BEV.CODE ANN. § 61.01 (obligation to obtain licenses and permits under the Alcoholic beverages code); TEX.HEALTH & SAFETY CODE ANN. § 437.003 (counties may require permits for food services to "enforce state law and rules adopted under state law").

Eschewing a hyper-technical definition of the term "state business," we conclude it would encompass the activities inherent in many of the industries and professions directly affected by the CE-13. The County dis-employs several state licensed professions and effectively deems that the regulations the state has in place for these professions are inadequate to guard against the spread of COVID-19. That intrusion into the state's sphere of influence makes CE-13 a regulation of state business. As such, the Legislature gave the governor the express authority to suspend Section 418.108, at least as it has been invoked here by the County.

Section 418.016(a) also requires that before the governor can suspend a regulatory statute, it must in some way "prevent, hinder, or delay necessary action in coping with a disaster." TEX.GOV'T CODE ANN. §418.016(a). GA-32 explicitly references "reopening Texas" as a part of

the Governor's planned response to this disaster. It necessarily recognizes that Texas must address the health of its citizens, and the health of its economy. As the Texas Supreme Court recently noted, the Governor under the Disaster Act "must necessarily balance a variety of competing considerations," which might include encouraging economic recovery and preserving constitutional rights. *Anti-Defamation League Austin*, 2020 WL 6295076, at *4. GA-32 is one means of achieving that balance. But CE-13 tips the balance differently by restricting economic activity (for some businesses) and by restricting associational opportunities of Texans. It also injects uncertainty into how people and businesses conduct their affairs, being subject to conflicting orders. The Governor was accordingly within his right to suspend Section 418.108 pursuant to Section 418.016.

D. Application

Returning to the injunction standard, the State and private litigants here need to show a probable right to the relief sought, and a probable imminent, irreparable injury. *Butnaru*, 84 S.W.3d at 204. A probable right of relief is established here if the County issued an order that conflicts with the Governor's order, given that we conclude the Governor's order would prevail. And it is clear that CE-13 order conflicts in several respects.

Section 1 of CE-13 imposes a stay at home order for all residents except for what the County has deemed essential business, essential travel, essential governmental functions, or critical infrastructure. But under GA-32, persons could additionally leave their residence to participate in several specified activities spelled out in Section 1(a)-(i) and outdoor activities in paragraph 3(a)-(e). GA-32 would also necessarily permit travel to patronize the businesses that CE-13 closes down. GA-32 says restaurants whose gross receipts are fifty percent or less from alcohol sales "may offer dine-in services" while CE-13 flatly disallows in-restaurant dining.

Section 3 of CE-13 imposes a stay at home curfew from 10:00 p.m. to 5:00 a.m., except for essential travel, essential business, government service, or critical infrastructure. To the extent the curfew restricts travel to, or participation in activities or business that GA-32 allows, it conflicts with GA-32. While GA-32 does not specifically prevent curfews, as drafted, the curfew is overbroad. Section 4 of CE-13 prohibits businesses from operating if they are deemed by the County to be non-essential; many of those prohibited businesses are expressly allowed to operate under GA-32. Section 5 of CE-13 prohibits public or private gatherings of any number of persons. But GA-32 allows gatherings for designated activities, as with sporting events, and up to ten persons for other reasons. Section 6 of CE-13 restricts all travel except for essential travel, essential business, government service, or critical infrastructure. To the extent the curfew restricts travel or participation that GA-32 allows, it also conflicts with GA-32. The State has shown a probable right to relief.

The State and the restaurants must also show irreparable injury. The State relies on the Texas Supreme Court's recent decision in *State v. Hollins*, No. 20-0729, 2020 WL 5919729 (Tex. Oct. 7, 2020) (per curiam). There, the Texas Supreme Court held that a Harris County election official who exceeded his authority in soliciting mail-at-home ballots acted *ultra vires*, and importantly here, the State had an intrinsic right to enforce state law. *Id*. at *6. The court concluded:

> As a result of sovereign immunity, the only remedies available in an *ultra vires* action are injunctive and declaratory relief. The sovereign would be impotent to "enforce its own laws" if it could not temporarily enjoin those breaking them pending trial. When 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. at *6. The *Hollins* court expressly disagreed with the lower court's view that the State had not established irreparable injury. Despite the dissenting opinion's effort to distinguish *Hollins*, we

view the case as controlling, and not limited only to election contests. Everything said by the court in *Hollins* about irreparable injury would equally apply here, and perhaps more so. The State is not only safeguarding its theoretical interests in the hierarchy of a governmental structure, but it also vindicates the interests of the innumerable small business owners and their employees (the barbers, hair stylists, cosmetologists, licensed massage therapists, booksellers, and other small shop owners) who have been put out of work by the County's order. True, restaurants can at least try and keep their business afloat with take-out and curbside delivery. But lost in this debate are the several professions completely barred from earning any living at all. The County's order works an irreparable injury.

Lest we be mis-read, our analysis does not mean every order of a county judge respecting the pandemic must be stricken, or even that a county is ousted from assisting in responding to the disaster. To state the obvious, the County plays a central role in enforcing the Governor's executive orders that already restricts group gatherings, restricts business activities, and imposes health and safety guidelines on those businesses that are allowed to operate. The Governor's order only pre-empts conflicting local orders. GA-32 supersedes any conflicting order by a local official "to the extent that such a local order restricts services allowed by this executive order[.]" And it suspends Section 418.108 "to the extent necessary to ensure local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with [GA-32]." And here, there are inconsistent and conflicting provisions. Nonetheless, our decision here would not bar the County taking actions that are not in conflict with GA-32.

We therefore sustain the State's issue on appeal and hold that the trial court erred in not issuing a temporary injunction that would enjoin enforcement of CE-13. On remand, we instruct the trial court to enter a temporary injunction barring enforcement of CE-13 (and its counterpart

provisions in CE-14), but allow for the possibilities that parties might identify some stand-alone restrictions in CE-13 that would not be inconsistent with GA-32. None of the briefing before us has attempted to tease out any discrete restriction which might compliment or otherwise not conflict with GA-32, and it would be inappropriate for us to attempt to do so here. We make clear, however, that we reject the County's paradigm that the Governor's order can set a ceiling for occupancy and the County can then set a floor, with the public required to abide by the more restrictive provision. If conduct is allowed under the Governor's order, that County cannot prohibit it. If activities are prohibited by the Governor's order, the County cannot allow them.

CONCLUSION

Just as a servant cannot have two masters, the public cannot have two sets of rules to live by, particularly in a pandemic and when those rules carry criminal penalties substantially impacting peoples' lives and livelihood. Much of the Disaster Act is premised on promoting cooperation between levels of government for the benefit of Texas citizens. The lack of a clear organizational chart with a defined leader and chain of command is antithetical to promoting cooperation. Now that this Court has done its job to define that organizational chart, we leave it to the political leaders of the State and this region, whose motives are all beyond reproach, to cooperatively lead us through this unparalleled disaster.

JEFF ALLEY, Chief Justice

November 13, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.
Rodriguez, J., dissenting