

Velva L. Price
District Clerk
Travis County
D-1-GN-20-004719
Ruben Tamez

CAUSE NO. D-1-GN-20-004719

**MARCY RENNEBERG, ALINE RENNEBERG,
WANDA WEBB, LELAND WEBB,
Plaintiffs,**

IN THE DISTRICT COURT

v.

53RD JUDICIAL DISTRICT

**GREG ABBOTT; TEXAS HEALTH AND HUMAN
SERVICES COMM’N; CECILE YOUNG, Exec.
Comm’r, Texas Health and Human Services Comm’n;
STATE OF TEXAS, PINE ARBOR NURSING HOME,
and PARK VALLEY INN, SAN GABRIEL
REHABILITATION AND CARE CENTER
Defendants.**

TRAVIS COUNTY TEXAS

PLAINTIFFS’ ORIGINAL PETITION and APPLICATION FOR EQUITABLE RELIEF

Plaintiffs are MARCY RENNEBERG and her mother ALINE RENNEBERG, married couple WANDA WEBB and LELAND WEBB, two pairs of individuals separated by policies implemented by nursing homes at the demand of Governor Greg Abbott and state agents. These plaintiffs come now to file this Original Petition and Application for Equitable Relief, including a temporary restraining order against the defendants, including the State of Texas, Gov. Abbott, THHS, Pine Arbor Nursing Home, and San Gabriel Rehabilitation and Care Center (“Defendant Nursing Homes”) executing these one-dimensional and harmful policies.

Defendants are violating constitutional and statutory rights of Plaintiffs by prohibiting essential family visitors, damaging the health of residents in these facilities, and costing precious time to the residents and their families. The Defendant Nursing Homes are breaching contracts with Plaintiffs by disallowing residents to visit with loved ones even when they have medical power of attorney for residents, resulting in elder abuse and violating the Americans with Disabilities Act by failing to provide equal access to medical care to their residents. This Court should order Defendants to allow residents to receive visits by essential family caregivers under the same conditions that apply to employees and staff.

I. DISCOVERY CONTROL PLAN

1. Plaintiffs intend to conduct discovery under Level 3 of the rules set forth in Rule 190 of the Texas Rules of Civil Procedure.

II. REQUEST FOR DISCLOSURE

2. Plaintiffs request Defendants provide disclosures in accordance with Texas Rule of Civil Procedure 194, including relevant documents.

III. TRCP 47 STATEMENT

3. Plaintiffs are suing for injunctive relief and declaratory relief.

4. Plaintiffs are seeking monetary relief of \$100,000 or less and non-monetary relief.

IV. PARTIES AND SERVICE

5. Plaintiff Marcy Renneberg and Maria Renneberg are Texas residents and may be served through their attorney of record, the undersigned.

6. Plaintiffs Wanda Webb and Leland Webb are Texas residents and may be served through their attorney of record, the undersigned.

7. Defendant Greg Abbott is the governor of the State of Texas and is being sued in his official capacity only. He may be served at 1100 San Jacinto Boulevard, Austin, Texas 78701.

8. Defendant Cecile Young is the Executive Director of the Texas Health and Human Services Commission (“HHSC”) and is being sued in her official capacity as the Executive Director of the Texas Health and Human Services Commission. She may be served with process at 4900 N. Lamar Blvd. Austin, Texas 78751 or wherever she may be found.

9. Defendant State of Texas can be served at the Office of the Attorney General, 300 W. 15th Street, Austin, TX 78701.

10. Defendant Pine Arbor is owned by Oakbend Medical Center and is a skilled nursing care facility located in Silsbee, Texas. It may be served through its Administrator Wendy K Jeselink at 705 Highway 418 West Silsbee, TX 77656.

11. Defendant San Gabriel Rehabilitation and Care Center South is owned by Limestone Hospital District and is a skilled nursing care facility located in Round Rock, Texas. It may be served through Administrator Leah Gage at 4100 College Park Drive Round Rock, TX 78665.

V. JURISDICTION AND VENUE

12. Plaintiffs seek relief that can be granted by courts of law or equity.

13. The Court has jurisdiction over the Plaintiffs' request for declaratory relief against Defendants because the Declaratory Judgment Act waives governmental immunity when the plaintiff is challenging the validity of an ordinance, order, or government action. See Tex. Civ. Prac. & Rem. Code §§ 37.004, 37.006; *Texas Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628 (2010); *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994).

14. The Court has jurisdiction over the Plaintiffs' request for injunctive relief against Defendants Abbott and Young because they are acting *ultra vires* by keeping Plaintiffs from in-person visits with each other in violation of Texas law and the Texas Constitution. See *City of El Paso v. Heinrich*, 284 S.W.3d 366-368-69 (Tex. 2009).

15. Plaintiffs have standing to seek declaratory and injunctive relief because they have been damaged by the Defendants' conduct.

16. The Court has personal jurisdiction over the Defendants.

17. Venue is proper in Travis County because Defendants have their principal office in Travis County, Texas. See Tex. Civ. Prac. & Rem. Code § 15.002(a)(3).

18. Based on past experience as described in the 5th Circuit Court’s ruling in *In re Abbott*, 956 F.3d 696 (5th Cir. 2020), Plaintiffs expect Defendant Abbott to assert that his proclamations and orders are not the same as enforcing non-laws and thus he should be permitted to dodge responsibility for the wanton economic destruction he is causing. To be sure, the Fifth Circuit recognized in *In re Abbott* that under section 418.012 of the Texas Government Code, the Texas Governor “may issue executive orders, proclamations, and regulations and amend or rescind them,” but then concluded that the Governor does not have the power to enforce such orders and thus is not subject to suit under the Eleventh Amendment. *Id.* at 708-710.

19. Plaintiffs acknowledge the Fifth Circuit’s ruling and recognize that Abbott did not physically appear at Plaintiffs’ businesses on a white steed and armed with a Colt .45 to ensure compliance with his executive orders. However, this is not a federal suit, and this Texas court should evaluate a request to enjoin enforcement of an unconstitutional rule pretending to be a law differently than a federal court applies to claims of immunity.

20. The Fifth Circuit’s evaluation warrants examination if only to distinguish between every case it cites and this suit. In *In re Abbott*, the Fifth Circuit granted mandamus to release Gov. Abbott and the Attorney General because they were only creating and threatening enforcement of executive orders, but not harming abortion providers by closing them down, therefore missing the “enforcement connection” element necessary for a court to order mandamus. 956 F.3d at 709-710 (discussing *Ex parte Young* and injunctions against state officials). In this case, Governor Abbott’s executive order directly states that “People shall not visit nursing homes...” and this Procrustean unlegislated “law” is causing irreparable damage to plaintiffs.

RELEVANT AUTHORITIES

21. Article I, § 28 of the Texas Constitution states, “No power of suspending laws in this State shall be exercised except by the Legislature.”
22. Article I, § 19 of the Texas Constitution states, ““No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.”
23. Article I, § 27 of the Texas Constitution states, “The citizens shall have the right, in a peaceable manner, to assemble together for their common good.”
24. Article XI, § 5 of the Texas Constitution provides that “no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.

Texas Human Resources Code, § 102.003(g) states:

An elderly individual is entitled to privacy while attending to personal needs and a private place for receiving visitors or associating with other individuals unless providing privacy would infringe on the rights of other individuals. This right applies to medical treatment, written communications, telephone conversations, meeting with family, and access to resident councils.

25. 42 U.S.C. § 12132 (Americans with Disabilities Act, Title II)

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

26. 42 U.S.C. § 12182(b)(1)(A.) (i.) (Americans with Disabilities Act, Title III)

Denial of participation: It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

VI. FACTS

A. The Disaster Act of 1975 & Executive Orders from Governor Abbott

27. On May 22, 1975 Governor Dolph Briscoe signed H.B. 2032 into law and the Texas Disaster Act of 1975 (“Disaster Act”) was born.¹ Since its 1987 re-codification, the Disaster Act has been found in Chapter 418 of the Texas Government Code.²

28. The Disaster Act was amended in 2005 following a year of heavy hurricane and flood damage. The amendment’s intention was to allow county judges and mayors to order evacuations and “control the movement of persons and the occupancy of premises” in damaged areas.³

29. The Disaster Act gives the Texas Governor broad powers in the case of an emergency, purporting to give his pronouncements the force of law at § 418.012, and giving him the ability to suspend laws if, based on his own judgment, they “prevent, hinder, or delay necessary action in coping with a disaster” at § 418.016.

30. The Disaster Act has rarely been invoked, and thus its deficiencies have not been obvious until about March 2020⁴, when the COVID-19 virus caused widespread alarm and executives all over Texas began issuing orders created by no legislative process.

31. Section 418.016 of the Act purports to give Gov. Abbott the power to suspend statutes that hinder efforts to cope with a disaster; Gov. Abbott has vigorously exercised that alleged power, though no central listing of such suspensions is available to government watchdogs.

¹ Act of May 22, 1975, 64th R.S., H.B. 2032 (1975).

² Act of May 21, 1987, 70th R.S., S.B. 894 (1987); Tex. Gov’t Code § 418.001 (“This chapter may be cited as the Texas Disaster Act of 1975”).

³ Act of June 9, 2005, 79th R.S., H.B. 3111 (2005), adding Tex. Gov’t Code § 418.108(f)-(g).

⁴ All dates in this document occur in 2020 unless otherwise specified; all internet URLs last checked August 12, 2020 or later.

B. The Governor's Executive Orders separate families during their last days together.

i. MARCY RENNEBERG and her mother, ALINE RENNEBERG

32. Aline Renneberg has been a resident of San Gabriel Rehabilitation and Care Center in Round Rock, Texas since September 2019. Aline Renneberg entered the nursing facility with her husband, who died in July 2020 from COVID-19. Aline has been left to grieve the loss of her husband alone, without the support or comfort of family. (See Exhibit C.)

33. Aline Renneberg suffers from dementia and also has diabetes. She is growing more and more incoherent, confused, and aggressive daily. She no longer cares to eat. She has begun hallucinating. She has lost weight.

34. Marcy Renneberg, Aline's daughter and decision maker based on a medical power of attorney, has been denied the right to enter San Gabriel Rehabilitation and Care Center to visit, care for, observe, and provide comfort and companionship to her mother.

35. Before Governor Abbott's orders and the rules and regulations promulgated by HHSC and enforced by San Gabriel Rehabilitation and Care Center, Marcy would visit her mother almost daily and care for her. She would check her skin for infections, cut and comb her hair, cut and clean her fingernails and toenails, make appointments to see the podiatrist, bring her food and make sure it was mashed so that Aline could eat it, put lotion on Aline's skin, give her water to keep her from being dehydrated. Marcy doubts the staff at San Gabriel Rehabilitation and Care Center is able or willing to provide that level of care. Nor can she check on her mother to be certain of the care she is receiving.

36. Aline Renneberg cannot carry on a window or phone visit well because of her dementia. Even if she could, it is no substitute for the in-person visit, care, companionship, and observation she is entitled to by her daughter as a resident of San Gabriel Rehabilitation and Care Center.

i. WANDA WEBB and her husband, LELAND WEBB

37. Leland Webb is 85 years old and is a nursing home resident at Pine Arbor in Silsbee, Texas. He has been married to his wife, Wanda, for 54 years. Leland suffers from dementia, diabetes, and congestive heart failure. His health conditions require that he receive constant care which Wanda cannot provide in her home. Leland has resided in Pine Arbor Nursing Facility since July 2018. He is wheelchair bound. (See Exhibits A and B.)

38. Wanda visited Leland regularly, at least several times per week, prior to Governor Abbott's orders. She provided hands-on care to him such as cutting his hair, trimming his nails, and taking him snacks. She would also play games and listen to music with him. Leland was very social, leaving his room to visit with other residents in the hallways and dining halls as much as possible. Wanda's help was integral to his care and well-being as well as his personal comfort. She would check his legs for swelling and help him move to the recliner to elevate his legs to prevent swelling due to his congestive heart failure.

39. Leland wants to visit in-person with his wife, Wanda. Pine Arbor has denied that. Phone calls are impossible because of Leland's hearing issues. Window visits are also challenging, again because of his hearing difficulties through a closed window. Though the facility provides video communications whenever staff is available, there have been times when Leland and Wanda have called requesting services and no one was available to accommodate the request. Leland and Wanda Webb represent the situation of thousands of nursing home residents and their family members who are currently separated.

40. Recently, when Wanda was waiting outside to have a window visit with Leland, she saw a delivery driver arrive, have his temperature taken, then be allowed to enter to deliver supplies to refill the vending machines inside the facility. (See *Declaration of Wanda Webb*.)

Governor Abbott's Approach

41. On March 19, 2020, Governor Abbott took drastic action in response to coronavirus cases in Texas. Abandoning the elderly and infirm to survive in long-term care facilities without the love, personal contact, and supportive care of their family members, Abbott issued Executive Order GA-8 (GA-8), which closed nursing homes and other long-term care facilities to all visitors not providing “essential care.”

42. In Texas, nursing homes are regulated by the Texas Department of Health and Human Services. Pursuant to GA-8 the Department of Health and Human Services (HHS), under executive director Cecile Young, guidelines to nursing homes provide that all visitors not providing critical assistance must be prohibited from visiting residents of long-term care facilities as these are among the most vulnerable of the state's residents. Recent guidance from HHS, updated on August 18, 2020, states:

During routine NF operations, visitors including family members, volunteers, consultants, external providers, and contractors regularly enter facilities. Many perform services essential for facility function, or in the case of service providers such as hospice and dialysis staff, they provide services critical to resident care. It is important to note current CMS and state guidance to NFs requires they limit visitors to only those who are providing critical assistance and only if these essential visitors are properly screened.⁵

43. Defendant Nursing Homes have implemented the HHS guidance to forbid all family visitors no matter how integral their contact is to the resident's care, except in “end-of-life” or “failure to thrive” situations when certain very specific conditions are met.

⁵ <https://hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/provider-portal/long-term-care/nf/covid-response-nursing-facilities.pdf>

C. Executive Order GA-28 and the recent “reopening” of Texas

44. Governor Abbott’s “Open Texas” plans issued on April 27, 2020 did not include any plan for opening nursing homes for visits by family members. His current order, GA-28, states:

People shall not visit nursing homes, state supported living centers, assisted living facilities, or long-term care facilities unless as determined through guidance from the Texas Health and Human Services Commission (HHSC). Nursing homes, state supported living centers, assisted living facilities, and long-term care facilities should follow infection control policies and practices set forth by HHSC, including minimizing the movement of staff between facilities whenever possible;⁶

45. Initially, nursing homes were closed to protect the most vulnerable of the citizens in Texas, as it is known that older patients who have comorbid conditions are more likely to contract and develop complications from COVID-19. Protecting the lives and well-being of these elderly and infirm residents of Texas is a noteworthy and laudable goal. However, COVID-19 is not the only health concern facing these residents. As noted by psychologist Melanie Webb, Leland Webb is already at risk for depressive episodes, which were many times managed with interaction, human connection, etc. The absolute worst thing that any individual can do when suffering from depression is isolate themselves from others. Social isolation is certain to exacerbate depression, which in turn, will exacerbate any general medical conditions. E.g., Aline Renneberg is growing more confused, incoherent, and even aggressive due to her isolation from her daughter, Marcy.

⁶ https://gov.texas.gov/uploads/files/press/EO-GA-28_targeted_response_to_reopening_COVID-19.pdf

46. HHS has recently implemented Phase 1 visitation for nursing facilities, which does not help the Plaintiffs in this lawsuit participate in in-person visits. The Phase 1 visitation guidelines⁷ allow only the following types of visitation and only if the facility is COVID-19 free among its residents and no member of staff has tested positive for 14 consecutive days prior to opening.

47. The Phase 1 visitation rules ignore differences in nursing homes, but are unnecessarily specific to no good purpose. A NF facility with a Phase 1 designation can allow:

- Outdoor visits—A visit between a resident and one or more personal visitors that occurs in-person in a dedicated outdoor space.
- Window visits—A personal visit between a visitor and a resident during which the resident and personal visitor are separated by an open window.
- Vehicle parades—A visit between a resident and one or more personal visitors, during which the resident remains outdoors on the facility property, and visitors drive past in a vehicle.
- Compassionate Care Visits—A visit between one permanently designated visitor and a resident experiencing a failure to thrive.⁸

48. While this small window of visitation may benefit a few residents, it does not allow Plaintiffs in this case to have the personal visitation, care, and observation vital to the health and well-being of their loved ones. Plaintiffs don't need more outdoor visits without personal contact and observation, especially in the sweltering Texas summer temperatures, where both patient and family member could be at risk for complications arising from heat exposure.

49. Though these new rules promulgated by Defendant Young and HHS allow for an extremely narrow exception designating a visitor for a resident who has been medically declared as demonstrating “failure to thrive,” those visits may still only take place in facilities which meet

⁷ <https://hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/provider-portal/long-term-care/nf/covid-response-nursing-facilities.pdf>

⁸ [https://texreg.sos.state.tx.us/public/regviewer\\$ext.RegPage?sl=R&app=1&p_dir=&p_rloc=380192&p_tloc=&p_ploc=&pg=1&p_reg=380192&ti=40&pt=1&ch=19&rl=2803&issue=08/21/2020&z_chk=4937918&z_contains=nursing%20facility^^^](https://texreg.sos.state.tx.us/public/regviewer$ext.RegPage?sl=R&app=1&p_dir=&p_rloc=380192&p_tloc=&p_ploc=&pg=1&p_reg=380192&ti=40&pt=1&ch=19&rl=2803&issue=08/21/2020&z_chk=4937918&z_contains=nursing%20facility^^^)

Phase I requirements. And if a single resident or employee tests positive for COVID-19, all visitation, no matter how limited, will be denied. In the meantime, staff and employees come and go freely from facilities that don't meet Phase 1 requirements.

50. The narrow exception notwithstanding, no nursing home resident should have to reach the point of "failing to thrive" before that resident is allowed to see his loved ones. Such a standard ought to be recognized as cruel in a civil society.

51. If Defendants' conduct is not restrained and declared unconstitutional, once this virus passes, the rights enjoyed by Plaintiffs under the Texas Constitution will be irreparably damaged. Indeed, many of these frail residents of nursing homes and other long-term care facilities may not survive the isolation imposed upon them by the government. Viruses mutate, so there may be a different coronavirus strain next year. The vulnerable residents of nursing homes cannot be locked down forever. After over five months, the Governor and the HHSC have only recently released any plans for allowing essential family visits to these Texas residents. These plans are very limited and only allow outdoor visits with no physical contact, and do not satisfy the concerns raised in this petition. Every day that Plaintiffs' rights are tread upon via unlawful shutdowns reinforces precedent for future unlawful governmental remedies related to virus and disease management.

52. There appears to be no end in sight to such executive orders as long as the Governor maintains a state of disaster, and effectively there can be no oversight of his actions as long as the Governor refuses to call the Legislature to a special session. As of this filing, Legislators must wait for the 2021 Legislative session to begin, under the current regime.

53. What is most troubling about GA-28 is that the order does not specify its duration. Most previous executive orders had a definitive end date or some form of deadline, but this order leaves closed any hope that nursing homes might someday even open to essential family visits.

54. The Governor has not explained (much less with any rational basis) why staff and employees can come and go from the nursing homes and other long-term care facilities and mingle in the community, and yet family members who have a vested interest in protecting their vulnerable loved ones from disease and in many instances have voluntarily quarantined themselves may not visit those facilities. Leland Webb has now tested positive for COVID-19, which must have come into Pine Arbor via a staff member or employee or maybe a vending machine delivery man, since no family members are able to enter the facility. Clearly, the policies defined in GA-28 are *not* preventing viral spread. They are, however, demonstrably hurting the very people they were intended to safeguard.

55. According to section 102.003(g) of the Texas Human Resources Code, “An elderly individual is entitled to privacy while attending to personal needs and a private place for receiving visitors or associating with other individuals unless providing privacy would infringe on the rights of other individuals. This right applies to medical treatment, written communications, telephone conversations, meeting with family, and access to resident councils.” The Governor is impeding this right and is suspending this portion of the law without authority.

56. Further, the Governor of Texas does not have the power to suspend statutes as Article 1, § 28 of the Texas Constitution states, “No power of suspending laws in this State shall be exercised **except by the Legislature.**” (Emphasis added.)

57. The Texas Disaster Act purports to allow the Governor to suspend regulatory statutes having to do with the conduct of state businesses, but no language in the Act can be colorably

claimed to allow the Governor to suspend the rights of disabled and elderly persons to receive family visitors to provide for their well-being, companionship, and assist in their essential care.

58. The Texas Disaster Act was passed to deal with emergency situations caused by disasters. It creates the Department of Emergency Management. However, it is a stretch to say that after over five months, the Governor and Director of Health and Human Services are still operating in an emergency situation. Certainly, the Governor could have called the Legislature into a special session by now and passed laws tailored by the HHSC to meet the needs of Leland Webb, allowing essential family visits under safe conditions. Or the Texas Legislature could hold hearings and pass a law that requires the Plaintiffs to sacrifice after weighing the costs of such a decision. Then at least an actual law would be passed by a representative body, rather than by a single individual claiming powers indistinguishable from that of a medieval king.

59. Other states have opened nursing homes to family visits. For example, Minnesota has implemented an “essential family caregiver” plan recognizing the vital role these family members play in the well-being of nursing home residents.⁹ Minnesota allows family caregivers to visit residents by using the same precautions expected of employees, including use of personal protective equipment. Failure to follow strict rules can result in revocation of visitation. Minnesota recognizes that visitation is an important component of caring for their nursing home residents. The Minn. Comm’r of Health has stated, “By rolling out this guidance for essential care providers, we are helping to build a more robust framework that providers can use to ensure that residents’ full range of needs are met.”¹⁰

⁹ See Minn. Department of Health’s Essential Caregiver Guidance for Long-term Care Facilities; see <https://www.health.state.mn.us/diseases/coronavirus/hcp/lccaregiver.pdf>,

¹⁰ <https://www.health.state.mn.us/news/pressrel/2020/covid071020.html>.

VII. CLAIMS

D. Claim 1 – Declaration – Defendants’ unlegislated suspension of Texas Human Resources Code §102.003(g) unconstitutionally suspends state law. Art. I, § 28.

60. Plaintiffs bring this claim and the following claims for declaratory relief under the Uniform Declaratory Judgment Act. They also bring suit under *City of El Paso v. Heinrich*, 284 S.W.3d, 366, 368-369 (Tex. 2009), which authorizes *ultra vires* claims against public officials who act in violation of state law.

61. Governor Abbott’s Order attempts to shut down Plaintiff Leland Webb and Aline Renneberg’s right to receive visitors as recognized by Texas Human Resources Code §102.003(g) and by preventing Plaintiff’s family members from exercising their medical powers of attorney and/or guardianship rights to make informed decisions for their loved ones’ care. If they are unable to see Plaintiff nursing home residents, observe them and the care they are receiving, and speak to them, Plaintiff family members are inhibited from exercising this right to make decisions in the patients’ best interest as recognized and required by section 166.152(e) of the Texas Health and Safety Code.

62. The Governor’s orders are therefore attempts to suspend state law, a power which the Texas Constitution reserves for the Texas Legislature. Art. I, § 28.

E. Claim 2 – Declaration -- Defendants directly violate the Texas Constitution due process protections and right to freely assemble. Art I, § 19 and § 27.

63. Article I, § 19 states that “[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land.”

64. Further, the Texas Constitution Art. 1 §27 provides that: “The citizens shall have the right, in a peaceable manner, to assemble together for their common good.” This is an inviolate right of the citizens of Texas recognized by our Texas Constitution.

65. By terminating Plaintiffs’ rights to visit in person, even with reasonable restrictions similar to those applied to staff of nursing homes, Defendants violate Article I, § 19 and §27 of the Texas Constitution. Additionally, Plaintiffs have been deprived of the privilege and right to have in-person visits and contact, a privilege and right recognized by the Texas Legislature at section 102.003(g) of the Texas Human Resources Code.

66. The Governor and the HHSC have not exercised due process before depriving these citizens of these rights. The Governor and the HHSC have a duty to provide adequate opportunity for the Plaintiffs to present their case and defend their rights before removing them. In similar cases where children are removed from the care of their parents, due process is required. (See Tex. Fam. Code § 262.101.) In this case, however, the Governor and the HHSC have promulgated decrees and regulations that are general, broad, and sweeping, but which have no bearing on the actual condition and medical needs of the individual patient.

67. Section 2001.034 of the Texas Government Code allows the Texas Health and Human Services Commission to adopt emergency rules “if an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule on fewer than 30 days' notice.”

68. The HHSC relies on this provision for its rules¹¹ which are depriving Plaintiff residents of the right to receive visitors, resulting in their precipitous decline. Perhaps during the first two weeks, even up to six weeks at the beginning of this coronavirus pandemic, the “emergency

¹¹ [https://texreg.sos.state.tx.us/public/regviewer\\$ext.RegPage?sl=R&app=1&p_dir=&p_rloc=380192&p_tloc=&p_ploc=&pg=1&p_reg=380192&ti=40&pt=1&ch=19&rl=2803&issue=08/21/2020&z_chk=4937918&z_contains=nursing%20facility^^^](https://texreg.sos.state.tx.us/public/regviewer$ext.RegPage?sl=R&app=1&p_dir=&p_rloc=380192&p_tloc=&p_ploc=&pg=1&p_reg=380192&ti=40&pt=1&ch=19&rl=2803&issue=08/21/2020&z_chk=4937918&z_contains=nursing%20facility^^^).

exception” for rule-making might be considered viable and applicable. However, over five months have elapsed and the rule-making process, which calls for public comment and input from the people most affected by the emergency, ought to be followed.

69. Under the normal rule-making procedure as laid out in the Texas Administrative Code, Title 26, the proposed rules are published in the Texas Register, adequate time for public comment is allowed, advisory committees meet and review said proposals, and the Executive Council reviews them before the adoption of the rules.

70. In the case of nursing facilities, the HHSC has not followed the normal rule-making procedure, even though one can reasonably conclude that our state is not operating under imminent peril when over five months have elapsed since the declaration of a State of Emergency. As such, the HHSC is violating the due process rights of the Plaintiffs by failing to follow the statutorily mandated rule-making process before stripping Plaintiffs of their constitutionally guaranteed rights to freely assemble with their loved ones and the statutorily recognized right to receive visitors.

71. The Texas Supreme court has held that:

Wherever the Constitution makes a declaration of political privileges or rights or powers to be exercised by the people or the individual, it is placed beyond legislative control or interference, as much so as if the instrument had expressly declared that the individual citizen should not be deprived of those powers, privileges, and rights; and the Legislature is powerless to deprive him of those powers and privileges. See *Bell v. Hill*, 174 S.W.2d 113, 120 (1934).

72. If the elected Legislature, the rightful lawmaking body of this State, is powerless to deprive citizens of the right to assemble, the Governor, Executive Branch, and the HHSC cannot assert such authority. And even if they could, they cannot claim that an emergency lasts until death is overcome and the last trumpet blows.

73. Defendants Abbott and Young have, through their actions, restricted individual Plaintiffs' right to assemble with their loved ones. The right to peaceably assemble for the common good is considered a fundamental right and thus subject to a strict scrutiny test. To survive this Court's review, the government must prove that any limitation of that right is narrowly tailored to serve a compelling government interest. Because the State has not done so, it violates the constitutionally guaranteed rights of the plaintiffs. See *Zaatari v. City of Austin*, No. 03-17-00812-CV, 2019, Tex. App. LEXIS 10290, (Tex. App. – Austin, 2019).

74. In this case, Plaintiffs have been deprived of the right to assemble together by the Governor in his decree, by the HHSC in its guidelines, and by Defendant nursing homes, which are state-Medicaid-funded providers. Defendants must show that they have narrowly tailored their actions that resulted in this deprivation in order to advance compelling government interest.

75. While Defendants may argue that protecting vulnerable, elderly, and infirm persons during a global pandemic is a compelling government interest, it cannot legitimately argue that it narrowly tailored its policy. After five months, there is no longer an emergency situation and there has been adequate time to tailor a policy to allow essential family visits by Plaintiff family caregivers to see and care for Plaintiff Nursing Home Residents, Webb and Renneberg.

76. If staff and employees and even vending machine delivery men are allowed to come and go daily, subject to temperature checks and wearing personal protection equipment, Defendants must demonstrate how the sweeping prohibition against any in-person visitation is legally acceptable given that it denies the Plaintiffs the right to assemble. Indeed, the sweeping prohibition is not acceptable and must be narrowly tailored to pass strict scrutiny.

77. Defendants also violate the Texas Constitution, Art. 1, §28 which provides that, "No power of suspending laws in this State shall be exercised except by the legislature." Defendant

Abbott's order prohibiting all in-person indoor visits to nursing homes (except those who meet the requirements of Phase I), combined with the enforcement actions by his agents, is a *de facto* suspension of the statutory provisions that protect the rights of nursing home residents to privately receive visitors. Chapter 418 of the Texas Government Code cannot give the Defendant authority to ignore the Texas Constitution; as even statutes passed by the Texas Legislature are subject to the Constitution.

78. The restrictions cannot even pass a rational basis test. COVID-19 cases have clearly entered nursing facilities through its employees. Defendants may argue that employees are necessary for the health of nursing home residents, as there is no other option, an obvious truth. But Defendants have taken the equally absurd position that no family visit is necessary for the health of nursing home residents, when many nursing home residents have received near daily care from their loved ones, and that care has been the difference between life and death.

79. To prohibit all family visits, even by those willing to wear the same personal protective equipment that the staff wears, based on the contention that the benefits of personal family visits are not worth the risk of those visits has no rational basis. Nursing home residents often receive actual health care during those visits. The State of Texas maintains an Ombudsman program allowing ordinary people who visit loved ones in nursing homes to identify negligent treatment of residents during visits.¹²

80. Because Defendants have failed to provide due process before depriving Plaintiffs of their rights, this Court should find and declare that the applicable section of GA-28 and relevant HHSC regulations are void under the Texas Constitution.

¹² See https://apps.hhs.texas.gov/news_info/ombudsman/. This Texas program allows any interested adult to be certified as a volunteer watch dog to advocate for nursing home residents.

F. Claim 3 – Declaration -- Governor Abbott’s Order violates the Equal Protection Clause of the Texas Constitution. Article I, § 3.

81. Governor Abbott’s Executive Order GA-28 picks and chooses winners and losers. Winners include staff and employees who can enter the nursing home and return home, visit the grocery store, and attend family gatherings while Plaintiff family caregivers lose by being kept out and Plaintiff Nursing Home Residents lose by suffering neglect because their family members cannot provide the essential care and attention they need. Residents of nursing homes who are able to hear telephone calls, be taken outside or to a window benefit more than other residents of nursing homes. Leland Webb and Aline Renneberg can do none of these because of their physical and mental disabilities. This is patently unequal. Unfortunately for Plaintiffs and others similarly situated, they have been relegated to Governor Abbott’s loser category and sentenced to isolation and heartbreak. The Governor and HHSC have a duty to promulgate regulations that provide equal protection to all groups involved – employees of nursing homes, all residents, and family members.

G. Claim 4 – Declaration -- GA-28 unlawfully suspends laws and is arbitrary.

82. The applicable section of GA-28 unlawfully suspends laws including the rights in the Bill of Rights, is arbitrary, and violates the Texas Constitution. GA-28 does not pass strict scrutiny analysis and violates the Texas Constitution, Art. 1, §§ 28 and 29:

Sec. 28. SUSPENSION OF LAWS. No power of suspending laws in this State shall be exercised except by the legislature.

Sec. 29. BILL OF RIGHTS EXCEPTED FROM POWERS OF GOVERNMENT AND INVIOATE. To guard against transgressions of the high powers herein delegated, we declare that everything in this “Bill of Rights” is excepted from the general powers of the government, and shall forever remain inviolate, and all laws contrary thereto, or the following provisions, shall be void.

83. Note: neither section 28 nor 29 says “. . . unless the government contends an emergency might possibly exist.” Indeed, our rights are MOST important during times of emergencies! As noted in *In re Abbott*, “The Constitution is not suspended when the government declares a state of disaster.” *In re Abbott*, No. 20-0291, 2020 WL 1943226, at *1 (Tex. Apr. 23, 2020).

84. The sections of the Texas Bill of Rights that GA-28 violates by “suspending” laws include Sections 19 (privileges and due process) and 27 (assembly). Abbott also illegally suspends the laws guaranteeing the rights of Plaintiffs Webb and Renneberg to receive visitors. Governor Abbott can claim all day that the legislature gave him “broad powers.” However, those powers that Abbott claims to have, whatever they may be, cannot supersede the rights guaranteed by the Texas Constitution.

85. Also, the executive orders by Abbott and enforcement by HHSC and Defendant Nursing Homes are arbitrary because they have no rational basis. How can it be rational that staff and employees of nursing homes, and even vending machine delivery men, can come and go from the nursing facilities subject to temperature checks, screenings, and wearing personal protective equipment, but loving family members who are motivated not to bring COVID-19 to their fragile loved ones residing in nursing homes can not be allowed to do so under the same guidelines? This distinction between employees and essential family caregivers is irrational and arbitrary, makes no sense, and violates the Texas Constitution.

H. Claim 5 – Declaration -- Governor Abbott and HHSC should follow the Communicable Disease and Control Act.

86. We need not guess what laws the Governor and HHS should be following during this time. In fact, the Texas Legislature spoke on the issue of communicable diseases such as COVID-19 in 1989 when it passed Chapter 81 of the Texas Health and Safety Code, known as

“Communicable Disease Prevention and Control Act.” This Act even addresses the control and prevention of these diseases in long-term care facilities in §81.014.

87. The Act states clearly that the primary person responsible is the individual. “Each person shall act responsibly to prevent and control communicable disease.” In doing so, the Texas Legislature understood that it is not the Governor or HHSC that is primarily responsible for a particular individual’s health and decisions related thereto, but it is the duty of the individual and his or her family members.

88. The Act anticipates the need for testing, the right to enter and inspect facilities, and to implement control measures, like quarantines, to prevent the spread of disease. However, crucially important is the fact that the Texas Legislature only allowed those control measures to be in place for up to 60 days. Texas Health & Safety Code §81.082(d) The State is well beyond 150 days at this point. The remedy is not for the Governor and HHSC to continue exercising authority beyond what is allowed, but to call on the Legislature to extend that authority if they deem it necessary.

I. Claim 6 – Declaration – Defendants are violating the ADA requirements

89. Governor Abbott through his order, HHSC through its guidelines, and Defendant Nursing Homes through their practices are violating the Americans with Disabilities Act (ADA) and Rehabilitation Act of 1973. Both Title II and Title III of the ADA and Section 504 require that medical care providers provide individuals with disabilities full and equal access to their health care services and facilities; and reasonable modifications to policies, practices, and procedures when necessary to make health care services fully available to individuals with disabilities, unless the modifications would fundamentally alter the nature of the services. They also prohibit these nursing facilities from discriminating against disabled persons by denying them the

opportunity “to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.”

90. As recipients of Medicaid Services by the state of Texas, residents of commercial nursing facilities, and as persons who have physical and mental impairments that substantially limit their major life activities, Leland Webb and Aline Renneberg are entitled to the protections of the ADA Title II & III. Webb is disabled in having Alzheimer’s disease, which inhibits his decision making ability. Renneberg has dementia which causes her to become confused and sometimes renders her unable to even press the help button to call staff in to help her with personal and medical needs. Webb also has physical impairments requiring the use of a wheelchair and that limit his movements and ability to function independently. Both plaintiffs have trouble understanding and effectively communicating via “virtual visits” and phone calls.

91. Webb’s wife, Wanda and Renneberg’s daughter, Marcy, need to be a regular part of their health care routine and their medical care decision making as their medical powers of attorney and guardians. They cannot carry out this duty adequately without attending to their loved ones in person and observing their care and condition. Even the small concessions of “Phase I Visitation” recently made by Defendant Young and Former Director Wilson are not sufficient to cure this defect and violation of the ADA and Rehabilitation Act of 1973. Essential family caregivers are still unable to visit Plaintiffs in the facility where they reside and the provision for “virtual” visits does not provide equal access to them as to others who are not as severely disabled both physically and mentally as they are.

J. Claim 7 – Declaration – By their abuse and neglect of Plaintiff Residents, Defendants are violating the Texas Human Resources Code & Centers for Medicare and Medicaid Services Regulations.

92. The Texas Legislature recognized in passing Chapter 48 of the Texas Human Resources Code that the elderly and disabled deserve special protection from abuse and neglect because they are vulnerable.

93. The adopted definition of abuse includes “unreasonable confinement” and the definition of neglect includes “the failure to provide for one’s self the goods or services, including medical services, which are necessary to avoid physical or emotional harm or pain or the failure of a caretaker to provide such goods or services.” Texas Human Resources Code §48.002a (2) & (4).

94. Skilled nursing facility employees and staff have a duty to report the abuse and neglect of their elderly residents, and HHSC has a duty to investigate and remedy those reports. The one-size-fits none approach that the state has taken with its sweeping orders over the last five months has left no room for remedying the many cases, including those of Leland Webb and Aline Renneberg, of abuse and neglect of the elderly in unreasonable confinement and deprivation.

95. The Centers for Medicare and Medicaid Services (CMS), which regulates Defendant Nursing Homes on the federal level, is governed by regulation §483.10 titled “Resident Rights” and states “The resident has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility. A facility must protect and promote the rights of each resident... Visit and be visited by others from outside the facility.”¹³ Further, it states that “A facility must promote the exercise of rights for each resident, including any who face barriers (such as communication problems, hearing problems

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<https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/downloads/R70SOMA.pdf>

and cognition limits) in the exercise of these rights. A resident, even though determined to be incompetent, should be able to assert these rights based on his or her degree of capability.”

96. Clearly, the federal government recognizes the important right of nursing home residents to have visits by their loved ones, who are essential to their care and well-being. Defendant Nursing Homes are violating this fundamental and important right of Plaintiff nursing home residents who face barriers to using alternate forms of communication and who are essentially imprisoned in their last days in a nursing facility without the ability to see their loved ones.

97. CMS Regulation 483.13(b) “Abuse: The resident has the right to be free from verbal, sexual, physical, and mental abuse, corporal punishment, and involuntary seclusion.” It goes on to explain in the comments that:

“Involuntary seclusion” is defined as separation of a resident from other residents or from her/his room or confinement to her/his room (with or without roommates) against the resident’s will, or the will of the resident’s legal representative. Emergency or short term monitored separation from other Residents will not be considered involuntary seclusion and may be permitted if used for a limited period of time as a therapeutic intervention to reduce agitation until professional staff can develop a plan of care to meet the resident’s needs.

98. Again, the federal government in its regulations recognizes that involuntary seclusion of nursing home residents is tantamount to abuse. In this case, Defendant Nursing Homes are involuntarily secluding Plaintiff residents from others, specifically their loved ones, against their will and the will of their legal representatives. The “emergency” argument cannot be maintained with any integrity as over 150 days have elapsed since the seclusion orders were put in place, and the seclusion of Plaintiff residents is resulting in real injury in the form of agitation and decline in their health and well-being.

K. Claim 8 – Declaration -- Breach of Contract

99. Defendant Nursing Homes have a duty under the contract terms it entered into with Leland and Wanda Webb and Marcy and Aline Renneberg to abide by the government regulations which govern them, to provide safe and quality care, and to provide opportunities for Plaintiff nursing home residents to receive visitors and have access to the care and critical attention only their family members can provide. Under the Governor's order (GA-28), Defendant Nursing Homes are failing. They are often short-handed and by not allowing Plaintiffs' loved ones to visit, they are harming, neglecting, and abusing the Plaintiff residents in their care. Defendant Nursing Homes could have designated Wanda Webb for Leland Webb and Marcy Renneberg for Aline Renneberg as essential to the residents' care and allowed them to enter under GA-28 and following the same guidelines and sanitary conditions as its employees and staff and even vending machine delivery men. Because they have not done so, they are in violation of their contract to provide services to the Plaintiff nursing home residents in their care and their legal representatives.

L. Claim 9 -- Declaration -- San Gabriel and Pine Arbor nursing homes are violating Title 40, Rules §§ 19.401 and 19.402 of the Texas Administrative Code by denying the right to visitors to their residents.

100. Rule § 19.401 of the Texas Administrative Code enumerates the protected rights of nursing home residents. Specifically, paragraph (c) outlines these rights including the right to “(16) receive visitors”. (See Exhibit H) Additionally, Rule § 19.402 states, “(b) The resident has the right to be free of interference, coercion, discrimination, or reprisal from the facility in exercising the resident's rights.”¹⁴

¹⁴ [https://texreg.sos.state.tx.us/public/readtac\\$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=40&pt=1&ch=19&rl=402](https://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=40&pt=1&ch=19&rl=402)

101. There is no contradiction with earlier Title 26 Rule § 506.3, which states, “(2) the right of the patient, in collaboration with his or her physician, to make decisions involving his or her health care; [...] (12) the right to receive visitors at reasonable hours, within reasonable limitations, as may be required by the facility in its operation policies.” Three reasons exist which confirm Title 40’s provisions and the violation in this case. First, Plaintiff residents are guaranteed the right to have a say in their health care plans. Plaintiff residents and their legal medical decision makers are willing and desire to forego the so-called “preventative measures” such as a total isolation from visitors. Second, the right enumerated relates to limiting visits to certain hours of operation, not whether or not the right may be wholly denied. Finally and most importantly, the provisions of Title 40, Section 19.402 were amended to take effect in March 2020 while Title 26, Section 506.33 was adopted to be effective in 2004, meaning the later provision, Title 40, ought to take precedence.

102. Given these facts, the Defendants Pine Arbor and San Gabriel are violating the protected rights of nursing home residents by denying them their right to receive visitors, which constitutes “interference” with the exercise of that right. This court should declare that Defendant Nursing Homes are violating the HHS rules protecting Plaintiff residents’ rights to receive visitors.

M. Claim 11 -- Application for TRO and Injunctive Relief

103. Based on the irreparable harm (and imminent danger of Plaintiffs’ death) caused by Defendant Abbott’s executive orders, Defendant Young’s rules and regulations, and Defendant Nursing Homes enforcement of those orders and rules, Plaintiffs seek a temporary restraining order (“TRO”), temporary injunction, and permanent injunction against Governor Abbott, HHS Commissioner Cecile Young, and Defendant Nursing Homes prohibiting them from enforcing GA-28 and all HHS Emergency Rules limiting in-person visitors until such time as the legitimate

law-making power in this state, the Texas Legislature, can be convened and explore what actual laws should be passed and enforced regarding these matters, and further, to immediately allow Plaintiffs to resume some semblance of visitation procedures.

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

105. The Uniform Declaratory Judgment Act and *City of El Paso v. Heinrich*, 284 S.W.3d 366-368-69 (Tex. 2009) each provide Plaintiffs with a cause of action to seek declaratory and injunctive relief against the Defendants.

106. Plaintiffs have a probable right to relief because the Defendants conduct violates the Texas Constitution, state statutes, and the Americans with Disabilities Act.

107. Plaintiffs are currently suffering and will continue to suffer probable, imminent, and irreparable injury absent a temporary restraining order and temporary injunction because the Defendants are trampling on Plaintiffs’ rights protected by the Texas Constitution and are exceeding Defendants’ authority under the Texas Disaster Act (Texas Gov’t Code §418.011).

108. Nursing home resident plaintiffs’ lives are at stake, and time is of the essence. Provision must be made to allow essential family caregivers to enter the facilities and provide personal care to their loved ones. Nursing homes must be ordered to allow these visits under the same conditions that they allow their employees and staff to enter and care for the residents.

VIII. ATTORNEY’S FEES

109. Plaintiff seeks recovery of its reasonable and necessary attorney’s fees pursuant to Chapters 37 & 38 *et seq* of the Texas Civil Practice and Remedies Code.

110. Plaintiff seeks recovery of its reasonable and necessary attorney's fees for violations of the ADA pursuant to 42 USCS § 12133 and 29 USCS §794a. ("In any action or proceeding to enforce or charge a violation of a provision of this title [29 USCS §§ 790 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.")

IX. CONDITIONS PRECEDENT

111. All conditions precedent have occurred.

X. REQUEST FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray for the following relief:

- i) declare GA-08 and GA-28 unconstitutional, as well as the referenced associated regulations mentioned herein issued by HHSC to enforce GA-08 and -28;
- ii) temporarily restrain the Governor, Executive Director of HHSC, and Defendant Nursing Homes from enforcing the aforementioned broad and unconstitutional orders;
- iii) issue a temporary and permanent injunction allowing for safe and limited family visits for essential family caregivers who are willing to follow the same safety and health protocols and staff and employees;
- iv) award nominal and compensatory damages;
- vi) award costs and attorneys' fees;
- vii) grant all additional relief to which Plaintiffs may be entitled at law or equity, including invalidation of other sections of the Disaster Act as appropriate.

Respectfully submitted this 4th day of September, 2020,

By: /s/Warren V. Norred

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Attachments:

Exhibit A: Declaration of Wanda Webb

Exhibit B: Declaration of Melanie Webb

Exhibit C: Declaration of Marcy Renneberg

Exhibit D: GA-08

Exhibit E: GA-18

Exhibit F: GA-26

Exhibit G: GA-28

Exhibit H: 40 TAC § 19.402(c) - Statement of Resident Rights

Exhibit I: 40 TAC §§ 19.2801-19.2802 - COVID-19 Emergency Rules

Exhibit J: Abstract - COVID-19 Response for Nursing Facilities