No. 05-21-00687-CV

IN THE FIFTH COURT OF APPEALS AT DALLAS, TEXAS

IN RE GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS,
Relator,

On Petition for Writ of Mandamus from the
116th Judicial District Court, Dallas County, Cause No. DC-21-10101

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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SUMMARY OF ARGUMENT

At its core, this is a straightforward statutory construction case. But Relator's mandamus petition is not faithful to the governing rules of statutory construction. The petition plucks isolated words and phrases from the governing statute and asks this Court to imbue them with meaning when read in isolation. But under the governing rules of construction, the words of a statute must be read in context. *Ross v. St. Luke's Episcopal Hosp.,* 462 S.W.3d 496, 501 (Tex. 2015) ("Determining legislative intent requires that we consider the statute as a whole, reading all its language in context, and not reading individual provisions in isolation."). By cobbling together out-of-context words and phrases read in isolation, Relator has created a Frankenstein that bears no resemblance to the actual language, spirit, and purpose of the Texas Disaster Act.

The petition creates the false impression that, in a disaster, the governor is "the commander in chief" of *all* governmental entities in Texas, Pet. 3, when in fact he is *only* "the commander in chief of *state* agencies, boards, and commissions having emergency responsibilities." TEX. GOV'T CODE § 418.015(c) (emphasis added). Nothing in the Act makes him "commander in chief" of local governmental entities.

The petition further asserts that in a disaster a county judge can act *only* as the "agent" of the governor and is thereby "subject to his direction and control." Pet. 3.

But the section of the Act in question neither states nor implies that a county judge is in any way "subject to [the governor's] direction and control." *See* TEX. GOV'T CODE § 418.1015(b). And, more fundamentally, an entirely different section of the Act expressly confers extraordinary powers on a county judge to act in a disaster, without being subject to any direction or control by the governor. *See id.* § 418.108(g).

It is true, as Relator asserts, that "[t]he Act vests the *Governor* with extraordinary powers" in a declared disaster. Pet. 3 (emphasis added). But it is equally true that the Act vests a *county judge* with extraordinary powers in a declared disaster, including the power to do what the Dallas County Judge did here, i.e., issue a targeted face-covering mandate applicable to certain public and commercial premises in Dallas County.

So, the central question before this Court boils down to this: when, as here, a county judge has taken action he deems necessary to cope with a disaster in his county—here, the once-again surging COVID-19 pandemic—does the governor have the statutory authority to nullify that action? As systematically demonstrated below, the answer to that question is a resounding "No." Respondent Judge Parker correctly so concluded after a protracted hearing in which she displayed a nuanced command of the pertinent provisions of the Disaster Act and recognized the exigency

and irreparable harm facing Judge Jenkins and Dallas County should she decline to act. There is no sound reason for this court to disturb her well-considered TRO.

ARGUMENT

I. Correctly applying the plain language of the Texas Disaster Act, Respondent Judge Parker properly issued the TRO.

A. The Disaster Act draws sharp distinctions between "state agencies" and "local governmental entit[ies]."

The "Purposes" section of the Act provides: "The purposes of this chapter are to . . . clarify and strengthen the roles of the governor, state agencies, the judicial branch of state government, and local governments in prevention of, preparation for, response to, and recovery from disasters[.]" TEX. GOV'T CODE § 418.002(4). This reflects the Legislature's understanding that, under the Act, "*state* agencies" are distinct from "*local* governments." This understanding is underscored in the "Definitions" section of the Act, in which "Local governmental entity" is a defined term that includes "a county." *Id.* § 418.004(10).

B. A local governmental entity has the power to issue a local mandate to wear a face covering.

Section 418.108(g), governing "Declaration[s] of Local Disaster[s]," authorizes local officials to declare a "local state of disaster" and provides that the "county judge or the mayor of a municipality *may control ingress to and egress from a disaster area under the jurisdiction and authority of the county judge or mayor*

and control the movement of persons and the occupancy of premises in that area." TEX. GOV'T CODE § 418.108(g) (emphasis added). This provision authorizes Judge Jenkins to require masks to be worn during the resurgence of COVID-19. MR:13-14; *see also* SMR:12 ¶ 4.

Invoking a different section of the Act with an identical provision conferring authority on the governor,[1] Relator relied on precisely the same language as Judge Jenkins as his authority to preempt or suspend local mask mandates:

> WHEREAS, under Section 418.018(c), the '*governor may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area*;'…NOW, THEREFORE, I, Greg Abbott, Governor of Texas…do hereby order…[that] no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering….

MR084[2] at 1-3 (¶3.b.) (emphasis added). But the Disaster Act does not imbue the governor with the preemptive power Relator claims.

In short, a county judge and the governor have some concurrent power. The question here is whether the governor can preempt or suspend an order of a county judge. The governor asserts preemptive power by virtue of his position alone, but no

[1] *See* TEX. GOV'T CODE § 418.018(c) ("The governor may control ingress and egress to and from a disaster area and the movement of persons and the occupancy of premises in the area.").

[2] Governor of the State of Texas, Executive Order GA 38, *Relating to the continued response to the COVID-19 disaster* (July 29, 2021), *available online at* https://gov.texas.gov/uploads/files/press/EO-GA-38_continued_response_to_the_COVID-19_disaster_IMAGE_07-29-2021.pdf (last checked Aug. 12, 2021) (MR:84-88).

Texas law grants the governor veto power over local officials. The Texas Disaster Act grants the governor very limited suspension power, and this power does not include the ability to do what the governor did in GA-38.

C. The governor has the power to suspend the order of a "state agency" during a disaster, but not of a "local governmental entity."

Section 418.016(a) provides: "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).

By definition, this section of the Act does *not* empower the governor to suspend the orders of a "*local governmental entity*," else the Legislature would have expressly included that phrase instead of restricting the section to "*state* business" and "*state* agencies." *Id.* § 418.004(10) (emphasis added). And yet, this is the very provision that Relator impermissibly relied upon as authority for his prohibition against local mask mandates. *See* MR084 at 1. ("WHEREAS, under Section 418.016(a), the 'governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business . . . if strict compliance with the provision . . . would in any way prevent, hinder, or delay necessary action in coping with a disaster[.]").

Importantly, Relator does not assert, or provide any argument or authority to support, a conclusion that the section 418.018 is a "regulatory statute" or that it "prescrib[es] procedures." Pet. 12-14. Section 418.108 does not establish a procedural rule. *See* TEX. GOV'T CODE § 418.108(a); *State v. El Paso Cty*., 618 S.W.3d 812, 837 (Tex. App.—El Paso 2020, no pet.) (Rodriguez, J., dissenting). Instead, it is a legislative delegation of power to local authorities. *See* TEX. GOV'T CODE § 418.108(a); *El Paso*, 618 S.W.3d at 837 (dissent). Because section 408.108 is not a regulatory statute and does not prescribe procedures, it does not fall into the first category set forth in section 418.016(a). The second category subject to suspension under section 418.016(a) is an order or rule of a state agency. But section 418.108 is not an order or rule, and it does not concern a state agency. A county is not a state agency. *See* TEX. GOV'T CODE §§ 418.004(6), 418.004(10), 418.051(c)(22); *see also id*. § 609.001(8).

D. Under the Act, the governor is not the "commander in chief" of local governmental entities.

To further bolster his incorrect assertion of control over local governmental entities in a disaster, Relator repeatedly trumpets his status as "commander in chief." Pet. 6, 9, 10. Yet that phrase appears only once in the 200-plus page Act. And the section in which it appears confers that status on the governor only as to "*state* agencies, boards, and commissions[.]" TEX. GOV'T CODE § 418.015(c) ("During a state of disaster and the following recovery period, the governor is the commander

in chief of *state* agencies, boards, and commissions having emergency responsibilities.") (emphasis added). By definition, under the Act, the governor is *not* commander in chief as to any "Local governmental entity," including a "county." *Id.* § 418.004(10).

E. The provision making a county judge the "designated agent" of the governor if anything expands the powers of a county judge, it does not restrict them.

Relator contends that Judge Parker's TRO is erroneous on the ground that Judge Jenkins may not manage the response to COVID in his locale because he may act "only . . . as the Governor's agent." Pet. 8 (citing TEX. GOV'T CODE § 418.1015(b)). The statute on which Relator relies provides:

> An emergency management director serves as the governor's designated agent in the administration and supervision of duties under this chapter. An emergency management director may exercise the powers granted to the governor under this chapter on an appropriate local scale.

TEX. GOV'T CODE § 418.1015(b). The State claims that because the statute uses the word "agent," "local officials are powerless to countermand the Governor's emergency orders."[3] Pet. 8. And the State goes even further than that, stripping local

[3] Relator relies upon the argument that "traditional agency" principles apply simply because the statute uses the word "agent." But there is nothing about the Disaster Act or the relationship between the governor and county judges that creates a "traditional" principal-agent relationship. If anything, this provision simply recognizes that the powers of the local disaster authority are co-extensive with those of the governor, such that the governor does not have to be present in 254 counties but can rely on the local "emergency management director" to act his "designated agent" with the unqualified and unrestricted authority to "exercise the powers granted to the governor." *Id.* There is nothing about that grant of authority that transforms what the Disaster Act indisputably

officials of any authority and arguing that local officials may only address locally-declared disasters "as the Governor's agent." *Id*. This overly broad "interpretation" of the statute has no support in the rules of statutory construction.

Statutory construction rules are clear: "When construing a statute, we begin with its language. Our primary objective is to determine the Legislature's intent which, when possible, we discern from the plain meaning of the words chosen." *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006). Nothing in the section relied upon by the State—or any provision of the relevant statute—states that a local official may only implement the orders of the governor. The State's argument fails the plain-language test.

The State also relies on that statute's "structure" to support its argument that local officials may only invoke the orders of the governor. But that argument also fails. As explained in § I.B., the Disaster Act expressly gives local officials the authority to respond to local disasters by controlling ingress and egress from the disaster area and controlling the movement of persons in the area. TEX. GOV'T CODE § 418.108(g). The Legislature invested local officials with their *own* authority to respond to local disasters—they need not rely on the governor.

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views as two separate entities imbued with their own powers into a traditional principal-agent relationship in which local officials are subject to the governor's control. *See Grissom v. Watson*, 704 S.W.2d 325, 326 (Tex. 1986) (to establish an agency relationship, the evidence must demonstrate the purported agent's consent to act on the principal's behalf and subject to the principal's control together with the purported authorization for the agent to act on his behalf).

Moreover, as explained in § I.C., the statute limits the regulations that the Governor may suspend during disasters. The governor may suspend only those that impede a statewide plan to "cope" with the disaster and reduce the vulnerability of Texas citizens. *See id*. at §§ 418.002, 418.016(a). The State's argument that local officials, as agents of the governor, may enforce *only* the governor's orders is wholly inconsistent with the statutory provision authorizing the governor to suspend only *certain* orders. If the State were correct, the Governor's power to suspend laws and local orders would be unlimited. It is not.

F. Prohibiting local governmental entities from issuing mask mandates in the midst of a raging pandemic is *not* "necessary action in coping with a disaster"; it is the precise opposite.

As demonstrated in sub-section I.C. above, the governor does not have the authority under section 418.016 of the Act to suspend the order of a local governmental entity. *See* TEX. GOV'T CODE § 418.016(a). But even if a local governmental entity could be deemed a "state agency" under that section (which it cannot be), Relator's reliance on this section to prohibit local mask mandates would still fail because of the important "if" clause in that section:

> 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.*

Id. (emphasis added).

The TRO permits Judge Jenkins to take what he reasonably deems to be necessary action to cope with the COVID-19 pandemic in Dallas County by issuing a face-mask order. Here, the undisputed record is clear that lives are on the line and the surging pandemic soberly underscores Judge Jenkins's necessary action to invoke reasonable mitigation measures like masking. But the same cannot be said of Relator's attempt to preempt local mask mandates. Simply put, it cannot be said that *prohibiting* local governmental entities from requiring the wearing of face coverings on certain premises to prevent the transmission of a fatal disease can be deemed "necessary action in coping with a disaster." *Id.*

Relator asserts that the TRO will permit a patchwork of local control that will "shatter[]" Relator's statewide approach to the COVID-19 pandemic. Pet. at 2. But the sky is not falling. The Legislature gave local officials *and* the governor the power to respond to disasters, including the COVID-19 pandemic. TEX. GOV'T CODE § 418.002(4). The goal of local *and* statewide control of emergency management is a singular one—to "reduce vulnerability of people and communities of this state to damage, injury, and loss of life and property resulting from natural or man-made catastrophes[.]" *Id*. at § 418.002(1).

The governor's power to suspend other laws in the context of a statewide disaster is limited. He may "suspend the provisions of any regulatory statute," only if compliance with the provisions of that regulation "would in any way prevent,

hinder, or delay necessary action in coping with a disaster." *Id*. at § 418.016(a). The Legislature did not grant Relator absolute power, even in a disaster like the present pandemic; Relator cannot suspend laws (much less, local orders beyond his control) solely to coerce local governments to bend to his will.

There is nothing about a local official like Judge Jenkins requiring face coverings that "prevent[s]," "hinder[s]," or "delay[s]" necessary action in "cop[ing]" with COVID-19. To the contrary, orders requiring faces masks in Dallas County seek to impede the now-steady increase in the spread of the COVID-19 Delta variant—attempting to reduce the "vulnerability" of Dallas citizens, as required by the statute. *Id*. at § 418.002(1). Like Relator before him, with the TRO in place, Judge Jenkins has now taken action to require face coverings to guard against the "imminent threat of [another] disaster" posed by COVID-19. *See* Governor of the State of Texas, Executive Order GA 29 ("GA-29") at 1, *Relating to the use of face coverings during the COVID-19 disaster* (July 2, 2020), *available online at* https://gov.texas.gov/uploads/files/press/EO-GA-29-use-of-face-coverings-during-COVID-19-IMAGE-07-02-2020.pdf (last checked Aug. 12, 2021).

Relator, in his most recent order, has not offered any alternative to the mask mandate; instead, he has eviscerated it—not in the name of reducing the vulnerability of Texas citizens, but in a purported effort to "ensure the ability of Texans to preserve livelihoods." MR084 at 3. By erasing the mask mandate, Relator

has not offered a proposal, idea, or program to "cope" with COVID-19's threat with which a local Dallas County face-mask order would conflict, prevent, hinder, or delay. Instead, Governor Abbott has simply created a void, cutting off the ability of local governments to "cope" with this disaster as they see fit for their communities. Local orders requiring masks are not a threat to a statewide "cop[ing]" system; they are a local response of a government official seeking to reduce the vulnerability of his citizens to injury or loss of life as the Legislature commanded him to do.

G. No binding precedent constrains this Court's decision.

Relator principally relies on two decisions in his effort to show that he has blanket authority to suspend and preempt local disaster orders. First, he cites *Abbott v. Anti-Defamation League Austin, Sw., and Texoma Regions*, 610 S.W.3d 911 (Tex. 2020) ("*ADL*"). *ADL*, however, does not advance his argument because that case involved suspension of a *state* statute, not a *local* order. *ADL*, 610 S.W.3d at 915. It involved the suspension of Texas Elections Code section 86l.006(a-1), which provides that a voter may only hand-deliver a ballot to the district clerk *on election day*. *Id*. The governor suspended the timing restriction to allow hand-delivery of ballots prior to election day. *Id*. The issue in the case was whether the Texas Disaster Act allowed the governor to amend the suspension of the statute to make it more restrictive, limiting the delivery locations to one per county. *Id*. The Texas Supreme

Court held that the governor had authority to amend his suspension of that provision of the Election Code. *Id*. at 923.

Judge Jenkins readily concedes that the governor has authority to suspend *state regulatory* statutes and regulatory requirements and *state* agency orders. *See supra*, § I.C. But that authority does not serve him here, where he asserts the authority to suspend a *local* order. *ADL* is, therefore, inapposite.

The governor also relies on *State v. El Paso County*, 618 S.W.3d 812 (Tex. App.—El Paso 2020, no pet.), a 2-1 decision on a very similar issue under the Texas Disaster Act—whether conflicting stay-at-home orders by the governor and the El Paso County Judge resulted inexorably in the governor's order taking precedence. *Id*. at 818-19. The majority credited the superficially appealing, although incorrect, notion that the governor's order takes precedence by virtue of his statewide office. While conceding that the Texas Disaster Act "certainly allowed county judges to lead local disasters," the majority substituted its own policy judgment for that of the Legislature, observing that "the idea of one captain of the ship has intuitive appeal" and "how could it be otherwise?" *Id*. at 822.

Justice Rodriguez dissented. In a comprehensive analysis of the statute's text, she demonstrates the Legislature indeed intended a decentralized approach to disaster management, allowing each locality to enact a targeted response to local conditions. *Id*. at 828. She concludes that while the governor has authority to remove

statewide obstacles to disaster response, "the Legislature never gave the Governor the authority, in making executive orders, to directly override local elected officials during a disaster and veto their decisions, much less suspend their power." *Id*.

Not bound by the majority opinion of the El Paso Court, this Court can and should make its own determination. The dissent's careful analysis of the statutory text is persuasive, and should be followed.

II. Relator has an adequate remedy by appeal.

Relator asserts that he is entitled to mandamus relief because he lacks an adequate remedy by appeal. Pet. 16. Relator makes an unfounded assertion that during a two-week period between issuance of the TRO and the temporary injunction hearing, other local entities will issue their own disaster-response orders "splintering the State's ability to achieve an orderly, cohesive, and uniform response to the COVID-19 pandemic." *Id*. Relator's unsupported speculation is not sufficient to establish that he has no adequate remedy by appeal.

First, there is no evidence that "innumerable other counties, cities, and other political subdivisions" have enacted—or will enact—their own disaster response orders between now and the date of the temporary injunction hearing, August 24. Even if they do, Relator's claim of "immediate and ongoing" injury from these orders rings hollow. The governor is currently subject to a similar TRO in Bexar County, but just today challenged that TRO by mandamus, only two business days

before the Bexar County order is set for a temporary injunction hearing. Upon determination of that temporary injunction, Relator will have the right to seek review of the validity of his GA-38 order (albeit from a different court) by appeal, if the Bexar County trial court grants a temporary injunction. Relator provided no evidence or authority that he is subject to a spate of local regulation that is unreviewable on appeal.

Second, Relator will have a full opportunity to present his arguments to this Court in an interlocutory appeal if the trial court issues a temporary injunction after the hearing just twelve days from now. Relator claims this is not sufficiently "timely relief." Pet. 16. But the single case on which he relies addresses an entirely different circumstance. In *In re Woodfill*, 470 S.W.3d 473, 480 (Tex. 2015) (per curiam), the Texas Supreme Court found no adequate remedy by appeal when the Houston City Council refused to perform its ministerial duty to act when a referendum petition was filed. *Id*. at 475-76. The Court reasoned that the appellate process would not resolve the case in time for the referendum to be placed on the ballot: "[M]andamus has long been recognized as an appropriate remedy when city officials improperly refuse to act on a citizen-initiated petition." *Id*. at 480-81.

There is no election looming here and no evidence that any statewide response to "cope" with the COVID-19 pandemic will be harmed by the appellate process. On the other hand, Judge Jenkins's order (which the TRO authorizes) seeks to

protect vulnerable Texans from the recent dramatic increase in COVID-19 infections in Dallas County, as required by statute.

According to the most recent COVID-19 forecast and modeling as of August 9, 2021 from UT Southwestern Medical Center in Dallas, the rate of COVlD-19 infections in Dallas County is reaching or has reached exponential growth rates. MR:5, 32 ¶ 12; *see also* MR:65-80. COVID-19 hospitalizations have increased in Dallas County by over 101% over the past two weeks, and total COVID-19 hospitalizations are estimated to reach over 1,500 hospitalized cases by August 26, 2021. MR:5, 32 ¶ 12; *see also* MR:65-80. And the evidence shows that mask mandates work: face coverings and masks are an effective mitigation strategy to reduce the spread of COVID-19. MR:6, 33 ¶13. The Governor himself has previously instituted a mask mandate to reduce the spread of COVID-19: "[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 at 1. Relator provides no countervailing proof of impending harm from the trial court's order.

Third, there is no risk that the subject matter of this mandamus will be mooted. This Court's jurisdiction is not threatened by declining to interfere with the temporary restraining order, as is the case when, for example, privileged documents

or trade secrets are ordered to be revealed[4]; overbroad document production is required[5]; First Amendment rights may be lost[6]; or a party's right to a jury trial is at stake.[7] The State challenges the order based on the merits of the legal issues, which will clearly remain live after the temporary-injunction hearing 12 days from now.

Finally, Texas courts have issued mandamus relief against TROs when they are void on their face. *See, e.g., In re Office of the Att'y Gen.*, 257 S.W.3d 695, 697-98 (Tex. 2008) (holding that TRO was facially void for noncompliance with Texas Rule of Civil Procedure 680, including being issued without notice and failing to define the injury or state why the injury was irreparable); *In re Elevacity, LLC*, No. 05-18-00135-CV, 2018 WL 915031, at *2 (Tex. App.—Dallas Feb. 16, 2018, orig. proceeding) (mem. op.) (same); *In re Rio Grande Cons. Indep. Sch. Dist.*, No. 04-16-00695-CV, 2016 WL 6609198, at *1 (Tex. App.—San Antonio Nov. 9, 2016, orig. proceeding) (mem. op.) (same) ("A TRO that is void is subject to remedy by mandamus."); *In re Nat'l Lloyds Ins. Co.*, No 13-15-00390-CV, 2015 WL 6759153,

[4] *See In re University of Texas Health Ctr.*, 33 S.W.3d 822, 827 (Tex. 2000); *In re Bridgestone/Firestone, Inc.*, 106 S.W.3d 730, 734 (Tex. 2003).

[5] *See In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003)

[6] *See In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 375 (Tex. 2000).

[7] *Freis v. Canales*, 877 S.W.2d 283, 284 (Tex. 1994).

at *4 (Tex. App.—Corpus Christi-Edinburg Nov. 3, 2015, orig. proceeding) (holding that TRO facially complied with Rule 680).

But here, the TRO is facially valid; the State does not argue otherwise. Instead, the State argues that it should not have issued on the merits. That argument can and should be addressed at the temporary-injunction hearing only two weeks away, and through the automatic interlocutory appeal available from the temporary-injunction ruling. *See* TEX. CIV. PRAC. & REM. CODE 51.051(a)(4).

Relator has an adequate remedy by appeal and mandamus relief is unwarranted.

CONCLUSION AND PRAYER

Local governmental entities throughout Texas are fighting a war against a common enemy, a virulent virus that is rapidly gaining ground. The Texas Disaster Act arms local governmental entities with the ammunition they need to fight that enemy. Relator arrogates to himself the role of "commander in chief" in this pandemic war. But no statute gives the governor absolute power over local governmental entities, much less the power to deprive those on the front line of the ammunition they need. This Court should deny Relator's request for mandamus relief.

Respectfully submitted,

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RULE 52.5(J) CERTIFICATION

I certify that I have reviewed the factual statements contained in this Response and have concluded that every factual statement in the Response is supported by competent evidence included in the mandamus record.

/s/ *Douglas W. Alexander*
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CERTIFICATE OF COMPLIANCE

Based on a word count run in Microsoft Word 2016, this brief contains 4,119 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ *Douglas W. Alexander*
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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2021, a true and correct copy of this response, including any and all attachments, is served via electronic service through eFile.TXCourts.gov on parties through counsel of record, listed below:

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