

CAUSE NO. _____

**STEVEN HOTZE, M.D.,
BRYAN SLATON,
SHARON HEMPHILL,
AL HARTMAN,
HON. CATHIE ADAMS,
HON. RICK GREEN,
NORMAN ADAMS,**

Plaintiffs,

V.

RUTH R. HUGHS,
in her official Capacity as Texas
Secretary of State,

Defendant.

IN THE DISTRICT COURT

 JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

**PLAINTIFFS' ORIGINAL PETITION, APPLICATIONS FOR EMERGENCY
TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, AND
PERMANENT INJUNCTION**

COME NOW Plaintiffs, Steven Hotze, M.D., Bryan Slaton, Sharon Hemphill, Al Hartman, Hon. Cathie Adams, Hon. Rick Green, and Norman Adams, and file their Original Petition, Applications for Emergency Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, and for cause would show as follows:

BACKGROUND FACTS

History typically measures the way our nation and state respond to adversity by our resolve in our commitment to the liberties enshrined in our constitution. The strength of these liberties is determined not by our resolve in times of ease, but in times of stress.

On March 13, 2020 Governor Abbott declared a state of disaster in response to a strain of the novel coronavirus, COVID-19. Since issuing his disaster proclamation, Governor Abbott has unilaterally suspended numerous laws. For instance, on June 26, 2020, Governor Abbott issued

GA-28, stating “I have issued executive orders and suspensions of Texas laws in response COVID-19....” (Exhibit “A”) In GA-28, among other things, limits the occupancy of certain business and orders that “people shall not visit bars or similar establishments that hold a permit from the Texas Alcoholic Beverage Commission (TABC)....” (Exhibit “A”) On July 2, 2020 Governor Abbott issued Executive Order GA-29. (Exhibit “A”) In GA-29 Governor Abbott states that he can suspend law and states, “Every very person in Texas shall wear a face covering over the nose and mouth when inside a commercial entity or other building or space open to the public, or when in an outdoor space, wherever it is not feasible to maintain six feet of social distancing from another person who is not in the same household. . . .” (Exhibit “A”)

Texas Election Code §85.001(a) provides that “[t]he period for early voting by personal appearance begins on the 17th day before election day and continues through the fourth day before election day.” On July 27, 2020, Governor Abbott chose to suspend the Texas Election Code, Section 85.001(a), unilaterally amending the Texas Election Code and moving early voting back to Tuesday, October 13, 2020. (Exhibit “B”) Governor Abbott’s July 27, 2020 Order also amended Texas Election Code §86.006(a-1), ordering, “I further suspend Section 86.006(a-1) of the Texas Election Code, for any election ordered or authorized to occur on November 3, 2020, to the extend necessary to allow a voter to deliver a marked ballot in person to the early voting clerk’s office prior to and including on election day.”

This draconian order is contrary to the Texas spirit and invades the liberties the people of Texas protected in the constitution. If the courts allow this invasion of liberty, today’s circumstances will set a precedent for the future, forever weakening the protections Texans sacrificed to protect.

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 a Governor to unilaterally suspend laws, bypass the Texas Legislature and trample on the Texas constitution? We cannot allow Governor Abbott to issues Orders similar to his July 27, 2020 edict that set precedent for future governmental remedies to viruses or diseases. Will it be a little easier next time for a governor to unilaterally make sweeping changes to the Texas Election Code, force people to wear certain items or not act in government-disapproved activities on pain of criminal sanctions? If Governor Abbott's July 27, 2020 Order is implemented, the government will further trample on the liberties of Texans.

DISCOVERY CONTROL PLAN

Plaintiffs intend to conduct discovery under Level 2 of the rules set forth in Rule 190 of the Texas Rules of Civil Procedure.

DISCLOSURES

Plaintiffs request Defendant provide disclosures in accordance with Texas Rule of Civil Procedure 194, including relevant documents.

TRCP 47 STATEMENT

Plaintiffs are suing for injunctive relief and declaratory relief.

Plaintiffs are seeking monetary relief of less than \$100,000.00.

JURISDICTION AND VENUE

The Court has subject-matter jurisdiction under the Texas Constitution, Article V, § 8, as the amount in controversy exceeds the minimum jurisdictional limits of the court of exclusive interest. Plaintiffs seek relief that can be granted by courts of law or equity.

The Court has jurisdiction over the Plaintiffs' request for declaratory relief against Defendants because the Declaratory Judgment Act waives governmental immunity when the plaintiff is challenging the validity of an ordinance, order, or government action. *See* Tex. Civ. Prac. & Rem. Code §§ 37.004, 37.006; *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628 (2010); *Texas Ed. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

The Court has jurisdiction over the Plaintiffs' request for injunctive relief against Defendants because Defendant is acting *ultra vires* by unlawfully enforcing a provision that violates Texas law and the Texas Constitution. *See Cty of El Paso v. Heinrich*, 284 S.W.3d 366-368-69 (Tex. 2009).

Plaintiffs have standing to seek declaratory and injunctive relief because they are adversely and irrevocably harmed by the illegal Order Defendants is implementing.

The Court has personal jurisdiction over the Defendants.

Venue is proper in Travis County because Defendant has her principal office in Travis County, Texas. *See* Tex. Civ. Prac. & Rem. Code § 15.002(a)(3).

Plaintiffs have provided the Texas Attorney General with notice of this suit as required by Texas Civil Practice & Remedies Code §30.004(b).

PARTIES

Plaintiff Steven Hotze, M.D. is a registered voter in Harris County, Texas who is eligible to vote, is a resident of Harris County, Texas, a citizen of the United States and who voted in person in the March 3, 2020 primary and will vote in the November 2020 general election.

Plaintiff Bryan Slaton is the Republican nominee for Texas House of Representatives District 2. Plaintiff Bryan Slaton is on the ballot in the general election on November 3, 2020. Plaintiff Bryan Slaton is a registered voter in Hunt County, Texas who is eligible to vote, is a

resident of Hunt County, Texas, a citizen of the United States and who voted in person in the March 3, 2020 primary and will vote in the November 2020 general election.

Plaintiff Sharon Hemphill is the Republican nominee for the 80th Judicial District in Harris County, Texas. Plaintiff Sharon Hemphill is on the ballot in the general election on November 3, 2020. Plaintiff Sharon Hemphill is a registered voter in Harris County, Texas who is eligible to vote, is a resident of Harris County, Texas, a citizen of the United States and who voted in person in the March 3, 2020 primary and will vote in the November 2020 general election.

Plaintiff Al Hartman is a registered voter in Harris County, Texas who is eligible to vote, is a resident of Harris County, Texas, a citizen of the United States and who voted in person in the March 3, 2020 primary and will vote in the November 2020 general election.

Plaintiff Norman Adams is a registered voter in Harris County, Texas who is eligible to vote, is a resident of Harris County, Texas, a citizen of the United States and who voted in person in the March 3, 2020 primary and will vote in the November 2020 general election.

Plaintiff Hon. Rick Green is a former member of the Texas House of Representatives and a registered voter in Hays County, Texas. Plaintiff Rick Green is a registered voter in Hays County, Texas who is eligible to vote, is a resident of Hays County, Texas, a citizen of the United States and who voted in the March 3, 2020 primary and will vote in the November 2020 general election.

Plaintiff Cathie Adams is the former Chairperson, Republican Party of Texas and a registered voter in Collin County, Texas. Plaintiff Cathie Adams is a registered voter in Collin County, Texas who is eligible to vote, is a resident of Collin County, Texas, a citizen of the United States and who voted in the March 3, 2020 primary and will vote in the November 2020 general election.

Defendant Ruth Hughes (the “Secretary”) is sued in her official capacity as the Secretary of State of Texas and is sued in her official capacity only. The Secretary’s official responsibilities include serving as the Chief Election Officer for Texas, assisting county election officials and ensuring the uniform application and interpretation of election laws throughout Texas. See TEX. ELECTION CODE § 31.001(a). As head of the Elections Divisions of her office, the Secretary is charged with administering the Texas Election Code. The Secretary may be served at 900 Congress, Suite 300, Austin, Texas 78751.

STATEMENT OF THE CLAIM

The facts below are supported or proved by the attached Exhibits, which are incorporated herein for all purposes.

THE DECLARATION

1. **Abbott’s July 27, 2020 Order Violates Article I, Section 28 of the Texas Constitution**

“The Constitution is not suspended when the government declares a state of disaster.” *In re Abbott*, No. 20-0291, 2020 WL 1943226, at *1 (Tex. Apr. 23, 2020). “All government power in this country, no matter how well-intentioned, derives only from the state and federal constitutions.” *In re Salon A La Mode et al.*, No. 20-0340 (concurring opinion, J Blacklock) (Tex. May 5, 2020). During a pandemic “the judiciary, the other branches of government, and our fellow citizens—must insist that every action our governments take complies with the Constitution, especially now. If we tolerate unconstitutional government orders during an emergency, whether out of expediency or fear, we abandon the Constitution at the moment we need it most.” *Id.*

Any government that has made the grave decision to suspend the liberties of a free people must demonstrate that its chosen measures are absolutely necessary to combat a threat of

overwhelming severity. *Id.* Before suspending freedoms protected from infringement by the Constitution, the government is also required to demonstrate that less restrictive measures cannot adequately address the threat. *Id.* Whether it is strict scrutiny or some other rigorous form of review, courts must identify and apply a legal standard by which to judge the constitutional validity of the government's anti-virus actions.

Justice Blacklock further stated: “[W]hen constitutional rights are at stake, courts cannot automatically defer to the judgments of other branches of government. When properly called upon, the judicial branch must not shrink from its duty to require the government’s anti-virus orders to comply with the Constitution and the law, no matter the circumstances.” *Id.*

Government power cannot be exercised in conflict with the constitution, even in a pandemic. *In re Abbott*, 2020 WL 1943226 at *1 (Tex. Apr. 23, 2020). Texas law does not and cannot empower a Governor to unilaterally suspend the laws of the State of Texas. Article I, § 28 of the Texas Constitution states, “No power of suspending laws in this State shall be exercised except by the Legislature.” The Texas Supreme Court has long held that the Legislature cannot delegate “to anyone else the authority to suspend a statute law of the state.” *Brown Cracker & Candy Co. v. City of Dallas*, 104 Tex. 290, 294-95 (1911); *Arroyo v. State*, 69 S.W. 503, 504 (Tex. Crim. App. 1902) (“Under the constitution, the legislature ha[s] no right to delegate its authority . . . to set aside, vacate, suspend, or repeal the general laws of this state.”).

“[P]rior to 1874 this section was as follows: ‘No power of suspending laws in this state shall be exercised, except by the legislature, **or its authority**’” (emphasis added). *Arroyo*, 69 S.W. at 504. This constitutional provision was then specifically amended to remove the provision allowing the Legislature to delegate its suspension power by “its authority.” *Id.* This was expressly done to remedy “the history of the oppressions which grew out of the suspension of laws by reason of such delegation of legislative authority and the declaration of martial law.” *Id.*

Article I, § 28 was created in part in response to then-Governor F.J. Davis “declar[ing] . . . counties under martial law” and depriving of liberty “offenders by court martial in Houston,” George D. Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* 84 (1977). Texas Government Code §418 is therefore unconstitutional on its face because it purports to delegate legislative power to suspend laws to the Governor in contravention of Texas Constitution, Art. I, §28 and Art. II, §1.

As the subject Order endeavors to suspend several provisions of the Texas Constitution, and on its face admit that Defendant is suspending laws in accordance with Texas Gov’t Code Chapter 418, the Order itself is an unconstitutional suspension of the laws and, therefore, violate Article I, §28 of the Texas Constitution and are “null and void.” See *Arroyo*, 69 S.W. at 504. Additionally, to the extent the Texas Disaster Act allows for the suspension of laws by the Governor, it is unconstitutional and void.

The Texas Constitution limits Defendant’s authority even in times of crisis or “extraordinary occasions.” If not limited, and if Constitutional rights may be suspended or infringed, unilaterally and for unlimited duration, whenever a Governor “declares” an emergency, then such rights are wholly illusory. Governor Abbott’s July 27, 2020 order violates the Texas Constitution and therefore should be declared void.

2. Abbott’s July 27, 2020 Order Violates Texas Government Code, Chapter 418

Texas Government Code § 418 et seq., the Texas Disaster Act, precludes Governor Abbott from unilaterally amending the Texas Election Code. Specifically, the Disaster Act limits Governor Abbott’s power to those provisions expressly described in the statute. The Disaster Act does not contain any language expressly allowing Governor Abbott to amend the Texas Election Code.

3. Abbott's July 27, 2020 Order Violates Article I, § 19 of the Texas Constitution

Abbott's July 27, 2020 Order violates the due course of law provision of the Texas Constitution because it deprives Plaintiffs of their constitutionally protected rights without due course of law. Article I, § 19, entitled, "Deprivation of life, liberty, etc.; due course of law," states:

"No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land."

Tex. Const. art. 1, § 19. Governor Abbott's actions constitute a violation and result in harm to Plaintiffs and their due process rights and Plaintiffs (1) have a liberty or property interest entitled to procedural due process protection; and (2) if so, the courts must determine which process is due. *Mosley v. Tex. Health & Human Servs. Comm'n*, 593 S.W.3d 250, 264 (Tex. 2019). Due process at a minimum requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Id.*

4. Texas Government Code, Chapter 418, Violates the Texas Constitution

Texas Government Code Chapter 418 is unconstitutional on its face and as applied. Texas Government Code Chapter 418 is unconstitutional on its face because it is an improper delegation of legislative authority expressly prohibited by Texas Constitution, Art. II, §1. Abbott's July 27, 2020 Order is facially unconstitutional because Defendant issued the Order pursuant to Chapter 418 (an unconstitutional statute) and because they purport to exercise the power to suspend laws which authority is reserved exclusively to the legislature. Tex. Const. art. I, §28. As such, Texas Government Code Chapter 418, and all orders issued pursuant thereto, should be declared unconstitutional and rendered null and void.

5. Abbott's July 27, 2020 Order Violates the Separation of Powers Doctrine

The Order Defendant is tasked with implementing/enforcing, i.e., Abbott's July 27, 2020 Order, violates the separation of powers provision of the Texas Constitution because it suspends laws. Article II, §1 of the Texas Constitution provides that "The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." Tex. Const. art. 2, §1. The Texas Constitution vests the Legislature with "legislative power, i.e., the law-making power of the people." Tex. Const. art. 3, § 1.

Only the Legislature can exercise law-making power, subject to restrictions imposed by the constitution. Tex. Const. art. II, § 1. Because of the Texas Constitution's "explicit prohibition against one government branch exercising a power attached to another," *Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001), exceptions to the constitutionally-mandated separation of powers may "never be implied in the least; they must be 'expressly permitted' by the Constitution itself." *Fin. Comm'n of Texas v. Norwood*, 418 S.W.3d 566, 570 (Tex. 2013). These restrictions must be expressed or clearly implied. *Jones v. State*, 803 S.W.2d 712, 716 (Tex. Crim. App. 1991) (citing *Gov't Servs. Ins. Underwriters v. Jones*, 368 S.W.2d 560, 563 (Tex. 1963)). The Legislature may enact laws that enhance the general welfare of the state and resolve political questions, such as the boundaries of political subdivisions, subject to constitutional limits. *Carter v. Hamlin Hosp. Dist.*, 538 S.W.2d 671, 673 (Tex. Civ. App.-Eastland 1976); see *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907).

The Legislature may delegate some of its powers to another branch, but only if those powers are not more properly attached to the legislature by Constitutional mandate. For example, Legislative power cannot be delegated to the executive branch, either directly or to an executive agency. *State v. Rhine*, 297 S.W.3d 301, 306 (Tex. Crim. App. 2009). The issue becomes a question of the point at which delegation becomes unconstitutional. *Id.* The Texas Supreme Court has described the problem: "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree." *Tex. Boll Weevil Eradication Found., Inc.*, 952 S.W.2d 454, 466 (Tex. 1997).

The Texas Court of Criminal Appeals in *Ex parte Granviel*, 561 S.W.2d 503 (Tex. Crim. App 1978), stated that sufficient standards are necessary to keep the degree of delegated discretion below the level of legislating. The existence of an area for exercise of discretion by the executive branch requires that standards are formulated for guidance and there is limited discretion. *Ex parte Granviel*, 561 S.W.2d at 514. The statute must be sufficiently complete to accomplish the regulation of the particular matters falling within the legislature's jurisdiction, the matters of detail that are reasonably necessary for the ultimate application, operation and enforcement of the law may be expressly delegated to the authority charged with the administration of the statute. *Ex parte Granviel*, 561 S.W.2d at 514. Therefore, if the Legislature has not provided sufficient standards to guide the executive's discretion and the delegated power is legislative, that executive has been granted a power that is more properly attached to the legislature and the delegation is an unconstitutional violation of separation of powers. *State v. Rhine*, 297 S.W.3d 306 (Tex. Crim. App. 2019).

Texas Government Code Chapter 418 not only does not provide robust, specific standards related to delegation of legislative authority, it provides ***NO*** standards to guide Defendant's discretion when identifying penalties, including fines and incarceration.

CAUSES OF ACTION

The Plaintiffs brings their claims for relief under the Uniform Declaratory Judgment Act. They also bring suit under *City of El Paso v. Heinrich*, 284 S.W.3d, 366, 368-369 (Tex. 2009), which authorizes *ultra vires* claims against public officials who act in violation of state law.

Plaintiffs are seeking relief entirely under state law and are not asserting any claims that arise under federal law.

EMERGENCY APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs reallege and incorporate the foregoing paragraphs and incorporate them here as if fully set forth herein.

Plaintiffs seek a temporary restraining order preventing Defendant from implementing Governor Abbott's July 27, 2020 Order. A temporary restraining order serves to provide emergency relief and preserve the status quo until a hearing may be had on a temporary injunction. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). To obtain injunctive relief, "the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparably injury in the interim." *See Butnaru*, 84 S.W.3d at 204. An applicant must plead a cause of action and present some evidence that tends to sustain it to show a probable right of recovery. *Intercontinental Terminals Co., LLC v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 897 (Tex.App.—Houston [1st Dist.] 2011, no pet.). "[T]he applicant is not required to establish that it will prevail on final trial." *Texas*

Kidney, Inc. v. ASD Specialty Healthcare, No. 14-13-01106-CV, 2014 WL 3002425, at *2 (Tex. App.—Houston [14th Dist.] July 1, 2014, no pet.).

The Uniform Declaratory Judgment Act and *Heinrich* each provide Plaintiffs with a cause of action to seek declaration and injunctive relief against the Defendants. Plaintiffs have a probable right to relief because, for the reason described above, the Defendants' conduct shut down the Plaintiffs' businesses and violates the Texas Constitution. Plaintiffs will suffer probable, imminent, and irreparable injury absent a temporary restraining order and temporary injunction because the Defendants are trampling on Plaintiffs' rights under the Texas Constitution and are exceeding Defendants' authority under the Texas Government code § 410 et seq. The deprivation of liberty is an irreparable injury.

Without immediate relief, Plaintiffs will suffer imminent and irreparable harm. With each day that passes Plaintiffs are deprived of liberty their liberty interest in having their respective representatives, i.e., the Texas Legislature, debate, vote and be heard on any amendment to the Texas Election Code or suspension of the Texas Election Code by Governor Abbott and the enforcement of Governor Abbott's July 27, 2020 Order by the Defendant.

The harm to Plaintiffs described herein is a direct and proximate result of the acts of Defendant enforcing and implementing an unconstitutional order. The requested temporary restraining order is appropriate to preserve the status quo until a hearing on Plaintiffs' application for temporary injunctive relief can be held. For just cause, Plaintiffs request the entry of a Temporary Restraining Order as follows, and further requests entry of a Preliminary Injunction following a hearing:

Plaintiffs will provide Defendant's counsel with notice of this Application for Temporary Restraining Order and hearing on same.

Plaintiffs files this Verified Application for Temporary Restraining Order and Other Equitable Relief pursuant to general principles of equity, Texas Rules of Civil Procedure 680, *et seq.*, and Texas Civil Practice and Remedies Code section 65.011. Plaintiffs are willing to post a bond as required by Texas law in an amount determined by the Court.

GROUND FOR TEMPORARY INJUNCTION

Plaintiffs reallege the foregoing paragraphs and incorporates them here as if fully set forth herein.

Plaintiffs request this Court to set is Request for Temporary Injunction for hearing and after hearing issue a temporary injunction against Defendant.

Additionally, Plaintiffs further request that following a trial on the merits of this case, that the Court enter a permanent injunction against Defendant.

DEMAND FOR JUDGMENT

Plaintiffs demand the following relief:

- a. a declaration that Governor Abbott's July 27, 2020 Order violates Article I § 19 of the Texas Constitution and is invalid;
- b. a declaration that to the extent Texas Government Code Chapter 418 allows Defendant to suspend laws, issue penalties, and violates the separation of powers doctrine, that Chapter 418 of Texas law is unconstitutional;
- c. a temporary and permanent injunction that prevents Defendant from enforcing and implementing Governor Abbott's July 27, 2020 Order;
- d. a temporary restraining order that suspends the enforcement of Governor Abbott's July 27, 2020 Order;
- e. an award of nominal and compensatory damages;

- f. an award of costs and attorneys' fees; and
- g. all other relief that the Court may deem just, proper, or equitable.

Respectfully submitted,

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