

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.

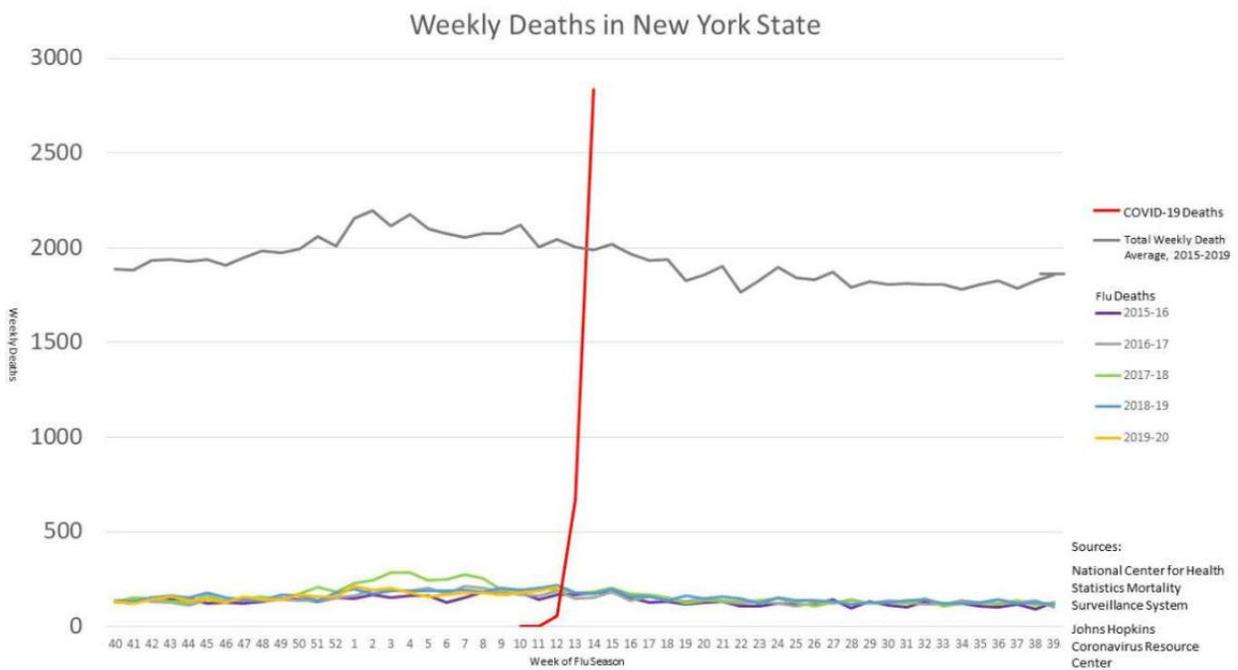
³³ Exhibit 1, Affidavit of Dr. Shah at 3.

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