COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

STATE OF TEXAS, PIZZA PROPERTIES, INC., M&S GROUP, INC., d/b/a WING DADDY'S, RUN BULL RUN, LLC d/b/a TORO BURGER BAR, CHARCOALER, LLC, TRIPLE A RESTAURANTS, INC., CC RESTAURANT LP, FD MONTANA LLC, WT CHOPHOUSE, LLC, VERLANDER ENTERPRISES, LLC, and BAKERY VENTURES I, LTD.,	§	No. 08-20-00226-CV
	§	On Appeal from the
	§	34th District Court
	§	El Paso County, Texas
	§	Cause No. 2016DCV0573
Appellants,		
V.	§	
EL PASO COUNTY, TEXAS and RICARDO A. SAMANIEGO, IN HIS OFFICIAL CAPACITY AS COUNTY JUDGE, EL PASO COUNTY, TEXAS,	§	
Appellants.	§	

D I S S E N T

The Attorney General and a group of local restaurants contend that during a disaster, if a local order from a county judge and an executive order from the Governor conflict, the Governor's order must control as a matter of natural order and common sense. But these are uncommon times, Texas is an uncommon state, and here in Texas, we are ruled by law.

The Governor does not rule Texas outright; he serves at the pleasure of the people, who

hold the true power in a democracy, and he exercises only those authorities granted to him by laws passed by the people through a democratic process. The limit of the Governor's power is not set by whether the Governor thinks it's common sense that he himself should exercise a power, nor is it set by the fact that the Restaurants in this lawsuit agree with him and echo his sentiments. The limit of the Governor's power is set by what the law in fact proscribes in the words of our constitution and the text of the Texas Disaster Act. As courts who must referee disputes about where the limits of lawful authority lie, we must be wary of creating authority that does not exist, particularly when a person asserts the power to unilaterally declare an emergency and then unwind democratically-enacted laws and countermand democratically-elected local officials in the name of crisis management.

In a flurry of fast-moving filings that have leapfrogged between the trial court, this Court, and the Texas Supreme Court, Appellants have urged us to endorse this sweeping idea of absolute gubernatorial control over all levers of government during the COVID-19 pandemic, and to do so quickly, since the dignity of the State has been offended, businesses are losing money, and El Paso County's intransigence in issuing an order that shuts the County down when the Governor has declared Texas is open undermines state supremacy and the Governor's uniform coronavirus economic recovery plan. To do anything other than immediately stop the County and bring them back in line with the Governor's will, Appellants contend, would, in their view, fly in the face of common sense.[1]

[1] The Attorney General wanted us to act so quickly, in fact, that after we agreed to his extraordinary request for an expedited appeal and promised him a decision resolving the central question regarding by Friday, he tried on Tuesday night to mandamus us into immediately granting him the relief that the trial court denied him, contending this Court acted unlawfully by giving the Governor only part of what he wanted, and not exactly what he wanted exactly when he wanted it. The Texas Supreme Court correctly recognized this Court, as part of a separate branch of government charged with judicial review and checking executive actions if needed, does not answer to the Attorney General when it comes to managing our own docket or exercising our discretionary emergency injunction powers, and the high court denied the Attorney General's request, finding our unprecedently fast scheduling arrangement to be reasonable under the circumstances. *See In re State*, No. 20-0903 (Tex. Nov. 11, 2020)(order denying emergency relief).

The County has resisted the Governor's order at every turn and questioned his authority to dictate county-level decision-making, arguing the Texas Disaster Act gives various officials at various levels of government their respective spheres of influence, and that by using an emergency power to suspend laws, he has consolidated power over Texas' 254 counties and more than 12,000 cities. The Governor insists on imposing a one-size-fits-all coronavirus recovery plan across the State over the objections of local leaders, but he has crossed a legal line. The Governor is claiming authority that is not his, and used a power the Legislature gave him in an unlawful way that was never authorized or even contemplated.

We chose to defer a ruling on the Attorney General's initial request for emergency relief and instead issue an expedited decision on the merits not just to resolve everything in tandem, but to give the Court a chance to absorb the issues and take a closer look at the law. And the longer I contemplate the law, the more it becomes apparent the County's legal position is not nearly as audacious or outlandish as the Attorney General would have us believe. In each filing, the Attorney General supports his position by citing fragments from the Texas Disaster Act without context and directing the Court's attention to broad generalized provisions that do not directly or wholly answer the question before us.

In putting those fragments together, reading them in context, and taking the time to study how those fragments fit in with the detailed, lengthy, comprehensive continuity-of-government plan laid out in the Texas Disaster Act, what becomes clear is the Governor's authority over El Paso County is not clear at all. On the contrary, the Texas Disaster Act instructs the Governor to

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By doing so, the high court gave us the breathing room necessary to do our important work of serving as first-line reviewers of trial court decisions, which, in turn, helps the justices of the Texas Supreme Court by giving them a fully-developed record and an initial read on the situation, whether they agree with our ultimate outcome or not. *Cf. In re Salon a La Mode*, No. 20-0340, 2020 WL 2125844, at *2 (Tex. May 5, 2020)(applicants seeking relief from local emergency orders could not proceed immediately to the Texas Supreme Court; orderly process required them to first present an application to a district court and proceed to the Texas Supreme Court only as a court of last resort).

meet disasters and to make executive orders that have "*the force and effect of law*." [Emphasis added]. TEX.GOV'T CODE ANN. § 418.012. But the Legislature never gave the Governor the authority, in making executive orders, to directly override local elected officials during a disaster and veto their decisions, much less suspend their power.

The provision of the Texas Disaster Act the Governor relies on to suspend law during a declared disaster applies only when suspending a law is necessary to clear state-level regulatory hurdles for disaster recovery at state-level agencies, boards, or commissions. Even so, the Governor may only invoke that limited power if strict compliance with a procedural law setting the ordinary course of state business would impede the disaster response effort.

In my view, the Governor has taken a law that was meant to help him assist local authorities by sweeping away bureaucratic obstacles in Austin, and used it in reverse to treat local authorities as a bureaucratic obstacle to the coronavirus response plan he has chosen from Austin. This is truly extraordinary and completely flips the structure of the Texas Disaster Act on its head. The way the Attorney General interprets the law is not the way the law is written.

The major assumption underpinning the Appellants' case—namely, the Governor's order automatically trumps a local order because that is the natural order of things—makes common sense only if we ignore Texas' constitutional history and the plain text and structure of the Texas Disaster Act. We must not make decisions based on what we believe the law ought to be, but on what the text of the law in fact says. Because I strongly disagree with the Attorney General's read of the powers given to the Governor under the Texas Disaster Act, I must dissent.

DISCUSSION

To prevail on appeal and have this Court overturn the trial court's decision to deny a

temporary injunction and impose a temporary injunction on appeal,[2] the Attorney General and the Restaurants must show (1) that they have a probable right to relief on the merits at trial and (2) that they would suffer irreparable harm if the County's order were allowed to stand. I do not believe that we have the authority to overrule the trial court's injunction decision in this appeal because the Attorney General's application for an injunction did not satisfy the first step of the temporary injunction test and show that the State would probably prevail at trial. In the alternative, I would find that the trial court's decision implicitly finding the equities weighed in favor of the County at the time of the injunction decision and fell within the zone of reasonable disagreement.

HISTORICAL AND CONSTITUTIONAL BACKGROUND

This is not the first time the issue of whether the Governor can countermand decisions made by local authorities has arisen in Texas history. On the contrary, concerns about the

[2] This appeal concerns the trial court's decision not to enjoin El Paso County Emergency Order No. 13, which by its own terms expired this past Wednesday at midnight. On November 12, 2020 at 12:00 a.m. MDT, a new order, El Paso County Emergency Order No. 14, took effect and was set to expire on Tuesday, December 1, 2020, at 12:00 a.m. MDT.

As I stated in my dissent to yesterday's order granting temporary relief, which I repeat again here, I believe we still have jurisdiction over the question of whether Emergency Order No. 13 violated Executive Order GA-32 because the declaratory judgment trial is still pending in the 34th District Court, and while the Emergency Order No. 13 has now expired, the controversy over the larger question of whether the Executive Order supersedes local orders is a controversy that was capable of repetition, yet evading review.

However, I do not believe we have jurisdiction to enjoin Emergency Order No. 14 at this time. Each trial court decision granting or denying a temporary injunction is a separately appealable event. *See* TEX.CIV.PRAC. & REM.CODE ANN. § 51.014(a)(4). When a temporary injunction order is appealed, the courts of appeals are limited to addressing the narrow question of whether the specific order that was appealed was valid at that moment in the litigation when it was rendered, and on interlocutory review, we must consider only the specific record relating to the specific order that is being appealed in making that determination. *Murphy v. McDaniel*, 20 S.W.3d 873, 877 (Tex.App.—Dallas 2000, no pet.); *see also Fuentes v. Union de Pasteurizadores de Juarez, S.A. de C.V.*, 527 S.W.3d 492, 502 (Tex.App.—El Paso 2017, no pet.)(refusing to consider brief attachments that detailed post-appeal trial court proceedings).

El Paso County Emergency Order No. 14 is a completely new order issued under vastly different circumstances than those Judge Moody considered at the hearing on November 4, 2020 that served as the basis of his injunction decision on November 6, 2020, regarding Emergency Order No. 13. Further, requests for temporary injunctions are usually presented to the trial court first, especially since the trial the State and the Restaurants are demanding is still pending. *In re Salon a La Mode*, No. 20-0340, 2020 WL 2125844, at *2 (Tex. May 5, 2020)(orderly process requires a litigant to first present an application for injunctive relief to a district court before proceeding to the appellate courts). The substantial differences in time, circumstances and the provisions of Emergency Order No. 14 from Emergency Order No. 13 mandate the Attorney General begin anew in the trial court.

Governor's power over local officials were a pivotal reason why the 1876 Texas Constitution structured state executive power in a way that deviates substantially from the way executive power is structured in the federal constitution.

History teaches us that the libertarian-minded farmers and Grangers who framed Texas' current constitution did not believe in a unitary executive-type ideology that elevated the Governor above all others. Far from it. Unlike the federal constitution, which vests the executive power in the Presidency and makes the President the ultimate official responsible for overseeing a hierarchical federal administrative bureaucracy under a unitary executive theory,[3] Texas is the classic example of a plural executive setup, where executive power is not vested in a single person but is divided among six separately elected officials: the Governor, the Lieutenant Governor, the Secretary of State, the Comptroller of Public Accounts, the Commissioner of the General Land Office, and the Attorney General. *See* TEX.CONST. Art. IV, §§ 1 & 2.

This structural arrangement was not an accident, but rather a deliberate attempt to decentralize government power in response to the well-known gubernatorial abuses and scandals of the day. During the Reconstruction era in Texas, "the military removed the moderate Republican governor from office and handed the state government over to carpetbaggers and scalawags." *See* A. J. Thomas, Jr. & Ann Van Wynen Thomas, *The Texas Constitution of 1876*, 35 TEX.L.REV. 907, 912 (1957). "This government immediately swept out of office all local and state officials who were not of the radical wing of the Republican Party" and adopted a state constitution in 1869 that conformed with the political goals of the Radical Republicans. *Id*. Historians have described the Reconstruction regime in Texas as being "one of oppression, corruption, graft and blackmail"

[3] *See* Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV.L.REV. 1153, 1165 (1992)(describing the strong unitary executive constitutional theory that the Vesting Clause of Article II of the United States Constitution creates "a hierarchical, unified executive department under the direct control of the President").

in which the Governor, by declaring martial law under sweeping powers granted to him by the Legislature, used police and militia forces "so often to enforce the arbitrary will of the governor that" the police force and the militia "became an emblem of despotic authority." *Id*. The Reconstruction Legislature "vested extraordinary powers in the governor[,]" including the "extension of the executive's appointing power to the governing bodies of the towns and cities," which was perceived as a "flagrant violation of the principle of local self-government[.]" *Id*. at 913.

Against this historical backdrop, conventioneers to the 1876 Constitutional Convention sought to limit the Governor's power as much as possible:

> The convention was determined to cut down on the governor's power to prevent a future renewal of executive despotic control over state or local administrations. It decentralized the executive authority by vesting power in other executive officers, most of whom were to be elected. It reduced the term of the governor from four years to two years; debarred the governor from holding any other office or commission, civil, military or corporate, while in office; and prohibited him from practicing any profession for profit while in office. It also reduced the salary of the governor and limited his powers by setting forth his duties in great detail.

35 TEX.L.REV. at 914.

We should bear these historical and constitutional considerations in mind as we interpret a comprehensive statutory scheme that sets out the powers and responsibilities wielded by various actors at various levels of state government in times of crisis while the machinery of civil government still remains functional.[4]

[4] The top-down, hierarchical, direct command authority the Attorney General asserts the Governor has appears to be closer to the authority the Governor would possibly exert as a military commander under a state of martial law. But the Governor's powers as exercised under the Act are different from those he may exercise inherently as the military commander-in-chief of Texas under martial law. The latter question has never been litigated.

"Marshal law [sic] can only exist and military power can only be exercised . . . when the civil arm of the government becomes powerless because of invasion, insurrection, or anarchy. Marshal law and military power over the citizen and his property are based upon and limited by necessity. Whenever this necessity ceases, such military power must end." *Rose Mfg. Co. v. W. Union Tel. Co.*, 251 S.W. 337, 339 (Tex.Civ.App.—Dallas 1923, writ ref'd).

TEX. CONST. Art. I, § 28 checks the ability of the Governor to suspend laws, stating: "No power of suspending laws in this State shall be exercised except by the Legislature." As such, the Governor does not have the power to suspend laws under the Texas Constitution; that power was explicitly taken away from the Office of the Governor in 1876. Because the Governor does not possess the inherent constitutional authority to suspend laws, his power to suspend laws by decree can only exist as a matter of legislative grace under the terms and conditions set by the Texas Disaster Act. The statutory text of the Act as written sets the parameters of the Governor's power here, and the Governor's actions must comport with the conditions set on him by the Legislature. If they do not, he acts without any authority and his actions are *ultra vires* and without legal effect. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952)(Jackson, J., concurring)(when the President of the United States "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter").

OVERVIEW OF THE TEXAS DISASTER ACT AND PRINCIPLES OF STATUTORY CONSTRUCTION

The Texas Disaster Act of 1975 appears as Chapter 418 in the Texas Government Code.

The Texas Disaster Act does not limit the Governor's ability to declare martial law or rely on any inherent constitutional authority he may have. *See* TEX.GOV'T CODE ANN. § 418.003(6). However, because the civil arm of state government remains intact and operational currently, the Governor's authority remains limited by the Texas Disaster Act. As I explain below, the Act, by its text, does not create the military-style command hierarchy the Attorney General envisions.

I note that even in a hypothetical universe where the COVID-19 pandemic reaches a point where the civil arms of the government were to fail due to the death or illness of all civil authorities in an area, even then under martial law, the Governor's authority is not limitless. His actions must comply with the law, and his actions would still be subject to judicial review. *See Constantin v. Smith*, 57 F.2d 227, 239 (E.D. Tex. 1932)(holding under the Texas Constitution that even in emergencies, "courts may not be closed, or their processes interfered with by military orders" nor can they "be ousted by the agencies detailed to aid them" or "their functions be transferred to tribunals unknown to the Constitution").

The Act is a comprehensive, detailed continuity-of-government framework that carefully allocates powers, duties, and responsibilities across various levels of state government and multiple agencies. One of the stated purposes of the Act includes "clarify[ing] and stengthen[ing] the roles of the governor, state agencies, the judicial branch of state government, and local government in prevention of, preparation for, response to, and recovery from disasters." TEX.GOV'T CODE ANN. § 418.002(4). As such, fidelity to the text is paramount.

Since the provisions of the Texas Disaster Act at issue in this appeal have never been interpreted—indeed, there has never been a need to interpret them because the Governor has never before tried to restrict the power of local leaders during a disaster in this way[5]—we must resort to the usual standards of statutory construction. We must not add words to the statute that are not there, and we must not ignore the words the Legislature has chosen, either, particularly in situations where we are being urged to read grants of authority from statutory silence. *See Newman v. Obersteller*, 960 S.W.2d 621 (Tex. 1997)(Abbott, J., dissenting)(the Legislature's omission of words from a statute is significant and "[i]t is not the province of this Court to expand" a limited statutory provision by making inferences of authority from silence, "no matter the policy rationale behind such an expansion").

PROBABLE RIGHT TO RELIEF

The Attorney General and the Restaurants contend they will probably succeed on the merits at trial because the Governor validly asserted control over local governments in three ways: (1) by issuing orders that directly control the acts of county judges and city mayors, who are the

[5] Both the State and the County submitted supplemental briefing to the trial court indicating that during the 1918 Spanish flu pandemic, the Governor of Texas did not issue a single executive order. The County also submitted a historical article showing various Texas cities handled the pandemic at the local level using many of the same techniques infectious disease specialists are encouraging us to use today until a COVID-19 vaccine or treatment can be found.

Governor's "designated agents" during an emergency response under Section 418.1015(b); (2) by issuing statewide executive orders that preempt conflicting local emergency orders; and (3) by suspending statutes that would allow local officials the authority to issue local emergency orders.

However, none of these three scenarios provide the Governor with the authority to suspend certain fundamental disaster management powers granted to cities and counties.

The Power to Make Executive Orders with the Force of Law

Turning to the State's second point first, the Governor does, indeed, have the power to issue executive orders that have "the force and effect of law" during a declared disaster. *See* TEX. GOV'T CODE ANN. § 418.012. The Attorney General's argument inherently assumes this grant of power imbues the Governor's executive orders, which are not laws but executive decrees that have the force of law, with a higher footing than legislative acts undertaken by counties and cities, which also have the force of law, simply by virtue of the fact that the Governor is the Governor. I vehemently disagree.

There are three problems with this assumption from a textualist perspective.

First, although the Legislature provided the Governor with the ability to issue executive orders given the force and effect of law, it did not explicitly state in this provision that executive orders issued by the Governor preempt contrary laws issued by local entities. This is extremely significant. Laws conflict with one another frequently, but there is no legal principle that automatically elevates certain laws above others as a matter of course. Certain laws preempt other laws not because there is an inherent hierarchy in government that says a law passed by a higher part of government necessarily preempts a law passed by a lower part of government. Laws preempt other laws because constitutions and other foundational texts create conflict-of-law schemes that establish priority ranks among different types of valid laws.

For example, federal laws preempt conflicting state laws not because we have a notion that the federal government automatically trumps state government as a matter of mere hierarchy (after all they are two sovereigns alike in dignity), but because the text of the Supremacy Clause in Article VI of the United States Constitution explicitly makes federal law "the supreme law of the land." U.S. CONST. Art. VI. Likewise, laws passed by the Texas Legislature preempt ordinances passed by Texas home-rule municipalities, which have inherent authority to self-govern, not because the State trumps cities as a matter of inherent hierarchy, but because the Texas Constitution prohibits cities from using their inherent authority to pass ordinances that are inconsistent with the general laws enacted by the Texas Legislature. *See* TEX.CONST. Art. XI, § 5; *S. Crushed Concrete, L.L.C. v. City of Houston*, 398 S.W.3d 676, 678 (Tex. 2013).

By contrast, here, there is nothing in the Texas Constitution giving executive orders the ability to preempt laws passed by counties and cities,[6] and there is nothing in Section 418.012 that provides for that, either. The grant of power in Section 418.012 is simply that—a grant of power. It does not make an executive order superior to a local order, nor does it make an executive inferior to a local order. The Executive Order by its terms purports to preempt local laws, but Section 418.012 is silent on the issue of whether the Executive Order can in fact preempt those laws.

Second, the Attorney General's argument that the grant of authority *per se* implies the Governor may countermand a law passed by local governments, even though the statute does not explicitly grant the Governor that authority. This argument of implied authority is belied by the fact that other provisions of the Texas Disaster Act clearly show the Legislature knows how to write priority-of-law provisions and make local actions subject to gubernatorial approval when it chooses to.

[6] On the contrary, the Texas Constitution explicitly states the Governor *cannot* suspend laws of his own accord. TEX.CONST. Art. 1, § 28.

For example, Section 418.108(h)(2) of the Texas Disaster Act states that when a city mayor and a county judge both use their inherent statutory authority to manage certain disaster relief activity in their jurisdictions, and orders issued by a mayor are in conflict with orders issued by a county judge, the orders of the county judge control over those of the mayor, even inside the boundaries of incorporated territory. *See* TEX.GOV'T CODE ANN. § 418.108(h)(1)-(2). That section clearly resolves contemplated conflicts among two actors with concurrent jurisdiction and sets up an explicit chain of command. Likewise, Section 418.108(i), which addresses a local government's ability to ban fireworks, allows local governments to institute bans for up to 60 hours, but if those governments enact bans beyond 60 hours, the Governor must approve. TEX.GOV'T CODE ANN. § 418.108(i)(1)-(2). This section explicitly creates a gubernatorial veto over local disaster management authority after a certain point in time. Other provisions in the Texas Disaster Act show the Legislature contemplated there may be situations in which the Governor may have indirect or proxy control of the emergency management process, *see, e.g.,* TEX.GOV'T CODE ANN. § 418.041(b)(giving the governor the ability to appoint the chief of the Texas Division of Emergency Management), and situations in which he serves in only an advisory role to local governments. *See, e.g.,* TEX.GOV'T CODE ANN. § 418.103 (the Governor shall recommend that municipal corporations establish and maintain emergency management programs of their own); *id*. at § 418.104 (the Governor may recommend that political subdivisions establish an interjurisdictional agency with other political subdivisions); *id*. at § 418.121(c)(the Governor shall from time to time make recommendations to local governments as may facilitate measures to mitigate the harmful consequences of disasters).

Under the *in pari materia* rule, the surest way to interpret a statute contained within a comprehensive act is to interpret that statute in context of the act's other provisions, since all

related statutory provisions are not separate text fragments existing in isolation but "are to be taken together, as if they were one law." *Worsdale v. City of Killeen*, 578 S.W.3d 57, 69 & n.81 (Tex. 2019). Given that other provisions of the Act contain specific prioritization schemes, veto powers, chains of command, and assignments of duties that are explicit in the text, we should be extremely hesitant to infer power from silence in one isolated statutory provision. The text is the text, and "policy arguments cannot prevail over the words of the statute." *In re Allen*, 366 S.W.3d 696, 708 (Tex. 2012)(orig. proceeding). "Although legal texts are sometimes incomplete because they fail to address matters that ought to have been addressed," courts may not "remedy the incompleteness with rules of their own creation." *See* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 98 (2012).

Third, and most importantly, the Legislature *did* give the Governor the explicit ability to preempt laws by executive order—the Legislature merely placed extensive conditions on when the Governor may do so. *See* TEX.GOV'T CODE ANN. § 418.016 (allowing the Governor to suspend laws and regulations under certain circumstances that will be more fully discussed below). Although the Legislature referred to Section 418.016 as granting "suspension" power, that section and its multiple subsections, along with other separate sections of the Act, give the Governor the explicit ability to effectively preempt laws and regulations by executive action, but they also limit his power. Those sections create the roadmap we must use in determining the preemption issue.

Although the specific subsection of Section 418.016 at issue in this appeal—Subsection (a)—allows the Governor to suspend "regulatory statutes" under certain circumstances, that is not the only suspension/preemption power the Legislature gave the Governor in the Act. Subsection (e) allows the Governor to waive or suspend a deadline imposed on a political subdivision by a statute or the orders or rules of a state agency at the political subdivision's request if the waiver or

suspension is reasonably necessary to cope with a disaster. *See* TEX.GOV'T CODE ANN. § 418.016(e). Subsection (f) even allows the governor to suspend certain transportation regulations when there is not a disaster going on in Texas, but a disaster taking place in a neighboring jurisdiction and Texas must come to that jurisdiction's assistance. *See* TEX.GOV'T CODE ANN. § 418.016(f). Elsewhere in the Act, the Governor may suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles. *See* TEX.GOV'T CODE ANN. § 418.019. He may also temporarily suspend or modify laws and regulations if the suspension or modification is essential to provide temporary housing or emergency shelter for disaster. TEX.GOV'T CODE ANN. § 418.020(c).

By my count, the Legislature has given the Governor the ability to preempt laws in at least six different parts of the Texas Disaster Act, though each preemption provision has specific limits and conditions triggering use. The fact the Legislature has set out broad but reasonable conditions on the Governor's ability to preempt laws in multiple portions of the Texas Disaster Act makes it even more difficult to conclude the silence in the Legislature's grant of general authority to make executive orders bears the weight the Attorney General asserts it does. A silence can be pregnant—but not that pregnant.

It would be anomalous under the rules of statutory construction to say the Governor's authority to suspend any laws contrary to his disaster relief goals is recognized by six specific on-point statutes that contain restrictions on use, only to say that a more general statute undoes all six of those restrictions simply because it gives the Governor's executive orders "*the force and effect of law*." [Emphasis added]. Reading Section 418.012 as granting the Governor plenary power to nullify contradictory laws by edict would render at least six provisions of the Texas Disaster Act redundant at best or nugatory at worst. It ignores overall statutory context and reads a broad

priority-of-laws provisions into textual silence while jettisoning six specific priority-of-laws provisions from the Act entirely.

The more natural reading of Section 418.012 which preserves and harmonizes all sections is the specific preemption provisions qualify and limits the Governor's general ability to issue executive orders that have the force of law. *See In re ReadyOne Industries, Inc*., 394 S.W.3d 697, 701 (Tex.App.—El Paso 2012, orig. proceeding)(when general and specific words are grouped together in a statute, the meaning of the general words is limited by conditions imposed by specific words).

In short, I am not at all persuaded Section 418.012 alone gives the Governor the unfettered, boundless ability to preempt any other law. Here, the specific limits of Section 418.016(a), which the Governor relied on as authority in issuing his executive order countermanding local officials, set the scope of our review in this appeal.

Direct Control Through Agency?

The Attorney General also contends the Governor has direct supervisory authority over County Judge Samaniego because County Judge Samaniego, as the emergency district manager for El Paso, has the ability to exercise emergency powers provided to the Governor under the Act at the county level because he is the Governor's agent. Further, as the Governor's agent, County Judge Samaniego owes the Governor fiduciary duty to act in accordance with the wishes and in the best interest of the Governor. *See* TEX.GOV'T CODE ANN. § 418.1015(a)-(b).

The issue of whether County Judge Samaniego is the Governor's agent when acting in his capacity as an emergency management director is a red herring. The Attorney General insists, under Section 418.1015(b), the Governor can withdraw County Judge Samaniego's authority to act as his agent for the purposes of exercising powers reserved to the Governor at the county level.

Even so, County Judge Samaniego still has some inherent authority that does not hinge on the Governor's approval, and County Judge Samaniego can reasonably rely on another standalone grant of inherent authority in Section 418.108 to issue his order.

Section 418.108, which deals with the specific ability of mayors and county judges to declare and manage disaster areas at the local level, contains a subsection specifically permitting County Judge Samaniego to "control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge . . . and control the movement of persons and the occupancy of premises in that area." TEX.GOV'T CODE ANN. § 418.108(g).[7] Unlike Section 418.1015(b), which directly ties the exercise of a county judge's power to gubernatorial authority, none of the subsections contained in Section 418.108 frame a county judge's authority in relation to the Governor; they describe the powers of local authorities to act on their own. Curiously, the Governor is not mentioned in Section 418.108 at all. That omission is significant and clearly indicates the Legislature did not intend to tether this power of local officials to the Governor.

Section 418.108 solely addresses the inherent authority county judges and mayors possess to manage disaster areas under their jurisdiction and to declare disasters and act autonomously under certain enumerated circumstances without the need to seek preapproval from the Governor. Reading Subsection (g) in the context of Section 418.108, as a whole, and comparing Section

[7] The majority correctly notes that TEX.GOV'T CODE ANN. § 418.012 gives the Governor this same power, and raises the question of what happens when both the Governor and a local official try to exercise this power at the same time in different ways. There is no explicit answer to that.

However, since I find the numerous preemption provisions in the Act set the conditions by which the Governor's administrative acts may preempt laws generally, my answer is this: the Governor's executive order would prevail whenever a preemption provisions allows him to prevail. Otherwise, as amicus curiae Travis County points out, the Code Construction Act requires that if a general provision conflicts with a local provision, the provisions shall be construed, if possible, so that effect is given to both. TEX.GOV'T CODE ANN. § 311.026(a). If the conflict between the general provision and the special or local provision is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later enactment and the manifest intent is that the general provision prevail. *Id*. at § 311.026(b). Alternatively, because the provision giving local authorities the same power as the Governor came later in time, the local provision would control under the last-in-time rule. *Id.* at § 311.025.

418.108 to Section 418.1015, it appears the County is correct. County Judge Samaniego issued his order under his own freestanding, autonomous inherent statutory authority granted by Section 418.108(g), unfettered by any concerns he was acting as the Governor's agent.

The County's order is prima facie valid.

The Governor's Power to Suspend Law During a Disaster

In light of the County order's prima facie validity, all threads of argument here collapse down into a single question: in order to preemptively countermand the County's order, could the Governor by executive order invoke Section 418.016(a) to lawfully suspend the statute granting county judges and mayors the inherent authority to autonomously manage certain disasters within their own jurisdictions?

The answer is no.

Per the terms of the Act, the Governor may "suspend the provisions of any regulatory statute prescribing the procedure for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster." TEX.GOV'T CODE ANN. § 418.016(a). There are two discrete questions that must be answered before the Governor's order can be held to be preemptive and controlling over the County's order: (1) whether Section 418.108 granting cities and counties the ability to manage emergencies at the local level is a "**regulatory statute**" that prescribes "**the procedure for conduct of state business**" falling within the ambit of the Governor's suspension power, and, if so, (2) whether the Governor's determination that suspension of that statute was "**in any way**" necessary to "**prevent, hinder, or delay necessary action in coping with a disaster**" was valid. [Emphasis added]. We need not answer the second question, because the Attorney General fails to show how the Governor can satisfy the requirements of the

first question.

The State must show that in addition to being regulatory, the statute is procedural and deals with state business. Section 418.108, standing alone, is not a statutory provision that establishes a procedural rule. It is a statutory grant of power to local authorities. The Attorney General argues Section 418.108 is procedural and regulatory in the sense that it appears in the context of an act that sets out emergency procedures statewide. The Attorney General asserts as to what constitutes "state business," that in the context of a statewide disaster like COVID-19, the Governor may suspend any statute dealing with local authority anywhere in Texas because during a disaster, all business, even actions taken by local governments, is in essence state business. The Attorney General punctuates his argument by stating the Act makes the Governor the "commander in chief" of statewide disaster management. *See* TEX.GOV'T CODE ANN. § 418.015(c).

The Attorney General's interpretation of the suspension statute, while rhetorically appealing, falters under close textual scrutiny and a complete contextual reading of how the suspension provision interacts with other provisions in the Act. In interpreting what words and phrases like **regulatory**, **procedural**, and **state business** mean, we of course can reference dictionaries and common meanings of those words. But "[g]iven the enormous power of context to transform the meaning of language, courts should resist rulings anchored in hyper-technical readings of isolated words or phrases." *In re Office of the Attorney Gen.*, 456 S.W.3d 153, 155–56 (Tex. 2015). "The import of language, plain or not, must be drawn from the surrounding context, particularly when construing everyday words and phrases that are inordinately context-sensitive." *Id.* at 155-56. Here, the surest way of ascertaining how the Legislature meant to use those words in the Act is to look at all provisions of the Act as a whole and see where this specific suspension statute fits in.

First, we look at the Governor's ability to suspend regulatory statutes with the provision of the Act setting out his duties and powers as commander-in-chief. TEX.GOV'T CODE ANN. § 418.015(c). On this point, the Attorney General's characterization of the Governor as "commander in chief" during a declared disaster is incomplete. The Texas Disaster Act states that during a declared disaster, the Governor is "commander in chief" not of emergency management broadly and at every level, but "***of state agencies, boards, and commissions having emergency responsibilities***[.]" [Emphasis added]. *Id.* That is a significant difference in scope. Most notably, the statute does not say the Governor is commander-in-chief of state agencies, boards, commissions having emergency responsibilities, *and political subdivisions*, which are defined in the definitional portions of the Act as being cities and counties that are conceptually separate from state agencies, boards, and commissions. *See* TEX.GOV'T CODE ANN. § 418.004(6).

The reference to state agencies, boards, and commissions in the grant of commander-in-chief power, in turn, provides context clues as to the meaning of the Governor's ability to suspend "the provisions of any *regulatory* statute prescribing the procedures for conduct of state business *or* the orders or rules of a *state agency*" in Section 418.016(a). [Emphasis added]. Likewise, so does Section 418.0155, which requires the Governor to compile a master list of "regulatory statutes and rules that may require suspension during a disaster." TEX.GOV'T CODE ANN. § 418.0155(a). Subsection (b) of this provision states "[o]n request by the governor's office, a state agency that would be impacted by the suspension of a statute or rule on the list . . . shall review the list for accuracy and shall advise the governor's office regarding any statutes or rules that should be added to the list." TEX.GOV'T CODE ANN. § 418.0155(b).

If everything during an emergency is a matter of state business such that the Governor has the power to suspend the enabling statutes of local governments, then why is it that another statute

requiring him to keep a master list of suspendable "regulatory statutes" allows him to request input about the master list from "*a state agency* that would be impacted by the suspension of a statute?" [Emphasis added]. Why not state the Governor can seek advice from *any* entity (such as a political subdivision) that may be affected by his suspension of a statute?

The answer is simple: the Legislature never envisioned the Governor's suspension powers would impact anything other than a state agency that manages the procedural aspects of state-level business because the Legislature did not intend for the Governor to be able to act unilaterally as he has done here. When the preemption provision at issue here is read in context, the context suggests that rather than placing the Governor at the apex of state emergency management with local authorities under his direct control for all purposes, the Act makes the Governor the direct commander of the state-level administrative bureaucracy (the "regulatory" realm of "state agencies, boards, and commissions") during an emergency. Further, it gives him the ability to suspend statutes like agency enabling statutes (statutes that proscribe the conduct of state business) *or* those agencies' normal procedures if strict compliance with the provisions, orders, or rules (i.e. following the ordinary bureaucratic processes and timelines of "state business") would "*in any way prevent, hinder, or delay necessary action in coping with a disaster*." TEX.GOV'T CODE ANN. § 418.016. In other words, the suspension statute gives the Governor the ability to clear state-level bureaucratic logjams, expedite administrative action at state-level agencies, and depart from the regular order of state-level business if doing so would help facilitate a disaster response.

This reading is not only more natural, complete, and grounded in the text, it is consistent with other provisions of the Act indicating the Governor's job during a disaster is not necessarily to tie the hands of local officials he potentially disagrees with and usurp their authority. But rather

to serve as a conduit for aid to local officials,[8] a connection point between different jurisdictions,[9] a facilitator who leverages state resources to mitigate and recover from disasters,[10] and someone who makes suggestions on how to improve local emergency response processes.[11]

The Attorney General's broad reading of "state business" creates yet another statutory interpretation problem. If the Governor can suspend the grant of autonomous disaster-management power to cities and counties because the Texas Disaster Act as a whole is "regulatory," all emergency-management activities are "state business," and the grant of authority to counties and cities appears in the Texas Disaster Act, then what are we to make of the fact that the Texas Disaster Act grants the Governor other specific preemption powers in at least five others places in the Act? Are those other grants of preemption power superfluous? Could the Governor use this suspension power to suspend the "regulatory" Texas Disaster Act in its entirety save for the provision allowing him to pass executive orders with "the force and effect of law," and then write a new set of rules for emergency management?

Of course not. Just because a textual reading comports with dictionary definitions of words read in isolation does not mean the grant of preemption powers at issue in this case is without limitation. A reading as broad as the Attorney General advocates renders at least five other preemptive provisions redundant. It also begins to skirt some serious nondelegation issues. If there is no effective limitation on the Governor's discretion to suspend laws during a disaster he himself

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[8] *See* TEX.GOV'T CODE ANN. § 418.021 (giving the governor that authority to apply for federal aid on behalf of a local government).

[9] *See* TEX.GOV'T CODE ANN. § 418.041(b) (giving the Governor the power to appoint a chief of the Texas Division of Emergency Management).

[10] *See* TEX.GOV'T CODE ANN. § 418.017 (allowing the Governor, inter alia, to use all available resources of state government, reassign executive department personnel, and commandeer or use private property).

[11] *See* TEX.GOV'T CODE ANN. § 418.121(a), (c) (giving the Governor the responsibility to "consider steps that could be taken to mitigate the harmful consequences of disasters" and to "from time to time *make recommendations* to the legislature, *local governments*, and other appropriate public and private entities as may facilitate measures to mitigate the harmful consequences of disasters")[Emphasis added].

declares, that raises the serious question of whether the Legislature has unconstitutionally abdicated legislative power to the Governor in contravention of the Texas Constitution. *Cf. In re Hotze*, No. 20-0430, 2020 WL 4046034, at *2 (Tex. July 17, 2020)(Devine, J., concurring)(voicing nondelegation concerns about portions of the Texas Disaster Act giving Governor quasi-legislative authority). By reading the conditions in the suspension clause at issue to be more restrictive in lieu of endorsing a broad, nearly limitless reading that begins to look more and more like a wholesale delegation of legislative power, we preserve authority rather than extinguishing it, and avoid a potential constitutional crisis and a nondelegation problem in a very necessary, useful disaster statute. *See Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454, 466 (Tex. 1997)(narrowing quasi-legislative statutes so that an executive official does not exercise "unguided discretion" helps avoid making a law constitutional under the nondelegation doctrine).

The implausibility of the Attorney General's reading of this preemption power only bolsters my conclusion the suspension provision in Section 418.016 is meant to be used to reduce bureaucratic delays at the state agencies, boards, and commissions over which the Governor asserts direct control. The suspension power does not extend to Section 418.108, the provision which gives county judges and mayors the ability to perform some disaster management activities with autonomy at the local level.

The State cannot establish a probable right to relief because the Governor's attempted suspension of the inherent authority of 254 county judges and more than 12,000 Texas' mayors is an *ultra vires* act. Section 418.108 is not a regulatory statute addressing state-level bureaucratic businesses or agency rulemaking, nor is it a procedural statute—it is a grant-of-authority statute giving local authorities the leeway to act in their best independent judgment within the confines of their own jurisdictions. As such, the Governor's attempted suspension of Section 418.108 to the

extent necessary to countermand mayors and county judges who issued orders that did not adhere to his disaster recovery goals exceeded the scope of statutory authority grant to him by the Legislature. And since the Governor possesses no inherent authority to suspend statutes under the Texas Constitution, the Governor's actions were done without proper authority and were void.[12]

The County's order controls.

IRREPARABLE HARM

We must not lose sight of the fact that while we are opining on a matter that has statewide implication, we are also considering an interlocutory appeal that turns on the facts presented to the trial court at a given point in time from which the trial judge made his decision, as viewed through the prism of the abuse of discretion standard.

There are two steps to the temporary injunction analysis, and the State and the Restaurants must satisfy both before being able to prove to us the trial court abused its discretion by not granting their injunction application. Even if a temporary injunction applicant can establish a probable right to relief, the temporary injunction applicant must also show that it would suffer irreparable harm if an injunction were not granted pending trial.

Dignitary Harm to the State

Although the State did not object to the trial court taking judicial notice of on-the-ground conditions in El Paso as a result of the COVID-19 crisis, the Attorney General argues the trial court could not consider undisputed local conditions or balance equities in deciding whether to grant an injunction here, since the State as sovereign had an automatic right to relief and is excused

[12] Even if Section 418.108 fell within the ambit of the Governor's suspension power, the Governor cannot suspend laws for any reason. Under the statute, the Governor's suspension of local authority must have been done for a proper purpose to be valid. It is unclear whether this could possibly be tried as a question of fact in the declaratory judgment action or how much deference the Governor receives in making his assessments of appropriateness, other than the placement of statutory restrictions intentionally indicate the Governor may not suspend a law simply by *ipse dixit*.

from the general requirement of showing the County's conduct would cause the State irreparable harm. In support of their argument that dignitary harm to the State alone entitles the State to an injunction here, the Attorney General cites a recent per curiam case in which the Texas Supreme Court overturned an injunction denial and issued an injunction prohibiting a county clerk from sending mail-in ballot applications to county citizens who did not fall within the categories of persons who were, in fact, authorized to vote by mail-in ballot. *See State v. Hollins*, No. 20-0729, 2020 WL 5919729, at *4-*6 (Tex. Oct. 7, 2020). That case is readily distinguishable from this one.

In *Hollins*, the Texas Supreme Court concluded the Election Code did not explicitly authorize a county clerk to send out mail-in ballot applications to persons who did not fall within the five categories of voters eligible to vote by mail, meaning the county clerk had no inherent authority to engage in that conduct. *Id*., at *2. The Election Code also made the county clerk clearly subordinate to the Secretary of State, who was explicitly identified in the Code as the top official ultimately responsible for statewide election regulation and who, by statute, had a mandatory duty under statute to ensure uniformity of the election process across Texas. *See id.* (noting that TEX.ELEC.CODE ANN. § 31.003 explicitly requires the Secretary to "obtain and maintain uniformity in the application, operation, and interpretation" of the Election Code and requiring him to "prepare detailed and comprehensive written directives and instructions" to local officials). Because the county clerk had no inherent authority to act, because the Secretary was the ultimate authority overseeing elections who had a statutory duty to maintain uniformity, and because the county clerk's actions were clearly ultra vires and in derogation of the statutory uniformity requirement, injunctive relief should have been granted because there was only reasonable outcome. Thus, the trial court's duty to grant the temporary injunction pending trial was essentially ministerial because the county clerk's duty was essentially ministerial.

Hollins is distinguishable from the case at hand. First, the structure of the Texas Disaster Act is not as hierarchical as the Election Code. Unlike the Election Code, which explicitly vests ultimate regulatory authority over local officials in one executive, the Texas Disaster Act does not make the Governor the sole official responsible for addressing a disaster. Second, unlike the Election Code which requires uniformity of action across the entire State, the Texas Disaster Act does not require any specific response during a disaster, but instead creates a flexible framework for cooperation among various officials at the state and local levels. The Secretary's actions in *Hollins* were necessitated by a mandatory duty to maintain uniformity statewide, which, in turn, made resolution of the injunction appeal ministerial because there was only one possible outcome. Here, the Act does not create mandatory statutory duties that require any specific response as a preordained outcome. To put it another way, the Act does not create clear, measurable ministerial duties in this situation.

Finally, unlike *Hollins*, which involved a county official exercising authority that had not been conferred by statute, Section 418.108, as we have stated before, explicitly confers emergency authority onto the County Judge without reference to any preclearance requirements from the Governor. The County Judge clearly had the authority to issue his order.

The State is correct that it can file an injunction to restrain violations of the law when the status quo involves ongoing violations of the law. But Texas Supreme Court case law also establishes that generally, when the determination of whether the status quo is a violation of the law "is the central question of the suit," that question should be determined with a full trial on the merits. *See Clint Indep. Sch. Dist. v. Marquez*, 487 S.W.3d 538, 555-56 (Tex. 2016). Against that longstanding backdrop, we read *Hollins* as standing for the proposition the State's request for injunctive relief based on general law enforcement grounds must be granted when statutes clearly

dictate only one possible legal outcome, making the trial court's decision on injunctive relief ministerial rather than discretionary. Otherwise, the issue should be resolved at trial on the merits, with temporary injunctive relief pending trial available—as in other situations—as a matter of a trial judge's discretion.

Here, even if my reading of the law is incorrect and a conflict-of-laws scheme is implied onto textual silence under a theory the Legislature simply forgot to include a conflicts provision and we can correct the Legislature's mistake by copy-editing the statute, the various portions of the Texas Disaster Act do not create clear ministerial duties. It is clear to me that the law here does not require any specific outcome as it did in *Hollins*. As such, the State has failed to show the existence of a ministerial duty and that it was violated. My view is the trial court did not err, to the extent, it concluded, it retained discretion to decide the issue of irreparable harm.

The trial court was free to weigh seven days' worth of dignitary harm to the State prior to the expiration of the County's order against other then-existing equities at the snapshot in time it made its decision. Since this harm is abstract and not tangible, the trial court had leeway to decide how likely it was any dignitary harm caused to the State over seven days would be in-fact irreparable.

Economic Harm to the Restaurants

The case presented by the Restaurants with respect to harm is far more compelling than the State. Unlike the dignitary abstract harm allegedly suffered by the State, the economic harm to the Restaurants as the result of the County Judge's order is tangible, quantifiable, and undeniable.

Under the County's order, the Restaurants are designated as one of twenty types of essential businesses exempt from the shut-down order, and they may continue to sell food through delivery and carry-out, but not through dine-in service. If the injunction were granted and the County's

order suspended, then the Restaurants would have been able to offer dine-in service up to 50% capacity under the Governor's Executive Order. Thus, the precise question before us in this appeal as to these litigants is whether at the time the trial court rendered its decision, the Restaurants established the harm they would suffer from their inability to offer dine-in services up to 50% capacity for seven days before the County's order expired would be irreparable for them.

That is a discretionary question that lies with the trial court in my view; we can only overturn the trial court's decision only if it falls outside the zone of reasonable disagreement. Here, we do not have an evidentiary record showing what kind of losses the Restaurants would be projected to suffer over the course of five days if their dine-in capacity was reduced from 50% to 0%. The Restaurants base their argument almost entirely around the proposition the Governor's order legally countermanded the County's order. Although the Restaurants failed to put on any evidence showing the projected amount of harm to their businesses as a specific dollar amount, it can be reasonably presumed the amount of revenue represented by a shift of dine-in business from 0% dine-in to 50% is substantial. The underlying assumption, of course, is the Restaurants were operating at full 50% dine-in capacity during operating hours. Still, because there is no evidentiary record here, it is difficult, if not impossible, to conclude the Restaurants established the harm they would suffer if the last seven days of the County's order were not enjoined was irreparable as a matter of law. The trial court would still have to balance the equities.

The County's Equitable Interests

We weigh the seven days' worth of intangible harm to the State's general dignity and the seven days' worth of lost 0%-50% capacity dine-in profit from the Restaurants as a result of allowing the County's order to stand until it expired against the harm the County would suffer if the order was enjoined before it expired. If the trial judge's weighing of those equities fell outside

the zone of reasonable disagreement, we must reverse his decision and impose an injunction pending trial on the merits.

Here, clearly the trial court's weighing of the equities fell within the zone of reasonable disagreement. The statistics, which are undisputed, paint a grim picture. In the lead-up to the trial court's injunction decision, El Paso County was on the brink of a cascading hospital failure that affected the care that both COVID and non-COVID patients received.

Considering the undisputed facts in the record, in my view, the trial court did not abuse its discretion by refusing to enjoin the County's order before it expired on its own terms.

CONCLUSION

The late textualist Justice Antonin Scalia and his writing partner Bryan A. Garner have stated that it is a "false notion that the quest in statutory interpretation is to do justice," since when a judge deviates from the text in a desire to see that justice is done in the specific dispute before them, "the law becomes subject to personal preferences and hence shrouded in doubt." READING LAW at 347-48. Though the Legislature has told courts that they may consider multiple things in constructing its acts, including the effects a particular statutory interpretation would have, Texas courts have nevertheless adopted a strict textualist approach to statutory construction under the theory that while we may have legal permission from the Legislature and by tradition to consider many factors in our decisions, "not all that is lawful is beneficial." *See Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 569 S.W.3d 126, 136 (Tex. 2018).

For this reason, it is critical we read the Texas Disaster Act as carefully as we can, and to apply textualist principles with as much fidelity as possible. I staunchly believe, setting aside any questions of political rightness or justness of outcome, that under the principles of textualism, the grant of authority allowing the Governor to issue executive orders with "the force and effect of

law" during a disaster does not inherently, silently, unilaterally give the Governor authority to overrule laws by executive order simply by stating "all local laws are preempted." There are clear methods by which the Governor may issue executive order preempting laws in the Texas Disaster Act. Because his executive order attempting to preempt local laws did not comport with the plain text of the limited preemption powers granted to him by the Legislature, his attempt to suspend the authority of local officials was void.

That, I think, should satisfy our inquiry.

But there are additional factors that are relevant to my analysis: the unintended consequences of the reading the Attorney General advances. Justice Scalia and Bryan Garner have said that under textualism, it is a "half-truth that consequences of a decision provide the key to sound interpretation." READING LAW at 352. While they generally disavow considering the consequences of a particular statutory construction, to the extent I as a judge still have discretion to weigh those consequences other than those deemed relevant by textualism at this historical moment, and to the extent my position as the dissenting justice frees me from any strict formal requirements in writing my decision, I will simply say this.

Amid a cascading hospital crisis as a virus without a clear cure spreads exponentially through the community, El Paso's local government has balkanized. The City Mayor and the County Judge haven taken diametrically opposed approaches to law enforcement. The city police department initially refused to enforce the County's order on the advice of the Attorney General, who (incorrectly in my view) contended the Governor's order preempted the County's order. Meanwhile, the county sheriff's department enforced the County's order based on the County's determination that it still retained emergency authority. Law enforcement personnel in El Paso County are in disarray, and the organs of local government have turned against each other.

Although I disagree with the interpretive approach taken by the majority, I do agree in one respect: we need to know who oversees what in this time of crisis, and soon. The real problem here is not that the Texas Disaster Act fails to give us guidance of who trumps whom in the event of a stalemate. The real problem is that there is a stalemate in the first place.

The nightly news incessantly reminds us the stakes of this litigation could not be higher and the effect of our judgment more consequential. This is not a bar exam question, an academic discussion, or an intellectual exercise in a law school classroom. This case, and the others that will undoubtedly ensue as more counties reassert their inherent statutory authority to deal with local conditions, are literally matters of life and death. More than one hundred years ago, a pandemic like this one tore across Texas. Each community in Texas decided for themselves how to best manage their affairs until the viral inferno was snuffed out. That history echoes in the background of our decision today. How will this crisis echo one hundred years from now?

Every hospital in El Paso County is at capacity, and it is not an exaggeration to say every other patient in our hospitals right now is a COVID patient, and the County's morgue has been at capacity for days because the County has been unable to process bodies quickly enough, creating a problem of where to store the deceased, whose bodies, in a grim turn of bureaucratic phrase, are backlogged at the Medical Examiner's Office. In the seven days this expedited appeal was pending, the County has gone from having one refrigerated mobile morgue for the overflow of bodies to six refrigerated mobile morgues. Rumor has it the number of refrigerated mobile morgues may possibly go up to ten in the coming days. How many more mobile morgues will come to El Paso before the Texas Supreme Court is able to render a final answer to the deadly riddle of which leader must yield? Will the Governor and the County Judge come to a workable solution first? Only time will tell.

Perhaps others will see what I see in this statute. Perhaps leaders will live up to the spirit of the Texas Disaster Act and find solutions rather than resorting to a race to the courthouse to have judges break ties over who has more authority while Rome burns around us. Perhaps the Legislature will insert the words into the statute this coming summer which provide more guidance as to what happens when people turn against each other in a crisis. Perhaps not. Until there is a vaccine or a cure for COVID-19, the turmoil facing our community today will be the turmoil another Texas community faces tomorrow.

There is little question the Governor is one of many people who has a part to play in coordinating our response to this unprecedented pandemic, but is he the sole arbiter? No reasonable Texan would disagree the goal of promoting and reopening the economy is, without any doubt, legitimate and necessary disaster relief. But my job, as a justice of a court of appeals, is to read and apply the law, to call balls and strikes. The Governor's goal may be legitimate, but the manner in which he has pursued it, is not. The Attorney General maintains, in times of emergency, the Governor is the ultimate decision-maker, that he is a unitary executive with power over all levels of government, that he alone may decide the fates of people in 254 counties and 12,000 cities, that local elected leaders may act only because he gives them the authority, and he can take away that authority if he believes their approach as to how they address disaster relief is, in his view, wrong. The only way any of that can be true is if courts ignore critical Texas constitutional history, disregard the structure and purpose of the Texas Disaster Act, read words into a statute that are simply not there, and discard important restrictions and qualifications on the Governor's power in the name of expediency and a belief that his noble ends justify its unlawful means.

Because the Governor's attempt to suspend the inherent disaster-management authority of county and city leaders violates the small government ethos the Framers wove into the Texas

Constitution, the cooperative spirit of the Texas Disaster Act, and, most importantly of all, the plain text of the Texas Disaster Act, I respectfully dissent.

YVONNE T. RODRIGUEZ, Justice

November 13, 2020

Before Alley, C.J., Rodriguez, and Palafox, JJ.