

No. 20-0331

IN THE SUPREME COURT OF TEXAS

IN RE: STEVEN HOTZE, M.D.

Relator,

Original Proceeding Arising from Case No. 2020-25311 in the 189th District Court
of Harris County, Texas
Honorable Steven Kirkland, Ancillary Judge Presiding

**RESPONSE TO EMERGENCY PETITION FOR WRIT OF MANDAMUS
AND MOTION TO DISMISS BY REAL PARTY IN INTEREST
HARRIS COUNTY JUDGE LINA HIDALGO**

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TO THE HONORABLE SUPREME COURT OF TEXAS:

INTRODUCTION AND RESPONSE TO STATEMENT OF THE CASE

Millions of doctors, nurses, and first-responders are in harm's way as they treat 3.3 million patients and bury more than 234,000 victims—and counting—during the worst pandemic in a century. Protective equipment is in short supply, and the heroes working long hours to save lives knowingly expose themselves to the risk of a disease two to three times as contagious as influenza, 10 to 20 times more deadly, and for which there is no vaccine, no cure, no approved treatment, and a shortage of reliable tests.¹

COVID-19 is a brutal adversary, and scientists with sophisticated epidemiological models warn that this scourge could cause the catastrophic failure of our medical system.² We are in the midst of an event that will mark a generation, and our actions today will determine how many funerals we attend in the coming months.

The leaders upon whose shoulders this burden falls have been forced to make difficult decisions. Approximately half the world and 90 percent of Americans are ordered to stay home,³ but these orders are being lifted, and society is rewriting its rules to balance our social, economic, and health needs.

¹ Tab 1, Affidavit of Dr. Umair Shah at 2-3.

² Tab 1 at 4-8.

³ Tab 1 at 8.

On April 22, Harris County Judge Lina Hidalgo implemented several important CDC and state guidelines into a “Use of Face Coverings” Order to protect residents as businesses reopen in the Houston area.⁴ This Order imposed no jail time and was drafted to be educational, rather than punitive.

Dissatisfied with this, Relator sued Judge Hidalgo for the third time in three weeks and sought to eliminate any effort to enforce CDC guidelines in Harris County. He complains that Judge Hidalgo’s Order “tramples” on his rights, but he could not explain what rights he loses by following CDC guidelines, which portions of the Order he disagreed with, how he had standing to sue, or how he could prevail in any of his claims. Still, he asks this Court to compel Judge Kirkland to grant him a Temporary Restraining Order.

On April 27, Governor Greg Abbott signed Executive Order GA-18, which took away the right of counties to implement these CDC guidelines and assumed State responsibility for controlling the spread of COVID-19.⁵ On April 28, Judge Hidalgo amended her Order to be consistent with Executive Order GA-18.⁶ Accordingly, Relator’s petition should be dismissed as moot.

⁴ Tab 2, April 22 “Use of Face Coverings” Order.

⁵ Tab 3, April 27 Executive Order GA-18 at 4 (Imposing no enforcement for hygiene, environmental cleanliness, sanitation, social distancing, and compliance with the President and CDC guidelines, and usurping local authority to impose penalties for failing to do so).

⁶ Tab 4, April 28 Amended “Use of Face Coverings” Order.

RESPONSE TO STATEMENT OF JURISDICTION

Harris County Judge Hidalgo agrees that this Court has jurisdiction over mandamus proceedings when a trial court clearly abuses its discretion and there is no adequate appellate remedy. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135-36 (Tex. 2004). However, Judge Hidalgo disputes that the trial court abused its discretion, or that there was no adequate appellate remedy. Judge Hidalgo further asserts this case is moot because she rescinded the Order Relator complains about.

RESPONSE TO ISSUES PRESENTED

Relators' three issues for review are moot. However, if the Court considers this case, Judge Hidalgo asserts that her April 22 Order was constitutional, did not violate Texas Government Code Section 418, *et seq.*, and was consistent with Governor Abbott's Executive Orders at the time Relator filed his lawsuit.

RESPONSE TO STATEMENT OF FACTS

As explained by Dr. Umair Shah,⁷ the COVID-19 pandemic is unlike anything modern society has experienced. There is no natural immunity to the SARS-CoV-2 virus that causes the disease, no "herd immunity", no vaccine, and no approved treatment.⁸ While influenza kills approximately 0.1% of those it

⁷ Tab 1 at 2-4.

⁸ Tab 1 at 2-3.

infects, COVID-19 kills as many as one to two percent of those it infects, including six percent of those over the age of 60, and 20 percent of those over the age of 80.⁹

This is compounded by the fact that SARS-CoV-2 is extremely contagious. A patient with seasonal flu will transmit the disease to an average of 1.3 people, while a patient with SARS-CoV-2 will transmit the virus to an average of 2 to 3 people, which allows for exponential rates of infection.¹⁰

The United States had its first COVID-19 case on January 20. By March 30, even with quarantine measures, it led the world with 164,248 confirmed cases. Less than a month later, it had more than a million cases.

Relator dismisses the pandemic as a hoax and relies on the opinion of a self-proclaimed “world-leading expert” who does not have a medical degree—much less board certification in either internal medicine or infectious disease. Relator claims society overreacted to this pandemic, and his expert’s April 7 affidavit downplays COVID-19 because only 6,593 Americans died from it.¹¹

As these Americans were dying, Relator was feverishly suing Judge Hidalgo every time she issued a regulation to protect Harris County residents. During Relator’s last lawsuit, Judge Hidalgo explained that we are less concerned with

⁹ Tab 1 at 2-3.

¹⁰ Tab 1 at 3.

¹¹ Relator’s Petition for Writ of Mandamus at Tab 9, Exhibit C at 2.

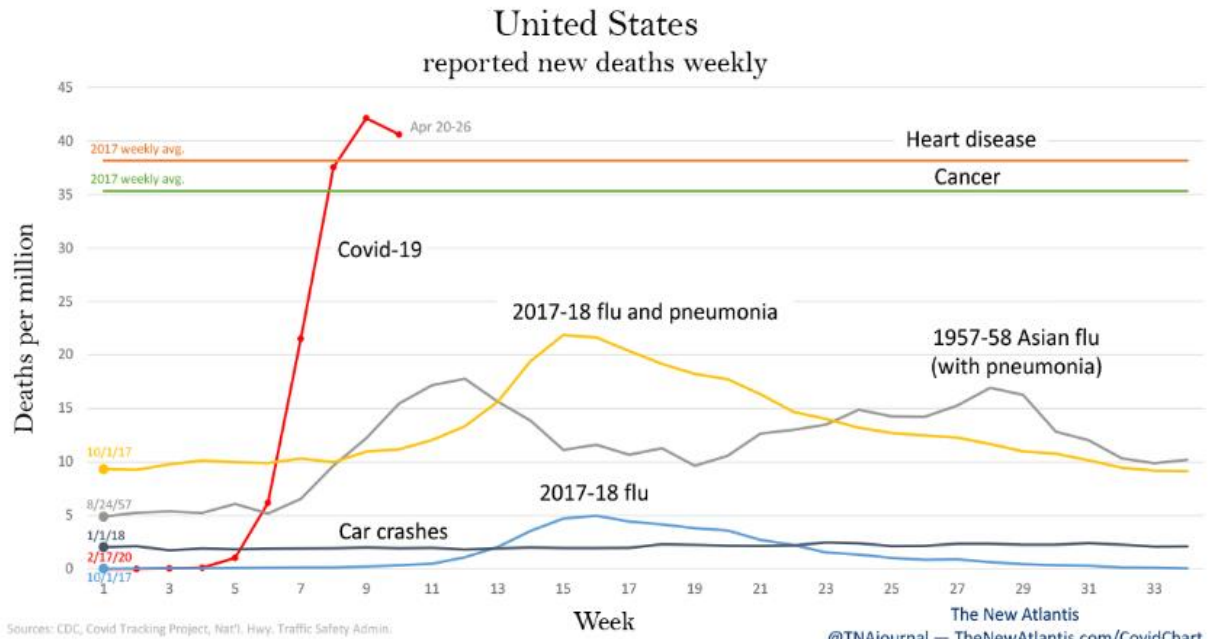
what happened in the first weeks of this pandemic, than with what *will* happen without action.¹² Those words were prophetic.

In the three weeks since Relator submitted his expert's affidavit, more than 57,000 additional Americans have died of COVID-19, and it is now the leading cause of death in the United States.¹³ Stated another way, more Americans died of COVID-19 in the last three weeks than by influenza in an entire year. This three-week death toll exceeds the number of combat deaths of American troops during the entire 20-year Vietnam War.

Using data from the Centers for Disease Control, *The New Atlantis* published a chart comparing COVID-19 deaths with other causes of death—dating to the 1957 Asian flu. In just eight weeks, COVID-19 deaths went from zero to surpassing all other modern flu seasons, cancer, heart disease, and car crashes, as depicted by the red line:

¹² Defendants' Plea to the Jurisdiction, Answer, and Response at 13, filed April 12, 2020 in *Steven Hotze, M.D., et al. v. Lina Hidalgo, in her official capacity, and Harris County*, Cause No. 2020-22609, in the 281st Judicial District, Harris County, Texas.

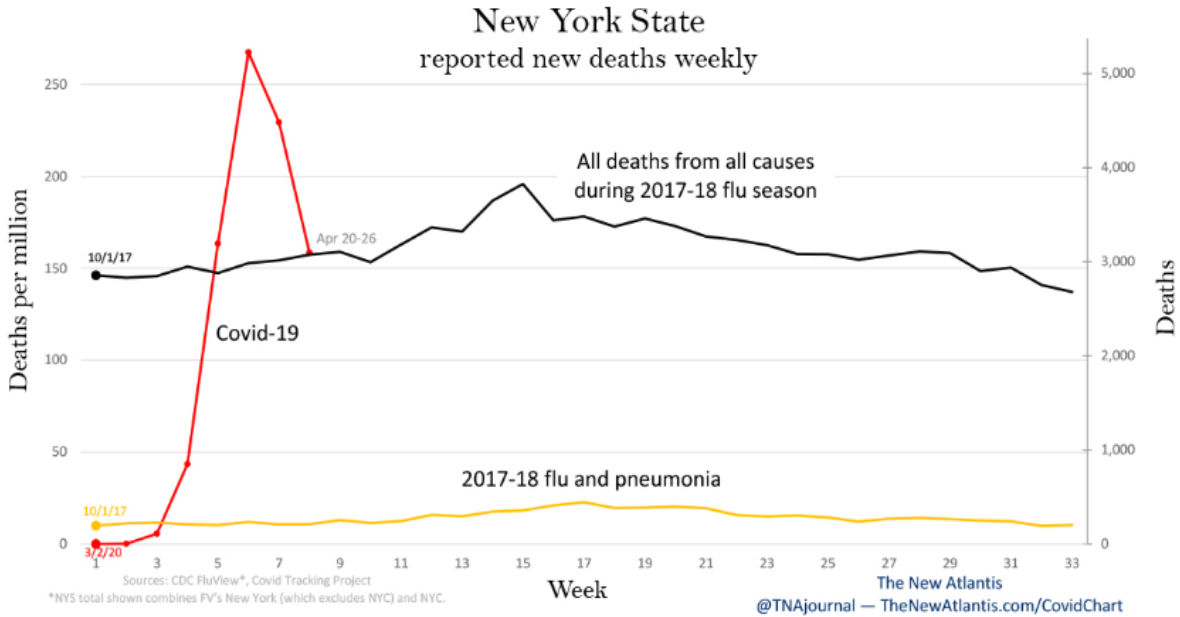
¹³ Laura Geggel, "COVID-19 is now the leading cause of death in the United States", *LiveScience*, <https://www.livescience.com/coronavirus-leading-cause-of-death.html> (visited April 30, 2020 at 1 p.m.).



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The casualties are even more dramatic in New York, where social distancing was not implemented soon enough to prevent a death spike. There, COVID-19 overwhelmed local hospitals and become not only the leading cause of death, but far surpassed all other causes of death *combined*:

¹⁴ Ari Schulman, *et al.*, “Not Like the Flu, Not Like Car Crashes, Not Like...”, *The New Atlantis* (Updated April 27, 2020), <https://www.thenewatlantis.com/publications/not-like-the-flu-not-like-car-crashes-not-like> (visited April 30, 2020 at 1 p.m.).



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Relator’s cavalier attitude toward this public health crisis is akin to someone standing on a beach the day before a Category 5 hurricane landfall and refusing to evacuate because the water has only risen a foot. When a person refuses to evacuate from a hurricane, he risks only his own life, while Relator risks the lives of his entire community.

The only way to reduce this risk is to slow the transmission of the virus and “flatten the curve” so hospitals can keep up with the volume of patients coming in. So far, Texas’s early and successful adoption of social distancing avoided the type of crisis experienced in other places. However, that could change quickly, and we cannot become complacent.

¹⁵ *Id.*

RESPONSE TO ARGUMENT

I. Judge Hidalgo Moves to Dismiss Relator's Petition as Moot.

Judge Hidalgo moves to dismiss Relator's emergency petition for writ of mandamus because it is moot. Texas is a vast state, and its 254 counties include urban areas like Harris County, with its 2,402 people per square mile and spacious areas like Loving County, with 0.1 people per square mile.

In a state this large and varied, it makes sense for local governments to be able to implement infection control regulations appropriate for their densities and needs. However, Executive Order GA-18 takes away local authority to implement CDC regulations during the COVID-19 emergency. Judge Hidalgo recognized this preemption, and on April 28, amended the "Use of Face Coverings" Order to state:

Whereas, on April 27, 2020, Governor Abbott issued Executive Order GA-18 which, among other things, provides that individuals "are encouraged to wear appropriate face coverings, but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering"; and

Whereas, a County Judge, who serves as her county's emergency management director and as the Governor's designated agent in the administration and supervision of duties under the Texas Disaster Act, is charged with enforcing the Governor's executive orders and imposing local restrictions that are consistent with the Governor's executive orders; and

Whereas, the Harris County Judge has determined that the "Use of Face Coverings" Order must be amended to ensure that local restrictions implemented to protect the health and safety of Harris

County residents during the COVID-19 pandemic also remain consistent with the Governor's newly issued Executive Order GA-18.¹⁶

Harris County has removed all penalties from the Order, and CDC advisories are now permissive, rather than required. Accordingly, there is no controversy before the Court, and Relator's Petition should be dismissed as moot. However, if the Court reaches the merits of Relator's claim, it should deny his petition for writ of mandamus for the reasons explained below.

II. The trial court properly denied Relator's TRO because he failed to identify what he sought to enjoin.¹⁷

The trial court properly denied Relator's request for a Temporary Restraining Order because Relator failed to identify which parts of Judge Hidalgo's superseded Order he was personally affected by, had standing to enjoin, and would have caused him irreparable harm. As explained in Judge Hidalgo's Plea to the Jurisdiction, Section 2, Parts 4, 5, and 7 and Sections 3 and 4 of the previous Order did not even require Relator to do anything and could not possibly be part of his challenge. With respect to the other sections, Relator's one-page conclusory affidavit fails to show standing or place the parties on notice of what Relator wanted to enjoin.

¹⁶ Tab 4, April 28 Amended "Use of Face Coverings" Order at 2.

¹⁷ See Tab 5, Judge Hidalgo's Plea to the Jurisdiction at 20-22.

III. The trial court properly denied Relator’s TRO because Relator was never at risk for prosecution and had no constitutional injury.¹⁸

In Texas, standing “requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court.” *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018), quoting *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012). Standing is a constitutional prerequisite to suit which derives from the Texas Constitution’s separation of powers, which denies judicial authority to decide issues in the abstract. Standing also derives from the open courts provision, which provides court access only to a “person for an injury done him.” *Id.* A party must show “he has suffered an injury distinct from the general public.” *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001).

This Court recently held that a party cannot challenge an emergency order under Chapter 418 unless he is being prosecuted or at imminent risk of prosecution under that order. In the case of *In re Abbott*, No. 20-0291, 2020 WL 1943226 (Tex. Apr. 23, 2020), a group of judges sought a petition for writ of mandamus against Governor Abbott for issuing Executive Order GA-13, which limited their ability to release detainees with a history of certain charges.

This Court held the judges had no personal, legally cognizable injury. None had been arrested or prosecuted for violating the Governor’s Order, and this Court

¹⁸ Relator’s Petition for Writ of Mandamus at Tab 9, Page 8. *See also*, Tab 5, Judge Hidalgo’s Plea to the Jurisdiction at 8-11.

explained that standing was not conferred on them just because the Governor had the power to criminally charge them under Texas Government Code § 418.173.

While a plaintiff does not need to be prosecuted to challenge the constitutionality of a law, he must allege “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.” *Id.*, quoting *Babbitt v. Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979). *See also, Mr. W. Fireworks, Inc. v. Comal Cty.*, No. 03-06-00638-CV, 2010 WL 1253931, at *7 (Tex. App. Mar. 31, 2010) (to challenge the constitutionality of a statute, a party must either be prosecuted or the threat of prosecution is imminent).

Relator never even threatened not to wear a face mask or suggested he was in imminent danger of being charged for not wearing one. To the contrary, Relator admitted on page 8 of his Fourth Amended Petition that even if he violated Judge Hidalgo’s Order, it would be “impossible” to prosecute him.¹⁹ Relator failed to show individual, probable, imminent, and irreparable injury by being asked to wash his hands or cover his mouth in public until the worst of the pandemic passes.

¹⁹ Relator’s Petition for Writ of Mandamus at Tab 9, Page 8. *See also*, Tab 5, Judge Hidalgo’s Plea to the Jurisdiction at 10-11.

IV. The trial court properly denied Relator’s TRO because Judge Hidalgo was not the proper party to enforce her Order.²⁰

Relator’s Temporary Restraining Order was also properly denied because Judge Hidalgo is not the proper party to enforce her Order. On April 20, the Fifth Circuit Court of Appeals considered an *ultra vires* case against Governor Abbott alleging he exceeded the scope of his authority in issuing Executive Order GA-13. *In re Abbott*, No. 20-50296 (5th Cir. Apr. 20, 2020). The Court held that the person who actually enforces the allegedly unconstitutional order is the proper defendant—not the person who drafts it. *Id.*, at 11-12.

Relator’s claim would be against whoever tried to issue him a fine under the Order, but that never happened. Until it did, Relator’s claim was not ripe, there was no proper defendant, and his damages were speculative.

V. The trial court properly denied Relator’s TRO because Relator never identified any fundamental liberty interest and Judge Hidalgo’s Order was a constitutional, narrowly tailored implementation of CDC guidelines necessary to protect the public from a pandemic.²¹

A. Relator has no fundamental liberty interest to not wear a mask or wash his hands during a pandemic.

A government’s most important function is to protect lives, and courts have upheld laws to improve safety, health, and eradicate smallpox, polio, and other endemic diseases that plagued prior generations of Americans.

²⁰ See Tab 5, Judge Hidalgo’s Plea to the Jurisdiction at 11-12.

²¹ See Tab 5, Judge Hidalgo’s Plea to the Jurisdiction at 12-18.

During oral argument on Relator’s request for a Temporary Restraining Order, The Honorable Steve Kirkland asked Relator for some constitutional basis for his claimed right not to wear a mask. Relator stated: “...this liberty interest that I’m referring to is the freedom to wear or not wear a mask.”²² He could not articulate any federal or state constitutional right—other than some nebulous right to privacy.²³

In 1918, this Court upheld the City of New Braunfels’ authority to impose criminal penalties on anyone who sent their children to school without proof of smallpox vaccination. Several parents alleged this violated their Constitutional rights, but this Court held their arguments did not even “justify further discussion.”

City of New Braunfels v. Waldschmidt, 207 S.W. 303, 304 (1918). Further:

It is a well-recognized fact that our public schools in the past have been the means of spreading contagious diseases throughout an entire community. They have been the source from which diphtheria, scarlet fever, and other contagious diseases have carried distress and death into many families. Surely there can be no substantial argument advanced adverse to the reasonableness of a rule or order of health officials which is intended and calculated to protect, in a time of danger, all school children, and the families of which they form a part, from smallpox or other infectious diseases.

Id., 207 S.W. 303, 306 (1918), quoting *Blue v. Beach*, 155 Ind. 136, 56 N. E. 94, 50 L. R. A. 64, 80 Am. St. Rep. 195.

²² Relator’s Petition for Writ of Mandamus at Tab 8, Page 26.

²³ Relator’s Petition for Writ of Mandamus at Tab 8, Page 29.

This Court found no right not to inject children with a live pathogen in an era when vaccines were far less safe than they are today. Certainly, if compulsory vaccination does not implicate a fundamental right during an epidemic, then being asked to put on a mask and wash your hands does not implicate a fundamental right during a pandemic.

This Court also noted a distinction between forcing vaccinations and requiring them to exercise a privilege such as attending school. In the instant case, even if Relator had a fundamental right not to wear a mask or wash his hands, no one went to his home and forced him to do these things. He was asked to do them as a condition of going to public places where he may spread a deadly virus.

This case can also be compared with smoking regulations. Although only a small percentage of people exposed to second-hand smoke may someday contract cancer, smoking ordinances are clearly reasonable restrictions for public health, and there is no fundamental right to smoke in public.

The Texas Attorney General concluded that counties can ban smoking in public buildings because, while there was no state law granting them that authority, “commissioners court may act without express authority, so long as its actions are reasonably necessary to pursue some authority granted by either statute or state constitution.” Tex. Att’y Gen. Op. DM-183 (1992). This authority derives from

Texas Health & Safety Code § 121.003(a), which vests counties with power to “enforce any law that is reasonably necessary to protect the public health.”

In 2007, restaurant owners challenged the City of Houston’s restaurant smoking ordinance. The Southern District of Texas held that smoking is not constitutionally protected, and if it were, the harm of regulation was greatly outweighed by the risk of future cancer cases that will cause the “health of the citizens of Houston” to be “detrimentally affected in ways perhaps beyond repair.” *Houston Ass’n of Alcoholic Beverage Permit Holders v. City of Houston*, 508 F. Supp. 2d 576, 587 (S.D. Tex. 2007).

The risk of contracting COVID-19 from an infected person’s breath is far greater than the risk of cancer from a smoker’s breath. Nevertheless, local governments may regulate smoking to limit the public’s exposure to a person’s airborne smoke. *A fortiori*, local governments may limit the public’s exposure to a person’s deadly airborne virus.

Relator attempted to compare COVID-19 deaths with automobile deaths by claiming that despite having 37,000 motor vehicle accident deaths per year, society does not “stop driving” or “eliminate all motor vehicles.”²⁴ While the government has not banned cars, it has imposed infringements upon the “freedom” of Americans to drive while intoxicated and enforces what was once considered

²⁴ Relator’s Petition for Writ of Mandamus at Tab 9, Exhibit B at Pages 5-6.

draconian seatbelt laws. A seatbelt straps a person to a moving vehicle filled with highly flammable fuel—which is much more onerous than wearing a face cloth. Nevertheless, the Third Circuit Court of Appeals held: “No fundamental liberty interest has been recognized to encompass the decision to forgo wearing a seatbelt...” and seatbelt laws are analyzed under the rational basis standard. *Burr v. Attorney Gen. Delaware*, 641 F. App’x 194, 196 (3d Cir. 2016).

The government further requires drivers to submit to the intrusion of handing over a photograph and personal information and proving competency to get a license. Americans have also spent billions of dollars mandating safety improvements such as standardized highway markings and guardrails, controlled access highways, and separated grade railroad crossings, while imposing costs on consumers for mandatory airbags, fuel tank reinforcements, redundant brake lights, anti-lock brakes, and other engineering improvements. Although many fought for years to drive unencumbered by such regulations, these rules have paid off. American deaths have declined from a high of 54,589 in 1972 to 36,560 in 2018—the figure cited by Relators’ expert.²⁵

²⁵ *Motor Vehicle Traffic Fatalities & Fatality Rate: 1899-2003*, <https://web.archive.org/web/20110921222129/http://www.saferoads.org/federal/2004/TrafficFatalities1899-2003.pdf> (visited April 30, 2020 at 1 p.m.).

B. Assuming Relator had identified a fundamental liberty interest, Judge Hidalgo’s Order is narrowly tailored in the least restrictive means to meet a compelling state interest.²⁶

There is no fundamental liberty interest not to cover your mouth or wash your hands, and Judge Hidalgo’s Order is analyzed under the rational basis standard. However, the Order would have survived strict scrutiny because it implements federal and state guidelines narrowly tailored to achieve the compelling purpose of saving lives in the least restrictive means possible, particularly when compared to alternatives such as keeping much of the international economy shut down.

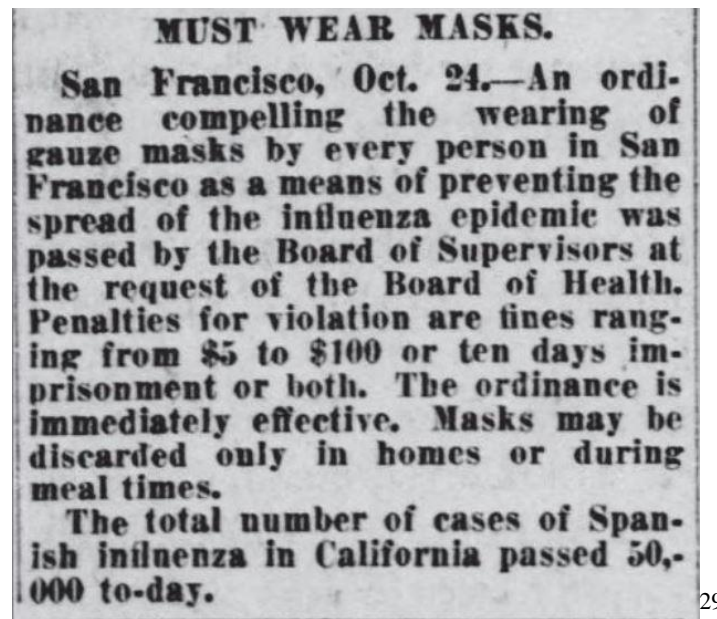
On April 3, the CDC and President Donald Trump recommended that everyone wear nonsurgical cloth face coverings in public during the COVID-19 pandemic.²⁷ This is because masks slow or stop infected water droplets from spreading when an infected person breathes, coughs, or sneezes. Masks are particularly important in large urban areas attempting to reopen after being in quarantine, especially for asymptomatic people who may be unknowingly harboring and spreading the virus.²⁸

²⁶ See Tab 5, Judge Hidalgo’s Plea to the Jurisdiction at 12-18.

²⁷ Tab 1 at 5-7.

²⁸ Tab 1 at 6.

Laws such as Judge Hidalgo’s Order have existed for more than 100 years, and our ancestors imposed even more harsh regulations during prior pandemics, as evidenced by this 1918 San Francisco advisory:



Recent cases affirm that masks are narrowly tailored, reasonable requirements to reduce the spread of viruses such as influenza—even during a normal season. *Spence v. Shah*, 26 N.Y.S.3d 613, 618 (N.Y. App. Div. 2016).

Hand washing, social distancing, and avoiding touching faces are other elements of the CDC’s guidelines that reduce the chance of someone contracting or spreading COVID-19.³⁰ These are easy to do, and Relator provided no reason why they impose an unreasonable burden on him.

²⁹ Paul French, “In the 1918 flu pandemic, not wearing a mask was illegal in some parts of America. What changed?”, <https://www.cnn.com/2020/04/03/americas/flu-america-1918-masks-intl-hnk/index.html> (visited April 30, 2020 at 2 p.m.).

³⁰ Tab 1 at 7-8.

VI. The trial court properly denied Relator’s TRO because Relator was unlikely to succeed on the merits.³¹

Relator never established any likelihood of success on the merits of any of his claims. Judge Hidalgo’s Order did not violate Article I, § 28 of the Texas Constitution because she never suspended any law. Relator never identified any law that was suspended, and Judge Hidalgo clearly acted under Tex. Gov’t Code § 418.1015(b) as agent for Governor Abbott to promulgate CDC regulations during a pandemic. By passing Chapter 418, the Legislature delegated a portion of its power to the Executive Branch during a disaster.

Judge Hidalgo did not violate Texas Government Code Chapter 418 just because the statute did not use the words “face coverings.” During a disaster, Tex. Gov’t Code § 418.012 gives the Governor and County Judge the flexible authority to issue or rescind executive regulations as necessary to respond to a disaster, and the Legislature would not be expected to promulgate statutes pertaining to every situation that might arise during a disaster.

Judge Hidalgo did not violate Texas Constitution Article XI, § 5, which prohibits a city with more than 5,000 people from passing a charter or ordinance inconsistent with the Constitution. Harris County is not a city, and Judge Hidalgo’s Order had nothing to do with this provision.

³¹ See Tab 5, Judge Hidalgo’s Plea to the Jurisdiction at 22-25.

CONCLUSION AND PRAYER

Relator's case is moot, and even if it were not moot, he failed to meet any of his burdens for a Temporary Restraining Order, and the Honorable Steven Kirkland's ruling was in accordance with law. Relator's Emergency Petition for Writ of Mandamus should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this document was produced on a computer and printed in a conventional typeface no smaller than 14-point, except for footnotes, which are no smaller than 12-point. This document also complies with the word-count limitations of Tex. R. App. P. 9.4. Relying on the word count of the computer program used to prepare this document, it contains 4,464 words, excluding the portions listed in Tex. R. App. P. 9.4(i)(1).

/s/ Seth Hopkins
SETH HOPKINS

CERTIFICATE OF SERVICE

I certify that on the 30th day of April, 2020, a true and correct copy of the foregoing instrument was served by electronic transmission on Relators, through their counsel of record, Jared Woodfill, 3 Riverway, Suite 750, Houston, Texas 77056, email woodfillservice@gmail.com.

/s/ Seth Hopkins
SETH HOPKINS

CERTIFICATION

I have reviewed the response and concluded that every factual statement is supported by competent evidence included in the appendix.

/s/ Seth Hopkins
SETH HOPKINS

**HARRIS COUNTY JUDGE LINA HIDALGO’S
INDEX TO THE APPENDIX**

TAB NO. DESCRIPTION

- 1 Affidavit of Harris County Public Health Executive Director Dr. Umair Shah, executed on April 24.

- 2 “Use of Face Coverings” Emergency Order signed by Harris County Judge Lina Hidalgo on April 22.

- 3 Executive Order GA-18 signed by Governor Greg Abbott on April 27.

- 4 “Use of Face Coverings” Amended Emergency Order signed by Harris County Judge Lina Hidalgo on April 28.

- 5 Defendant’s Plea to the Jurisdiction, Answer, and Response to Plaintiff’s First Amended Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction.

TAB 1

HARRIS COUNTY TEXAS :
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AFFIDAVIT OF UMAIR A. SHAH, M.D., M.P.H.

Before me, the undersigned authority, personally appeared UMAIR A. SHAH, M.D., M.P.H, who, being by me duly sworn, deposed as follows:

“My name is Dr. Umair Shah. I am over the age of 18, have never been convicted of a crime of moral turpitude, and am of sound mind and qualified to make this affidavit. I am personally familiar with the facts contained in this affidavit.

I received a medical degree from the University of Toledo Health Science Center in 1996 and a Master of Public Health (Management) from The University of Texas Health Science Center at Houston in 2001. I have also completed an Internal Medicine internship, residency, and fellowship at The University of Texas Health Science Center in Houston. I have been an Emergency Department physician for Houston’s Michael E. DeBakey Veteran’s Health Administration Hospital since 1999. In 2003-2004, I served as Chief Medical Officer for the Galveston County Health District. In 2004, I joined Harris County Public Health (HCPH), the local health department for Harris County, Texas. Since 2013, I have served as the Executive Director of HCPH, a nationally recognized \$100 million agency serving the nation’s third largest county. I also serve as the Local Health Authority for Harris County.

I have presented nationally and globally and sit on numerous boards and advisory groups, including for the National Academies of Sciences, Engineering, and Medicine, U.S. Centers for Disease Control & Prevention, Network for Public Health Law, Trust for America’s Health, Texas Department of State Health Services, and the Texas Medical Association. I am past president of the National Association of County and City Health Officials, which represents nearly 3,000 local health departments, and its Texas affiliate, which represents approximately 45 local health departments in Texas. I have participated in leadership trainings at the World Health Organization in Geneva, National Public Health Leadership Institute, American Leadership forum, Kresge Foundation, and others. I have helped to respond to large emergencies such as infectious disease responses to novel H1N1, Ebola, and Zika, and in the aftermath of large-scale natural disasters such as global earthquakes and several hurricanes.

I. The COVID-19 pandemic is unlike anything modern society has experienced.

I am very familiar with, and competent to testify about, the COVID-19 pandemic. COVID-19 is the name of a disease caused by the SARS-CoV-2 virus. This virus differs from any other I have seen in my career for several reasons.

First, SARS-CoV-2 is a novel virus and has never been seen in human populations. Unlike the seasonal varieties of coronaviruses and influenza, there is no individual human immunity to SARS-CoV-2. Once infected, each person's immune system must first recognize the new pathogen as a threat, then determine how to develop antibodies and mount a response. This lack of prior individual immunity combined with our current knowledge of its transmissibility and its ability to cause severe illness or death makes this a dangerous virus to the general public, especially for those who are immunocompromised and with chronic health conditions.

Second, there is no "herd" or group immunity for SARS-CoV-2. For common diseases (such as influenza, chicken pox, and measles), much of the population has either been vaccinated or exposed and developed immunity. When an epidemic emerges, it rarely becomes a pandemic because it runs out of non-immune hosts to infect. Until earlier this year, no one had immunity against SARS-CoV-2, which is why this pandemic has run unchecked. This is similar to how European diseases wiped out populations in the Western Hemisphere in the nation's early days. Just as those populations then had no group immunity to smallpox and measles, we have no group immunity against SARS-CoV-2.

Third, there are no medical counter measures for SARS-CoV-2. Patients can protect themselves from other communicable diseases with vaccinations and avoid the need to quarantine. There is no similar option to protect against SARS-CoV-2, rendering the general population vulnerable to infection with the virus. While there are some hopeful trials, they are months (or years) from approval and being commonly available.

Fourth, due to limitations in the availability of SARS-CoV-2 testing across the country, Texas has limited opportunity for widespread testing. This has also been the case in Harris County, making it very difficult to ascertain where disease transmission has occurred and how to best protect the community.

Fifth, SARS-CoV-2 has a long incubation period before a person shows signs of illness. This permits people who appear healthy to spread the disease without realizing it for a long time. Asymptomatic (without symptoms) and pre-symptomatic (before symptoms appear) are both key concerns for transmission related to this virus. The Centers for Disease Control & Prevention estimates the incubation period to be between two and 14 days. By comparison, the incubation period for seasonal flu is only one to four days.

Sixth, SARS-CoV-2 is extremely contagious—even before symptoms appear. A patient with seasonable flu will transmit the disease to an average of 1.3 other people. A patient with COVID-19 will transmit the disease to an estimated two to three other people. Assuming that each COVID-19 patient spreads the disease to only two other people, the number of infected people will grow exponentially.

The rapid pace of SARS-CoV-2 infection is evident across the globe. In reviewing World Health Organization data from March 15, the number of infected people doubled every four days in Italy, France, and the United States. It doubled every three days in Spain and Germany. By March 30, 2020, the WHO reported infections in 177 countries. (By comparison, only 28 countries had cases of MERS during the 2012 epidemic, and only 29 countries had cases of SARS during the 2002 epidemic.)

The United States had its first case on January 20, 2020. By March 30, 2020, it led the world with 164,248 confirmed cases—and growing quickly. On that day alone, Texas reported an additional 239 cases and six deaths. As of April 23, there were 876,156 cases and 27,439 deaths in the United States.

Seventh, SARS-CoV-2 is deadly. A typical seasonal flu will kill approximately 0.1% of (typically unvaccinated) people who contract it. COVID-19 is estimated to kill approximately 1-2% of people who contract it. Six percent of those over the age of 60 die from COVID-19, and nearly one in five of those over the age of 80 die from COVID-19.

Of course, death is not the only consequence of COVID-19, and as many as 20 percent of patients require hospitalization. Hospitalized patients often under considerable resources to care for their in-hospital needs as there is no specific treatment for COVID-19. Supportive care may include use of critical care beds, use of ventilators, and critical supplies/personal protective equipment so they can stay alive. It also puts additional risk on healthcare workers who provide for COVID-19 patients.

COVID-19 is often compared to influenza (the flu). That is a false comparison for the reasons explained above. Instead of comparing the flu to COVID-19, the concern should be the burden the healthcare system and our community will have to ensure care for additional COVID-19 hospitalizations and deaths on top of the those who are affected by the flu and other diseases. Additionally, healthcare workers treating those with influenza generally have received the flu-vaccine, which gives them moderate amounts of protection against the virus. For COVID-19, healthcare workers are susceptible to the disease and, because of the nature of their job, put themselves at high risk of contracting the disease.

This is further impacted by the lack of personal protective equipment (PPE) available to healthcare workers and first responders across the country given the global nature of supply chain constraints. There is presently no vaccine available for COVID-19 and while vaccine development is a key strategy for this pandemic, it will not be available in the foreseeable future. Finally, just because influenza can be deadly does not excuse ignoring other public health problems, especially those that present as a threat of greater magnitude such as COVID-19. In fact, the potential for a severe flu outbreak only makes it more important to control the spread of COVID-19. This is not just an outbreak in one part of the globe but a true pandemic markedly more severe than the nH1N1 pandemic of 2009-10.

II. The public has a significant interest in slowing the spread of COVID-19, preventing the breakdown of the healthcare system, and saving thousands of lives.

COVID-19 spreads so quickly and virulently that it has overwhelmed health care systems in many of the communities it strikes. There are a limited number of healthcare providers, personal protective equipment (PPE) such as face masks, gloves, etc., hospital beds (especially at the intensive care unit level) and ventilators that further exacerbate the situation. When there is a sudden surge of sick people, there are simply not enough resources to care for patients. This applies not only to those with COVID-19, but those needing treatment for accidents, cancer, surgeries, heart disease, and other medical problems.

Some areas have been extremely hard-hit. Resources had been so strained in Italy and Spain that hospitals stopped intubating patients over the age of 60—instead allowing them to die because there was a lack of resources to treat them. In New York, hospitals were so overcrowded that medical staff rigged ventilators to try to save multiple patients at once. Contingency plans had to be implemented including

setting up Central Park with tents to house patients in a mass field hospital, and a floating hospital was even tied up in Manhattan.

In a modern society without travel restrictions, a virus such as this can cross state and international borders with record speed and respects no political boundaries. There is only one way to slow the spread of COVID-19. Society must work together to “flatten the curve” by slowing the spread of the virus so that sick people do not overwhelm the hospital systems.

With policies that aggressively and assertively enact social distancing practices, the curve can be “flattened”, and the number of cases handled over a slower period, which assures that a higher percentage of those who get sick will have an opportunity to be treated. Social distancing measures allows for the rate of transmission to slow greatly because of a decreased number of contacts and exposures. This will result in protection of life through necessary management of public and private resources. While we know we cannot stop a virus, we can do everything in our power to slow COVID-19 and slowing it down is our only chance to prevent an overwhelming surge in our healthcare system.

III. Harris County must maintain social distancing and follow CDC guidelines to wear face protection in public, wash hands, and avoid touching faces and noses.

So far, Texas and Harris County’s (including Houston) early and successful adoption of social distancing has helped avoid the type of crisis experienced in other places. However, social distancing measures may need to be modified to ensure that quality of life and access to needed resources for a healthy life continue. Social distancing disrupts where we live, learn, work, worship, and play but it is an essential measure to protect life in the face of COVID-19. To save thousands of lives, policy makers must continue to protect the communities they serve by requiring social distancing and introducing novel strategies to reduce the spread of infection until epidemiological models and other data show a sustained decrease in threat to life.

On April 3, 2020, the Centers for Disease Control and Prevention and President Donald Trump began recommending that everyone wear nonsurgical cloth face coverings anytime they go out in public during the COVID-19 pandemic. On April 17, Texas Governor Greg Abbott issued Executive Order GA-16, which instructs Texans to “following the Guidelines from the President and the CDC by practicing good hygiene, environmental cleanliness, and sanitation, implementing social distancing, and working from home if possible.”

A. Face coverings are part of the CDC’s COVID-19 guidelines.

Part of good hygiene, cleanliness, and sanitation during a pandemic is wearing face coverings while in public. In a pandemic, an uncovered cough or sneeze can be deadly, and face coverings are inexpensive, pose little burden on the wearer, and can be made of virtually any type of cloth.

A cloth face covering acts as a barrier to spread of virus. The covering slows or stops contagious airborne pathogens and other particles from being transmitted by an asymptomatic (without symptoms) and/or pre-symptomatic (prior to having symptoms) person from spreading beyond the wearer to another. Data suggests a large number of asymptomatic people may be unknowingly harboring and spreading COVID-19. If both persons wear the face covering (in complement to six-foot social distancing strategies), this provides the optimal means of slowing the spread of COVID-19 among people. Wearing a face covering not only benefits the wearer, but also everyone in the vicinity by slowing or stopping an asymptomatic person’s contagious and airborne pathogens.

Even if a person does not care for his or her own safety, (s)he has no right to infect others, and face coverings help to reduce the chance that (s)he will spread infection. Widespread use of face coverings is not just to prevent being exposed to COVID-19, it is also to prevent unintended exposures of COVID-19 to the general public. Additionally, it serves as an important reminder to individuals not to touch their face (which increases further risk of transmission). In a society that is trying to get back to some sense of “normalcy” and business operations, cloth facial coverings – in complement to other public health strategies – provides the best chance of not seeing an inadvertent rapid increase in transmission necessitating further actions that again revert to restricting social movement by individuals in a community.

Many nations, at least eight states, and numerous counties, cities, and other localities mandate that some form of facial coverings be worn in public. On April 17, Bexar County, Texas (San Antonio) began requiring all people age 10 or older to wear a cloth face covering in public. On April 18, Dallas County ordered that all people over the age of two “shall wear some form of covering over their nose and mouth” while in public, in line with CDC and American Pediatric Association recommendations. These are sensible regulations, particularly in large urban areas such as Harris County, which is the third largest county in the United States.

As Texas and Harris County begin the orderly process of exploring re-opening segments of businesses in the coming weeks or months to reduce the burden of social

distancing on quality of life, it must still continue to be balanced with the risk of exponentially increased rates of COVID-19 disease transmission. Preventing asymptomatic and community spread of disease will require appropriate policies to ensure that residents normalize the use of face coverings and slow the airborne transmission of disease, regardless of presented symptoms or setting. Ensuring widespread use of face coverings is a critical component to exploring modified social distancing without caused exponential threat of life for the general public.

B. Hand washing is part of the CDC's COVID-19 guidelines.

Hand washing is another element of the CDC's good hygiene, cleanliness, and sanitation guidelines. Many studies have reported that frequent hand washing reduces the chance of someone contracting or spreading COVID-19. Handwashing is an inexpensive, easy requirement that has existed as part of hospital, medical office, and food service establishment regulations for many years, and it is not unreasonable to expand the scope of these regulations during this pandemic.

C. Avoiding touching the face is part of the CDC's COVID-19 guidelines.

The CDC also recommends that anyone who has been in public avoid touching his/her nose or face as much as possible, because SARS-CoV-2 enters the respiratory system through the nose or mouth. During a typical day, people use their hands to touch community objects such as doorknobs, telephones, keyboards, and faucets. The virus can live on many of these surfaces for several days. If a person touches an object and then touches his/her face, (s)he provides an avenue for the virus to spread. Thus, the CDC has asked people to be mindful to avoid unnecessarily touching their faces, and it is good public policy for this to be promulgated. It costs nothing and generally poses no problem for people to try to avoid touching their faces. As above, wearing a facial covering over the nose and mouth further minimizes the chance that an individual will touch his/her face.

D. In-person dining continues to pose a risk.

At this time, the CDC and most experts recommend that restaurants do not resume in-person dining services for a number of reasons. First, as explained above, the virus which causes COVID-19 is still infecting a large number of people. Even prior to COVID-19, a key role of a health department is to monitor and inspect restaurants, where there is always a potential for transmission and/or infection. Dining rooms are particularly dangerous for the spread of COVID-19 because

patrons are seated in the same room, not wearing face coverings because they are drinking and dining, touching utensils, tables, door knobs, restroom fixtures, menus, plates and bowls, glasses, napkins, and other community items, and being served food transported through the dining area and past other patrons, who are also not wearing face coverings and may be sick. A single cough by a patron and employee can send the virus a great distance, including onto someone else's food.

Social distancing is difficult to achieve at present in such dining establishments especially since those patrons are not wearing facial coverings (while eating) and the risk for virus transmission remains a significant concern. Social distancing measures over time will allow for such establishments to open but at a significant change from how they were operating previously. That time however is for the future, not now when food establishments are still ripe for serving as locations for further COVID-19 transmission. It should be noted that many communities across the globe have reverted back to easing restrictions prematurely only to see COVID-19 return with a vengeance or a second wave of increased transmission. For these reasons, it is too early to open dine-in restaurants.

IV. Judge Hidalgo's Orders are reasonable and narrowly tailored.

For the reasons above, I support Harris County Judge Lina Hidalgo's decision to sign a disaster declaration and her orders to promote social distancing and enact directives such as the use of facial coverings and other preventive measures to continue to protect the health and safety of our community.

While there are costs to these requirements, the investment in flattening the epidemiological curve saves money and lives, which is why well over 90% percent of Americans—including residents of Harris County—are, or have been, under instructions to stay indoors or instructed to implement other preventive strategies that our nation has not seen in well over a century. These are unprecedented times. As a result, I believe it is especially important for an urban community such as Harris County to avoid the mistakes of other communities across the globe and enact appropriate public health measures that protect its residents.

Protecting the lives of residents and preventing a pandemic from causing more infections and preventable COVID-19 related deaths by overtaking the healthcare system made up of heroic healthcare workers who are charged with caring for the lives of their individual patients and do so on a daily basis, is a compelling government interest, and Judge Hidalgo's order is appropriate and necessary.

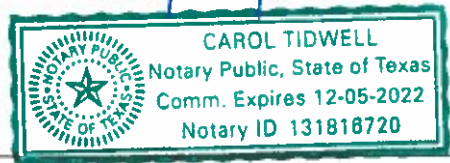
Further, Affiant sayeth not.”

Signed on April 24, 2020



Umair A. Shah, M.D., M.P.H.

SWORN TO AND SUBSCRIBED before me on 4/24/2020



Notary Public, State of Texas
Printed Name: Carol Tidwell
My Commission Expires: 12/5/2022

TAB 2



County Judge Lina Hidalgo
D I R E C T O R

ORDER OF COUNTY JUDGE LINA HIDALGO

Use of Face Coverings

Whereas, on March 11, 2020, a Declaration of Local Disaster for Public Health Emergency was issued to allow Harris County to take measures to reduce the possibility of exposure to COVID-19 and promote the health and safety of Harris County residents; and

Whereas, on March 13, 2020, a Declaration of State of Disaster was issued by Governor Abbott to take additional steps to prepare for, respond to, and mitigate the spread of COVID-19 to protect the health and welfare of Texans; and

Whereas, on March 19, 2020, Governor Abbott issued the first Public Health Disaster Declaration released in the State of Texas since 1901 and an Executive Order which, among other things, prohibits Texans from gathering in groups of more than ten persons; and

Whereas, on March 24, 2020, the Harris County Judge issued a “Stay Home, Work Safe” Order prohibiting gatherings and providing that residents stay home other than to perform Essential Services as defined in Federal guidance. The Stay Home, Work Safe order provided that in performing or obtaining Essential Services, residents should follow Center for Disease Control and Prevention “CDC” guidelines on social distancing; and

Whereas, on March 31, 2020, Governor Abbott issued an Executive Order implementing Essential Services and Activities Protocols through April 30, 2020; and

Whereas, on April 4, 2020, the Harris County Judge issued an Order Amending and Extending the “Stay Home, Work Safe” Order; and

Whereas, the COVID-19 virus is contagious and spreads through person-to-person contact, especially in group settings; and

Whereas, the Centers for Disease Control and Prevention (“CDC”) recommends an “All of Community” approach focused on slowing the transmission of COVID-19 through social distancing to reduce illness and death, while minimizing social and economic impacts; and

Face Covering Order – page 1 of 4

Whereas, upon Declaration of a Local Disaster, a County Judge is authorized to control ingress to and egress from a disaster area and control the movement of persons and the occupancy of premises in accordance with Section 418.108(g) of the Texas Government Code; and

Whereas, upon Declaration of a Local Disaster, a County Judge serves as her county's emergency management director and as the Governor's designated agent in the administration and supervision of duties under the Texas Disaster Act and is authorized to exercise all powers granted to the Governor on an appropriate scale under Section 418.1015 of the Act, including the authority to control the movement of persons and the occupancy of premises in accordance with Sections 418.1015 and 418.018 of the Texas Government Code; and

Whereas, given the ongoing evaluation of circumstances related to the COVID-19 virus, the updated recommendations of the Centers for Disease Control and the Texas Department of State Health Services, and the substantial risks posed by the COVID-19 virus to Harris County residents and their property, the following extraordinary measures shall be taken to mitigate the effects of this public health emergency and to facilitate a response to the public health threat in order to protect the public's safety.

NOW THEREFORE, I, COUNTY JUDGE FOR HARRIS COUNTY, TEXAS, PURSUANT TO THE AUTHORITY VESTED BY TEXAS GOVERNMENT CODE CHAPTER 418, HEREBY FIND AND ORDER:

SECTION 1. That the findings and recitations set out in the preamble to this ORDER are found to be true and correct and they are hereby adopted by the County Judge and made a part hereof for all purposes.

SECTION 2. Face Covering Requirements

Because an infected person can transmit the COVID-19 virus to others before showing any symptoms, the covering of a person's nose and mouth is necessary to help slow the spread of the virus.

1. When leaving one's residence and when in a public place all persons over the age of ten (10) shall wear some form of face covering that covers the nose and mouth. The face covering may, for example, be a homemade mask, scarf, bandana, handkerchief and other cloth masks.
2. When outside their residences and in a public place, residents shall continue to maintain social distance of at least six feet.

3. Face coverings shall be worn except when:
 - a. Exercising outside or engaging in physical activity outside alone;
 - b. Alone in a separate single space, whether indoors or outdoors;
 - c. In the presence only of other members of one's residence, whether inside or outside the residence;
 - d. When doing so poses a greater mental or physical health risk, including exacerbating a pre-existing medical condition or including, but not limited to, anyone who has trouble breathing, or is unconscious, incapacitated or otherwise unable to remove the cover without assistance;
 - e. When doing so poses a security or safety risk, such as impairing the ability to drive or to be inspected at a security checkpoint; or
 - f. When eating or drinking;

4. **IT IS STRONGLY RECOMMENDED THAT FACE COVERINGS NOT INCLUDE SURGICAL MASKS, SURGICAL N-95 RESPIRATORS OR OTHER MEDICAL MASKS AS THEY ARE A NEEDED RESOURCE FOR HEALTH CARE PROVIDERS AND FIRST RESPONDERS.** Healthcare workers and first responders on the front-line combating COVID-19 must have priority access to medical masks and other personal protective equipment.

5. **Wearing a face covering is not a substitute for maintaining 6-foot social distancing and hand washing because these remain important steps to slowing the spread of the virus.**

6. Residents shall wash their hands before leaving the residence and upon return, and shall take the following additional actions after leaving their residences:

- a. Stay at least six feet away from others; and
- b. Avoid touching the nose or face.

7. It is recommended that residents not use disposable face coverings more than three times. Residents should wash reusable cloth face coverings regularly to prevent the spread of the virus.

8. Individuals experiencing homelessness are exempt from this Order except that, to the extent individuals are using shared or outdoor spaces, they shall, to the greatest extent feasible, maintain social distancing of at least six feet from any other person. Individuals experiencing homelessness are strongly urged to obtain shelter. Governmental and other entities that can provide face coverings to homeless individuals are strongly urged to make face coverings available as soon as possible and to the maximum extent practicable (and to utilize social distancing requirements in their operations). Additionally, entities that provide assistance to the needy are urged to donate face coverings to the homeless and to homeless shelters.

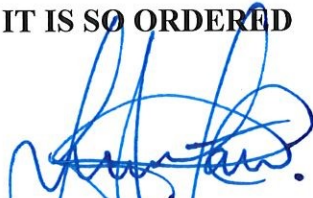
SECTION 3. Pursuant to Appendix 9 to Annex U of the Harris County Basic Plan adopted by Harris County Commissioners Court on October 29, 2019, and in accordance with Tex. Gov't Code § 418.173, any law enforcement agency based in Harris County is hereby authorized to use its discretion in enforcing this Order. An offense under this Order may be punishable by a fine that does not exceed \$1,000.00.

SECTION 4. The Harris County Judge will post this Order on the Internet. If any subsection, sentence, clause, phrase, or word of this Order or any application of it to any person, structure, gathering, or circumstance is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, then such decision will not affect the validity of the remainder of this Order.

This Order takes effect at 12:01 a.m. on April 27, 2020, will continue through 11:59 p.m. on May 26, 2020, or until it is either rescinded, superseded, or amended pursuant to applicable law; and it is

ORDERED this 22 day of April 2020, in the County of Harris, Texas.

IT IS SO ORDERED



LINA HIDALGO
HARRIS COUNTY JUDGE



I, Marilyn Burgess, District Clerk of Harris County, Texas certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this April 24, 2020

Certified Document Number: 90340433 Total Pages: 4

Marilyn Burgess, DISTRICT CLERK
HARRIS COUNTY, TEXAS

In accordance with Texas Government Code 406.013 electronically transmitted authenticated documents are valid. If there is a question regarding the validity of this document and or seal please e-mail support@hcdistrictclerk.com

TAB 3



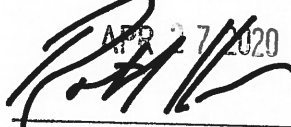
GOVERNOR GREG ABBOTT

April 27, 2020

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
1 PM O'CLOCK

APR 27 2020

The Honorable Ruth R. Hughs
Secretary of State
State Capitol Room 1E.8
Austin, Texas 78701


Secretary of State

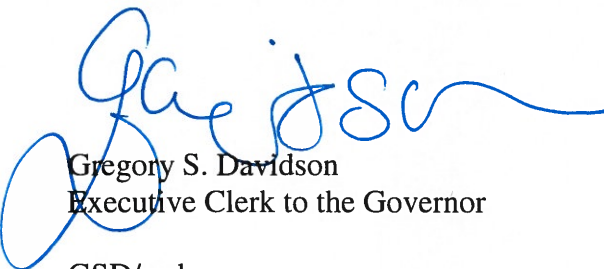
Dear Secretary Hughs:

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

Executive Order No. GA-18 relating to the expanded reopening of services as part of the safe, strategic plan to Open Texas in 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
April 27, 2020

EXECUTIVE ORDER GA 18

Relating to the expanded reopening of services as part of the safe, strategic plan to Open Texas in 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 counties in the State of Texas; and

WHEREAS, on April 12, 2020, I issued a proclamation renewing the disaster declaration for all counties in Texas; and

WHEREAS, the Commissioner of the Texas Department of State Health Services (DSHS), Dr. John Hellerstedt, has determined that COVID-19 represents a public health disaster within the meaning of Chapter 81 of the Texas Health and Safety Code, and renewed that determination on April 17, 2020; and

WHEREAS, I have issued executive orders and suspensions of Texas laws in response to COVID-19, aimed at protecting the health and safety of Texans and ensuring an effective response to this disaster; and

WHEREAS, I issued Executive Order GA-08 on March 19, 2020, mandating certain obligations for Texans in accordance with the President's Coronavirus Guidelines for America, as promulgated by President Donald J. Trump and the Centers for Disease Control and Prevention (CDC) on March 16, 2020, which called upon Americans to take actions to slow the spread of COVID-19 for 15 days; and

WHEREAS, shortly before Executive Order GA-08 expired, I issued Executive Order GA-14 on March 31, 2020, based on the President's announcement that the restrictive social-distancing Guidelines should extend through April 30, 2020, in light of advice from Dr. Anthony Fauci and Dr. Deborah Birx, and also based on guidance by DSHS Commissioner Dr. Hellerstedt and Dr. Birx that the spread of COVID-19 can be reduced by minimizing social gatherings; and

WHEREAS, Executive Order GA-14 superseded Executive Order GA-08 and expanded the social-distancing restrictions and other obligations for Texans that are aimed at slowing the spread of COVID-19, including by limiting social gatherings and in-person contact with people (other than those in the same household) to providing or obtaining "essential services," and by expressly adopting federal guidance that provides a list of critical-infrastructure sectors, workers, and functions that should continue as "essential services" during the COVID-19 response; and

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SECRETARY OF STATE
1 PM O'CLOCK

APR 27 2020

WHEREAS, after more than two weeks of having in effect the heightened restrictions like those required by Executive Order GA-14, which have saved lives, it was clear that the disease still presented a serious threat across Texas that could persist in certain areas, but also that COVID-19 had wrought havoc on many Texas businesses and workers affected by the restrictions that were necessary to protect human life; and

WHEREAS, on April 17, 2020, I therefore issued Executive Order GA-17, creating the Governor's Strike Force to Open Texas to study and make recommendations on safely and strategically restarting and revitalizing all aspects of the Lone Star State—work, school, entertainment, and culture; and

WHEREAS, also on April 17, 2020, I issued Executive Order GA-16 to replace Executive Order GA-14, and while Executive Order GA-16 generally continued through April 30, 2020, the same social-distancing restrictions and other obligations for Texans according to federal guidelines, it offered a safe, strategic first step to Open Texas, including permitting retail pick-up and delivery services; and

WHEREAS, Executive Order GA-16 is set to expire at 11:59 p.m. on April 30, 2020; and

WHEREAS, Texas must continue to protect lives while restoring livelihoods, both of which can be achieved with the expert advice of medical professionals and business leaders; and

WHEREAS, the “governor is responsible for meeting ... the dangers to the state and people presented by disasters” under Section 418.011 of the Texas Government Code, and the legislature has given 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 418.017(a), the “governor may use all available resources of state government and of political subdivisions that are reasonably necessary to cope with a disaster;” and

WHEREAS, under Section 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;” and

WHEREAS, under Section 418.173, failure to comply with any executive order issued during the COVID-19 disaster is an offense punishable by a fine not to exceed \$1,000, confinement in jail for a term not to exceed 180 days, or both fine and confinement.

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, and continuing through May 15, 2020, subject to extension based on the status of COVID-19 in Texas and the

recommendations of the Governor's Strike Force to Open Texas, the White House Coronavirus Task Force, and the CDC:

In accordance with guidance from DSHS Commissioner Dr. Hellerstedt, and to achieve the goals established by the President to reduce the spread of COVID-19, every person in Texas shall, except where necessary to provide or obtain essential services or reopened services, minimize social gatherings and minimize in-person contact with people who are not in the same household. People over the age of 65, however, are strongly encouraged to stay at home as much as possible; to maintain appropriate distance from any member of the household who has been out of the residence in the previous 14 days; and, if leaving the home, to implement social distancing and to practice good hygiene, environmental cleanliness, and sanitation.

"Essential services" shall consist of everything listed by the U.S. Department of Homeland Security (DHS) in its Guidance on the Essential Critical Infrastructure Workforce, Version 3.0 or any subsequent version, plus religious services conducted in churches, congregations, and houses of worship. Other essential services may be added to this list with the approval of the Texas Division of Emergency Management (TDEM). TDEM shall maintain an online list of essential services, as specified in this executive order and any approved additions. Requests for additions should be directed to TDEM at EssentialServices@tdem.texas.gov or by visiting the TDEM website at www.tdem.texas.gov/essentialservices.

"Reopened services" shall consist of the following to the extent they are not already "essential services:"

1. Retail services that may be provided through pickup, delivery by mail, or delivery to the customer's doorstep.
2. Starting at 12:01 a.m. on Friday, May 1, 2020:
 - a) In-store retail services, for retail establishments that operate at up to 25 percent of the total listed occupancy of the retail establishment.
 - b) Dine-in restaurant services, for restaurants that operate at up to 25 percent of the total listed occupancy of the restaurant; provided, however, that (a) this applies only to restaurants that have less than 51 percent of their gross receipts from the sale of alcoholic beverages and are therefore not required to post the 51 percent sign required by Texas law as determined by the Texas Alcoholic Beverage Commission, and (b) valet services are prohibited except for vehicles with placards or plates for disabled parking.
 - c) Movie theaters that operate at up to 25 percent of the total listed occupancy of any individual theater for any screening.
 - d) Shopping malls that operate at up to 25 percent of the total listed occupancy of the shopping mall; provided, however, that within shopping malls, the food-court dining areas, play areas, and interactive displays and settings must remain closed.
 - e) Museums and libraries that operate at up to 25 percent of the total listed occupancy; provided, however, that (a) local public museums and local public libraries may so operate only if permitted by the local government, and (b) any components of museums or libraries that have interactive functions or exhibits, including child play areas, must remain closed.
 - f) For Texas counties that have filed with DSHS, and are in compliance with, the requisite attestation form promulgated by DSHS regarding five or fewer cases of COVID-19, those in-store retail services, dine-in restaurant services, movie theaters, shopping malls, and museums and libraries, as otherwise defined and limited above, may operate at up to 50 percent (as opposed to 25 percent) of

- the total listed occupancy.
- g) Services provided by an individual working alone in an office.
 - h) Golf course operations.
 - i) Local government operations, including county and municipal governmental operations relating to permitting, recordation, and document-filing services, as determined by the local government.
 - j) Such additional services as may be enumerated by future executive orders or proclamations by the governor.

The conditions and limitations set forth above for reopened services shall not apply to essential services. Notwithstanding anything herein to the contrary, the governor may by proclamation identify any county or counties in which reopened services are thereafter prohibited, in the governor's sole discretion, based on the governor's determination in consultation with medical professionals that only essential services should be permitted in the county, including based on factors such as an increase in the transmission of COVID-19 or in the amount of COVID-19-related hospitalizations or fatalities.

In providing or obtaining essential services or reopened services, people and businesses should follow the minimum standard health protocols recommended by DSHS, found at www.dshs.texas.gov/coronavirus, and should implement social distancing, work from home if possible, and practice good hygiene, environmental cleanliness, and sanitation. This includes also following, to the extent not inconsistent with the DSHS minimum standards, the Guidelines from the President and the CDC, as well as other CDC recommendations. Individuals are encouraged to wear appropriate face coverings, but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering.

Religious services should be conducted in accordance with the joint guidance issued and updated by the attorney general and governor.

People shall avoid visiting bars, gyms, public swimming pools, interactive amusement venues such as bowling alleys and video arcades, massage establishments, tattoo studios, piercing studios, or cosmetology salons. The use of drive-thru, pickup, or delivery options for food and drinks remains allowed and highly encouraged throughout the limited duration of this executive order.

This executive order does not prohibit people from accessing essential or reopened services or engaging in essential daily activities, such as going to the grocery store or gas station, providing or obtaining other essential or reopened services, visiting parks, hunting or fishing, or engaging in physical activity like jogging, bicycling, or other outdoor sports, so long as the necessary precautions are maintained to reduce the transmission of COVID-19 and to minimize in-person contact with people who are not in the same household.

In accordance with the Guidelines from the President and the CDC, people shall not visit nursing homes, state supported living centers, assisted living facilities, or long-term care facilities unless to provide critical assistance as determined through guidance from the Texas Health and Human Services Commission (HHSC). Nursing homes, state supported living centers, assisted living facilities, and long-term care facilities should follow infection control policies and practices set forth by the HHSC, including minimizing the movement of staff between facilities whenever possible.

In accordance with the Guidelines from the President and the CDC, schools shall remain temporarily closed to in-person classroom attendance by students and shall not

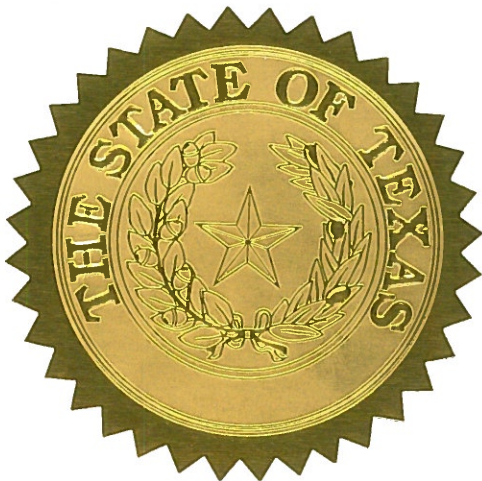
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SECRETARY OF STATE
1 PM O'CLOCK

APR 27 2020

recommence before the end of the 2019-2020 school year. Public education teachers and staff are encouraged to continue to work remotely from home if possible, but may return to schools to conduct remote video instruction, as well as perform administrative duties, under the strict terms required by the Texas Education Agency. Private schools and institutions of higher education should establish similar terms to allow teachers and staff to return to schools to conduct remote video instruction and perform administrative duties when it is not possible to do so remotely from home.

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 essential services or reopened services allowed by this executive order, allows gatherings prohibited by this executive order, or expands the list of essential services or the list or scope of reopened services as set forth in this executive order. 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 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.

This executive order supersedes Executive Order GA-16, but does not supersede Executive Orders GA-10, GA-11, GA-12, GA-13, GA-15, or GA-17. This executive order shall remain in effect and in full force until 11:59 p.m. on May 15, 2020, unless it is modified, amended, rescinded, or superseded by the governor.



Given under my hand this the 27th
day of April, 2020.

Handwritten signature of Greg Abbott in black ink.

GREG ABBOTT
Governor

ATTESTED BY:

Handwritten signature of Ruth R. Hughs in black ink.

RUTH R. HUGHS
Secretary of State

FILED IN THE OFFICE OF THE
SECRETARY OF STATE
1PM O'CLOCK

APR 27 2020

TAB 4



County Judge Lina Hidalgo

DIRECTOR

**AMENDED ORDER OF COUNTY JUDGE LINA HIDALGO
Use of Face Coverings**

Whereas, on March 11, 2020, a Declaration of Local Disaster for Public Health Emergency was issued to allow Harris County to take measures to reduce the possibility of exposure to COVID-19 and promote the health and safety of Harris County residents; and

Whereas, on March 13, 2020, a Declaration of State of Disaster was issued by Governor Abbott to take additional steps to prepare for, respond to, and mitigate the spread of COVID-19 to protect the health and welfare of Texans; and

Whereas, on March 19, 2020, Governor Abbott issued the first Public Health Disaster Declaration released in the State of Texas since 1901 and an Executive Order which, among other things, prohibits Texans from gathering in groups of more than ten persons; and

Whereas, on March 24, 2020, the Harris County Judge issued a “Stay Home, Work Safe” Order prohibiting gatherings and providing that residents stay home other than to perform Essential Services as defined in Federal guidance. The Stay Home, Work Safe order provided that in performing or obtaining Essential Services, residents should follow Center for Disease Control and Prevention “CDC” guidelines on social distancing; and

Whereas, on March 31, 2020, Governor Abbott issued an Executive Order implementing Essential Services and Activities Protocols through April 30, 2020; and

Whereas, on April 4, 2020, the Harris County Judge issued an Order Amending and Extending the “Stay Home, Work Safe” Order; and

Whereas, the COVID-19 virus is contagious and spreads through person-to-person contact, especially in group settings; and

Whereas, the Centers for Disease Control and Prevention (“CDC”) recommends an “All of Community” approach focused on slowing the transmission of COVID-19 through social distancing to reduce illness and death, while minimizing social and economic impacts; and

Whereas, upon Declaration of a Local Disaster, a County Judge is authorized to control ingress to and egress from a disaster area and control the movement of persons and the occupancy of premises in accordance with Section 418.108(g) of the Texas Government Code; and

Whereas, upon Declaration of a Local Disaster, a County Judge serves as her county’s emergency management director and as the Governor’s designated agent in the administration and supervision of duties under the Texas Disaster Act and is authorized to exercise all powers granted to the Governor on an appropriate scale under Section 418.1015 of the Act, including the authority to control the movement of persons and the occupancy of premises in accordance with Sections 418.1015 and 418.018 of the Texas Government Code; and

Whereas, on April 22, 2020, the Harris County Judge issued a “Use of Face Coverings” Order requiring, with some exceptions, all persons over the age of ten (10) to wear some form of face covering in public places; providing for a fine of up to \$1,000 for the violation of the Order; and authorizing Harris County law enforcement agencies to use their discretion in enforcing the Order; and

Whereas, on April 27, 2020, Governor Abbott issued Executive Order GA-18 which, among other things, provides that individuals “are encouraged to wear appropriate face coverings, but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering”; and

Whereas, a County Judge, who serves as her county’s emergency management director and as the Governor’s designated agent in the administration and supervision of duties under the Texas Disaster Act, is charged with enforcing the Governor’s executive orders and imposing local restrictions that are consistent with the Governor’s executive orders; and

Whereas, the Harris County Judge has determined that the “Use of Face Coverings” Order must be amended to ensure that local restrictions implemented to protect the health and safety of Harris County residents during the COVID-19 pandemic also remain consistent with the Governor’s newly issued Executive Order GA-18; and

Whereas, given the ongoing evaluation of circumstances related to the COVID-19 virus, the updated recommendations of the Centers for Disease Control and the Texas Department of State Health Services, and the substantial risks posed by the COVID-19 virus to Harris County residents and their property, the following extraordinary measures shall be taken to mitigate the effects of

this public health emergency and to facilitate a response to the public health threat in order to protect the public's safety.

NOW THEREFORE, I, COUNTY JUDGE FOR HARRIS COUNTY, TEXAS, PURSUANT TO THE AUTHORITY VESTED BY TEXAS GOVERNMENT CODE CHAPTER 418, HEREBY FIND AND ORDER:

SECTION 1. That the findings and recitations set out in the preamble to this ORDER are found to be true and correct and they are hereby adopted by the County Judge and made a part hereof for all purposes.

SECTION 2. Face Covering Requirements

Because an infected person can transmit the COVID-19 virus to others before showing any symptoms, the covering of a person's nose and mouth is necessary to help slow the spread of the virus.

1. When leaving one's residence and when in a public place all persons over the age of ten (10) are encouraged to wear some form of face covering that covers the nose and mouth. The face covering may, for example, be a homemade mask, scarf, bandana, handkerchief and other cloth masks.
2. When outside their residences and in a public place, residents are encouraged to continue to maintain social distance of at least six feet.
3. All persons over the age of ten (10) are encouraged to wear a face covering that covers the nose and mouth except when:
 - a. Exercising outside or engaging in physical activity outside alone;
 - b. Alone in a separate single space, whether indoors or outdoors;
 - c. In the presence only of other members of one's residence, whether inside or outside the residence;
 - d. When doing so poses a greater mental or physical health risk, including exacerbating a pre-existing medical condition or including, but not limited to, anyone who has trouble breathing, or is unconscious, incapacitated or otherwise unable to remove the cover without assistance;
 - e. When doing so poses a security or safety risk, such as impairing the ability to drive or to be inspected at a security checkpoint; or

- f. When eating or drinking
- 4. **IT IS STRONGLY RECOMMENDED THAT FACE COVERINGS NOT INCLUDE SURGICAL MASKS, SURGICAL N-95 RESPIRATORS OR OTHER MEDICAL MASKS AS THEY ARE A NEEDED RESOURCE FOR HEALTH CARE PROVIDERS AND FIRST RESPONDERS.** Healthcare workers and first responders on the front-line combating COVID-19 must have priority access to medical masks and other personal protective equipment.
- 5. **Wearing a face covering is not a substitute for maintaining 6-foot social distancing and hand washing because these remain important steps to slowing the spread of the virus.**
- 6. Residents should wash their hands before leaving the residence and upon return, and should take the following additional actions after leaving their residences:
 - a. Stay at least six feet away from others; and
 - b. Avoid touching the nose or face
- 7. It is recommended that residents not use disposable face coverings more than three times and it is further recommended that residents wash reusable cloth face coverings regularly to prevent the spread of the virus.
- 8. Individuals experiencing homelessness are exempt from this Order except that, to the extent individuals are using shared or outdoor spaces, they are encouraged, to the greatest extent feasible, to maintain social distancing of at least six feet from any other person. Individuals experiencing homelessness are strongly urged to obtain shelter. Governmental and other entities that can provide face coverings to homeless individuals are strongly urged to make face coverings available as soon as possible and to the maximum extent practicable (and to utilize social distancing requirements in their operations). Additionally, entities that provide assistance to the needy are urged to donate face coverings to the homeless and to homeless shelters.

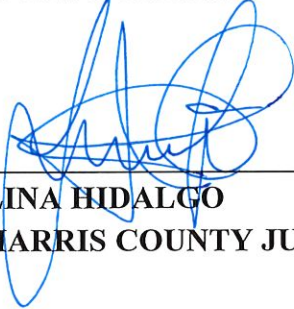
SECTION 3. The Harris County Judge will post this Order on the Internet. If any subsection, sentence, clause, phrase, or word of this Order or any application of it to any person, structure,

gathering, or circumstance is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, then such decision will not affect the validity of the remainder of this Order.

This Order supersedes and amends the Order issued by the County Judge on April 22, 2020 concerning Use of Face Coverings, takes effect upon signing on April 28, 2020, and will continue through 11:59 p.m. on May 26, 2020, or until it is either rescinded, superseded, or amended pursuant to applicable law; and it is

ORDERED this 28th day of April 2020, in the County of Harris, Texas.

IT IS SO ORDERED



LINA HIDALGO
HARRIS COUNTY JUDGE

TAB 5

Cause No. 2020-25311

STEVEN HOTZE, M.D.
Hotze Health & Wellness Center

Plaintiffs,

v.

LINA HIDALGO, in her official capacity as
Harris County Judge

Defendant

IN THE DISTRICT COURT

189th JUDICIAL DISTRICT

HARRIS COUNTY, TEXAS

**DEFENDANT’S PLEA TO THE JURISDICTION, ANSWER, AND RESPONSE TO
PLAINTIFFS’ FIRST AMENDED APPLICATION FOR TEMPORARY RESTRAINING
ORDER, TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION**

COMES NOW, Defendant Harris County Judge Lina Hidalgo, who files this Plea to the Jurisdiction, Answer, and Response to Plaintiffs’ Applications for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, and represents as follows:

INTRODUCTION

Millions of doctors, nurses, and first-responders are in harm’s way as they treat 2.7 million victims—and counting—during the worst pandemic in a century. The SARS-CoVid-2 virus that causes COVID-19 has already killed more than 191,000 men and women in one of the most horrific ways possible—by drowning them in their own fluids. Protective equipment is in short supply, and the heroes working long hours to save lives knowingly expose themselves to the risk of a disease two to three times as contagious as influenza, 10 to 20 times more deadly, and for which there is no vaccine, no cure, and no approved treatment.¹

¹ Exhibit 1, Affidavit of Dr. Umair Shah at 2-3.

Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, estimated that this scourge could kill 100,000 to 200,000 Americans,² and scientists with sophisticated epidemiological models have advised our leaders to invoke quarantine laws to save lives and prevent the catastrophic failure of our medical system.³ We are in the midst of an event that will mark a generation and change society in ways we cannot foresee, and our actions today will determine how many funerals we attend in the coming months.

The leaders upon whose shoulders this burden falls show great courage as they make difficult decisions. Today, approximately half the world and 90 percent of Americans have been ordered to stay home until the worst of the pandemic passes.⁴ As the third largest county in the United States, and a densely populated urban area, Harris County joined most of the nation on March 24 by signing a “Stay Home, Work Safe” Order⁵ that complies with Centers for Disease Control and Prevention Guidelines.

On March 31, Governor Greg Abbott signed a similar “Stay Home” Executive Order GA-14 closing most businesses in Texas and imposing “a fine not to exceed \$1,000, confinement in jail for a term not to exceed 180 days, or both fine and confinement” on anyone who disobeys his Order.⁶ On April 17, Governor Abbott extended most portions of this Order, including the part requiring all Texans to “follow the Guidelines from the President and the CDC by practicing good hygiene, environmental cleanliness, and sanitation, implementing social distancing, and working from home if possible.”⁷

² Exhibit 1, Affidavit of Dr. Shah at 3-4.

³ Exhibit 1, Affidavit of Dr. Shah at 2-3.

⁴ Exhibit 1, Affidavit of Dr. Shah at 8.

⁵ Exhibit 2, Harris County’s March 24 “Stay Home, Work Safe” Emergency Order.

⁶ Exhibit 3, Governor Greg Abbott’s Executive Order GA-14 at 2 (emphasis added).

⁷ Exhibit 4, Governor Abbott’s Executive Order GA-16.

As the State and County begin planning to reopen the economy, Judge Hidalgo reviewed the CDC guidelines cited by Governor Abbott’s executive orders and promulgated them into a “Use of Face Coverings” Order. These regulations make it easier to reopen businesses, because they allow people to more safely interact in public.⁸

Despite overwhelming evidence to the contrary, Plaintiff⁹ dismisses this pandemic by comparing it to the flu. He submits an affidavit from a self-proclaimed “world-leading expert” who does not even have a medical degree—much less board certification in either internal medicine or infectious disease.¹⁰ This expert’s affidavit provides grossly inaccurate (and dangerous) misinformation about the incidence, mortality, and morbidity of COVID-19. For example, he falsely claims there is a “coronavirus vaccine.”¹¹ He also claims the virus does not kill people, and blames COVID-19 deaths on those who have a “weakened and dysfunctional immune system” that could be solved “by food and nutrition.”¹² Rather than protect vulnerable populations from COVID-19, he proposes they be given “nutritional interventions.”¹³

Not only does Plaintiff misrepresent the science behind the pandemic, but he also misrepresents his own claims. This is the **third time** in **three weeks** Plaintiff has sued Judge Hidalgo for trying to protect the residents of Harris County. On March 31, Plaintiff and a group of pastors filed an Emergency Writ of Mandamus in the Texas Supreme Court seeking to

⁸ Exhibit 5, Judge Hidalgo’s April 22 “Use of Face Coverings” Order.

⁹ Although Plaintiff lists both his name and the name of his business in the caption, Defendant refers to him in the singular because it appears he brought suit in his name only.

¹⁰ Plaintiffs’ First Amended Petition at Exhibit C.

¹¹ Plaintiffs’ First Amended Petition at 1 and Exhibit B.

¹² Plaintiffs’ First Amended Petition Exhibit B.

¹³ Plaintiffs’ First Amended Petition.

invalidate Harris County’s “Stay Home, Work Safe” Order.¹⁴ Harris County responded,¹⁵ and the Supreme Court ordered the parties to file letter briefs explaining whether Plaintiffs-Relators’ claims should be dismissed as moot following Governor Abbott’s signing of Executive Order GA-14.¹⁶ Rather than respond, they dismissed their case.¹⁷ That should have ended this matter, but on the eve of Easter, Plaintiffs resurrected their claims against Judge Hidalgo in 281st District Court,¹⁸ where they were denied a Temporary Restraining Order.

Now—apparently without the blessing of the pastors—Hotze has once again sued Judge Hidalgo. This time, Dr. Hotze complains he does not want to wash his hands, does not want to avoid touching his face, and does not want to wear a mask similar to that worn by his peers in hospitals and clinics around the world. Rather than comply with these simple, common sense recommendations by experts working to stem the pandemic so society can reopen, Hotze complains his rights are being “trampled on” and he should be permitted to violate CDC guidelines and risk spreading the infection.

Plaintiff should not be permitted to file yet another baseless lawsuit with figuratively (and perhaps literally) unclean hands. This Court should dismiss this case based on lack of standing to bring suit, failure to sue the correct defendant, and failure to plead facts to show any violation of

¹⁴ Exhibit 6, Plaintiffs’ Emergency Petition for Writ of Mandamus in the Texas Supreme Court, seeking to invalidate Harris County’s “Stay Home, Work Safe” Emergency Order in its entirety.

¹⁵ Exhibit 7, Harris County’s Response to Plaintiffs’ Emergency Petition for Writ of Mandamus in the Texas Supreme Court. In the short time the case was active, Americans United for Separation of Church and State and Wolfgang Hirczy de Mino, Ph.D both submitted amicus briefs or letters to the Supreme Court strongly condemning Plaintiffs’ attempts to force an end to the emergency restrictions.

¹⁶ Exhibit 8, Supreme Court’s April 2 Order requiring additional briefing on whether Governor Abbott’s Executive Order GA-14 rendered Plaintiffs/Relators’ claims moot.

¹⁷ Exhibit 9, Plaintiffs’ Motion to Dismiss in the Texas Supreme Court.

¹⁸ Exhibit 10, *Hotze, et al. v. Harris County, et al.*, Cause No. 2020-22609 in the 281st Judicial District, Harris County, Texas.

his Constitutional rights. If this case is not dismissed outright, this Court should deny Plaintiffs' Application for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction.

PLEA TO THE JURISDICTION

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. A plea to the jurisdiction contests the trial court's power to determine the subject matter of the controversy. *Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Subject matter jurisdiction is essential to the authority of a court to decide a case, and the plaintiff bears the burden to allege facts affirmatively demonstrating the trial court's jurisdiction to hear a case. *Tex Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). If a plaintiff pleads facts that affirmatively demonstrate an absence of jurisdiction and the defect is incurable, then the cause is properly dismissed. *Peek v. Equip. Serv. Co. of San Antonio*, 779 S.W.2d 802, 805 (Tex. 1989).

I. Governor Abbott's Executive Order GA-16 imposes the same CDC guidelines on Plaintiff as Judge Hidalgo's Order, and Plaintiff has a pending case against Governor Abbott in Travis County. Plaintiff must either consolidate these cases, or dismiss this case.

Under Texas law, the governor is responsible for meeting "the dangers to the state and people presented by disasters." Tex. Gov't Code § 418.003. During a disaster, the Governor may issue or rescind executive regulations that "have the force and effect of law." Tex. Gov't Code § 418.012. "The governor may use all available resources of state government and of political subdivisions that are reasonably necessary to cope with a disaster." Tex. Gov't Code § 418.017. The governor may even "commandeer or use any private property if the governor finds it necessary to cope with a disaster..." Tex. Gov't Code § 418.017(c).

At the local level, the presiding officer (county judge) of a county is the designated emergency management director for that county. The emergency management director "serves as

the governor’s designated agent” and “may exercise the powers granted to the governor” on a local scale. Tex. Gov’t Code § 418.1015(b). Thus, it is under Governor Abbott’s authority that Harris County Judge Hidalgo may issue executive regulations that have the force of law, control the ingress and egress of people, and control the movement of persons and occupancy of buildings as necessary to cope with this disaster. *See*, Tex. Gov’t Code § 418.018(c); *United States v. Ferguson*, No. 1:07-CR-70, 2007 WL 4146319, at *5 (E.D. Tex. Nov. 16, 2007).

As noted, those who violate Governor Abbott’s Order and fail to comply with the CDC’s Guidelines can be fined \$1,000 and jailed for 180 days, as specified by Local Government Code § 418.173.¹⁹ In contrast, Judge Hidalgo’s April 22 “Use of Face Coverings” Order imposes only the risk of a fine—no jail time.²⁰

The restrictions in Governor Abbott’s Order are nearly identical to those in Judge Hidalgo’s Order, and on April 2, the Texas Supreme Court recognized that the lynchpin of Plaintiffs’ first case is whether Governor Abbott’s Executive Order GA-14 moots their claim against Judge Hidalgo.²¹ It did at the time, and it still does. Governor Abbott’s most recent Executive Order GA-16, signed April 17, has the same language requiring that:

People and businesses should **follow the Guidelines from the President and the CDC by practicing good hygiene, environmental cleanliness, and sanitation, implementing social distancing**, and working from home if possible. In particular, all such services should be provided through remote telework from home unless they cannot be provided through remote telework.²²

Judge Hidalgo’s “Use of Face Coverings” Order implements the same good hygiene, environmental cleanliness, sanitation, and social distancing required by Governor Abbott’s Order. The only difference is that, rather than simply reference CDC guidelines, Judge Hidalgo

¹⁹ Exhibit 4, Executive Order GA-16 at 2.

²⁰ Exhibit 5 “Use of Face Coverings” Order at § 3.

²¹ Exhibit 8, The Texas Supreme Court’s April 2 Order for Additional Briefing.

²² Exhibit 4, Executive Order GA-16 at 3 (emphasis added).

identifies some of them and incorporates them into Harris County's Order: (1) wearing face coverings under certain circumstances, (2) maintaining social distancing, (3) avoiding touching the nose or face, and (4) washing hands.²³

When a party challenges the constitutionality of both the Governor and a county judge's disaster orders, he is required to name both as defendants. In the *Mr. W. Fireworks* case, the Austin Court of Appeals explained:

Mr. W's remaining claims challenge the constitutionality of the Act, the Governor's Order, the County Order, and the County Plan under the Texas and U.S. Constitutions. For such claims, the Uniform Declaratory Judgments Act requires that the relevant governmental entities be made parties to the suit. *See* Tex. Civ. Prac. & Rem.Code Ann. § 37.006(b) ("In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard."); *Heinrich*, 284 S.W.3d at 373 n. 6; *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex.1994) ("The DJA expressly provides that persons may challenge ordinances or statutes, and that governmental entities must be joined or notified. Governmental entities joined as parties may be bound by a court's declaration on their ordinances or statutes. The Act thus contemplates that governmental entities may be-indeed, must be-joined in suits to construe their legislative pronouncements.").

Although Mr. W raised claims seeking declarations that the Act, the Governor's Order, the County Order, and the County Plan violate both the Texas and U.S. Constitutions, it named only Comal County as a defendant. Given Mr. W's failure to make the State or Governor's office parties to this suit, we dismiss Mr. W's claims regarding the constitutionality of the Act and the Governor's Order under the Texas and U.S. Constitutions. *See* Tex. Civ. Prac. & Rem.Code Ann. § 37.006(b); *Heinrich*, 284 S.W.3d at 373 n. 6; *Leeper*, 893 S.W.2d at 446.

Mr. W. Fireworks, Inc. v. Comal Cty., No. 03-06-00638-CV, 2010 WL 1253931, at *4 (Tex. App. Mar. 31, 2010). Any finding by this Court that Harris County's "Use of Face Coverings" order is unconstitutional is also a finding that Governor Abbott's Executive Order GA-16 is unconstitutional. Accordingly, Governor Abbott is an essential party to this suit and must be

²³ Exhibit 1, Dr. Shah's Affidavit at 5-8.

named and served before this suit can proceed. Plaintiff already has a case pending against Governor Abbott in Travis County based on Executive Order GA-16 in Travis County.²⁴ Plaintiff must either consolidate this case into his case against Governor Abbott, or dismiss this case.

II. Plaintiff's claims against Harris County Judge Hidalgo must be dismissed for lack of standing.

A. Plaintiff has the burden to establish standing.

In Texas, standing to sue “requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court.” *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018), *quoting Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012). Standing is a constitutional prerequisite to suit which derives from the Texas Constitution’s provision for separation of powers, which denies judicial authority to decide issues in the abstract. Standing also derives from the open courts provision, which provides court access only to a “person for an injury done him.” *Id.*

Standing requires that a plaintiff personally suffer an “injury in fact,” which is an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Standing also requires the injury to be “fairly ... trac[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.” *Id.*, 548 S.W.3d at 485, *quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). For an individual to establish standing to challenge an executive order, he must show more than some government actor who acted outside of his authority. He must also show “he has suffered an injury distinct from the general public.” *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001).

²⁴ Exhibit 11, *Hotze, et al. v. Governor Greg Abbott, et al.*, Travis County, Texas.

Plaintiff fails to show concrete, particularized, actual injury distinct from the general public. The State and County Emergency Orders affect all of society in a similar manner by adopting the Center for Disease Control and Prevention guidelines. Plaintiff has no particularized standing to bring suit and fails to even explain his injuries. He also fails to explain how an injunction against Judge Hidalgo will address those alleged, unspecified injuries—especially when Governor Abbott has imposed the same regulations, but with higher penalties.

B. Plaintiff’s case must be dismissed for lack of standing because he is not being prosecuted under any regulation.

On April 23, the Texas Supreme Court held that a party cannot challenge an emergency order under Chapter 418 unless he is being prosecuted under that order. In the case of *In re Greg Abbott, Governor of the State of Texas, and Ken Paxton, Attorney General of the State of Texas, Relators*, No. 20-0291, a group of judges sought a petition for writ of mandamus against Governor Abbott for issuing Executive Order GA-13, which limited the release of detainees who were charged with, or had a history of, certain offenses.

The judges whose orders were affected by Executive Order GA-13 filed suit because they were “directly harmed by [the] issuance of this Order and impeded from exercising their judicial authority pursuant to the Texas Constitution” because they were “now caught between fulfilling their obligations to decide bail in individual cases as prescribed by the Constitution and Legislature, or obeying an Executive Order.”²⁵ The judges were granted a Temporary Restraining Order prohibiting the enforcement of Executive Order GA-13.

The Supreme Court reversed and held the judges had no personal, legally cognizable injury required for standing. None of the judges had been arrested or prosecuted for violating the

²⁵ Exhibit 12, *In re Greg Abbott, Governor of the State of Texas, and Ken Paxton, Attorney General of the State of Texas, Relators*, No. 20-0291.

Governor's Order, and the Supreme Court explained it is irrelevant that the Governor had the power to criminally charge them under Texas Government Code § 418.173 for disobeying his order. It is also irrelevant that the Attorney General sent employees to personally monitor their hearings and stated on Twitter he would "not stand for" the judges' actions. None of that rose to the level of "imminent prosecution."

"To establish standing based on a perceived threat of injury that has not yet come to pass, the 'threatened injury must be certainly impending to constitute injury in fact'; mere '[a]llegations of possible future injury' are not sufficient." *In re Greg Abbott, Governor of the State of Texas, and Ken Paxton, Attorney General of the State of Texas* at 13, quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (citations omitted). While a plaintiff does not need to be arrested and prosecuted to challenge the constitutionality of a criminal law, he must allege "an intention to engage in a course of conduct arguable affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.*, quoting *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). *See also, Mr. W. Fireworks, Inc. v. Comal Cty.*, No. 03-06-00638-CV, 2010 WL 1253931, at *7 (Tex. App. Mar. 31, 2010) (to challenge the constitutionality of a statute, a party must either be prosecuted or the threat of prosecution is imminent).

C. Plaintiff admits he will not be prosecuted.

Not only has Plaintiff failed to plead that he is in imminent danger of being prosecuted, but he affirmatively states he will *not* likely be prosecuted. On page 6 of his First Amended Petition, he admits:

"6. Judge Hidalgo's Order Impossible to Enforce

After Judge Hidalgo announced her draconian order, HPOU tweeted a response to the mandate, labeling the order “draconian” and impossible to enforce...”²⁶

It is undisputed that Judge Hidalgo’s Order prefers that officers educate—rather than penalize—residents. That fact is clearly implied in the Order itself. While peace officers in Texas typically have a *duty* to enforce the law, Section 3 explains that “any law enforcement agency based in Harris County is hereby authorized to use its *discretion* in enforcing this Order.”²⁷ There is no imminent threat of prosecution, and Plaintiff’s case should be dismissed.

D. Plaintiff fails to establish irreparable injury.

Even if Plaintiff could establish that he is being prosecuted for violating any part of Judge Hidalgo’s Order, he must still show that this particular statute causes irreparable injury to a vested property right. *Id.*, citing *State v. Morales*, 869 S.W.2d 941, 945 (Tex. 1994). A “property right” refers to any type of right to specific property, whether tangible or intangible. The term “vested right” must have “some definitive, rather than merely potential existence.” *City of La Marque v. Braskey*, 216 S.W.3d 861, 864 (Tex.App.—Houston [1st Dist.] 2007, pet denied). At the most, Plaintiff’s complaint seems to be that he will be have to wash his hands and put on a mask. He has not alleged how this will deprive him of any property right. For this reason as well, his case should be dismissed for lack of standing.

IV. Plaintiff’s claims should be dismissed because Judge Hidalgo is not the proper party to enforce her Order and is not subject to the *ultra vires* doctrine in this case.

There is yet another reason Plaintiff’s claims against Judge Hidalgo should be dismissed—she is not the proper party to enforce her Order. On April 20, the federal Fifth Circuit Court of Appeals considered a case against Governor Abbott under the *ultra vires* doctrine alleging that he had exceeded the scope of his authority in issuing Executive Order GA-

²⁶ Plaintiff’s First Amended Complaint at 6.

²⁷ Exhibit 5, “Use of Face Coverings” Order at § 3 (emphasis added).

13 under Chapter 418 of the Texas Government Code. *In re Abbott*, No. 20-50296 (5th Cir. Apr. 20, 2020). The Court held there was no jurisdiction to consider the case because Governor Abbott is not the party who enforces his order: “[t]he power to promulgate law is not the power to enforce it.” *Id.*, at 11-12 (citing *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 152 (1999)).

Similarly, Judge Hidalgo is not the party responsible for imposing any potential fine on Plaintiff for violating the Order, and Plaintiff is required to bring his suit against the law enforcement or prosecutorial agency who ultimately does enforce this order. This is particularly true in this case, since Judge Hidalgo’s order specifically provides law enforcement agencies with the discretion for how to enforce the order.²⁸

V. Plaintiff’s claims should be dismissed because Plaintiff fails to plead facts sufficient to show any violation of his Constitutional rights.

A. The COVID-19 pandemic is a major public health crisis.

As explained by the declaration of Dr. Umair Shah,²⁹ the COVID-19 pandemic is unlike anything modern society has experienced. There is no natural immunity to the virus that causes the disease, no “herd immunity” to the virus, no vaccine for the virus, and no approved treatment for the virus.³⁰ While influenza (the flu) kills approximately 0.1% of those it infects, COVID-19 may kill as many as one to two percent of those it infects. Six percent of those over the age of 60 die from COVID-19, and nearly one in five of those over the age of 80 die from COVID-19.³¹

This is compounded by the fact that the SARS-CoV-2 virus is extremely contagious. A patient with seasonal flu will transmit the disease to an average of 1.3 other people, while

²⁸ Exhibit 5, “Use of Face Coverings” Order at § 3.

²⁹ Exhibit 1, Affidavit of Dr. Shah at 2-4.

³⁰ Exhibit 1, Affidavit of Dr. Shah at 2-3.

³¹ Exhibit 1, Affidavit of Dr. Shah at 2-3.

preliminary estimates suggest a patient with SARS-CoV-2 may transmit the virus to an estimated 2 to 3 other people. Assuming that each COVID-19 patient spreads the disease to only two other people, the number of infected people will grow exponentially.³²

The World Health Organization data on March 15 showed the number of infected people was doubling every four days in Italy, France, and the United States. It doubled every three days in Spain and Germany. The United States had its first case on January 20. By March 30, it led the world with 164,248 confirmed cases, as the World Health Organization reported infections in 177 countries. (By comparison, only 28 countries had cases of MERS during the 2012 epidemic, and only 29 countries had cases of SARS during the 2002 epidemic.)³³

Plaintiff's expert claims society has overreacted to this pandemic. As support, he points to the fact that approximately 50,000 people die per year from influenza, while, between January 21 and April 3, there were only 6,593 deaths from COVID-19.³⁴ The problem, of course, is that influenza had a full year to work through populations (most of whom had the opportunity to be vaccinated), while COVID-19 has been around only a few months and has not even reached all parts of the United States. The concern is not what has happened in the first few weeks of this pandemic, but what will happen if we do not take action. Plaintiffs claim that on April 3, there were "91 deaths per day" from COVID-19.³⁵ By April 11, that figure has ballooned to more than 2,000 deaths per day in the United States.³⁶

³² Exhibit 1, Affidavit of Dr. Shah at 3.

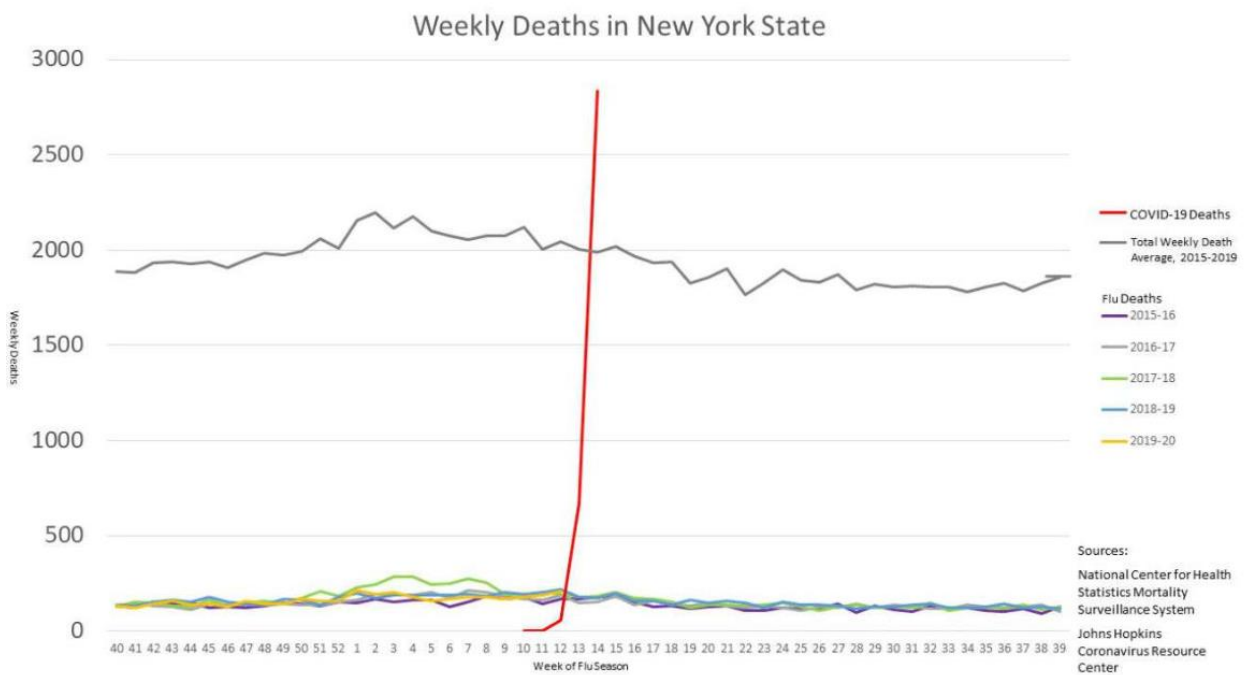
³³ Exhibit 1, Affidavit of Dr. Shah at 3.

³⁴ Plaintiff's First Amended Petition at Exhibit B at 2. To illustrate how fast this disease is spreading, when Plaintiff's expert signed his affidavit, the number of deaths was 6,593. As of April 11, it is 106,662. By the time the Court reads this brief, it will certainly be higher.

³⁵ Plaintiffs' First Amended Petition at Exhibit B.

³⁶ If the United States were to maintain 2,000 deaths per day, it would have 730,000 deaths from COVID-19 in the next year.

Using data from the National Center for Health Statistics Mortality Surveillance System and Johns Hopkins Coronavirus Resource Center, we can plot weekly flu deaths in New York State every year between 2015 and 2020, which are represented by the lines near the bottom of the chart below. The average number of weekly deaths from *all causes* between 2015 and 2019 is represented by the gray horizontal line in the middle of the chart. The red line, which shoots almost straight up, represent deaths from COVID-19 in New York in the first *three weeks* of the pandemic. By the second week, COVID-19 had already far eclipsed all other causes of death. The red COVID-19 line demonstrates why this unprecedented surge has crippled New York—it looks nothing like any of the flu plots on the bottom of the chart:



Weekly flu deaths versus weekly COVID-19 deaths in New York State (Max Roser/OurWorldInData)

Plaintiffs’ cavalier attitude toward this public health crisis is akin to someone standing on the edge of a beach the day before a Category 5 hurricane landfall and boasting that they will not evacuate because the water has only risen a foot. When a person refuses to evacuate from a

hurricane, he risks his own life, and perhaps the lives of first responders who choose to later rescue him. In this case, Plaintiffs risk the lives of their entire communities.

This disease spreads so quickly and virulently that it often overwhelms the health care systems in the communities it strikes. There are a limited number of hospital beds, nurses, doctors, face masks, hand sanitizers, and ventilators. When there is a sudden surge of sick people, there are not enough resources to care for patients—not only with COVID-19, but also for accidents, cancer, surgeries, heart disease, and other medical problems.³⁷ Resources in Italy and Spain became so strained by this new disease that hospitals stopped intubating patients over the age of 60—instead allowing them to die.³⁸ In New York, hospitals were so overcrowded that Central Park was filled with tents to house patients in a mass field hospital, and a floating hospital was tied up at Pier 90 in Manhattan.³⁹

There is only one way to reduce this healthcare burden. Society must slow the transmission of the virus and “flatten the curve” so hospitals can keep up with the volume of patients coming in. With social distancing and similar measures, the number of cases will develop more slowly, which assures a higher percentage of those who get sick will have an opportunity to be treated. This will result in a massive protection of life and resources.

So far, Texas’s early and successful adoption of social distancing has helped avoid the type of crisis experienced in other places. However, that could change quickly, and we cannot become complacent. To save thousands of lives, policy makers must continue to protect the communities they serve by requiring social distancing and other strategies to reduce the spread of infection until epidemiological models show the risk has become reasonable.

³⁷ Exhibit 1, Affidavit of Dr. Shah at 4-5.

³⁸ Exhibit 1, Affidavit of Dr. Shah at 4.

³⁹ Exhibit 1, Affidavit of Dr. Shah at 4-5.

B. Harris County’s Order is narrowly tailored and consistent with state and federal guidelines.

Judge Hidalgo’s Order is narrowly tailored to the specific governmental purpose of saving lives while imposing minimal burdens on individuals.

1. Face coverings are part of the CDC’s COVID-19 guidelines.

On April 3, 2020, the Centers for Disease Control and Prevention and President Donald Trump began recommending that everyone wear nonsurgical cloth face coverings anytime they go out in public during the COVID-19 pandemic. Part of good hygiene, cleanliness, and sanitation during a pandemic is wearing face masks while in public. In a pandemic, an uncovered cough or sneeze can be deadly, and face coverings are inexpensive, pose little burden on the wearer, and can be made of virtually any type of cloth.

A face covering slows or stops contagious water droplets and other particles from being breathed by the wearer. Many nations and numerous states, counties, and cities mandate that masks be worn in public. On April 17, Bexar County, Texas (San Antonio) began requiring all people age 10 or older to wear a cloth face covering in public. On April 18, Dallas County ordered that all people over the age of two “shall wear some form of covering over their nose and mouth” while in public. These are sensible regulations, particularly in large urban areas such as Harris County, which is the third largest county in the United States.

These requirements are particularly important in light of new data suggesting a large number of asymptomatic people may be unknowingly harboring and spreading the virus. Wearing a face mask not only benefits the wearer, but also everyone in the vicinity by slowing or stopping an asymptomatic person’s contagious water droplets from spreading when he breathes, coughs, or sneezes. Even if a person does not care for his own safety, he has no right to infect others, and face coverings help to reduce the chance that he will spread infection.

It is well established that governments have the right to require people to cover body parts for reasons less compelling than stopping a pandemic. Courts have long upheld laws prohibiting a person from showing up at a public venue pant-less, or shirtless, even if the law's sole basis is to preserve modesty and decorum. When faced with the compelling public health goal of saving lives, it is completely reasonable for people to cover their mouths and noses.

2. Hand washing is part of the CDC's COVID-19 guidelines.

Hand washing is another element of the CDC's good hygiene, cleanliness, and sanitation guidelines. Many studies have reported that frequent hand washing reduces the chance of someone contracting or spreading COVID-19. Handwashing is an inexpensive, easy requirement that has existed as part of hospital, medical office, and food service establishment regulations for many years, and courts have upheld laws requiring restaurant and healthcare workers to wash their hands after going to the bathroom. This common-sense regulation protects the public from the spread of infectious diseases. During a pandemic, it makes sense to extend those regulations.

3. Avoiding touching the face is part of the CDC's COVID-19 guidelines.

The CDC also recommends that anyone who has been in public avoid touching his nose or face as much as possible, because SARS-CoV-2 enters the respiratory system through the nose or mouth. During a typical day, people use their hands to touch community objects such as door knobs, telephones, keyboards, and faucets. The virus can live on many of these surfaces for several days. If a person touches an object and then touches his face (or vice versa), he provides an avenue for the virus to spread. Thus, the CDC has asked people to be mindful to avoid unnecessarily touching their faces, and it is good public policy for this to be promulgated. It costs nothing and provides tremendous social benefits.

4. Six foot social distancing is part of the CDC’s COVID-19 guidelines.

The social distancing requirements discussed above are also part of the CDC’s COVID-19 guidelines. For the reasons explained, the purpose of limiting social gatherings is not to infringe on anyone’s rights—the purpose is to keep people alive so they may continue to have rights.

SPECIAL DENIALS

Defendants assert there is a defect in joinder of parties because Governor Greg Abbott, who issued Executive Order GA-16 (a similar order affecting Plaintiffs’ rights in an identical manner) is a necessary party who has not been joined as a defendant in this case.

“A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties.” Tex. R. Civ. P. 39(a)(1). A necessary party who is subject to the court’s jurisdiction must be joined in the action, or the case will be dismissed. Tex. Rule Civ. P. 39(a); *Longoria v. Exxon Mobil Corp.*, 255 S.W.3d 174, 184 (Tex. App.—San Antonio 2008, pet. den.)

Even if Plaintiff could prove that Harris County’s “Use of Face Covering” Order somehow violated his constitutional rights, his injunction would no effect, and his rights would continue to be violated because he would still be subject to the same restrictions by Governor Abbott’s Executive Order GA-16.

GENERAL DENIAL

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendant denies each and every material allegation contained in Plaintiffs’ Original Petition, Applications for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, and demands strict proof thereof.

**RESPONSE TO APPLICATION FOR TEMPORARY RESTRAINING ORDER,
TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION**

As explained above, the Court lacks subject matter jurisdiction and should dismiss this case in its entirety. But if the Court concludes otherwise, each of Plaintiff's requests for injunctive relief should be denied. Defendant incorporates the arguments above, and further addresses Plaintiff's request for injunctive relief as follows.

I. Standard for injunctions.

To obtain a temporary restraining order, a plaintiff must show that he "is entitled to preservation of the status quo of the subject matter of the suit pending trial on the merits." *Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202, 208 (Tex. 1980); 44 Tex. Jur. 3d *Injunctions* § 12 (3d ed.). Plaintiffs may not use a request for a temporary restraining order as a means "to obtain an advance ruling on the merits." *Id.* If an order does more than merely maintain the status quo, then it is not a temporary restraining order at all. *Del Valle Indep. Sch. Dist. v. Lopez*, 845 S.W.2d 808, 809 n. 2 (Tex. 1992).

To obtain a temporary injunction, a plaintiff must plead and prove three specific elements: (1) a cause of action against the defendants; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); 44 Tex Jur. 3d *Injunctions* § 13 (3d ed.); *see also In re Tex. Nat. Res. Conserv. Comm'n*, 85 S.W.3d at 204 (noting a request for a temporary injunction "has more stringent proof requirements" than a request for a temporary restraining order). Moreover, "the proof required to support a judgment issuing a writ of temporary injunction may not be made by affidavit." *Millwrights Local Union No. 2484 v. Rust Eng'g Co.*, 433 S.W.2d 683, 687 (Tex. 1968). Instead, a temporary injunction may issue only after the court conducts a hearing and only if the plaintiff offers evidence that "establishes a probable right of recovery" on the

merits. *Id.* at 687. Absent that showing, “no purpose is served” by the issuance of a temporary injunction because its purpose is likewise to maintain the status quo pending a trial on the merits. *In re Tex. Nat. Res. Conserv. Comm’n*, 85 S.W.3d 201, 204 (Tex. 2002).

To obtain a permanent injunction, a plaintiff must actually succeed on the merits at final judgment. 44 Tex. Jur. 3d *Injunctions* § 15 (3rd ed.).

Plaintiff cannot establish the elements necessary for any of the three forms of relief sought. He is not entitled to a temporary restraining order because no one is threatening the status quo. He is not entitled to a temporary or permanent injunction because he has not stated a cause of action, not shown a probable right to the relief sought, and there is no probable, imminent, and irreparable injury in the interim.

II. Plaintiff fails to state a claim for injunctive relief.

A. Plaintiff fails to identify which portions of the Order he wants enjoined and fails to state his requested relief with specificity.

Plaintiff is not entitled to injunctive relief because he fails to show which parts of Judge Hidalgo’s Order he has violated or intends to violate and seeks to have enjoined, or why he can meet his burden as to each item. Plaintiff’s burden as to each part of Judge Hidalgo’s Order is explained below:

Section 2, Parts 1 & 3.

That Hotze is over the age of 10, has no medical condition to prevent him from using a face covering, and intends to leave his residence and be in public places in Harris County without any form of face covering while in close proximity to others who are not members of his household and while not engaging in exercise, eating or drinking.

Section 2, Part 2.

That Hotze intends to violate the existing (and constitutional) requirement that he maintain social distance of at least six feet while in public in the State of Texas.

Section 2, Part 4.

Hotze cannot challenge this part, as it does not require him to do anything; it simply recommends that the public avoid purchasing medical supplies, so that they will be available for first responders.

Section 2, Part 5.

Hotze cannot challenge this part, as it does not require him to do anything; it simply reinforces that Section 2, Part 2 is important.

Section 2, Part 6.

That Hotze intends to leave his residence without washing his hands, intends to violate Section 2, Part 2, and/or intends to unnecessary touch his nose or face.

Section 2, Part 7.

Hotze cannot challenge this part, as it does not require him to do anything; it simply recommends that he not use disposable face coverings more than three times and wash reusable cloth face coverings regularly to prevent the spread of the virus.

Section 2, Part 8.

That Hotze is homeless and does not intend to maintain social distancing of at least six feet from any other person, or that he objects to having face coverings donated to him.

Section 3.

Hotze cannot object to this section, as it simply cites Tex. Gov't Code § 418.173 and elects not to impose the possibility of jail time on anyone who violates the order.

Section 4.

Hotze cannot object to this section, as it simply advises that this Order will be posted on the Internet and contains a severance clause.

Rather than identify which part of the Order he intends to violate and provide enough detail to show why he will be irreparably harmed without an injunction, Hotze submits a one-

page affidavit in which he misstates the terms of Judge Hidalgo's Order and makes the conclusory assertion that he will suffer some vague injury by complying with the Order:

If I leave my home without a mask, if I do not wash my hands, if I touch my face, or if I do not remain six feet away from another person, I can be fined \$1,000. By forcing me to do these things Judge Hidalgo's April 22, 2020 Order infringe[s] upon my civil liberties and the freedoms granted to me by the Texas Constitution, article I, § 19. If this Court does not grant my Temporary Restraining Order, I will experience imminent and irreparable injury. Specifically, I will be denied my constitutional rights."⁴⁰

This affidavit fails to even allege facts sufficient to show entitlement to injunctive relief.

B. Plaintiff does not have a cause of action against Judge Hidalgo.

Further, as explained, even if Plaintiff had identified which portion of the Order he wished to enjoin, his request should still be denied because: (1) Plaintiff fails to meet his burden to establish standing, (2) Plaintiff fails to meet his burden to establish constitutional, and (3) Plaintiff fails to name Governor Abbott as an essential party.

C. Plaintiff does not have a probable, imminent, and irreparable injury in the interim.

Finally, assuming Plaintiff could survive all of the above, he makes no showing of any probable, imminent, and irreparable injury in the interim by being asked to wash his hands, not unnecessarily touch his face, or cover his mouth in public until the worst of the pandemic passes.

III. Plaintiff is unlikely to succeed on the merits of any of his claims.

A. Harris County's Order does not violate Article I, § 28 of the Texas Constitution.

Plaintiff alleges that Judge Hidalgo's Order violates Article I, § 28 of the Texas Constitution, which provides: "No power of suspending laws in this State shall be exercised except by the Legislature." As explained, Judge Hidalgo has not suspended any law; she has

⁴⁰ Plaintiff's First Amended Petition, Exhibit C.

acted under Tex. Gov't Code § 418.1015(b) as agent for Governor Abbott to promulgate CDC regulations during a pandemic. Plaintiff has not identified any law that has been suspended, and assuming, *arguendo*, he could identify a suspended law, Plaintiff would be required to name Governor Abbott in this suit, since Judge Hidalgo has acted as his agent. Finally, even if any law had been suspended and Governor Abbott were not a necessary party, the alleged suspension of law would not be in violation of the Legislature's power—since the Legislature passed Chapter 418 to permit the Governor and County Judge to exercise disaster powers under precisely these circumstances. Plaintiff has no chance of prevailing on this claim.

B. Harris County's Order is consistent with the Governor's Executive Order GA-16.

Plaintiff next alleges Harris County's Order is inconsistent with Governor Abbott's Order, and that Governor Abbott “make it clear that they supersede any order issued by a county judge or mayor under the Texas Disaster Act of 1975.” Plaintiff is wrong on both accounts.

First, as explained above, Governor Abbott's Executive Order GA-16, signed April 17, requires that:

People and businesses should follow the Guidelines from the President and the CDC by practicing good hygiene, environmental cleanliness, and sanitation, implementing social distancing, and working from home if possible. In particular, all such services should be provided through remote telework from home unless they cannot be provided through remote telework.⁴¹

Judge Hidalgo's “Use of Face Coverings” Order implements the same good hygiene, environmental cleanliness, sanitation, and social distancing required by Governor Abbott's Order. As explained by the affidavit of Dr. Shah, the CDC's practices require: (1) wearing face

⁴¹ Exhibit 4, Executive Order GA-16 at 3.

coverings in public, (2) maintaining social distancing, (3) avoiding touching the nose or face, and (4) washing hands.⁴²

Second, even if Judge Hidalgo's Order differed from Governor Abbott's, that would not make it unconstitutional. Contrary to Plaintiff's claim, Governor Abbott did not "supersede any order issued by a county judge." Executive Order GA-16 states:

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 essential services or reopened services allowed by this executive order or allows gatherings prohibited by this executive order.**⁴³

In other words, Governor Abbott prohibits Judge Hidalgo from doing only two things: (1) allowing gatherings that the Governor has banned and (2) closing essential services or other businesses that Governor Abbott has opened. Nothing in Executive Order GA-16 prohibits Judge Hidalgo from enforcing CDC guidelines. Plaintiff has no chance of prevailing on this claim.

C. Judge Hidalgo's Order does not violate Tex. Government Code § 410, *et seq.*

Plaintiff also asserts that the Texas Government Code does not permit Judge Hidalgo to require people to wash their hands or cover their mouths. Plaintiff seems to believe that unless the Legislature specifically passes a law dealing with handwashing and face masks, that Judge Hidalgo has no authority to promulgate these emergency regulations. As explained, during a disaster, Tex. Gov't Code § 418.012 gives the Governor the authority to issue or rescind executive regulations that "have the force and effect of law." Judge Hidalgo acts as the Governor's agent and has the same authority. Plaintiff can show no authority to prohibit this valid exercise of power. Plaintiff has no chance of prevailing on this claim.

⁴² Exhibit 5, "Use of Face Coverings" Order.

⁴³ Exhibit 4, Executive Order GA-16 at 4.

D. Judge Hidalgo’s Order does not violate Tex. Const. Article XI, § 5.

Plaintiff asserts Judge Hidalgo’s Order violates Texas Constitution Article XI, § 5, which prohibits a city with more than 5,000 people from passing a charter or ordinance inconsistent with the Constitution. First, Harris County is not a city—it is a county—and this provision is not applicable. Second, Judge Hidalgo’s Order was passed under Chapter 418 of the Texas Government Code and does not violate any provision of the Constitution. Plaintiff has no chance of prevailing on this claim.

E. Judge Hidalgo’s Order does not violate Article I, § 19 of the Texas Constitution

Plaintiff asserts that Judge Hidalgo’s Order deprives him of life, liberty, or property by requiring him to wash his hands and wear a mask to reduce the chance of infecting others with a deadly virus. Plaintiff provides no evidence of what life, property, or liberty he has lost by complying with this public health requirement. Plaintiff has no chance of prevailing on this claim.

NOTICE

Defendant gives notice that it will use any and all documents produced by Plaintiff in discovery at the trial of this cause or any pretrial proceeding. Defendant reserves the right to object to the authenticity of any document produced within 10 days of receiving actual notice from Plaintiff that the documents will be used in a pre-trial proceeding or trial.

PRAYER

Wherefore, premises considered, Defendant pray that this Court grant her Plea to the Jurisdiction and dismiss Plaintiff’s case in its entirety. In the alternative, Defendant prays that this Court deny Plaintiffs’ request for a temporary restraining order, temporary injunction, and permanent injunction, award Defendants attorneys’ fees and costs as allowed under Civil

Practices & Remedies Code § 125.068, and any further relief to which Defendants may be entitled in law or equity.

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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that on the 24th day of April, 2020, a true and correct copy of the foregoing instrument was served by electronic transmission to all counsel of record.

/s/ Seth Hopkins

SETH HOPKINS