



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 12, 2020

via E-mail (nwofff@bexar.org; mayorronnirenberg@sanantonio.gov)

Judge Nelson Wolff
Bexar County Judge
8130 Inner Circle
San Antonio, TX 78235

Mayor Ron Nirenberg
City of San Antonio
P.O. Box 839966
San Antonio, TX 78283

Dear Judge Wolff and Mayor Nirenberg:

It has come to our attention that Bexar County and the City of San Antonio 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 these mistakes to avoid further confusion and litigation challenging these unconstitutional and unlawful restrictions.

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 mandates how religious services should be conducted.

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.

Your orders conflict with the governor’s order by mandating that houses of worship limit the number of people on the premises, even though they may be conducting or attending religious services.⁴ Executive Order GA-21 provides that it supersedes “any conflicting order issued by local officials” to the extent the local order “restricts essential services[.]”⁵ A local order that limits how a house of worship conducts services, or otherwise restricts essential services, conflicts with the governor’s order and is, therefore, unenforceable. To be clear, Executive Order GA-21 prohibits a local order from limiting the number of people who can attend religious services.

In addition, unlike the governor’s order, which respects the robust constitutional and statutory rights protecting Texans’ free exercise of religion, your local orders unlawfully trample religious freedom and expose the county and the city to legal liability. The federal and state Constitutions and the Texas Religious Freedom Restoration Act 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

Insofar as your local orders conflict with Executive Order GA-21 by restricting essential or reopened services, they are invalid and unenforceable. Executive Order GA-21 identifies essential and reopened services.⁶ In addition to the religious services identified in the governor’s order, the CISA guidance outlines which businesses are considered essential businesses, critical infrastructure and essential business workers.⁷ Executive Order GA-21 supersedes a conflicting local order that restricts essential or reopened services.⁸ Your orders impose certain restrictions on essential and reopened businesses. For example, all essential and reopened business must provide masks to employees under the terms of your order. Insofar as such a requirement restricts essential or reopened services, they are superseded by Executive Order GA-21 and are, therefore, invalid.

Masks

Executive Order GA-21 encourages individuals to wear appropriate masks and prohibits any jurisdiction from imposing a civil or criminal penalty for not doing so.⁹ State law allows the

⁴ Bexar Cnty. Exec. Order NW-07 (Apr. 29, 2020), <https://www.bexar.org/DocumentCenter/View/26838/Executive-Order-NW-07-Issues-April-29?bidId=>; City of San Antonio 6th Declaration of Public Health Emergency (Apr. 29, 2020), <https://www.sanantonio.gov/Portals/0/Files/health/COVID19/Public%20Info/4.29%20Mayor's%20Emergency%20Declaration%20No.%206.pdf?ver=2020-04-29-173056-153> (restrictions on houses of worship); *see also* City of San Antonio Stay Home, Work Safe Order (Apr. 29, 2020), <https://www.sanantonio.gov/gpa/News/ArtMID/24373/ArticleID/18816/City-of-San-Antonio-and-Bexar-County-announce-continued-Stay-Home-Work-Safe-Orders> (listing houses of worship as “reopened services”).

⁵ Exec. Order GA-21 at 6.

⁶ *Id.* at 3 (defining essential services as everything listed in the Cybersecurity and Infrastructure Security Agency, Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, Version 3.0 (hereafter CISA Guidance) (Apr. 17, 2020) *available at*: <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>).

⁷ *See* CISA Guidance.

⁸ Exec. Order GA-21 at 6.

⁹ *Id.*

governor to “issue executive orders, proclamations, and regulations and amend or rescind them.”¹⁰ These orders, proclamations, and regulations “have the force and effect of law.”¹¹ 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.¹²

Your orders provide that “all persons over the age of ten shall wear some form of” mask when leaving their residence.¹³ Executive Order GA-21 encourages individuals to wear appropriate masks 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. 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.¹⁴ The governor’s order does not include a mandatory “shelter-in-place” order¹⁵ but yours does. Your orders require all residents to shelter-in-place, close all businesses that are not essential or reopened services, and prohibit all gatherings except those permitted by the order.¹⁶ As we have explained, Executive Order GA-21 supersedes conflicting local orders that restrict essential or reopened services. Insofar as your orders conflict with the governor’s order, 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 to eliminate confinement as a punishment for violating any state or local orders.¹⁷ 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, to the extent your orders attempt to impose a criminal penalty for violations, they are invalid.

Finally, the city’s order provides that a violation “is punishable by a fine up to \$2,000 per incident, and any other penalties authorized by state law and the City Code.”¹⁸ The maximum civil penalty allowed under state law for violations of a local emergency order is \$1,000.¹⁹ To the extent the city’s order imposes a civil penalty that exceeds \$1,000 for such violations, it is preempted by state law and is, therefore, unenforceable.

¹⁰ TEX. GOV’T CODE § 418.012.

¹¹ *Id.*

¹² *See* TEX. CONST. art. XI, § 5; *City of Laredo, Tex. v. Laredo Merchants Assoc.*, 550 S.W.3d 586, 592 (Tex. 2018).

¹³ Bexar Cnty. Exec. Order NW-07; City of San Antonio 6th Declaration of Public Health Emergency.

¹⁴ Exec. Order GA-21 at 3.

¹⁵ *See id.*

¹⁶ Bexar Cnty. Exec. Order NW-07; City of San Antonio 6th Declaration of Public Health Emergency.

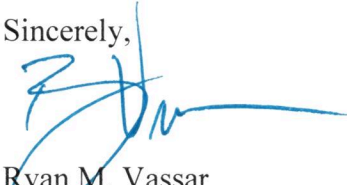
¹⁷ Exec. Order GA-22 at 2 (May 7, 2020).

¹⁸ City of San Antonio 6th Declaration of Public Health Emergency.

¹⁹ TEX. GOV’T CODE § 418.173(b).

Our office appreciates your prompt attention to these matters.

Sincerely,



Ryan M. Vassar
Deputy Attorney General for Legal Counsel