Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-21-00342-CV

Greg **ABBOTT**, in his Official Capacity as Governor of Texas,
Appellant

v.

CITY OF SAN ANTONIO and County of Bexar,
Appellees

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2021CI16133
Honorable Antonia Arteaga, Judge Presiding

Opinion by: Rebeca C. Martinez, Chief Justice

Sitting: Rebeca C. Martinez, Chief Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: November 10, 2021

AFFIRMED

In this interlocutory appeal, Texas Governor Greg Abbott challenges a temporary injunction restraining him and his agents and employees from enforcing sections of Executive Order GA-38 to the extent it prohibits local officials and governmental entities from requiring masks or face coverings be worn in certain settings within the City of San Antonio and Bexar County. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4). In two issues, the Governor contends (1) the trial court abused its discretion in issuing the temporary injunction; and (2) the trial court lacked jurisdiction to enjoin GA-38. We affirm the trial court's order.

BACKGROUND

On July 29, 2021, the Governor signed Executive Order GA-38, which provides, 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 . . . ."[1] The Order also suspends the following statutes "[t]o the extent necessary to ensure that local governmental entities or officials do not impose any such face-covering requirements": (i) sections 418.1015(b) and 418.108 of the Texas Government Code; (ii) chapter 81, subchapter E of the Texas Health and Safety Code; (iii) chapters 121, 122, and 341 of the Texas Health and Safety Code; (iv) chapter 54 of the Texas Local Government Code; and (v) any other statute invoked by any local governmental entity or official in support of a face-covering requirement.[2]

On August 10, 2021, the City of San Antonio and Bexar County filed a declaratory judgment suit against the Governor, in his official capacity as Governor of Texas, challenging Executive Order GA-38. The City and County's suit alleges that the Governor acted *ultra vires* and outside the scope of his authority under the Texas Disaster Act of 1975 (the "Texas Disaster Act" or the "Act") and, alternatively, that the Act violates the Texas Constitution. The City and County's suit also includes an application for a temporary injunction.

On August 16, 2021, the trial court held a hearing on the temporary injunction application and heard evidence from Dr. Junda Woo, who is the Medical Director and Local Health Authority for the City of San Antonio Metro Health, San Antonio City Manager Erik Walsh, Bexar County

[1] Executive Order GA-38 § 4(a). Further, Section 3(b) provides that "no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering"; Section 3(g) provides that "the imposition of any conflicting or inconsistent limitation by a local governmental entity or official . . . is subject to a fine up to $1,000"; and Section 5(a) provides, among other things, that Executive Order GA-38 "shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster."

[2] Executive Order GA-38 § 4(b).

Manager David Smith, and two other witnesses. After the hearing, the trial court signed an order granting the temporary injunction. In its order, the trial court stated its reasons for enjoining the enforcement of the provisions of Executive Order GA-38 disallowing local governmental entities from requiring individuals to wear face coverings as follows:

> [T]he Court finds that unless Defendant Greg Abbott, in his official capacity as Governor of Texas, is temporarily restrained as described below, Plaintiffs will suffer irreparable injury before trial on the merits through the inability to impose masking requirements to control the spread of the COVID-19 virus that threatens to overwhelm the capacity of the healthcare system in the City and County and to cause the City and County to reduce services to the community and furlough workers. The Court further finds that Plaintiffs have shown a probable right to relief on the merits of their claims.
>
> The temporary injunction order specifically restrains the Governor, in his official capacity,
>
> and each of his agents, employees, or those in active participation or concert with him, from enforcing [s]ections 3(b), 3(g), 4, and 5(a) of Executive Order GA-38 to the extent those provisions (1) prohibit the City of San Antonio and Bexar County from requiring City and County employees or visitors to City- and County-owned facilities to wear masks or face coverings; or (2) prohibit the San Antonio and Bexar County Public Health Authority from requiring masks in public schools in the City and County.

The temporary injunction order also sets the case for trial on the merits on December 13, 2021.

After the trial court signed the temporary injunction order, the Governor filed a notice of appeal in this court stating that "[u]pon filing of this instrument[,]" the temporary injunction order "is superseded" pursuant to Rule 29.1(b) of the Texas Rules of Appellate Procedure and section 6.001 of the Texas Civil Practice and Remedies Code. *See* TEX. R. APP. P. 29.1(b); TEX. CIV. PRAC. & REM. CODE ANN. § 6.001(b). The City and County filed an emergency motion with our court asking us to preserve their rights by issuing an order reinstating the trial court's temporary injunction. We granted the City and County's emergency motion and reinstated the trial court's temporary injunction pending final disposition of the appeal. The Governor subsequently sought

emergency relief from the Texas Supreme Court, which granted emergency relief to the Governor, staying this court's order for altering the status quo.

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). A temporary injunction serves to preserve 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). Accordingly, the only question before the trial court is whether the applicant is entitled to preservation of the status quo pending trial on the merits. *Walling*, 863 S.W.2d at 58; *Blackthorne v. Bellush*, 61 S.W.3d 439, 442 (Tex. App.—San Antonio 2001, no pet.). At the hearing for a temporary injunction, the applicant is not required to establish that it will prevail on final trial. *Walling*, 863 S.W.2d at 58. A temporary injunction should only issue if the applicant establishes (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 if the injunction is not granted. *Butnaru*, 84 S.W.3d at 204.

The decision to grant a temporary injunction lies in the sound discretion of the trial court and is subject to reversal only for a clear abuse of that discretion. *Id.*; *Walling*, 863 S.W.2d at 58. The trial court abuses its discretion when it misapplies the law to the "established facts, or when the evidence does not reasonably support the conclusion that the applicant has a probable right of recovery." *State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526, 528 (Tex. 1975). All legitimate inferences from the evidence are drawn in favor of the trial court's judgment. *City of San Antonio v. Rankin*, 905 S.W.2d 427, 430 (Tex. App.—San Antonio 1995, no writ). An abuse of discretion does not exist when the trial court bases its decision on conflicting evidence and the evidence reasonably supports its conclusion. *Butnaru*, 84 S.W.3d at 211; *see Khaledi v. H.K. Glob. Trading, Ltd.*, 126 S.W.3d 273, 281 (Tex. App.—San Antonio 2003, no pet.) ("An injunction is not

improper merely because the evidence presented below conflicted; it need only reasonably support the movant's complaints.").

PROBABLE RIGHT TO RECOVERY

The Governor first asserts the trial court abused its discretion in concluding that the City and County have a probable right to relief on their *ultra vires* claim seeking a declaratory judgment that the Governor's ban on the adoption of mask mandates by local governments in GA-38 is outside the scope of his authority under the Texas Disaster Act. The Governor asserts that under the Act, he has the authority to manage statewide disasters, which allows him to issue executive orders suspending statutory provisions that the City and County rely on to manage the COVID-19 pandemic. We hold that the trial court did not abuse its discretion in concluding that the City and County have a probable right to relief on their *ultra vires* claim.

An *ultra vires* claim must be brought against a government officer in his or her official capacity. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009). The plaintiff must plead and prove "that the officer acted without legal authority or failed to perform a purely ministerial act." *Id.* at 372. "[A] government officer with some discretion to interpret and apply a law may nonetheless act 'without legal authority,' and thus *ultra vires*, if he exceeds the bounds of his granted authority or if his acts conflict with the law itself." *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 158 (Tex. 2016).

The City and County's *ultra vires* claim requires construction of the Texas Disaster Act. Statutory construction is a question of law that we review de novo. *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). Our primary objective in construing statutes is to give effect to the legislature's intent. *Id.* In ascertaining legislative intent, if the words of a statute are clear and unambiguous, we apply them according to their plain and common meaning. *Id.* If the plain language of a statute does not convey the legislature's apparent intent, we may

resort to additional construction aids, such as the objective of the law, the legislative history, the common law or former statutory provisions, including laws on the same or similar subject, and the consequences of a particular construction. *Id.* at 867–68; *see also* TEX. GOV'T CODE ANN. §§ 311.023(1), (3), (5) (allowing a court to consider the objective of the statute, legislative history, and the consequences of a proposed construction).

Further, "we must always consider the statute as a whole rather than its isolated provisions." *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). "We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone." *Id.* "[E]very word of a statute must be presumed to have been used for a purpose. Likewise, we believe every word excluded from a statute must also be presumed to have been excluded for a purpose." *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) (citations omitted). We must not add words to the statute that are not there, and we must not ignore the words the Legislature has chosen, either, particularly in situations where we are being urged to read grants of authority from statutory silence. *See Newman v. Obersteller*, 960 S.W.2d 621, 625 (Tex. 1997) (Abbott, J., dissenting) (stating that the Legislature's omission of words from a statute is significant and "[i]t is not the province of this Court to expand" a limited statutory provision by making inferences of authority from silence, "no matter the policy rationale behind such an expansion").

A. Local Health and Safety Laws

The City and County's authority to administer public health measures is established by the Texas Legislature. *See, e.g.,* TEX. HEALTH & SAFETY CODE ANN. §§ 81.082, 121.003, 122.006, 341.081; *see also* TEX. GOV'T CODE ANN. §§ 418.1015, 418.108; TEX. LOC. GOV'T CODE ANN. ch. 54. "A home-rule municipality may enforce ordinances necessary to protect health, life, and property and to preserve the good government, order, and security of the municipality and its

inhabitants." TEX. LOC. GOV'T CODE ANN. § 54.004. Home-rule municipalities may "adopt rules to protect the health of persons in the municipality, including quarantine rules to protect the residents against communicable disease." TEX. HEALTH & SAFETY CODE ANN. § 122.006(1). The municipalities have the power "to enact . . . more stringent ordinances" than the minimum requirements for sanitation and health protection otherwise required by state law. *Id.* § 341.081(1). "The governing body of a municipality or the commissioners court of a county may enforce any law that is reasonably necessary to protect the public health." *Id.* § 121.003(a). Further,

> The commissioners court of a county may grant authority . . . to a county employee who is trained by a health authority appointed by the county under Section 121.021, by a local health department established under Section 121.031, or by a public health district established under Section 121.041 and who is not a peace officer. The court may grant to the employee the power to issue a citation in an unincorporated area of the county to enforce any law or order of the commissioners court that is reasonably necessary to protect the public health.

Id. § 121.003(c).

These powers are granted to local municipalities at all times and are especially relevant during times of disaster. *See Hanzal v. City of San Antonio*, 221 S.W. 237, 239 (Tex. App.—San Antonio 1920, writ ref'd) ("Health authorities of municipalities are often empowered, and it is made their duty to execute rules, and courts uniformly hold that it is not an improper delegation of legislative authority, to adopt and execute such rules as are expedient to prevent the spread of cholera, smallpox, yellow fever, scarlet fever, diphtheria, and other communicable diseases."). Finally, section 418.108 of the Texas Government Code states that "the presiding officer of the governing body of a political subdivision may declare a local state of disaster." TEX. GOV'T CODE ANN. § 418.108(a).

B. The Governor's Powers Under the Texas Disaster Act

In Executive Order GA-38, the Governor states that "no governmental entity can mandate masks" and states that his GA-38 "supersede[s] any face-covering requirement imposed by any

local governmental entity or official."[3] The Governor purports to suspend many of the local health and safety laws listed above, chapter 54 of the Texas Local Government Code, and "any other statute invoked by any local governmental entity or official in support of a face-covering requirement."[4] *See* TEX. GOV'T CODE ANN. §§ 418.1015(b), 418.108; TEX. HEALTH & SAFETY CODE ANN. chs. 81, 121–22, 341; TEX. LOC. GOV'T CODE ANN. ch. 54.

The Governor invokes section 418.016(a) of the Texas Government Code as support for his authority. *See* TEX. GOV'T CODE ANN. § 418.016(a). Whether this provision of the Texas Disaster Act provides for such authority is a matter of statutory construction. Under the section, the Governor may "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster." *Id.*

We hold Section 418.016(a) does not provide the Governor with the authority he claims to suspend statutes that concern local control over public health matters or to prohibit local restrictions on face coverings. First, the statutes the Governor purports to suspend are not "regulatory statutes," subject to suspension under the Act. *See id.* ("The governor may suspend the provisions of any regulatory statute . . . ."). As specified by section 418.016(a), regulatory statutes "prescribe the procedures" for the conduct of state business, such as procedures for the proper return of mail-in ballots. *See id.*; *Abbott v. Anti-Defamation League Austin, Sw., and Texoma Regions*, 610 S.W.3d 911, 917–18 (Tex. 2020) (per curiam) (rejecting contention that Governor exceeded his authority under section 418.016(a) by acting under an improper motive when issuing a proclamation related to the return of mail-in ballots); *State v. El Paso Cty.*, 618

[3] Executive Order GA-38 § 4(a)–(b).
[4] Executive Order GA-38 § 4(b).

S.W.3d 812, 838 (Tex. App.—El Paso 2020, no pet.) (Rodriguez, J., dissenting) (stating that the language and context of section 418.016(a) shows that the Legislature intended to give "the Governor the ability to clear state-level bureaucratic logjams, expedite administrative action at state-level agencies, and depart from the regular order of state-level business if doing so would help facilitate a disaster response."). The statutes the Governor purports to suspend do not address state-level procedure or business; instead, they are "grant-of-authority statute[s] giving local authorities the leeway to act in their best independent judgment within the confines of their own jurisdictions." *El Paso Cty.*, 618 S.W.3d at 839–40 (Rodriguez, J., dissenting); *see, e.g.*, TEX. LOC. GOV'T CODE ANN. § 54.004 (providing local governments the power to enforce ordinances "necessary to protect health, life, and property and to preserve the good government, order, and security of the municipality and its inhabitants"); TEX. HEALTH & SAFETY CODE ANN. § 121.003(a) (allowing local governments to "enforce any law that is reasonably necessary to protect the public health."); *id.* § 122.006(1) (permitting local governments to "adopt rules to protect the health of persons in the municipality, including quarantine rules to protect the residents against communicable disease"); *id.* § 341.081 (stating local governments have the power "to enact . . . more stringent ordinances" than the minimum requirements for sanitation and health protection otherwise required by state law).

Moreover, section 418.016(a) only allows the Governor to suspend provisions of regulatory statutes prescribing procedures "for conduct of state business." *See* TEX. GOV'T CODE ANN. § 418.016(a). The health and safety laws outlined above grant authority to local governments to act on matters of local public health and do not pertain to "state business." *See, e.g.*, TEX. LOC. GOV'T CODE ANN. § 54.004 (stating local governments can enforce ordinances "necessary to protect health, life, and property and to preserve the good government, order, and security of the municipality and its inhabitants"); TEX. HEALTH & SAFETY CODE ANN. § 121.003(a) (stating local

governments can "enforce any law that is reasonably necessary to protect the public health."); *id.* § 122.006(1) (stating local governments can "adopt rules to protect the health of persons in the municipality, including quarantine rules to protect the residents against communicable disease"); *id.* § 121.021 (allowing a health authority who is appointed under Chapter 121 to administer laws relating to public health "within the appointing body's jurisdiction."); *id.* § 341.081 (stating local governments can "enact . . . more stringent ordinances" than the minimum requirements for sanitation and health protection otherwise required by state law).

By singling out "state business" and, later in the section, "state agenc[ies]," section 418.016(a) joins with other provisions of the Act to distinguish between state and local matters. The Act recognizes the Governor as the "commander in chief of state agencies, boards, and commissions having emergency responsibilities" during a disaster and the following recovery period. *See* TEX. GOV'T CODE ANN. § 418.015(c). Section 418.016(a) gives the Governor authority to suspend provisions, orders, or rules related to "state business" or "state agenc[ies]." *Id.* § 418.016(a). Other sections of the Act address "local governments," as distinct from the Governor and "state agencies." *See, e.g.*, TEX. GOV'T CODE ANN. § 418.002(4) (stating a purpose of chapter 418 is to "clarify and strengthen the roles of the *governor*, *state agencies*, the judicial branch of state government, and *local governments* in prevention of, preparation for, response to, and recovery from disasters") (emphasis added); *id.* § 418.002(9) (stating a purpose of chapter 418 is to "encourage *state agencies*, *local governments*, nongovernmental organizations, private entities, and individuals to adopt the goals of the strategic plan of the Federal Emergency Management Agency for preparing for, responding to, and recovering from a disaster that emphasize cooperation among federal agencies, *state agencies*, *local governments*, nongovernmental organizations, private entities, and individuals") (emphasis added).

If the Legislature had intended Section 418.016(a) to reach the ordinances and business of local governments, Section 418.016(a) would have stated an application to "political subdivision[s]" or "local governmental entit[ies]", which are terms defined in the Act. *See* TEX. GOV'T CODE ANN. § 418.004(6) ("'Political subdivision' means a county or incorporated city."); *id.* § 418.004(10) ("'Local government entity' means a county, incorporated city, independent school district, . . . or other entity defined as a political subdivision under the laws of this state"); *see also id.* § 418.017(a) ("The governor may use all available resources of state government *and of political subdivisions* that are reasonably necessary to cope with a disaster") (emphasis added).

We cannot say that the Legislature intended section 418.016(a) to apply to matters of local control over public health without mentioning this possibility. *See Hogan v. Zoanni*, No. 18-0944, 2021 WL 2273721, at *5 (Tex. June 4, 2021) ("[W]hen a statute is silent on a subject, we presume the Legislature purposefully excluded that language."). It would strain credulity to suppose the Legislature intended to abdicate its legislative prerogative, beyond the narrow regulatory and procedural matters specified, and permit the Governor to suspend all legislated grants of local authority on matters of public health without stating so directly. "The [L]egislature does not alter major areas of law . . . [with] no terms at all—'it does not, one might say, hide elephants in mouseholes.'" *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 438 (Tex. 2016) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also El Paso Cty.*, 618 S.W.3d at 839 (Rodriguez, J., dissenting) ("Could the Governor use this suspension power to suspend the 'regulatory' Texas Disaster Act in its entirety save for the provision allowing him to pass executive orders with 'the force and effect of law,' and then write a new set of rules for emergency management?"); *cf. In re Hotze*, No. 20-0430, 2020 WL 4046034, at *1 (Tex. July 17, 2020) (orig. proceeding) (Devine, J., concurring) (expressing concern about portions of the Act which give the Governor quasi-legislative authority, in conflict with the nondelegation doctrine).

Applying the plain language of the Act, we conclude the City and County demonstrated a probable right to relief that the Governor's power to suspend laws, orders, and rules under section 418.016(a) does *not* include the power to prohibit face-covering mandates that local governments may adopt to respond to public-health conditions or the power to suspend public-health statutes authorizing local governments to act for the benefit of public health. *See In re Abbott*, No. 05-21-00687-CV, 2021 WL 3610314, at *1 (Tex. App.—Dallas Aug. 13, 2021, orig. proceeding) (mem. op.) (denying Governor's petition for writ of mandamus challenging trial court's temporary restraining order enjoining certain portions of Executive Order GA-38 because county judge demonstrated probable right to relief on his claim that Governor did not have power to suspend Texas Disaster Act's grant of authority to county judges to declare and manage local disasters under section 418.108); *cf. El Paso Cty.*, 618 S.W.3d at 839 (Rodriguez, J., dissenting) ("The suspension power does not extend to Section 418.108, the provision which gives county judges and mayors the ability to perform some disaster management activities with autonomy at the local level.").

Because the Governor possesses no inherent authority to suspend statutes under the Texas Constitution and he exceeded the scope of statutory authority granted to him by the Legislature, his actions in issuing Executive Order GA-38 were done without authority.[5] The trial court did

[5] Separate from section 418.016(a), the Governor argues that he, as the "commander in chief" of the State's disaster response, has authority under section 418.018(c) to prohibit local governments from issuing face-covering mandates. *See* TEX. GOV'T CODE ANN. § 418.015(c) (stating Governor is the "commander in chief of state agencies, boards, and commissions having emergency responsibilities" during "a state of disaster and the following recovery period"). Section 418.018(c) states that the Governor "may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area." *Id.* § 418.018(c). The Governor fails to show how this provision provides him with the power to prohibit local governments from adopting rules to promote public health within their jurisdictions during a disaster. Further, the Act provides local officials with this same power to "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.* § 418.108(g).

not abuse its discretion by concluding that the City and County have a probable right of recovery on their *ultra vires* claim.[6]

INJURY IN THE INTERIM

Probable injury in the interim is established by tendering evidence of imminent harm, irreparable injury, and inadequate legal remedy. *Khaledi*, 126 S.W.3d at 283. "An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by a certain pecuniary standard." *Butnaru*, 84 S.W.3d at 204. Money damages are not available in an *ultra vires* action. *State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020). As a result of sovereign immunity, the only remedies available in an *ultra vires* action are injunctive and declaratory relief. *Id.*; *see Heinrich*, 284 S.W.3d at 368–69 ("We conclude that while governmental immunity generally bars suits for retrospective monetary relief, it does not preclude prospective injunctive remedies in official-capacity suits against government actors who violate statutory or constitutional provisions."). The Texas Supreme Court has held that 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. *Hollins*, 620 S.W.3d at 410.

Looking at the facts presented to the trial court at the time of the temporary injunction hearing, we hold that the City and County met their burden of showing irreparable harm. In weighing the evidence and reaching its decision to grant the temporary injunctive relief, the trial court reasonably could have credited expert testimony that supported findings that: (1) the Delta Variant was causing a rapid increase in COVID-19 infections and deaths in the City and County; (2) the City and County were expected to surpass previous peaks of cases and deaths during the

[6] Because we hold that the Governor acted *ultra vires* in issuing Executive Order GA-38, we do not examine the City and County's alternative arguments in support of the preliminary injunction.

pandemic; (3) the healthcare system in San Antonio and Bexar County was facing an immediate threat due to COVID-19 and there were fewer staffed beds in the hospital and ICU for COVID patients; (4) pediatric hospitalizations were increasing due to most children being unvaccinated and such pediatric hospitalization would continue to increase as school was about to begin at the time of the hearing; (5) a local outbreak of respiratory syncytial virus occurred among children around the time of the hearing, thereby increasing pediatric hospitalizations even more; (5) mask mandates in schools "will help reduce the number of deaths in the community" and that without a mask mandate, there will be a "bigger surge in hospitalizations in a few weeks;" (6) a San Antonio school that had returned to in-person schooling with only voluntary masking reported more COVID-19 cases in a few weeks than all of the previous school year due to "student-to-student in school transmission" and students not widely using masks; and (7) without mask mandates in place, the City and County would potentially need to halt essential services and close facilities. In its order granting the temporary injunction, the trial court stated that unless the Governor is temporarily restrained, the City and County "will suffer irreparable injury before trial on the merits through the inability to impose masking requirements to control the spread of the COVID-19 virus that threatens to overwhelm the capacity of the healthcare system in the City and County and to cause the City and County to reduce services to the community and furlough workers." *See* TEX. R. CIV. P. 683 (requiring order granting injunction to "set forth the reasons for its issuance").

In his brief on appeal, the Governor attempts to challenge the evidence presented at the temporary injunction hearing regarding injury by focusing on the lack of evidence presented relating to voluntary mask compliance. However, evidence at the hearing was presented showing that encouragement of mask wearing was insufficient. Dr. Woo testified that masking "was not widely used" during the first weeks of the school year when no mask mandate was in place and that a San Antonio school that had returned to in-person schooling with only voluntary masking

reported more COVID-19 cases in a few weeks than all of the previous school year due to "student-to-student in school transmission" and students not widely using masks. Dr. Woo stated that mask mandates in schools will help reduce the number of deaths in the community and is a necessary tool in order to avoid hospitalizations increasing in the weeks following the temporary injunction hearing.

Viewing the evidence in the light most favorable to the trial court's temporary injunction, we cannot conclude that the trial court abused its discretion by determining the evidence presented at the temporary injunction hearing demonstrated the City and County's probable, imminent, irreparable harm absent the temporary injunction. *See Fox*, 121 S.W.3d at 857.

STATUS QUO

"The issuance of a temporary restraining order, like the issuance of a temporary injunction, is to maintain the status quo between the parties." *Cannan v. Green Oaks Apartments, Ltd.*, 758 S.W.2d 753, 755 (Tex. 1988) (per curiam). The status quo to be preserved by the issuance of a temporary injunction is the last actual, peaceable, non-contested status which preceded the pending controversy. *San Miguel v. City of Windcrest*, 40 S.W.3d 104, 109 (Tex. App.—San Antonio 2000, no pet.). Where the acts sought to be enjoined violate an expressed law, the status quo to be preserved could never be a condition of affairs where the respondent would be permitted to continue the acts constituting that violation. *Id.*

The Governor argues that the trial court erred in granting the temporary injunction because the injunction departs from the status quo. The City and County argue that the continuation of illegal conduct cannot be justified as the preservation of status quo. We agree.

In the present case, the trial court's temporary injunction was entered after an evidentiary hearing and the trial court concluded that the City and County showed a probable right to relief on the merits of their *ultra vires* claim that the Governor acted outside of his authority. Enjoining

enforcement of the Governor's Executive Order GA-38 is necessary because allowing continued enforcement of the order would be unlawful. *See In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004) (orig. proceeding) ("[T]he continuation of illegal conduct cannot be justified as preservation of the status quo."); *see also City of San Antonio v. Vakey*, 123 S.W.3d 497, 502 (Tex. App.—San Antonio 2003, no pet.) (affirming temporary injunction enjoining the city from deducting money from an employee's paycheck as reimbursement for workers' compensation benefit payments because enjoining such conduct avoids "a condition of affairs where the respondent would be permitted to continue the acts constituting that violation"); *Public Utils. Bd. v. Central Power & Light Co.*, 587 S.W.2d 782, 790 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.) (affirming temporary injunction preventing municipal electric company from delivering electrical services to specific subdivision because trial court determined that "the acts to be enjoined [were] prima facie violations of the law").

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

STANDING

Finally, the Governor argues that the City and County do not have standing to sue him because he does not enforce Executive Order GA-38 and the City and County's injuries cannot be redressed by an order against him. We disagree.

"A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012). Texas's standing doctrine parallels the federal test for Article III standing, and we consider precedent from the United States Supreme Court when considering standing to sue in Texas courts. *Id.* at 154. To establish standing, a plaintiff must show: (1) an injury in fact, which is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) that is fairly traceable to the defendant's

conduct; and (3) that is likely to be redressed by the requested relief. *Id.* at 154–55 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

The standing inquiry begins with the plaintiff's alleged injury. *Id.* at 155. An individual must demonstrate a particularized interest distinct from the public at large. *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex. 2007). Here, the City and County meet the first element of standing because they have shown an actual injury resulting from the Governor's promulgation of Executive Order GA-38. Executive Order GA-38 suspends the City and County's authority to implement mask mandates, which their evidence shows to be critical to the public health and the healthcare system within the City's and County's jurisdictions. Dr. Woo testified on the benefit of face masks to save lives and avoid hospitalizations by preventing individuals from contracting the COVID-19 virus, and she testified that face masks would alleviate stress on the local healthcare system, which was on the brink of collapse at the time of the temporary injunction hearing.

The City and County also meet the second "traceability" element of standing. *See Heckman*, 369 S.W.3d at 154. To establish "traceability," a plaintiff must show that the injury complained of must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560–61. In this case, the City and County's injuries and the conduct they complain of are traceable to the Governor's actions to author and promulgate Executive Order GA-38 and enforceability provisions therein, which purportedly suspend local health ordinances and local authority over public health and impose penalties for violations of the Executive Order. Were it not for the executive order there would be no question as to the legality and local applicability of the City and County's ordinances. *See* TEX. GOV'T CODE ANN. § 418.012 ("[T]he 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."). Therefore, the conduct

the Plaintiffs complain of is traceable to the Governor. *See Mi Familia Vota v. Abbott*, 497 F. Supp. 3d 195, 210 (W.D. Tex. 2020) (holding that Governor Abbott was the proper defendant when plaintiffs sued him challenging Exemption 8 in Executive Order GA-29 because he was "the author and executive who promulgated the Executive Order and all exemptions and enforceability provisions therein").[7]

Finally, we conclude that the City and County have pled sufficient facts to establish that their injuries are "likely to be redressed by the requested relief." *See Heckman*, 369 S.W.3d at 155. The City and County seek 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 Act. Such declaratory relief will redress the City and County's injuries by allowing them to exercise their authority delegated by the Legislature, including authority to impose mask requirements within their jurisdictions. The City and County have alleged facts demonstrating a real controversy regarding the existence of a right and concrete injury from its deprivation, and they seek a declaration of this right and a remedy for its deprivation. Based on the allegations in the live petition, we conclude that the City and County have alleged sufficient

[7] The Governor argues that the City and County do not have standing to sue him because he does not have the power to enforce Executive Order GA-38 and cannot initiate prosecutions for violations of the Order. Executive Order GA-38 states that "the imposition of any such face-covering requirement by a local governmental entity or official constitutes a 'failure to comply' that is subject to a fine up to $1,000." Executive Order GA-38 § 4(b). Although the Order does not grant the Governor a direct enforcement role, this limitation does not defeat the traceability element for standing. *See K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010) (defining "enforcement" as involving "compulsion or constraint" and holding that a board denying malpractice claims for abortion services was the proper defendant because their conduct constituted threatened "enforcement" of an anti-abortion law); *Mi Familia Vota*, 497 F. Supp. 3d at 210. The Governor relies on *In re Abbott*, 601 S.W.3d 802 (Tex. 2020) (orig. proceeding) for his proposition that the City and County do not have standing due to his inability to initiate prosecutions for violations of Executive Order GA-38. However, this case is inapposite because it focused on the injury element of standing and whether allegations of possible prosecutions constituted injury in fact. *Id.* at 812. Here, the trial court reasonably could have credited evidence of actual injury resulting from the Governor's Executive Order GA-38 based on evidence of a surge of infections and deaths after local mask ordinances were suspended.

facts that, if taken as true, would confer standing for their claim that the Governor acted *ultra vires*. *See Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446–48 (Tex. 1993).[8]

CONCLUSION

We affirm the trial court's temporary injunction order.

Rebeca C. Martinez, Chief Justice

[8] In his second issue, the Governor argues that, when the trial court granted the City and County's application for a temporary injunction, it necessarily denied the Governor's plea to the jurisdiction. We hold that the challenge to the plea to the jurisdiction is outside the scope of this interlocutory appeal because the trial court did not rule on the plea. At the August 16, 2021 hearing on the temporary injunction, the City and County objected to the trial court hearing the plea to the jurisdiction and announced "not ready" on the plea to the jurisdiction because they stated they did not have sufficient notice of the plea before the hearing was set. The Governor recognized that "there wasn't sufficient notice time," but argued the plea should be heard because of judicial economy. The trial court granted the City and County's "not ready" on the plea and specified that it would only proceed with the motion for temporary injunction. Counsel for the Governor acknowledged the ruling, stating: "I understand that the plea to the jurisdiction is not being taken up right now." On this record, we hold the trial court did not rule on the Governor's plea. *See City of Rio Grande City, Tex. v. BFI Waste Servs. of Tex., L.P.*, 511 S.W.3d 300, 304 (Tex. App.—San Antonio 2016, no pet.) (holding trial court's order granting temporary injunction did not rule on jurisdictional questions presented in plea to the jurisdiction).