

CAUSE NO. D-1-GN-21-003792

**THE SOUTHERN CENTER FOR
CHILD ADVOCACY**
Plaintiff,

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IN THE DISTRICT COURT

V.

53RD **JUDICIAL DISTRICT**

**GREG ABBOTT, in his official
capacity as GOVERNOR OF TEXAS,**
Defendant.

TRAVIS COUNTY, TEXAS

**PLAINTIFF’S ORIGINAL PETITION, APPLICATIONS FOR TEMPORARY
RESTRAINING ORDER, TEMPORARY INJUNCTION,
AND PERMANENT INJUNCTION**

Plaintiff THE SOUTHERN CENTER FOR CHILD ADVOCACY files this *Original Petition, and Applications for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction* (“*Original Petition*”), and in support would respectfully show as follows:

I.
INTRODUCTION

1. One third of all new COVID-19 cases are in the states of Texas and Florida.¹
2. Children are among the most vulnerable to the Delta variant of COVID-19.²
3. On May 18, 2021, Defendant Greg Abbott in his official capacity as Governor of the

¹ Ashbrook, Maeve. “COVID-19 cases in Texas and Florida made up one-third of new cases in the US last week: The 7-day average for new cases in Texas was 7,662 as of Monday, Aug. 3.” August 3, 2021. KVUE.com. <https://www.kvue.com/article/news/health/coronavirus/coronavirus-numbers/texas-florida-one-third-covid19-cases-united-states/269-58ec180c-c757-4dca-8bf9-0dd3f51c5c09>

² Hart, Robert. “Kids Among Most Vulnerable To Infectious Delta Variant — Here’s Why You Should Be More Worried.” Forbes.com. July 2, 2021. <https://www.forbes.com/sites/roberthart/2021/07/02/kids-among-most-vulnerable-to-infectious-delta-variant---heres-why-you-should-be-more-worried/?sh=7a464ab22701>

State of Texas issued *Executive Order GA 36*, which, in relevant part, divests the authority of independent school districts in Texas to mandate the wearing of masks if it is necessary to protect the health and safety of students and school staff:

NOW, THEREFORE, I, Greg Abbott, Governor of Texas, by virtue of the power and authority vested in me by the Constitution and laws of the State of Texas, do hereby order the following on a statewide basis effective immediately:

1. No governmental entity, including a county, city, school district, and public health authority, and no governmental official may require any person to wear a face covering or to mandate that another person wear a face covering; provided, however, that:
 - a. state supported living centers, government-owned hospitals, and government-operated hospitals may continue to use appropriate policies regarding the wearing of face coverings; and
 - b. the Texas Department of Criminal Justice, the Texas Juvenile Justice Department, and any county and municipal jails acting consistent with guidance by the Texas Commission on Jail Standards may continue to use appropriate policies regarding the wearing of face coverings.
2. Notwithstanding the above, public schools may continue to follow policies regarding the wearing of face coverings to the extent reflected in current guidance by the Texas Education Agency, until June 4, 2021. The Texas Education Agency shall revise its guidance such that, effective 11:59 p.m. on June 4, 2021, no student, teacher, parent, or other staff member or visitor may be required to wear a face covering.

Governor's Executive Order: GA 36. May 18, 2021, pg. 2 of 3.³

4. *The Southern Center for Child Advocacy*⁴ is a nonprofit, tax exempt charitable Texas organization formed for the express purpose of advocating for children in K-12 public schools in Texas and bring this suit on their behalf.

5. As a result of *Executive Order: GA 36*, students throughout Texas are at risk of imminent irreparable harm due to the likelihood they will contract COVID-19 if school districts are not authorized to require masks for students and staff. Secondly, but perhaps equally important, the taxpayers of Texas will pay the costs of the Governor's actions *inter alia* in the form of school closures, suits against local school districts for knowingly, recklessly and unnecessarily exposing

³ https://gov.texas.gov/uploads/files/press/EO-GA-36_prohibition_on_mandating_face_coverings_response_to_COVID-19_disaster_IMAGE_05-18-2021.pdf

⁴ <https://southerncenterforchildadvocacy.org/support-%26-transparency>

students and staff to the risks of contagion, and the order's inordinate impact on students of color and students with special needs. Finally, the Governor's issuance of *Executive Order: GA 36* violates the constitutional and statutory regime in Texas as it relates to the provision of public education.

II. **JURISDICTION, VENUE AND DISCOVERY**

6. **Discovery Control Plan.** Plaintiffs intend to conduct discovery under Level 2 of the rules set forth in Rule 190 of the Texas Rules of Civil Procedure.

7. **Disclosures.** Plaintiffs request Defendant provide disclosures in accordance with Texas Rule of Civil Procedure 194, including relevant documents.

8. **TEX. R. CIV. P. 47.** Plaintiff is suing for both injunctive and declaratory relief. Plaintiffs are seeking monetary relief of less than \$100,000.00.

9. **Subject Matter Jurisdiction.** The Court has subject-matter jurisdiction pursuant to Constitution of Texas, Article V, § 8, as the amount in controversy exceeds the minimum jurisdictional limits of the court of exclusive interest. Plaintiff seeks relief that can be granted by courts of law or equity. Plaintiff brings this complaint under the Declaratory Judgment Act, referenced *infra.*, as well as pursuant to *City of El Paso v. Heinrich*, 284 S.W.3d, 366, 368-369 (Tex. 2009), which authorizes *ultra vires* claims against public officials alleged to act in violation of state law. Plaintiff is seeking relief entirely under state law and is not asserting claims that arise under federal law or any federal cause of action.

10. **Declaratory Judgment Act.** The Court has jurisdiction over the Plaintiff's request for declaratory relief against Defendant because the Declaratory Judgment Act waives governmental immunity when a petitioner is challenging the validity of an order. *See* Tex. Civ. Prac. & Rem.

Code §§ 37.004, 37.006; *Texas Lottery Commission v. First State Bank of DeQueen*, 325 S.W.3d 628 (2010); *Texas Education Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

11. **Venue.** Venue in this Court is proper in accordance with TEX. CIV. PRAC. & REM. CODE § 15.014.

III. PARTIES AND STANDING

12. **Defendant.** Defendant GREG ABBOTT in his official capacity as GOVERNOR OF TEXAS issued *Executive Order: GA 36*, referenced *supra*. at this heart of this controversy in his official capacity as governor on or about May 18, 2021. Defendant may be served via THE HONORABLE KEN PAXTON, ATTORNEY GENERAL FOR THE STATE OF TEXAS, Office of the Attorney General, 300 West 15th Street Austin, TX 78701.

13. **Plaintiff.** *The Southern Center for Child Advocacy* (SCCA) is a nonprofit formed in the State of Texas for the express purpose of advocating on behalf of children in K-12 public schools in Texas. Plaintiff has organizational and associational standing to prosecute this cause. *Texas Ass'n of Business v. Texas Air Control Board*, 852 S.W.2d 440, 444 (Tex. 1993) (“Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.”).⁵ Further, its Board of Directors includes teachers employed in Texas public schools, who would have standing in their own right. Finally, Plaintiff respectfully submits

⁵ One party with standing is sufficient to meet Article III's case or controversy requirement. *Rumsfield v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n. 2 (2006); *Texas v. United States*, 945 F.3d 355, 377378 (5th Cir. 2019); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2019) (“the injury alleged as an Article III injury-in-fact need not be substantial; ‘it need not measure more than an ‘identifiable trifle,’ . . . [t]his is because ‘the[requirement] under Article III is qualitative, not quantitative, in nature.’” An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right; the interests it seeks to protect are germane to the organization's purpose; and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Adver. Comm 'n.*, 432 U.S. 333, 343, 97 S. Ct. 2434 (1977).

that the hyper-politicized environment surrounding mask mandates has resulted in death threats on both sides of the political divide.⁶ Permitting organizational and associational standing will obviate the need to add the names of individual children and their parents as petitioners and subject them to possible retaliatory action.

IV. DECLARATION OF CLAIMS

Petition for Declaratory Judgment

14. Article VII, § 1 of the Texas Constitution vests authority in the “Legislature of the State” to provide for the “support and maintenance of an efficient” public school system:

“Sec. 1. SUPPORT AND MAINTENANCE OF SYSTEM OF PUBLIC FREE SCHOOLS. A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”

15. The Texas Legislature has vested the Texas Education Agency (TEA) with the sole authority to oversee the administration and monitoring of education programs required by both state and federal legislation. TEX. EDU. CODE § 7.021 (“Texas Education Agency Powers and Duties”).

16. In Texas, local independent school districts have the following powers and duties germane to the instant case—

- “The [Board of Trustees] shall: (1) seek to establish working relationships with other public entities to make effective use of community resources and ***to serve the needs of public school students in the community.***” TEX. EDUC. CODE § 11.1511(b)(1) (emphasis added).
- The [Board of Trustees] shall “carry out other powers and duties as provided by this code or other law.” TEX. EDUC. CODE § 11.1511(b)(14).

⁶ Such threats are so prevalent this unfortunate phenomenon has even been reported in mainstream culinary magazines. See Castrodale, Jelisa. “Texas Restaurants Face Backlash, Threats for Continuing to Require Masks.” March 8, 2021. *FoodandWine.com*. <https://www.foodandwine.com/news/texas-restaurants-threats-mask-mandate>.

17. This includes Chapter 38 (“Health and Safety”) of the Texas Education Code. TEX. EDUC. CODE §§ 38.001 – 38.352.

18. By circumventing the legislative process, the Governor has undermined both the constitutional and statutory regime regarding education in Texas. Consequently, *Executive Order: GA 36* violates the state constitution as well as state law.

Executive Order: GA 36 is an overreach of the Governor’s executive authority under TEX. GOV. CODE § 418.014 and, therefore, unconstitutional

19. In the Preamble to *Executive Order: GA 36*, the Governor cites to TEX. GOV. CODE §§ 418.014, 418.011, 418.016 and 418.018 as justification for his order. Plaintiff respectfully submits that this authority was vested by the Texas Legislature in order to permit the Governor to take *proactive steps* to mitigate against the impact of a declared disaster on the citizens of Texas, not to advance an anti-mask political agenda that has no discernible basis in the data regarding the COVID-19 contagion rate.

20. For example, the Governor’s previous order mandating the wearing of masks in Texas public schools is an appropriate use of the Governor’s emergency authority. To hold the inverse to be true confounds all logic and undermines the legitimacy of the Governor’s “emergency” order.

21. This is particularly true when the *Centers for Disease Control (CDC)* has concluded as recently as August 5, 2021 that “[d]ue to the circulating and highly contagious Delta variant, CDC recommends universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status.” *See CDC. Guidance for COVID-19 Prevention in K-12 Schools. August 5, 2021.*⁷

⁷ <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>

22. Now, as a consequence of *Executive Order: GA 36*, TEA has issued lackluster so-called “Public Health Guidance” that has no rational basis in either data regarding the spread of COVID-19 among school aged populations or the data regarding the new Delta variant of COVID-19. *See* TEA. *Public Health Guidance*. August 5, 2021, in relevant part:⁸

Masks

Per GA-38, school systems cannot require students or staff to wear a mask. GA-38 addresses government-mandated face coverings in response to the COVID-19 pandemic. Other authority to require protective equipment, including masks, in an employment setting is not necessarily affected by GA-38.

School systems must allow individuals to wear a mask if they choose to do so.

9

Cause of Action for Violation of TEX. EDUC. CODE § 1.002 (“Equal Educational Services or Opportunities”)

23. The Texas Education Code expressly requires that public schools in the state of Texas “shall provide equal opportunities to all individuals within its jurisdiction or geographical boundaries” as follows:

“Equal Educational Services Or Opportunities (a) An educational institution undertaking to provide education, services, or activities to any individual within the jurisdiction or geographical boundaries of the educational institution shall provide equal opportunities to all individuals within its jurisdiction or geographical boundaries pursuant to this code. (b) An educational institution may not deny services to any individual eligible to participate in a school district's special education program as provided by Section 29.003, but the educational institution shall provide individuals with disabilities special educational services as authorized by law or, where expressly authorized, assist in and contribute toward the provision of appropriate special educational services in cooperation with other educational institutions and other appropriate agencies, institutions, or departments.” TEX. EDUC. CODE § 1.002.

⁸ At least one school district has indicated that it will defy the Governor’s order in part. *See* “Austin ISD scrapping certain new guidelines announced by TEA.” KVUE.com. August 6, 2021. <https://www.kvue.com/article/news/education/schools/austin-isd-scrapping-certain-new-guidelines-announced-by-tea/269-fe3a51fd-1457-4436-8658-68cddf827049>

⁹ Most parents of school-aged children understand that, in the face of peer pressure, TEA’s “choice” provision is a farce.

24. By usurping the authority of local school districts, in coordination with their public health departments, to require masks, *Executive Order: GA 36* creates an arbitrary and capricious impediment to the ability of school districts to respond to this pandemic. Moreover, pursuant to TEX. EDUC. CODE § 1.002, Texas public schools are obligated to ensure that all children with disabilities have an appropriate public education in the most integrated and least restricted environment possible. In other words, children with disabilities are entitled to learn and interact with their non-disabled or typical peers in a safe and healthy educational environment. Many students with disabilities are at higher risk for severe illness or death resulting from contracting COVID-19. Consequently, many of these students will be unable to attend school in-person if masking is not required. Thus, Governor Abbott is effectively excluding these children from the public school system by Executive order.¹⁰

25. Similarly, people of color remain less likely than their White counterparts to have received a COVID-19 vaccine, and, as such, they are left with an increased risk of contagion, particularly in light of the COVID-19 Delta variant and its rapid spread.¹¹

26. Thus, *Executive Order: GA 36* arbitrarily and capriciously puts students of color at risk of contagion in areas of the state where disease is rampant, and vaccinations are lagging.

Grounds for Temporary Injunction

27. To obtain a temporary injunction, an applicant must plead and prove: “(1) a cause of

¹⁰ By extension, Governor Abbott is also excluding any public school teacher or staff member who is vulnerable to COVID-19.

¹¹ Ndugga, Nambi et al. “Latest Data on COVID-19 Vaccinations by Race/Ethnicity.” *Kaiser Family Foundation*. KFF.org. August 4, 2021. <https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-race-ethnicity/>

action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Butnaru v. Fort Motor Car Co.*, 284 S.W.3d 198, 205 (Tex. 2002).

28. Both the Declaratory Judgment Act and the holding of the Texas Supreme Court in *City of El Paso v. Heinrich*, referenced *supra.*, provide Plaintiff with a cause of action to seek declaration and injunctive relief against Defendant over his issuance and enforcement of *Executive Order: GA 36*.

29. Plaintiff is likely to prevail and, therefore, entitled to the relief requested because Defendant’s *Executive Order: GA 36* violates inter alia Article VII, § 1 of the Texas Constitution, and Plaintiff (and, more importantly, the children it represents) will suffer probable, imminent, and irreparable injury absent a temporary restraining order and temporary injunction prior to the start of the 2021-2022 school year, which in most school districts in Texas is between August 16-23, 2021. The threat to the health and safety of Texas public school students and teachers is imminent and real.

V.
PRAYER FOR RELIEF

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Plaintiff asks that the Court issue citation for Defendant to appear and answer and that Plaintiff be awarded judgment against Defendant as follows:

- a. **A Temporary Restraining Order, Preliminary and Permanent Injunction** against implementation and enforcement of *Executive Order: GA 36* as it applies to Texas public schools.
- b. **Declaratory Judgment** declaring that *Executive Order: GA 36* is unconstitutional as it violates Article VII, § 1 of the Texas Constitution and, therefore, void; declaring *Executive Order: GA 36* violates TEX. EDUC. CODE § 1.002, and, therefore, unenforceable; and declaring *Executive Order: GA 36* to be an unconstitutional overreach of the Governor’s authority pursuant

- d. **Reasonable attorney fees, costs of court and expenses** as authorized by TEX. CIV. PRAC. & REM. CODE § 37.009.
- e. All other relief to which Plaintiff is justly entitled at law or equity.

Respectfully submitted,
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**COUNSEL FOR THE SOUTHERN CENTER
FOR CHILD ADVOCACY (SCCA), Plaintiff**

CERTIFICATE OF SERVICE

I certify that on August 9, 2021, a true and correct copy of Plaintiff's *Original Petition* was served on Defendant by certified mail with return receipt requested and by first class mail, postage prepaid, in accordance with the Texas Rules of Civil Procedure as follows:

**THE HONORABLE KEN PAXTON
ATTORNEY GENERAL
FOR THE STATE OF TEXAS**
Office of the Attorney General
300 W. 15th Street
Austin, TX 78701

/s/Henry Green Bostwick II
Henry Green Bostwick
SCCA Volunteer Center Coordinator
COUNSEL FOR THE SOUTHERN CENTER FOR
CHILD ADVOCACY, Plaintiff