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August 14, 2021

Via E-filing

Blake Hawthorne, Clerk
Supreme Court of Texas

Re: No.21-0686, *In re Abbott*

Dear Mr. Hawthorne:

Judge Clay Jenkins' Response to Governor Greg Abbott's request for temporary relief under Rule 52.10 underscores the urgent need for this Court to stay the trial court's order temporarily restraining the Governor from enforcing GA-38 on a statewide basis.

The Response cannot (and does not try) to refute the Governor's overwhelming showing that he is entitled to mandamus relief. The Legislature unambiguously deputized the Governor—not a county judge—to manage Texas's response to a statewide disaster. Mot. 7-8. Judge Jenkins may not issue emergency orders that contradict the Governor's because the Disaster Act empowers county judges to act, if at all, only as the Governor's agents. *Id.* at 8-9. Even if section 418.108 of the Government Code somehow allowed Judge Jenkins to act independently of the Governor, that provision has been suspended by the Governor pursuant to his authority under the Disaster Act. *Id.* at 9-10. Finally—and at a minimum—the extraordinary *statewide* nature of the trial court's order requires this Court's intervention. *Id.* at 11.

Instead of countering the Governor's arguments on the first factor of the *Dietz* test, the Response insists that the Governor's Rule 52.10 motion improperly seeks "an immediate merits decision, without the necessary factual development." Resp. 1; *see id.* at 3-5. It complains that the Governor has failed to "prove" "with any evidence" that irreparable harm or prejudice would befall him in the next two weeks while he is unable to enforce a key provision of Executive Order GA-38 statewide. Resp. at 5-8. And Judge Jenkins concludes by claiming he is the one who would suffer

irreparable injury if relief is granted because he will be unable to continue issuing dictates that are at odds with the position taken by the Governor on behalf of the State. Resp. at 9-10. The arguments lack merit.

First, Judge Jenkins' own filing demonstrates that the Court does not need to "allow the facts to be developed at the temporary-injunction hearings" before granting the Governor relief. Resp. at 5-6. At no point does Judge Jenkins identify a factual dispute that precludes an award of relief. To the contrary, he concedes in his response to the Governor's mandamus petition that "the parties agree the outcome is governed *solely* by the correct construction of the Texas Disaster Act of 1975." Pet. Resp. 10. Moreover, following Judge Jenkins's preferred course by allowing these pure questions of law to be resolved on a piecemeal basis in trial courts across the State over the coming weeks will not resolve the Governor's injury, which he shares with the State, that a single trial court judge has arrogated to himself the ability to set statewide policy regarding how to respond to a deadly pandemic.

Second, Judge Jenkins is wrong that the Governor failed to demonstrate that allowing this *statewide* temporary restraining order to remain in place during the pendency of the Court's resolution of the mandamus petition will harm the Governor. This Court held just last year that counties are arms of the State without independent sovereignty; failure by a County Judge to abide by state law is harm to the sovereign *as a matter of law*. See *State v. Hollins*, 620 S.W.3d 400, 410 (Tex. 2020). In this instance, the Governor is acting in his official capacity precisely to vindicate that interest.

If that were not enough, the record demonstrates that other localities have followed in Judge Jenkins' footsteps and issued, or expressed the intent to issue, mask mandates that defy GA-38. Local actors in at least two other districts, including Bexar County and Fort Bend County, have obtained temporary restraining orders purporting to block the Governor from enforcing GA-38. MR.89-97. And at least three other lawsuits raising identical claims have been filed against the Governor by local government actors in Travis County. See MR.98-182. Absent this Court's intervention, more such lawsuits will surely follow. Those lawsuits will cause the State and the Governor to divert time and resources to responding to seriatim court filings, when their time would be far better spent addressing the pandemic on a statewide basis. That drain is particularly acute because it coincides with a special

session of the Legislature and the arrival of census data to begin the decennial redistricting process.

Third, the trial court’s order is far from a “narrow restriction” that does not impact the Governor’s “overall ability to address the entire pandemic.” *Contra* Resp. 9. Indeed, the existence of this lawsuit, allowing a single county judge to force his own policy preferences statewide, demonstrates that the Governor is not currently able to “use” those “political subdivision[s] . . . to cope with a disaster.” *Contra* Resp. 9. Dallas County and the localities that follow in its footsteps are openly resisting the Governor’s directives.

Finally, Judge Jenkins’ insistence (at 9-10) that he will be irreparably harmed if the Court grants this motion because he will be unable to implement his preferred COVID-19 policy misapprehends the role of counties under Texas law. Counties “represent no sovereignty distinct from the state and possess only such power . . . conferred upon them” by the State. *Hollins*, 620 S.W.3d at 406 (quoting *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 429-30 (Tex. 2016)). State law—namely, the Disaster Act—makes the Governor, not Judge Jenkins, “the proverbial captain of the ship to make the difficult decisions” regarding state efforts to “meet disaster dangers” posed by “the COVID-19 pandemic.” *State v. El Paso County*, 618 S.W.3d 812, 819 (Tex. App.—El Paso 2020, no pet.). This Court has repeatedly held that “[a]s a sovereign entity, the State has an intrinsic right to . . . enforce its own laws”—regardless of whether those laws conform to Judge Jenkins’ preferred policies. *Hollins*, 620 S.W.3d at 410 (citing *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015)).

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Respectfully submitted.

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Microsoft Word reports that this brief contains 973 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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