NO. 20-0291

In the Supreme Court of Texas

In re Greg Abbott, Governor of the State of Texas, and Ken Paxton, Attorney General of the State of Texas,

Relators.

On Petition for Writ of Mandamus
to the 459th District Court of Travis County

REAL PARTIES IN INTEREST RESPONSE IN OPPOSITION TO RELATORS' OPENING BRIEF ON THE MERITS

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459th Judicial District Court, Travis County

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Austin Criminal Defense Lawyers Association
NAACP Texas
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- Hon. Judge Ronnisha Bowman

Hon. Judge Erica Hughes
Hon. Judge Shannon Baldwin
Hon. Judge David M. Fleischer
Hon. Judge Kelley Andrews
Hon. Judge Andrew A. Wright
Hon. Judge Franklin Bynum
Hon. Judge Toria J. Finch
Hon. Judge Lee Harper Wilson
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REASONS TO DENY MANDAMUS

Relators' petition assumes the Governor possesses unilateral power to suspend any Texas statute during a disaster, displacing the Legislature as the purveyor of public policy. This super-statutory power assumed by Relators' petition would also override the judicial branch. According to Relators, this broad new power is unreviewable.

The executive order animating Relators' petition, GA-13 (or "Order"), suspends provisions of the Code of Criminal Procedure relating to personal bonds on the Governor's belief that "judges were misusing" their authority. As a result, it eliminates discretion the Constitution and Legislature confers on judges to assess whether an incarcerated person may be safely released even if that person is too poor to afford bail. While the Governor certainly plays a critical role and must be afforded some leeway to protect the health and safety of Texans in times of disaster, such authority cannot extend to eliminating judicial review entirely. Yet that is GA-13's effect: it replaces the discretion of judicial officers with the Governor's one-size-fits-all preference.

The Order creates a regime in which two incarcerated people, identical in every respect but wealth, will be treated different with respect to a deadly, fast-spreading pandemic: the one who has money can escape the death trap of a virus-

infected jail; the one who has none has no hope even if a judge's conditions of release would protect the community.

The harm from the Governor's Order extends beyond the judges, whose power has been diminished, and incarcerated indigents, who have been placed at greater risk of contracting COVID-19. In crowded jails, the threat to an incarcerated person is also a risk to a corrections officer. By preventing courts from limiting jail populations, the Order increases the risk of COVID-19 to corrections officers and jail personnel, whose jobs protect society. It also imperils families and communities to whom they return after their shifts.

Plaintiffs are a coalition of judges, defense lawyers, and organizations representing at-risk populations who seek to invalidate the Order and enjoin future enforcement. They contend that the Order far exceeds the Governor's powers under the Texas Disaster Act, which is limited to suspending "regulatory statutes"—statutes concerning regulatory agencies within the executive branch. The statute does not empower the Governor to usurp the authority ascribed to other branches of government—and if it does, it is unconstitutional.

Relators focus on technical jurisdictional arguments that they assert deprive the district court of the power to hear this case or grant relief. These arguments fail. Plaintiffs' standing is straightforward: the Order deprives judges of statutory power, diminishing their judicial authority. Diminution of statutory power is an injury in

fact. The injury is traceable to the Governor, who signed the Order, and the Attorney General, who promises to enforce it. And the injury is redressable by a declaration that the Order is invalid and an injunction against its enforcement.

Sovereign immunity is waived. The Governor acted *ultra vires* by purporting to suspend laws outside the scope of the Disaster Act. The Declaratory Judgments Act also waives immunity to challenge the Order's validity or the Act's constitutionality; if the Act indeed gives the Governor the unilateral authority he asserts, immunity cannot impede the restoration of proper constitutional order.

Finally, Relators' exclusive-jurisdiction argument under section 22.002(c) of the Government Code ignores the statute's plain language. As a court of general jurisdiction, the district court has injunction jurisdiction unless some constitutional provision or statute withdraws it. Unlike district courts, section 22.002 gives this Court *no* jurisdiction, exclusive or otherwise, to issue writs against the Governor. And the Court's exclusive jurisdiction over the Attorney General is limited to injunctions *compelling* him to affirmatively act—relief Plaintiffs have not requested and the district court did not grant.

Relators' mandamus petition is legal overreach in aid of executive overreach. Just as the Governor's Order, if not enjoined, will damage the State's public health, Relators' arguments, if accepted, will destabilize our republican form of government. This Court should deny the petition.

STATEMENT OF FACTS

The Governor issued Executive Order GA-13 on the ground that "judges were misusing" their constitutional authority in individual cases.[1] M.R.75. Specifically, Relators disagreed with judicial decisions to release certain people pretrial on personal bonds, which require no upfront payment of money, instead of requiring them to pay money bonds for their release.

GA-13 is extremely broad in its usurpation of judicial authority. It suspends several articles of the Code of Criminal Procedure; creates new categories of people who, if they cannot afford bond, must be detained for an indeterminate amount of time; and prohibits judges and magistrates from granting personal bonds to certain people, regardless of a defendant's ability to pay. Specifically, GA-13 suspends five articles of the Texas Code of Criminal Procedure:

1. GA-13 suspends Article 17.03. This operates to bar judges from using their statutory authority to grant a personal bond to people arrested for any offense involving violence or the threat of violence, and for those arrested for any charge if they were ever convicted of an offense involving violence or the threat of violence in the past. The term "violent" is undefined, but would capture even low-level

[1] Relators repeatedly assert that GA-13 also prevents the "mass release" of violent offenders in response to COVID-19. This is an illusory exigency; there have been no such releases and Relators can cite none.

misdemeanor offenses like Class C assault, which carries the same penalty as a traffic citation.

2. GA-13 suspends Article 17.151, removing the only statutory limit on how long a person can be detained before the State is ready for trial and forcing judges to choose between complying with state statute or complying with the Order. This suspension applies to people arrested for any charge, with no caveat regarding violence or a history of violence.

3. GA-13 suspends Article 15.21, preventing judges from using their authority to release on personal bond individuals who have been arrested on an out-of-county-warrant and have not been picked up by the other county after 11 days. This provision also applies to people arrested for any charge.

4. GA-13 suspends Article 42.032 to prevent any authority from releasing individuals based on credits for "good conduct, industry, and obedience," for anyone serving a sentence for a crime involving violence or the threat of violence or who at some point in their past was convicted of such a crime. Judges, defense attorneys, and prosecutors routinely consider such credits in sentencing and plea-bargaining, and sheriffs use such credit to maintain order.

5. GA-13 suspends Article 42.035, preventing judges from allowing a person to serve their sentence through an electronic monitoring program instead of in jail,

if the person is serving a sentence for a crime involving violence or the threat of violence or has ever been convicted of such a crime.

Additionally, the Order creates a new and single exception to its prohibition of release on personal bond for certain individuals, permitting such release only where necessary for "health or medical reasons" and requiring a new hearing not defined in the Code of Criminal Procedure. Judges are prevented from setting personal bond based on any other individualized factors required by the Texas Constitution and state law.

While Relators claim that the Order focuses on public safety, the opposite is true. Most of the Order focuses on stopping people who cannot afford bond from getting out of jail, while those who can pay—even with the exact same charge and criminal history—can purchase their freedom. Furthermore, each provision of GA-13 threatens to explode local jail populations at a time when public health experts are urging jurisdictions to reduce their jail populations in order to mitigate the spread of COVID-19. This threatens not only people detained in the jail, but also correctional officers and other jail personnel who return home to their families and communities after work. *See infra* Section II.A.1.C.

GA-13 immediately caused confusion due to its conflict with judges' duties under Texas law and the federal and state constitutions. Relators' three-page recitation of the law related to bond underscores the careful balance achieved by the

Legislature and effectuated by the Judiciary in protecting public safety and personal liberty when setting bond. Additionally, the U.S. Constitution prohibits bond schemes that result in wealth-based detention. *O'Donnell v. Harris County*, 892 F.3d 147, 161 (5th Cir. 2018) ("[P]retrial imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible under both due process and equal protection requirements[.]") (citations omitted). As a result of these conflicts, judges are forced to either violate the Executive Order or else violate federal and state law.

Plaintiffs challenged GA-13 as *ultra vires* and unconstitutional and sought declaratory and injunctive relief. M.R.31-32. The district court concluded that the Order injures Plaintiff Judges because "many of the orders in [GA-13] strip away the discretion of the judiciary and potentially subject its judges to mandamus or criminal action with little or no rationale for coping with the current health crisis." Resp. App. 1. It also found that GA-13 was based on an "unsubstantiated fear" that judges were "abandon[ing] their legal obligation to balance the interests of the public, individuals accused, but not convicted of criminal offenses, and the victims of those alleged offenses." *Id*. The court determined that "the judges of this State may not abandon their responsibility in this regard, but neither may it be taken away from them by an executive order." *Id*.

The TRO returned to the status quo ante. Courts resumed exercising their lawful discretion to grant personal bonds in individual cases while considering public safety. *See* Petition for Original Writ of Habeas Corpus, *Ex Parte Luis Arroyos*, NO. WR-91,169-01 (Tex. Crim. App. 2020) (explaining that the applicant had been arrested on April 4, 2020 and held pursuant to GA-13, but that, "in light of [Judge Livingston's] restraining order, the magistrate then approved a personal bond for Applicant's release").

Following a stay of the district court's order, Plaintiffs opposed Relators' petition for writ of mandamus and now submit briefing on the merits.

SUMMARY OF ARGUMENT

The Texas Constitution and Disaster Act demarcate the Governor's authority during times of crisis. GA-13 disregards these limitations, suspending five substantive provisions of the Code of Criminal Procedure relating to personal bonds and other conditions of release. Relators urge this Court to adopt a constitutionally suspect interpretation of the Disaster Act that allows the Governor to suspend any state law in times of disaster. Relators' position is unsupported by Texas law and sets a dangerous precedent by giving the Governor unchecked power. This Court should reject Relators' arguments and deny their mandamus petition.

First, the Governor acted *ultra vires* under the Disaster Act. The Act only allows the Governor to suspend regulatory statutes concerning the conduct of state

business. Tex. Gov't Code § 418.016(a). The suspensions in GA-13 fall well outside the scope of gubernatorial action contemplated under the Act.

Second, the Governor's suspension of substantive laws runs afoul of Article I, section 28 of the Constitution, which provides "[n]o power of suspending laws in this State shall be exercised except by the Legislature." Relators cite no authority that overcomes this clear bar to the Governor's suspension power.

Third, GA-13 violates the constitutional separation of powers because it usurps the role of the Judiciary and the Legislature. The Order removes decision-making authority about who should receive personal bond as a condition of pretrial release from individual judges. This authority, however, is expressly reserved to the Judiciary under the Constitution and state law. Further, by suspending provisions of the Code of Criminal Procedure and unilaterally declaring how personal bonds should be issued, the Governor has assumed the lawmaking authority of the Legislature.

None of Relators' jurisdictional arguments bar the district court from declaring the Order unconstitutional or enjoining its enforcement. Plaintiff Judges and Organizations, on their own and on behalf of their members, satisfy the injury-in-fact, traceability, and redressability standing requirements to bring this suit. Sovereign immunity does not protect Relators in this action because such immunity

does not embrace *ultra vires* acts. Sovereign immunity is also waived for challenges to the validity of a state law such as GA-13 or the Disaster Act.

Lastly, Plaintiffs correctly brought this action in the district court because they seek an injunction prohibiting Relators from acting to enforce GA-13. This Court only exercises exclusive jurisdiction under section 22.002(c) to issue injunctions against officers of the executive departments of the state when the injunction seeks to compel performance. This suit falls outside section 22.002(c)'s purview. This Court should deny Relators' petition.

ARGUMENT

I. The District Court Acted Within Its Discretion Because Plaintiffs Have Standing, Plaintiffs' Injuries Are Traceable and Redressable, Relators Are Proper Defendants, and It Had Jurisdiction.

A. Plaintiff Judges and Plaintiff Organizations have standing to sue Relators.

1. Plaintiff Judges have standing.

Before GA-13 was issued, judges in Texas had exclusive authority over when and under what conditions to release an individual from custody, within the limits set by statute.

a. GA-13 causes concrete and particular injury to each Plaintiff Judge.

GA-13 usurps judges' discretion and diminishes their power. That act further harms the judges by forcing them to choose between obeying GA-13 and obeying the Code of Criminal Procedure, the Texas Constitution, and even a federal consent decree.

First, GA-13 deprives Plaintiff Judges of judicial authority vested in them by the Texas Constitution and statutes. As stated by the district court, the "exercise of judicial discretion falls squarely within the purview of the judicial branch of our government," vested in the judges who were "required to balance [the interests in public safety and the rights of the accused] every day prior to the disaster declaration, and they are required to do so every day while the disaster persists." Resp. App. 1.

The provisions of GA-13 "strip away the discretion of the judiciary and potentially subject its judges to mandamus or criminal action[.]" *Id*. As a result, the district court correctly found that GA-13 injured Plaintiff Judges, and an order enjoining enforcement was necessary to prevent imminent and irreparable harm.

Plaintiff Judges possess the constitutional and statutory authority to determine bail. *See, e.g.*, M.R.22-23, 25-26. Relators do not dispute that judicial power vests in each Plaintiff Judge's individual court, Tex. Const. art. v, § 1; Tex. Gov't Code § 25.1031, and each Plaintiff Judge exercises the jurisdiction prescribed to that court by law, Tex. Gov't Code § 25.003. Specifically, each judge is empowered to admit arrestees to bail or "release the accused without bond." Tex. Code Crim. Proc. art. 15.17. "[A] magistrate"—defined to include judges, *id.* art. 2.09—"may, in the magistrate's discretion, release the defendant on personal bond without sureties or other security." *Id.*, art. 17.03. Each judge is empowered—and required—to consider five factors, including "[t]he ability to make bail," and to find that bail "is not to be so used as to make it an instrument of oppression." *Id.* art. 17.15. Judges possess additional statutory tools to make individualized decisions weighing a person's liberty and the public safety interest at stake. *E.g.*, *id.* art. 42.035 ("A judge . . . may permit the defendant to serve the sentence under house arrest, including electronic monitoring[.]").

GA-13 expressly suspends provisions granting Plaintiff Judges such independent authority, and otherwise affirmatively restricts their powers. M.R.24-25; M.R.42-43; M.R.46-48. In their capacity as criminal court judges, Plaintiffs "routinely set bail and determine conditions of pretrial release." M.R.41. GA-13 "directly interfere[s] with and remove[s] the discretion given to [judges] by the laws and Constitution of our State . . . [imposing] a categorical response in lieu of judicial discretion." M.R.42.

Relators admit that GA-13 "alter[s] the statewide procedural tools available" to judges, and that it limits judicial discretion to a "health or medical" exception. Relators' Br. 7-8, 52. Alteration of these "tools" is injury in fact. *Cf. Nash v. Califano*, 613 F.2d 10, 15 (2d Cir. 1980) ("[T]hese provisions confer a qualified right of decisional independence upon [administrative law judges].").

Further, Plaintiff Judges must choose between GA-13's prohibition against personal bonds, *see* M.R.42; M.R.47, and their obligation, pursuant to a federal consent decree, to make individual assessments of flight risk, safety, and ability to pay, and to release certain arrestees on personal bond, M.R.41 (referring to Harris County Criminal Courts at Law Rule 9); M.R.46-47 (same). "There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation." *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968); *see also City of El Cenizo, Texas v. Texas*, 890 F.3d 164, 186 (5th Cir. 2018) (plaintiff government

officials had standing to bring constitutional challenge against ICE-detainer mandate where compliance and non-compliance with the challenged law subjected the officials to potential criminal or civil liability).

Second, GA-13 has interfered with judicial administration, undermining Plaintiff Judges' effective exercise of their jurisdiction. Prior to GA-13, Plaintiff Judges took several steps, following guidance from this Court and the Court of Criminal Appeals, "to reduce the risk of infection to [court] staff and transmission to others, including those in state custody[.]" M.R.41; M.R.25-26. At a crucial time, GA-13 is "slowing down court proceedings by causing confusion and creating a new type of hearing." M.R. 42; M.R.26. "It has caused confusion among prosecutors . . . among magistrates and hearing officers." *Id.* Further, the Order "has spurred the creation of an entirely new criminal procedure that is not grounded in Texas law," by requiring new hearings on medical and health assessments before judges are permitted to issue personal bonds, which further "slow the process down." *Id.*

b. Relators' arguments show Plaintiff Judges have standing.

Relators do not dispute the above injuries. Instead, they argue that the concrete harms caused by GA-13 do not entitle Plaintiff Judges to sue, since "the *Legislature* may alter the Code of Criminal Procedure . . . [and] likely causes some degree of confusion every time." Relators' Br. 15 (emphasis added). But this is a merits

argument irrelevant to injury, begging the question of whether the injurious act is *ultra vires*.

Courts have long heard judges' challenges to the acts of other branches that injured the judges personally or interfered with the administration of their courts. *See, e.g.*, *United States v. Will*, 449 U.S. 200 (1980) (resolving constitutional challenge by 13 federal judges alleging that federal legislation violated Compensation Clause); *Henry v. Cox*, 483 S.W.3d 119, 148 (Tex. App.—Houston [1st Dist.] 2015), *rev'd on merits*, 520 S.W.3d 28 (Tex. 2017). In *Henry*, the appeals court found that a judge had standing to sue an executive official on the basis that acts affecting a judicial employee impeded the judge's ability to "manag[e] caseloads and implement[] efficient docket control;" to "train[] court staff;" to "arrang[e] for personal bonds," and to fulfill other administrative requirements. The defendant's alleged "interfer[ence] with the ability of [their] court to properly perform its judicial functions," and likewise the judge's ability to "enforce[] constitutional rights and powers under the inherent power of the courts[,]" overcame the defendant's challenge to standing. *Henry*, 483 S.W.3d at 119. This Court did not disturb those conclusions, reaching the merits of the dispute to hold that "Texas law provides a ready answer" to what it framed as a "grave separation-of-powers battle, a clash over judicial independence." *Henry v. Cox*, 520 S.W. 3d 28, 36 (Tex. 2017); *see also Will*, 449 U.S. at 217-18 (Judges could challenge legislature's compensation

decisions, as "[a] Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.").

Relators cite only one case from another state for the proposition that a judge lacks standing to challenge a law's constitutionality. Relators' Br. 12 (quoting *Greater New Orleans Expressway Comm'n v. Olivier*, 892 So. 2d 570, 572 (La. 2005)). In *Olivier*, *defendant* judges lacked standing "as parties to a mandamus proceeding" to challenge "ministerial" duties they asserted violated the rights of third parties. *Id.* at 577. *Olivier* bears no resemblance to Plaintiff Judges' claims here, and indeed the issue might have been resolved differently if "[the court's] jurisdiction [were] affected," as when another branch of government "interferes with or curtails the plenary power of the reviewing court." *State v. Brewster*, 764 S.W.2d 945, 946–47 (La. 2000).

Relators' references to legislative standing cases are also unhelpful, Relators' Br. 12-15, and instead show that deprivation of constitutional authority *is* an injury conferring standing to sue. Plaintiff Judges are not individual members of any legislative body. Unlike legislators, whose power vests in them collectively as members of the legislative body, judicial power vests individually for Plaintiffs Judges, in *each of their courts*. Tex. Const. art. V, § 1. Each Plaintiff Judge individually is granted independent jurisdiction under Texas law. Tex. Gov't Code

§ 25.1031. Relators say that "[t]he same thing was true of the public officials who lacked standing in *Raines*." Relators' Br. 15. Not so. *Compare* Tex. Const. art. 5 § 1 ("The judicial power of this State shall be vested in one Supreme Court . . . in District Courts, in County Courts, . . . and in such other courts as may be provided by law.") *with* Tex. Const. art. 3, §§ 1–2 ("The Legislative power of this State shall be vested in a Senate and House of Representatives[,]" which shall consist of 31 and 150 members, respectively).

Indeed, in *Brown v. Todd*, 53 S.W. 3d 297, 305 (Tex. 2001), this Court held that a single city council member, who was not himself impacted by an ordinance, did not have standing to claim an institutional injury to the council writ large. *Id.* at 305-06 (emphasis added). In *Raines*, four Senators and two Members of Congress did not have standing to challenge the Line Item Veto Act on behalf of the United States Congress. 521 U.S. 811, 817 (1997). The Court noted that the plaintiffs "[had] not been authorized to represent their respective houses of Congress," and "indeed, both houses actively opposed their suit." *Raines v. Byrd*, 521 U.S. at 829. Relators' other citations stand for the same proposition. *E.g.*, *Blumenthal v. Trump*, 949 F.3d 14, 20 (D.C. Cir. 2020) (per curiam) (a group of members who "do not constitute a majority of either body and are, therefore, powerless" do not have standing). Whether the injured party may act "determinatively" is key. *Blumenthal*, 949 F.3d at 20.

Absent GA-13, individual judges may act determinatively with respect to bail. GA-13's restriction of this authority confers standing to sue. *See Ariz. State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2665 (2015) (legislature had standing to challenge ballot initiative that "strip[ped] the Legislature of its prerogative to initiate redistricting"); *Coleman v. Miller*, 307 U.S. 433, 436, 438 (1939) (standing to sue where executive official's allegedly unlawful act "overr[ode] and virtually held for naught" legislative act).

By stripping Plaintiff Judges of their prerogative to grant personal bonds, enforce deadlines, and order non-monetary conditions of relief, GA-13 has individually injured Plaintiff Judges.

An order enjoining enforcement of GA-13 would restore Plaintiff Judges' authority to enforce the rule of law in their courtrooms. And he courts are the proper forum to redress Plaintiff Judges' harms: It is precisely *because* of the separation-of-powers concerns implicated by GA-13 that Plaintiff Judges requested relief from the District Court. Plaintiff Judges have standing to seek temporary, permanent, and declaratory relief. M.R.26, 31-32.

2. Plaintiff Organizations have standing.

Plaintiff Organizations have standing to sue on behalf of themselves and their members. Though the District Court did not need to make findings regarding Plaintiff Organizations' standing to issue a TRO, their standing provides an

independent basis to issue the relief sought. *See Andrade v. NAACP of Austin*, 345 S.W.3d 1, 6 (Tex. 2011) ("where parties seek only declaratory and injunctive relief, 'only one plaintiff with standing is required'").[2]

a. Plaintiff Organizations have standing to sue on behalf of their members.

As evidenced by the specific and numerous allegations of harm set forth by Plaintiffs in their declarations, Plaintiff Organizations have identified members, alleged injury suffered by those members as a result of GA-13, and demonstrated an adequate membership structure.

Relators mistakenly claim that Plaintiff Organizations may not even "hav[e] members who associate." Relators' Br. 18. As Plaintiffs alleged, TCDLA is a statewide membership organization with over 3,400 criminal defense attorney members, M.R.49; CAPDS assigns and manages over 180 defense attorneys to represent indigent clients, M.R.55; ACDLA is a professional organization made up of dues-paying lawyers in Central Texas who represent accused citizens, M.R.63; and Texas State Conference of the NAACP ("NAACP") has thousands of members throughout Texas. M.R.69. Plaintiffs have shown that they have membership to represent. *E.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958)

[2] Real Parties in Interest previously incorporated specific paragraphs of their Application and the sworn declarations of Organization representatives in their response to Relators' Petition for Review. *See, e.g.,* M.R.26-30, 49-73.

(holding that an organization could sue on behalf of its members without disclosing membership lists).[3]

Each has members with standing to sue in their own right. TCDLA represents a statewide network of criminal defense attorneys, and "GA-13 contains several provisions directly impacting the defense of the citizen accused[.]" M.R.52. Attorneys must analyze and implement the terms of this unlawful order. The detention of clients who would have been released but for GA-13 implicates the schedule of representation, impedes communication, burdens investigation, requires additional visits to jails, and necessitates additional work to secure HIPAA-compliant releases of medical records to secure pretrial release for clients. M.R.53-54. The revisions to good-time requirements obligate additional coordination with the Sheriff's Office to determine and advocate for eligibility for commutation, and have required revisions to plea agreements. *Id.* Because attorneys are often compensated with a flat fee, the additional burdens of representation are not compensated. *Id.* 53-54.

Prior to GA-13, CAPDS had implemented a "virtual bonding system that allowed defense attorneys, prosecutors, and judges to review bonding packages . . . collect electronic signatures, and communicate with clients in custody without any

[3] Nor can Relators rest on a supposed failure to assert "indicia of membership." *See e.g.*, M.R. 49, 55, 64.

parties requiring in-person contact." M.R.58. GA-13 has "dramatically and irrevocably hampered" this system of bond review. Members must now prepare for and appear at new hearings seeking release for "health or medical reasons," creating a new workload for which there is "no precedent." *Id.* These hearings require obtaining client signatures—a high-risk burden with detained clients now subject to mandatory quarantine in jail—in order to procure HIPAA-compliant medical records. *Id.* at 59. CAPDS members have conducted such novel hearings that would have been unnecessary but for GA-13. *Id.* at 58. All provisions add uncompensated work, including work to do comprehensive criminal history checks to investigate whether a client will be subject to GA-13. *Id.* at 61-62.

ACDLA members have "spen[t] substantial time developing and filing writs seeking releases that otherwise would have been automatic," which requires visiting detained clients who would have otherwise been out on personal bond. M.R.66-67. As one example, ACDLA's board president "had to travel to Del Valle outside of Austin, submit to have her temperature taken, and produce paperwork for her client's signature so she could submit [a] writ on her client's behalf. This process would have been wholly unnecessary prior to the issuance of GA-13." M.R.66-67. As another example, an ACDLA member's client had a personal bond denied for failure to present proof of a medical issue, which then required the attorney to engage in additional work to meet this new evidentiary hurdle. M.R.67.

NAACP represents not only judges and defense lawyers, but also corrections officers and incarcerated individuals who are at an increased risk of harm of contracting COVID-19 in jails that are overcrowded as a result of GA-13. M.R.70–71. These risks are especially concerning to the NAACP because numerous studies have shown that African-Americans face a substantially higher risk of death and serious physical impairment from COVID-19.[4] M.R.71-72.

Relators do not dispute these injuries in fact. Instead, Relators reduce the organizational members' myriad injuries to simply the increased need to visit jails. Relators assert that attorneys' "decision to go to jails to seek the release of felony arrestees during a global pandemic is a voluntary undertaking." Relators' Br. 17-18. This assertion is rebutted by the Record. *See* M.R.52 ("To be blunt, this order may mean life or death for many of our clients."). Plaintiffs' members "are constitutionally and professionally duty-bound to their clients. They must fight for their clients' constitutional rights, including bail." M.R.65. In itself, the detention of clients that otherwise would have been released but for GA-13 burdens representation. M.R.53. During a public health crisis, attorneys are now forced to rush to jail in service of a client who would otherwise not be detained while putting

[4] *See* Melani Barden, *Statistics show minority communities are disproportionately affected by coronavirus*, CBS|Austin (April 13, 2020), *available at* https://cbsaustin.com/news/local/statistics-show-minority-communities-are-disproportionately-affected-by-coronavirus.

themselves and their families at heightened risk of contracting this deadly virus. M.R.52. Indeed, as of April 18, a sheriff's deputy in the Travis County Jail has tested positive for COVID-19, and ten people incarcerated in the jail are under quarantine because they have exhibited symptoms of the virus.[5]

As a result of these injuries, Plaintiff Organizations have standing on behalf of their members. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). In *Austin Lawyers Guild v. Securus Techs., Inc.*, the court found that a "membership-based, incorporated non-profit organization, which includes as members a number of Austin, Texas criminal defense attorneys" had associational standing to assert statutory and constitutional claims against Travis County officials and a private company for their alleged recording of attorney-client phone calls. No. 1:14-CV-366-LY, 2015 WL 108185854 at *4–5 (W.D. Tex. Feb. 4, 2015), *adopted by* 2015 WL 11237655 (W.D. Tex. Mar. 23, 2015). The court held that, like the burdens imposed by GA-13, the defendants' alleged conduct "interfere[d] with the business relationship between attorneys and their clients," by requiring additional time for each representation, and therefore constituted injury-in-fact. *Id.* at *4.

[5] *Travis County Jail officer tests positive for coronavirus, officials say*, Austin Am. Statesman (April 17, 2020), *available at* https://www.statesman.com/news/20200417/travis-county-jail-deputy-tests-positive-for-coronavirus-officials-say?fbclid=IwAR00bSN0OdbaYqWe6crYluINU3KaIAA426EI-XaqfT9YL7HVeobMviyjHJ8.

Relators' argument that Plaintiff Organizations did not "allege the identity of at least one specific member" is legally and factually incorrect. Relators' Br. 17. Because associational representation stands in for individual representation, *Hunt*, 432 U.S. at 342-43, it is not necessary to name each impacted member. *See Austin Lawyers Guild*, 2015 WL 1018584 at *4 ("it is unnecessary to demonstrate every member of an association has suffered an injury-in-fact; if any member has suffered an injury-in-fact it may be imputed to the association") (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Nevertheless, each Plaintiff has submitted sworn declarations detailing injury to members by GA-13. TCDLA detailed that specific volunteer members, led by Clay Steadman, formed a "Task Force" to respond to GA-13, which has daily received at least 25 member calls pertaining to GA-13 through its hotline. M.R.51, 53. CAPDS explained that individual members have conducted hearings pursuant to GA-13. M.R.58. The declaration of Steve Brand on behalf of ACDLA not only identifies Mr. Brand as a member, but also cites the work of several others. M.R.66-67.

Plaintiffs also satisfy the other requirements for associational standing. Fighting to vindicate their members' interests to zealously defend their clients and support their community is germane to each organization's purpose. *See* M.R.50 (TCDLA); M.R.56 (CAPDS); M.R.64-65 (ACDLA); M.R.70-71 (NAACP); *see also Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, 627 F.3d 547, 550

n.2 (5th Cir. 2010) ("the germaneness requirement is 'undemanding' and requires 'mere pertinence'" with the organization's purpose). And the claims asserted and relief requested do not require individual representation. "[T]he remedy, if granted, will inure to the benefit of those members of the association actually injured." *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993) (quoting *Hunt*, 432 U.S. at 343).

b. Plaintiff Organizations have standing on their own behalf

Plaintiff Organizations have themselves suffered injury in fact from the issuance of GA-13. For injury in fact, an organization need only show a "concrete and demonstrable injury to the organization's activities." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). A "perceptibl[e] impair[ment]" to the organization's normal activities, and the diversion of resources that would have gone elsewhere to counteracting that impairment, suffices. *Id.*

GA-13 "alter[s] the statewide procedural tools available" to secure pretrial and post-conviction release and creates the narrow exception of pretrial release "for health or medical reasons." Relators' Br. 52. Relators wrongly assert that the work required does not differ from Plaintiffs' "routine activity" and that Plaintiffs do not "specif[y] projects" that GA-13 has prevented them from undertaking. Relators' Br. 18-19.

Each Plaintiff Organization has diverted substantial resources in response to GA-13. CAPDS has lost the value of administrative and technical support systems it previously implemented with courts and jails and has been required to build new capacity, including arranging for video appearance at medical exception hearings. M.R. 58-59. The organization has been required to provide new technical assistance to members who must now gather medical evidence. M.R.59. This diversion frustrates previously ongoing projects including "the further development of [] virtual dockets, enhancements to [their] electronic bonding process, refinement of electronic disposition paperwork, and training on all these matters," as well as contractually obligated improvements to and enhancement of indigent defense services. M.R.60. GA-13 has thus hindered CAPDS's work in furtherance of its mission. M.R.56.

TCDLA immediately diverted "scarce and valuable" volunteer time to respond to member concerns in the wake of GA-13. M.R.52. GA-13 was not "routine": it precipitated a "fundamental shift to the landscape of both pretrial and post-conviction criminal procedure in every [statewide] jurisdiction in which [TCDLA] operate[s]." M.R.51. Members have inundated TCDLA with requests for assistance, which requires analyzing the terms of the order and its implementation in 38 jurisdictions. M.R.52. The organization has fielded at least 25 calls through its hotline every day that GA-13 has been in force, *id.*, and put all of its ordinary

operations—"revenue collection, membership drives, publications, advocacy, amicus support, and other activities"—all of which are necessary to TCDLA's mission, M.R.50, on hold. M.R.53. This was not a distributional choice by TCDLA management; rather, it was in direct response to demands of members who sought guidance that TCDLA is obligated to provide, and it is "not sustainable." M.R.53

ACDLA has been similarly "inundated with phone calls and requests." M.R.66. The organization has had to develop training materials for its members to respond to GA-13. *Id.* ACDLA has responded to hundreds of calls per day on all provisions of the order. *Id.* And, upon learning that pretrial services in a county had ceased accepting bond paperwork if it unilaterally determined a person in custody was ineligible for personal bond under GA-13, ACDLA immediately coordinated with judges to ensure that the practice would not continue. *Id.* at 67-68. ACDLA is thus diverting *all* of its capacity in a manner that does not further its long-term mission. M.R.64-65.

Prior to this crisis, the NAACP's Criminal Justice Committee received between 55 and 60 calls each month seeking assistance, and the Committees' protocol is to give each of these requests an individualized assessment and follow-up. M.R.72. Already, the NAACP is receiving increased calls from its membership seeking assistance related to GA-13, and it expects the Committee to quickly become "inundated with calls for help" arising from the Order. *Id.* Given the resources

required to handle each caller, responding will "monopolize" the resources of the Committee and its staff, causing the diversion of resources away from the critical civil-rights matters they would normally address but now "will not be able to." *Id.* The NAACP has been forced to "place on hold many of [its] efforts to address . . . injustices," efforts in furtherance of its mission, M.R.70-71, in order to address the impact of GA-13. M.R.73. These concrete and particularized harms give the NAACP standing to challenge the order.

These injuries are not "self-inflicted" or mere "budgetary choices." Plaintiff Organizations did not seek out GA-13—it crashed upon them. Relators' citations do not undermine Plaintiff Organizations' standing. In *Fair Employment Council of Wash.v. BMC Marketing Corporation*, 28 F.3d 1268 (D.C. Cir. 1994), the D.C. Circuit held that an employment organization had standing to challenge a marketing company's discriminatory practices because the company's actions had impaired organizational activity and because the organization had to "expend resources to counteract BMC's alleged discrimination." *Id.* at 1276-77. Though the court declined to find standing based on costs spent solely in furtherance of the litigation itself, the court found standing based on other resource diversion. *Id.*

The harms caused by GA-13 confer standing on each Plaintiff Organization. *See Veasey v. Perry*, 71 F. Supp. 3d 627, 633 (S.D. Tex. 2014), *affirmed with independent standing review*, 796 F. 3d 487, 494 (5th Cir. 2015) (NAACP and other

organizations had standing to challenge state voting law because allegedly illegal interpretation caused diversion from, *inter alia*, voter registration, to educate members about S.B. 14); *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250 (11th Cir. 2012) (injury where organization "receive[d] an increased number of inquiries about the" challenged statute, "forcing it to divert volunteer time and resources" away from normal activities "to educating affected members of the community and fielding inquiries"); *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165–66 (11th Cir. 2008) (injury where organization "reasonably anticipate[d] that [it would] have to divert personnel and time to educating volunteers and [affected individuals] on compliance" with the challenged statute).[6]

c. Plaintiffs' injuries are traceable to Relators' actions and redressable by the relief requested.

Relators contend that the injuries caused by GA-13 are not traceable to Relators' actions or redressable because the Governor and Attorney General lack authority to enforce the Executive Order. This contravenes both the law and the factual record.

[6] Relators assert that Plaintiffs cannot establish "statutory standing" as defined in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014), as "the only arguable 'right' implicated under [the UDJA] is an arrestee's alleged liberty interest." Relators' Br. 20. Plaintiffs do not assert that the UDJA *creates* their rights. *See Lexmark*, 572 U.S. at 128. Plaintiffs themselves have suffered injury by GA-13 and invoke the UDJA "to settle and to afford relief." *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 626 (Tex. 1996).

Ultimately, there must only be "a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[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.'" *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 154–55 (Tex. 2012) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992)). And, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id*. at 155. Here, this entire controversy was caused by the Governor's issuance of the Order, and the Attorney General has publicly threatened enforcement. A declaration as to the Order's invalidity and an injunction as to its enforcement by these officials would fully redress the harms alleged by Plaintiffs above.

3. Plaintiffs have standing to sue Relators as proper defendants who do not enjoy sovereign immunity.

a. Relators are proper defendants.

The Governor issued GA-13 "by virtue of the power and authority vested in [him] by the Constitution and laws of the State of Texas" and ordered suspension of the laws at issue "on a statewide basis effective immediately." M.R.37. As Relators argue and GA-13 states, the Governor intends for the Order to "have the full force and effect of law." *Id*. (quoting Tex. Gov't Code § 418.012). Further, the Order, by its own terms, "shall remain in effect and in full force" and may *only* be "modified,

amended, rescinded, or superseded" by the Governor. M.R.38. The existence of GA-13 harms Plaintiffs and is traceable directly to the Governor.

The Attorney General threatened to enforce GA-13 against Plaintiff Judges and has actively litigated in other cases to encourage its enforcement, including *intervening* in a pending federal lawsuit to argue the Order's constitutionality. The threat of enforcement of GA-13 harms Plaintiffs, traceable directly to the Attorney General.

Beyond the text of the Order, the Governor has additional ways to enforce executive orders. For example, during a declared state of disaster, the Governor is the head of all state agencies with emergency responsibilities. Tex. Gov't Code § 418.015. The Governor also may, at any time during a disaster, "assume command and direct the activities" of the Department of Public Safety, including all state troopers and Texas Rangers, in order to "perform the governor's constitutional duty to enforce law." Tex. Gov't Code § 411.012. Given the Governor's position that GA-13 has the full force and effect of the law and is subject to criminal penalties and fines, *see* Tex. Gov't Code § 418.173, this enforcement authority during disasters could even extend to "command[ing] or direct[ing]" the arrest of people not complying with GA-13, including judges.

This Court, however, need not determine the full reach of the Governor's authority to enforce his executive orders. Here, the Governor has assumed the power

to suspend laws and, has mandated its enforcement. But for GA-13, there would be no controversy. As a result, the Governor's actions have caused and continue to cause harm to Plaintiffs. Restraining the Governor from exercising his declared authority to enforce the Executive Order redresses the injuries that Plaintiffs are experiencing as a result of the Executive Order. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Similarly, the Attorney General has the authority to prosecute Plaintiffs, at the request of local prosecutors, for alleged violations of the Executive Order. Tex. Gov't Code §402.028(a); Relators' argument that the threat of enforcement is speculative is belied by the Attorney General's public statement on GA-13, in which he threatened enforcement, stating that the "office [of the Attorney General] *will not stand* for any action that threatens the health and safety of law-abiding citizens."[7] Relators minimize the importance of this statement as a "tweet"—as if to suggest that the Attorney General does not intend what he publicly states. Relators' Br. 22. Given the Attorney General's public statements, the Plaintiff Judges reasonably fear likely enforcement if they prioritize the Constitution and statute over the Governor's conflicting order. Plaintiffs Judges need not subject themselves to an enforcement

[7] Attorney General Ken Paxton (@KenPaxtonTX), Twitter (March 30, 2020, 10:26 AM), https://twitter.com/KenPaxtonTX/status/1244647288976412675. Courts have recognized that Twitter accounts run by government officials constitute government speech. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 552 (S.D.N.Y. 2018), aff'd, 928 F.3d 226 (2d Cir. 2019) .

action to establish harm. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59 (2014). Further, actions by the Attorney General's Office demonstrate their intent to take action. At the time Plaintiffs' petition was filed, members of the Attorney General's office had already joined at least one Plaintiff's proceedings via Zoom to observe and monitor the implementation of GA-13. M.R.42.

Such threats of enforcement by the Governor and Attorney General have been held to confer standing to challenge a Governor's executive order. Determining that plaintiffs had standing to challenge an executive order relating to surgical procedures during this very pandemic, the court in *Planned Parenthood v. Abbott* held that the Governor and Attorney General likely have "some connection" to the enforcement of the executive order, "consistent with the governor's statutory authority, Tex. Gov't Code § 418.012," the Attorney General's "authority to prosecute Plaintiffs and their agents, at the request of local prosecutors, for alleged violations of the Executive Order, Tex. Gov't Code § 402.028(a)," and the Attorney General's "publicly threatened enforcement." No. A-20-CV-323-LY, 2020 WL 1815587, at *6 (W.D. Tex. Apr. 9, 2020).

The same result must apply here. Relators state that "judges are obligated to comply with state law," including this Executive Order. Relators' Br. 22 (citing Tex. Gov't Code § 418.012 (providing that "[e]xecutive orders . . . have the force and effect of law")). A declaration clarifying that GA-13 is invalid as *ultra vires* and an

order enjoining any enforcement of it against Plaintiff Judges would entirely nullify their ongoing harm. This meets the standard for redressability.

It is also clear that injunctive relief against Relators would redress the harm GA-13 inflicts because, while the TRO was in effect, the harm was in fact redressed. *See* Petition for Original Writ of Habeas Corpus, *Ex Parte Luis Arroyos*, NO. WR-91,169-01 (Tex. Crim. App. 2020) (explaining that the applicant had been arrested on April 4, 2020 and held pursuant to GA-13, but that, "in light of [Judge Livingston's] restraining order, the magistrate then approved a personal bond for Applicant's release."). And needless to say, if Relators indeed have no interest in enforcement, a restraining order would cause them no harm and mandamus is unnecessary.

b. Relators do not enjoy sovereign immunity for their ultra vires acts.

Relators cannot claim immunity because their acts were *ultra vires*. Lawsuits brought "to require state officials to comply with statutory or constitutional provisions are not prohibited by sovereign immunity." *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). This exception to sovereign immunity applies if the suit (1) "is brought against state actors in their official capacity"; (2) "allege[s], and ultimately prove[s] that the officer acted without legal authority"; and (3) is for prospective relief only. *Id*. at 368–73.

Plaintiffs have alleged a proper *ultra vires* action against proper defendants. The action was brought against Relators in their official capacities. As explained below, the Governor's Order was not lawful; therefore, the Attorney General cannot lawfully enforce it. Plaintiffs have not requested any retrospective relief, relief that would require Relators to perform an act, or any relief that would require the expenditure of state funds. *See id.* at 375 (noting that "the modern justification for [sovereign] immunity" is "protecting the public fisc.").

Relators conflate this Court's *ultra vires* doctrine with federal *Ex Parte Young* doctrine. This Court has never adopted *Young*'s framework, which is different from Texas *ultra vires* law in important respects. Instead, this Court has only ever discussed the *Ex Parte Young* doctrine in relation to one prong of the *ultra vires* analysis: the requirement that relief should be prospective. *Heinrich*, 284 S.W.3d at 376 ("The best way to resolve this conflict is to follow the rule, outlined [by the federal courts], that a claimant who successfully proves an *ultra vires* claim is entitled to prospective injunctive relief.").

Relying on *Young*, Relators assert that the proper party for an *ultra vires* suit is the official threatening to enforce an illegal statute or policy. Relators' Br. 32 (citing *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019)). This is not Texas law. Rather, the proper party is the official who exceeded their authority, even if another person will enforce that policy. This Court's decision in *Hall v. McRaven*,

508 S.W.3d 232 (Tex. 2017), is illustrative. There, Hall, a University of Texas regent, filed an *ultra vires* suit against McRaven, the chancellor, for failing to turn over certain University-held information. *See id.* at 239-40. But in denying Hall the information, McRaven was only following rules established by the Board of Regents. *See id.* at 240. This Court held that to the extent Hall took issue with the rules McRaven followed, his complaint was with the Board itself, not McRaven. *Id.* Here, Plaintiffs' complaint is with Governor Abbott for issuing GA-13, not with local district attorneys who might enforce it.

The critical point is that, unlike under *Young*, the viability of an *ultra vires* suit under Texas law depends not on whether the challenged action is generally unconstitutional, but whether the official exceeded the authority given by the governing law—or acted without *any* authority. Thus, in *Pruett v. Harris County Bail Bond Board*, the defendants did not act *ultra vires* because the Occupations Code permitted their actions—even though those actions violated the plaintiff's First Amendment right to commercial speech. 249 S.W.3d 447, 452, 461-62 (Tex. 2008). Similarly, in *Patel v. Texas Department of Licensing and Regulation*, this Court held that officials were not acting *ultra vires* when they acted pursuant to state statute, but left open the question of whether the statute itself was unconstitutional. 469 S.W.3d 69, 77 (Tex. 2015). In both cases the defendants acted within the authority granted by the statute, and therefore were not acting *ultra vires* regardless of whether

the authorizing statute was constitutional. By contrast, Plaintiffs in this case are not challenging the constitutionality of a statute; their claim is that Relators were not permitted by the Disaster Act or any other state statute to suspend articles of the Code of Criminal Procedure. Therefore, Relators are proper defendants in this *ultra vires* action.

Conflating the federal *Ex Parte Young* doctrinal requirement that plaintiffs sue the person chiefly in charge of enforcement with *ultra vires* doctrine would mean courts could provide no remedy in an *ultra vires* action against an executive order, no matter its contents. So long as a Governor does not personally "enforce" an executive order and instead ordered some other official to do it, no court could reach the question of whether the governor had acted *ultra vires* in issuing the order. Any official that did enforce it would be acting pursuant to the executive order, which would have the full effect of law, and therefore would not be acting *ultra vires*. And as discussed *infra*, Relators also argue that the UDJA does not waive sovereign immunity for executive orders. Thus, under Relators' interpretation of the law, there is no recourse available under state law to challenge an executive order, no matter how unauthorized or unconstitutional it is. This is plainly wrong.

Relators also assert that Plaintiffs should have named district attorneys as defendants. Beyond the impracticality and inefficiency of naming hundreds of district attorneys in a suit to facially invalidate an action taken by one state official,

as discussed above, Relators are the appropriate defendants in an *ultra vires* action. The inappropriateness of the district attorneys as defendants is illustrated by *Southwestern Bell*, in which this Court held that defendant county officials acted *ultra vires* when directing a city official to send a letter, but the city official did not act *ultra vires* in executing the county officials' instructions because they were authorized to do so under city ordinance. *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 588 (Tex. 2015); *accord McRaven*, 580 S.W.3d at 240. District attorneys, in enforcing the illegal Order, would not be acting *ultra vires* because they would be acting pursuant to the Governor's Executive Order, which purports to have the full effect of law, and pursuant to Tex. Gov't Code § 418.173. Here, the Governor has issued an executive order he had no authority to issue, and is therefore a proper defendant. Relators also need not wait for a district attorney to attempt to enforce GA-13, as described above.

c. Sovereign Immunity Is Also Waived Under the UDJA Because Plaintiffs Challenge the Validity of the Executive Order

Under the UDJA, sovereign immunity is waived "for challenges to the validity of an ordinance or statute." *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 552 (Tex. 2019). Relators argue that because GA-13 is not a statute, sovereign immunity is not waived. This incongruous result would immunize from challenge the Governor's extraordinarily broad claims of unitary power. Indeed, even as Relators

deny that the Order is a statute, they tout its super-statutory power: the Order "ha[s] the force and effect of law," permitting the Governor to unilaterally amend Texas statutes at will during a disaster that only he can declare. Relators' Br. 49 (quoting Tex. Gov't Code § 418.012). To hold that executive orders are outside the scope of judicial review would invite abuse by the executive. This Court should recognize that the UDJA waives immunity in these circumstances. *See also Texas Dep't of Transp. v. Sefzik*, 355 S.W.3d 618, 622 n.4 (Tex. 2011) ("On 'rare occasions,' we may recognize a waiver absent explicit language." (quoting *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2003)).

Further, the Governor, as chief executive of the State, is the proper defendant for a challenge to the constitutionality of a state executive order. *Mr. W. Fireworks, Inc. v. Comal County* 03-06-00638-CV, 2010 WL 1253931, at *4 ("[The plaintiff's] remaining claims challenge the constitutionality…the Governor's Order…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…. Given [the plaintiff's] failure to make the State or Governor's office parties to this suit, we dismiss [his] claims regarding the constitutionality of the…Governor's Order under the Texas and U.S. Constitutions.").

"The legislature intended the UDJA to be remedial, to settle and afford relief from uncertainty and insecurity with respect to rights, and to be liberally construed."

Texas Logos, L.P. v. Texas Dept. of Transp., 241 S.W.3d 105, 114 (Tex. App.—Austin 2007, no pet.). Because Plaintiffs challenge the validity of an executive order that would otherwise have the force and effect of law, Relators are proper defendants and sovereign immunity is waived under the UDJA.[8]

B. The District Court's jurisdiction to issue the TRO against the Governor is not affected by Section 22.002(c).

The TRO is within the District Court's jurisdiction. The district court "is a court of general jurisdiction," with "'exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by th[e] Constitution or other law on some other court, tribunal, or administrative body.'" *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000) (quoting Tex. Const. art. V, § 8).

Relators argue that the jurisdiction to issue the kind of TRO issued by the District Court falls within the limited scope of original jurisdiction that Section 22.002(c) reserved for the Supreme Court. Relators' argument is at odds with the plain language of Section 22.002(c) as consistently interpreted by Texas courts for more than 100 years.

[8] If this Court finds that the Disaster Act or any other statute does give the Governor the authority to suspend the subject provisions of the Code of Criminal Procedure, then Plaintiffs challenge those statutes as unconstitutional violations of the separation of powers and of Article 1, Section 28 of the Texas Constitution. In challenges to unconstitutional statutes, sovereign immunity is waived under the UDJA. See *Shady Shores*, 590 S.W.3d at 552.

In interpreting statutes, courts "must look to the plain language," as a "statute's plain language is the most reliable guide to the Legislature's intent." *Silguero v. CSL Plasma, Inc.*, 579 S.W.3d 53, 59 (Tex. 2019). Section 22.002(c) provides:

> Only the supreme court has the authority to issue a writ of mandamus or injunction, or any other mandatory or compulsory writ or process, against any of the officers of the executive departments of the government of this state to order or compel the performance of a judicial, ministerial, or discretionary act or duty that, by state law, the officer or officers are authorized to perform.

By its terms, Section 22.002(c) reserves for the Supreme Court original jurisdiction to issue only an injunction that (1) is "against any of the officers of the executive departments of the government of this state," *and* (2) is to "order or compel *the performance of a* judicial, ministerial, or discretionary *act or duty* that, by state law, the officer or officers are authorized to perform." *Id.* (emphasis added).

1. The Governor cannot be an "officer" for purposes of Section 22.002(c).

As to the first prerequisite for Section 22.002(c)'s application, the Governor is not an "officer[] of the executive departments" for purposes of the statute. The Texas Constitution explicitly denies the Legislature the power to grant the Supreme Court jurisdiction to issue writs of mandamus against the Governor. *See* Tex. Const. art. V, sec. 3 ("The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be

specified, *except as against the Governor of the State*." (emphasis added)); *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 672 (Tex. 1995) (recognizing that section 22.002(c) does not apply to the governor). Because section 22.002(c) does not grant to a different tribunal exclusive jurisdiction to issue writs of mandamus or injunction against the governor, the district court's general jurisdiction remains intact.

2. Section 22.002(c) applies only to orders that compel performance of an act or duty, and this TRO does not compel performance.

Not every injunction against an executive officer is within this Court's exclusive jurisdiction, but only those that "order or *compel the performance* of [an] . . . act or duty." Tex. Gov't Code § 22.002(c) (emphasis added). This Court "presume[s] the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted." *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015).

The District Court's TRO does not "order or compel the performance" of any act by either the Governor or the Attorney General. The TRO only "[r]estrains Defendants from enforcing Executive Order GA-13 against judges." M.R.2. This is why Relators attempt, unsuccessfully, to characterize Plaintiffs' claims as compelling the Governor to take action to rescind his order. But Plaintiffs have never asked for such relief, and the TRO's text is clear. Plaintiffs seek injunctive relief "to preserve the *status quo* and restrain Defendants from enforcing GA-13, while the

Order's validity is determined," and a declaratory judgment that GA-13 is *ultra vires* and unconstitutional. M.R.31-32. If the ultimate requested relief were granted, the Court would simply declare the Executive Order null and void and restrict any enforcement or implementation by Relators—the Governor and the Attorney General would not be required to take any action. The TRO issued by the District Court therefore is not within the scope of Section 22.002(c).

For over 100 years, Texas courts consistently have interpreted Section 22.002(c) and its predecessor to apply only to orders that compel affirmative performance of an act, consistent with the language of the statute. *See* Tex. Gov't Code § 22.002(c); *Kaufman Cty. v. McGaughey*, 21 S.W. 261, 262 (Tex. App.—Austin 1893, writ ref'd) (holding that predecessor to section 22.002(c), identical in relevant respects, applied to orders compelling action by state executives, but not orders prohibiting acts that "have been, or will be, committed without and in excess of lawful authority"); *Terrell v. Middleton*, 187 S.W. 367, 369 (Tex. App.—San Antonio 1916) ("By the terms of that law no court could compel, by any writ, the performance of any act or duty of any state officer; but it is not even hinted that the district court would not have the power and authority to restrain the performance of an illegal and unconstitutional act by a state officer." (interpreting predecessor to section 22.002(c))), writ ref'd, 191 S.W. 1138 (1917); *Witt v. Whitehead*, 900 S.W.2d 374, 375–76 (Tex. App.—Austin 1995, writ denied) (holding that where a

state executive officer's delegation of responsibility was beyond the officer's authority, the district court "can grant permanent injunctive relief to prohibit enforcement" of that unlawful delegation). *See also* 14 Tex. Prac., Texas Methods of Practice §63:68 (3d ed.).

This Court has routinely affirmed prohibitory trial-court injunctions against executive officers, or if it reversed has done so on non-jurisdictional grounds. *See, e.g.*, *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Thompson v. Calvert*, 489 S.W.2d 95 (Tex. 1972); *Calvert v. Hull*, 475 S.W.2d 907 (Tex. 1972); *House of Tobacco, Inc. v. Calvert*, 394 S.W.2d 654 (Tex. 1965); *Gordon v. Lake*, 356 S.W.2d 138 (Tex. 1962); *Port Arthur Tr. Co. v. Muldrow*, 291 S.W.2d 312 (Tex. 1956); *Rogers v. Daniel Oil & Royalty Co.*, 110 S.W.2d 891 (Tex. 1937).

Relators cite no authority contradicting this plain-language interpretation of Section 22.002(c). Indeed, the unpublished child support cases cited by the Relators are consistent with this interpretation because they involve orders requiring executive officers to *perform* an act or duty. *See In re C.H.*, No. 13-17-00544-CV, 2019 WL 5251145, at *4 (Tex. App.—Houston [14th Dist.] Oct. 17, 2019, no pet.) (concerning district court order that the Attorney General rescind writs of withholding already issued and stop further withholding efforts); *In re Office of Att'y Gen.*, No. 05-18-00086-CV, 2018 WL 1725069, at *1-2 (Tex. App.—Dallas Apr. 10, 2018, orig. proceeding [mand. denied]) (holding that district court did not have

jurisdiction under § 22.002(c) to issue "direct and mandatory" order compelling the Attorney General to withhold child support payments); *In re H.G.-J.*, 503 S.W.3d 679, 682 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (district court lacked jurisdiction to issue order compelling Attorney General to distribute child support payments); *In re A.B., Jr.*, 267 S.W.3d 564, 565 (Tex. App.—Dallas 2008, no pet.) (district court lacked jurisdiction to issue order directing Attorney General to remit child support payments to particular party).

Relators ultimately concede that it is "permissible" for a District Court to issue a prohibitory injunction that "seeks to enjoin future acts from occurring as opposed to a mandatory injunction that operates to undo or nullify an act already performed." Relators' Br. 27. Enjoining a future act from occurring is exactly the function of a TRO. The TRO issued by the District Court is therefore within its jurisdiction.

Because section 22.002(c) does not apply to the governor and, in any event, the TRO does not compel any executive officer to perform any act or duty, the District Court acted well within its jurisdiction in issuing the TRO.

II. Plaintiffs are likely to prevail on the merits because the Disaster Act does not permit Relators to suspend the targeted provisions of the Code of Criminal Procedure.

A. Section 418.016(a) of the Texas Government Code does not grant the Governor authority to suspend articles of the Code of Criminal Procedure.

1. The Code of Criminal Procedure cannot be suspended by the Governor because it is not a regulatory statute affecting state business.

During a declared disaster, 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 § 418.016(a). The provisions of the Texas Code of Criminal Procedure targeted by GA-13 do not fall within this authority.

a. Accepting Relators' definition of "regulatory" would grant the Governor unlimited authority to suspend laws.

Relators assert that the Governor may suspend any and all laws during a disaster. *See* Relators' Br. 44 ("In effect, the Legislature decreed that *any of its statutes* can be suspended based upon a factual determination by the Governor about the effects of a rapidly unfolding disaster") (emphasis added). But legislatures do not "hide elephants in mouseholes." *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001) (Scalia, J.)

Regulatory statutes are those that are directed at or implemented by state agencies. *See* Beal Br. 3 ("[T]he legal meaning of a regulatory statute is one of a civil nature to be administered by an Executive agency."). While the term "regulatory statute" is not defined in the Disaster Act, its meaning is straightforward and can be determined from the language and structure of the Act. *City of Houston v. Bates*, 406 S.W.3d 539, 543 (Tex. 2013) ("[T]he meaning of particular words in a statute may be ascertained by reference to other words associated with them in the same statute.") . *First*, the Legislature limited the regulatory statutes that may be suspended to those "prescribing the procedures for conduct of state business," Tex. Gov't Code § 418.016(a), and these words cannot be ignored or "read out of the statute" to favor a broader construction. *Aleman v. Texas Med. Bd.*, 573 S.W.3d 796, 804 (Tex. 2019).

Second, the remaining text of Section 418.016 illustrates the kind of "regulatory statutes" that the Governor may suspend in order to cope with disaster, including rules related to vehicle registration, § 418.016(f)(2), and a fuel tax requirement, § 418.016(f)(6). This interpretation is consistent with the Governor's other enumerated powers under the Act to suspend specific regulatory provisions that are implemented by state agencies. *See*, *e.g.*, § 418.019 (allowing the governor to "suspend or limit the sale, dispensing, or transportation of alcoholic beverages, firearms, explosives, and combustibles"); § 418.020 (permitting the governor to

temporarily suspend certain laws to provide temporary housing or emergency shelter).

Third, if the Legislature had intended for the Governor's ability to suspend "regulatory statutes" to include all state laws, it would have said so explicitly. But in that case, each of the above provisions setting out the governor's authority would be superfluous. *See Worsdale v. City of Killeen*, 578 S.W.3d 57, 69 (Tex. 2019) ("Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes.") (*quoting* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 539 (1947)). The title of this section also refers to "Suspension of *Certain* Laws and Rules," Tex. Gov't Code § 418.016(a) (emphasis added), which further suggests the Legislature did not intend to grant the Governor authority to suspend *all* laws and rules. *Id.*[9]

Fourth, recent legislation amending the Disaster Act confirms this meaning. In 2019, the Legislature codified Section 418.0155 of the Act, which requires the governor's office to compile a list of regulatory statutes and rules that may require suspension. *See* Acts of 2019, 86th Leg., ch. 945 (H.B. 7), § 1 (to be codified at Tex.

[9] Relators' invocation of the Open Meetings Act does not disprove this point. Relators' Br. 39. The Disaster Act itself provides exceptions to quorum requirements for public meetings during disasters, Tex. Gov't Code § 418.1102, and the Open Meetings Act waives certain requirements for emergency meetings, Tex. Gov't Code § 551.125. The Attorney General also has a statutorily prescribed role in enforcing and monitoring any violations of the Open Meetings Act. *See, e.g.,* Tex. Gov't Code § 551.142.

Gov't Code § 418.0155). Critically, this law only enables a "state agency *that would be impacted by* the suspension of a statute or rule on the list . . . to review the list for accuracy." Tex. Gov't Code § 418.0155(b) (emphasis added). If the Act provides the Governor the power to suspend all state laws, then there is no need for the Governor's office to maintain a suspension list or for agencies to review it.

The only feasible interpretation of "regulatory statutes" is that such statutes are limited to laws that are directed at or implemented by state agencies.

b. These articles of the Code of Criminal Procedure are not "regulatory statutes" that may be suspended by the Governor.

The provisions of the Texas Code of Criminal Procedure that GA-13 purports to suspend are not "regulatory" and fall within the sole purview of the legislative and judicial branches. *See* Beal Br. 3-5. The Legislature duly enacted these provisions of the Code of Criminal Procedure to provide the statutory framework for discretionary judicial functions, including bail determinations and sentencing provisions, arts. 17.03, 42.035; rights of defendants to mandatory release if certain prosecution timelines are not met, arts. 15.21, 17.151; discretionary duties of local law enforcement officers to manage their jail populations, art. 42.032; as well as "all other relevant statutes and rules" relating to personal bonds and good time credit. M.R.37-38.

The provisions at issue here are fundamental to the independent constitutional authority of Texas judges. If this Court were to accept Relators' definition of

"regulatory" and extend the Governor's suspension power to the Code of Criminal Procedure, there would be no principled limit on what laws the Governor could suspend during an emergency.

The limitations offered by Relators would do nothing to cure the violation of core constitutional principles that would result from such suspensions. While disaster declarations initially last only for 30 days, the Governor first declares a disaster and the Governor can indefinitely extend it. *See* Tex. Gov't Code § 418.014(c). That the Legislature may terminate a state of disaster does not limit the Governor's power, since only the Governor has the authority to call an emergency session while the Legislature is not in session. Tex. Const. Art. 4, Sec. 8. Under Relators' expansive reading, a future Governor would have the power to suspend laws authorizing the Legislature to convene, so long as the Governor determined that reconvening would hinder the disaster response (which Relators have suggested it would).

c. GA-13 does not assist the governor in coping with COVID-19

While it is clear that the Governor cannot suspend the provisions at issue, Relators also fail to demonstrate that the laws targeted by GA-13 would "prevent, hinder, or delay necessary action in coping with a disaster," as required by Tex. Gov't Code § 418.016(a). GA-13 will in fact exacerbate harms to the public caused by COVID-19.

d. GA-13 is counterproductive and exacerbates the risk of a COVID-19 outbreak in jails and surrounding communities.

GA-13 goes against public health authorities' recommendations and threatens to endanger the health of people both within and outside jail facilities. Each provision of GA-13 threatens to overwhelm local jail populations at a time when public health experts are universally urging reductions to mitigate the spread of COVID-19.[10] The Centers for Disease Control and Prevention has identified correctional facilities as particularly vulnerable environments for a COVID-19 outbreak and attendant public health crisis.[11] Indeed, jail settings provide "the ideal situation for a massive outbreak of COVID-19, which is extremely dangerous for staff and inmates." M.R. 71 (quoting Dr. Richard Watkins, Senior Warden, Texas Department of Criminal Justice, retired). According to the Chair of the Department of Immunology and Infectious Diseases at the Harvard School of Public Health, "The more people we have behind bars when the virus hits, the more people will die – including people who are not detained."[12]

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[10] *See, e.g.*, The Hackett Center for Mental Health & Meadows Mental Health Policy Institute, COVID-19 Response Briefings – Jail Diversion / Admission Considerations for Texas Counties 1 (Mar. 24, 2020), available at https://www.texasstateofmind.org/uploads/whitepapers/COVIDJailDiversion.pdf (identifying the county jail as the potential "hot spot" for counties);

[11] Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities (Mar. 23, 2020), available at https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html.

[12] Statement of Sarah Fortune, MD (March 20, 2020), available at http://bitly.com/FortuneLetter.

Increasing the size and density of the inmate population also increases the risk of disease spread among jail staff and the communities to which they go home. M.R.71. Inmates and staff live and work in very close confines, making it difficult, if not impossible, to create safe distances between them to slow the spread of the disease. *Id.* Inmates often live and sleep in dormitory environments, eat their meals together, and congregate together. *Id.* Each shift of jail staff brings a new risk of further spreading the disease. *Id.* Similarly, GA-13 forces attorneys to physically visit county jails in order to obtain signatures for medical releases. *See* M.R.59. An outbreak in the jail or the surrounding community could quickly overwhelm counties' public health systems ability to treat the infected population.

The State is aware of these risks. Even as Relators are fighting this TRO, the State now bars counties from sending new inmates from county jails into the prison system to mitigate risks of potential outbreak that a large prison population presents.[13]

e. Relators' public safety argument is undermined because GA-13's bail provisions only affect people who cannot pay a monetary bond.

[13] Jolie McCullough, Inmates' attorneys challenge Gov. Greg Abbott's order banning some jail releases, says it's unconstitutional, THE TEXAS TRIBUNE (Apr. 1, 2020), https://www.texastribune.org/2020/04/01/jail-inmate-attorneys-challenge-greg-abbott-bail-order/.

Further, the manner in which GA-13 operates undercuts its purported safety rationale. GA-13 prohibits judges from issuing a personal bond for people who fall under an exceedingly broad category, including those ever charged or convicted of a crime involving violence. GA-13, however, does not prevent judges from setting a *monetary* bail amount for anyone within that category. In other words, if a person can pay that bond, they go free, but if a person cannot pay, their liberty is lost. The Order fails to protect the public from these purportedly "dangerous individuals" because anyone who is wealthy can pay bond and return to the community.

The category of people identified in the Order for whom personal bond is no longer available is also much wider than people that Relators would consider "dangerous individuals." Relators' Br. 49. GA-13 casts an enormously broad net: it captures a person arrested for trespass or possession of marijuana but who was convicted decades ago for misdemeanor assault (the same offense level as a traffic ticket). This undercuts the claimed nexus to public safety, and Relators provide no reason for why the Order's blunt-force approach to policymaking should usurp the individualized determinations that occur every day in courtrooms across Texas.

Ultimately, Relators rely only on hyperbole and unsubstantiated statements to suggest that individual judges have abdicated their responsibility during this crisis. Relators' Br. 49 (accusing judges of "giving *no* consideration to community safety"). But the wealth-based detention scheme imposed by GA-13 does not further public

safety and puts all of us at risk by keeping people detained who would otherwise be eligible for release as COVID-19 spreads through county jails.

2. No Other Provision of the Disaster Act grants Relators the authority claimed by GA-13

a. Forbidding personal bond and good time credit do not control ingress and egress within the meaning of section 418.018(c).

The Governor's authority to "control ingress and egress to and from a disaster area," Tex. Gov't Code § 418.018(c), does not authorize GA-13. Far from it, GA-13 seeks to restrict judges' ability to issue personal bonds to certain individuals, while allowing similarly situated people who can afford bail to go free. The plain meaning of ingress and egress cannot possibly authorize the rewriting of criminal laws or permit movement by only those who can afford to pay. Such an expansive interpretation does not make sense in light of other subsections of this provision that specifically enumerate the types of evacuation powers the Governor has: Section 418.018(a) grants the power to evacuate individuals from a disaster area, § 418.018(b) provides for evacuation routes, and § 418.018(c) limits when those evacuated can return to their homes and businesses within the disaster area. *See also* Beal Br. 5-6 ("the Governor is able to order citizens where they must go or not go" but "[i]t does NOT provide that the Governor may supersede the power of the Judiciary or any other state entity, nor allow him to suspend any criminal law upon which they rely[.]").

b. Executive Orders only have the full force of law when issued pursuant to valid legal authority.

That executive orders issued pursuant to the Disaster Act "have the force and effect of law" also does not authorize the Governor to pass or suspend any law he wants. *See* Tex. Gov't Code § 418.012. An executive order issued by the Governor only has the "force and effect of law" if it is issued within the Governor's legal authority in the first place. Relators' expansive reading would render numerous sections of the Disaster Act meaningless, as they describe specific powers available to the Governor during a disaster and the conditions that must be met to invoke them. *Cf.* Tex. Gov't Code § 311.021 ("In enacting a statute, it is presumed that . . . the entire statute is intended to be effective"). Furthermore, Texas law uses similar language to grant rule-making authority to Executive agencies in several other areas, none of which provides *carte blanche* authority to make any law. *See, e.g.*, Tex. Agric. Code § 201.124 ("An ordinance adopted under [the Land-Use Regulation] subchapter has the force and effect of law in the conservation district and is binding on all owners or occupiers of land in the conservation district.").

c. Judicial discretion is not a resource of state government or political subdivisions to be commandeered by the Governor during a disaster.

Lastly, Relators set forth no support for the assertion that the Code of Criminal Procedure or the discretion of locally elected judges in individual criminal cases constitutes an "available resource of state government and of political subdivisions" that the Governor could commandeer. Relators' Br. 41 (citing Tex. Gov't Code 418.017(a)). Such a reading would render all state laws, and all the judges who enforce them, subject to the Governor's control during a disaster.

3. The judicial branch of state government has statutory and inherent authority to control court procedures without interference from the executive branch.

The Disaster Act makes clear that every branch plays a critical role in times of crisis. *See* Tex. Gov't Code § 418.002(4). To that end, Section 22.0035 provides the Judiciary with authority to modify judicial procedures during a disaster. No provision in the Act or otherwise grants the Governor authority over the courts.

The Act provides that "[n]otwithstanding any other statute, the supreme court may modify or suspend procedures for the conduct of any court proceeding affected by a disaster during the pendency of a disaster declared by the governor." Tex. Gov't Code § 22.0035. Disaster declarations enable district and county court judges to adopt local rules of administration to provide "a coordinated response for the transaction of essential judicial functions in the event of a disaster." Tex. Gov't Code § 74.093(c)(4).

Relators' contention that these provisions grant only "primary" jurisdiction to the courts, Relators' Br. 35, is unprecedented. The Act does not provide the Governor sweeping discretion to control court proceedings, nor does he have this authority under any other state law. *See PHI, Inc. v. Texas Juvenile Justice Dep't*, 593 S.W.3d 296, 305 (Tex. 2019) ("no court has the authority, under the guise of interpreting a statute, to engraft extra-statutory requirements not found in a statute's text").

B. Relators' Expansive Interpretation of the Governor's Powers Under the Disaster Act Would Render the Act Unconstitutional

1. The Governor cannot wield the power to suspend all laws.

Relators assert the Disaster Act allows the Governor to suspend *any* statute during a state of emergency, Relators' Br. 44—an interpretation that conflicts with the text of Constitution that "[n]o power of suspending laws in this State shall be exercised except by the Legislature." Tex. Const. art. I, § 28.

Until 1874, this section read: "No power of suspending laws in this state shall be exercised, except by the legislature, *or its authority*." *Arroyo v. State*, 69 S.W. 503, 504 (Tex. Crim. App. 1902) (emphasis added). During Reconstruction, the Legislature expressly granted to Governor F.J. Davis the authority to "declare . . . counties under martial law and to suspend the laws therein until the legislature shall convene." George D. Braden, 1 *The Constitution of the State of Texas: An Annotated*

and Comparative Analysis 83 (1977). But because of "the history of the oppressions which grew out of the suspension of laws," *Arroyo,* 69 S.W. at 504, the Constitution was specifically amended to prohibit the Legislature from again delegating its suspension powers to any other branch of government.

Relators, nevertheless, wrongly assert that the Disaster Act delegates to the Governor the power to suspend all laws, including provisions of the Code of Criminal Procedure. This ignores unequivocal precedent in which Article I, Section 28 has been repeatedly interpreted to limit executive power and provide that only the Legislature may suspend Texas laws. *See Brown Cracker & Candy Co. v. City of Dallas*, 137 S.W. 342, 343 (Tex. 1911) (recognizing that this provision "restricts the power to suspend laws to the Legislature, and expressly prohibits the exercise of such power by any other body"); *Spence v. Fenchler*, 180 S.W. 597, 605 (Tex. 1915) (same); *Coombs v. State*, 44 S.W. 854, 860 (Tex. Crim. App. 1898) (same); *Constantin v. Smith*, 57 F.2d 227, 237 (E.D. Tex. 1932) (enjoining Governor R.S. Sterling from suspending state statutes and declaring martial law in East Texas oil fields because Section 28 had "by express provision withheld such power" and "prohibited the Governor . . . to suspend the Constitution and laws."); Gerald C. Mann, A.G. Opinion, 1939-303 (informing Governor W. Lee O'Daniel that he could not suspend laws because "our Constitution has spoken in such distinct and unmistakable language that there exists no room for interpretation. . . The

Constitution expressly confers upon the Legislature the power of suspending laws and denies that power to any other branch of the State government.").

Unable to overcome this binding precedent, Relators attempt to characterize the purported grant of sweeping authority to the Governor to suspend all laws as a limited delegation of rulemaking authority like in *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 472 (Tex. 1997), which does not concern suspension authority and is inapposite to this case. Relators' Br. 43. While the Legislature may delegate its rulemaking authority to state agencies through regulatory statutes, this is entirely different from granting the Governor the power to suspend all laws. The few cases that Relators cite involve the delegation of legislative authority to state agencies to make "exceptions" within the confines of particular statutes. *See Williams v. State*, 146 Tex. Crim. 430, 442 (1943) (finding that the Commissioner of Agriculture's authority "to promulgate rules and regulations constituting exceptions to the [Pink Bollworm] Act making it unlawful to grow cotton in regulated zones" was not an impermissible delegation of suspension authority because it was "of a fact-finding and administrative nature"); *Sproles v. Binford,* 286 U.S. 374, 397 (1932) (determining that the Texas Highway Commission could grant exceptions for trucks carrying excess weight on state highways, since "the authority given to the department is *not to suspend the law*, but

is of a fact-finding and administrative nature, and hence is lawfully conferred.") (emphasis added).

Because it is so clear that only the Legislature may suspend laws, the question of whether Article 1, Section 28 has been violated nearly always hinges on whether a particular act was actually a suspension of laws. *See, e.g., FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000) (determining whether provision of Water Code allowing certain private landowners to create water quality protection zones in certain cities' extraterritorial jurisdictions constituted an unconstitutional delegation of suspension powers). In this case, GA-13 states that five articles of the Code of Criminal Procedure and "all other relevant statutes and rules" are "hereby suspended." M.R.37-38. There is no ambiguity concerning whether the Order is an attempt to suspend laws, and it is the same type of sweeping exercise of executive power that Article I, Section 28 was specifically amended to prevent. The Order is therefore in direct conflict with the Texas Constitution.

2. The Governor may not usurp the powers of the legislature and judiciary.

Relators urge this Court to adopt an interpretation of the Disaster Act that would violate separation of powers by concentrating all authority in the executive branch during times of disaster. This runs afoul of core tenets enshrined in the Texas Constitution 175 years ago: that all lawmaking authority is vested in the Legislature,

and the power to set bail and decide individual cases lies in the sole province of the Judiciary. *See* Tex. Const. art. II, § 1.

a. GA-13 impermissibly infringes on the power of the judicial. branch.

By admitting that GA-13 was intended to remove judicial authority because the "the personal bond process was reportedly being misused" by judges, M.R.79, Relators concede that the Order interferes with judicial power. As the trial court correctly found, "many of the orders in Executive Order GA-13 strip away the discretion of the judiciary . . . [in] balanc[ing] the interests of the public, individuals accused, but not convicted of criminal offenses, and the victims of those alleged offenses." Resp. App. 1. Such authority "falls squarely within the purview of the judicial branch of our government," and while "judges of this State may not abandon their responsibility in this regard . . . neither may it be taken away from them by executive order." *Id.*

All exceptions to the constitutionally mandated separation of powers may "never [] be implied in the least; they must be 'expressly permitted' by the Constitution itself." *Fin. Comm'n of Texas v. Norwood*, 418 S.W.3d 566, 570 (Tex. 2013) (quoting Tex. Const. art. II, § 1). "[W]hen the functioning of the judicial process in a field constitutionally committed to the control of the courts is interfered

with by the executive or legislative branches," then "a constitutional problem arises." *State Bd. of Ins. v. Betts*, 308 S.W.2d 846, 851–52 (Tex. 1958).

Here, the authority to determine bail in individual cases is constitutionally committed to the courts. *See* Tex. Const. art. I, § 11a-c (providing that only a "district judge" or "judge or magistrate" in this State may set or revoke bail); art. V, § 1 (vesting the judicial power of the State in the courts); *Ex Parte Gill*, 413 S.W.3d 425, 432 (Tex. Crim. App. 2013) (judges have the "exclusive role" under the Constitution of "hearing and considering evidence" and "determining whether to issue a personal bond or to set an amount of bail to effectuate the accused's release").

In issuing GA-13, the Governor usurped the power of the judiciary by imposing categorical restrictions that prevent judges from exercising their constitutionally ascribed authority to determine bail and other conditions of release. M.R.37. Although the Order provides a narrow exception for judges to grant personal bonds "for health or medical reasons"—which itself triggers the need for a new hearing previously nonexistent in Texas law—this does not salvage the sweeping and direct infringement that GA-13 imposes on judges' constitutional authority. *See* M.R.42.

Relators cite no case permitting such infringement on judicial authority, and the few cases they cite undercut their position. In *Armadillo Bail Bonds v. State*, the Court of Criminal Appeals invalidated a statute that "unduly interfere[d] with the

Judiciary's effective exercise of its constitutionally assigned power," by preventing courts from issuing judgments until the remitter of bond. 802 S.W.2d 237, 241 (Tex. Crim. App. 1990). Likewise, *Texas Department of Family & Protective Services v. Dickensheets*, acknowledged that "a constitutional problem arises when the core functioning of the judicial process in a field constitutionally committed to the control of the courts is interfered with by the executive . . . branch[]" before ultimately dismissing a challenge to a speedy trial provision brought by state prosecutors. 274 S.W.3d 150, 156 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

b. The Governor may not usurp the role of the legislative branch.

The Legislature "possesses the sole authority to establish criminal offenses and prescribe punishments," *Vandyke v. State*, 538 S.W.3d 561, 573 (Tex. Crim. App. 2017). It has "complete authority to pass any law regulating the means, manner, and mode of assertion of any of [criminal defendant's] rights in [] court," *Johnson v. State*, 58 S.W. 60, 61 (Tex. Crim. App. 1900), provided that those procedures do not violate defendants' constitutional rights or infringe on the constitutional decision-making authority of the Judiciary. *See Ex parte Ancira*, 942 S.W.2d 46, 48 (Tex. App.—Houston [14th] 1997, no writ) (holding that Article 17.151 of the Code of Criminal Procedure was constitutionally enacted by the Legislature without infringing on the powers of the Judiciary).

Relators cite no Texas authority that would allow the Governor to usurp the Legislature's role and suspend the relevant provisions of the Code of Criminal Procedure. Indeed, such executive action is unprecedented under Texas law because the Governor's powers have "never extended so far that he may presume to exercise or substantially interfere with the Legislature's prerogative to make, alter, and repeal laws, let alone define criminal offenses or fix punishment for those offenses." *Vandyke*, 538 S.W.3d at 573.

Relators instead resort to a Pennsylvania decision holding that an executive order closing non-essential businesses during the COVID-19 pandemic did not violate separation of powers in the Pennsylvania Constitution. Br. 48 (citing *Friends of DeVito v. Wolf*, No. 68 MM 2020, 2020 WL 1847100 (Pa. Apr. 13, 2020)). That case does not apply here. First, whatever power the Governor of Pennsylvania may have under that state's constitution has no bearing here. Second, the executive order at issue did not involve any attempt to modify or suspend rules of criminal procedure or any state laws. Instead, the governor ordered non-essential businesses to close, which the court found was within the governor's authority to control "ingress and egress to and from a disaster area" under Pennsylvania's Emergency Code. *Id.* (citing 35 Pa. Stat. and Cons. Stat. § 7301).

And GA-13 is far more sweeping than the executive order at issue in Pennsylvania, interferes with the power of the Judiciary while assuming the

lawmaking authority of the State. *Cf. Norwood*, 418 S.W.3d at 569–70 (quoting James Madison in Federalist No. 47 that guarding against "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands" is a bedrock principle of our government).

PRAYER

Plaintiffs respectfully request that the Court deny Relators' petition.

April 18, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), the undersigned counsel certifies that the total number of words in this Brief, exclusive of the matters designated for omission, is 14,934 words as counted by Microsoft Word Software.

/s/ Andre Segura
Andre Segura

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Real Parties in Interest Response has been served on Relators' counsel of record via e-service on this the 18th day of April, 2020.

/s/ Andre Segura
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