Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-21-00419-CV

STATE of Texas,
Appellant

v.

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT
and Pedro Martinez, in his Official Capacity,
Appellees

From the 45th Judicial District Court, Bexar County, Texas
Trial Court No. 2021-CI-19115
Honorable Mary Lou Alvarez, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Patricia O. Alvarez, Justice
Irene Rios, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: July 27, 2021

AFFIRMED

In this interlocutory appeal, the State of Texas ("State") challenges the trial court's order denying its request for a temporary injunction. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(4) (allowing an interlocutory appeal from an order that refuses a temporary injunction). We affirm.

BACKGROUND

On September 9, 2021, the State sued the San Antonio Independent School District and its superintendent, Pedro Martinez, (collectively, "the District"), seeking a declaratory judgment

regarding the District's policy requiring that all its employees be vaccinated for COVID-19 by October 15, 2021. The State sought declarations that the District's employee vaccine policy (1) violates executive order GA-39, and (2) is an ultra vires action. The State requested a temporary injunction prohibiting the District from enforcing its COVID-19 vaccine mandate policy. The trial court held a hearing on the State's request for a temporary injunction and denied the request. The State filed the instant appeal in this court. The State's notice of appeal was accompanied by a motion for emergency temporary relief, asking this court to issue an order prohibiting the District from enforcing its vaccine mandate during the pendency of this appeal. This court denied the motion.

On October 8, 2021, the State filed a petition for a writ of mandamus and a writ of injunction in the Texas Supreme Court, requesting interim relief prohibiting the District from enforcing its vaccine policy while this appeal was pending. The Texas Supreme Court granted the State the relief it sought. *See In re State*, No. 21-0873, 2021 WL 4785741, at *1 (Tex. Oct. 14, 2021, order) ("Today we stay enforcement of San Antonio Independent School District's policy requiring that all its employees be vaccinated for COVID-19 by October 15."). Thereafter, the parties briefed the merits of the instant appeal.

STANDARD OF REVIEW

"A temporary injunction is an extraordinary remedy and does not issue as a matter of right." *Abbott v. Anti-Defamation League Austin, Southwest, and Texoma Regions*, 610 S.W.3d 911, 916 (Tex. 2020). "To obtain a temporary injunction, a party must plead and prove (1) a cause of action against the defendant, (2) [a] probable right to the relief sought, and (3) a probable, imminent, and irreparable injury in the interim." *In re State*, 2021 WL 4785741, at *1 (citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)). "The applicant must establish each element." *Anti-Defamation League*, 610 S.W.3d at 916. The decision to grant or deny a temporary injunction lies

within the trial court's sound discretion and is subject to reversal only for a clear abuse of that discretion. *Butnaru*, 84 S.W.3d at 204. A trial court abuses its discretion when it acts unreasonably or in an arbitrary manner or without reference to any guiding rules and principles. *Id.* at 211.

DISCUSSION

The State's sole issue on appeal is whether the trial court abused its discretion in denying the State's request for a temporary injunction. We begin by examining the second element: whether the State established at the temporary injunction hearing that it had a probable right to the relief sought—sometimes referred to as the likelihood of success on the merits. *See In re Newton*, 146 S.W.3d 648, 652 (Tex. 2004) (orig. proceeding) (stating a temporary injunction applicant must show "a likelihood of success on the merits" to meet "the standard required for injunctive relief").

The State's lawsuit was premised on the theory that the District's employee vaccine mandate policy was ultra vires, or outside the District's authority, because executive order GA-39 prohibits vaccine mandates. The State based its lawsuit on two paragraphs of executive order GA-39:

> 1. No governmental entity can compel any individual to receive a COVID-19 vaccine. I hereby suspend Section 81.082(f)(1) of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to ensure that no governmental entity can compel any individual to receive a COVID-19 vaccine.
>
> 2. State agencies and political subdivisions shall not adopt or enforce any order, ordinance, policy, regulation, rule or similar measure that requires an individual to provide, as a condition of receiving any service or entering any place, documentation regarding the individual's vaccination status for any COVID-19 vaccine. I hereby suspend Section 81.085(i) of the Texas Health and Safety Code, and any other relevant statutes, to the extent necessary to enforce this prohibition. This paragraph does not apply to any documentation requirements necessary for the administration of a COVID-19 vaccine.[1]

[1] The State referred to this paragraph in the injunction hearing. We note an independent school district is not defined as a state agency or a political subdivision in the Texas Disaster Act. *See* TEX. GOV'T CODE ANN. § 418.004(10) (defining an independent school district as a "[l]ocal government entity"). Thus, it appears this paragraph of GA-39 does not apply to the District.

The District argues the Texas Disaster Act does not give the Governor the authority to prohibit the District's vaccine mandate for its employees, and the Governor's vaccine mandate prohibition in GA-39 exceeds the Governor's authority under the Texas Disaster Act. Therefore, the District argues, its vaccine mandate does not constitute an ultra vires action.

As the parties have framed the issue before us, the question is whether—under the parameters and the scope of the Texas Disaster Act—the State met its burden that it is likely to succeed on the merits by showing GA-39 applies to the District and suspends the District's authority to issue a vaccine mandate to protect the health and safety of its students.

"To the extent our review of the trial court's temporary injunction turns on statutory construction, we review these issues de novo." *Abbott v. Harris County*, 641 S.W.3d 514, 523 (Tex. App.—Austin 2022, pet. filed) (citing *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm'n*, 518 S.W.3d 318, 325 (Tex. 2017)). "In construing statutes, our primary objective is to give effect to the [l]egislature's intent as expressed in the statute's language." *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009). "If the words of a statute are clear and unambiguous, we apply them according to their plain and common meaning." *Id.* "[O]ur practice when construing a statute is to recognize that the words the [l]egislature chooses should be the surest guide to legislative intent." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) (internal quotation marks and alterations omitted).

"[W]e presume the [l]egislature chose the statute's language with care, purposefully choosing each word, while purposefully omitting words not chosen." *In re Centerpoint Energy Hous. Elec., LLC*, 629 S.W.3d 149, 158–59 (Tex. 2021, orig. proceeding). "We must give effect to all words of a statute and not treat any language as surplusage." *Abbott v. Jenkins*, No. 05-21-00733-CV, 2021 WL 5445813, at *9 (Tex. App.—Dallas Nov. 22, 2021, pet. filed) (mem. op.) "We must not add words to the statute that are not there, and we must not ignore the words the

[l]egislature has chosen, either, particularly in situations where we are being urged to read grants of authority from statutory silence." *Abbott v. City of San Antonio*, No. 04-21-00342-CV, 2021 WL 5217636, at *3 (Tex. App.—San Antonio Nov. 10, 2021, pet. filed); *see also Newman v. Obersteller*, 960 S.W.2d 621, 625 (Tex. 1997) (Abbott, J., dissenting) (declaring the legislature's omission of words from a statute is significant and "[i]t is not the province of [the courts] to expand" a limited statutory provision by making inferences of authority from silence, "no matter the policy rationale behind such an expansion").

On appeal, the State argues it established that it is likely to succeed on the merits because executive order GA-39 is a valid exercise of the Governor's authority under the Texas Disaster Act for two reasons. First, the State concomitantly argues, the Texas Disaster Act designates the Governor as the State's "commander in chief" and GA-39's prohibition on vaccine mandates fits within the Act's grant of authority to control "ingress and egress" to, "movement" throughout, and the "occupancy of premises" in the disaster area, which spans the entire State. *See* TEX. GOV'T CODE ANN. §§ 418.015(c), 418.018(c). Relying on section 418.012 of the Texas Disaster Act, the State contends GA-39 has the "force and effect of law" and preempts any "local law" that conflicts with GA-39's prohibition on vaccine mandates. *Id.* § 418.012. Second, the State maintains, the Governor has validly suspended the statutory authority upon which the District could rely to issue local rules in response to the COVID-19 pandemic. *See id.* § 418.016(a).

A. Preemption

To support its preemption argument, the State relies on sections 418.012, 418.015(c), and 418.018(c) of the Texas Disaster Act. *See* TEX. GOV'T CODE ANN. §§ 418.012, 418.015(c), 418.018(c). While determining the scope of the Governor's authority under the Texas Disaster Act in analogous cases, our sister courts in Austin and Dallas have addressed the same arguments the State puts forth here. *See Harris County*, 641 S.W.3d at 522–27; *Jenkins*, 2021 WL 5445813,

at *8–11; *see also Abbott v. La Joya Indep. Sch. Dist.*, No. 03-21-00428-CV, 2022 WL 802751, at *3–4 (Tex. App.—Austin Mar. 17, 2022, pet. filed) (mem. op.). We find their analysis instructive and their reasoning persuasive.[2]

Executive Orders - Section 418.012

Section 418.012 of the Texas Disaster Act states:

> Under this chapter, the governor may issue executive orders, proclamations, and regulations and amend or rescind them. Executive orders, proclamations, and regulations have the force and effect of law.

TEX. GOV'T CODE ANN. § 418.012.

The State argues the Governor has broad authority to issue executive orders that subjugate a local government entity's ability to respond to disasters. According to the State, because the legislature chose to give the Governor's executive orders "the force and effect of law" during a declared disaster, any local government entity's rule, order, or law that conflicts with the Governor's executive order is automatically preempted. *See id.* § 418.012. However, in section 418.016(a) of the Texas Disaster Act—promulgated at the same time as section 418.012—"the [l]egislature has expressly provided the Governor with a limited power to suspend provisions of 'regulatory statute[s] prescribing the procedures for conduct of state business.'" *Harris County*, 641 S.W.3d at 526 (quoting TEX. GOV'T CODE ANN. § 418.016(a)). If we were "[t]o construe the phrase 'force and effect of law' as broadly as the [State] suggest[s]—as granting the [G]overnor absolute power to suspend or prohibit any order or regulation that, in [the Governor's] estimate, is unnecessary or overly restrictive in mitigating the disaster—[we] would render [section 418.016(a)] superfluous." *Id.*

[2] We recognize the El Paso Court of Appeals has also addressed these same arguments and concluded the Governor has broad powers to prohibit mask mandates under the Texas Disaster Act. *See State v. El Paso County*, 618 S.W.3d 812, 826 (Tex. App.—El Paso 2020, no pet.). However, *El Paso County* is not mandatory authority in our jurisdiction, and we are not bound by its holdings. We respectfully agree with Chief Justice Rodriguez's dissent in that case. *See id.* at 832–40 (Rodriguez, J., dissenting).

Our rules of statutory construction do not support the State's interpretation of section 418.012 of the Texas Disaster Act. *See Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) ("We should not give one provision a meaning out of harmony or inconsistent with other provisions, although it might be susceptible to such a construction standing alone."); *Jenkins*, 2021 WL 5445813, at *10–11 ("The grant of power in [s]ection 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 [order] inferior to a local order. The [e]xecutive [o]rder by its terms purports to preempt local laws, but [s]ection 418.012 is silent on the issue of whether the [e]xecutive [o]rder can in fact preempt those laws." (quoting *State v. El Paso County*, 618 S.W.3d 812, 833 (Tex. App.—El Paso 2020, no pet.) (Rodriguez, J., dissenting))); *see also Harris County*, 641 S.W.3d at 526 (concluding the Governor's executive orders under section 418.012 do not preempt local government orders); *La Joya*, 2022 WL 802751, at *4 ("For the reasons previously set forth in our opinion in *Harris County*, we again conclude that the Governor does not possess absolute authority under the Texas Disaster Act to preempt orders issued by governmental entities and officials.").

Commander in Chief - Section 418.015(c)

In relevant part, subsection 418.015(c) of the Texas Disaster Act states:

> During a state of disaster and the following recovery period, the governor is the commander in chief of state agencies, boards, and commissions having emergency responsibilities.

TEX. GOV'T CODE ANN. § 418.015(c).

Using rules of statutory construction, the *Jenkins* court held the plain language of section 418.015(c) "expressly limits the governor's commander-in-chief authority to state agencies, state boards, and state commissions." *Jenkins*, 2021 WL 5445813, at *9; *see also Harris County*, 641 S.W.3d at 525 ("[T]he Act designates the Governor as 'commander in chief of state agencies,

boards, and commissions having emergency responsibilities,' not counties."); *La Joya*, 2022 WL 802751, at *4 (extending the holding in *Harris County* to school districts). We agree.

"[T]he series-qualifier canon [of statutory construction] . . . provides that when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series." *Willacy Cnty. Appraisal Dist. v. Sebastian Cotton & Grain, Ltd.*, 555 S.W.3d 29, 38–39 (Tex. 2018) (internal quotation marks omitted); *see also Howard v. Howard*, 490 S.W.3d 179, 186 n.2 (Tex. App.—Houston [1st Dist.] 2016, pet denied) (internal quotation marks omitted) ("[T]he Supreme Court of Texas has endorsed application of the grammar rule providing that the first adjective in a series of nouns or phrases modifies each noun or phrase in the following series unless another adjective appears." (citing *Illif v. Illif*, 339 S.W.3d 74, 80 (Tex. 2011)).

Here, the prepositive modifier "state" modifies the list of entities the Governor can assert authority over as commander in chief during a declared disaster. Under the plain and common meaning of the terms used by the legislature, and adhering to the series-qualifier canon of statutory construction, the Texas Disaster Act expressly limits the Governor's commander-in-chief authority to state agencies, state boards, and state commissions having emergency responsibilities.

The District is not a state agency, a state board, or a state commission. Rather, the Texas Disaster Act defines the District as a "local government entity." TEX. GOV'T CODE ANN. § 418.004(10). "The [Texas] Disaster Act does not empower the governor to act as the commander in chief of . . . local government entities . . . ." *Jenkins*, 2021 WL 5445813, at *9; *see also Harris County*, 641 S.W.3d at 525 ("Based on the plain language of the [Texas] Disaster Act, we do not agree that the provisions designating the Governor as 'commander in chief' . . . demonstrate that the [l]egislature intended to empower the governor with broad authority to preempt local orders."). Because the Governor is not the commander in chief of the District, this provision does not support

the State's contention that GA-39 preempts the District's vaccine mandate. Accordingly, the State's reliance on this provision must fail.

Movement of People - Section 418.018(c)

> Section 418.018(c) of the Texas Disaster Act states:
>
> The governor may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area.

TEX. GOV'T CODE ANN. § 418.018(c).

The State briefly makes a conclusory argument that "a prohibition on vaccination mandates controls 'ingress and egress' to, the 'occupancy of premises' in, and 'the movement of persons' through the locations into which [the District and Martinez] seek to impose their mandate—all schools within the school district—because it authorizes the entry of individuals into premises that would be prohibited under [the District and Martinez's] preferred regime." The State, however, fails to explain in its brief how this provision is applicable to the District's vaccine mandate.

Moreover, nothing in the District's vaccine mandate precludes individuals from entering the schools within the district because they are not vaccinated. Instead, the District's vaccination mandate specifically applies only to employees as a condition of employment, not as a condition of "ingress and egress," "occupancy of premises," or "movement of persons within the school district." *See id.* § 418.018(c).

B. Suspension

The State does not contest the District's general authority to issue a vaccine mandate for its employees under sections 7.003 and 11.151 of the Texas Education Code. *See* TEX. EDUC. CODE ANN. § 7.003 ("An educational function not specifically delegated to the agency or board under this code is reserved and shall be performed by school districts . . . ."); *id.* § 11.151(b) ("[T]he trustees [of an independent school district] have the exclusive power and duty to govern

and oversee the management of the public schools of the district."); *id.* § 11.151(d) ("The trustees may adopt rules and bylaws necessary to carry out the powers and duties provided by [s]ubsection (b)."). Instead, the State argues GA-39 suspended those codes under section 418.016(a) of the Texas Disaster Act and divested the District of its authority to issue a vaccine mandate during the declared disaster.

Section 418.016(a) of the Texas Disaster Act states:

> The governor may suspend the provisions of any regulatory statute prescribing the procedures 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).

We have previously held the Governor's authority to suspend statutes under section 418.016(a) of the Texas Disaster Act, by the statute's express terms, is limited to suspension of "regulatory statutes [that] prescribe the procedures for the conduct of state business . . . ." *See City of San Antonio*, 2021 WL 5217636, at *4 (internal quotation marks omitted). Section 418.016(a) does not give the Governor authority to suspend "grant-of-authority statutes giving local authorities leeway to act in their best independent judgment within the confines of their own jurisdiction." *Id.* (alterations omitted); *see also La Joya*, 2022 WL 802751, at *5 ("[T]he term 'regulatory statute' does not include statutes that are 'grant-of-authority statute[s], giving local authorities the leeway to act in their best independent judgment within the confines of their own jurisdiction.'" (quoting *Harris County*, 641 S.W.3d at 528)).

"The provisions of the Texas Education Code relied on by the school district[] . . . are 'grant-of-authority' statutes, meaning they empower school districts and district officials to take actions to protect the safety and health of students, staff, and visitors but do not direct or require them to take any particular action, and thus are not 'regulatory' statutes." *La Joya*, 2022 WL

802751, at *5. Because sections 7.003 and 11.151 are "grant-of-authority" statutes, they are not subject to suspension under section 418.016(a) of the Texas Disaster Act and the Governor is, therefore, without authority to suspend them. *See City of San Antonio*, 2021 WL 5217636, at *6.

Moreover, the Governor's authority to suspend statutes under section 418.016(a) is further limited to regulatory statutes "*prescribing the procedures for conduct of state business*." *See* TEX. GOV'T CODE ANN. § 418.016(a) (emphasis added). "[T]he Education Code provisions granting broad authority to local school districts . . . to govern and oversee public schools within their districts do not prescribe 'the procedures for conduct of state business.'" *La Joya*, 2022 WL 802751, at *5.

Finally, "[i]f the [l]egislature had intended [s]ection 418.016(a) to reach the ordinances and business of local governments, [s]ection 418.016(a) would have stated an application to 'political subdivisions' or 'local governmental entities,' which are terms defined in the [Texas Disaster] Act." *City of San Antonio*, 2021 WL 5217636, at *5; *see also* TEX. GOV'T CODE ANN. § 418.004(10) ("'Local government entity' means a county, incorporated city, independent school district, . . . or other entity defined as a political subdivision under the laws of this state.").

"In sum, the Texas Disaster Act does not grant the Governor absolute authority to preempt orders issued by local government entities, such as school districts, and the provisions of the Education Code relied on by the school district" to issue its vaccine mandate "are not subject to suspension under [s]ection 418.016(a)." *La Joya*, 2022 WL 802751, at *6. Because the District is not precluded from requiring its employees receive a COVID-19 vaccine as a condition of their employment, the trial court could have reasonably concluded the State was not likely to succeed on the merits of its claims. Therefore, the trial court did not abuse its discretion when it denied the State's application for a temporary injunction.

Accordingly, the State's sole issue is overruled.

CONCLUSION

We affirm the trial court's order denying the State's application for a temporary injunction.

Irene Rios, Justice