

IN THE SUPREME COURT OF TEXAS

***In re* GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE
STATE OF TEXAS ,**

Relator

On Petition for Writ of Mandamus to the Court of Appeals for the Fifth
Judicial District, Dallas, Texas

**BRIEF OF AMICI CURIAE (LIST OF SCHOOL DISTRICTS)
IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS**

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I. Interests of Amicus/i

Amici Curiae are X school districts in Texas, charged with educating approximately YY public school students. Amici retained the undersigned counsel to prepare an amicus brief due to the significance of the issues at stake in this case and the potential impact to the health and safety of public school students in the state of Texas. Amici's interest in these proceedings is to support the need for localized control and response to the COVID-19 pandemic, and specifically to protect the ability of locally-governed independent school districts to assert their own unique and particularized interests with respect to the imposition of face covering requirements in schools.

No attorneys for any party have authored this brief in whole or in part, and no person or entity other than Amici Curiae and its counsel have made any monetary contribution to the preparation or submission of this brief.

II. Introduction and Summary of the Argument

The order the State challenges does not address school districts' authority to implement mask requirements in school-district-operated facilities, no school district was a party to the proceeding below, the State

has not brought action challenging school districts' authority to require masks in public schools, and no school district was heard in the proceeding below on the issue of whether the Governor has authority to prevent school districts from requiring masks in schools. These issues are not before this Court and it does not have jurisdiction to address those issues in this original proceeding.

Local control of public schools stems not from the Texas Disaster Act ("TDA") under which the Dallas County Judge sued, nor from any *regulatory* law or state agency rule, but from the Texas Education Code. Furthermore, school districts have well-established, longstanding obligations and rights to control students' behavior during the school day and while on school property. This authority cannot be suspended by the Governor.

III. COVID-19 Presents a Serious Threat to Many School Districts' Operations

COVID-19 has severely disrupted learning across the State of Texas and poses a unique and particularized risk for public schools. Beginning in March 2020 when the Governor made his disaster proclamation, Texas public schools closed for in-person learning through

the end of the 2019–2020 school year.¹ Later that summer, due to surging case numbers, many school districts delayed reopening for the 2020–2021 school year and offered virtual learning options.² When students did return in person, they did so with face-coverings due to the Governor’s statewide face-covering mandate that went into effect in July 2020.³ Thanks to mandatory mask use, Texas schools, by and large, remained open for the 2020–2021 school year.

Counties around the state are experiencing COVID-19 surges like those experienced when GA-29’s mask mandate was implemented, due in part to a more virulent strain of COVID-19 known as the delta variant.⁴ As of August 10, 2021, children’s hospitals in North Texas were

¹ Exec Order GA-08 at p. 2 (Mar. 19, 2020) (closing schools through April 3, 2020); Exec. Order GA-14 at p. 3 (Mar. 31, 2020) (extending closure through May 4); Exec. Order GA-16 at p. 4 (Apr. 17, 2020) (extending closure through end of 2021-22).

² Nicole Villalpando, *From March to March: A timeline of the COVID-19 pandemic in Central Texas*, AUSTIN AM.-STATESMAN (Mar. 22, 2021), available at <https://www.statesman.com/in-depth/news/healthcare/2021/03/22/austin-covid-one-year-pandemic-texas-timeline/6921773002/> (last visited Aug. 12, 2021).

³ Exec. Order GA-29, p. 1 (July 2, 2020).

⁴ See Texas Department of State Health Services’ (“DSHS”) COVID-19 data at <https://dshs.texas.gov/coronavirus/AdditionalData.aspx>; Roberto Villalpando, *Texas now has 10,000 COVID patients; Travis County Hospitalizations Nearing Pandemic Peak*, AUSTIN AM.-STATESMAN (Aug. 11, 2021), available at <https://www.statesman.com/story/news/local/2021/08/10/texas-travis-county-covid-tracker-latest-case-trends-hospital-data/5551871001/> (last visited Aug. 12, 2021).

at more than 99% capacity and available beds for adult patients were also declining.⁵ Recognizing this increasing threat, the Governor recently asked for out-of-state healthcare workers to assist with the surge of cases in Texas and requested that hospitals delay elective surgeries to create more space for coronavirus patients.⁶ However, the Governor has prohibited school districts from responding to conditions in their communities by implementing mask requirements. Moreover, public K-12 schools have millions of students that are less than 12 years old and are not currently eligible to receive vaccines, leaving masks as their most effective, and perhaps only line of defense against COVID-19. The data proves that when everyone is wearing face coverings, the transmission rate decreases.⁷ As the Governor has said, requiring masks is a “targeted”

⁵ *DFW Area Pediatric ICU Beds More than 99% Occupied Hospital Council Says*, CBSDFW.com (Aug. 10, 2021), at <https://dfw.cbslocal.com/2021/08/10/pediatric-icu-beds-occupied-dfw-hospital-council/> (last visited Aug. 10, 2021).

Amici Curiae recognize that not every school district in the state is currently facing the same threat. That circumstances vary by community is precisely why the Legislature grants control over local schools to locally-elected boards and the superintendents they hire.

⁶ Chris Blake, *Abbott Requests Help from Hospitals, Out-of-State Healthcare Workers as Virus Surges*, (Aug. 10, 2021), available at <https://www.nbcdfw.com/news/coronavirus/abbott-requests-out-of-state-healthcare-workers-asks-hospitals-to-postpone-elective-surgeries-as-virus-surges/2714430/> (last visited Aug. 12, 2021).

⁷ *Id.*

response and the “least restrictive means” for responding to the disaster.

GA-29, p. 1.

IV. School Districts Have Independent Authority to Require Students and Employees to Require Masks to Protect Their Health and Safety

A. Local control of public schools advances important policy objectives.

“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.” *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974). Local control “affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs,” and “promotes accountability to the citizens of the district.” *Morales v. Shannon*, No. DR-70-CA-14, 2007 WL 2317177, at *5 (W.D. Tex. Aug. 9, 2007).

“Nearly all” the framers of the Texas Constitution “were for local control, having chafed under the centrally controlled schools of the Reconstruction Era.” *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 786 (Tex. 2005). “[L]ocal management and control of public schools is a primary and longstanding legislative policy manifested

throughout the statutes concerning education.”⁸ *Fort Worth Indep. Sch. Dist. v. Palazzolo*, No. 02-18-00205-CV, 2019 WL 2454866, at *8 (Tex. App.—Fort Worth June 13, 2019, pet. denied); *Ysleta Indep. Sch. Dist. v. Meno*, 933 S.W.2d 748, 752 (Tex. App.—Austin 1996, writ denied).

Consistent with these principles, school districts and charter schools are vested with “the primary responsibility for implementing the state’s system of public education and ensuring student performance.” TEX. EDUC. CODE § 11.002. This is evident in the Legislature’s consistent declaration—through multiple revisions of the Education Code—that school board trustees have the “exclusive power and duty to govern and oversee the management of the public schools of the district.” TEX. EDUC. CODE § 11.151(b); *Ysleta Indep. Sch. Dist. v. Meno*, 933 S.W.2d 748, 752 (Tex. App.—Austin 1996, writ denied). School districts have great power and broad discretion in local management and control of their schools. *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 563 (Tex. 2000). Any educational function “not specifically delegated” to the Texas

⁸ Local control of school governance is so well enshrined in Texas law that the loss of it is in and of itself “a probable, imminent, and irreparable injury” to the district. *Texas Educ. Agency v. Hous. Indep. Sch. Dist.*, No. 03-20-00025-CV, 2020 WL 7757365, at *9 (Tex. App.—Dec. 30, 2020, pet. filed Feb. 24, 2021) (citing TEX. EDUC. CODE § 11.151(b)).

Education Agency (“TEA”) or the State Board of Education “is reserved to and shall be performed by school districts or open-enrollment charter schools.” *Id.* § 7.003; *see also id.* § 11.151(b) Trustees may adopt any rules or bylaws necessary to carry out their statutory powers and duties. *Id.* § 11.151(d). And they are tasked with “ensur[ing] that the superintendent implements and monitors plans, procedures, programs, and systems to achieve appropriate, clearly defined, and desired results in the major areas of district operations.” *Id.* § 11.051(a)(2). Superintendents, in turn, are the chief executive officer and are tasked with managing the day-to-day operations of the district. *Id.* § 11.201.

These statutory grants of power have been long understood to confer on school districts “broad discretion” to enact rules or policies that “further the educational process[,] as long as they are neither arbitrary, unreasonable, nor contrary to law.” *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223, 230 (E.D. Tex. 1980). As a result, “the preponderating bulk of all decisions affecting the schools is made and executed at the local level, guaranteeing the greatest participation by those most directly concerned.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 53, (1973).

B. Determining how and when to take steps to protect the health and safety of students are important aspects of local control.

In the name of furthering the educational process, school districts have implemented—and courts have long upheld—reasonable policies designed to protect the health and safety of their students, including from communicable disease. For example, in 1910, the Court of Civil Appeals held that the 1907 legislative charter for the City of Fort Worth vesting the board of trustees of the city’s schools with “the power to control, manage and govern” the schools was “sufficiently comprehensive” to authorize it to require students be vaccinated against smallpox. *McSween v. Bd. of Sch. Trustees*, 129 S.W. 206, 208 (Tex. Civ. App. 1910, writ refused). The Court reasoned that since the purpose of preserving the health of pupils was valid, so was the method chosen by the board. *Id.* (“Appellee was authorized to adopt any reasonable regulation to effect the purpose sought to be accomplished.”).

Courts recognize that students learn best in a safe and healthy environment. *See Jones*, 499 F. Supp. at 230 (upholding district anti-drug policy as reasonable regulation consistent with district’s “responsibility to maintain the health and safety of [its] students within a productive

learning environment”); *Marble Falls Indep. Sch. Dist. v. Shell*, No. 03-02-00652-CV, 2003 WL 1738417, at *4 (Tex. App.—Austin Apr. 3, 2003, no pet.) (upholding extra-curricular drug-testing policy on grounds that trustees have “legitimate interest in protecting the safety and health of its students”); *Bozeman v. Morrow*, 34 S.W.2d 654, 657 (Tex. Civ. App.—El Paso 1931, no writ) (operation of school cafeteria advanced student welfare and was “reasonable exercise of the discretionary power conferred by law upon the board”). As such, “[r]easonable rules to . . . protect . . . the health, and the safety of the pupils, and to do, and to require pupils to do, whatever is reasonably necessary to preserve and conserve all of these interests may be made and enforced.” *Hailey v. Brooks*, 191 S.W. 781, 783 (Civ. App.—Fort Worth 1916).

The right and obligation to control and discipline students is likewise “part and parcel of operating schools.” *Friona Indep. Sch. Dist. v. King*, 15 S.W.3d 653, 659 (Tex. App.—Amarillo 2000, no pet.). School boards have long been given “wide discretion” in adopting mandates and prohibitions aimed at promoting “better order, decorum and discipline.” *McLean Indep. Sch. Dist. v. Andrews*, 333 S.W.2d 886, 891 (Tex. Civ. App.—Amarillo 1960, no writ) (upholding requirement that student-

driven cars be parked in school lot). This encompasses the “well recognized” authority to prescribe “appropriate behavior and dress.” See *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 286–87 (5th Cir. 2001) (upholding policy requiring students to wear uniforms); *Wood v. Alamo Heights Indep. Sch. Dist.*, 433 F.2d 355, 356 (5th Cir. 1970) (upholding policy requiring students to cut their hair).

The obligations to protect and discipline students are two sides of the same coin. *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 481 (5th Cir. 1982) (citing *State v. Young*, 216 S.E.2d 586, 592 (Ga. 1975)). These obligations are heightened because students are compelled to be there. TEX. EDUC. CODE § 25.0585. As the Supreme Court of Georgia noted, “it is not merely the unruly or criminal student who is involuntarily in school. All the other students are there involuntarily also, and are forced to associate with the criminal few—or perhaps merely the immature and unwise few—closely and daily. The state owes those students a safe and secure environment.” *Young*, 216 S.E.2d at 592. The same reasoning applies in the context of a global pandemic involving a potentially deadly, aerosolized virus. Both masked and unmasked children are required to be there, and masked children are forced to

associate with unmasked children—closely and daily. Districts owe their students—especially those too young to take be vaccinated—a safe and secure environment. GA-29, p. 1. (“[W]earing a face covering is important not only to protect oneself, but also to avoid unknowingly harming fellow Texans”).

C. Mask requirements are a reasonable use of district authority.

School district policies requiring students and employees to wear masks during a pandemic severe enough to warrant spending more than a year under a statewide disaster declaration fit squarely within the districts’ powers to protect their students’ health and regulate their dress and behavior. Governor Abbott has acknowledged the significance of masks in controlling the spread of COVID-19 throughout the pandemic, noting that “[h]ealth authorities have repeatedly emphasized that wearing face coverings is one of the most important and effective tools for reducing the spread of COVID-19.” GA-29, p. 2. “Masks [p]rotect [e]veryone,” and DSHS continues to recommend that everyone, regardless of vaccination status, wear one in indoor public spaces. TEX. DEPT OF STATE HEALTH SERVS., *Coronavirus Disease 2019 (COVID-19)*, available at dshs.texas.gov/coronavirus (last accessed Aug. 10, 2021); see

also GA-38, p. 3 ¶ 3.c (“strongly encourag[ing]” “every person” to follow DSHS health recommendations); Exec. Order GA-34, p. 2 ¶ 1.b (Mar. 2, 2021) (encouraging face coverings over nose and mouth).

The importance of masks in preventing the transmission of COVID-19 is only more pronounced in schools, where much of the student population is not yet eligible for vaccination. Exec. Order GA-34, p. 1 (Mar. 2, 2021) (crediting vaccines and “abundant supplies” of personal protective measures for slowing spread of virus and authorizing). Masks are a “targeted response . . . using the least restrictive means” to prevent the spread of the virus “and if people follow this requirement, more extreme measures may be avoided.” GA-29, p. 2; *see also* Exec. Order GA-28, pp. 1-2 (June 26, 2020). Requiring people on school premises to wear masks is a rational measure to reduce the spread of COVID-19 and thereby create a safer learning environment from which fewer children will be removed due to actual or feared illness. GA-34, p. 1 (prohibiting mask mandates by local officials but allowing school officials to operate under guidance from TEA); Exec. Order GA-36, p. 2, ¶ 2 (May 18, 2021) (allowing school officials to continue to operate under guidance from TEA until June 4, 2021); Texas Education Agency Announces Updates to

Public Health Guidance; TEA Also Provides Updates to COVID-19 Vaccine FAQ, Tex. Educ. Agency (Mar. 3, 2021) (“Local school boards have full authority to determine their local mask policy.”).⁹ Masks also allow schools to safely provide in-person schooling, while reducing the risk of a more restrictive shut-down of a campus or district. *Cf. McSween*, 129 S.W. at 208 (vaccine requirement less restrictive than closing schools in event of smallpox epidemic; school board “unquestionably” has power to close schools).

V. The Governor Cannot Prohibit School Districts from Requiring Masks

GA-38 purports to prohibit local governments, including school districts, from requiring masks by suspending any and all statutes that a local government might rely on for authority to require masks. On its face, the TDA does not authorize that action. And if it did, it would violate the separation of powers written into the Texas Constitution.

⁹ <https://tea.texas.gov/about-tea/news-and-multimedia/news-releases/news-2021/texas-education-agency-announces-updates-to-public-health-guidance-tea-also-provides-updates-to-covid-19-vaccine-faq>

A. The TDA does not authorize the Governor to prohibit schools from enacting rules to ensure health and safety of students.

The Legislature enacted the TDA to give state and local authorities more power to prevent, prepare for, respond to, and recover from disasters. TEX. GOV'T CODE § 418.002(4). Among the Act's stated purposes are "reduc[ing] vulnerability of people and communities of this state to damage, injury, and loss of life" resulting from a disaster and "authoriz[ing] and provid[ing] for cooperation in disaster mitigation, preparedness, response, and recovery" between jurisdictions in the state. *Id.* §§ 418.002(1), (5). To these ends, the TDA gives the Governor, among other things, limited emergency powers to issue executive orders and suspend regulatory statutes or state agency rules that would "prevent, hinder, or delay necessary action in coping with a disaster." *See id.* §§ 418.012, .016.

Delegations of legislative powers to the executive, to be constitutionally valid, must establish "reasonable standards" to guide the exercise of those powers. *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000). Exercises of the delegated powers, in turn, are valid only if they adhere to the articulated standards. *See id.*

The overarching standards for the Governor's actions under the TDA are that he alleviate dangers and mitigate harmful consequences flowing from the disaster. *See* TEX. GOV'T CODE §§ 418.011(a), .121. GA-38 is directly contrary to that standard.

The State relies on this Court's decision in *Abbott v. Anti-Defamation League*, 610 S.W.3d 911, 918 (Tex. 2020), for the proposition that the Governor's actions need not be aimed at curtailing the harmful effects of a disaster. But that case relied on the fact that the governor was amending a prior executive order that *was* aimed at mitigating the disaster:

If the plaintiffs were correct that each order issued by the Governor during a disaster must be motivated by a desire to alleviate the threat of the pandemic, then the Governor would be powerless to *amend or rescind his orders* based on other important goals

Id. Under the plain meaning of the text, the Governor has discretion to decide whether to exercise his emergency powers to mitigate a disaster. *E.g.*, TEX. GOV'T CODE §§ 418.012, .013, .016, .025. If he chooses to take mitigation measures, he can later modify or rescind his order in response to changing circumstances or other policy calculus. *See id.* § 418.012.

GA-38 however, neither implements measures to mitigate the harm of the pandemic nor reduces previous mitigation measures. Instead, it prohibits local governments, including school districts, from themselves taking steps to respond to the disaster under their independent authorities. That decision is not authorized by the TDA.

B. The Governor is not empowered to suspend Sections 7.003 and 11.151 of the Education Code, which are not “regulatory statutes prescribing the procedures for conduct of state business.”

As the source of his ostensible power to suspend any statute that might authorize a local government, including a school district, to require mask wearing, Governor Abbott cites § 418.016(a) of the TDA, which allows him to “suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster.” But that grant of suspension power contains several important substantive limits that place school districts’ authorizing statutes out of reach.

Reading § 418.016(a) in context, “regulatory statutes prescribing the procedures for conduct of state business” refers to statutes dictating

how administrative agencies carry out their functions. See *Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 326 (Tex. 2017) (courts must “consider the context and framework of the entire statute and meld its words into a cohesive reflection of legislative intent”). In other words, “the suspension provision . . . is meant to be used to reduce bureaucratic delays at the state agencies, boards, and commissions over which the Governor asserts direct control.” *State v. El Paso Cnty.*, 618 S.W.3d 812, 839 (Tex. App.—El Paso 2020, mandamus dismissed) (Rodriguez, J., dissenting).

First, regulatory statutes are—and were at the time that the TDA was passed—commonly understood to mean statutes that are implemented by administrative agencies. See, e.g., *Lewis v. Metro. Savings & Loan Ass’n*, 550 S.W.2d 11, 13 (Tex. 1977) (explaining that the “business of administering regulatory statutes enacted by the legislature” sits with administrative agencies); *Tex. Indus. Traffic League v. R.R. Comm’n of Tex.*, 682 S.W.2d 368, 369 (Tex. 1984) (describing law authorizing Railroad Commission to set freight carrier service rates as “regulatory statute”); *Crosby v. State*, 750 S.W.2d 768, 775 (Tex. Crim. App. 1987) (describing “regulatory statute” as one regulating business

and administered by state agency); *Wishnow v. Tex. Alcoholic Beverage Comm’n*, 757 S.W.2d 404, 409 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (describing “regulatory statutes” as being administered by state agencies); *City of San Antonio v. Tex. Dep’t of Health*, 738 S.W.2d 53, 55 (Tex. App.—Austin 1987, writ denied) (describing statutes that place duties on administrative agencies as “regulatory statute[s]”); *Presbyterian Hosp. N. v. Tex. Health Facilities Comm’n*, 664 S.W.2d 391, 402 (Tex. App.—Austin 1983, writ denied) (using “regulatory statute” to refer to laws charging administrative agencies with particular tasks).

The surrounding provisions in the TDA are consistent with the understanding that regulatory statutes relate to administrative agencies. Starting with § 418.016(a) itself, the Governor is authorized to suspend “regulatory statutes . . . or orders or rules of a state agency,” indicating that the two actions are related. *See Greater Houston P’ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015) (consistent with the canon of statutory construction *noscitur a sociis*—“it is known by its associates”—“the meaning of a word or phrase, especially one in a list, should be known by the words immediately surrounding it”). Section 418.0155 reinforces that relationship by providing a mechanism for state agencies,

and only state agencies, to review the Governor’s list of “regulatory statutes and rules” to be suspended in times of disaster. *See State v. Hollins*, 620 S.W.3d 400, 407-08 (Tex. 2020) (looking to surrounding provisions, holding that context indicated narrower meaning of seemingly broad authority). Even the “commander in chief” provision is limited to “state agencies, boards, and commissions having emergency responsibilities.” TEX. GOV’T CODE § 418.015(c). Taken together, these provisions demonstrate the Legislature’s plan to give the Governor more control over executive branch agencies, and to give those agencies more leeway in implementing their assigned statutes, when necessary to respond to a disaster.

Second, “prescribing procedures for” limits the suspension power to regulatory statutes that set “specific method[s] or course[s] of action” for conducting state business. *Procedure*, BLACK’S LAW DICTIONARY (11th ed. 2019). Sections 7.003 and 11.151(b) of the Education Code do as near the opposite of prescribing specific methods or actions as imaginable: they devolve general, undefined powers to school districts.

Third, “conduct of state business,” refers to functions of the executive branch. “State” modifies “business” in the same way that

“state” modifies “agency” later in the same sentence; that is, it describes business under the control of the Governor. TEX. GOV’T CODE § 418.016; *see also* § 418.023 (“state employees”). By reserving all powers to the school districts unless explicitly given to a state agency, sections 7.003 and 11.151(b) of the Education Code define what is *not* the executive branch’s business.

Further, the Governor has not established that suspension of these statutes would meet the prescribed decisional standard that “strict compliance” would get in the way of “necessary action in coping with the disaster.” TEX. GOV’T CODE § 418.016(a). Setting aside whether the idea of “strict compliance” even makes sense in the context of these laws, the Governor has not articulated what state action to address the pandemic would be hindered by schools’ requiring people to wear masks on campus.

It is the role of the courts to ensure that the executive branch exercises its delegated authorities according to the standards provided by the Legislature. *See, e.g., Harlingen Family Dentistry v. Tex. Health & Human Servs. Comm’n*, 452 S.W.3d 479, 482 (Tex. App.—Austin 2014) (holding that agency actions are valid only if they comport with relevant authorizing statute; agencies cannot invent new powers in name of

expediency).¹⁰ Executive agency action is invalid if it violates the Constitution or other law, contravenes or exceeds the authorizing statute, or runs counter to the general objectives of the authorizing statute. *See, e.g., State v. Pub. Util. Comm’n*, 131 S.W.3d 314, 321 (Tex. App.—Austin 2004). Courts play the essential role of ensuring that the executive branch uses its delegated powers within the bounds of the law. And so they must do here, where the Governor purports to exercise legislative powers delegated to him by the TDA

C. The Governor’s interpretation of his suspension power conflicts with other provisions in the TDA and entails an unconstitutional delegation of legislative power.

The Governor’s interpretation of his suspension power under § 418.016(a) seems to omit the limiting words or else to give them meanings that don’t jibe with the rest of the statute. *But see Cadena*, 518 S.W.3d at 326 (the “objective is not to take definitions and mechanically tack them together” but to read the statute as a cohesive whole). The TDA contemplates a limited universe of regulatory statutes that will be

¹⁰ The Texas Administrative Procedure Act (“APA”) defines state agencies to include “state officer[s] . . . with statewide jurisdiction that make rules.” TEX. GOV’T CODE § 2001.033(7). The definition specifically excludes the legislative and judicial branches, but does not exclude the governor. *Id.*

suspended. The section immediately before the suspension power invoked by the Governor states that he should keep a “comprehensive list” of regulatory statutes and rules that would need to be suspended in case of a disaster. TEX. GOV’T CODE § 418.0155. While the suspension power is not explicitly limited to the statutes and rules on the list, maintaining such a list would be pointless if the Legislature intended to allow the Governor to issue a blanket order suspending *any statute* that might conflict with his preferred course of responding to a disaster.

But if the suspension power in § 418.016(a) were reasonably susceptible to the Governor’s interpretation, the school districts’ narrower reading should still be adopted because it sidesteps serious constitutional questions.

Article I, § 28 of the Texas Constitution states that “[n]o power of suspending laws in this State shall be exercised except by the Legislature.” Courts have long believed that the power to suspend general laws enacted by the Legislature is entirely nondelegable. *In re Hotze*, __ S.W.3d __ 2020 WL 4046034, at *2 (Tex. July 17, 2020) (Devine, J., concurring in dismissal) (citing *Brown Cracker & Candy Co. v. City of Dallas*, 137 S.W. 342, 343 (1911) (power to suspend a statute may not be

delegated “to a municipal corporation or to anyone else”)); *accord Ex Parte Farnsworth*, 135 S.W. 535, 537 (Tex. Crim. App. 1911) (“nor can it authorize any other department of the government[—]municipal or State[—]to suspend any law.”). In contrast, the power to suspend administrative procedures and rules may be granted to the executive branch because it is functionally a modification of properly-delegated administrative function. *See Garner v. Lumberton Indep. Sch. Dist.*, 430 S.W.2d 418, 423 (Tex. App.—Austin 1968, no writ) (Legislature could include in regulatory statute the power for administrative agency to suspend agency procedures because altering administrative powers via statute was different from delegating power to suspend a statute).¹¹

The Legislature’s presumptive intent is for an enacted statute to comply with state and federal constitutions and for the entirety of the statute to have effect. TEX. GOV’T CODE § 311.021; *Stockton v. Offenbach*, 336 S.W.3d 610, 618 (Tex. 2011). Courts are therefore “obligated”, “if

¹¹ By way of concrete example, the Texas Administrative Procedure Act contains several provisions granting administrative agencies limited emergency powers to dispense with procedural requirements when public health or safety is at issue. *See* TEX. GOV’T CODE §§ 2001.034, .036, .054, .144. Under the districts’ interpretation of the TDA the suspension power in § 418.016(a) would, in effect, consolidate in the Governor similar powers, which are properly delegated to the executive branch.

possible,” to interpret state law “to avoid constitutional problems” as a means of giving effect to the legislation. *Stockton*, 336 S.W.3d at 618 (quoting *Brooks*, 141 S.W.3d at 169). Courts are also “only [to] decide constitutional questions when [they] cannot resolve issues on nonconstitutional grounds.” *See also In re B.L.D.*, 113 S.W.3d 340, 349 & n.8 (Tex. 2003). The Governor’s view that the TDA delegates to him the power to suspend unbounded swaths of Texas law likely violates longstanding constitutional precedent, whereas hewing to the actual text of the TDA avoids or minimizes the constitutional concerns.

VI. Conclusion & Prayer for Relief

For all of the foregoing reasons, Amicus Curiae pray that the Court not restrict the power of school districts to protect the health and safety of their students by imposing a mask requirement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2021, a true and correct copy of this Brief was served via electronic service on all parties through counsel of record, listed below:

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/s/ Carlos G. Lopez

Carlos G. Lopez