Opinion issued October 13, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-21-00453-CV

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

V.

COUNTY OF FORT BEND, TEXAS, Appellee

On Appeal from the 434th District Court
Fort Bend County, Texas
Trial Court Case No. 21-DCV-286148

MEMORANDUM OPINION

The COVID-19 pandemic has presented significant public health challenges across this state, nation, and beyond. Government officials at all levels have enacted mitigation measures to reduce the spread of the virus and lessen the burden on their health care systems. This suit addresses whether a statewide official—

Governor Greg Abbott—may issue an executive order that prohibits a political subdivision—Fort Bend County—from requiring face masks in certain settings.

The Governor contends that the Texas Disaster Act gives him control over the State's continuing disaster response, the County is his designated agent in that endeavor, and he may preempt conflicting orders issued by the County. The County contends that its powers flow directly from the state constitution, not through the Governor, and that it has statutory authority to address disasters on a local level. It argues that the Governor acted *ultra vires*, without legal authority, to prevent local disaster-mitigation efforts and seeks to prohibit the Governor's interference in its mitigation plans.

These arguments reach us on appeal from the trial court's orders denying the Governor's plea to the jurisdiction and granting the County's application for a temporary injunction enjoining the Governor, his agents, and his employees from enforcing sections of his executive order that prohibit local officials and governmental entities from requiring face masks.[1] Because we conclude that the trial court has subject-matter jurisdiction over the dispute between the Governor and the County and that it did not abuse its discretion by granting the temporary injunction, we affirm.

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[1] The temporary injunction was stayed, meaning that the mask mandate has not been in force during the pendency of the appeal.

Background

COVID-19 reached Fort Bend County in March 2020. The County issued a Declaration of Local Disaster for Public Health Emergency on March 12, 2020. Governor Abbott issued a Declaration of State of Disaster the next day and, in each subsequent month, has renewed the disaster declaration through a series of proclamations.[2] During the first COVID surge in the summer of 2020, the Governor imposed a statewide mask mandate. According to Dr. Jacquelyn Johnson-Minter, the County's Director of Health and Human Services, the mask mandate reduced the number of COVID cases. That winter, there was another resurgence of cases, which Dr. Johnson-Minter attributed to children returning to in-person school and adults increasing their personal interactions. Vaccines became available in December 2020 and, as people began to be vaccinated, the case numbers fell again.

In July 2021, the Delta variant of the COVID-19 virus reached Fort Bend County. Initial information was that both vaccinated and unvaccinated people could contract the Delta variant, it spread more easily, and it presented a heightened risk to those who were not eligible for vaccines. There were public health concerns that rampant spread could allow for mutations of the virus that

[2] The Governor signed the most recent disaster proclamation on September 19, 2022. *See* The Governor of the State of Tex., Disaster Proclamation 41-3931, 47 Tex. Reg. 6331, 6331 (2022).

would be more difficult to treat and control. In Dr. Johnson-Minter's medical opinion, the rapid rise of cases in the summer of 2021 created a public health emergency in Fort Bend County, as the County had only five ICU beds available for a population of over 800,000 and thousands of unvaccinated children readied to return to school.

Throughout this period, the Governor continued to exercise powers under the disaster declaration. One such act was the issuance of Executive Order GA-38 on July 29, 2021, which addressed the wearing of face masks. *See* The Governor of the State of Tex., Executive Order GA-38, 46 Tex. Reg. 4913, 4915 (2021). GA-38 provided, with some exceptions, that:

> No governmental entity, including a county, city, school district, and public health authority, and no governmental official may require any person to wear a face covering or to mandate that another person wear a face covering . . . .

Id. It claimed to supersede any conflicting order issued by a local official and announced that "any conflicting or inconsistent limitation by a local governmental entity or official" would be subject to a fine of up to $1,000. *Id.* GA-38 also suspended multiple statutes as "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 Government Code; portions of Chapter 81, and Chapters 121, 122, and 341 of the Health and Safety Code; Chapter 54 of the Local Government Code; and "[a]ny other statute invoked by any local

governmental entity or official in support of a face-covering requirement." *Id.* Finally, GA-38 stated it "shall remain in effect and in full force unless it is modified, amended, rescinded, or superseded by the [G]overnor." *Id.*

Various local governmental entities filed declaratory judgment suits against the Governor in his official capacity to challenge this limitation on their local COVID mitigation efforts. Relevant here, the County sought a declaratory judgment that:

- the Governor's suspension of laws allowing local governments to impose mask requirements is *ultra vires* and outside the scope of his authority under the Texas Disaster Act of 1975[3] or, alternatively, the Act violates the Texas Constitution's Suspension Clause and Separation of Powers Clause;
- GA-38 infringes on the constitutional authority of the County Judge and County Commissioners' Court to exercise powers and jurisdiction over all county business; and
- GA-38 infringes on the statutory authority of the County Judge.

The County sought a temporary restraining order and temporary injunction to prohibit enforcement of GA-38.

The County obtained a temporary restraining order on August 11, 2021, prohibiting the enforcement of GA-38. The next day, with the executive order restrained, the County issued a mask mandate. The Governor moved to stay the

[3] *See* TEX. GOV'T CODE §§ 418.001–.307.

temporary restraining order. Considering similar grants by the Texas Supreme Court, this Court granted the Governor's stay request.

The Governor filed a plea to the jurisdiction, arguing that (1) the Governor's sovereign immunity bars the County's claims; (2) the County lacked standing to sue the Governor; and (3) the trial court lacked authority to enjoin the Governor.

The trial court held a hearing on the County's request for a temporary injunction and the Governor's plea to the jurisdiction on August 19, 2021. At that hearing, the trial court denied the Governor's plea to the jurisdiction and then received evidence on the temporary injunction application. At the end of the hearing, the trial court granted the temporary injunction. A written order issued the same day to restrain the Governor and his agents and employees from enforcing certain provisions of GA-38 to the extent they prohibit mask mandates and Fort Bend County Public Health Authority from enforcing any law or order that is reasonably necessary to protect the public health or implementing control measures to slow the spread of the COVID-19 virus within the County. A separate written order denied the Governor's plea to the jurisdiction. The Governor appealed both orders.

The notice of appeal stayed the temporary injunction pending resolution of the appeal. *See* TEX. R. APP. P. 29.1(b). The County moved to reinstate the temporary injunction under Rule 29.3. *See* TEX. R. APP. P. 29.3. Citing the Texas

Supreme Court's decision to stay the effect of our sister court in San Antonio's order granting a similar Rule 29.3 motion, this Court denied the County the relief it sought.

Under these stay orders, GA-38 remained effective, preventing the County from enforcing its mask mandate pending our resolution of this appeal.[4] Because it implicates subject-matter jurisdiction, we begin by reviewing the trial court's ruling on the Governor's plea to the jurisdiction before considering the merits of the temporary injunction.

Plea to the Jurisdiction

The Governor presents three arguments why the trial court erred in denying his plea to the jurisdiction: (1) the Governor has sovereign immunity from suit, and the *ultra vires* exception to that immunity does not apply; (2) the County lacks standing to sue the Governor because the Governor does not enforce GA-38; and (3) the trial court lacks statutory authority to enjoin the Governor.

A. Standards of review

A plea to the jurisdiction challenges the trial court's subject-matter jurisdiction. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 225–26

[4] Although the ongoing state of disaster is dynamic, with variable rates of infection and changing approaches to disease mitigation, this appeal is not moot. *See Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 166–67 (Tex. 2012) (appellate courts have obligation to consider their appellate jurisdiction). The Governor continues to renew the disaster proclamation, GA-38 remains in effect, and the controversy regarding whether GA-38 preempts or supersedes the County's authority to implement a mask mandate persists.

(Tex. 2004). Whether a trial court has subject-matter jurisdiction is a question of law that we review de novo. *Id.* at 226. The plaintiff has the burden to affirmatively demonstrate the trial court's jurisdiction. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 150 (Tex. 2012). First, we look at the plaintiff's live pleadings to determine if the plaintiff has alleged facts that affirmatively demonstrate the trial court's jurisdiction. *Miranda*, 133 S.W.3d at 226. We construe the plaintiff's pleadings liberally, taking all assertions as true and looking to the plaintiff's intent. *Id.* When a plea challenges the existence of jurisdictional facts, we consider evidence to resolve the jurisdictional issues raised. *Id.* at 227. The evidence is reviewed in the light most favorable to the nonmovant to determine whether a genuine issue of material fact exists. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019).

The arguments on appeal also involve statutory interpretation, which is a legal question 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. *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000); *see also Bosque Disposal Sys., LLC v. Parker Cnty. 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." (internal quotation omitted)).

When construing a statute, "we presume the Legislature chose the statute's language with care, purposefully choosing each word, while purposefully omitting words not chosen." *In re CenterPoint Energy Hous. Elec., LLC*, 629 S.W.3d 149, 158–59 (Tex. 2021) (quoting *In re Commitment of Bluitt*, 605 S.W.3d 199, 203 (Tex. 2020)). We strive to give effect to all words without allowing any to be mere surplusage. *Id.* at 159. We may not add words to the statute or ignore words the Legislature chose to include. *Cornyn v. Universe Life Ins. Co.*, 988 S.W.2d 376, 379 (Tex. App.—Austin 1999, pet. denied). Additionally, "we must always consider the statue as a whole rather than its isolated provisions." *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001).

B. Sovereign immunity and *ultra vires* acts

Here, whether the County has sufficiently pleaded facts or presented evidence to support a valid *ultra vires* claim to demonstrate subject-matter jurisdiction overlaps with the substantive issue of whether the County has established a probable right to relief on its *ultra vires* claim to obtain a temporary injunction. *See, e.g., Abbott v. Harris Cnty.*, 641 S.W.3d 514, 521 (Tex. App.—Austin 2022, pet. filed). For the reasons more fully set forth in that portion of our opinion discussing the temporary injunction, we conclude that the County met its

burden to demonstrate a valid *ultra vires* claim. The County's pleadings, when liberally construed, and the evidence submitted, when viewed in the light most favorable to the County, allege facts sufficient to show that the Governor acted without authority in issuing GA-38 to the extent that GA-38 prohibits the County and its officials from implementing masking requirements in certain places. *See id.*

C. Standing

Standing is required to maintain a lawsuit. *Farmers Tex. Cnty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 240 (Tex. 2020). The standing doctrine assures there is a real controversy between the parties that will be determined by the judicial determination sought. *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 77 (Tex. 2015). To establish standing, a plaintiff must show an injury in fact, which is concrete and particularized and actual or imminent instead of conjectural or hypothetical, that is fairly traceable to the defendant's conduct, and that is likely to be redressed by the relief requested. *Heckman*, 369 S.W.3d at 154–55. Standing is determined on the plaintiff's pleadings. *Beasley*, 598 S.W.3d at 241.

The County alleges an injury in fact based on the Governor's interference with its inherent constitutional authority to exercise jurisdiction over all "county business." TEX. CONST. art. V, § 18(b). It also points to its statutory authority to declare a local disaster. *See* TEX. GOV'T CODE § 418.108. And to statutory limits on the Governor's authority to suspend laws. *See id.* § 418.016(a). As discussed

more fully in the portion of our opinion addressing the temporary injunction, the Governor can suspend "any regulatory statute" or "orders or rules of a state agency," but his suspension power does not include grant-of-authority statutes that empower local governmental entities and officials or declarations by a political subdivision. *See id.*

The County alleges that COVID-19 has presented a public health crisis in its territory. The COVID-19 pandemic is "an imminent threat to public safety due to the surge of a more transmissible and more dangerous variant of the virus known as the Delta Variant." The County issued emergency orders including a Declaration of Local Disaster for Public Health Emergency.

The County has followed scientifically grounded recommendations of the Fort Bend County Health Department and the federal Centers for Disease Control and Prevention, including the use of face coverings to limit the spread of COVID-19. This led to an Order Requiring Use of Face Coverings in County Facilities. At the time of the filing of the litigation, the County had only five operational ICU beds available for over 800,000 county residents. And COVID-19 rates were surging due to the more contagious Delta variant. The County determined that face coverings were necessary to limit the spread of COVID-19 during this surge.

According to the County's pleading and an attached affidavit from a public health official, Dr. Johnson-Minter, "but for the Governor's Executive Order GA[-]38," which purports to suspend the County's authority to issue and enforce mask mandates, the County would mandate the use of masks in County facilities by employees and the public interfacing with employees and each other and at public schools. GA-38 is prohibiting the County from taking these public health measures to address the public health emergency COVID-19 presents. According to the County, mask mandates are critical to managing the COVID-19 pandemic and health care system in its jurisdiction.

Construing the County's pleadings liberally in favor of jurisdiction and accepting the allegations in the pleadings as true, the County alleged the Governor inflicted a concrete and particular injury on the County by constraining its authority to implement mask mandates. The County met the first element of standing by showing it has an actual injury. *See Abbott v. Jenkins*, No. 05-21-00733-CV, 2021 WL 5445813, at *12–14 (Tex. App.—Dallas Nov. 22, 2021, pet. filed) (mem. op.) (concluding county judge making similar allegations met first element of standing); *Abbott v. City of San Antonio*, 648 S.W.3d 498, 511–12 (Tex. App.—San Antonio 2021, pet. filed) (concluding city and county making similar allegations met first element of standing).

The County also meets the "traceability" element of standing. To meet this requirement, a plaintiff must show that the injury complained of is fairly traceable to the challenged action of the defendant. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The County alleges that it would issue and enforce a mask mandate except that GA-38 prohibits it from doing so. In other words, the source of the County's alleged injuries is the Governor's promulgation of GA-38 in which he limited the County's statutory authority to manage a local disaster. Construing the County's pleadings liberally in favor of jurisdiction and accepting the allegations in the pleadings as true, the County has alleged injuries directly traceable to the Governor's action in promulgating GA-38. *See Jenkins*, 2021 WL 5445813, at *7 (concluding county judge making similar allegations met second element of standing); *City of San Antonio*, 648 S.W.3d at 512 & n.7 (concluding city and county making similar allegations met second element of standing); *see also Mi Familia Vota v. Abbott*, 497 F. Supp. 3d 195, 210 (W.D. Tex. 2020) (governor was proper defendant in suit challenging part of executive order because alleged injury was traceable to him as "the author and executive who promulgated the [e]xecutive [o]rder and all exemptions and enforceability provisions therein").

Last, the County pleaded facts that its injury would be redressed by the requested relief. The Governor argues that the lawsuit will not redress any injury alleged by the County because the Governor does not have the authority to enforce

GA-38. The Governor asserts that only a local district attorney can prosecute a violation of GA-38 and, therefore, he is the wrong defendant. Our sister courts have rejected this same argument, noting numerous lawsuits filed on behalf of the State that seek to prevent local governmental entities and officials from taking measures inconsistent with the Governor's emergency orders and the expansive meaning of enforcement to include compulsion or constraint. *See Harris Cnty.*, 641 S.W.3d at 521–22; *City of San Antonio*, 648 S.W.3d at 512–13; *see also* TEX. R. EVID. 201(b) (court may judicially notice facts that are not subject to reasonable dispute); *Off. of Pub. Util. Couns. v. Pub. Util. Comm'n of Tex.*, 878 S.W.2d 598, 600 (Tex. 1994) (discussing court of appeals' power to take judicial notice). We also reject the Governor's argument.

The Governor cites *In re Abbott*, 601 S.W.3d 802 (Tex. 2020) (orig. proceeding) (per curiam). There, a group of trial judges challenged the Governor's executive order that "change[d] the rules applicable to judges' decisions regarding pretrial bail" in response to the COVID-19 disaster. *Id.* at 805. The judges alleged that the executive order improperly interfered with their judicial authority to make individualized bail decisions. *Id.* At their request, the trial court issued a temporary restraining order blocking enforcement of the executive order against the judges. *Id.* On review, the Texas Supreme Court concluded that the trial court lacked jurisdiction to grant the temporary restraining order because the judges did not

have a personal, legally cognizable injury. *Id.* The Court disagreed that the judges had standing because the Governor had the power to enforce the executive order against the judiciary by holding non-compliant judges criminally liable. *Id.* at 811–12. Standing based on a perceived threat of enforcement must rest on a credible threat of prosecution. *Id.* at 812. And because the Governor and Attorney General disavowed any authority to initiate prosecutions for violations of the executive order, that threat did not exist in *Abbott*.

But *Abbott* does not foreclose our conclusion that the County has standing to challenge GA-38 in this suit against the Governor. *Abbott* focused on the injury element of standing and whether allegations of possible prosecutions constituted injury in fact. *Id.* at 812. Here, as we have already determined, the County has an injury in fact because it is constrained by GA-38 from choosing a mask mandate as a measure to mitigate the ongoing state of disaster. Thus, the County's standing does not depend on a perceived threat of criminal liability.

Important for standing, the County seeks a declaratory judgment that it has the statutory authority to require face masks and that the Governor's purported suspension of its authority is an *ultra vires* act. The County is not complaining about any threat of enforcement for non-compliance with GA-38, but about the validity of the executive order itself. Declaratory relief, if granted, would redress the County's injuries by allowing the County to again exercise its statutory

authority to impose mask mandates within its jurisdiction. *See Harris Cnty.*, 641 S.W.3d at 522 (concluding county making similar allegations met third element of standing); *City of San Antonio*, 648 S.W.3d at 512–13 (concluding city and county making similar allegations met third element of standing); *see also Mi Familia Vota*, 497 F. Supp. 3d at 210 (injury allegedly caused by executive order was redressable against Governor as author of executive order). Construing the County's pleadings liberally in favor of jurisdiction and accepting the allegations in the pleadings as true, the County has alleged sufficient facts to show the requested relief would redress the alleged injury. *See Harris Cnty.*, 641 S.W.3d at 522; *Jenkins*, 2021 WL 5445813, at *7; *City of San Antonio*, 648 S.W.3d at 512.

In sum, the County has alleged an actual concrete injury caused by GA-38. If the County obtains the relief it seeks, the injury will be redressed. Accordingly, we conclude that the County has standing to sue the Governor.

D. Trial court's authority to enjoin

The Governor's final jurisdictional challenge concerns the trial court's authority to enjoin executive officers, like the Governor. He argues that only the Texas Supreme Court has the authority to enjoin him, under section 22.002(c) of the Government Code.

This argument has no support in the law. It ignores section 22.002's plain language. Section 22.002(c) addresses juridical authority to "order or compel the

performance of a judicial, ministerial, or discretionary act or duty." TEX. GOV'T CODE § 22.002(c). The County does not seek to compel an act by the Governor. It seeks to prohibit an executive order's interference in its local mitigation efforts. The statute does not apply. *See Jenkins*, 2021 WL 5445813, at *7–8; *see also Canales v. Paxton*, No. 03-19-00259–CV, 2020 WL 5884123, at *2 (Tex. App.—Austin Sept. 30, 2020, pet. ref'd) (mem. op.) ("A district court has original jurisdiction to issue an injunction prohibiting unlawful executive action."); *Kaufman Cnty. v. McGaughey*, 21 S.W. 261, 262 (Tex. App.—Austin 1893, writ ref'd) (holding that functionally identical predecessor to section 22.002(c) applied to orders compelling action that state executives "are authorized to perform," but not to orders prohibiting acts that "have been, or will be, committed without and in excess of lawful authority").

The County established subject-matter jurisdiction. The trial court did not err in denying the Governor's plea to the jurisdiction.

We now consider the Governor's challenge to the temporary injunction.

Temporary Injunction

The Governor argues that the trial court abused its discretion by granting the County temporary injunctive relief because (1) the County failed to establish that it is likely to prevail on the merits of its *ultra vires* claim; (2) the County failed to

establish it will suffer irreparable harm; and (3) the temporary injunction is not necessary to preserve the status quo.

A. Standard of review

A temporary injunction is an extraordinary remedy and does not issue as a matter of right. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (Tex. 1993) (per curiam). It preserves the status quo of the litigation's subject matter pending trial on the merits. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The temporary-injunction applicant must establish (1) a cause of action against the defendant, (2) a probable right to the relief sought in the litigation, and (3) a probable, imminent, and irreparable injury in the interim if the injunction is not granted. *Id.*

The grant of a temporary injunction is reviewed for an abuse of discretion. *Id.* The trial court abuses its discretion when it misapplies the law to the established facts or the evidence does not reasonably support the conclusion that the applicant has a probable right to recovery. *State v. Sw. Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975). We view the evidence in the light most favorable to the order, indulging every reasonable inference in its favor, and determine whether the order was so arbitrary that it exceeded the trial court's discretion. *Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 857 (Tex. App.—Fort Worth 2003, no pet.); *City of San Antonio v. Rankin*, 905 S.W.2d 427, 430 (Tex. App.—San

Antonio 1995, no writ). A trial court does not abuse its discretion when it bases its decision on conflicting evidence and the evidence reasonably supports its conclusion. *Butnaru*, 84 S.W.3d at 211.

B. Probable right to recovery

The Governor asserts that the County does not have a probable right to recovery on its *ultra vires* claim that he acted outside the scope of his authority under the Texas Disaster Act in suspending statutes and prohibiting disaster mitigation efforts on a local level. *See* TEX. GOV'T CODE §§ 418.001–.307. He claims that, under the Texas Disaster Act, he has the authority to manage disasters statewide, including controlling the "ingress and egress" and "movement" in a disaster area, and this authority allows him to suspend any statute local governmental entities might rely on to enact mitigation measures. Further, according to the Governor, local officials act as his agents during a disaster. Finally, he asserts that the status quo was "gubernatorial oversight," meaning that a temporary injunction cannot issue to prohibit his use of disaster authority.

Governmental immunity provides broad protections to the State and its officers, but it does not bar a suit against a state officer who has acted outside his authority. *Hous. Belt & Terminal Ry. v. City of Hous.*, 487 S.W.3d 154, 161 (Tex. 2016). Suits alleging a state officer acted outside his authority assert *ultra vires* claims. *Id. Ultra vires* suits seek to enforce existing policy by compelling a

government official to comply with the law, whether a statutory provision or a constitutional one. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). A plaintiff making an *ultra vires* claim alleges and may ultimately prove that the officer acted outside legal authority (or failed to perform a ministerial act). *See id.* A government official who has discretion to interpret and apply a law may act without legal authority—and thus *ultra vires*—if he exceeds the limits of his granted authority or his acts conflict with the law. *Hous. Belt*, 487 S.W.3d at 158.

1. Whether the Governor holds preemptive power

The Texas Disaster Act is found in Chapter 418 of the Government Code. TEX. GOV'T CODE §§ 418.001–.307. The main provisions the Governor relies on to assert a preemptive power are:

- Section 418.011(1), which makes the Governor responsible for meeting "the dangers to the state and people presented by disasters."
- Section 418.012, which grants the Governor the ability to issue executive orders and amend or rescind them and provides that these orders "have the force and effect of law."
- Section 418.016(a), which allows the Governor to suspend certain laws and rules: he 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 compliance . . . would in any way prevent, hinder, or delay necessary action in coping with a disaster."
- Section 418.018(c), which permits the Governor to "control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area."

See id. §§ 418.011(1), 418.012, 418.016(a), 418.018(c).

He argues that these provisions, together, demonstrate a legislatively granted supremacy over local mitigation efforts, authorizing him to supersede statutes to prevent some events and issue orders to mandate others. Like our sister courts that have considered these same arguments, we cannot agree that the Act grants the Governor the broad authority he claims. *See Abbott v. La Joya Indep. Sch. Dist.*, No. 03-21-00428-CV, 2022 WL 802751, at *4 (Tex. App.—Austin Mar. 17, 2022, pet. filed) (mem. op.); *Harris Cnty.*, 641 S.W.3d at 525–28; *Jenkins*, 2021 WL 5445813, at *9–11; *City of San Antonio*, 648 S.W.3d at 506–07.

The Act gives both the Governor and local governmental entities authority to address disasters. In the event of a statewide disaster, the Governor may control ingress and egress in the area. TEX. GOV'T CODE § 418.018(c). And in the event of a local disaster, the county judge or mayor likewise may control ingress and egress. *Id.* § 418.108(g).

According to the Governor, the Act resolves the apparent conflict by granting him "tie breaker" authority through its provision in section 418.012 that his declarations have the force of law, effectively preempting any conflicting, local declaration. But the Governor's reading of section 418.012 is at odds with other provisions of the same statute.

Elsewhere in the Act, county judges are granted the authority to order an evacuation. *Id.* § 418.108(f). The Governor is granted a more limited authority: he

may recommend an evacuation, not order one. *Id.* § 418.018(a). This division of authority related to evacuations is at odds with the Governor's reading of section 418.012's language on "force and effect of law" to mean that his disaster-related authority always supersedes local authority. We must analyze statutory provisions within the context of the surrounding language. *See Wilkins*, 47 S.W.3d at 493–94. The division of authority elsewhere in this same statute belies the Governor's supremacy argument. *See Jenkins*, 2021 WL 5445813, at *10. The Act does not grant the Governor broad superseding authority over conflicting local directives.

Nor does the Act grant the Governor limitless ability to suspend statutes that permit actions he chooses not to pursue. Section 418.016(a) specifically permits the Governor to suspend "regulatory statutes" that prescribe "the procedures for conduct of state business" and "orders or rules of a state agency." TEX. GOV'T CODE § 418.016(a). The statutes the Governor sought to suspend under GA-38 are not regulatory statutes. They are "grant-of-authority" statutes that give local authorities the ability to act within their local jurisdictions to address local disasters. *See, e.g.*, TEX. LOC. GOV'T CODE § 54.004 (local governments granted authority to enforce ordinances necessary to protect health, life, and property); TEX. HEALTH & SAFETY CODE § 121.003(a) (granting local governments authority to enforce any law reasonably necessary to protect public health); *id.* § 122.006(1) (granting local governments authority to adopt rules to protect health of persons in

municipality, including quarantine rules); *id.* § 341.081 (granting local governments authority to enact more stringent ordinances than minimum required by state law for sanitation and health protection).

By merely granting the Governor the authority to suspend regulatory statutes, the Legislature did not also authorize him to suspend grant-of-authority statutes that empower other governmental entities and officials. *City of San Antonio*, 648 S.W.3d at 508.

Nor is the County a "state agency." It is a "political subdivision," also referred to in the statute as a "local governmental entity." TEX. GOV'T CODE § 418.004(6), (10).

The Governor's argument sweeps too wide to claim authority to nullify any statute that grants power to local governments to deal with public health crises. We cannot say that the Legislature intended section 418.016(a) to permit the Governor to negate local control over public health without a single mention of such a vast and impactful power. The statutory-suspension authority is legislatively limited to "regulatory statute[s]" and "orders or rules of a state agency." The statutes the Governor seeks to suspend to prevent local mitigation efforts are neither. We conclude that the Governor does not have preemptive power to nullify local mitigation efforts.

2. Whether the County acts merely as the Governor's agent

Next, the Governor argues that the Act designates the presiding officer of the governing body of a county as the Governor's agent, meaning the power to address local disasters is also as the Governor's agent, and that the Governor's executive order controls and limits the agent's authority to act.

The provision the Governor points to is section 418.1015, which states that the presiding officer of the governing body of a county is designated as the "emergency management director for the officer's political subdivision," "serves as the governor's designated agent in the administration and supervision of duties" under Chapter 418, and "may exercise the powers granted to the governor under this chapter on an appropriate local scale." TEX. GOV'T CODE § 418.1015(a–b). But this is not the only provision granting authority to a county judge.

Section 418.108 grants the same presiding officer the ability to declare a local state of disaster. *Id.* § 418.108(a). That grant does not tie the county judge's power to gubernatorial authority. It does not limit the power to situations in which no statewide disaster has been declared. It independently grants to a local authority the power to declare a local disaster, separate from the grant to the Governor of the power to declare a disaster. *Compare id.*, *with* § 418.014(a).

Reading these sections together, we conclude that section 418.1015 is not a limitation on the presiding officer's power to that of an agent. Rather, it provides

an expansion of power to allow the presiding officer to also exercise powers granted the governor on an appropriate scale. *Jenkins*, 2021 WL 5445813, at *11–12. Section 418.1015 does not evince a subordinate role for local mitigation efforts. It does not support the Governor's argument that, where a local disaster has been declared, the local authority must bend to his directives.

3. Whether the Governor's power to suspend statutes leaves the County without a statutory basis to act

The Governor argues that none of these powers previously discussed that are held by local governmental entities and officials can prevent his dominance over disaster-related efforts because he holds the statutory power to suspend any law under which a local official purports to operate. He focuses his argument on the part of section 418.016(a) that allows suspension of a provision dealing with the "conduct of state business" and argues that disaster response is state business. TEX. GOV'T CODE § 418.016(a). But as discussed, that provision has other limiting language. It permits the Governor to suspend "any regulatory statute" or "orders or rules of a state agency." *Id.* The statutes that grant authority to local governmental entities and officials to address local disasters are not regulatory statutes, and those entities and officials are not state agencies. *See Harris Cnty.*, 641 S.W.3d at 527–28; *City of San Antonio*, 648 S.W.3d at 507–08. Being within the meaning of "state business" is not enough to allow suspension under this statute: the provision must be a regulatory statute or order or rule of a state agency. Because the provisions the

Governor seeks to suspend are not, GA-38 exceeds his authority under section 418.016(a).

We conclude that the Governor's authority to suspend certain statutes under section 418.016 does not include the authority to suspend grant-of-authority statues empowering local governmental entities and authorities to enact mitigation efforts. Without a constitutional or statutory basis for suspending the statues that grant local governmental entities and officials power to implement mitigation efforts, the Governor's actions in issuing GA-38 were done without authority. The trial court did not abuse its discretion in concluding that the County has a probable right of recovery on its *ultra vires* claim.

C. Irreparable Harm

The Governor argues that the evidence presented at the temporary injunction hearing "diminishes the County's claim that, absent an injunction, they would suffer" irreparable harm and that no witness "could directly tie a rise in local COVID-19 rates to GA-38's ban on face-covering mandates."

At the hearing, Dr. Johnson-Minter testified that she works in public health in Fort Bend County. She is the County's Director of Health and Human Services. In that capacity, she advises local leaders on how to deal with contagious diseases and has been involved in the County's COVID-19 response.

Dr. Johnson-Minter discussed the statewide mask mandate that the Governor implemented in mid-2020, before opting for a less robust approach, and she opined that the statewide mask mandate reduced the number of cases seen in late-September through November of 2020. She described how the recent surge was due to the Delta variant that was more highly transmissible than the original form of the virus.

She detailed the current surge in COVID cases the County was facing at the time of the hearing. Just one week before the hearing to determine whether the Governor could prohibit local mitigation efforts, the County faced over 1,000 COVID cases per day. The disease was taking up bed space in the local hospitals, leaving little room for patients with non-COVID medical needs, like trauma care. The County was facing a rapid rise in hospitalizations taking up general beds and ICU beds. Also, the County did not have spare healthcare professionals to care for rising hospital admittances.

In her opinion, "the rapid rise of cases in the last month" leading up to the temporary injunction hearing presented "a public health emergency" that was "overwhelming [the] healthcare system" in Fort Bend County.

Dr. Johnson-Minter reviewed scientific literature concerning the efficacy of face masks to limit the spread of COVID-19. After discussing individual studies and articles, she opined that, based on reasonable medical probability, face masks

are an effective mitigation effort to slow the spread of COVID-19, including the Delta variant. In her opinion, mask mandates worked in the past. The Governor's statewide mask mandate went into place, and the number of cases dropped 10 to 14 days later. In her opinion, masks are "one of the strongest tools" available to reduce the spread of COVID-19.

Dr. Johnson-Minter concluded by testifying that GA-38 was preventing the County from implementing the steps she believed, as a public health official, were necessary to protect public health.

Based on the evidence presented at the hearing, viewed in the light most favorable to the trial court's order, we conclude that the County sufficiently demonstrated that the use of masks is an effective tool to control the spread of COVID-19, that the uncontrolled spread of COVID-19 is detrimentally impacting the County and overtaxing its health care system, and that GA-38 was further hindering its efforts. GA-38, by its terms, prevents local governmental entities and officials from enforcing local orders requiring facemasks even though the Governor's previous statewide mask mandate proved to slow the spread of the virus. GA-38 harms the County's efforts to combat COVID-19.

D. Status quo

Finally, we address the Governor's argument that the trial court abused its discretion because the County failed to establish that the temporary injunction was

necessary to preserve the status quo. According to the Governor, the status quo to which a temporary injunction would return the parties is the same gubernatorial oversight the County now seeks to avoid. Given that the status quo favors him, he argues, a temporary injunction against him is an abuse of discretion. He bases this argument on Executive Order GA-36 (GA-36), which preceded GA-38 and, as a general matter, also prohibited local entities from imposing mask requirements. *See* The Governor of the State of Tex., Executive Order GA-36, 46 Tex. Reg. 3325, 3325 (2021).

We have already concluded that the County demonstrated a probable right to relief on its claim that the Governor exceeded his authority in issuing GA-38 to prevent local mitigation efforts. The trial court's temporary injunction prevents that interference. The fact that a state of interference existed before the County took action to end the Governor's *ultra vires* acts does not mandate that the County's efforts must fail. "[T]he continuation of illegal conduct cannot be justified as preservation of the status quo." *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (orig. proceeding). If GA-38 is *ultra vires*, the features of GA-36 that the Governor presents to establish the status quo are equally infirm. *Harris Cnty.*, 641 S.W.3d at 529–30; *La Joya Indep. Sch. Dist*., 2022 WL 802751, at *7. GA-36 cannot constitute the status quo as a matter of law, and the trial court's temporary

injunction returns the parties to the position they were in before the allegedly *ultra vires* conduct.

The trial court did not abuse its discretion in granting the temporary injunction.

Conclusion

We affirm the trial court's orders.

Sarah Beth Landau
Justice

Panel consists of Justices Landau, Hightower, and Rivas-Molloy.