



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 12, 2020

via E-mail (sarah.eckhardt@traviscountytexas.gov; steve.adler@austintexas.gov)

Judge Sarah Eckhart
Office of County Judge
Travis County
P.O. Box 1748
Austin, Texas 78767

Mayor Stephen Adler
Office of the Mayor
City of Austin
P.O. Box 1088
Austin, Texas 78767-1088

Dear Judge Eckhart and Mayor Adler:

It has come to our attention that Travis County and the City of Austin have issued local public health orders that exceed the county's and city's lawful authority and that are likely to confuse residents. This letter identifies some of the concerns with your recent orders. We trust you will act quickly to correct mistakes like these to avoid further confusion and litigation challenging the county's and city's unconstitutional and unlawful restrictions.

Houses of Worship

Both the county's and city's orders attempt to restrict essential services, including those provided by houses of worship. Executive Order GA-21 recognizes that "religious services conducted in churches, congregations, and houses of worship" are essential services.¹ The governor's order further recommends that religious services "be conducted in accordance with the joint guidance issued and updated by the attorney general and governor."² Enclosed is a copy of the joint guidance for houses of worship.³ Importantly, nothing in the governor's order or the joint guidance

¹ Exec. Order GA-21 at 3 (May 5, 2020).

² *Id.* at 5.

³ *Guidance for Houses of Worship During the COVID-19 Crisis*, <https://www.texasattorneygeneral.gov/sites/default/files/images/admin/2020/Press/Third%20Revised%20AG%20Guidance%20for%20Houses%20of%20Worship%20During%20the%20COVID-19%20Crisis%20-%20Final.pdf>.

This joint guidance identifies that the recommendations provided to houses of worship for religious services are just that—recommendations—and are the least restrictive means of serving a compelling government interest to protect public health. *Id.* at 5.

mandates how religious services should be conducted or how houses of worship should make employment decisions. Yet your orders provide that essential services, such as houses of worship, “shall” comply with certain restrictions, including:

- not making certain employment decisions based on “sexual orientation” or “gender identity,”
- prohibiting certain employees and members of the public from providing or obtaining essential services, unless social-distancing and face-covering requirements are followed,
- creating and implementing an infectious disease response plan, and
- minimizing or canceling in-person meetings and conferences.

These restrictions exceed the county’s and city’s lawful authority and are superseded by Executive Order GA-21 because they conflict with that order and restrict essential services.⁴

In addition, unlike the governor’s order, which respects the robust constitutional and statutory rights protecting Texans’ free exercise of religion, the county’s and city’s orders unlawfully trample religious freedom. This exposes the county and city to legal liability. Limiting access to a house of worship or imposing unconstitutional and unlawful restrictions on a house of worship, as the county and the city are doing presently, violates the religious liberty guaranteed by the federal and state Constitutions and the Texas Religious Freedom Restoration Act, all of which ensure that Texans can worship and freely exercise their religion according to the dictates of their own consciences, and not limited by overbearing government action.

Essential Businesses and Reopened Businesses

The city’s order also restricts other essential services that are allowed by the governor’s order, such as law offices.⁵ In addition to the religious services identified in Executive Order GA-21, the CISA guidance outlines which businesses are considered essential businesses, critical infrastructure and essential business workers.⁶ A local order that fails to allow these businesses to operate contradicts Executive Order GA-21. Insofar as a local order restricts essential or reopened services, it conflicts with the governor’s order and is, therefore, invalid.

Contact-tracing

The city’s order expressly provides that certain restaurants “are encouraged” to keep track of all customers who dined at these restaurants, the day they visited, and their personal contact information. Although the order only seems to recommend for these restaurants to track their employees and customers, it forces restaurants into submission by threatening to release the names of restaurants who do not comply. In addition to the threat of exposure, the city’s Orwellian order raises privacy concerns and is also likely superseded by the governor’s order. Executive Order

⁴ The governor’s order supersedes “any conflicting order issued by local officials” to the extent the local order “restricts essential services”. Exec. Order GA-21 at 6.

⁵ See Cybersecurity and Infrastructure Security Agency, Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, Version 3.0 (Apr. 17, 2020) *available at*: <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>.

⁶ *Id.*

GA-21 supersedes conflicting local orders that restrict essential services. Insofar as orders like these restrict essential services, they are invalid.

Masks

Neither the county nor the city can impose civil or criminal penalties for not wearing a mask in public. Executive Order GA-21 encourages individuals to wear appropriate face coverings and prohibits any jurisdiction from imposing a civil or criminal penalty for not doing so.⁷ State law allows the governor to “issue executive orders, proclamations, and regulations and amend or rescind them.”⁸ These orders, proclamations, and regulations “have the force and effect of law.”⁹ Because local governments cannot enact laws that are inconsistent with State law, any local order that purports to impose a civil or criminal penalty for not wearing a face covering is void and unenforceable.¹⁰

Your orders provide that “all persons over the age of six shall wear some form of” mask when leaving their residence. Executive Order GA-21 encourages individuals to wear appropriate mask but does not require them. Instead, the governor’s order recognizes that Texans will act responsibly and make smart decisions to protect themselves and their families. In contrast, your orders purport to strip Texans of their agency.¹¹ Although your orders “require” individuals to wear masks when they leave their home, they are free to choose whether to wear one or not.

Shelter-in-Place

The plain language of Executive Order GA-21 only requires Texans to minimize social gatherings and in-person contact with people who do not live in the same household.¹² The governor’s order does not include a mandatory “shelter-in-place” order.¹³, but yours does. Your orders require all residents to shelter-in-place, close all businesses that are non-essential or not reopened services, and prohibit all gatherings except as permitted by the orders. The city’s order further prohibits all non-essential travel. As we have explained, Executive Order GA-21 supersedes conflicting local orders that restrict essential or reopened services. In addition, the Texas and United States Constitutions likely prohibit the city from banning ingress into or egress from the city. Insofar as the county’s or city’s orders exceed these limitations, they are unenforceable.

Criminal Offense

Your orders also conflict with the governor’s orders by attempting to impose a criminal penalty for violations. The governor modified his executive orders related to COVID-19 on May 7, 2020

⁷ Exec. Order GA-21 at 5.

⁸ TEX. GOV’T CODE § 418.012.

⁹ *Id.*

¹⁰ See TEX. CONST. art. XI, § 5; *City of Laredo, Tex. v. Laredo Merchants Assoc.*, 550 S.W.3d 586, 592 (Tex. 2018).

¹¹ “Here in Austin we’ve kept face masks mandatory with the understanding that *the penalty for not wearing a face mask in Austin is that more people are going to get sick and some of them are going to die*”. https://www.facebook.com/CNNReplay/videos/austin-texas-mayor-the-penalty-for-not-wearing-a-face-mask-is-some-people-are-go/306968366987458/?__so__=permalink&__rv__=related_videos (emphasis added).

¹² Exec. Order GA-21 at 3.

¹³ See *id.*

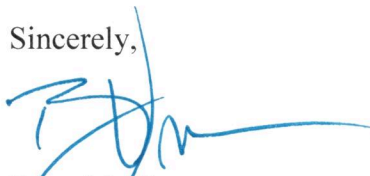
to eliminate confinement as a punishment for violating any state or local orders.¹⁴ These modifications are being applied retroactively to April 2, 2020, for certain offenses. For all existing executive and local orders, confinement is no longer permitted for violations. Therefore, your orders that attempt to impose a criminal penalty of 180 days in jail are invalid.

Communications

Finally, when communicating with the public about local orders in this ever-changing pandemic environment, it is important to convey the difference between a mandate and a recommendation. Your orders and your public statements are confusing and misleading. A recommendation, by definition, is not a requirement. Yet your orders seem to confuse the two. To avoid misleading your constituents, we encourage you to clarify those portions of your orders that could be construed as requirements, when, in fact, if they were requirements, they would be invalid and unenforceable.

Our office appreciates your prompt attention to these matters.

Sincerely,



Ryan M. Vassar
Deputy Attorney General for Legal Counsel

¹⁴ Exec. Order GA-22 at 2 (May 7, 2020).