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2021 Winter Leadership Conference

Working from Home: Employee Work Issues and Claims in the Post-COVID-19 World

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CONCURRENT SESSION

2021

Working from Home: Employee Work Issues and Claims in the Post-COVID-19 World

Presenters:

- Emily Burkhardt Vicente, Hunton Andrews Kurth LLP, Los Angeles, CA
- Jordi Guso, Berger Singerman LLP, Miami, FL
- Jim A. Peko, GrantThornton LLP, New York, NY
- Robert V. Sartin, Frost Brown Todd LLC, Nashville, TN

White House Directive that OSHA issue an Emergency Temporary Standard

Requiring All Employers with 100+ Employees to Ensure their Workers are Vaccinated or Tested Weekly

The Department of Labor's Occupational Safety and Health Administration (OSHA) is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. OSHA will issue an Emergency Temporary Standard (ETS) to implement this requirement. This requirement will impact over 80 million workers in private sector businesses with 100+ employees.

Executive Order

BY THE
GOVERNOR OF THE STATE OF TEXAS

Executive Department
Austin, Texas
August 25, 2021

EXECUTIVE ORDER
GA 39

Relating to prohibiting vaccine mandates and vaccine passports subject to legislative action.

WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on March 13, 2020, certifying under Section 418.014 of the Texas Government Code that the novel coronavirus (COVID-19) poses an imminent threat of disaster for all Texas counties; and

WHEREAS, in each subsequent month effective through today, I have renewed the COVID-19 disaster declaration for all Texas counties; and

WHEREAS, I have issued a series of executive orders aimed at protecting the health and safety of Texans, ensuring uniformity throughout Texas, and achieving the least restrictive means of combatting the evolving threat to public health; and

WHEREAS, COVID-19 vaccines are strongly encouraged for those eligible to receive one, but have always been voluntary for Texans; and

WHEREAS, I issued Executive Orders GA-35 and GA-38, addressing COVID-19 vaccines administered under an "emergency use authorization" by prohibiting vaccine mandates from governmental entities and by prohibiting "vaccine passports" from governmental entities and certain others; and

WHEREAS, subsequently, on August 23, 2021, while the legislature was already convened in a special session, the U.S. Food and Drug Administration (FDA) approved one of the COVID-19 vaccines for certain age groups, such that this vaccine is no longer administered under an emergency use authorization for those age groups; and

WHEREAS, while this COVID-19 vaccine is now FDA-approved for certain age groups, others are not yet approved and still are administered under an emergency use authorization; and

WHEREAS, through Chapter 161 of the Texas Health and Safety Code, as well as other laws including Chapters 38 and 51 of the Texas Education Code, the legislature has established its primary role over immunizations, and all immunization laws and regulations in Texas stem from the laws established by the legislature; and

WHEREAS, in other contexts where the legislature has imposed immunization requirements, it has also taken care to provide exemptions that allow people to opt out of being forced to take a vaccine; and

WHEREAS, given the legislature's primacy and the need to avoid a patchwork of regulations with respect to vaccinations, it is appropriate to maintain the status quo of

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2 PM O'CLOCK

AUG 25 2021

prohibiting vaccine mandates through executive order while allowing the legislature to consider this issue while in session; and

WHEREAS, in this instance, given the legislature's prior actions, maintaining the status quo of prohibiting vaccine mandates and ensuring uniformity pending the legislature's consideration means extending the voluntariness of COVID-19 vaccinations to all COVID-19 vaccinations, regardless of regulatory status; and

WHEREAS, I am also adding this issue to the agenda for the Second Called Session of the legislature that is currently convened so that the legislature has the opportunity to consider this issue through legislation; and

WHEREAS, I will rescind this executive order upon the effective date of such legislation;

NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following on a statewide basis effective immediately:

1. No governmental entity can compel any individual to receive a COVID-19 vaccine. I hereby suspend Section 81.082(f)(1) of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that no governmental entity can compel any individual to receive a COVID-19 vaccine.

2. State agencies and political subdivisions shall not adopt or enforce any order, ordinance, policy, regulation, rule, or similar measure that requires an individual to provide, as a condition of receiving any service or entering any place, documentation regarding the individual's vaccination status for any COVID-19 vaccine. I hereby suspend Section 81.085(i) of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to enforce this prohibition. This paragraph does not apply to any documentation requirements necessary for the administration of a COVID-19 vaccine.

3. Any public or private entity that is receiving or will receive public funds through any means, including grants, contracts, loans, or other disbursements of taxpayer money, shall not require a consumer to provide, as a condition of receiving any service or entering any place, documentation regarding the consumer's vaccination status for any COVID-19 vaccine. No consumer may be denied entry to a facility financed in whole or in part by public funds for failure to provide documentation regarding the consumer's vaccination status for any COVID-19 vaccine.

4. Nothing in this executive order shall be construed to limit the ability of a nursing home, state supported living center, assisted living facility, or long-term care facility to require documentation of a resident's vaccination status for any COVID-19 vaccine.

5. This executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster. Pursuant to Section 418.016(a) of the Texas Government Code, I hereby suspend Sections 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E of the Texas Health and Safety Code, and any

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SECRETARY OF STATE
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other relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order.

This executive order supersedes only paragraph No. 2 of Executive Order GA-38, and does not supersede or otherwise affect the remaining paragraphs of Executive Order GA-38. This executive order shall remain in effect and in full force unless it is modified, amended, rescinded, or superseded by the governor. This executive order may also be amended by proclamation of the governor.

Given under my hand this the 25th day of August, 2021.

GREG ABBOTT
Governor

ATTESTED BY:

JOE A. ESPARZA
Deputy Secretary of State

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
2PM O'CLOCK
AUG 25 2021

Cause No. DC-21-10101

J.J. Koch, *Plaintiff,* v. Clay Jenkins, in his Official Capacity *Counter-Plaintiff and Defendant,* v. Greg Abbott, in his Official Capacity as Governor of the State of Texas, *Counter-Defendant.*	IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 116th JUDICIAL DISTRICT

TEMPORARY RESTRAINING ORDER

This Court, having heard the Application for Temporary Restraining Order filed by Counter-Plaintiff and Defendant Clay Jenkins in his official capacity as County Judge of Dallas (referred to as "Judge Jenkins") and all evidence and arguments of counsel with notice properly provided to Plaintiff J.J. Koch and Counter-Defendant Greg Abbott in his official capacity as Governor of the State of Texas, finds that (1) Counter-Plaintiff and Defendant Clay Jenkins has shown a probable right to the relief sought in his First Supplemental Counterclaim, Request for Declaratory Judgment, and Request for Temporary Restraining Order and Temporary Injunction ("Application"); and (2) Judge Jenkins and the Citizens of Dallas will suffer immediate, imminent, and irreparable harm for which there is no adequate remedy at law if a temporary restraining order does not issue against Counter-Defendant Governor Abbott.

The Court is of the opinion that immediate and irreparable injury, loss, or damage will result to Judge Jenkins and the citizens of Dallas County if Judge Jenkins is not allowed to exercise his statutory authority under Texas Government Code §418.108(g) and the Dallas County Declaration of Local Disaster to mandate face coverings and other mitigation strategies within

Dallas County, including within the Commissioners Court and other public places. Judge Jenkins and the citizens of Dallas County have and will continue to be damaged and injured by Governor Abbott's conduct, including, but not limited to Governor Abbott's enforcement of his Executive Order GA-38. These findings are based on the following facts[1]:

1. Clay Jenkins is the duly elected Dallas County Judge. Judge Jenkins serves as the County chief-executive and presiding officer of its governing body. In his role, Judge Jenkins leads the County government in providing, among other services, safety protection for all citizens of Dallas County. As the chief presiding officer of Dallas County, Judge Jenkins is authorized to take certain actions as provided in the Texas Disaster Act for the safety and welfare of Dallas County citizens. Judge Jenkins has standing to bring this suit and to asset all claims.

2. The Texas Disaster Act clarifies the roles of various governmental authorities in responding to disasters. The COVID-19 epidemic falls within the purview of the Texas Disaster Act which sets forward the following among the purposes of the Act:

> (1) to reduce vulnerability of people and communities of this state to damage, injury, and loss of life…resulting from natural or man-made catastrophes;
>
> (2) to prepare prompt and efficient…care, and treatment of persons… victimized or threatened by disaster;
>
> (3) provide a setting conductive to the rapid and orderly restoration and rehabilitation of persons…affected by disasters;
>
> (4) to clarify and strengthen the roles of the governor…and local governments in prevention of, preparation for, response to and recovery from disasters;

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[1] The Court's findings of fact, in large part, are based on the Affidavit of Philip Huang, MD, MPH, the Director and Health Authority for the Dallas County Health and Human Services Department, together with the attachments thereto.

(5) authorize and provide for cooperation in disaster mitigation, preparedness, response, and recovery; and

(6) authorize and provide for coordination of activities relating to disaster mitigation, preparedness, response, and recovery by agencies and officers of this state, and similar state-local...activities in which the state and its political subdivisions may participate....[2]

3. County Judge Jenkins declared a local disaster on March 12, 2020. This declaration provided Judge Jenkins with legislative authority to perform certain acts under §418.108 of the Texas Government Code, including to control whether people are required to wear face coverings in public or in the Commissioners' Court.

4. On July 29, 2021, Greg Abbott issued "Executive Order No. GA-38 relating to the continued response to the COVID-19 disaster." ("GA-38"). In that Order, Governor Abbott relied, in part, on Sections 418.016 (a) and 418.018 (c) of the Texas Government Code as authority for the issuance of GA-38.

5. In GA-38, Governor Abbott ordered, among others, that "...no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering" and that "...any conflicting local order in response to the COVID-19 disaster, and all relevant laws are suspended to the extent necessary to preclude any such inconsistent local orders." Counter-Defendant Abbott's Executive Order No. 38 also provided: "...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..." Counter-Defendant Abbott further ordered that any face-covering requirements (absent limited exceptions)

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[2] See Tex.Gov't Code Ann. § 418.002.

imposed by any local governmental entity or official be superseded by his Order and that any laws that allow local government officials from enacting their own emergency declarations be suspended.

6. Dallas County is currently experiencing a surge in infections of 2019 novel coronavirus (COVID-19). As of August 6, 2021, Dallas County Health and Human Services is reporting a cumulative total of 276,813 confirmed cases of COVID-19 in Dallas County. The cumulative total probable case count in Dallas County is 46,060 cases. The total number of COVID-19 cases or probable cases is 322,873. Dallas County has experienced 4,224 deaths from COVID-19 as of August 6th.

7. Beginning in July of 2021, the number of positive PCR tests reported to Dallas County Health and Human Services began to rise dramatically. During the month of July 2021, positive PCR tests climbed from near 5% to almost 25%. Since the end of July and into August, the positive tests rate continues to climb.

8. The number of cases is growing quickly in Dallas County. From July 18, 2021, to July 31, 2021, Dallas County experienced approximately 360 cumulative COVID-19 cases per 100,000 individuals. The total new cases reported during that same period in Dallas County was 9,484. The provisional seven-day average of daily new confirmed and probable cases (by date of test collect ion) for CDC week 30 (week ending 7/31/2021), was 806, which is a rate of 30.6 daily new cases per 100,000 residents.

9. There continues to be risk to unvaccinated populations in Dallas County from the COVID-19 pandemic. For example, as of July 31, 2021, about 84% of COVID-19 cases diagnosed were Dallas County residents not fully vaccinated.

10. Dallas County medical infrastructure and hospitals are beginning to experience the strain of the surge of infections. As of August 8, 2021, Dallas County had 16 available staffed

adult ICU beds. As of August 9, 2021, Dallas County has approximately 682 confirmed COVID 14 inpatient hospitalizations with only 14 available staffed adult ICU beds.

11. According to UT Southwestern 's most recent COVID- 19 forecast and modeling as of August 9, 2021, the rate of COVlD- 19 infections in Dallas County is reaching or has reached exponential growth rates. COVID-19 hospitalizations have increased in Dallas County by over 101% over the past two weeks and it is estimated that total COVID-19 hospitalizations are predicted to reach over 1,500 hospitalized cases by August 26.

12. Judge Jenkins regularly relies on information provided to him by various business leaders, community activists, healthcare providers and scientists including Philip Huang, MD, MPH, the Director and Health Authority for the Dallas County Health and Human Services Department. In making decisions to protect the safety and well-being of Dallas County Citizens, Judge Jenkins bases his decisions on sound medical evidence and is driven by the most up to date public and non-public data from, among others, the Dallas County Health and Human Services department, the University of Texas Southwestern Medical Center, and North Central Texas Trauma Regional Advisory Council.

13. As a result of the information shared with Judge Jenkins, on August 3, 2021, Judge Jenkins moved the county-wide risk level from color-coded Orange: Extreme Caution to the most serious color-coded risk level of Red: High Risk of Transmission. This move was made to assist in fighting the escalating trajectory or cases and the spread of the Delta-variant of COVID-19, which appears to account for approximately 78% of sequenced strains of COVID-19 in the last two weeks from the UT Southwestern Medical Center.

14. Judge Jenkins is deeply concerned about the health and safety and welfare of the citizens, including the unvaccinated and children, of Dallas County based on UT Southwestern 's

most recent COVID- 19 forecast and modeling and the reported exponential growth rates. According to information on which Judge Jenkins relies, COVID-19 hospitalizations have increased in Dallas County by over 101% over the past two weeks and it is estimated that total COVID-19 hospitalizations are predicted to reach over 1,500 hospitalized cases by August 26.

15. Governor Abbott also remains concerned about the impact of the current surge of COVID-19 infections as evidenced by his directive to state agencies to use staffing agencies to find additional medical staff from outside of Texas and his request to the Texas Hospital Association that hospitals postpone elective medical procedures. These actions are inconsistent with a refusal to permit local governmental authorities to implement reasonable mitigation measures such as face mask requirements and establish that GA-38 is not necessary action to combat the pandemic.

16. Dallas County has higher infection and transmission rates than other counties and a localized response in Dallas County must be different than in a county that is not experiencing the exponential growth of COVID-19 infections and transmission rates that Dallas County experiencing.

17. Judge Jenkins cannot be precluded from implementing the mitigation strategies he believes are sound, reliable, and backed by scientific evidence on which he relies and must be able to mitigate the damage, injury, and potential loss of life related to the COVID-19 virus. Judge Jenkins and the Citizens of Dallas County will be irreparably harmed if Judge Jenkins is barred from engaging in mandatory mitigation practices, including face covering and mask mandates. Face coverings and masks are an effective mitigation strategy and can further reduce the spread of COVID-19.

18. Under the Texas Disaster Act, County Judge Jenkins is vested with authority to issue orders to protect the safety and welfare of Dallas County Citizens, which includes among other mitigation strategies, the option to mandate face coverings and masks in public. Fighting the virus is a public health crisis that threatens the lives and safety of Dallas County citizens. Dallas County citizens will be irreparably harmed if Judge Jenkins cannot initiate appropriate mitigation strategies, including the initiation of face covering and mask mandates to stop the transmission of COVID-19. The harm of not being able to initiate such safeguards strongly outweighs the harm of complying with Governor Abbott's Executive Order GA-38.

It is, therefore, **ORDERED, ADJUDGED, and DECREED** that that the Clerk of this Court issue a Temporary Restraining Order, operative until August 24, 2021, and pending the hearing ordered below, restraining Counter-Defendant Greg Abbott in his official capacity as Governor of the State of Texas or any of his agents, servants, employees, attorneys, representatives, or any persons in active concert or participation with Counter-Defendant Abbott who receive actual notice of this Order from:

> Enforcing of Governor Abbott's Executive Order No. GA-38, paragraphs (3)(b), (3)(g), and (4).

The Court hereby sets the hearing on Plaintiff's application for temporary injunction for the 24th day of August 2021 at 1:00 p.m. in this Court. The purpose of the hearing shall be to determine whether this Temporary Restraining Order should be made a temporary injunction pending a full trial on the merits; and

Bond is set at FIVE HUNDRED DOLLARS ($500.00). This Temporary Restraining Order shall enter upon Counter-Plaintiff and Defendant Clay Jenkins posting said bond with the clerk of this Court and shall expire as set forth below.

This Order expires on the 24TH day of August 2021, unless otherwise agreed by the parties or ordered by the Court.

IT IS SO ORDERED.

SIGNED this the 10th day of August 2021 at 6:43 p.m.

JUDGE PRESIDING

TAB 2:
EXECUTIVE ORDER GA-38

ACCEPTED
05-21-00687-CV
FIFTH COURT OF APPEALS
DALLAS, TEXAS
8/11/2021 4:51 PM
LISA MATZ
CLERK

05-21-00687-CV

No. ___

In the Court of Appeals for the Fifth Judicial District Dallas, Texas

FILED IN
5th COURT OF APPEALS
DALLAS, TEXAS
8/11/2021 4:51:48 PM
LISA MATZ
Clerk

In re Greg Abbott, in his Official Capacity as Governor of the State of Texas,

Relator.

On Petition for Writ of Mandamus
to the 116th Judicial District Court, Dallas County

PETITION FOR WRIT OF MANDAMUS

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Identity of Parties and Counsel

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Appellate and Trial Counsel for Relator:
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Respondent:
The Honorable Tonya Parker, 116th Judicial District Court, Dallas County

Real Parties in Interest:
Clay Jenkins, County Judge of Dallas County

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Cases:

Statutes:

Record References

"App." refers to the appendix to this petition. "MR" refers to the mandamus record.

Statement of the Case

Nature of the underlying proceeding:	Dallas County Judge Clay Jenkins filed a counterclaim suit against the Relator Governor Greg Abbott seeking injunctive and declaratory relief prohibiting the Governor from enforcing Executive Order GA-38, which forbids local government entities from requiring individuals to wear face coverings. MR.9-82.
Respondents:	The Honorable Tonya Parker, 116th Civil District Court, Dallas County
Respondents' challenged actions:	The trial court issued a temporary restraining order enjoining the Governor from enforcing GA-38 anywhere in the State. MR.1-9.

Statement of Jurisdiction

This Court has jurisdiction under Texas Government Code section 22.221(b)(1).

Issues Presented

Whether the respondent clearly abused its discretion in enjoining the enforcement of Governor Abbott's Executive Order GA-38 issued pursuant to his authority under the Texas Disaster Act.

INTRODUCTION

Dallas County's petition and the trial court's temporary restraining order depend on the premise that when Governor Greg Abbott and Dallas County Judge Clay Jenkins issue contradictory emergency orders, Jenkins's controls. The Legislature has mandated precisely the opposite. The Texas Disaster Act of 1975 definitively makes the Governor the "commander in chief" of the State's response to a disaster, Gov't Code § 418.015(c), and empowers him to issue executive orders that have the "force and effect of law." *Id.* § 418.012.

Governor Abbott has done so. On July 29, Governor Abbott issued Executive Order GA-38, which aims to strike a balance between "the ability of Texans to preserve livelihoods" and "protecting lives" through "the least restrictive means of combatting the evolving threat to public health." MR.84, 86. GA-38 further suspends the authority of local officials to issue orders which contradict GA-38—including Judge Jenkins. And the Disaster Act only empowers local officials, including Judge Jenkins, to act as an agent of the Governor in addressing a disaster. No agent may contradict the direction of his principal.

Nonetheless, Dallas County Judge Clay Jenkins has unilaterally taken it on himself to not only exercise powers proper belonging to the Governor, but to do so on a statewide basis through a temporary restraining order that blocks the Governor from implementing various provisions of GA-38 anywhere in the State. This order vests local officials in each Texas's 254 counties with the authority to decide if and how they will respond to a statewide emergency, which is precisely the opposite of the

hierarchy the Disaster Act contemplates. This was a clear abuse of discretion over which the Governor has no adequate remedy on appeal.

If not vacated, the district court's order will cause severe and irreparable harm to the State. The order reaches far beyond the parties to this lawsuit by purporting to enjoin the Governor on a statewide basis. And the Governor lacks an adequate remedy on appeal: the hearing on Judge Jenkins's temporary injunction is two weeks away, by which point innumerable local officials and school districts across the State will have ignored the Governor's pandemic response, imposing mandates on Texans that GA-38 has forbidden. Texas's effort to carry out an orderly, cohesive, and uniform response to the COVID-19 pandemic will have shattered. Immediate relief is necessary to prevent this inversion of the Disaster Act.

Statement of Facts

A. The Texas Disaster Act of 1975 "provide[s] an emergency management system embodying all aspects of predisaster preparedness and postdisaster response." Gov't Code § 418.002(7). This comprehensive regime "provide[s] a setting conducive to the rapid and orderly restoration and rehabilitation of persons and property affected by disasters," *id.* § 418.002(3), by "clarify[ing] . . . the roles of the governor, state agencies, the judicial branch of state government, and local governments in . . . response to, and recovery from[,] disasters," *id.* § 418.002(4).

True to its stated purpose, the Act charges the Governor with determining whether (and declaring that) a disaster has occurred. *Id.* § 418.014(a). "During a state of disaster and the following recovery period," the Governor "is the commander in chief" of the State's disaster response, *id.* § 418.015(c), "responsible for

meeting . . . the dangers to the state and people presented by disasters." *Id.* § 418.011(1).

The Act vests the Governor with extraordinary powers to meet that responsibility. The Governor may issue executive orders "the force and effect of law." *Id.* § 418.012. He may suspend "any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency" if these "provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster." *Id.* § 418.016(a). The Governor "may control ingress and egress to and from a disaster area and the movement of persons and occupancy of premises in the area." *Id.* § 418.018(c). And he may "use all available re-sources of state government and of political subdivisions that are reasonably necessary to cope with a disaster," *id.* § 418.017(a), including "temporarily reassign[ing] resources, personnel, or functions" of state executive departments or agencies. *Id.* § 418.017(b).

The Act also enables certain local officials to exercise the Governor's powers subject to his direction and control. Under the Act, the "presiding officer of the governing body" of an incorporated city or county is deemed the "emergency management director" for that political subdivision. *Id.* § 418.1015(a). That director must "serve[] as the governor's designated agent in the administration and supervision of duties under this chapter." *Id.* § 418.1015(b). Such a director "may exercise the powers granted to the governor under this chapter on an appropriate local scale." *Id.* The presiding officer of a political subdivision may also "declare a local state of disaster." *Id.* § 418.108(a). Consistent with section 418.1015(a)'s directive that such an officer

acts as the Governor's agent, declaring such a local disaster triggers local or inter-jurisdictional emergency aid plans, allows the officer to evacuate the affected area, and enables the officer to control the movement of persons and occupancy of premises in that area. *Id.* § 418.108(d), (f), (g).

B. To discharge his statutory responsibilities under the Disaster Act, Governor Abbott has issued a series of orders over the course of the last year-and-a-half to mitigate the risks from COVID-19 and to provide for a speedy and uniform statewide recovery. On July 29, the Governor issued Executive Order GA-38, which directs the State's "continued response to the COVID-19 disaster" in the light of the wide availability of COVID-19 vaccines. MR.84. This Executive Order strikes a balance between "the ability of Texans to preserve livelihoods" and "protecting lives" through "the least restrictive means of combatting the evolving threat to public health." MR.84, 86. The Executive Order "strongly encourage[s] [Texans] as a matter of personal responsibility to consistently follow good hygiene, social-distancing, and other mitigation practices," but it also provides that "no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering." MR.84, 86. This provision expressly "supersedes any conflicting local order in response to the COVID-19 disaster" and "suspend[s]" "all relevant laws . . . to the extent necessary to preclude any such inconsistent local orders." MR.86.

To ensure "uniformity" in the State's response to the COVID-19 pandemic, GA-38 also provides that "[n]o governmental entity, including a county, city, school district, and public health authority, and no governmental official may require any

person to wear a face covering or to mandate that another person wear a face covering." MR.87.[1] This provision explicitly "supersede[s] any face-covering requirement imposed by any local governmental entity or official, except as explicitly provided." MR.87. GA-38 further suspends sections 418.1015(b) and 418.108 of the Government Code—sections designating local officials as the Governor's agents and allowing for local emergency declarations—"[t]o the extent necessary to ensure that local governmental entities or officials do not impose any such face-covering requirement." MR.87.

C. Though GA-38 has existed for weeks—and analogous predecessor orders have been in place for months—Dallas County Judge Clay Jenkins filed the counterclaim underlying the current order on August 10. He requested a temporary restraining order, a temporary injunction, and a declaration that Judge Jenkins "has the full authority and discretion . . . to order mask mandates in the Commissioners court or in public"; that GA-38 "exceed[s] the authority delegated" to the Governor; and that Governor Abbott lacks the statutory authority to "prevent[] county judges or mayors from issuing orders . . . requiring face coverings." MR.17.

Late in the evening on August 10, the 116th District Court issued a temporary restraining order forbidding the Governor from enforcing "paragraphs (3)(b), (3)(g), and (4)" of GA-38, which together prevent local governmental entities from imposing mask mandates in derogation of the Governor's Executive Order. MR.7 (at 7). The trial court did not address the broad scope of the Governor's powers under the

[1] There are exceptions in particular health care and criminal justice contexts, but they are not relevant here. MR.86-87.

Disaster Act. Instead, the trial court issued a statewide injunction based on its conclusion "[u]nder the Texas Disaster Act, *Judge Jenkins* is vested with authority to issue orders to protect the safety and welfare of Dallas County Citizens," which includes "the option to mandate face coverings and masks in public." MR.7 (emphasis added). The trial court justified this sweeping order on the ground that "[t]he harm of not being able to initiate such safeguards strongly outweighs the harm of complying with Governor Abbot's Executive Order GA-38." MR.7.

ARGUMENT

Mandamus relief is available where the trial court's error "constitute[s] a clear abuse of discretion" and the relator lacks "an adequate remedy by appeal." *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). Both elements are met here.

I. The Trial Court Clearly Abused Its Discretion by Granting a Temporary Restraining Order.

A. The Legislature Deputized the Governor, Not a County Judge, to Manage Statewide Disasters.

The trial court's order concludes that a County Judge's view of how best to manage the COVID-19 pandemic should trump the Governor's on a statewide basis. This holding cannot be reconciled with the Disaster Act. The Governor—not a county judge—"is the commander in chief" of the State's disaster response. Gov't Code § 418.015(c). And as part of that authority section 418.018(c) of the Government Code plainly and unambiguously provides that "*[t]he Governor* may control ingress and egress to and from a disaster area and the movement of persons and occupancy of premises in the area." Gov't Code § 418.018(c) (emphasis added).

GA-38's prohibition on local governments implementing mask mandates falls comfortably within this broad statutory language. Regulating the wearing of face masks qualifies as an exercise of the Governor's power to "control . . . ingress and egress to a disaster area" and the "occupancy of premises in the area." Gov't Code § 418.018(c). After all, Dallas County, no less than Texas's other 253 counties, falls within the "disaster area": GA-38 "renew[s] the disaster declaration for *all* Texas counties." MR.84 (emphasis added). And GA-38's prohibition on mask mandates controls "ingress and egress" to the locations in which Judge Jenkins wishes to implement a mask mandate, MR.17, and the "occupancy of those premises" because it authorizes the entry of individuals and occupancy of premises that would be otherwise prohibited under Judge Jenkins's preferred regime.

Judge Jenkins cannot rely on similar language in Government Code, section 418.108(g)—which permits a county judge to "control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge"—to supersede an order issued by the Governor under section 418.180. "Texas is faced with a statewide disaster, not simply a local one." *State v. El Paso County*, 618 S.W.3d 812, 823 (Tex. App.—El Paso 2020, no pet.). And in such a scenario, "the Legislature inserted a tie breaker and gave it to the governor in that his or her declarations under [s]ection 418.012 have the force of law." *Id.* at 822. "[N]o similar power [is] accorded to county judges." *Id.* And were Judge Jenkins to try to assert such power by promulgating a mask mandate, the Governor's Executive Order would control because "state law will eclipse inconsistent local law." *Id.* (citing *City of San Antonio v. City of Boerne*, 111 S.W. 3d 22, 28 (Tex. 2003)).

B. Judge Jenkins May Only Act as the Governor's Agent Under the Disaster Act.

Judge Jenkins cannot arrogate to himself the power to manage the response to a statewide emergency falters for an additional reason: to the extent that he may act under section 418.108 to address a locally-declared disaster, he can only do so as the Governor's agent. Basic principles of agency law prohibit Judge Jenkins from contradicting GA-38.

To resolve any uncertainty as to the chain-of-command and scope of local officials' power during a statewide disaster like the COVID-19 pandemic, the Disaster Act directs that "[t]he presiding officer of the governing body of an incorporated city or a county . . . is designated as the emergency management director," Gov't Code § 418.1015(a), and that those "emergency management director[s] serve[] as the governor's designated agent in the administration and supervision of duties under this chapter," *id.* § 418.1015(b).

Giving the word "agent" its usual meaning, *TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011), local officials are powerless to countermand the Governor's emergency orders: "black letter law teaches that an agent is subject to the control of the principal, and not vice versa." *El Paso Cnty.*, 618 S.W.3d at 820-21; *see also Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 697 (Tex. 2017); *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 590 (Tex. 2017); Restatement (Third) of Agency § 1.01 cmt. f (2006).

The statute's "structure, subject matter, [and] context" are also consistent with the understanding that local officials' emergency power under section 418.108(g) is

derivative of the Governor's. *State v. Atwood*, 16 S.W.3d 192, 195 (Tex. App.—Beaumont 2000, pet. ref'd). Consider, for example, section 418.108(i). That section provides a textual limit on the scope of local officials' emergency power: an official may not "include a restriction that exceeds a restriction authorized by section 352.051 [of the] Local Government Code" that lasts more than "60 hours." Gov't Code § 418.108(i)(1). But that limit does not apply to their principal, the Governor, who is empowered to grant them an extension. *See id.* § 418.108(i)(1), (2).

Or take section 418.108(h), which explains that "[f]or purposes of [s]ubsections (f) and (g)," "to the extent of a conflict between decisions of the county judge and the mayor, the decision of the county judge prevails." *Id.* § 418.108(h)(2). Subsections (f) and (g) grant local officials authority to order evacuations and "control ingress to and egress from a disaster area," *id.* § 418.108(f), (g)—powers that are also available to the Governor. *See id.* § 418.020(e) (describing shelter for persons "evacuated by . . . order of the governor"); *id.* § 418.018(c) ("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."); *El Paso Cnty.*, 618 S.W.3d at 820-23. Still, subsection (h) only deals with conflict between a county judge and the mayor—not with the Governor. That is because it would be superfluous—as the principal, the Governor's decisions necessarily prevail.

The Governor's duties confirm this result. He is "the commander in chief of state agencies, boards, and commissions having emergency responsibilities." Gov't Code § 418.015(c). To that end, the "governor may use all available resources of state government and of political subdivisions that are reasonably necessary to cope

with a disaster." *Id.* § 418.017(a). These provisions establish the Governor's authority over local officials exercising emergency responsibilities under section 418.1015: it has long been the law that a "county is merely an arm of the state. It is a political subdivision thereof. In view of the relation 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." *Childress Cnty.*, 92 S.W.2d at 1015; *accord El Paso Cnty.*, 618 S.W.3d at 820-23. Again, the Texas Disaster Act creates a chain of command with the Governor at its apex; it does not countenance local officials attempting to substitute their views about how to handle an emergency for those of the State's commander in chief.

Finally, lest there be any doubt, the Act clarifies that "[t]he *Governor* is responsible for meeting . . . the dangers to the state and people presented by disasters"—and accountable to voters for failing to do so. Gov't Code § 418.011(1) (emphasis added). By statute, he has a broad range of powers to satisfy this responsibility, some of which overlap with the emergency power of local officials. *Supra* at 2-4, 6-7. If local officials could supersede any of the Governor's emergency orders merely by claiming that a statewide emergency is also a local one, the Governor would quickly find himself unable to discharge his statutory duties. Because an Act cannot both task the Governor with a duty and simultaneously empower local officials to frustrate it, there "ha[s] to be a tie-breaker"—in this instance, the Governor. *See El Paso Cnty.*, 618 S.W.3d at 822; *cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) (holding that the President cannot fulfil his constitutional obligation to "take Care that the Laws be faithfully executed" if he is unable to supervise the officers who execute them). After all, under the Act, it is the "*legislature by law*"—

not a county judge and city mayor by local order—that may terminate the Governor's use of his emergency powers. Gov't Code § 418.014(c) (emphasis added).

Whether the subordinate nature of local officials' emergency powers is textual, structural, or both, it prevents local officials' attempts to issue orders that conflict with those of the Governor. For these reasons, § 418.108 does not give Judge Jenkins the power to issue any orders contrary to GA-38.

C. The Governor Suspended the Statutory Provision upon which Judge Jenkins Relies to Craft Local Rules for a Statewide Disaster.

Section 418.018 also cannot give Judge Jenkins authority to make local rules to manage a statewide disaster because GA-38 validly suspends that provision under these circumstances.

"[I]n order to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with" the Governor's Executive Order, section 5(a) of GA-38 invokes the Governor's statutory power under section 418.016(a) of the Government Code to suspend section 418.108 of the Government Code. That provision—suspended here—is what authorizes "the governing body of a political subdivision" to declare and manage a local state of disaster in the first place. MR.87-88. Because Judge Jenkins wishes to rely on section 418.108 to impose mask mandates "in the Commissioners Court or in public," he asked the trial court to countermand the Governor by holding that the Governor lacked the statutory authority to suspend section 418.108. MR.17, 21. The trial court did so based on its view that Judge Jenkins's order is "sound, reliable, and backed by scientific evidence" and thus must be consistent with the Disaster Act, which "vest[s]

him with authority to issue orders to protect the safety and welfare of Dallas County Citizens," MR.6.

But the Legislature did not empower the trial court to sit in judgment of the comparative worth of the Governor's and County Judge's policies. The Disaster Act supplies the Governor with the power to "suspend the provisions of any regulatory statute prescribing the procedures for the 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." Gov't Code § 418.016(a). It is the Governor, not the trial court, which the Legislature has empowered to decide whether a given order—or the decision to suspend a given law—is "sound" or "reliable."

Though the trial court did not grapple with the Governor's suspension authority, Judge Jenkins's petition offered two arguments why it would not apply: (1) that GA-38's provisions forbidding local governments from imposing mask mandates do not qualify as a law about "*state* business or rules of *state agencies*," MR.14 (emphasis original); (2) that a mask-mandate prohibition does not "directly impact efforts to fight a disaster," MR.15. Neither argument has merit.

1. Section 418.108 is a law addressing the conduct of "state business"—particularly when invoked to justify a statewide temporary restraining order that permits local officials to deviate from the State's response to a statewide emergency.

Because the Disaster Act "does not define the term 'state business,'" the starting point is that term's "common, ordinary meaning." *El Paso County*, 618 S.W.3d at 823 (citing *Jaster v. Comet II Constr., Inc.*, 438 S.W.3d 556, 563 (Tex. 2014)). Texas

courts "[e]schew[] a hyper-technical definition of the term 'state business.'" *Id.* at 824. And "common dictionary meanings," *id.*, for the term "business" in the context of the phrase "state business" include "purposeful activity: activity directed toward some end." *Webster's*, *supra*, at 302; *see also, e.g.*, *Business*, Oxford Dictionaries, https://tinyurl.com/2xwhk38v (online ed.) (giving "government business" as an example of "[w]ork that has to be done or matters that have to be attended to"). GA-38's mask-mandate prohibition easily "fits the classic definition of" state business, *El Paso Cnty.*, 618 S.W.3d at 824: it is a regulation aimed at achieving the Governor's goal of striking a balance between "the ability of Texans to preserve livelihoods" and "protecting lives" through "the least restrictive means of combatting the evolving threat to public health." MR.84, 86.

It is of no moment that GA-38's mask-mandate prohibition applies at the local level: as the Eighth Court recently explained, the term "state business" does not "mean only the activities of state agencies and actors." *El Paso Cnty.*, 618 S.W.3d at 824. To the contrary, "state business" often occurs at a local level because "the state may use . . . a county as its agent in the discharge of the State's functions and duties." *Childress County v. State*, 92 S.W.2d 1011, 1015 (Tex. 1936); *cf. supra* at 8-11. Thus, "had the Legislature meant to so limit the term, it would have said 'official state business,' as it has done in many other statutes." *El Paso Cnty.*, 618 S.W.3d at 824 (collecting statutes); *see id*. at 824 (looking to "the use and definitions of the word in other statutes and ordinances"). It did not do so in the Disaster Act, which uses "state agency" when it means "state agency." *See, e.g.*, Gov't Code §§ 418.013(b), .0155(b), .016(e). Therefore, a rule limiting the Governor's authority to suspending

actions by state agencies would ignore the "cardinal rule of statutory construction" that "different words used in the same . . . statute are assigned different meanings whenever possible." *Liverman v. State*, 448 S.W.3d 155, 158 (Tex. App.—Fort Worth 2014), *aff'd*, 470 S.W.3d 831 (Tex. Crim. App. 2015).

2. Likewise, there is no merit to Judge Jenkins's suggestion that GA-38's mask mandate prohibition does not "directly impact efforts to fight a disaster," MR.15 (Pet. at 7). The Texas Supreme Court has already rejected this argument as taking too narrow a view of the Governor's power: In *Abbott v. Anti-Defamation League Austin, S.W., & Texoma Regions*, it expressly held that the Governor is not required to prevent the transmission of COVID 19 at all costs but may instead consider a variety of policy goals when determining what statutes may "prevent, hinder, or delay necessary action in coping with a disaster." 610 S.W.3d 911, 918 (Tex. 2020). There, plaintiffs argued that a gubernatorial order restricting the number of delivery locations for mail-in ballots was improper because it was likely to increase the spread of COVID-19. *Id.* at 915. The Court rejected this argument as unduly myopic: Addressing this disaster requires more than just "a desire to alleviate the threat of the pandemic." *Id.* at 918. Were it otherwise, the Governor's "pandemic orders would operate as a one-way ratchet, moving only in the direction of alleviating the disaster." *Id.* Instead, the Governor may also consider "other important goals, such as promoting economic welfare [and] protecting constitutional rights." *Id.* "Nothing in the Act suggests any limitation on the Governor's ability to consider valid policy goals" when issuing or amending executive orders. *Id.*

Executive Order GA-38 is fully consistent with *Anti-Defamation League Austin*. It attempts to "balance a variety of competing considerations," *id.*: principally, "the ability of Texans to preserve livelihoods" and "protecting lives" through "the least restrictive means of combatting the evolving threat to public health." MR.84, 86. And the Governor has decided that allowing hundreds of different local government entities to craft their own rules would imperil the "uniformity" of the State's response to the COVID-19 disaster. This is a judgment call that is subject to good-faith disagreement. But that is why the "the only question that [the courts] are capable of answering is, under the text of the statute, who is the proverbial captain of the ship to make the difficult decisions" regarding State efforts to "meet disaster dangers" posed by "the COVID-19 pandemic." *El Paso Cnty.*, 618 S.W.3d at 819). As described above, the Governor holds that obligation—not a single County Judge or district court.

D. The Temporary Restraining Order is Overbroad.

Even if the order were otherwise lawful—and it is not—the breathtaking geographic scope of the injunction is reason enough to grant mandamus relief: at the behest of a single Dallas County official, the trial court issued a sweeping temporary restraining order blocking provisions of the Governor's Executive Order *statewide*. "A trial court abuses it discretion by entering an overly-broad injunction which grants more relief than a plaintiff is entitled to by enjoining a defendant from conducting lawful activities or from exercising legal rights." *Super Starr Int'l, LLC v. Fresh Tex Produce, LLC* 531 S.W.3d 829, 849 (Tex. App.—Corpus Christi-Edinburg, 2017, no pet.) (citation omitted). There can be no question here that the trial court

lacked the authority to issue statewide relief on behalf of governmental parties who are not even before the court. *See In re D & J Alexander Mgmt.*, 2014 WL 4723136, at * 3 (Tex. App.—San Antonio Sept. 24, 2014, no pet.) (citing *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (Tex. 1991)); *Fuqua v. Taylor* 683 S.W.2d 735, 738 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

II. The Governor Has No Adequate Appellate Remedy as Time is of the Essence.

The Governor is also entitled to a writ of mandamus because he lacks an adequate remedy for the trial court's unlawful action by ordinary appeal. In this instance, a single trial court judge has—at the request of a single County Judge—declared that the Governor cannot act anywhere in the State to manage a statewide disaster for *at minimum* two weeks (when it has set a hearing on the larger temporary injunction). Even if it were to issue a temporary injunction immediately, by then, innumerable other counties, cities, and other political subdivisions will have issued their own disaster-response orders—splintering the State's ability to achieve an orderly, cohesive, and uniform response to the COVID-19 pandemic. Assuming that these orders *can* be undone (which depending on their exact content may not be possible), it will require the investment of innumerable resources from the State—resources that are needed to respond to this and any future disasters. The Governor's injury is therefore both immediate and ongoing, and any recourse to the regular channels of appellate review will come too late, as this injury grows more acute each passing day. When the ordinary appellate process cannot afford timely relief, mandamus is proper. *See In re Woodfill*, 470 S.W.3d 473, 480-81 (Tex. 2015) (per curiam).

Prayer

The Court should grant the petition for a writ of mandamus and either vacate or reverse the trial court's temporary restraining order.

Respectfully submitted.

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Certificate of Service

On August 11, 2021, this document was served electronically on Charla G. Aldous, lead counsel for Clay Jenkins, via caldous@aldouslaw.com.

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Certificate of Compliance

Microsoft Word reports that this brief contains 4458 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ Judd E. Stone II
JUDD E. STONE II

No. ___

In the Court of Appeals for the Fifth Judicial District Dallas, Texas

In re Greg Abbott, in his Official Capacity as Governor of the State of Texas,

Relator.

On Petition for Writ of Mandamus
to the 116th Judicial District Court, Dallas County

APPENDIX TO THE PETITION FOR WRIT OF MANDAMUS

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Judd E. Stone II

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TAB 1:
TEMPORARY RESTRAINING ORDER

Cause No. DC-21-10101

J.J. Koch, *Plaintiff,* v. Clay Jenkins, in his Official Capacity *Counter-Plaintiff and Defendant,* v. Greg Abbott, in his Official Capacity as Governor of the State of Texas, *Counter-Defendant.*	IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 116th JUDICIAL DISTRICT

TEMPORARY RESTRAINING ORDER

This Court, having heard the Application for Temporary Restraining Order filed by Counter-Plaintiff and Defendant Clay Jenkins in his official capacity as County Judge of Dallas (referred to as "Judge Jenkins") and all evidence and arguments of counsel with notice properly provided to Plaintiff J.J. Koch and Counter-Defendant Greg Abbott in his official capacity as Governor of the State of Texas, finds that (1) Counter-Plaintiff and Defendant Clay Jenkins has shown a probable right to the relief sought in his First Supplemental Counterclaim, Request for Declaratory Judgment, and Request for Temporary Restraining Order and Temporary Injunction ("Application"); and (2) Judge Jenkins and the Citizens of Dallas will suffer immediate, imminent, and irreparable harm for which there is no adequate remedy at law if a temporary restraining order does not issue against Counter-Defendant Governor Abbott.

The Court is of the opinion that immediate and irreparable injury, loss, or damage will result to Judge Jenkins and the citizens of Dallas County if Judge Jenkins is not allowed to exercise his statutory authority under Texas Government Code §418.108(g) and the Dallas County Declaration of Local Disaster to mandate face coverings and other mitigation strategies within

Dallas County, including within the Commissioners Court and other public places. Judge Jenkins and the citizens of Dallas County have and will continue to be damaged and injured by Governor Abbott's conduct, including, but not limited to Governor Abbott's enforcement of his Executive Order GA-38. These findings are based on the following facts[1]:

1. Clay Jenkins is the duly elected Dallas County Judge. Judge Jenkins serves as the County chief-executive and presiding officer of its governing body. In his role, Judge Jenkins leads the County government in providing, among other services, safety protection for all citizens of Dallas County. As the chief presiding officer of Dallas County, Judge Jenkins is authorized to take certain actions as provided in the Texas Disaster Act for the safety and welfare of Dallas County citizens. Judge Jenkins has standing to bring this suit and to asset all claims.

2. The Texas Disaster Act clarifies the roles of various governmental authorities in responding to disasters. The COVID-19 epidemic falls within the purview of the Texas Disaster Act which sets forward the following among the purposes of the Act:

> (1) to reduce vulnerability of people and communities of this state to damage, injury, and loss of life…resulting from natural or man-made catastrophes;
>
> (2) to prepare prompt and efficient…care, and treatment of persons… victimized or threatened by disaster;
>
> (3) provide a setting conductive to the rapid and orderly restoration and rehabilitation of persons…affected by disasters;
>
> (4) to clarify and strengthen the roles of the governor…and local governments in prevention of, preparation for, response to and recovery from disasters;

---

[1] The Court's findings of fact, in large part, are based on the Affidavit of Philip Huang, MD, MPH, the Director and Health Authority for the Dallas County Health and Human Services Department, together with the attachments thereto.

(5) authorize and provide for cooperation in disaster mitigation, preparedness, response, and recovery; and

(6) authorize and provide for coordination of activities relating to disaster mitigation, preparedness, response, and recovery by agencies and officers of this state, and similar state-local...activities in which the state and its political subdivisions may participate....[2]

3. County Judge Jenkins declared a local disaster on March 12, 2020. This declaration provided Judge Jenkins with legislative authority to perform certain acts under §418.108 of the Texas Government Code, including to control whether people are required to wear face coverings in public or in the Commissioners' Court.

4. On July 29, 2021, Greg Abbott issued "Executive Order No. GA-38 relating to the continued response to the COVID-19 disaster." ("GA-38"). In that Order, Governor Abbott relied, in part, on Sections 418.016 (a) and 418.018 (c) of the Texas Government Code as authority for the issuance of GA-38.

5. In GA-38, Governor Abbott ordered, among others, that "...no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering" and that "...any conflicting local order in response to the COVID-19 disaster, and all relevant laws are suspended to the extent necessary to preclude any such inconsistent local orders." Counter-Defendant Abbott's Executive Order No. 38 also provided: "...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..." Counter-Defendant Abbott further ordered that any face-covering requirements (absent limited exceptions)

---

[2] See Tex.Gov't Code Ann. § 418.002.

imposed by any local governmental entity or official be superseded by his Order and that any laws that allow local government officials from enacting their own emergency declarations be suspended.

6. Dallas County is currently experiencing a surge in infections of 2019 novel coronavirus (COVID·19). As of August 6, 2021, Dallas County Health and Human Services is reporting a cumulative total of 276,813 confirmed cases of COVID-19 in Dallas County. The cumulative total probable case count in Dallas County is 46,060 cases. The total number of COVID·19 cases or probable cases is 322,873. Dallas County has experienced 4,224 deaths from COVID-19 as of August 6th.

7. Beginning in July of 2021, the number of positive PCR tests reported to Dallas County Health and Human Services began to rise dramatically. During the month of July 2021, positive PCR tests climbed from near 5% to almost 25%. Since the end of July and into August, the positive tests rate continues to climb.

8. The number of cases is growing quickly in Dallas County. From July 18, 2021, to July 31, 2021, Dallas County experienced approximately 360 cumulative COVID-19 cases per 100,000 individuals. The total new cases reported during that same period in Dallas County was 9,484. The provisional seven-day average of daily new confirmed and probable cases (by date of test collect ion) for CDC week 30 (week ending 7/31/2021), was 806, which is a rate of 30.6 daily new cases per 100,000 residents.

9. There continues to be risk to unvaccinated populations in Dallas County from the COVID-19 pandemic. For example, as of July 31, 2021, about 84% of COVID-19 cases diagnosed were Dallas County residents not fully vaccinated.

10. Dallas County medical infrastructure and hospitals are beginning to experience the strain of the surge of infections. As of August 8, 2021, Dallas County had 16 available staffed

adult ICU beds. As of August 9, 2021, Dallas County has approximately 682 confirmed COVID 14 inpatient hospitalizations with only 14 available staffed adult ICU beds.

11. According to UT Southwestern 's most recent COVID- 19 forecast and modeling as of August 9, 2021, the rate of COVlD- 19 infections in Dallas County is reaching or has reached exponential growth rates. COVID-19 hospitalizations have increased in Dallas County by over 101% over the past two weeks and it is estimated that total COVID-19 hospitalizations are predicted to reach over 1,500 hospitalized cases by August 26.

12. Judge Jenkins regularly relies on information provided to him by various business leaders, community activists, healthcare providers and scientists including Philip Huang, MD, MPH, the Director and Health Authority for the Dallas County Health and Human Services Department. In making decisions to protect the safety and well-being of Dallas County Citizens, Judge Jenkins bases his decisions on sound medical evidence and is driven by the most up to date public and non-public data from, among others, the Dallas County Health and Human Services department, the University of Texas Southwestern Medical Center, and North Central Texas Trauma Regional Advisory Council.

13. As a result of the information shared with Judge Jenkins, on August 3, 2021, Judge Jenkins moved the county-wide risk level from color-coded Orange: Extreme Caution to the most serious color-coded risk level of Red: High Risk of Transmission. This move was made to assist in fighting the escalating trajectory or cases and the spread of the Delta-variant of COVID-19, which appears to account for approximately 78% of sequenced strains of COVID-19 in the last two weeks from the UT Southwestern Medical Center.

14. Judge Jenkins is deeply concerned about the health and safety and welfare of the citizens, including the unvaccinated and children, of Dallas County based on UT Southwestern 's

most recent COVID- 19 forecast and modeling and the reported exponential growth rates. According to information on which Judge Jenkins relies, COVID-19 hospitalizations have increased in Dallas County by over 101% over the past two weeks and it is estimated that total COVID-19 hospitalizations are predicted to reach over 1,500 hospitalized cases by August 26.

15. Governor Abbott also remains concerned about the impact of the current surge of COVID-19 infections as evidenced by his directive to state agencies to use staffing agencies to find additional medical staff from outside of Texas and his request to the Texas Hospital Association that hospitals postpone elective medical procedures. These actions are inconsistent with a refusal to permit local governmental authorities to implement reasonable mitigation measures such as face mask requirements and establish that GA-38 is not necessary action to combat the pandemic.

16. Dallas County has higher infection and transmission rates than other counties and a localized response in Dallas County must be different than in a county that is not experiencing the exponential growth of COVID-19 infections and transmission rates that Dallas County experiencing.

17. Judge Jenkins cannot be precluded from implementing the mitigation strategies he believes are sound, reliable, and backed by scientific evidence on which he relies and must be able to mitigate the damage, injury, and potential loss of life related to the COVID-19 virus. Judge Jenkins and the Citizens of Dallas County will be irreparably harmed if Judge Jenkins is barred from engaging in mandatory mitigation practices, including face covering and mask mandates. Face coverings and masks are an effective mitigation strategy and can further reduce the spread of COVID-19.

18. Under the Texas Disaster Act, County Judge Jenkins is vested with authority to issue orders to protect the safety and welfare of Dallas County Citizens, which includes among other mitigation strategies, the option to mandate face coverings and masks in public. Fighting the virus is a public health crisis that threatens the lives and safety of Dallas County citizens. Dallas County citizens will be irreparably harmed if Judge Jenkins cannot initiate appropriate mitigation strategies, including the initiation of face covering and mask mandates to stop the transmission of COVID-19. The harm of not being able to initiate such safeguards strongly outweighs the harm of complying with Governor Abbott's Executive Order GA-38.

It is, therefore, **ORDERED, ADJUDGED, and DECREED** that that the Clerk of this Court issue a Temporary Restraining Order, operative until August 24, 2021, and pending the hearing ordered below, restraining Counter-Defendant Greg Abbott in his official capacity as Governor of the State of Texas or any of his agents, servants, employees, attorneys, representatives, or any persons in active concert or participation with Counter-Defendant Abbott who receive actual notice of this Order from:

> Enforcing of Governor Abbott's Executive Order No. GA-38, paragraphs (3)(b), (3)(g), and (4).

The Court hereby sets the hearing on Plaintiff's application for temporary injunction for the 24th day of August 2021 at 1:00 p.m. in this Court. The purpose of the hearing shall be to determine whether this Temporary Restraining Order should be made a temporary injunction pending a full trial on the merits; and

Bond is set at FIVE HUNDRED DOLLARS ($500.00). This Temporary Restraining Order shall enter upon Counter-Plaintiff and Defendant Clay Jenkins posting said bond with the clerk of this Court and shall expire as set forth below.

This Order expires on the 24TH day of August 2021, unless otherwise agreed by the parties or ordered by the Court.

IT IS SO ORDERED.

SIGNED this the 10th day of August 2021 at 6:43 p.m.

JUDGE PRESIDING

TAB 2:
EXECUTIVE ORDER GA-38

GOVERNOR GREG ABBOTT

July 29, 2021

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
3:15PM O'CLOCK
JUL 29 2021
Secretary of State

Mr. Joe A. Esparza
Deputy Secretary of State
State Capitol Room 1E.8
Austin, Texas 78701

Dear Deputy Secretary Esparza:

Pursuant to his powers as Governor of the State of Texas, Greg Abbott has issued the following:

Executive Order No. GA-38 relating to the continued response to the COVID-19 disaster.

The original executive order is attached to this letter of transmittal.

Respectfully submitted,

Gregory S. Davidson
Executive Clerk to the Governor

GSD/gsd

Attachment

Executive Order

BY THE
GOVERNOR OF THE STATE OF TEXAS

Executive Department
Austin, Texas
July 29, 2021

EXECUTIVE ORDER
GA 38

Relating to the continued response to the COVID-19 disaster.

WHEREAS, I, Greg Abbott, Governor of Texas, issued a disaster proclamation on March 13, 2020, certifying under Section 418.014 of the Texas Government Code that the novel coronavirus (COVID-19) poses an imminent threat of disaster for all Texas counties; and

WHEREAS, in each subsequent month effective through today, I have renewed the COVID-19 disaster declaration for all Texas counties; and

WHEREAS, from March 2020 through May 2021, I issued a series of executive orders aimed at protecting the health and safety of Texans, ensuring uniformity throughout Texas, and achieving the least restrictive means of combatting the evolving threat to public health by adjusting social-distancing and other mitigation strategies; and

WHEREAS, combining into one executive order the requirements of several existing COVID-19 executive orders will further promote statewide uniformity and certainty; and

WHEREAS, as the COVID-19 pandemic continues, Texans are strongly encouraged as a matter of personal responsibility to consistently follow good hygiene, social-distancing, and other mitigation practices; and

WHEREAS, receiving a COVID-19 vaccine under an emergency use authorization is always voluntary in Texas and will never be mandated by the government, but it is strongly encouraged for those eligible to receive one; and

WHEREAS, state and local officials should continue to use every reasonable means to make the COVID-19 vaccine available for any eligible person who chooses to receive one; and

WHEREAS, in the Texas Disaster Act of 1975, the legislature charged the governor with the responsibility "for meeting … the dangers to the state and people presented by disasters" under Section 418.011 of the Texas Government Code, and expressly granted the governor broad authority to fulfill that responsibility; and

WHEREAS, under Section 418.012, the "governor may issue executive orders … hav[ing] the force and effect of law;" and

WHEREAS, under Section 418.016(a), the "governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business … if strict compliance with the provisions … would in any way prevent, hinder, or delay necessary action in coping with a disaster;" and

WHEREAS, under Section 418.018(c), the "governor may control ingress and egress to

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and from a disaster area and the movement of persons and the occupancy of premises in the area;" and

WHEREAS, under Section 418.173, the legislature authorized as "an offense," punishable by a fine up to $1,000, any "failure to comply with the [state emergency management plan] or with a rule, order, or ordinance adopted under the plan;"

NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following on a statewide basis effective immediately:

1. To ensure the continued availability of timely information about COVID-19 testing and hospital bed capacity that is crucial to efforts to cope with the COVID-19 disaster, the following requirements apply:

   a. All hospitals licensed under Chapter 241 of the Texas Health and Safety Code, and all Texas state-run hospitals, except for psychiatric hospitals, shall submit to the Texas Department of State Health Services (DSHS) daily reports of hospital bed capacity, in the manner prescribed by DSHS. DSHS shall promptly share this information with the Centers for Disease Control and Prevention (CDC).
   b. Every public or private entity that is utilizing an FDA-approved test, including an emergency use authorization test, for human diagnostic purposes of COVID-19, shall submit to DSHS, as well as to the local health department, daily reports of all test results, both positive and negative. DSHS shall promptly share this information with the CDC.

2. To ensure that vaccines continue to be voluntary for all Texans and that Texans' private COVID-19-related health information continues to enjoy protection against compelled disclosure, in addition to new laws enacted by the legislature against so-called "vaccine passports," the following requirements apply:

   a. No governmental entity can compel any individual to receive a COVID-19 vaccine administered under an emergency use authorization. I hereby suspend Section 81.082(f)(1) of the Texas Health and Safety Code to the extent necessary to ensure that no governmental entity can compel any individual to receive a COVID-19 vaccine administered under an emergency use authorization.
   b. State agencies and political subdivisions shall not adopt or enforce any order, ordinance, policy, regulation, rule, or similar measure that requires an individual to provide, as a condition of receiving any service or entering any place, documentation regarding the individual's vaccination status for any COVID-19 vaccine administered under an emergency use authorization. I hereby suspend Section 81.085(i) of the Texas Health and Safety Code to the extent necessary to enforce this prohibition. This paragraph does not apply to any documentation requirements necessary for the administration of a COVID-19 vaccine.
   c. Any public or private entity that is receiving or will receive public funds through any means, including grants, contracts, loans, or other disbursements of taxpayer money, shall not require a consumer to provide, as a condition of receiving any service or entering any place, documentation regarding the consumer's vaccination status for any COVID-19 vaccine administered under an emergency use authorization. No consumer may be denied entry to a facility financed

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in whole or in part by public funds for failure to provide documentation regarding the consumer's vaccination status for any COVID-19 vaccine administered under an emergency use authorization.

d. Nothing in this executive order shall be construed to limit the ability of a nursing home, state supported living center, assisted living facility, or long-term care facility to require documentation of a resident's vaccination status for any COVID-19 vaccine.

e. This paragraph number 2 shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster. I hereby suspend Sections 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order.

3. To ensure the ability of Texans to preserve livelihoods while protecting lives, the following requirements apply:

   a. There are no COVID-19-related operating limits for any business or other establishment.

   b. In areas where the COVID-19 transmission rate is high, individuals are encouraged to follow the safe practices they have already mastered, such as wearing face coverings over the nose and mouth wherever it is not feasible to maintain six feet of social distancing from another person not in the same household, but no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering.

   c. In providing or obtaining services, every person (including individuals, businesses, and other legal entities) is strongly encouraged to use good-faith efforts and available resources to follow the Texas Department of State Health Services (DSHS) health recommendations, found at www.dshs.texas.gov/coronavirus.

   d. Nursing homes, state supported living centers, assisted living facilities, and long-term care facilities should follow guidance from the Texas Health and Human Services Commission (HHSC) regarding visitations, and should follow infection control policies and practices set forth by HHSC, including minimizing the movement of staff between facilities whenever possible.

   e. Public schools may operate as provided by, and under the minimum standard health protocols found in, guidance issued by the Texas Education Agency. Private schools and institutions of higher education are encouraged to establish similar standards.

   f. County and municipal jails should follow guidance from the Texas Commission on Jail Standards regarding visitations.

   g. As stated above, business activities and legal proceedings are free to proceed without COVID-19-related limitations imposed by local governmental entities or officials. This paragraph number 3 supersedes any conflicting local order in response to the COVID-19 disaster, and all relevant laws are suspended to the extent necessary to preclude any such inconsistent local orders. Pursuant to the legislature's command in Section 418.173 of the Texas Government Code and the State's emergency management plan, the imposition of any conflicting or inconsistent limitation by a local governmental entity or official constitutes a "failure to comply with" this executive order that is subject to a fine up to $1,000.

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4. To further ensure that no governmental entity can mandate masks, the following requirements shall continue to apply:

   a. 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; *provided, however, that*:
      i. state supported living centers, government-owned hospitals, and government-operated hospitals may continue to use appropriate policies regarding the wearing of face coverings; and
      ii. the Texas Department of Criminal Justice, the Texas Juvenile Justice Department, and any county and municipal jails acting consistent with guidance by the Texas Commission on Jail Standards may continue to use appropriate policies regarding the wearing of face coverings.
   b. This paragraph number 4 shall supersede any face-covering requirement imposed by any local governmental entity or official, except as explicitly provided in subparagraph number 4.a. To the extent necessary to ensure that local governmental entities or officials do not impose any such face-covering requirements, I hereby suspend the following:

      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.

      Pursuant to the legislature's command in Section 418.173 of the Texas Government Code and the State's emergency management plan, the imposition of any such face-covering requirement by a local governmental entity or official constitutes a "failure to comply with" this executive order that is subject to a fine up to $1,000.
   c. Even though face coverings cannot be mandated by any governmental entity, that does not prevent individuals from wearing one if they choose.

5. To further ensure uniformity statewide:

   a. 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 or allows gatherings restricted by this executive order. Pursuant to Section 418.016(a) of the Texas Government Code, I hereby suspend Sections 418.1015(b) and 418.108 of the Texas Government Code, Chapter 81, Subchapter E of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions in response to the

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COVID-19 disaster that are inconsistent with this executive order, provided that local officials may enforce this executive order as well as local restrictions that are consistent with this executive order.

b. Confinement in jail is not an available penalty for violating this executive order. To the extent any order issued by local officials in response to the COVID-19 disaster would allow confinement in jail as an available penalty for violating a COVID-19-related order, that order allowing confinement in jail is superseded, and I hereby suspend all relevant laws to the extent necessary to ensure that local officials do not confine people in jail for violating any executive order or local order issued in response to the COVID-19 disaster.

This executive order supersedes all pre-existing COVID-19-related executive orders and rescinds them in their entirety, except that it does not supersede or rescind Executive Orders GA-13 or GA-37. This executive order shall remain in effect and in full force unless it is modified, amended, rescinded, or superseded by the governor. This executive order may also be amended by proclamation of the governor.

Given under my hand this the 29th day of July, 2021.

GREG ABBOTT
Governor

ATTESTED BY:

JOE A. ESPARZA
Deputy Secretary of State

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3:15PM O'CLOCK
JUL 29 2021

TAB 3:
TEX. GOV'T CODE § 418.012

§ 418.012. Executive Orders, TX GOVT § 418.012

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 4. Executive Branch (Refs & Annos)
Subtitle B. Law Enforcement and Public Protection
Chapter 418. Emergency Management (Refs & Annos)
Subchapter B. Powers and Duties of Governor (Refs & Annos)

V.T.C.A., Government Code § 418.012

§ 418.012. Executive Orders

Currentness

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.

Credits

Acts 1987, 70th Leg., ch. 147, § 1, eff. Sept. 1, 1987.

V. T. C. A., Government Code § 418.012, TX GOVT § 418.012
Current through legislation effective June 18, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

TAB 4:
TEX. GOV'T CODE § 418.015

§ 418.015. Effect of Disaster Declaration, TX GOVT § 418.015

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 4. Executive Branch (Refs & Annos)
Subtitle B. Law Enforcement and Public Protection
Chapter 418. Emergency Management (Refs & Annos)
Subchapter B. Powers and Duties of Governor (Refs & Annos)

V.T.C.A., Government Code § 418.015

§ 418.015. Effect of Disaster Declaration

Currentness

(a) An executive order or proclamation declaring a state of disaster:

(1) activates the disaster recovery and rehabilitation aspects of the state emergency management plan applicable to the area subject to the declaration; and

(2) authorizes the deployment and use of any forces to which the plan applies and the use or distribution of any supplies, equipment, and materials or facilities assembled, stockpiled, or arranged to be made available under this chapter or other law relating to disasters.

(b) The preparedness and response aspects of the state emergency management plan are activated as provided by that plan.

(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. To the greatest extent possible, the governor shall delegate or assign command authority by prior arrangement embodied in appropriate executive orders or plans, but this chapter does not restrict the governor's authority to do so by orders issued at the time of the disaster.

Credits

Acts 1987, 70th Leg., ch. 147, § 1, eff. Sept. 1, 1987.

§ 418.015. Effect of Disaster Declaration, TX GOVT § 418.015

V. T. C. A., Government Code § 418.015, TX GOVT § 418.015
Current through legislation effective June 18, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

TAB 5:
TEX. GOV'T CODE § 418.016

§ 418.016. Suspension of Certain Laws and Rules, TX GOVT § 418.016

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 4. Executive Branch (Refs & Annos)
Subtitle B. Law Enforcement and Public Protection
Chapter 418. Emergency Management (Refs & Annos)
Subchapter B. Powers and Duties of Governor (Refs & Annos)

V.T.C.A., Government Code § 418.016

§ 418.016. Suspension of Certain Laws and Rules

Effective: September 1, 2013

Currentness

(a) 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.

(b) Upon declaration of a state of disaster, enforcement of the regulation of on-premise outdoor signs under Subchapter A, Chapter 216, Local Government Code,[1] by a municipality that is located in a county within, or that is located in a county adjacent to a county within, the disaster area specified by the declaration is suspended to allow licensed or admitted insurance carriers or licensed agents acting on behalf of insurance carriers to erect temporary claims service signage for not more than 30 days or until the end of the declaration of disaster, whichever is earlier.

(c) A temporary claims service sign shall not:

(1) be larger than forty square feet in size;

(2) be more than five feet in height; and

(3) be placed in the right of way.

(d) At the end of the 30 days or the end of the declaration of disaster, whichever is earlier, the insurance carrier or its licensed

agents must remove the temporary claims service signage that was erected.

(e) On request of a political subdivision, the governor may waive or suspend a deadline imposed by a statute or the orders or rules of a state agency on the political subdivision, including a deadline relating to a budget or ad valorem tax, if the waiver or suspension is reasonably necessary to cope with a disaster.

(f) The governor may suspend any of the following requirements in response to an emergency or disaster declaration of another jurisdiction if strict compliance with the requirement would prevent, hinder, or delay necessary action in assisting another state with coping with an emergency or disaster:

(1) a registration requirement in an agreement entered into under the International Registration Plan under Section 502.091, Transportation Code, to the extent authorized by federal law;

(2) a temporary registration permit requirement under Section 502.094, Transportation Code;

(3) a provision of Subtitle E, Title 7, Transportation Code[2], to the extent authorized by federal law;

(4) a motor carrier registration requirement under Chapter 643, Transportation Code;

(5) a registration requirement under Chapter 645, Transportation Code, to the extent authorized by federal law; or

(6) a fuel tax requirement under the International Fuel Tax Agreement described by 49 U.S.C. Section 31701 et seq., to the extent authorized by federal law.

(g) For the purposes of Subsection (f), "emergency or disaster declaration of another jurisdiction" means an emergency declaration, a major disaster declaration, a state of emergency declaration, a state of disaster declaration, or a similar declaration made by:

(1) the president of the United States under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. Section 5121 et seq.); or

(2) the governor of another state.

(h) To the extent federal law requires this state to issue a special permit under 23 U.S.C. Section 127 or an executive order, a suspension issued under Subsection (f) is a special permit or an executive order.

Credits

Acts 1987, 70th Leg., ch. 147, § 1, eff. Sept. 1, 1987. Amended by Acts 2009, 81st Leg., ch. 990, § 1, eff. June 19, 2009; Acts 2009, 81st Leg., ch. 1280, § 1.03a, eff. Sept. 1, 2009; Acts 2011, 82nd Leg., ch. 91 (S.B. 1303), § 11.008, eff. Sept. 1, 2011; Acts 2013, 83rd Leg., ch. 1135 (H.B. 2741), § 3, eff. Sept. 1, 2013.

Footnotes

[1] V.T.C.A., Local Government Code § 216.001 et seq.

[2] V.T.C.A. Transportation Code § 621.001 et seq.

V. T. C. A., Government Code § 418.016, TX GOVT § 418.016
Current through legislation effective June 18, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

TAB 6:
TEX. GOV'T CODE § 418.018

§ 418.018. Movement of People, TX GOVT § 418.018

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 4. Executive Branch (Refs & Annos)
Subtitle B. Law Enforcement and Public Protection
Chapter 418. Emergency Management (Refs & Annos)
Subchapter B. Powers and Duties of Governor (Refs & Annos)

V.T.C.A., Government Code § 418.018

§ 418.018. Movement of People

Currentness

(a) The governor may recommend the evacuation of all or part of the population from a stricken or threatened area in the state if the governor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.

(b) The governor may prescribe routes, modes of transportation, and destinations in connection with an evacuation.

(c) 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.

Credits

Acts 1987, 70th Leg., ch. 147, § 1, eff. Sept. 1, 1987.

V. T. C. A., Government Code § 418.018, TX GOVT § 418.018
Current through legislation effective June 18, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

TAB 7:
TEX. GOV'T CODE § 418.108

§ 418.108. Declaration of Local Disaster, TX GOVT § 418.108

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 4. Executive Branch (Refs & Annos)
Subtitle B. Law Enforcement and Public Protection
Chapter 418. Emergency Management (Refs & Annos)
Subchapter E. Local and Interjurisdictional Emergency Management

V.T.C.A., Government Code § 418.108

§ 418.108. Declaration of Local Disaster

Effective: September 1, 2009

Currentness

<By executive order, Governor Abbott suspended V.T.C.A., Government Code §§ 418.1015(b) and 418.108 to the extent necessary to preclude any county judge or mayor of a municipality, or any emergency management director, from releasing persons under any circumstances inconsistent with Texas Executive Order 13 (GA-13). See 2019 TX EO 13, 45 TexReg 2368 (detention in county and municipal jails during COVID-19 disaster).>

<See Executive Order GA-38 (2021 TX EO 38, dated July 29, 2021), which suspends this Section to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with the executive order, and to the extent necessary to ensure that local governmental entities or officials do not impose particular face-covering requirements.>

(a) Except as provided by Subsection (e), the presiding officer of the governing body of a political subdivision may declare a local state of disaster.

(b) A declaration of local disaster may not be continued or renewed for a period of more than seven days except with the consent of the governing body of the political subdivision or the joint board as provided by Subsection (e), as applicable.

(c) An order or proclamation declaring, continuing, or terminating a local state of disaster shall be given prompt and general publicity and shall be filed promptly with the city secretary, the county clerk, or the joint board's official records, as applicable.

(d) A declaration of local disaster activates the appropriate recovery and rehabilitation aspects of all applicable local or interjurisdictional emergency management plans and authorizes the furnishing of aid and assistance under the declaration. The appropriate preparedness and response aspects of the plans are activated as provided in the plans and take effect

immediately after the local state of disaster is declared.

(e) The chief administrative officer of a joint board has exclusive authority to declare that a local state of disaster exists within the boundaries of an airport operated or controlled by the joint board, regardless of whether the airport is located in or outside the boundaries of a political subdivision.

(f) The county judge or the mayor of a municipality may order the evacuation of all or part of the population from a stricken or threatened area under the jurisdiction and authority of the county judge or mayor if the county judge or mayor considers the action necessary for the preservation of life or other disaster mitigation, response, or recovery.

(g) 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.

(h) For purposes of Subsections (f) and (g):

(1) the jurisdiction and authority of the county judge includes the incorporated and unincorporated areas of the county; and

(2) to the extent of a conflict between decisions of the county judge and the mayor, the decision of the county judge prevails.

(i) A declaration under this section may include a restriction that exceeds a restriction authorized by Section 352.051, Local Government Code. A restriction that exceeds a restriction authorized by Section 352.051, Local Government Code, is effective only:

(1) for 60 hours unless extended by the governor; and

(2) if the county judge requests the governor to grant an extension of the restriction.

Credits

Acts 1987, 70th Leg., ch. 147, § 1, eff. Sept. 1, 1987. Amended by Acts 2003, 78th Leg., ch. 33, § 3, eff. May 14, 2003; Acts 2005, 79th Leg., ch. 274, § 1, eff. June 9, 2005; Acts 2007, 80th Leg., ch. 258, § 17.01, eff. Sept. 1, 2007; Acts 2009, 81st Leg., ch. 1280, § 1.13, eff. Sept. 1, 2009.

§ 418.108. Declaration of Local Disaster, TX GOVT § 418.108

V. T. C. A., Government Code § 418.108, TX GOVT § 418.108
Current through legislation effective June 18, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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TAB 8:
TEX. GOV'T CODE § 418.1015

Vernon's Texas Statutes and Codes Annotated
Government Code (Refs & Annos)
Title 4. Executive Branch (Refs & Annos)
Subtitle B. Law Enforcement and Public Protection
Chapter 418. Emergency Management (Refs & Annos)
Subchapter E. Local and Interjurisdictional Emergency Management

V.T.C.A., Government Code § 418.1015

§ 418.1015. Emergency Management Directors

Effective: September 1, 2009

Currentness

<By executive order, Governor Abbott suspended V.T.C.A., Government Code §§ 418.1015(b) and 418.108 to the extent necessary to preclude any county judge or mayor of a municipality, or any emergency management director, from releasing persons under any circumstances inconsistent with Texas Executive Order 13 (GA-13). See 2019 TX EO 13, 45 TexReg 2368 (detention in county and municipal jails during COVID-19 disaster).>

<See Executive Order GA-38 (2021 TX EO 38, dated July 29, 2021), which suspends Section 418.1015(b) and 418.1015(h) to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with the executive order, and to the extent necessary to ensure that local governmental entities or officials do not impose particular face-covering requirements.>

(a) The presiding officer of the governing body of an incorporated city or a county or the chief administrative officer of a joint board is designated as the emergency management director for the officer's political subdivision.

(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.

(c) An emergency management director may designate a person to serve as emergency management coordinator. The emergency management coordinator shall serve as an assistant to the emergency management director for emergency management purposes.

(d) A person, other than an emergency management director exercising under Subsection (b) a power granted to the governor, may not seize state or federal resources without prior authorization from the division or the state or federal agency having responsibility for those resources.

Credits

Added by Acts 2007, 80th Leg., ch. 258, § 1.02, eff. June 6, 2007; Acts 2007, 80th Leg., ch. 865, § 1.02, eff. June 15, 2007. Amended by Acts 2009, 81st Leg., ch. 1280, § 1.11, eff. Sept. 1, 2009.

V. T. C. A., Government Code § 418.1015, TX GOVT § 418.1015
Current through legislation effective June 18, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STATE OF FLORIDA,

Plaintiff,

v. No. 8:21-cv-2524

BILL NELSON, in his official capacity as Administrator of the National Aeronautics and Space Administration; NATIONAL AERONAUTICS AND SPACE ADMINISTRATION; the UNITED STATES OF AMERICA; JOSEPH R. BIDEN, JR., in his official capacity as President of the United States; FEDERAL ACQUISITION REGULATORY COUNCIL; LESLEY A. FIELD, in her official capacity as Acting Administrator for Federal Procurement, Office of Management and Budget; JOHN M. TENAGLIA, in his official capacity as Principal Director of Defense Pricing and Contracting, Department of Defense; JEFFREY A. KOSES, in his official capacity as Senior Procurement Executive & Deputy Chief Acquisition Officer, General Services Administration; KARLA S. JACKSON, in her official capacity as Assistant Administrator for Procurement, National Aeronautics and Space Administration; SHALANDA D. YOUNG, in her official capacity as acting Director of the Office of Management and Budget; OFFICE OF MANAGEMENT AND BUDGET; the GENERAL SERVICES ADMINISTRATION; ROBIN CARNAHAN, in her official capacity as General Services Administrator,

Defendants.
_____/

COMPLAINT FOR DECLARATORY AND
PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

INTRODUCTION

1. Relying on a statute authorizing the President to "prescribe policies and directives that the President considers necessary to carry out" the Federal Property and Administrative Services Act of 1949 (FPASA), 40 U.S.C. § 121(a), the Biden Administration seeks to compel millions of Americans who work for government contractors to receive a COVID-19 vaccine.

2. Nothing in that statute authorizes such a radical intrusion on the personal autonomy of American workers—especially, as is the case here, when many of those workers are officials of a sovereign state.

3. But even if FPASA did authorize such a mandate, the Biden Administration's vaccine requirements would still be unlawful because the manner in which they were enacted violates fundamental principles of administrative and procurement law.

4. The Federal Acquisition Regulatory Council (FAR Council) is the agency exclusively charged with creating "[g]overnment-wide procurement regulation[s]." 41 U.S.C. § 1303(a)(1). Other agencies may not enact such regulations. Id. § 1303(a)(2).

5. Yet that is precisely what the President's executive order contemplates. See Exec. Order No. 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors, 86 Fed. Reg. 50,985 (Sept. 9, 2021). The executive order directs the Safer Federal Workforce Task Force (Task Force) to draft federal contractor vaccine

requirements—along with other onerous mandates for federal contractors like masking and social distancing—subject only to approval by the Director of the Office of Management and Budget (OMB). Id.; see also Safer Federal Workforce Task Force, COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors (Sept. 24, 2021) [hereinafter Task Force guidance], https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf.

6. This not only violates the exclusivity provisions of § 1303(a), but also 41 U.S.C. § 1707(a)–(b), which requires notice and comment for any "procurement policy, regulation, procedure, or form," subject only to a narrow "urgent and compelling circumstances" exception, id. § 1707(d).

7. The government cannot satisfy that exception, but even if it could, it has not invoked it. See Determination of the Promotion of Economy and Efficiency in Federal Contracting Pursuant to Executive Order No. 14042, 86 Fed. Reg. 53,691 (Sept. 28, 2021) (approving the Task Force guidance); 41 U.S.C. § 1707(e) (requiring an agency invoking that exception to designate the action as "temporary" and provide a 30-day comment period after it becomes effective); see also DHS v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020) (explaining that "post hoc rationalizations" are not "properly before" a reviewing court).

8. Moreover, the OMB rule approving the Task Force guidance is invalid under the Administrative Procedure Act (APA) because it does not reflect reasoned decisionmaking. In fact, it contains no reasoning at all. The entire rationale provided for requiring federal contractors to follow the Task Force's thirteen pages of single-

spaced "guidance" is as follows: The Task Force guidance "will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a [f]ederal [g]overnment contract." 86 Fed. Reg. at 53,692.

9. Such conclusory justifications do not satisfy the APA. *See Motor Vehicle Mfrs. Ass'n of U.S. v State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that an agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made").

10. Meanwhile, even though the President has sought to circumvent the FAR Council's authority, he has separately instructed the FAR Council to amend federal procurement regulations to include a contract clause requiring federal contractors to comply with the Task Force guidance once approved by OMB. *See* 86 Fed. Reg. at 50,986. But the FAR Council, too, has ignored § 1707(a)–(b), instead promulgating the requested contract clause without notice and comment as "guidance." *See* Memorandum from FAR Council to Chief Acquisition Officers et al. re: Issuance of Agency Deviations to Implement Executive Order 14042 (Sept. 30, 2021) [hereinafter FAR Council guidance], https://www.whitehouse.gov/wp-content/uploads/2021/09/FAR-Council-Guidance-on-Agency-Issuance-of-Deviations-to-Implement-EO-14042.pdf.

11. The government is, of course, treating this "guidance" as binding, as multiple agencies are already including the contract provision drafted by the FAR Council in their contracts.

12. But even if the Administration were not treating it as binding, the FAR Council guidance would still violate § 1707(a)–(b) because, at a minimum, the guidance is a "procurement policy" subject to notice and comment. 41 U.S.C. § 1707(a)(1).

13. Making matters worse, the draft contract language violates the Spending Clause by conditioning Florida's receipt of appropriated funds on Florida agreeing to comply with the Task Force guidance even if it changes during the course of the contract. FAR Council guidance at 5.

14. On top of all these issues, the vaccine requirements are transparently pretextual. While the government pays lip service to the rationale of "improv[ing] economy and efficiency" in federal procurement, 86 Fed. Reg. at 53,692, it openly admits that its true purpose is to "get[] more people vaccinated and decrease the spread of COVID-19." FAR Council guidance at 3; see also Remarks by President Biden on Fighting the COVID-19 Pandemic, White House (Sept. 9, 2021) [hereinafter President Biden Remarks], https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/09/09/remarks-by-president-biden-on-fighting-the-covid-19-pandemic-3/ ("As your President, I'm announcing tonight a new plan to require more Americans to be vaccinated, to combat those blocking public health.")

15. Having failed in its earlier attempts to dictate COVID policy from Washington, see Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021), one can understand why the Executive Branch is no longer relying on its public health authorities to regulate public health. But doing so under the guise of efficient

procurement is pretextual and violates the APA. *See* Dep't of Com. v. New York, 139 S. Ct. 2551, 2573–76 (2019).

16. Because the government's unlawful vaccine requirements seek to interfere with Florida's employment policies and threaten Florida with economic harm and the loss of federal contracts, the State seeks relief from this Court.

PARTIES

17. Plaintiff State of Florida is a sovereign State and has the authority and responsibility to protect its sovereign interests, its public fisc, and the health, safety, and welfare of its citizens.

18. Defendants are the United States, the President of the United States, appointed officials of the United States government, and United States governmental agencies responsible for the issuance and implementation of the challenged actions.

19. Defendant Joseph R. Biden, Jr. issued the challenged executive order. *See* 86 Fed. Reg. at 50,985.

20. Defendant OMB is an agency within the Executive Office of the President. OMB issued the rule approving the Task Force guidance. *See* 86 Fed. Reg. at 53,691.

21. Defendant FAR Council is responsible for "manag[ing], coordinat[ing], control[ing], and monitor[ing] the maintenance of, issuance of, and changes in the Federal Acquisition Regulation." 41 U.S.C. § 1303(d). The FAR Council issued the challenged guidance. *See* FAR Council guidance.

22. Defendant National Aeronautics and Space Administration (NASA) frequently contracts with Florida, has current contractual relationships with Florida,

and is and will continue to seek to impose the Biden Administration's unlawful requirements on Florida.

23. Defendant General Services Administration (GSA) frequently contracts with Florida, has current contractual relationships with Florida, and is and will continue to seek to impose the Biden Administration's unlawful requirements on Florida.

24. Defendant Shalanda D. Young is the Acting Director of OMB. She is sued in her official capacity.

25. Defendants Lesley A. Field, John M. Tenaglia, Jeffrey A. Koses, and Karla S. Jackson are members of the FAR Council by virtue of their roles in their respective agencies. Defendant Lesley A. Field is the Acting Administrator for Federal Procurement of OMB. Defendant John M. Tenaglia is the Principal Director of Defense Pricing and Contracting of the Department of Defense. Defendant Jeffrey A. Koses is the Senior Procurement Executive & Deputy Chief Acquisition Officer of GSA. Defendant Karla S. Jackson is the Assistant Administrator for Procurement of NASA. They are sued in their official capacities.

26. Defendant Bill Nelson is the Administrator of NASA. He is sued in his official capacity.

27. Defendant Robin Carnahan is the Administrator of GSA. She is sued in her official capacity.

JURISDICTION AND VENUE

28. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346, 1361 and 5 U.S.C. §§ 702–03.

29. The Court is authorized to award the requested declaratory and injunctive relief under 5 U.S.C. § 706, 28 U.S.C. §§ 1361, 2201–02, the Constitution, and the Court's equitable powers.

30. Venue lies in this district pursuant to 28 U.S.C. § 1391(e)(1) because the State of Florida is a resident of every judicial district in its sovereign territory, including this judicial district (and division). *See* California v. Azar, 911 F.3d 558, 570 (9th Cir. 2018).[1] Further, there is a related case pending in this division, which also challenges the vaccine requirements for federal contractors. *See* Navy Seal 1 v. Biden, 8:21-cv-2429-SDM-TGW (M.D. Fla.).

FACTUAL BACKGROUND

The Federal Property and Administrative Services Act

31. In the aftermath of World War II, during which the federal government amassed a substantial amount of war supplies and other property, there was an evident need for "an improved and efficient property management program," H.R. Rep. No. 81-670, at 1475, and an overhaul of the internal "housekeeping" activities of the world's largest buyer of goods and services in the world, id. at 1476. As one member

[1] Accord Alabama v. U.S. Army Corps of Eng'rs, 382 F. Supp. 2d 1301, 1329 (N.D. Ala. 2005); see also Atlanta & F.R. Co. v. W. Ry. Co. of Ala., 50 F. 790, 791 (5th Cir. 1892) (explaining that "the state government . . . resides at every point within the boundaries of the state").

of Congress explained, the federal procurement system was "largely uncoordinated, to some extent duplicative," and in desperate need of reform. 95 Cong. Rec. 7441 (June 8, 1949) (remarks of Rep. Holifield).

32. Congress enacted FPASA in 1949 "to provide the [f]ederal [g]overnment with an economical and efficient system for" certain enumerated activities, including "[p]rocuring and supplying property and nonpersonal services," "establish[ing] . . . pools or systems of transportation of [g]overnment personnel," and "manag[ing] of public utility services." 40 U.S.C. § 101(1).[2]

33. For example, FPASA charges GSA with returning excess foreign property, id. § 702, and donating surplus medical supplies owned by the federal government, id. § 703. It also prescribes rules for the use of proceeds from sales or transfers of property, id. § 571, and outlines procedures for the selection of architects and engineers, id. § 1103.

34. To effectuate FPASA, Congress authorized the President to "prescribe policies and directives that the President considers necessary to carry out" that statute. Id. § 121(a). Notably, Congress did not authorize the President to issue orders with the force or effect of law, as it authorized the GSA Administrator to do. Compare § 121(a) ("prescribe policies and directives"), with § 121(c) ("prescribe regulations"); see Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain

[2] Although the relevant statutes have changed over time, Florida cites the current versions except when citing prior versions is necessary to explain historical developments.

language in one part of the statute and different language in another, the court assumes different meanings were intended.").

35. Over time, however, FPASA proved inadequate to control the lack of coordination across agencies, and the proliferation of procurement regulations by different agencies led to a morass of legal requirements.[3] In 1979, Congress directed the Office of Federal Procurement Policy (OFPP)—part of OMB—to "issue policy directives . . . for the purpose of promoting the development and implementation of [a] uniform procurement system," with concurrence of the OMB Director. See Office of Federal Procurement Policy Amendments of 1979, Pub. L. No. 96-83, § 4(e), 93 Stat. 650; see also Kate M. Manuel et al., Cong. Rsch. Serv., R42826, The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions 10 (2015), https:/ / sgp.fas.org/ crs/ misc/ R42826.pdf.

36. In 1983, under the policy directive of the Administrator of OFPP, the Department of Defense, GSA, and NASA jointly promulgated the first version of the Federal Acquisition Regulation (FAR), 48 Fed. Reg. 42,102 (Sept. 19, 1983).

37. Even after creation of the FAR, however, the problems FPASA was designed to solve persisted. S. Rep. No. 100-424, at 13–14 ("Redundancies and inconsistencies continue to exist between the FAR and agency supplementing

[3] As early as 1972, the Commission on Government Procurement described the landscape as "a burdensome mass and maze of procurement and procurement-related regulations" with "no effective overall system for coordinating, controlling, and standardizing regulations." Kate M. Manuel et al., Cong. Rsch. Serv., R42826, The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions 10 (2015) (quoting United States Comm'n on Gov't Procurement, Report of the Commission on Government Procurement, Vol. 1, at 33 (1972)), https:/ / sgp.fas.org/ crs/ misc/ R42826.pdf.

regulations implementing the FAR." (quoting study prepared by OMB Director Tom Daley (Nov. 1986))).

38. Finally, in 1988, after decades of failure by officials in the Executive Office of the President charged with coordinating government-wide procurement,[4] Congress established the FAR Council "to assist in the direction and coordination of [g]overnment-wide procurement policy and [g]overnment-wide procurement regulatory activities in the [f]ederal [g]overnment." Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679, § 3, 102 Stat. 4056, later codified at 41 U.S.C. §1302(a).

39. The FAR Council consists of the OFPP Administrator, the Secretary of Defense, the Administrator of NASA, and the GSA Administrator. 41 U.S.C. § 1302(b).[5]

40. Subject to limited exceptions,[6] the FAR Council has the exclusive authority to issue "a single [g]overnment-wide procurement regulation." Id. § 1303(a)(1). No other agency is authorized to issue government-wide procurement regulations. Id. § 1303(a)(2).

[4] See S. Rep. No. 100-424, at 4 ("OFPP's performance as the [f]ederal [g]overnment's procurement policy leader has been uneven. . . . [M]any of the procurement executives, industry officials and other procurement experts . . . rated OFPP's overall performance during this as being no more than marginally [e]ffective." (quoting Assessment of the Office of Federal Procurement Policy, GAO/ NSIAD–88–35 (Nov. 1987))).

[5] These officials are authorized to designate another agency official to serve on the FAR Council. 41 U.S.C. § 1302(b)(2).

[6] For example, the OFPP Administrator may issue government-wide regulations if the Department of Defense, NASA, and GSA are unable to agree on or fail to issue regulations, 41 U.S.C. § 1121(d), and may remove a regulation if it is inconsistent with the FAR, id. § 1303(a)(5).

41. Finally, § 1707 further protects Congress's reforms to government procurement practices by requiring that any "procurement policy, regulation, procedure, or form"—whether issued government wide by the FAR Council or for one agency by that agency—be subject to notice and comment. 41 U.S.C. § 1707(a)–(b). The relevant official may waive that requirement only if "urgent and compelling circumstances make compliance with the requirements impracticable." Id. § 1707(d).

The Biden Administration's Vaccine Policies

42. Despite pushing the envelope in numerous ways during the COVID-19 pandemic, e.g., Ala. Ass'n of Realtors, 141 S. Ct. at 2485; Florida v. Becerra, 8:21-cv-839-SDM-AAS, 2021 WL 2514138 (M.D. Fla. June 18, 2021), the Biden Administration has made clear that mandating vaccines is "not the role of the federal government." Press Briefing by Press Secretary Jen Psaki, July 23, 2021, https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/23/press-briefing-by-press-secretary-jen-psaki-july-23-2021/.

43. Since his press secretary made that statement, however, the President's "patience" has apparently been "wearing thin," and he has grown "angr[y] at those who haven't gotten vaccinated." President Biden Remarks.

44. On September 9, 2021, the President announced three new administrative actions aimed at compelling much, if not most, of the adult population in the United States to receive a COVID-19 vaccine. Id.

45. First, the President announced that the Department of Labor would develop an emergency rule mandating that private employers with 100 or more employees require their employees to become fully vaccinated or submit to weekly testing. Id.

46. Second, the President announced that the federal government would mandate vaccines for employees who work at healthcare facilities that accept Medicare and Medicaid. Id.

47. Finally, as relevant here, the President announced that he would issue an executive order requiring all executive branch employees and federal contractors to be vaccinated. As the President put it, "[i]f you want to work with the federal government and do business with us, get vaccinated. If you want to do business with the federal government, vaccinate your workforce." Id.

48. In making this announcement, President Biden claimed that these combined initiatives would affect about 100 million Americans. Id.

The Challenged Actions

49. On September 9, 2021, President Biden issued the challenged executive order. 86 Fed. Reg. at 50,985. The order relies on FPASA, as well as the Constitution and the President's power under 3 U.S.C. § 301 to delegate his statutory authorities. 86 Fed. Reg. at 50,985.

50. The executive order directs all agencies to ensure that "contracts and contract-like instruments [covered by the executive order] . . . include a clause [that specifies] that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations

published by the Safer Federal Workforce Task Force," subject to that guidance being approved by the OMB Director. 86 Fed. Reg. at 50,985.

51. The executive order instructs the Task Force to develop this guidance and asks the OMB Director, pursuant to the President's delegation of his FPASA power under 3 U.S.C. § 301, to determine whether the Task Force guidance will promote economy and efficiency in federal procurement. 86 Fed. Reg. at 50,985–86. If the OMB Director makes this determination and publishes it in the federal register, agencies are to include this clause in covered contracts. Id. The order contemplates that the Task Force will update the guidance on a continuing basis, subject to re-approval by the OMB Director. Id.

52. The executive order also instructs the FAR Council to "amend the [FAR] to provide for inclusion in [f]ederal procurement solicitations and contracts subject to this order" the contract clause discussed in the executive order and further instructs agencies to seek to implement the contract clause in contracts not covered by the FAR. Id. at 50,986.

53. The executive order exempts certain contracts such as those with a value below "the simplified acquisition threshold," which is typically $250,000. 86 Fed. Reg. at 50,986–87; FAR § 2.101.

54. The executive order applies to contracts entered into, renewed, or with an option to be exercised on or after October 15, 2021. 86 Fed. Reg. at 50,987.

55. On September 24, 2021, the Task Force issued its guidance. Task Force guidance. The Task Force guidance, which is over thirteen pages single-spaced,

outlines the following requirements: (1) vaccination of covered contractor employees,[7] except in limited circumstances where an employee is legally entitled to an accommodation, id. at 5–6; (2) compliance with CDC guidance for masking and physical distancing at contractor workplaces, including for visitors, id. at 6–7; and (3) designation of a person to coordinate compliance with the guidance and other COVID-19 safety protocols, id. at 7–8.

56. In a lengthy Q&A portion, the guidance makes clear that prior COVID-19 infection, even with an antibody test, does not satisfy the vaccination requirement. Id. at 10. The Q&A also makes clear that employees who work exclusively outdoors are subject to the same stringent requirements.[8] Id.

57. The Task Force guidance sets a deadline of December 8, 2021, for all covered contractor employees to be fully vaccinated. Id. at 5.

58. The guidance also declares that the Task Force will consider updates "based on future changes to [CDC] guidance and as warranted by the circumstances of the pandemic and public health conditions."[9] Id. at 2.

[7] A "covered contractor employee" is defined as "any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace [including] employees of covered contractors who are not themselves working on or in connection with a covered contract." Task Force guidance at 3–4.

[8] Although the Task Force guidance excludes a person's residence from the definition of "covered contractor workplace," it does not exclude people who work exclusively from home from the definition of "covered contractor employee" and thus appears to require the vaccination of people who work exclusively from home. Task Force guidance at 3–4.

[9] To the extent the government seeks to require compliance with "updates" to the Task Force guidance that the OMB Director has not approved, this raises additional issues, including the Task Force's absence of authority, the fact that delegations under 3 U.S.C. § 301 must be made to officials appointed by the President and confirmed by the Senate, and the fact that the Task Force includes officials not appointed pursuant to the Appointments Clause.

59. On September 28, 2021, as contemplated by the executive order, the OMB Director published a notice of determination in the federal register, without reasoning or explanation, finding that the Task Force guidance "will improve economy and efficiency by reducing absenteeism and decreasing labor costs for contractors and subcontractors working on or in connection with a [f]ederal [g]overnment contract." 86 Fed. Reg. at 53,692.

60. On September 30, 2021, the FAR Council—purporting to comply with the executive order—issued its "guidance" entitled "Issuance of Agency Deviations to Implement Executive Order 14042." See FAR Council guidance.

61. In its guidance, the FAR Council "encourage[s] [agencies] to make . . . deviations" to the FAR, which should be "effective until the FAR is amended." Id. at 3.

62. A deviation clause is a clause that is inconsistent with the FAR. FAR § 1.401. The FAR prescribes procedures for both individual deviations and class deviations. Id. § 1.403–04. Deviations are not an appropriate manner to implement a government-wide procurement policy, and "[w]hen an agency knows that it will require a class deviation on a permanent basis, it should propose a FAR revision." Id. § 1.404.

63. The draft contract clause cites the executive order as the single authority for these deviations and contains little substantive content other than requiring compliance with the Task Force guidance, even if that guidance is amended during performance of the contract. FAR Council guidance at 3–5.

64. The FAR Council guidance "reminds" agencies that, under the executive order, they are "required to include an implementing clause" in new contracts awarded on or after November 14, new solicitations issued on or after October 15, extensions or renewals of existing contracts awarded on or after October 15, and options on existing contracts exercised on or after October 15. Id. at 2.

65. The FAR guidance also "strongly encourages" agencies to apply the guidance broadly by including the clause in contracts before those deadlines and on contracts not otherwise subject to the executive order. Id. at 3. This broad application is meant "[t]o maximize the goal of getting more people vaccinated and decreas[ing] the spread of COVID-19." Id. at 3.

Florida is Irreparably Harmed by These Acts

66. Florida contracts with the federal government as a matter of course. Space Florida, an arm of the State, § 331.302(1), Fla. Stat., has several contracts with NASA, many of which involve leasing federal land, but others of which involve Space Florida providing services to the government. Florida's public universities also have many contracts with NASA, especially for research. And the Florida Department of Education has a number of contracts with GSA, including for providing vending and other food-related services in GSA buildings. These contracts are worth tens of millions of dollars, if not more.

67. Florida expects to continue pursuing government contracts in the future. Florida also has current contracts subject to renewal or the exercise of options—both

of which the federal government has said it will not do unless Florida acquiesces to the challenged actions.

68. Because Florida's employees are generally not required to be vaccinated, the challenged actions threaten Florida with the loss of millions of dollars in future contracting opportunities and put undue pressure on Florida to create new policies and change existing ones, each of which threatens Florida with imminent irreparable harm.

CLAIMS

COUNT 1

Agency action that is not in accordance with law and is in excess of authority (OMB Rule)

69. Florida repeats and incorporates by reference ¶¶ 1–68.

70. Under the APA, a court must "hold unlawful and set aside agency action" that is "not in accordance with law" or "in excess of statutory . . . authority, or limitations, or short of statutory right." See 5 U.S.C. § 706(2)(A), (C).

71. The OMB rule adopting the Task Force guidance is contrary to law for at least four reasons.

72. First, the OMB rule violates 41 U.S.C. § 1303(a) because it is a government-wide procurement regulation, which only the FAR Council may issue.

73. The executive order apparently seeks to circumvent § 1303 by delegating the President's FPASA power to the OMB Director. 86 Fed. Reg. at 50,985.

74. That attempt is unlawful because the President has no authority to issue regulations under § 1303—only the FAR Council may issue government-wide procurement regulations. *See* Centralizing Border Control Policy Under the Supervision of the Attorney General, 26 Op. OLC 22, 23 (2002) ("Congress may prescribe that a particular executive function may be performed only by a designated official within the Executive Branch, and not by the President.").

75. Second, and relatedly, the OMB rule is contrary to law because FPASA does not otherwise grant the President the power to issue orders with the force or effect of law. Congress authorized the President to "prescribe policies and directives that the President considers necessary to carry out" FPASA. 40 U.S.C. § 121(a). "[P]olicies and directives" describe the President's power to direct the exercise of procurement authority throughout the government. It does not authorize the President to issue regulations himself.

76. Congress knows how to confer that power, as it authorized the GSA Administrator, in the same section of the statute, to "prescribe regulations." Id. § 121(c); *see also Sosa*, 542 U.S. at 711 n.9 ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended."). And Congress has given the President the power to "prescribe regulations" in other contexts, typically in the realm of foreign affairs and national defense. E.g., 18 U.S.C. § 3496 ("The President is authorized to prescribe regulations governing the manner of executing and returning commissions by consular

officers."); 32 U.S.C. § 110 ("The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.").

77. Third, even if FPASA authorized the President to issue orders with the force or effect of law, it would not authorize approval of the Task Force guidance. The President appears to assume that FPASA authorizes him to issue any order that he believes, as FPASA's statement of purpose states, promotes "an economical and efficient" procurement system. 40 U.S.C. § 101; see 86 Fed. Reg. at 50,985 ("This order promotes economy and efficiency in [f]ederal procurement."). But that mistakes a prefatory purpose statement for a grant of authority. D.C. v. Heller, 554 U.S. 570, 578 (2008) ("[A]part from [a] clarifying function, a prefatory clause does not limit or expand the scope of the operative clause.").

78. And even if FPASA did authorize the President to issue binding procurement orders solely because they may promote economy and efficiency, the OMB rule does not adequately do so. Providing the federal government with an "economic and efficient system for" procurement is not a broad enough delegation to impose nationwide social policy that Congress has not separately authorized. Further, the executive order is divorced from the practical needs of procurement. It will exclude otherwise competitive bidders, cause contractors to suffer labor shortages, and is substantially overbroad in, for example, refusing to account for natural immunity and ignoring the low transmission risk for COVID-19 outdoors.

79. Fourth, the OMB rule is inconsistent with the requirements of the Competition in Contracting Act, which requires federal agencies to "provide for full

and open competition through the use of competitive procedures." 41 U.S.C. § 3301; see 40 U.S.C. § 121(a) (requiring "policies" issued by the President pursuant to FPASA to be "consistent with this subtitle"); 40 U.S.C. § 111 (defining "this subtitle" to include portions of Title 41, including § 3301). The OMB rule precludes an entire class of contractors from obtaining federal contracts without regard to their capability to perform the contract. That is unlawful. See Nat'l Gov't Servs., Inc. v. United States, 923 F.3d 977, 986 (Fed. Cir. 2019) (finding invalid an agency policy that "effectively exclude[ed] an offeror from winning an award, even if that offeror represent[ed] the best value to the government").

80. Because the OMB rule violates § 1303(a), seeks to exercise a delegated power the President does not possess, relies on a misreading of FPASA, and violates § 3301, it is contrary to law.

COUNT 2

Failure to conduct notice and comment[10]
(OMB Rule)

81. Florida repeats and incorporates by reference ¶¶ 1–68.

82. Under 41 U.S.C. § 1707(a)–(b), procurement "polic[ies], regulation[s], procedure[s], or form[s]" must go through notice and comment, so long as they "relate to the expenditure of appropriated funds" and either (i) have "a significant effect

[10] Florida invokes both 41 U.S.C. § 1707 and 5 U.S.C. § 553, see 5 U.S.C. § 706(2)(D), but focuses on § 1707 because it is more stringent.

beyond the internal operating procedures of" the issuing agency, or (ii) have "a significant cost or administrative impact on contractors or offerors."

83. The OMB rule easily satisfies each of these requirements. Moreover, the government has not invoked the exception in § 1707(d), which requires "urgent and compelling circumstances" that "make compliance with the requirements impracticable." 41 U.S.C. § 1707(d); see id. § 1707(e) (requiring an agency invoking that exception to designate the action as "temporary" and provide a 30-day comment period after it becomes effective).

84. Even if it had, the COVID-19 pandemic has existed for over eighteen months, and the prospect of a vaccine has existed for at least a year. There is no reason that notice and comment was impracticable.

COUNT 3

Arbitrary and capricious agency action
(OMB Rule)

85. Florida repeats and incorporates by reference ¶¶ 1–68.

86. Under the APA, a court must "hold unlawful and set aside agency action" that is "arbitrary [or] capricious." 5 U.S.C. § 706(2)(A).

87. An agency action is arbitrary or capricious if it fails to "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." State Farm, 463 U.S. at 43.

88. The OMB rule contains no explanation or reasoning at all. 86 Fed. Reg. at 53,691–92.

89. What is more, the OMB rule is arbitrary and capricious because the current Task Force guidance does not sufficiently promote economy and efficiency, or at least consider and address the shortfalls Florida has highlighted. See ¶¶ 78–79.

90. Moreover, the OMB rule ignores costs to the States, a "centrally relevant factor when deciding whether to regulate," Michigan v. EPA, 576 U.S. 743, 752–53 (2015), and neither accounts for Florida's reliance interests nor considers lesser alternatives, Regents, 140 S. Ct. at 1913–14.

91. Finally, the OMB Director's conclusion that the Task Force guidance would improve procurement efficiency by reducing absenteeism and decreasing labor costs is blatantly pretextual. See Dep't of Com., 139 S. Ct. at 2576 ("Accepting contrived reasons would defeat the purpose of the enterprise [of judicial review.]").

92. The OMB rule is a trojan horse for federal regulation of public health. President Biden, in his remarks announcing the executive order, stated that he was "frustrated with the nearly 80 million Americans who are still not vaccinated," referenced "overcrowd[ed] . . . hospitals" and "overrun[] . . . emergency rooms," and blamed "elected officials actively working to undermine the fight against COVID-19." President Biden Remarks.

93. The FAR Council guidance likewise admits that the goal of this effort is "getting more people vaccinated and decreas[ing] the spread of COVID-19." FAR Council guidance at 3.

94. For all these reasons, the OMB rule is arbitrary and capricious.

COUNT 4

Agency action that is not in accordance
with law and is in excess of authority
(FAR Council Guidance)

95. Florida repeats and incorporates by reference ¶¶ 1–68.

96. While the FAR Council claims to be issuing only "guidance," the guidance is being "applied . . . in a way that indicates it is binding." Texas v. EEOC, 933 F.3d 433, 441 (5th Cir. 2019). It is therefore reviewable.

97. The guidance does not explain what authority would authorize the FAR Council to create a government-wide procurement regulation mandating vaccines for contractors. But to the extent the FAR Council relies on FPASA, it lacks that authority for the reasons described in count 1.

COUNT 5

Failure to conduct notice and comment
(FAR Council Guidance)

98. Florida repeats and incorporates by reference ¶¶ 1–68.

99. As discussed in count 2, 41 U.S.C. § 1707(a)–(b) requires procurement "polic[ies], regulation[s], procedure[s], or form[s]" to go through notice and comment.

100. Even if the FAR Council guidance is not being treated as binding—and it is—the guidance is a procurement policy.

101. By requiring notice and comment—not just for regulations, but for policies—Congress subjected any government-wide pronouncements, whether

binding or not, to notice and comment. The FAR Council guidance is therefore invalid.

102. Moreover, the draft contract language in the guidance is a procurement form subject to notice and comment.

103. For these reasons, and those discussed in count 2, the FAR Council guidance is invalid.

COUNT 6

Arbitrary and capricious agency action
(FAR Council Guidance)

104. Florida repeats and incorporates by reference ¶¶ 1–68.

105. Under the APA, a court must "hold unlawful and set aside agency action" that is "arbitrary [or] capricious." 5 U.S.C. § 706(2)(A).

106. The FAR Council guidance is arbitrary and capricious for the reasons explained in count 3.

COUNT 7

Ultra vires acts of the President

107. Florida repeats and incorporates by reference ¶¶ 1–68.

108. Apart from the APA, there is a nonstatutory cause of action to challenge unlawful procurement-related actions by the President. See Chamber of Com. of U.S. v. Reich, 74 F.3d 1322, 1330 (D.C. Cir. 1996) (discussing a government concession to that effect).

109. As explained in count 1, the President does not have the authority to issue the challenged executive order.

COUNT 8

Violation of the U.S. Constitution, Art. I, § 1
Unconstitutional delegation of legislative power

110. Florida repeats and incorporates by reference ¶¶ 1–68.

111. Article I, § 1 of the U.S. Constitution states, "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." Under Article I, § 1, only Congress may engage in lawmaking.

112. To the extent the Court agrees that FPASA authorizes the President to require contractors to mandate vaccines to their employees to promote economy and efficiency in procurement, FPASA lacks an intelligible principle and represents an unconstitutional delegation of legislative authority.

COUNT 9

Violation of the U.S. Constitution, Amend. X
Unconstitutional exercise of the spending power

113. Florida repeats and incorporates by reference ¶¶ 1–68.

114. The challenged actions are unconstitutional conditions on the State's receipt of federal funds.

115. "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously," so "States [can] exercise their choice knowingly," Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

116. Federal contracts are an exercise of the Spending Clause, yet the challenged actions ask Florida to agree to an ambiguous contract term—specifically, agreeing to comply with uncertain Task Force guidance that can be changed at any time.

117. The challenged actions are invalid for that reason alone.

COUNT 10

Declaratory judgment that challenged actions are unlawful

118. Florida repeats and incorporates by reference ¶¶ 1–68.

119. For the same reasons described in each of the previous counts, Florida is entitled to a declaratory judgment that the Defendants are violating the law.

PRAYER FOR RELIEF

For these reasons, Florida asks the Court to:

a) Hold unlawful and set aside the executive order, the OMB rule, and the FAR Council guidance.

b) Issue preliminary and permanent injunctive relief enjoining Defendants from enforcing the executive order, the OMB rule, and the FAR Council guidance.

c) Issue declaratory relief declaring the Defendants' actions unlawful.

d) Award Florida costs and reasonable attorney's fees.

e) Award such other relief as the Court deems equitable and just.

Respectfully submitted,

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EMERGENCY TEMPORARY STANDARD

SUMMARY

COVID-19 Vaccination and Testing ETS

OSHA Occupational Safety and Health Administration

The Occupational Safety and Health Administration (OSHA) has issued an emergency temporary standard (ETS) to minimize the risk of COVID-19 transmission in the workplace. The ETS establishes binding requirements to protect unvaccinated employees of large employers (100 or more employees from the risk of contracting COVID-19 in the workplace.

COVID-19 was not known to exist until January 2020, and since then nearly 745,000 people, many of them workers, have died from the disease in the U.S. alone. At the present time, workers are continually becoming seriously ill and dying as a result of occupational exposures to COVID-19. OSHA expects that the Vaccination and Testing ETS will result in approximately 23 million individuals becoming vaccinated. The agency has conservatively estimated that the ETS will prevent over 6,500 deaths and over 250,000 hospitalizations. In issuing the ETS, OSHA has made several important determinations:

Unvaccinated Workers Face Grave Danger:
Unvaccinated workers are much more likely to contract and transmit COVID-19 in the workplace than vaccinated workers. OSHA has determined that many employees in the U.S. who are not fully vaccinated against COVID-19 face grave danger from exposure to COVID-19 in the workplace. This finding of grave danger is based on the severe health consequences associated with exposure to the virus along with evidence demonstrating the transmissibility of the virus in the workplace and the prevalence of infections in employee populations. The evidence for the finding of a grave danger is in Section III.A. of the ETS preamble.

An ETS is Necessary:
Workers are becoming seriously ill and dying as a result of occupational exposures to COVID-19, when a simple measure, vaccination, can largely prevent those deaths and illnesses. The ETS protects these workers through the most effective and efficient control available – vaccination – and further protects workers who remain unvaccinated through required regular testing, use of face coverings, and removal of all infected employees from the workplace. OSHA also concludes, based on its enforcement experience during the pandemic to date, that continued reliance on existing standards and regulations, the General Duty Clause of the OSH Act, and workplace guidance, in lieu of an ETS, is not adequate to protect unvaccinated employees from COVID-19. Thus, OSHA has also determined that an ETS is necessary to protect unvaccinated workers from the risk of contracting COVID-19 at work. The evidence for the need for the ETS is in Section III.B. of the ETS preamble.

The ETS is Limited to Employers with 100 or More Employees:
In light of the unique occupational safety and health dangers presented by COVID-19, and against the backdrop of the uncertain economic environment of a pandemic, OSHA is proceeding in a stepwise fashion in addressing the emergency this rule covers. OSHA is confident that employers with 100 or more employees have the administrative capacity to implement the standard's requirements promptly, but is less confident that smaller employers can do so without undue disruption. OSHA needs additional time to assess the capacity of smaller employers, and is seeking comment to help the agency make that determination. Nonetheless, the agency is acting to protect workers now in adopting a standard that will reach two-thirds of all private-sector workers in the nation, including those working in the largest facilities, where the most deadly outbreaks of COVID-19 can occur. Additional information on the scope of the ETS is found in Section VI.B. of the ETS preamble.

The ETS is Feasible:
OSHA has evaluated the feasibility of this ETS and has determined that the requirements of the ETS are both economically and technologically feasible. The evidence for feasibility is found in Section IV. of the ETS preamble. The specific

requirements of the ETS are outlined and described in the Summary and Explanation, which is in Section VI. of the ETS preamble.

The ETS Preempts State and Local Laws: OSHA intends the ETS to address comprehensively the occupational safety and health issues of vaccination, wearing face coverings, and testing for COVID-19. Thus, the standard is intended to preempt States, and political subdivisions of States, from adopting and enforcing workplace requirements relating to these issues, except under the authority of a Federally-approved State Plan. In particular, OSHA intends to preempt any State or local requirements that ban or limit an employer from requiring vaccination, face covering, or testing. Additional information on the preemption of State and local laws is found in Section VI.A. of the ETS preamble.

The ETS Also Serves as a Proposed Rule: Although this ETS takes effect immediately, it also serves as a proposal under Section 6(b) of the OSH Act for a final standard. Accordingly, OSHA seeks comment on all aspects of this ETS and how it would be adopted as a final standard. OSHA encourages commenters to explain why they prefer or disfavor particular policy choices, and to include any relevant studies, experiences, anecdotes or other information that may help support the comment. Stakeholders may submit comments and attachments, identified by Docket No. OSHA-2021-0007, electronically at www.regulations.gov. Follow the instructions online for making electronic submissions.

OSHA May Revise or Update the ETS: OSHA will continue to monitor trends in COVID-19 infections and death as more of the workforce and the general population become fully vaccinated against COVID-19 and as the pandemic continues to evolve. Where OSHA finds a grave danger from the virus no longer exists, or new information indicates a change in measures necessary to address the grave danger, OSHA may update this ETS, as appropriate.

This fact sheet highlights some of the additional requirements of the ETS; employers should consult the standard for full details. Read the full text of the ETS at: www.osha.gov/coronavirus/ets2.

Understanding the ETS

- **Employers covered by the ETS.** The ETS generally applies to employers in all workplaces that are under OSHA's authority and jurisdiction, including industries as diverse as manufacturing, retail, delivery services, warehouses, meatpacking, agriculture, construction, logging, maritime, and healthcare. Within these industries, all employers that have a total of at least 100 employees firm- or corporate-wide, at any time the ETS is in effect, are covered.
- **Workplaces not covered by the ETS.** This standard does not apply to workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors or in settings where employees provide healthcare services or healthcare support services when subject to the requirements of the Healthcare ETS (29 CFR 1910.502).
- **Employees of covered employers not subject to the requirements.** The ETS does not apply to employees who do not report to a workplace where other individuals such as coworkers or customers are present, employees while they are working from home, or employees who work exclusively outdoors.
- **Effective Dates.** The ETS is effective immediately upon publication in Federal Register. To comply, employers must ensure provisions are addressed in the workplace by the following dates:
  - 30 days after publication: All requirements other than testing for employees who have not completed their entire primary vaccination dose(s)
  - 60 days after publication: Testing for employees who have not received all doses required for a primary vaccination

How to Protect Workers from COVID-19

The ETS establishes minimum vaccination, vaccination verification, face covering, and testing requirements to address the grave danger of COVID-19 in the workplace. The key requirements of the ETS are:

Employer Policy on Vaccination. The ETS requires covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead establish, implement, and enforce a policy allowing

employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace.

Determination of employee vaccination status. The ETS requires employers to determine the vaccination status of each employee, obtain acceptable proof of vaccination, maintain records of each employee's vaccination status, and maintain a roster of each employee's vaccination status.

Employer support for employee vaccination. The ETS requires employers to support vaccination by providing employees reasonable time, including up to four hours of paid time, to receive each vaccination dose, and reasonable time and paid sick leave to recover from side effects experienced following each dose.

COVID-19 testing for employees who are not fully vaccinated. The ETS requires employers to ensure that each employee who is not fully vaccinated is tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer). The ETS does not require employers to pay for any costs associated with testing. However employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements. In addition, nothing prohibits employers from voluntarily assuming the costs associated with testing.

Employee notification to employer of a positive COVID-19 test and removal. The ETS requires employers to: (1) require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19; (2) immediately remove any employee from the workplace, regardless of vaccination status, who received a positive COVID-19 test or is diagnosed with COVID-19 by a licensed healthcare provider; (3) keep removed employees out of the workplace until they meet criteria for returning to work.

Face coverings. The ETS requires employers to ensure that each employee who is not fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes, except in certain limited circumstances. Employers must not prevent any employee, regardless of vaccination status, from voluntarily wearing a face covering unless it creates a serious workplace hazard (e.g., interfering with the safe operation of equipment).

Information provided to employees. The ETS requires employers to provide employees the following in a language and at a literacy level the employees understand: (1) information about the requirements of the ETS and workplace policies and procedures established to implement the ETS; (2) the CDC document "Key Things to Know About COVID-19 Vaccines"; (3) information about protections against retaliation and discrimination; and (4) information about laws that provide for criminal penalties for knowingly supplying false statements or documentation.

Reporting COVID-19 fatalities and hospitalizations to OSHA. The ETS requires employers to report work-related COVID-19 fatalities to OSHA within 8 hours of learning about them, and work-related COVID-19 in-patient hospitalizations within 24 hours of the employer learning about the hospitalization.

Availability of records. The ETS requires employers to make available for examination and copying an employee's COVID-19 vaccine documentation and any COVID-19 test results to that employee and to anyone having written authorized consent of that employee. Employers are also required to make available to an employee, or an employee representative, the aggregate number of fully vaccinated employees at a workplace along with the total number of employees at that workplace.

Additional Information

Visit www.osha.gov/coronavirus for additional information on:

- COVID-19 Laws and regulations
- COVID-19 Enforcement policies
- Compliance assistance materials and guidance
- Worker's Rights (including how/when to file a safety and health or whistleblower complaint).

OSHA 4162-11 2021

Faculty

Jordi Guso is a partner with Berger Singerman, LLP in Miami in its Business Reorganization practice, where he concentrates his practice in commercial bankruptcy, workouts, financial restructuring and commercial litigation. He represents financially distressed businesses in court-supervised and out-of-court restructurings in a variety of industries, including aviation, hospitality, retail, casual dining and real estate. He also advises official committees, secured creditors and purchasers in the areas of bankruptcy, insolvency and § 363 asset sales. Mr. Guso has been listed in *The Best Lawyers in America* (2006-19), *Chambers & Partners USA*: *America's Leading Business Lawyers* (2004-18), *Florida Trend* magazine's "Legal Elite" (2004-18) and "Legal Elite Hall of Fame" (2015-18), as one of the top 1.6 percent of attorneys in Florida, *The South Florida Legal Guide*'s "Top Lawyer" (2005-18), *Florida's Super Lawyers* (2006-18), *Who's Who Legal*, Florida (2008-17) and *Who's Who Legal* (2008-17), and he is AV Preeminent-rated by Martindale-Hubbell. He is a Fellow of the American College of Bankruptcy and an ABI member, and he has served on the board of the Bankruptcy Bar Association for the Southern District of Florida and on the advisory board of ABI's Alexander L. Paskay Memorial Bankruptcy Seminar. Mr. Guso is admitted to practice in Florida, the Eleventh Circuit U.S. Court of Appeals, and the U.S. District and Bankruptcy Courts for the Southern, Middle and Northern Districts of Florida. He clerked for Hon. Sidney M. Weaver, former Chief U.S. Bankruptcy Judge of the U.S. Bankruptcy Court for the Southern District of Florida, from 1990-92. Mr. Guso received his B.S. in political science from Spring Hill College and his J.D. from the University of Miami School of Law.

James A. Peko, CFA, CIRA, CDBV is a principal in the Corporate Advisory & Restructuring Services group at Grant Thornton LLP in New York. He has more than 20 years of experience in investment banking, capital markets and financial advisory services, and specializes in working with with troubled, underperforming and bankrupt entities. He has assisted clients with debt restructuring, strategic planning, business plan analysis, liquidity planning, the § 363 sales process and chapter 11 bankruptcies. His experience includes all facets of the bankruptcy process, including pre-bankruptcy planning, developing reorganization plans and evaluating capital structure. Mr. Peko has served various constituencies, including companies in in- and out-of-court proceedings, creditor committees and lender groups. In addition, he advised chief executive officers and executive management teams on sustainability and shareholder value optimization strategies by evaluating strategic alternatives, including restructurings, acquisitions, divestitures, joint ventures, capital sourcing and initial public offerings. He has served clients in the airline, automotive, engineering and construction, financial, gaming, hospitality, manufacturing, media, real estate, retail, technology and utility industries. Previously, Mr. Peko served as a director at Navigant Capital Advisors and as a senior manager in the Reorganization Services Group at Deloitte. He also was a director at Ernst & Young Corporate Finance LLC and a first vice president in the Corporate Finance Group at The Nikko Securities Co., International Inc. Mr. Peko received his B.S. in economics and accounting from St. Peter's College and his M.B.A. in finance from Fordham University.

Robert V. Sartin is chairman of Frost Brown Todd LLC in Nashville, Tenn., and focuses his practice on the energy, health care, transportation and private-equity industries. In 2009, he formed the firm's Automotive Industry Task Force, which convenes an annual symposium, AutoConnect,

that draws thought leaders and industry titans from around the globe. Throughout his decades-long career, Mr. Sartin has worked in some of the most heavily regulated sectors — from the coal and auto industries to new ventures in health care and biopharmaceuticals — often acting as lead outside counsel for large national and multinational companies. He routinely advises clients on important contractual, transactional, tax and compliance matters, including asset and stock acquisitions, M&As, joint-venture formation and dissolution, private placements, tax planning, refinancings and corporate restructurings. He also oversees all 13 of the firm's markets, as well as the firm's ancillary business ventures, having served or currently serving on its Strategic Planning, Finance, Advancement, and Executive Committees. Mr. Sartin is admitted to the Kentucky and Tennessee Bars, is an ABI member, and is AV-rated by Martindale-Hubbell. He has been listed in *The Best Lawyers in America* for Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law and Litigation – Bankruptcy (2006-19), *Mid-South Super Lawyers* (2012-17) and *Nashville Post In-Charge Legal* (2013-19), and was named a *BTI Client Service* "All Star" in 2014. Mr. Sartin received his B.B.A. in finance and economics in 1989 from Baylor University, his J.D. in 1995 from Washington & Lee University and his LL.M. in taxation from New York University in 1997.

Emily Burkhardt Vicente is a partner with Hunton Andrews Kurth in Los Angeles and co-chairs the firm's labor and employment group. She has a national practice focusing on complex employment and wage and hour litigation and advice. Ms. Vicente is a trial lawyer who defends employers in complex employment litigation, including California and FLSA wage and hour class and collective actions, California representative PAGA actions, employment discrimination class actions, and complex whistleblower matters. In addition to her litigation practice, she helps employers develop forward-thinking compliance practices that reduce wage and hour disputes and help mitigate other employment-related risks. Ms. Vicente regularly counsels clients on employment-related matters, including design and implementation of diversity and inclusion programs, ESG initiatives, harassment and discrimination investigations, "me too" issues, fair-pay compliance, negotiation of employment contracts, and the use and implementation of artificial intelligence (AI) and emerging technology in the workplace. She also has successfully guided employers through various stages of pandemic response, including navigating state and federal sick pay laws, furloughs and layoffs, WARN Act requirements and return-to-work issues. Ms. Vicente co-chairs the firm's diversity & inclusion committee and is a member of the firm's national associates committee. She also is a regular speaker on labor and employment and class action issues, and is a contributing author to the firm's Employment & Labor Perspectives blog. Ms. Vicente is admitted to practice before the U.S. Supreme Court, the U.S. District Courts for the Central, Southern, Eastern and Northern Districts of California, the U.S. Courts of Appeals for the Ninth and Eleventh Circuits, the U.S. District Courts for the Northern and Middle Districts of Georgia, and the Superior, Appellate and Supreme Courts of California and Georgia. She received her B.A. summa cum laude in 1996 from St. John Fisher College and her J.D. with honors in 1999 from the University of North Carolina at Chapel Hill, where she was admitted to the Order of the Coif and the Order of the Barristers.