

August 14, 2020

Re: Status of Litigation

Over the past six months, Governor Abbott, County Judge Hidalgo, County Judge Clay Jenkins and numerous local officials across the state of Texas have issued unconstitutional, draconian orders that trample on the constitutional rights of all Texans. The state and local orders are issued under Texas Government Code, Chapter 418, which is unconstitutional on its face and as applied. Moreover, Governor Abbott, Harris County Judge Hidalgo and the other's recent executive order which, among other things, force businesses to require employees and visitors to wear face coverings is an unconstitutional infringement on our liberties. Additionally, certain businesses have been identified as "essential" and can remain open while others are classified as "non-essential" and sentenced to bankruptcy, i.e., bars, etc. These Executive Orders are unconstitutional and violate the separation of powers doctrine, and numerous provisions in the Texas Constitution's Bill of Rights including, but not limited to, Article I, §3, Article I, §19, Article I, §28, Article II, §1, and Article IV, §8.

The executive orders in issue continue to deprive Texas citizens of various Constitutional rights, not the least of which is representative governance derived from a

proper separation of powers and legislative exclusivity in the creation and suspension of duly-enacted law.

Through a series of lawsuits at the state and federal level we are trying stop these unconstitutional actions that keep popping up as if government officials are involved in a warped game of “who can better trample the Constitutional rights of Texas citizens?”

Even if the ever-morphing “scary facts” the Governor and local officials and others repeatedly and gleefully cite in their pleadings in the trial court were true (and there is *considerable* debate on that point in the world-wide medical and epidemiological communities, calling into question whether ), one fact remains crystal clear and is irrefutably repeated in numerous, very-recent Texas Supreme Court opinions: the Texas Constitution has no “pandemic exception” for the protections it affords to the citizens of Texas. Indeed, Texas citizens put those protections in place with the express purpose of stopping the potential for the *precise form* of despotic government overreach Texans are experiencing every day we allow government officials free rein to trample our fundamental rights in the name of merely-announced-but-never-proven-and-highly-debatable “health concerns.”

Even if the subject executive orders were founded upon legitimate constitutional authority (which they are not), they are unconstitutional as applied because they were instituted without due process, violate equal protection, and are composed of provisions that are arbitrary, capricious, and which are not the least restrictive, narrowly tailored, means for advancing the government’s purported compelling interest (i.e., protecting public health).

“It is incumbent on the courts to ensure decisions are made according to the rule of law, not hysteria.” *Department of Health and Human Services v. Manke*, (June 5, 2020 SC 161394, Michigan Supreme Court).

It should be noted that over the past five months, Judge Lina Hidalgo and others have issued numerous Orders based on hysteria, including banning worship services, requiring Harris County residents to wash their hands, ordering Harris County residents not touch their face, requesting that neighbors report neighbors, implementing a COVID-19 contact-tracing army, and forcing individuals to wear facial coverings. The Governor and these local officials like Hidalgo, continue to issue Orders that trample on the liberties of Texans, orders whose validity are highly suspect.

For example, on June, 19<sup>th</sup>, 2020, Judge Lina Hidalgo signed an Order requiring all commercial entities in Harris County providing goods or services directly to the public to implement “Health and Safety Policies that require, at a minimum, that all employees or visitors to the commercial entity’s business premises or other facilities wear face coverings when in an area or performing an activity which will necessarily involve close contact or proximity to co-workers or the public.” Nowhere does Hidalgo in any way further describe or define the terms “directly,” “at a minimum,” “other facilities,” “coverings,” “necessarily,” “close,” “contact,” or the “public.” Hidalgo further orders “all people 10 years or older shall wear a face covering over their nose and mouth when in a commercial entity or working in areas in a commercial entity that involve close proximity with others.” Again, no descriptions or definitions are provided for the terms “covering,” “over,” “commercial entity,” or “close proximity.” Hidalgo’s Order further states that “[f]ailure to

develop and implement the Health and Safety Policy required by this Executive Order within (5) calendar days following the effective date may result in a fine not to exceed \$1,000 for each violation.” Unlike Hidalgo, some of the counties surrounding Harris County have not implemented a similar draconian and unconstitutional Order. In fact, Galveston County Judge Mark Henry described the Hidalgo Order as “unconstitutional.”

In the eyes of the Governor and some local officials, the heavy hand of government will fine businesses who refuse to force their employees or customers to wear a mask. The rights we enjoy under the Texas Constitution are being trampled on by these folks, while millions of individuals have lost their jobs and thousands of businesses are on the brink of bankruptcy. Not only that, but the Governor and these local officials seem to have no concern for large outdoor gatherings of people in Harris County dubbed “protests,” so any argument that her restrictions are meant to keep people from congregating or being close to each other such that they might spread diseases is a blatant, conscious misrepresentation. If the Governor’s Orders and the Texas Disaster Act are not declared unconstitutional and void, once this virus passes, the rights we are afforded under the Texas Constitution will be forever damaged. Viruses mutate, so there may be a different coronavirus strain, or some other contagion, next year. Like the flu vaccine, this year’s coronavirus vaccine may not protect against next year’s strain. Will we allow Governor Abbott’s and local officials’ orders to set precedent for future governmental remedies to viruses or diseases? Will it be a little easier to force people to wear certain items or not act in government-disapproved activities on pain of criminal sanctions? Today a mask,

tomorrow a hazmat suit – where does it stop? Every day these Orders are allowed to stay in place, the liberties of Texans are trampled upon.

On March 13, 2020, Governor Greg Abbott issued a Declaration of State of Disaster under Section 418.014 of the Texas Government Code. Like Texas Government Code sec. 418.014, section 418.108 et seq. gives a county judge or local official almost identical power to that vested in the governor once a declaration of local disaster is declared. Tex. Gov't Code sec. 418.108 et seq.

Texas Government Code section 418.014 allows the governor by executive order or proclamation to declare a state of disaster if the governor finds a disaster has occurred or that the occurrence or threat of disaster is imminent.

Tex. Gov't Code section 418.014 (a). The state of “disaster” and all the powers under the Texas Disaster Act continue until the governor finds that:

- (A) the threat or danger has passed; or
  - (B) the disaster has been dealt with to the extent that emergency conditions no longer exist; and
- (2) terminates the state of disaster by executive order.

Tex. Gov't Code section 418.014.

After thirty (30) days, the Disaster Act gives the governor the unilateral power to renew the Executive Order or Proclamation of disaster. The governor can continue to do so indefinitely. The only limit on this power is identified in Texas Government Code section 418.014(c), which allows the “legislature by law may terminate a state of disaster at any time.” However, the Texas Constitution

states: “The Legislature shall meet every two years at such time as may be provided by law and at other times when convened by the Governor.” Texas Const. Art. III, sec. 5(a).

Despite numerous requests by Texas Legislators, Governor Abbott refuses to convene the Legislature during the Covid-19 pandemic, allowing himself and others like Judge Hidalgo to act unilaterally without any checks and balances and/or input from the only body the Disaster Act allows to terminate the state of disaster at any time. In fact, Governor Abbott has indicated he has no intention to convene the Legislature prior to January of 2021.

Like Abbott, Hidalgo and others are using the Disaster Act in an unconstitutional attempt to bypass the Texas Legislature, and unilaterally execute orders that trample on the freedoms Relators and Texans enjoy. These actions violate the separation of powers doctrine.

We recently filed a federal suit in the Eastern District of Texas and are preparing to file a case in Travis County challenging Governor Abbott’s July Executive Order amending the Texas Election Code to move early voting back by a week. As stated above, Abbott is utilizing Texas Government Code section 418 et seq. to unilaterally amend the Texas Election Code. Governor Abbott seems to have forgotten that we live in a Republic not a monarchy.

Very truly yours,

Jared R. Woodfill