

CAUSE NO. 2021-2775-5

STATE OF TEXAS,
Plaintiff,

IN THE DISTRICT COURT

v.

WACO INDEPENDENT
SCHOOL DISTRICT; BOARD OF
TRUSTEES OF WACO
INDEPENDENT SCHOOL
DISTRICT; DR. SUSAN
KINCANNON in her official
capacity as superintendent of the
Waco Independent School District;
and ANGELA TEKELL,
STEPHANIE KORTEWEG, JOSE
VIDAÑA, CARY DUPUY, KEITH
GUILLORY, JEREMY DAVIS,
and EMILY IAZZETTI in their
official capacities as trustees of
the Waco Independent School
District;

MIDWAY INDEPENDENT
SCHOOL DISTRICT; BOARD OF
TRUSTEES OF MIDWAY
INDEPENDENT SCHOOL
DISTRICT; DR. GEORGE
KAZANAS in his official capacity
as superintendent of the Midway
Independent School District; and
PETE RUSEK, BRAD ALFORD,
DR. ANDY POPEJOY, SUSAN
VICK, PAM WATTS, RICK
TULLIS, and COLIN WITT, in
their official capacities as trustees
of the Midway Independent School
District;

MCLENNAN COUNTY, TEXAS

414TH JUDICIAL DISTRICT

**STATE OF TEXAS'S VERIFIED ORIGINAL PETITION AND APPLICATIONS FOR
TEMPORARY AND PERMANENT INJUNCTIVE RELIEF**

INTRODUCTION

1. Defendants are deliberately violating state law. In flouting GA-38's ban on mask mandates, Defendants challenge the policy choices made by the State's commander in chief during times of disaster.¹ But the Texas Legislature made the Governor—not a patchwork of county judges, city mayors, superintendents, or school boards—the leader of the State's response to and recovery from a statewide emergency.²

2. GA-38 is a statewide order, issued using statewide emergency powers, with a statewide legal effect. It has the force and effect of state law, and state law preempts inconsistent local law. Defendants disagree with Governor Abbott's policy choice. But Defendants must recognize the fact that they are not above the law. Waco ISD's, Midway ISD's, McGregor ISD's, and La Vega ISD's mask mandates should be immediately enjoined.

**REQUEST FOR AN EXPEDITED HEARING ON THE STATE'S APPLICATIONS FOR A
TEMPORARY RESTRAINING ORDER AND A TEMPORARY INJUNCTION**

3. Given the important and urgent issues raised in this action, the State requests an expedited setting on its applications for a temporary restraining order and a temporary injunction.

¹ See Tex. Gov't Code § 418.015(c).

² *Id.* § 418.011.

4. The State is seeking non-monetary relief. Discovery is intended to be conducted under Level 1.

PARTIES

5. Plaintiff is the State of Texas.

Waco ISD Defendants

6. Defendant Waco Independent School District (“Waco ISD”) has approximately 14,854 students enrolled from Pre-Kindergarten to Grade 12.

7. Defendant Board of Trustees of Waco ISD is the board of trustees for Waco ISD.

8. Defendant Dr. Susan Kincannon is the superintendent of Waco ISD.

9. Defendants Angela Tekell, Stephanie Korteweg, Jose Vidaña, Cary DuPuy, Keith Guillory, Jeremy Davis, and Emily Iazzetti are members of the Waco ISD Board of Trustees.

10. Defendants may be served with process through Angela Tekell, the president of the Waco ISD Board of Trustees, or through Dr. Susan Kincannon, the Waco ISD superintendent.

Midway ISD Defendants

11. Defendant Midway Independent School District (“Midway ISD”) has approximately 8,348 students enrolled from Pre-Kindergarten to Grade 12.

12. Defendant Board of Trustees of Midway ISD is the board of trustees for Midway ISD.

13. Defendant Dr. George Kazanas is the superintendent of Midway ISD.

14. Defendants Pete Rusek, Brad Alford, Dr. Andy Popejoy, Susan Vick, Pam Watts, Rick Tullis, and Colin Watt are members of the Midway ISD Board of Trustees.

15. Defendants may be served with process through Pete Rusek, the president of the Midway ISD Board of Trustees, or through Dr. George Kazanas, the Midway ISD superintendent.

McGregor ISD Defendants

16. Defendant McGregor Independent School District (“McGregor ISD”) has approximately 1,490 students enrolled from Pre-Kindergarten to Grade 12.

17. Defendant Board of Trustees of McGregor ISD is the board of trustees for McGregor ISD.

18. Defendant James Lenamon is the superintendent of McGregor ISD.

19. Defendants Kyle Paschall, Trenton Rice, Mary Jo Williams, Robbie Jo Allison, Frank Graves, Chad Miller, and David Lillard are members of the McGregor ISD Board of Trustees.

20. Defendants may be served with process through Kyle Paschall, the president of the McGregor ISD Board of Trustees, or through James Lenamon, the McGregor ISD superintendent.

LaVega ISD Defendants

21. Defendant La Vega Independent School District (“La Vega ISD”) has approximately 3,196 students enrolled from Pre-Kindergarten to Grade 12.

22. Defendant Board of Trustees of La Vega ISD is the board of trustees for La Vega ISD.

23. Defendant Dr. Sharon M. Shields is the superintendent of La Vega ISD.

24. Defendants Mildred Watkins, Henry C. Jennings, Raymond Koon, Phil Banacle, Rev. Larry Carpenter, Randy Devorsky, and Brenda Rocha are members of the La Vega ISD Board of Trustees.

25. Defendants may be served with process through Mildred Watkins, the president of the La Vega ISD Board of Trustees, or through Dr. Sharon M. Shields, the La Vega ISD superintendent.

JURISDICTION AND VENUE

26. The subject matter in controversy is within the jurisdictional limits of this Court, and the Court has jurisdiction over the action under Article V, Section 8 of the Texas Constitution and section 24.007 of the Texas Government Code, as well as under sections 37.001 and 37.003 of the Texas Uniform Declaratory Judgments Act and section 65.021 of the Texas Civil Practice and Remedies Code.

27. Venue is proper in McLennan County under section 15.002(a)(1), (a)(2), and (a)(3), and under § 15.0151 of the Texas Civil Practices and Remedies Code.

BACKGROUND

I. The Texas Disaster Act of 1975 Makes the Governor the Leader of the State's Emergency Response.

28. Two core purposes of the Texas Disaster Act of 1975 ("TDA") are to: (1) mitigate the "damage, injury, and loss of life and property" resulting from a disaster;

and (2) “provide a setting conducive to the rapid and orderly restoration and rehabilitation of persons and property affected by disasters.”³

29. The TDA names the Governor the “commander in chief” of the State’s response to a disaster⁴ and makes him “responsible for meeting . . . the dangers to the state and people presented by disasters.”⁵

30. The TDA grants the Governor vast powers to meet this obligation, which include the power to: (1) issue executive orders carrying “the force and effect of law”;⁶ (2) control the movement of persons and occupancy of premises;⁷ (3) suspend statutes, orders, or rules;⁸ and (4) use all available public resources, including resources of cities and counties.⁹

31. The TDA makes certain local officials “agents” of the Governor and gives them powers subordinate to the Governor’s.¹⁰ Local officials who preside over an incorporated city or a county—meaning city mayors and county judges—are deemed “emergency management directors.”¹¹ These directors “serve[] as the governor’s designated agent in the administration and supervision of duties under this chapter.”¹² When serving in this capacity, these directors “may exercise the powers granted to the governor under this chapter on an appropriate local scale.”¹³

³ Tex. Gov’t Code § 418.002(1), (3).

⁴ *Id.* § 418.015(c).

⁵ *Id.* § 418.011.

⁶ *Id.* § 418.012.

⁷ *Id.* § 418.018(c).

⁸ *Id.* § 418.016(a).

⁹ *Id.* § 418.017(a).

¹⁰ *Id.* § 418.1015(b).

¹¹ *Id.* § 418.1015(a).

¹² *Id.* § 418.1015(b).

¹³ *Id.*

32. The TDA also allows these same local officials the power to control the movement of persons and the occupancy of premises in a local disaster area.¹⁴ But as a power under “this chapter,” emergency management directors can wield it only in their capacities as the Governor’s “designated agent[s].”¹⁵

33. The TDA does not confer on county judges, city mayors, or any other local officials an independent power to issue emergency orders carrying the force and effect of law.

34. School districts are included in the definition of “local government entities” applicable to the TDA.¹⁶ Although recognizing that school districts are “local governmental entities” under the TDA, the Legislature did not delegate to those school districts specific authority to respond to disasters. Instead, that authority was delegated to the Governor.¹⁷

II. GA-38 Protects Individual Autonomy in Making Personal Health Decisions.

35. On July 29, 2021, Governor Abbott issued executive order GA-38.¹⁸

36. GA-38 seeks to create a uniform response to the COVID-19 pandemic, one that gives individuals the autonomy to make personal health decisions free from government control.¹⁹

¹⁴ *Id.* § 418.108(g).

¹⁵ *Id.* § 418.1015(b).

¹⁶ *See* Tex. Gov’t. Code § 418.004(10).

¹⁷ *See id.* at §§ 418.011–.026.

¹⁸ A copy of GA-38 is attached hereto as Exhibit A. GA-38 is publicly available at <https://tinyurl.com/eo-ga-38>.

¹⁹ *See id.* at p. 1.

37. Towards this end, GA-38 enacts limits to “ensure that vaccines continue to be voluntary for all Texans and that Texans’ private COVID-19-related health information continues to enjoy protection against compelled disclosure...”²⁰

38. Also, GA-38 protects businesses and other establishments from “COVID-19-related operating limits.”²¹

39. Further, GA-38 bans most state and local officials from mandating the wearing of facemasks.²² GA-38 contains an exception that allows certain institutions—state supported living centers, government-owned hospitals, and jails—to require the wearing of facemasks.²³

40. To ensure individual autonomy and promote uniformity, GA-38 supersedes conflicting local emergency orders.²⁴ For the same reasons, GA-38 also suspends certain listed statutes and any others “to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with this executive order.”²⁵

41. Importantly, under GA-38, any person who wants to wear a facemask, get a vaccine, or engage in social distancing can still do so.²⁶ GA-38 “strongly encourage[s]” such practices.²⁷ But GA-38 leaves individuals free to follow the safe practices they should have already mastered over the last 18 months.²⁸

²⁰ *Id.* at pp. 2–3.

²¹ *Id.* at p. 3

²² *Id.* at pp. 3–4.

²³ *Id.* at p. 4.

²⁴ *Id.* at pp. 3–4.

²⁵ *Id.* at pp. 3–5.

²⁶ *Id.* at pp. 4.

²⁷ *Id.* at pp. 1.

²⁸ *Id.* at pp. 3.

42. GA-38's prohibition on local officials' facemask mandates falls comfortably within Governor Abbott's broad power to "control ingress and egress to and from a disaster area and the movement of persons and occupancy of premises in the area."²⁹

43. Specifically, GA-38's ban on facemask mandates controls "ingress and egress" to, "movement" in, and "occupancy of" a disaster area as it authorizes the entry of students into schools who would be prohibited if a school district was to require the wearing of facemasks. GA-38 also controls the conditions individuals may be subjected to when "occupying" premises in a disaster area.

III. Waco ISD Issues a Facemask Mandate in Defiance of GA-38.

44. On or about August 26, 2021, Waco ISD Superintendent, Dr. Susan Kincannon, mandated masks in all Waco ISD facilities beginning August 30, 2021 ("Defendants' Facemask Order").³⁰ On information and belief, the Waco ISD Board of Trustees participated in this decision or failed to take action to prevent Dr. Kincannon from implementing the mask mandate.

45. Defendants' Facemask Order is barred by GA-38, which explicitly prohibits local officials such as Defendants from issuing facemask mandates in response to COVID-19.

²⁹ Tex. Gov't Code § 418.018(c).

³⁰ WACO ISD, *Beginning Aug. 30, Face Masks will be required inside all Waco ISD facilities*, available at <https://www.wacoisd.org/site/default.aspx?PageType=3&DomainID=4&ModuleInstanceID=40&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=42574&PageID=1> (last visited September 10, 2021). A copy of this webpage is attached hereto as Exhibit B.

46. On September 3, 2021, the Office of Attorney General sent a letter to Waco ISD Superintendent Kincannon, warning that the imposition of the mask mandate exceeded her authority and violated GA-38. The letter requested Dr. Kincannon “rescind [the] local policy requiring masks in public schools or alternatively, not enforce it pending the Texas Supreme Court’s disposition of the cases before it involving this issue. Otherwise, you face potential legal action brought by this office.”³¹

47. As of September 13, 2021, Waco ISD and Superintendent Kincannon have not rescinded the mandatory masking policy in response to the letter from Attorney General Paxton’s office, and furthermore, Dr. Kincannon has indicated their intent to continue defying GA-38, stating that Waco ISD “will also continue to require masks in all Waco ISD buildings.”³²

IV. Midway ISD Issues a Facemask Mandate in Defiance of GA-38.

48. On or about August 6, 2021, Midway ISD Superintendent, Dr. George Kazanas announced a COVID-19 policy which provides for “mask directives” in certain circumstances (“Defendants’ Facemask Order”).³³ On information and belief, the Midway ISD Board of Trustees participated in this decision or failed to take action

³¹ Exhibit C (September 3, 2021 letter to Dr. Kincannon).

³² Smith, JB, WACO HERALD TRIBUNE, *Waco-area schools face state threats over masks as children lead record COVID-19 case load*, available at https://wacotrib.com/news/local/education/waco-area-schools-face-state-threats-over-masks-as-children-lead-record-covid-19-case/article_e909d4dc-10fd-11ec-9caa-2f85495d2515.html (last visited September 9, 2021). A copy of this webpage is attached hereto as Exhibit D.

³³ MIDWAY ISD, *Midway ISD Situational Matrix*, available at <https://www.midwayisd.org/cms/lib/TX01000662/Centricity/Domain/2064/Midway%20ISD%20Situational%20Matrix.pdf> (last visited September 10, 2021). A copy of this webpage is attached hereto as Exhibit E.

