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Cause No. 2020-38804

STEVEN HOTZE, M.D., **Hotze Health & Wellness Center,** **MATT BRICE, Federal American Grill,** **NORMAN ADAMS, Adams Insurance,** **AL HARTMAN, Hartman Income REIT**	**IN THE DISTRICT COURT**
Plaintiffs,	**133rd JUDICIAL DISTRICT**
v.	
LINA HIDALGO, in her official capacity as Harris County Judge and **LAURIE L. CHRISTENSEN in her official capacity as Harris County Fire Marshal,**	**HARRIS COUNTY, TEXAS**
Defendants	

DEFENDANTS' MOTION TO DISMISS, PLEA TO THE JURISDICTION, ANSWER, AND RESPONSE TO PLAINTIFFS' PETITION AND APPLICATIONS FOR TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION

COME NOW, Defendants Harris County Judge Lina Hidalgo and Harris County Fire Marshal Laurie Christensen, who file this Motion to Dismiss, Plea to the Jurisdiction, Answer, Response to Plaintiffs' Petition and Applications for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, and represent as follows:

INTRODUCTION AND SUMMARY OF THE ARGUMENT

I. 132,000 Americans have died because of the failure to enforce social distancing and face coverings in public.

Millions of Americans are in harm's way during the worst pandemic in a century. The global toll of COVID-19 exceeds 12 million infected and 548,000 dead—and counting. COVID-19 is two to three times as contagious as influenza, much more deadly, and has no vaccine, no

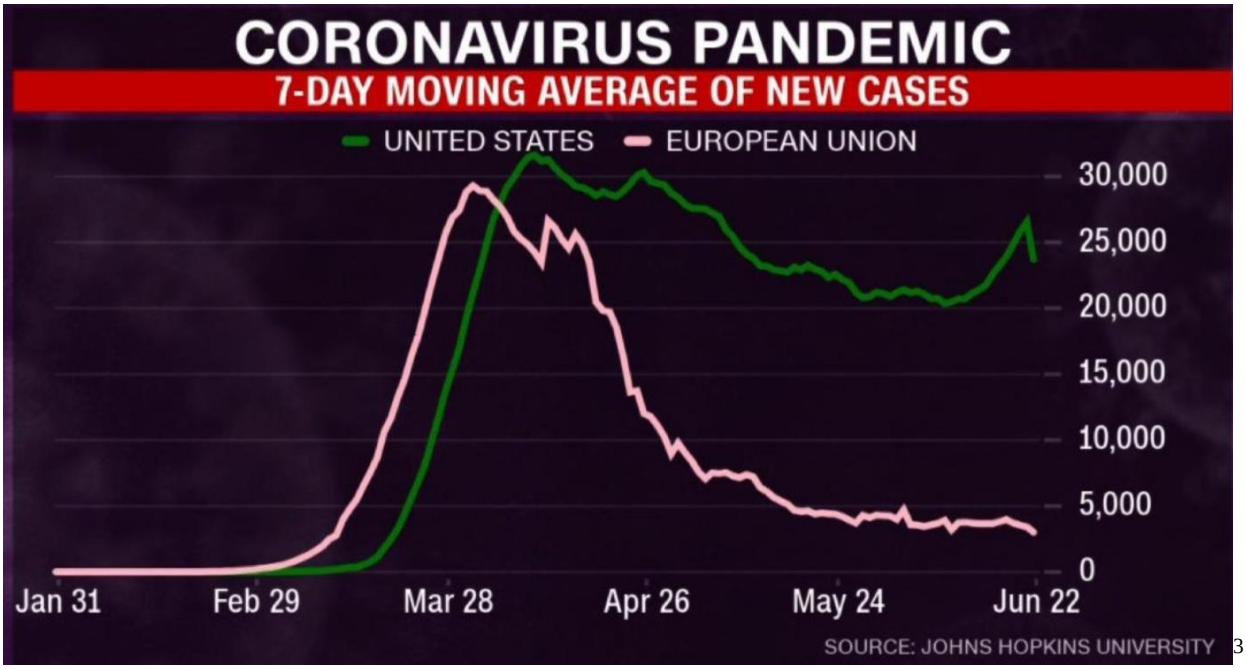
cure, few reliable treatments, and a shortage of reliable tests.[1] For this reason, the leaders of 91 percent of the world's population—7.1 billion people—heeded the advice of epidemiologists and doctors and ordered their populations to stay home for much of the last three months.[2]

In states and nations that followed this advice, virus transmission markedly slowed. In states and nations that placed politics above science, transmission continues unabated. One of the starkest contrasts is between the United States and European Union. While Europe initially made headlines for the immense suffering and death caused by the virus, its bold quarantine measures saved thousands of lives and caused its infection "curve" to drop precipitously. In March, there were nearly 30,000 new COVID-19 cases per day in the European Union. By May, there were fewer than 5,000 cases per day. European nations are now reaping the benefits of their policies and reopening their economies, but they wisely require face masks, social distancing, and other common-sense behaviors in public to avoid undoing their hard work.

The United States did far less to control the spread of this deadly virus. For the first month, the two regions' transmission rates mirrored each other. But American infection rates never dropped, and between 20,000 and 30,000 Americans were infected every day through June 22, as depicted on the chart below:

[1] Exhibit 1, Affidavit of Dr. Umair Shah at 1-2.

[2] Phillip Connor, "More than nine-in-ten people worldwide live in countries with travel restrictions amid COVID-19", *Pew Research Center Factank*, https://www.pewresearch.org/fact-tank/2020/04/01/more-than-nine-in-ten-people-worldwide-live-in-countries-with-travel-restrictions-amid-covid-19/ (Visited July 4, 2020 at 10 a.m.).



[3]

A week after this graph was published, American infections skyrocketed to **48,000** new cases per day,[4] and by Independence Day, **55,000** new infection per day. We have—by far—the highest infection rate in the world, and our decisions cost 132,000 American lives and more than 2.8 million infections from a disease whose long-term effects on survivors are still unknown. Stated another way, in the last three months, COVID-19 has killed the equivalent of one third the population of New Orleans and infected more than the ***combined*** populations of Wyoming, Vermont, Alaska, and North Dakota.

Not surprisingly, Americans are not welcome in Europe, which closed its borders to us protect its people from our recklessness.[5] Not only will we be banned from traveling for months, but as we watch other nations recover, our economy will likely be crippled for years.

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[3] Johns Hopkins University, "Coronavirus Pandemic: 7-Day Moving Average of New Cases", https://www.rocketnews.com/wp-content/uploads/2020/06/200622125748-us-eu-coronavirus-comparison-graph-super-tease.jpg (Visited July 4, 2020 at 10 a.m.).

[4] Exhibit 2 at 1, "Coronavirus Live Updates", *The New York Times*, June 30, 2020.

[5] Exhibit 2 at 4-6, "Coronavirus Live Updates", *The New York Times*, June 30, 2020.

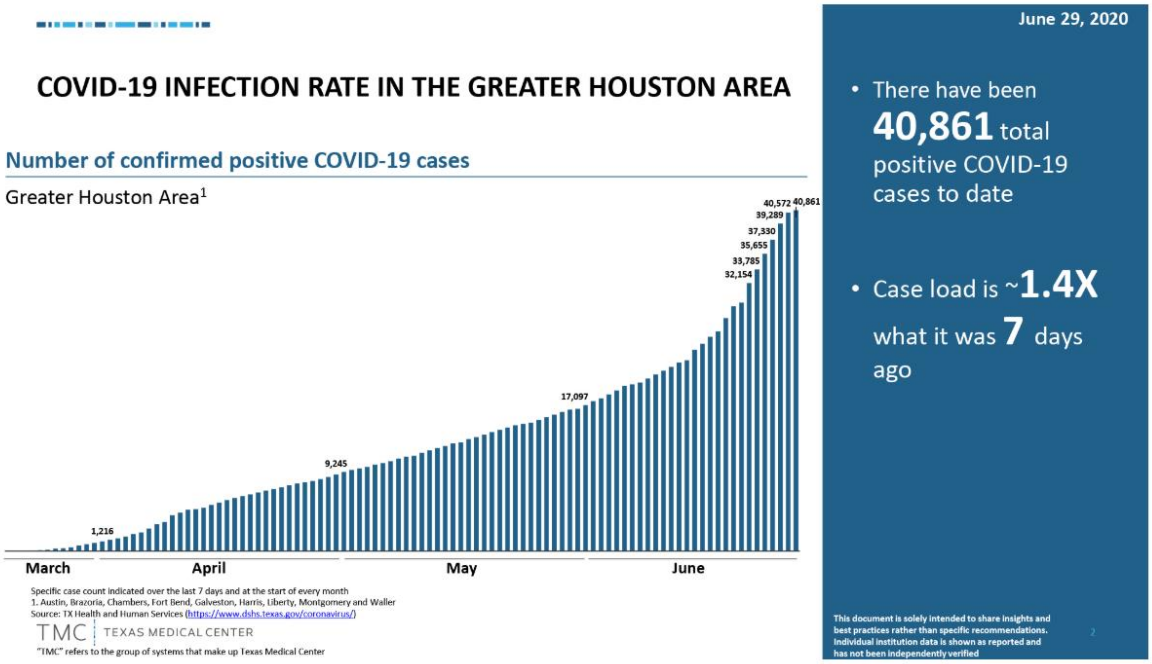
II. Houston is now one of the world's hotbeds for COVID-19 infection.

Texas recently garnered international attention for its lax attitude toward this pandemic. For months, Governor Greg Abbott preempted counties' local efforts to issue Stay-Home Orders, require masks, or take other steps to protect their residents. Now, Houston has become one of the world's hotbeds of infection. On June 30, 2020, Dr. Anthony Fauci, the nation's top infectious disease expert, testified before Congress that he expects new infections to double to 100,000 per day because of spikes occurring in the "South and the West" that put "the entire country at risk."[6] Because of this, Texans face increasing travel restrictions even within the United States. They may no longer travel to New York, Connecticut, New Jersey, or Chicago without going into quarantine for 14 days.[7] Other states, such as Louisiana, are considering similar measures against Texans.

According to the Texas Medical Center's June 29, 2020 update, the number of cases in Harris County increased 140% in the last seven days, and our "curve" is rapidly accelerating:

[6] Exhibit 2 at 2, "Coronavirus Live Updates", *The New York Times*, June 30, 2020.

[7] Exhibit 2 at 4-6, "Coronavirus Live Updates", *The New York Times*, June 30, 2020.



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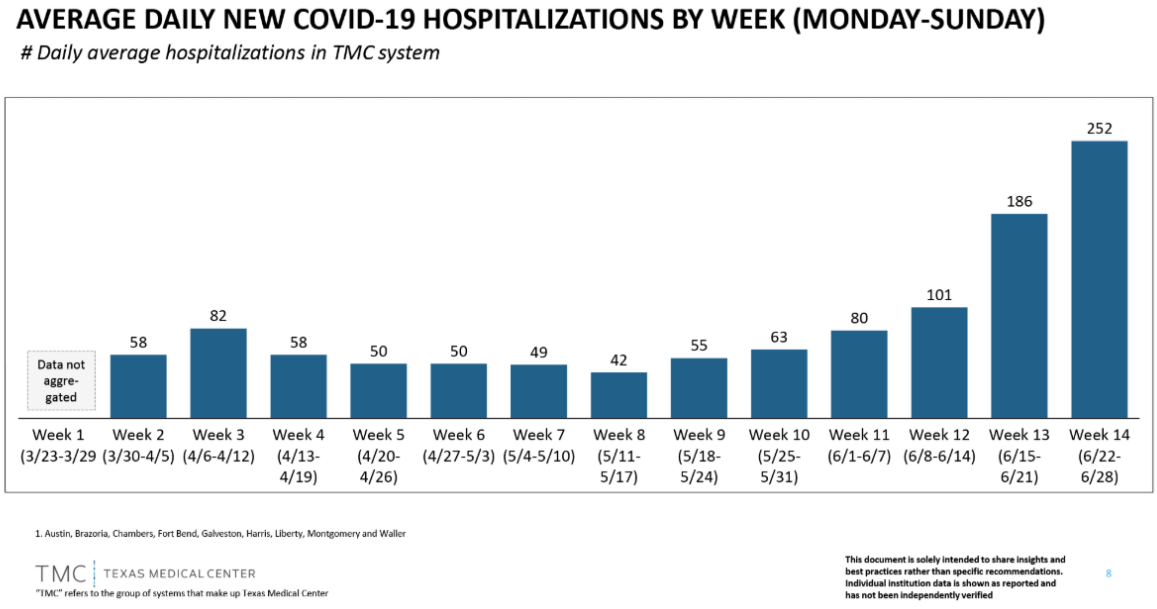
Not surprisingly, the number of new COVID-19 hospitalizations in Harris County has increased 250% in the last two weeks. This is particularly alarming because there is a delay between new cases and new hospitalizations. These new hospitalizations are graphed below:



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8 "COVID-19 Infection Rate in the Greater Houston Area", The Medical Center, https://www.tmc.edu/coronavirus-updates/infection-rate-in-the-greater-houston-area/

On July 1, 2020, *The Houston Chronicle* reported that 49 percent of the patients in Ben Taub Hospital's intensive care unit are COVID-19 positive, and the Harris County public hospital system has reached capacity and "is now transferring COVID-19 patients to other healthcare facilities" because they "don't have the internal capacity to manage" these patients.[10]

The same day, The Texas Medical Center—the largest in the world—reached 102% intensive care capacity. While Plaintiffs claim The Medical Center has the ability to increase ICU capacity during an emergency, Dr. Umair Shah, Harris County's Public Health Authority, explains that "expanding" medical capacity often requires drasic and expensive measures that strain hospital resources, stress front-line health care providers, deny care to other patients, and is not a long-term or ideal solution.[11] Expanding capacity means, for example, denying treatment to cancer patients if their cancer is not as urgent as COVID-19, denying elective surgeries for conditions such as bad backs, knees, and other orthopedic problems, and denying routine screening and other procedures—all to make room for throngs of patients dying from COVID-19. That is not sustainable.

III. As businesses reopen, face coverings are the key to saving lives.

Even as Texas' COVID-19 cases surge and hospitals fill to capacity, Governor Abbott has opened businesses and forbid counties from imposing Stay-Home Orders. However, both he and Harris County have taken steps to reduce the spread of COVID-19 by requiring business

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[9] "Average New COVID-19 Hospitalizations By Week", The Medical Center, https://www.tmc.edu/coronavirus-updates/average-daily-new-covid-19-hospitalizations-by-week-monday-sunday/

[10] Alison Medley, "Brink of capacity: Houston hospitals now transferring COVID-19 patients to other cities", July 1, 2020, https://www.chron.com/local/article/Brink-of-capacity-Houston-hospitals-now-15380502.php?cmpid=trend

[11] Exhibit 1, Affidavit of Dr. Shah at 7.

employees and customers to wear face coverings. There is strong scientific evidence to support this sensible requirement.

A. The most comprehensive medical study shows face masks reduce transmission of SARS viruses from 17.4% to 3.1%.

As explained by the attached affidavit of Dr. Shah, 39 major studies establish that face coverings dramatically reduce the spread of SARS viruses such as SARS-CoV-2, which causes COVID-19:

> If businesses are to open in Harris County, it is imperative that employees and patrons be protected as much as possible. The easiest, least restrictive, and most economical way to do that is by mandating face coverings while in places of business in coordination with increased focus on physical distancing and other safety measures. Numerous studies have confirmed that face coverings reduce infection rates. On June 27, 2020, *The Lancet* published an analysis of 39 major studies involving 12,817 people to conclude that face coverings reduced the risk of exposure to respiratory viruses similar to SARS-CoV-2 from 17.4% to approximately 3.1%. For the Harris County population of 4.7 million residents, this potential reduction in transmission is dramatic.[12]

B. Goldman Sachs estimates that mandatory masks will prevent a second round of quarantines and avoid a 5 percent drop in G.D.P.

Mandatory face coverings in public places not only save lives, but they also contribute to the nation's economic health and prevent precisely the bankruptcies and other economic hardships that Plaintiffs complain about. On July 1, 2020, Jan Hatzius, chief economist for Goldman Sachs, concluded:

> We find that face masks are associated with significantly better coronavirus outcomes," and that a national mask mandate would reduce COVID-19 cases enough to prevent another round of quarantines and contribute 5% to the nation's gross domestic product this year.[13]

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[12] Exhibit 1 at 3-4. *See also*, Exhibit 8, Derek K Chu, et al., "Physical distancing, face masks, and eye protection to prevent person-to-person transmission of SARS-CoV-2 and COVID-19: a systematic review and meta-analysis", *The Lancet*, June 27, 2020.

[13] Thomas Franck, "Goldman Sachs says a national mask mandate could slash infections and save economy from a 5% hit", CNBC, June 30, 2020, https://www.cnbc.com/2020/06/30/goldman-sachs-says-a-national-mask-mandate-could-slash-infections-and-save-economy-from-a-5percent-hit.html

Dr. Shah agreed with this conclusion and noted that Goldman Sachs concluded that a national mandate to wear masks would dramatically reduce the number of new cases. He opined: "[s]uch a reduction in transmission is remarkably important in fighting a pandemic that has no vaccines or therapies other than prevention at its disposal."[14]

C. The CDC strongly recommends face coverings in public.

The Centers for Disease Control and Prevention advises "all people 2 years of age and older wear a cloth face covering in public settings and when around people who don't live in your household, especially when other social distancing measures are difficult to maintain."[15] While the CDC does not have legal authority to mandate masks, it clearly and unequivocally advises state and local authorities to do so.

IV. Harris County and Governor Abbott's Orders balance individual rights with the common good.

A. On July 1, 2020, Harris County adopted an Order requiring businesses to have health and safety policies which include requiring face coverings in certain circumstances.

On July 1, 2020, based on both State and County emergency declarations under Chapter 418 of the Texas Government Code, Harris County adopted an Amended Order of County Judge Lina Hidalgo Regarding Health and Safety Policy and Face Coverings ("Order").[16] That Order—not the April 28, 2020 Order Plaintiffs attached to their petition—is currently in effect.[17] Harris County's Order cites the CDC guidelines, Governor Greg Abbott's Emergency Declaration and

[14] Exhibit 1, Affidavit of Dr. Shah at 5-6.

[15] Exhibit 3, "Considerations for Wearing Cloth Face Coverings", Centers for Disease Control and Prevention, updated June 28, 2020.

[16] Exhibit 4, Amended Order of County Judge Lina Hidalgo Regarding Health and Safety Policy and Face Coverings.

[17] Compare Plaintiffs' Exhibit A with Defendants' Exhibit 4. It is unclear whether Plaintiffs are challenging the wrong order, or simply attached the wrong order to their Petition.

Executive Order GA-28, and other legal and scientific authority to require that commercial entities that provide goods and services directly to the public "develop, post, and implement a health and safety policy" that requires "employees or visitors to the commercial entity's business premises or other facilities wear face coverings when in an area or performing an activity which will necessarily involve close contact or proximity to co-workers or the public." Further, those age 10 or older must wear a face covering (which can include "homemade masks, scarfs, bandanas, or a handkerchief") while in commercial businesses.

The Order specifically exempts face coverings:

(1) When exercising outside or engaging in physical activity outside;

(2) While driving alone or with passengers who are part of the same household as the driver;

(3) When doing so poses a greater mental or physical health, safety, or security risk;

(4) While pumping gas or operating outdoor equipment;

(5) While in a building or activity that requires security surveillance or screening, for example, banks; or

(6) While consuming food or drink.

In compliance with Executive Order GA-28, there are no civil or criminal penalties for individuals who fail to wear a face covering. The only consequence could be a $1,000 penalty to a business that permits its employees or patrons to disobey this common sense health requirement.

B. On July 3, 2020, the State of Texas adopted Executive Order GA-29 requiring the Use of Face Coverings throughout the State.

On July 3, 2020, Governor Greg Abbott followed Judge Hidalgo's lead and signed Executive Order GA-29, which requires all Texans to wear a face covering in public. Governor Abbott's Order is far broader than Judge Hidalgo's, and (with few exceptions) applies

throughout the State of Texas. Like Judge Hidalgo, Governor Abbott exempts those younger than 10 years old, with medical conditions that prevent them from wearing a face covering, while consuming food or drink, while exercising outdoors, and while driving alone or with passengers in the same household.[18] Governor Abbott largely adopted Judge Hidalgo's Order and applied it statewide. The primary difference is that Governor Abbott's Order imposes a $250 fine on ***individuals*** who fail to wear a mask, while Harris County's Order regulates only businesses.

Long before Governor Abbott ordered fines for Texans who fail to wear masks in public, he personally wore them—even for the most important events. In the June 28, 2020 photo below, Governor Abbott greeted Vice President Mike Pence at Love Field in Dallas while wearing a patriotic mask:

[18] Exhibit 5, Executive Order GA-29 at 2.

MOTION TO DISMISS AND PLEA TO THE JURISDICTION

A plea to the jurisdiction is a dilatory plea that seeks dismissal of a case for lack of subject matter jurisdiction. A plea to the jurisdiction contests the trial court's power to determine the subject matter of the controversy. *Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). Subject matter jurisdiction is essential to the authority of a court to decide a case, and the plaintiff bears the burden to allege facts affirmatively demonstrating the trial court's jurisdiction to hear a case. *Tex Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). If a plaintiff pleads facts that affirmatively demonstrate an absence of jurisdiction and the defect is incurable, then the cause is properly dismissed. *Peek v. Equip. Serv. Co. of San Antonio*, 779 S.W.2d 802, 805 (Tex. 1989).

I. Plaintiffs' claims must be dismissed because Plaintiff has no standing or injury.

A. Requirements for standing under Texas Government Code Chapter 418.

In Texas, a court lacks subject matter jurisdiction if a party cannot show standing. Standing "requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Meyers v. JDC/Firethorne, Ltd.*, 548 S.W.3d 477, 484 (Tex. 2018), *quoting Heckman v. Williamson Cty.*, 369 S.W.3d 137, 150 (Tex. 2012). Standing is a constitutional prerequisite to suit which derives from the Texas Constitution's provision for separation of powers, which denies judicial authority to decide issues in the abstract. Standing also derives from the open courts provision, which provides court access only to a "person for an injury done him." *Id.*

Standing requires that a plaintiff personally suffer an "injury in fact," which is an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Standing also requires the injury to be "fairly …

trac[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court." *Id*, 548 S.W.3d at 485, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). For an individual to establish standing to challenge an executive order, he must show more than some government actor who acted outside of his authority. He must also show "he has suffered an injury distinct from the general public." *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001).

B. Plaintiffs lack standing because they fail to show how they are individually affected by the emergency order they complain about.

Plaintiffs fail to show concrete, particularized, actual injury distinct from the general public, as Harris County's Order Regarding Health and Safety Policy and Face Coverings affect all commercial entities in a similar manner to prevent the spread of COVID-19. None of the Plaintiffs even attach affidavits explaining how this policy would harm them, except Dr. Hotze, who claims only that he does not want to wear a face covering to protect his patients at his medical practice, and that if required to do so, it would somehow "infringe upon my civil liberties" and cause "imminent and irreparable injury."[19] This barebones affidavit does not even attempt to meet the minimum requirements to show a constitutional injury.

C. Plaintiffs lack standing because they fail to show imminent fear of prosecution.

It is not enough for Plaintiffs to claim they run businesses and intend to ignore Judge Hidalgo and Governor Abbott's Orders. To have standing, Plaintiffs must also show they are in imminent risk of prosecution for violating these orders. Until then, their damages are hypothetical, there is no live controversy before the Court, and the Court lacks subject matter jurisdiction.

[19] Plaintiff's Petition, Exhibit C at 2.

In the *Mr. W. Fireworks* case, the Austin Court of Appeals noted there are only two scenarios when courts have jurisdiction to hear a challenge to a government's emergency order under Chapter 418 of the Texas Government Code: (1) when the statute is enforced and the party is prosecuted or (2) when the statute is enforced and the threat of prosecution is imminent. *Mr. W. Fireworks, Inc. v. Comal Cty.*, No. 03-06-00638-CV, 2010 WL 1253931, at *7 (Tex. App. Mar. 31, 2010).

While a plaintiff does not need to be actually prosecuted to challenge the constitutionality of a law, he must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Plaintiffs fail to show any credible threat of prosecution.

The Texas Supreme Court recently held that a group of judges lacked standing to challenge Governor Abbott's Executive Order GA-13. While the judges were technically at risk of arrest and prosecution under Texas Government Code § 418.173 for violating Governor Abbott's Order, the risk of that actually occurring was remote, and they judges had no personal, legally cognizable injury. *In re Abbott*, No. 20-0291, 2020 WL 1943226 (Tex. Apr. 23, 2020).

Plaintiffs do not meet the criteria for being prosecuted or imminently prosecuted under Judge Hidalgo's Order. No one has ticketed them, fined them, or even threatened to do so. They simply learned that they are required to protect their customers from an infectious virus during a global pandemic. Unless they are imminently threatened with prosecution, they have no standing to challenge this regulation and have simply presented an abstract philosophical question—rather than a live controversy—to the Court.

II. Plaintiffs' claims must be dismissed because Defendants are not the proper parties to enforce this Order, and their claims are not ripe.

Plaintiffs' claims must also be dismissed because Judge Hidalgo and the Fire Marshal are not the proper parties to enforce this Order. On April 20, the Fifth Circuit Court of Appeals considered an *ultra vires* case against Governor Abbott alleging he exceeded the scope of his authority in issuing Executive Order GA-13. *In re Abbott*, No. 20-50296 (5th Cir. Apr. 20, 2020). The Court held that the proper defendant is the person who actually enforces the allegedly unconstitutional order—not the person who drafts it. *Id.*, at 11-12.

If a law enforcement agency actually issues a citation under the Order, that would be the proper defendant in this case. Until that happens, Plaintiffs' claims are not ripe, there is no proper defendant, and their damages are speculative.

III. The Texas Medical Board is an essential party to this case because Dr. Hotze has challenged its authority to issue Emergency Rule 190.8(2)(U), which requires all physicians to wear masks while treating patients.

The only Plaintiff who even attempted to assert standing is Dr. Hotze, who signed an affidavit suggesting he will not wear masks while treating patients at his medical practice in Harris County. If Dr. Hotze's affidavit is to be believed, he is in violation of The Texas Medical Board's May 13, 2020 Emergency Rule 190.8(2)(U), which states in part:

> (1) The physician, the physician's delegate, and the patient must wear a mask when the physician and/or delegate are within less than six feet from the patient.
>
> (2) Everyone must follow policies that have been put into place by the physician, the medical and health care practice, or the facility to address COVID-19 screening and testing, and/or screening patients.
>
> (3) Before any encounter with a patient, the patient must be screened for potential COVID-19 symptoms, or if the patient has been screened within the last 20 days before the encounter, the screening must be verified.

(4) Prior to care involving a medical procedure or surgery on the mucous membranes, including the respiratory tract, with a high risk of aerosol transmission, the minimum safety equipment used by a physician or physician's delegate should include N95 masks, or an equivalent protection from aerosolized particles, and face shields.[20]

To practice medicine in the State of Texas, Dr. Hotze must comply with these Medical Board requirements, which are more stringent that those in Harris County. However, Dr. Hotze signed an oath and filed pleadings suggesting COVID-19 is a hoax and that he either has not been wearing, or will not wear, a mask while treating his patients during the COVID-19 pandemic. Based on his representations to this Court, Dr. Hotze can no longer lawfully continue to treat patients in the State of Texas and can no longer operate his business. Because Judge Hidalgo's Order applies only to businesses, Dr. Hotze lacks standing to bring this suit.

Alternatively, Dr. Hotze appears to be asserting that The Texas Medical Board's Emergency Rule 190.8(2)(U) is also unconstitutional, and he is challenging all three concurrent orders from the State, the County, and the Medical Board requiring him to wear a mask while treating patients. Accordingly, The Texas Medical Board is an essential party to this case, and this Court cannot take action until The Texas Medical Board has been provided notice and an opportunity to defend the constitutionality of its Emergency Rule 190.8(2)(U).

IV. Governor Greg Abbott is an essential party to this case for three reasons.

A. Governor Abbott is an essential party because Dr. Hotze has challenged Executive Order GA-19, which requires Texas physicians to comply with The Texas Medical Board's Emergency Rule 190.8(2)(U).

Governor Greg Abbott is also an essential party to this case for three reasons. First, The Texas Medical Board's authority to issue Emergency Rule 190.8(2)(U) derives from Governor Abbott's Executive Order GA-19, and Governor Abbott has the right to enforce a physician's

[20] Exhibit 6, The Texas Medical Board Emergency Rule 190.8(2)(U).

violation of Medical Board requirements with a penalty of up to six months in jail and/or a $1,000 fine.[21]

On April 27, 2020, Governor Abbott signed Executive Order GA-19, which ordered "All licensed health care professionals shall be limited in their practice by, and must comply with, any emergency rules promulgated by their respective licensing agencies dictating minimums standards for safe practice during the COVID-19 disaster."[22] The Medical Board's Emergency Rule 190.8(2)(U) is promulgated under Governor Abbott's Executive Order GA-19.[23] Thus, Dr. Hotze's violation of Emergency Rule 190.8(2)(U) is also a violation of Governor Abbott's Executive Order GA-19. Governor Abbott has the right to appear and defend the Constitutionality of Executive Order GA-19. Accordingly, he is an essential party to this case.

B. Governor Abbott is an essential party because Harris County's Order derives from Governor Abbott's authority.

Second, Governor Abbott is an essential party to this case because Judge Hidalgo's authority to issue her Order is derived from his emergency authority. Under Texas law, Governor Abbott is responsible for meeting "the dangers to the state and people presented by disasters." Tex. Gov't Code § 418.003. During a disaster, the Governor may issue or rescind executive regulations that "have the force and effect of law." Tex. Gov't Code § 418.012. "The governor may use all available resources of state government and of political subdivisions that are reasonably necessary to cope with a disaster." Tex. Gov't Code § 418.017. The governor may even "commandeer or use any private property if the governor finds it necessary to cope with a disaster…" Tex. Gov't Code § 418.017(c).

[21] Exhibit 7, Executive Order GA-19 at 2.

[22] Exhibit 7, Executive Order GA-19 at 2.

[23] Exhibit 6, Texas Medical Board Emergency Rule 190.8(2)(U).

Judge Hidalgo's Order derives from Governor Abbott's authority, and she has been designated his agent. Further, her Order clearly states: "It is the intent of this Executive Order to remain as consistent with and to harmonize, to the extent possible, the executive orders of Governor Greg Abbott." Accordingly, a challenge to Harris County's authority to issue its Order is also a challenge to Governor Abbott's authority to issue his executive orders.

C. Governor Abbott is an essential party because Dr. Hotze has challenged his concurrent authority to issue Executive Order GA-29 requiring the Use of Face Coverings throughout Texas.

The third reason Governor Abbott is an essential party is because, as noted, on July 3, 2020, he signed Executive Order GA-29, which is much broader than the one signed by Judge Hidalgo. Governor Abbott's Order imposes a ***statewide*** face covering mandate not only on businesses—but on ***individuals***—who can be fined for being ***anywhere*** in public without a face covering. Any ruling by this Court on the Constitutionality of Judge Hidalgo's Order is also a ruling on the Constitutionality of Governor Abbott's Executive Order GA-29. Thus, Governor Abbott is an essential party for this reason as well.

D. Texas law clearly requires that all relevant governmental entities be made parties in suits such as these.

Because this Court's ruling on Judge Hidalgo's Order will necessarily affect Governor Abbott's Executive Orders GA-19 and GA-29 and The Medical Board's Emergency Rule 190.8(2)(U), these are essential parties to this case. In the *Mr. W. Fireworks* case, the Austin Court of Appeals explained:

> Mr. W's remaining claims challenge the constitutionality of the Act, the Governor's Order, the County Order, and the County Plan under the Texas and U.S. Constitutions. For such claims, the Uniform Declaratory Judgments Act requires that the relevant governmental entities be made parties to the suit. *See* Tex. Civ. Prac. & Rem.Code Ann. § 37.006(b) ("In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is

> alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard."); *Heinrich*, 284 S.W.3d at 373 n. 6; *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex.1994) ("The DJA expressly provides that persons may challenge ordinances or statutes, and that governmental entities must be joined or notified. Governmental entities joined as parties may be bound by a court's declaration on their ordinances or statutes. The Act thus contemplates that governmental entities may be-indeed, must be-joined in suits to construe their legislative pronouncements.").
>
> Although Mr. W raised claims seeking declarations that the Act, the Governor's Order, the County Order, and the County Plan violate both the Texas and U.S. Constitutions, it named only Comal County as a defendant. Given Mr. W's failure to make the State or Governor's office parties to this suit, we dismiss Mr. W's claims regarding the constitutionality of the Act and the Governor's Order under the Texas and U.S. Constitutions. *See* Tex. Civ. Prac. & Rem.Code Ann. § 37.006(b); *Heinrich*, 284 S.W.3d at 373 n. 6; *Leeper*, 893 S.W.2d at 446.

Mr. W. Fireworks, Inc. v. Comal Cty., No. 03-06-00638-CV, 2010 WL 1253931, at *4 (Tex. App. Mar. 31, 2010). Any finding by this Court that Harris County's Order is unconstitutional is also a finding that Governor Abbott's Executive Orders are unconstitutional and The Texas Medical Board's Emergency Rule 190.8(2)(U) is unconstitutional. Accordingly, these are necessary parties to this suit, and this Court should order them to be served as co-defendants.

IV. Plaintiffs' claims against Harris County Judge Hidalgo should be dismissed because Plaintiffs fail to plead facts sufficient to show any constitutional violation.

A. The COVID-19 pandemic is a major public health crisis.

As discussed above and explained by Dr. Shah,[24] the COVID-19 pandemic is unlike anything modern society has experienced. There is no natural immunity to the SARS-CoV-2 virus that causes the disease, no "herd immunity", no available vaccine, and no reliable treatment.[25] This is compounded by the fact that SARS-CoV-2 is extremely contagious. A patient with seasonal flu will transmit the disease to an average of 1.3 people, while a patient

[24] Exhibit 1 at 2-4.

[25] Exhibit 1 at 2-3.

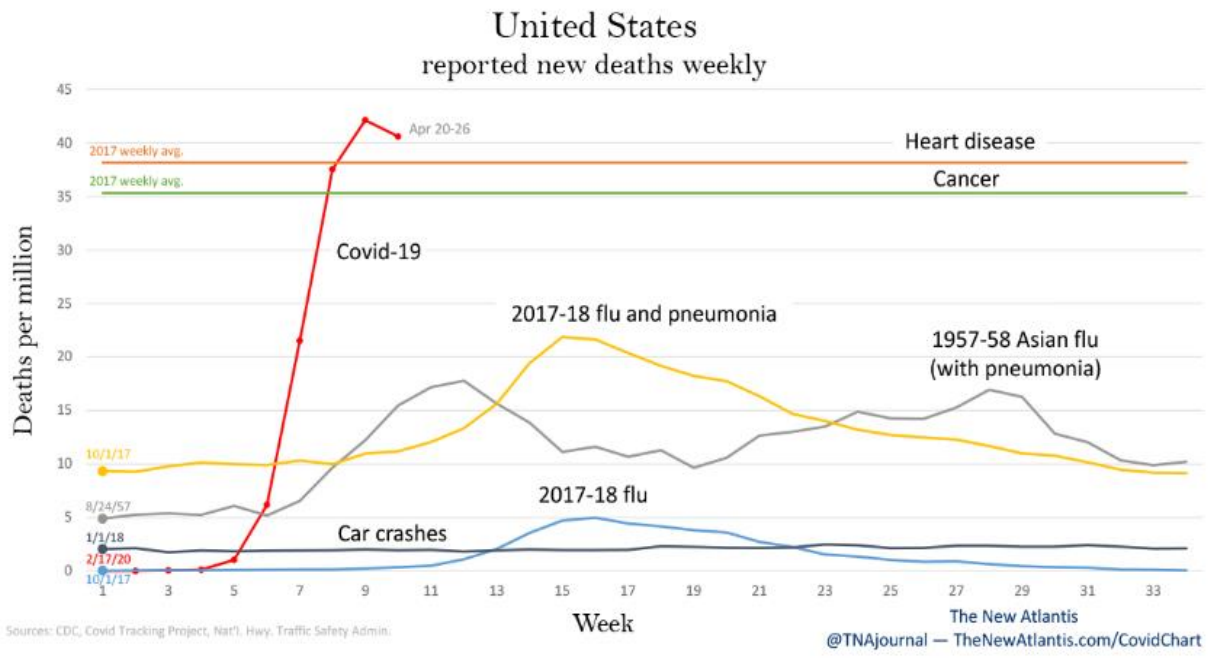
with SARS-CoV-2 will transmit the virus to an average of 2 to 3 people, which allows for exponential rates of infection.[26]

The United States had its first COVID-19 case on January 20. By March 30, even with quarantine measures, it led the world with 164,248 confirmed cases. Less than a month later, it had more than a million cases. By July 3, there were 2.8 million cases in the United States and 11 million worldwide. During April alone, more than 66,000 Americans died of COVID-19, and it became the leading cause of death in the United States.[27] Stated another way, more Americans died of COVID-19 in a four week period than by influenza in an entire year. This four-week death toll exceeds the number of combat deaths of American troops during the entire 20-year Vietnam War.

Using data from the Centers for Disease Control, *The New Atlantis* published a chart comparing weekly COVID-19 deaths with other causes of death—dating to the 1957 Asian flu. In just eight weeks, the weekly total of COVID-19 deaths went from zero to surpassing the weekly average of all other modern flu seasons, cancer, heart disease, and car crashes, as depicted by the red line:

[26] Exhibit 1 at 3.

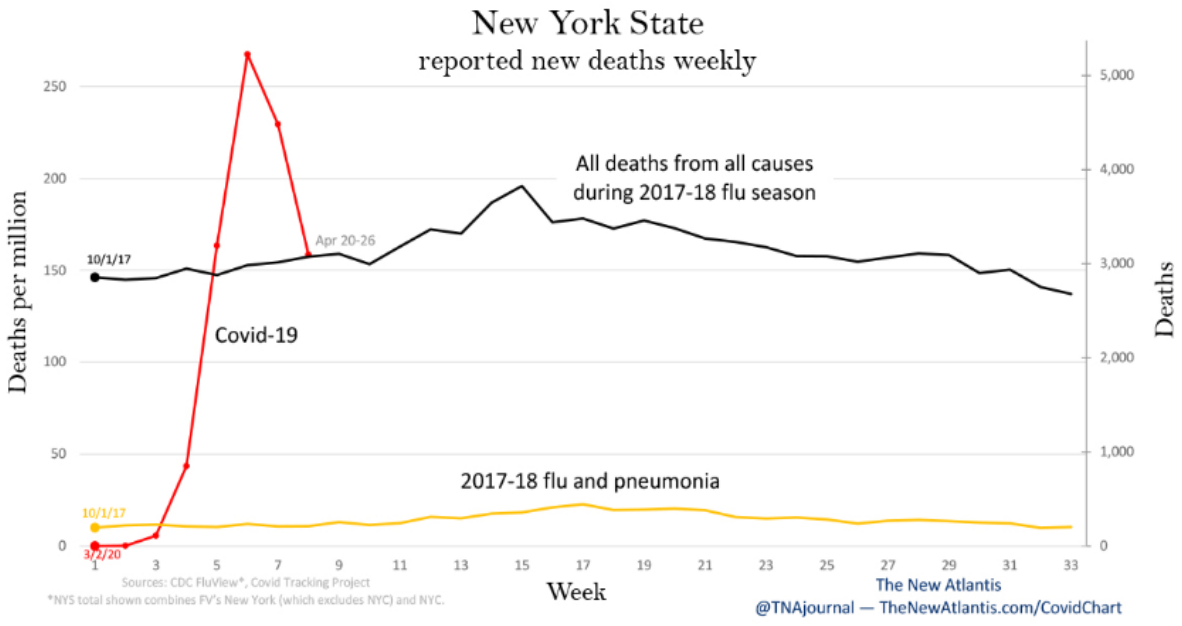
[27] Laura Geggel, "COVID-19 is now the leading cause of death in the United States", *LiveScience*, https://www.livescience.com/coronavirus-leading-cause-of-death.html (visited April 30, 2020 at 1 p.m.).



[28]

The casualties are even more dramatic in New York, where social distancing was not implemented soon enough to prevent a death spike. There, COVID-19 overwhelmed local hospitals and for several weeks, it become not only the leading cause of death, but far surpassed all other causes of death ***combined***:

[28] Ari Schulman, *et al.*, "Not Like the Flu, Not Like Car Crashes, Not Like…", *The New Atlantis* (Updated April 27, 2020), https://www.thenewatlantis.com/publications/not-like-the-flu-not-like-car-crashes-not-like (visited April 30, 2020 at 1 p.m.).



[29]

This tsunami of death has reached the shores of Texas, and Plaintiffs' cavalier attitude toward this public health crisis is akin to standing on a beach the day before a Category 5 hurricane landfall and refusing to evacuate because the water has only risen a foot. When a person refuses to evacuate from a hurricane, he risks only his own life, yet Plaintiffs' refusal to do something as simple as wearing a face covering risks the lives of their entire communities.

V. Plaintiffs' lawsuit is based on demonstratively false information.

Despite the clear scientific data, this is the fifth lawsuit Plaintiffs have filed against Judge Hidalgo since March in an attempt to thwart her efforts to protect the residents of Harris County. In their first four cases, Plaintiffs relied on the opinion of a self-proclaimed "world-leading expert" who claimed COVID-19 was a hoax that was less serious than the annual flu. This "expert" was not only proven wrong within a matter of weeks, but he was never qualified to sign an affidavit in the first place, since he does not even have a medical degree.

[29] *Id.*

Plaintiffs have now recruited Dr. Donald Ellsworth to their cause. Dr. Ellsworth is Dr. Hotze's partner—a family doctor who specializes in treatments for conditions such as "low libido," "weight gain," and "brain fog,"[30] Dr. Ellsworth filed an affidavit dismissing the "so called" pandemic as a hoax and claiming face coverings do not reduce the spread of the virus and are responsible for everything from unconsciousness, spreading cancer, and even forcing COVID-19 into the brain.

As Dr. Shah explains, Dr. Ellsworth does not appear to have board certification or expertise in infectious diseases, epidemiology, or public health. Accordingly, Dr. Shah opines that Dr. Ellsworth is not qualified to render opinions on the matters contained in Plaintiffs' petition.[31]

Dr. Shah is the Public Health Authority for Harris County, past president of the National Association of County and City Health Officials (which represents approximately 3,000 local health departments). He has extensive experience with epidemics such as H1N1, Ebola, and Zika.[32] Dr. Shah identified 10 of the most significant false allegations in Plaintiffs' Petition:

(1) On page 3, Plaintiffs incorrectly claim there is a "vaccine" for "this year's coronavirus." There is no proven, evidence-based, and effective vaccine for SARS-CoV-2 available for widespread distribution.

(2) On page 6, Plaintiffs incorrectly refer to COVID-19 as a "so-called" pandemic. COVID-19 is a pandemic, has been recognized as a pandemic by the World Health Organization since March, and meets every definition of a pandemic. This designation has been used by the White House and Governor's Office since March 2020.

(3) On page 6, Plaintiffs incorrectly claim there is "little or no scientific support as regards reducing the spread of this infection" with surgical masks. That is false, for the reasons explained above. To support their claim, Plaintiffs cited an affidavit from Dr. Ellsworth that cited an article from 2012 which dealt only with

[30] Hotze Health & Wellness Center, Intl., https://www.hotzehwc.com/

[31] Exhibit 1, Affidavit of Dr. Shah at 5.

[32] Exhibit 1, Affidavit of Dr. Shah at 1.

influenza. The study acknowledged that influenza is very different from SARS viruses such as SARS-CoV-2 (COVID-19) and noted that: "[e]ight of nine retrospective observational studies found that mask and/or respirator use was independently associated with a reduced risk of severe acute respiratory syndrome (SARS)." Thus, the very study that Plaintiffs cited may be useful to analyze the spread of influenza, but it does not support their allegations about COVID-19.

(4) On pages 7 and 8, Plaintiffs point out that the CDC and Dr. Fauci recommended that people not wear coverings in March, 2020. That is correct. In March, the virus was still largely contained to a few communities, and the extremely limited supply of masks were needed by front-line medical personnel treating the few thousand COVID-19 patients at the time. Today, there are increased rates of transmission and unknown community spread in the context of increasing availability of cloth face coverings which validate the need for widespread use of such face coverings across known and unknown persons to protect themselves and the rest of the community. The CDC correctly amended its guidance as circumstances changed.

(5) On page 7, Plaintiffs correctly point out that most people infected with SARS-CoV-2 are asymptomatic. That is part of the problem—those asymptomatic people spread the virus to others. In fact, some studies estimate that the concern for asymptomatic spread may be as high as 20-40% of those individuals infected with COVID-19. They unknowingly infect their friends, family members, neighbors, and even strangers they encounter.

(6) On page 8, Plaintiffs repeat the false claim that there is no evidence to establish a relationship between masks and the transmission of COVID-19. Face coverings such as masks dramatically reduce transmission of SARS viruses, including COVID-19.

(7) On pages 8-10, Plaintiffs claim that wearing face masks can lead to headaches, low oxygen, unconsciousness, cancer, and other dangers—particularly if the wearer has pre-existing conditions such as having only one lung. In my clinical practice, I have seen medical providers wear masks thousands of times and never encountered the dramatic and overstated claims made by Plaintiffs. Further, the studies cited involved medical personnel who wore very restrictive and tightly-fitting specialty N95 respirators for long shifts at work—not the homemade masks and bandanas required by Harris County's Order for trips to the grocery store and other businesses. The face coverings required by the Order would also be worn for much shorter time periods, presumably during less stressful events than performing major surgery. Finally, Harris County's Order makes it clear that anyone who has a medical problem such as difficulty breathing is exempt from the Order.

(8) On pages 10-11, Plaintiffs made the outlandish claim that wearing a face covering to protect others may cause "the virus" to "enter the brain."

Significantly, Plaintiffs cite no studies for this. While SARS-CoV-2 is believed to affect far more than the respiratory system, there is no evidence that wearing a face covering to reduce the spread of the virus will cause the virus to "enter the brain" of the person wearing the mask, exacerbate cancer, or to be more deadly.

(9) On pages 11-12, Plaintiffs report that Harris County Judge Lina Hidalgo misrepresented the Texas Medical Center's report of having reached maximum ICU capacity because The Medical Center (TMC) has the ability to expand capacity in an emergency. Judge Hidalgo did not misrepresent this information as this is what was presented to the community by TMC. Further, the plaintiffs fail to mention that "expanding" medical capacity often requires drastic and expensive measures that strains hospital resources, stresses front-line health care providers, denies care to other patients, and is not a long-term or ideal solution. It is far more economical and logical to prevent new cases in the first place.

(10) On pages 12-13, Plaintiffs claims that only half a percent of Texans currently have COVID-19 and only 2,393 Texans have died of COVID-19. Plaintiffs claim that means "over 99.99% of Texans have survived COVID-19." That is false. Most Texans have not yet been exposed to COVID-19. When they are, many Texans could die. That is why it is so important to require face coverings in public places. Plaintiffs incorrectly state that the 2,393 Texans who lost their lives to COVID-19 so far are "trivial." As a physician who has both saved lives and believes saving lives is the foundation of health and medicine, I strongly disagree. Their lives—and the lives of COVID-19's future victims—are far from trivial.

Accordingly, Defendants ask that the Court disregard the allegations in Plaintiffs' petition referenced above. These are improper lay opinions that cannot be relied upon as a basis for granting any injunctive relief.

C. Plaintiffs have no fundamental right to expose their employees and customers to the unnecessary risk of contracting COVID-19.

A government's most important function is to protect lives, and for two centuries, courts have upheld laws that have led to the eradication of smallpox, polio, and other endemic diseases that once plagued Americans. In 1918, the Texas Supreme Court upheld the City of New Braunfels' authority to impose criminal penalties on anyone who sent their children to school without proof of smallpox vaccination. Several parents alleged this violated their Constitutional

rights, but this Court held their arguments did not even "justify further discussion." *City of New Braunfels v. Waldschmidt*, 207 S.W. 303, 304 (1918). Further:

> It is a well-recognized fact that our public schools in the past have been the means of spreading contagious diseases throughout an entire community. They have been the source from which diphtheria, scarlet fever, and other contagious diseases have carried distress and death into many families. Surely there can be no substantial argument advanced adverse to the reasonableness of a rule or order of health officials which is intended and calculated to protect, in a time of danger, all school children, and the families of which they form a part, from smallpox or other infectious diseases.

Id., 207 S.W. 303, 306 (1918), quoting *Blue v. Beach*, 155 Ind. 136, 56 N. E. 94, 50 L. R. A. 64, 80 Am. St. Rep. 195.

The Supreme Court found no right for children not to be vaccinated in an era when vaccines were far less safe than they are today. Certainly, if a child does not have a fundamental right to avoid being injected with a live pathogen to protect others during an epidemic, then Plaintiffs do not have a fundamental right to breathe on their customers and employees without a face covering during a pandemic.

The Supreme Court also noted a distinction between forcing children to be vaccinated and requiring vaccinations to exercise a privilege such as attending school. In the instant case, no one is forcing Plaintiffs to wear a face covering. Plaintiffs are being instructed to require face coverings in exchange for the license to operate a commercial establishment open to the public.

Each Plaintiff understands this, because each owns a business in a regulated industry. Dr. Hotze is a physician, and he is subject to the regulations of The Texas Medical Board. Matt Brice claims to own a restaurant, which requires him to comply with directives of the Public Health Department regarding the safe handling and distribution of food. Norman Adams claims to own an insurance agency, which requires him to comply with directives of the Texas Department of

Insurance. Al Hartman claims to own a real estate investment trust, which may require that he comply with banking, securities, and/or real estate regulations.

In each case, these Plaintiffs submitted to their respective regulatory authorities for the privilege of doing business in their industries. In 2020, the most important duty these business owners have to their customers and employees is to make their premises as safe as practically possible from COVID-19. Unless they are willing to follow simple, inexpensive, non-invasive guidelines from the CDC, the State of Texas, and Harris County to minimize the spread of this deadly virus, they have no fundamental right to open their commercial operations to the public until this pandemic ends.

D. Assuming Plaintiffs had a fundamental liberty interest to breathe on their customers without a face covering, their claims would still fail because the Order they complain about is narrowly tailored in the least restrictive means to meet a compelling state interest of saving lives during a pandemic.

There is no fundamental liberty interest to breathe on others during a pandemic, and Harris County's Order is analyzed under the rational basis standard. However, the Order would have survived strict scrutiny because it implements federal and state guidelines narrowly tailored to achieve the compelling purpose of saving lives based on the least restrictive control measures possible. When compared with alternatives such as keeping much of the international economy shut down, a face covering presents minimal burden. Dr. Shah, who is Harris County's public health official, explains:

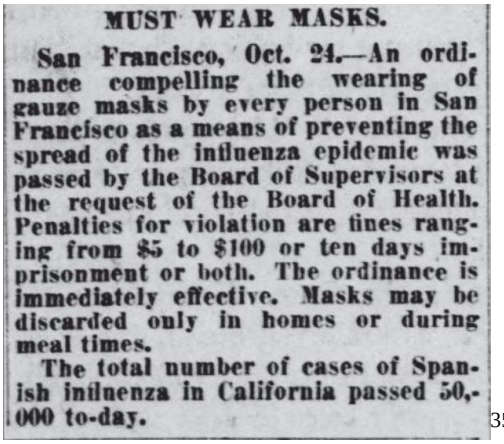
> Pandemics, like other disasters, are expensive. Face coverings are cheap, and face coverings save lives. There is no undue expense or burden to require those in public to use a low cost or even homemade face covering to prevent acquiring (or spreading) a fatal case of COVID-19. Protecting the lives of residents and preventing a pandemic from overtaking hospitals and killing tens of thousands of Harris County residents is a compelling government interest, and Judge Hidalgo's order is appropriate, minimally intrusive, and necessary.[33]

[33] Exhibit 1, Affidavit of Dr. Shah at 7.

On April 3, the CDC and President Donald Trump began recommending that everyone wear nonsurgical cloth face coverings in public during the COVID-19 pandemic. As explained, *supra*, that recommendation has since been adopted throughout the world. Masks slow or stop infected water droplets from spreading when an infected person breathes, coughs, or sneezes, and they are particularly important in large urban areas attempting to reopen after being in quarantine. This has been confirmed by at least 39 major studies involving 12,817 people.[34]

A few years ago, a New York court upheld a requirement to wear masks near those potentially exposed to viruses such as influenza—even during a normal flu season. Masks were considered a narrowly tailored, reasonable requirement to reduce the spread of pathogens. *Spence v. Shah*, 26 N.Y.S.3d 613, 618 (N.Y. App. Div. 2016).

Our ancestors also understood the importance of face coverings during a pandemic. During the 1918 Spanish Flu pandemic, laws such as Harris County's Order were common place, as evidenced by this San Francisco advisory from October 24, 1918:



MUST WEAR MASKS.

San Francisco, Oct. 24.—An ordinance compelling the wearing of gauze masks by every person in San Francisco as a means of preventing the spread of the influenza epidemic was passed by the Board of Supervisors at the request of the Board of Health. Penalties for violation are fines ranging from $5 to $100 or ten days imprisonment or both. The ordinance is immediately effective. Masks may be discarded only in homes or during meal times.

The total number of cases of Spanish influenza in California passed 50,000 to-day.

[35]

[34] Exhibit 1 at 3-4. *See also*, Exhibit 8, Derek K. Chu, et al., "Physical distancing, face masks, and eye protection to prevent person-to-person transmission of SARS-C-oV-2 and COVID-19: a systematic review and meta-analysis", *The Lancet*, Vol. 395, June 27, 2020.

[35] Paul French, "In the 1918 flu pandemic, not wearing a mask was illegal in some parts of America. What changed?", https://www.cnn.com/2020/04/03/americas/flu-america-1918-masks-intl-hnk/index.html (visited April 30, 2020 at 2 p.m.).

Society has long imposed far more restrictive laws to address far less serious risks. For example, while there are less than 37,000 motor vehicle accident deaths per year, federal and state governments impose infringements upon the "freedom" of Americans to drive while intoxicated or with vehicles that lack necessary lights, brakes, air bags, and other safety equipment. The government also enforces what was once considered draconian seatbelt laws. A seatbelt straps a person to a moving vehicle filled with highly flammable fuel—which is much more onerous than wearing a face cloth. Nevertheless, the Third Circuit Court of Appeals held: "No fundamental liberty interest has been recognized to encompass the decision to forgo wearing a seatbelt…" and seatbelt laws are analyzed under the rational basis standard. *Burr v. Attorney Gen. Delaware*, 641 F. App'x 194, 196 (3d Cir. 2016).

The government further requires drivers to hand over a photograph and personal information and prove competency to get a license. Americans have also spent billions of dollars mandating safety improvements such as standardized highway markings and guardrails, controlled access highways, and separated grade railroad crossings, while imposing costs on consumers for mandatory airbags, fuel tank reinforcements, redundant brake lights, anti-lock brakes, and other engineering improvements.

Although many fought for years to drive unencumbered by such regulations, these rules have paid off. American deaths have declined from a high of 54,589 in 1972 to 36,560 in 2018.[36] As explained, *supra*, more Americans died from COVID-19 in the last **three months** than from

[36] *Motor Vehicle Traffic Fatalities & Fatality Rate: 1899-2003*, https://web.archive.org/web/20110921222129/http://www.saferoads.org/federal/2004/TrafficFatalities1899-2003.pdf (visited April 30, 2020 at 1 p.m.).

all automobile accidents in the last **three years**.[37] Imposing the "burden" of a 50 cent face covering in commercial spaces is not unreasonable or overly broad, given what is at stake.

This case can also be compared with smoking regulations. Although only a small percentage of people exposed to second-hand smoke may someday contract cancer, smoking ordinances are clearly reasonable restrictions for public health, and there is no fundamental right to smoke in public.

The Texas Attorney General concluded that counties can ban smoking in public buildings because, while there was no state law granting them that authority, "commissioners court may act without express authority, so long as its actions are reasonably necessary to pursue some authority granted by either statute or state constitution." Tex. Att'y Gen. Op. DM-183 (1992). This authority derives from Texas Health & Safety Code § 121.003(a), which vests counties with power to "enforce any law that is reasonably necessary to protect the public health."

In 2007, restaurant owners challenged the City of Houston's restaurant smoking ordinance. The Southern District of Texas held that smoking is not constitutionally protected, and if it were, the harm of regulation was greatly outweighed by the risk of future cancer cases that will cause the "health of the citizens of Houston" to be "detrimentally affected in ways perhaps beyond repair." *Houston Ass'n of Alcoholic Beverage Permit Holders v. City of Houston*, 508 F. Supp. 2d 576, 587 (S.D. Tex. 2007).

The risk of contracting COVID-19 from an infected person's breath is far greater than the risk of cancer from a smoker's breath. Nevertheless, local governments may regulate smoking to

[37] Harris County's COVID-19 deaths are just beginning to spike, yet our 395 COVID-19 deaths in the last three months have already exceeded the 391 motor vehicle fatalities from all of 2018. *See*, Exhibit 9 at 4, "Crashes and Injuries by County, 2018", Texas Department of Transportation.

limit the public's exposure to a person's airborne smoke. *A fortiori*, local governments may limit the public's exposure to a person's deadly airborne virus while in public businesses.

Other than taking anecdotal potshots, Plaintiffs provide no explanation for how it is unduly burdensome to wear an inexpensive, non-intrusive cloth barrier in public to prevent asymptomatic carriers of COVID-19 from potentially killing those they come in contact with. Plaintiffs further fail to explain how this Order could possibly be more narrowly tailored to prevent the spread of COVID-19.

IV. Plaintiffs' case should be dismissed.

For the reasons explained, Plaintiffs' case should be dismissed. If the Court reaches the merits of their claim, it should deny each of Plaintiffs' requests, conclude that Judge Hidalgo's Order is reasonable, constitutional, and should be affirmed in all respects as an important contribution to public health. Further, Plaintiffs should be required to pay Defendants' costs and attorney's fees.

SPECIAL DENIALS

There is a defect in joinder of parties because Plaintiffs failed to name Governor Greg Abbott, The Texas Medical Board, and whatever law enforcement entity may eventually enforce Judge Hidalgo's Order against Plaintiffs. These are necessary parties who has not been joined as defendants in this case. "A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties." Tex. R. Civ. P. 39(a)(1). A necessary party who is subject to the court's jurisdiction must be joined in the action, or the case will be dismissed. Tex. Rule Civ. P. 39(a); *Longoria v. Exxon Mobil Corp.,* 255 S.W.3d 174, 184 (Tex. App.—San Antonio 2008, pet. den.)

Even if Plaintiffs could show that Judge Hidalgo's Order violated their rights, their injunction would have no effect, and their rights would continue to be violated because they would still be subject to the same restrictions by Governor Abbott's Executive Orders GA-19 and GA-29 and The Medical Board's Emergency Rule 190.8(2)(U). A declaration that Judge Hidalgo's Order is unconstitutional is also a declaration that these three orders are unconstitutional, and these are necessary parties to this case.

GENERAL DENIAL

Pursuant to Texas Rule of Civil Procedure 92, Defendant denies each and every material allegation in Plaintiffs' Original Petition, Applications for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction, and demands strict proof thereof.

RESPONSE TO APPLICATION FOR TEMPORARY RESTRAINING ORDER, TEMPORARY INJUNCTION, AND PERMANENT INJUNCTION

A. Standard for injunctive relief.

As explained above, the Court lacks subject matter jurisdiction and should dismiss this case in its entirety. But if the Court concludes otherwise, each of Plaintiffs' requests for injunctive relief should be denied. Defendant incorporates the arguments above, and further addresses Plaintiffs' request for injunctive relief as follows.

To obtain a temporary injunction, a plaintiff must plead and prove three specific elements: (1) a cause of action against the defendants; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002); 44 Tex Jur. 3d *Injunctions* § 13 (3d ed.); *see also In re Tex. Nat. Res. Conserv. Comm'n*, 85 S.W.3d at 204 (noting a request for a temporary injunction "has more stringent proof requirements" than a request for a temporary restraining order). Moreover, "the proof required to support a judgment issuing a writ of temporary injunction may not be

made by affidavit." *Millwrights Local Union No. 2484 v. Rust Eng'g Co.*, 433 S.W.2d 683, 687 (Tex. 1968). Instead, a temporary injunction may issue only after the court conducts a hearing and only if the plaintiff offers evidence that "establishes a probable right of recovery" on the merits. *Id.* at 687. Absent that showing, "no purpose is served" by the issuance of a temporary injunction because its purpose is likewise to maintain the status quo pending a trial on the merits. *In re Tex. Nat. Res. Conserv. Comm'n*, 85 S.W.3d 201, 204 (Tex. 2002).

To obtain a permanent injunction, a plaintiff must actually succeed on the merits at final judgment. 44 Tex. Jur. 3d *Injunctions* § 15 (3rd ed.).

Plaintiffs cannot establish the elements necessary for any of the relief they seek. They are not entitled to a temporary restraining order, temporary injunction, or permanent injunction because they have not stated a cause of action, not shown a probable right to the relief sought, and there is no probable, imminent, and irreparable injury in the interim.

B. Plaintiffs are unlikely to succeed on the merits because they lack standing.

As explained above, Plaintiffs are unlikely to succeed on the merits of their claim because they lack standing to bring this suit in the first place. First, they fail to attach evidence explaining how they have an interest in overturning Judge Hidalgo's Order. Second, they fail to show they have been, or will likely be, prosecuted for violating this Order.

C. Plaintiffs are unlikely to succeed on the merits because they failed to name essential parties.

As explained above, Plaintiffs are also unlikely to succeed on the merits because they fail to name essential parties to this case. If this Court were to find Judge Hidalgo's Order invalid, it would also be finding Governor Abbott's Executive Orders GA-19 and GA-29 and The Texas Medical Board's Emergency Rule 190.8(2)(U) invalid. These parties have an absolute right to be present to defend their orders, and this case cannot proceed without them. The Texas Supreme

Court has already advised Plaintiffs of this fact ***twice***, and Judge Hidalgo has similarly advised Plaintiffs of this fact in each of the last ***five cases*** Plaintiff filed against Judge Hidalgo in the last three months.[38] Plaintiffs' persistence in filing these cookie-cutter petitions show an extraordinary lack of good faith, and Plaintiffs are—again—unlikely to succeed on the merits.

D. Plaintiffs are unlikely to succeed on the merits because Judge Hidalgo's Order is more narrowly tailored than CDC guidelines, Governor Abbott's Executive Orders GA-19 and GA-29, and The Medical Board's Emergency Rule 190.8(2)(U), and Plaintiffs' demands are overly broad and ambiguous.

For the reasons discussed, Harris County's Order is reasonable and narrowly tailored to deal with the worst pandemic in a century. The Order contains numerous exceptions that allow customers and employees to avoid wearing a face covering when it is not possible or practical to do so, and this is far more narrow than the CDC's guidelines, The Medical Board's Emergency Rule 190.8(2)(U), and Governor Abbott's Executive Orders GA-19 and GA-29. Plaintiffs' shot-gun attack on Judge Hidalgo's Order makes no effort to even identify which portions they find objectionable, or how the Order could be fashioned to be more narrowly tailored to deal with this pandemic. Thus, Plaintiffs are unlikely to succeed on the merits.

E. Plaintiffs are unlikely to succeed on the merits of their claim that Harris County's Order violates Chapter 418 of the Texas Government Code.

Plaintiffs are unlikely to succeed on the merits of their claim that Texas Government Code does not permit businesses to be required to keep their premises reasonably safe from COVID-19 by mandating face coverings under the circumstances listed in Harris County's Order. Plaintiff's only allegation is that because "The Disaster Act does not contain any language

[38] *See*, (1) *In re: Steven Hotze, M.D., et al.*, The Texas Supreme Court No. 20-0249, (2) *Steven Hotze, M.D., et al v. Lina Hidalgo*, Cause No. 2020-22609, (3) *Steven Hotze, M.D. v. Lina Hidalgo*, Cause No. 2020-25311, (4) *Steven Hotze, M.C. and Edd Hendee v. Lina Hidalgo*, Cause No. 2020-27743, and (5) *In re: Steven Hotze, M.D.*, The Texas Supreme Court No. 20-0331.

forcing businesses to require their employees and customers to wear masks" that there is no authority to do so.

As explained, Chapter 418 is flexible and permits the Governor (and his agents, such as Judge Hidalgo) to issue or rescind executive regulations that "have the force and effect of law." Tex. Gov't Code § 418.012. "The governor may use all available resources of state government and of political subdivisions that are reasonably necessary to cope with a disaster." Tex. Gov't Code § 418.017. The governor may even "commandeer or use any private property if the governor finds it necessary to cope with a disaster…" Tex. Gov't Code § 418.017(c).

The Legislature passed the Disaster Act precisely to allow executives to respond to unforeseen, emerging conditions. It is ridiculous for Plaintiffs to assert that the Disaster Act is required to specify every possible emergency—and every possible reaction to an emergency—that might ever arise in the State of Texas and preemptively determine every possible response to every possible emergency. Plaintiffs are unlikely to succeed on the merits of this claim.

F. Plaintiffs are unlikely to succeed on the merits of their claim that Chapter 418 violates the Constitution.

Plaintiffs are even less likely to succeed on the merits of their claim that Chapter 418 is unconstitutional. Plaintiffs allege Chapter 418 violates Article I, § 28 of the Texas Constitution, which provides that: "No power of suspending laws in this State shall be exercised except by the Legislature."

Tellingly, the most recent case Plaintiffs could find to support their position is 109 years old—a 1911 case dealing with the City of Dallas' passage of a criminal statute:

> To prohibit and punish keepers and inmates of bawdyhouses and variety shows, to prevent and suppress assignation houses and houses of ill fame; and to regulate, colonize and segregate the same; to determine such inmates and keepers as vagrants and provide for the punishment of such persons.

Brown Cracker & Candy Co. v. City of Dallas, 104 Tex. 290, 292, 137 S.W. 342, 342 (1911). Clearly, the Governor's right to deal with a pandemic in 2020 is far removed from the City of Dallas' decision to pass a criminal statute dealing with the menace of bawdyhouses three years after the first Model T was produced. Since 1911, case law has developed to recognize that in a growing state like Texas, modern society could not function unless the Legislature delegated power to the Executive Branch to cope with ever-changing problems.

In 1943, the Court of Criminal Appeals explained that while Article I, § 28 of the Constitution allows only the Legislature to suspend laws, the Legislature may delegate that power to the Executive Branch:

> The question of this delegation of authority has been much before the courts, and especially is that true in recent years by the enlarged powers conferred upon administrative boards and tribunals. The generally accepted rule governing such matters now appears to be that a legislative body may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the power to fill up the details, by prescribing rules and regulations to promote the purpose and spirit of the legislation and to carry it into effect. In such cases the action of the Legislature in giving such rules and regulations the force of laws does not violate the constitutional inhibition against delegating the legislative function. The rule finds support in Field (Marshall) v. Clark, 143 U.S. 649, 12 S.Ct. 495, 505, 36 L.Ed. 294, wherein the Supreme Court said: "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation." See also: United States v. Grimaud, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563; United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 53 S.Ct. 42, 77 L.Ed. 175; Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446; Ex parte *439 Leslie, 87 Tex.Cr.R. 476, 223 S.W. 227; Carter v. State, 135 Tex.Cr.R. 457, 116 S.W.2d 371; Smith v. State, 74 Tex.Cr.R. 232, 168 S.W. 522; Tuttle v. Wood, Tex.Civ.App., 35 S.W.2d 1061; Britton v. Smith, Tex.Civ.App., 82 S.W.2d 1065; Housing Authority of City of Dallas v. Higginbotham, 135 Tex. 158, 143 S.W.2d 79, 130 A.L.R. 1053; and authorities from other jurisdictions, collated under 79 L.Ed. 490.

Williams v. State, 146 Tex. Crim. 430, 438–39, 176 S.W.2d 177, 183 (1943). Even more recently, the Supreme Court held that, "[a]lthough the Constitution vests legislative power in the Legislature, courts have recognized that in a complex society like ours, delegation of legislative power is both necessary and proper in certain circumstances." *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000).

For the same reason, Plaintiffs are unlikely to succeed on the merits of their claim that Chapter 418 (the Disaster Act) violates the separation of powers in Article II, § 1 of the Texas Constitution. While the Legislature Branch is vested with the power to make law, it is well established that it may delegate that power if it provides sufficient direction to the Executive Branch. *State v. Rhine*, 297 S.W.3d 301, 306 (Tex. Crim. App. 2009).

The Legislature properly delegated its power when it passed the Texas Disaster Act. The Act provides adequate standards to guide the Governor in its application. Section 418.002 identifies the Act's purposes, Section 418.003 describes its limitations, and Section 418.004(1) even defines a "disaster" to include an "epidemic." The Legislature places time limits on how long a disaster may be declared. Tex. Gov't Code § 418.014. The Legislature even determined the penalty for violating the Act—a maximum fine of $1,000 and six months in jail. Perhaps most importantly, the Legislature retains the ability to override the Governor and terminate a state of disaster at any time. Tex. Gov. Code § 418.014(d)-(e). And, if the Legislature believed the Act provided the Governor with too much authority, it could have rescinded it at any time in the last half-century (and could still do so today).

A few months ago, the Supreme Court was asked to determine whether Chapter 418 violated Article I § 28 or Article II, § 1 of the Texas Constitution. If the Supreme Court believed Chapter 418 was unconstitutional, it had an opportunity to make that finding. Instead, it did not

even address the issue. *In re Abbott*, No. 20-0291, 2020 WL 1943226, at *2 (Tex. Apr. 23, 2020). The Texas Disaster Act is constitutional, and Plaintiffs are unlikely to succeed on the merits of this claim.

To the extent Plaintiffs claim Chapter 418 is unconstitutional in its application, that argument is also unlikely to succeed. Plaintiffs claim they are denied their due process rights because their businesses "are presumed to be virus incubators."[39] In a rapidly evolving pandemic where only a small percentage of the population has been tested, infections are growing rapidly, many infected people are asymptomatic but contagious, and Plaintiffs' businesses welcome members of the public to interact with employees, it is safe for epidemiologists and policy makers to assume that Plaintiffs' businesses—are—or may soon be—virus incubators. The purpose of these regulations is to protect patrons and employees from that possibility.

Further, Plaintiffs are not being "punished" based on the assumption that their employees and customers have COVID-19 (as Plaintiffs assert). Plaintiffs are being asked to take precautions in case an infected customer or employee enters their business. This is analogous to a restaurant being asked to store food in a refrigerated area and cook meat thoroughly—not because their meat has been proven to have harmful bacteria—but to make sure that if does have harmful bacteria, customers are not exposed to it.

Plaintiffs' Equal Protection Clause is equally difficult to understand. At no point does the Face Covering regulation create "separate public emoluments, or privileges" or single out certain people.[40] These regulations are applied to commercial businesses as a public health regulation similar to health regulations applied to restaurants and bars to prevent the public from being subjected to unsafe food or drink.

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[39] Plaintiffs' Petition at 19.

[40] Plaintiffs' Petition at 23.

The Texas Supreme Court recently suggested that restrictions on freedoms during this pandemic are reasonable, so long as the "chosen methods" of curtailing the pandemic are "less restrictive" and "more targeted" than measures such as forbidding people "to leave their homes without a government-approved reason," putting tens of millions out of work, and closing churches. *In re Salon a La Mode*, No. 20-0340, 2020 WL 2125844, at *1 (Tex. May 5, 2020).

The County, State, and Texas Medical Board Orders are precisely the kind of narrowly tailored remedy endorsed by the Supreme Court, and Plaintiffs fail to even suggest a more narrow alternative given the immense loss of human life at stake. Further, as explained, Plaintiffs have no standing to even challenge the Constitutionality of this statute until they name Governor Abbott and The Texas Medical Boards as parties to this case.

G. Plaintiffs are unlikely to succeed on the merits of their claim that Harris County's Order violates Article XI, § 5 of the Texas Constitution

Plaintiffs assert Judge Hidalgo's Order violates Texas Constitution Article XI, § 5, which prohibits a city with more than 5,000 people from passing a charter or ordinance inconsistent with the Constitution. As Judge Hidalgo has patiently explained to Plaintiffs in their last four lawsuits, Harris County is not a city—it is a county—and this provision is not applicable. Second, Judge Hidalgo's Order was passed under Chapter 418 of the Texas Government Code and does not violate any provision of the Constitution. Plaintiff has no chance of prevailing on this claim.

H. Plaintiffs are unlikely to succeed on the merits of their claim that Harris County's Order violates Article I, § 19 of the Texas Constitution.

Plaintiffs assert that Judge Hidalgo's Order deprives them of life, liberty, or property by requiring them to use inexpensive face coverings during this pandemic to protect their employees and customers from a deadly virus. Plaintiffs fail to explain what rights they have lost, or how

Harris County's minimal commercial regulation deprives them of life, liberty, or property—particularly in light of the fact that they are subject to even more stringent regulations from Governor Abbott and The Texas Medical Board. Plaintiffs have no chance of prevailing on this claim.

NOTICE

Defendants give notice that she will use any and all documents produced by Plaintiffs in discovery at the trial of this cause or any pretrial proceeding. Defendant reserves the right to object to the authenticity of any document produced within 10 days of receiving actual notice from Plaintiff that the documents will be used in a pre-trial proceeding or trial.

PRAYER

Wherefore, premises considered, Defendants pray that this Court grant their Motion to Dismiss and Plea to the Jurisdiction and dismiss Plaintiffs' case in its entirety and award sanctions, attorney's fees, costs, and any further relief to which Defendants may be entitled in law or equity.

In the alternative, Defendants pray that this Court deny Plaintiffs' request for a temporary restraining order, temporary injunction, and permanent injunction, deny Plaintiffs' request for declaratory judgment, award sanctions, attorneys' fees and costs, and any further relief to which Defendant may be entitled in law or equity.

Respectfully submitted,

VINCE RYAN
HARRIS COUNTY ATTORNEY

SETH HOPKINS
Assistant County Attorney
State Bar No. 24032435
1019 Congress, 15th Floor
Houston, Texas 77002
Telephone: (713) 274-5141
Facsimile: (713) 755-8924
Seth.Hopkins@cao.hctx.net

ATTORNEY FOR HARRIS COUNTY JUDGE LINA HIDALGO AND HARRIS COUNTY FIRE MARSHAL LAURIE L. CHRISTENSEN

CERTIFICATE OF SERVICE

I certify that on the 8th day of July, 2020, a true and correct copy of the foregoing instrument was served by electronic transmission to all counsel of record.

/s/ Seth Hopkins

SETH HOPKINS