



September 14, 2023

The Texas Constitution and sections 402.042 and 402.043 of the Government Code grant the attorney general authority to issue attorney general opinions. An attorney general opinion is a written interpretation of existing law. The development of an attorney general opinion is an involved and thorough process involving many layers of comprehensive review. Attorney general opinions do not necessarily reflect the attorney general's personal views, nor does the attorney general in any way "rule" on what the law should say. As have those that have come before it, this administration strives to craft opinions with the greatest level of legal accuracy and without any hint of impropriety.

By its very nature, the attorney general opinion process invites a variety of legal issues to be brought before our office for analysis and review. The questions asked are outside the scope of this office's control, and some of the questions to be addressed may raise actual or perceived conflicts of interest for the Attorney General and his staff. Consistent with applicable statutes and rules, staff members involved in the opinion process must recuse themselves from matters in which there may exist an actual or perceived conflict of interest. Accordingly, pursuant to section 402.001 of the Government Code, I delegate my signature authority in the attorney general opinion process to the First Assistant Attorney General, Brent Webster, for those opinions in which I may have an actual or perceived conflict of interest or in which my involvement gives even the appearance of impropriety. Any such opinion signed by the First Assistant under this delegation carries the full force of an attorney general opinion.

Very truly yours,

A handwritten signature in black ink that reads "Angela Colmenero". The signature is written in a cursive, flowing style.

ANGELA COLMENERO  
Provisional Attorney General of Texas



September 14, 2023

The Honorable Dee Hobbs  
Williamson County Attorney  
405 M.L.K. Street, #7  
Georgetown, Texas 78626

Dear Mr. Hobbs:

In the process of reviewing this matter, this office concludes there could be an actual or perceived conflict of interest such that the Attorney General has recused herself from any participation on the matter. Accordingly, pursuant to Government Code section 402.001 and the authority delegation issued by the Attorney General, the First Assistant Attorney General will sign this opinion. Any such recusal is intended to go beyond the letter and spirit of the governing law and rules in order to avoid even the appearance of impropriety and to demonstrate our ongoing commitment to the highest ethical standards.

Very truly yours,

A handwritten signature in black ink, appearing to read "BWB", with a long horizontal flourish extending to the right.

BRENT WEBSTER  
First Assistant Attorney General



THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS

September 14, 2023

The Honorable Dee Hobbs  
Williamson County Attorney  
405 M.L.K. Street, #7  
Georgetown, Texas 78626

**Opinion No. AC-0005**

Re: Whether an executive order is enforceable as a “law” under subsection 1.07(a)(30) of the Penal Code (RQ-0432-KP)

Dear Mr. Hobbs:

You ask whether “a governor’s order issued pursuant to the authority granted in Chapter 418 of the Government Code [is] enforceable as ‘law’ as that term is defined in section 1.07(a)(30) of the Penal Code[.]”<sup>1</sup> Your question arises in the context of enforcement of executive orders issued in response to the COVID-19 disaster. The Governor declared a state of disaster in Texas due to COVID-19 on March 13, 2020, subsequently renewing it each month until June 2023.<sup>2</sup> The Legislature authorized the Governor, upon declaring a disaster, to “issue executive orders, proclamations, and regulations and amend or rescind them.” TEX. GOV’T CODE § 418.012. The Governor’s executive orders issued pursuant to his emergency powers under the Texas Disaster Act “have the force and effect of law.” *Id.* Pursuant to that authority, the Governor issued multiple executive orders, proclamations, and other statements, relating to the COVID-19 disaster declaration.

On July 29, 2021, the Governor issued Executive Order GA-38. Executive Order GA-38 provided, in relevant part that

[n]o governmental entity, including a county, city, school district,  
and public health authority, and no governmental official may

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<sup>1</sup>Letter from Honorable Dee Hobbs, Williamson Cnty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Sept. 10, 2021), <https://www.texasattorneygeneral.gov/sites/default/files/request-files/request/2021/RQ0432KP.pdf> (“Request Letter”).

<sup>2</sup>Office of the Governor, Proclamation 41-3720, 45 Tex. Reg. 2094 (2020). The Governor last renewed the COVID-19 disaster declaration on May 15, 2023. *See* [https://gov.texas.gov/uploads/files/press/DISASTER\\_renewing\\_COVID19\\_disaster\\_proclamation\\_IMAGE\\_05-15-2023.pdf](https://gov.texas.gov/uploads/files/press/DISASTER_renewing_COVID19_disaster_proclamation_IMAGE_05-15-2023.pdf); *see also* Patrick Svitek, *Gov. Greg Abbott says he won’t renew his COVID-19 disaster declaration later this week*, TEXAS TRIBUNE (June 12, 2023), <https://www.texastribune.org/2023/06/12/greg-abbott-covid-disaster-renew/#:~:text=The%20Texas%20Tribune-,Gov.,pushback%20in%20his%20own%20party.>

require any person to wear a face covering or to mandate that another person wear a face covering[.]

Executive Order GA-38 at 4.<sup>3</sup> Executive Order GA-38 further provided that “the imposition of any such face-covering requirement by a local governmental entity or official constitutes a ‘failure to comply with’ this executive order that is subject to a fine up to \$1,000.” *Id.*; *see also* TEX. GOV’T CODE § 418.173 (providing that the emergency plan may provide that failure to comply with the “plan or with a rule, order, or ordinance adopted under the plan is an offense” and providing that the plan “may prescribe a punishment for the offense” including a fine that does not exceed \$1,000 or confinement in jail for a term that does not exceed 180 days). Executive Order GA-38 “supersede[s] any face-covering requirement imposed by any local governmental entity or official, except as explicitly provided” under subparagraphs 4.a(i) and (ii). Executive Order GA-38 at 4.

You suggest that Penal Code provisions may be enforceable against governmental officials who violated Executive Order GA-38 by imposing requirements that individuals wear face masks. Request Letter at 2. You reference subsection 39.02(a)(1) of the Penal Code, which provides in relevant part that a “public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly . . . violates a law relating to the public servant’s office or employment[.]”<sup>4</sup> TEX. PENAL CODE § 39.02(a)(1) (“Abuse of Official Capacity”); Request Letter at 2. Whether a government official violates this provision in any given circumstance involves fact questions beyond the scope of an Attorney General opinion, and you do not ask us to address this ultimate question. *See* Tex. Att’y Gen. Op. Nos. KP-0332 (2020) at 2 (“[T]his office does not determine as a matter of law whether a criminal violation occurred[.]”), GA-0760 (2010) at 3 (“Whether particular conduct constitutes a violation of a criminal statute involves questions of fact that are outside the purview of the opinion process.”). However, as your request is limited to the legal question of whether Executive Order GA-38 constituted “a law” as that term is defined by subsection 1.07(a)(30) of the Penal Code, we nonetheless can consider whether an executive order issued by the Governor is a “law” for purposes of Texas Penal Code section 1.07. *See* Request Letter at 1. The Texas Supreme Court recently upheld the Governor’s authority with respect to Executive Order GA-38 by holding that “during a declared disaster, the Governor has the lawful authority to prohibit local officials from imposing mask requirements in response to a contagious disease.” *Abbott v. Harris Cnty.*, 672 S.W.3d 1, 6 (Tex. 2023). Moreover, we note that Executive Order GA-38 is no longer in effect.<sup>5</sup>

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<sup>3</sup>On August 25, 2021, the Governor issued Executive Order GA-39, prohibiting most private entities from issuing vaccine mandates and vaccine passports. *See* GOVERNOR OF THE STATE OF TEXAS, EXECUTIVE ORDER 39 (Aug. 25, 2021), [https://gov.texas.gov/uploads/files/press/EO-GA-39\\_prohibiting\\_vaccine\\_mandates\\_and\\_vaccine\\_passports\\_IMAGE\\_08-25-2021.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-39_prohibiting_vaccine_mandates_and_vaccine_passports_IMAGE_08-25-2021.pdf). While that order superseded one paragraph of Executive Order GA-38, it did not impact the provisions of Executive Order GA-38 relevant to this opinion. *See id.* at 3.

<sup>4</sup>An offense under subsection 39.02(a) is a Class A misdemeanor. TEX. PENAL CODE § 39.02(b). Class A misdemeanors are generally “punish[able] by: (1) a fine not to exceed \$4,000; (2) confinement in jail for a term not to exceed one year; or (3) both such fine and confinement.” *Id.* § 12.21. But Executive Order GA-38 provides that “[c]onfinement in jail is not an available penalty for violating this executive order.” Executive Order GA-38 at 5.

<sup>5</sup>*See supra* note 2. With the expiration of the COVID-19 disaster declaration comes the expiration of the executive orders issued thereunder. *See* Office of the Governor, Proclamation 41-3971, 48 Tex. Reg. 2645, 2646 (2023) (stating that “[w]hereas, ending the disaster declaration would terminate the executive orders”).

For purposes of the Penal Code, the Legislature defined the term “[l]aw” as “the constitution or a statute of this state or of the United States, a written opinion of a court of record, a municipal ordinance, an order of a county commissioners court, or a rule authorized by and lawfully adopted under a statute.” TEX. PENAL CODE § 1.07(a)(30). We therefore must consider whether an executive order of the Governor constitutes “law” under this definition.

An executive order is not the constitution or a statute, nor is it a written opinion of a court of record, a municipal ordinance, or an order of a county commissioners court. We therefore must consider whether it constitutes “a rule authorized by and lawfully adopted under a statute.” *Id.* Section 418.012 authorizes the Governor, upon declaring a disaster, to “issue executive orders, proclamations, and regulations and amend or rescind them.” TEX. GOV’T CODE § 418.012. Thus, the Governor’s executive orders are “authorized by” state statute. *See* TEX. PENAL CODE § 1.07(a)(30). Moreover, the Governor has express authority pursuant to that statute to issue “regulations,” which are included in the definition of “rule” in the Penal Code. *See* TEX. GOV’T CODE § 418.012; *see also* TEX. PENAL CODE § 1.07(a)(44) (defining “[r]ule” to include “regulations”). Through Executive Order GA-38, the Governor issued a rule adopted under a statute (namely, chapter 418 of the Government Code), which prohibits governmental officials from requiring any person to wear a face covering, with limited exceptions.<sup>6</sup>

Under chapter 418 of the Government Code, the Legislature provided that the Governor’s executive orders issued pursuant to his emergency powers “have the force and effect of law.” TEX. GOV’T CODE § 418.012; *see Mi Familia Vota v. Abbott*, 977 F.3d 461, 469 (5th Cir. 2020) (“The Texas Legislature has given Governor Abbott the authority to issue executive orders in times of emergencies, and those orders have the force of a law.” (footnote omitted)). Given this clearly expressed intent from the Legislature, a court is likely to conclude that executive orders authorized by and lawfully adopted pursuant to state statute constitute “laws” for purposes of subsection 1.07(a)(30) of the Penal Code. *See Abbott*, 672 S.W.3d at 19 (recognizing that an executive order issued by the Governor has the “force and effect of law”).

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<sup>6</sup>In construing an executive order as a rule adopted pursuant to chapter 418 of the Government Code, we do not suggest that such an order is subject to any procedural requirements found in the Administrative Procedure Act. *See* TEX. GOV’T CODE §§ 2001.001–.903.

**S U M M A R Y**

Pursuant to section 418.012 of the Government Code, executive orders issued by the Governor pursuant to his emergency powers under chapter 418 have the force and effect of law. The Penal Code defines “law” to include a rule authorized by and lawfully adopted under a statute. A court is therefore likely to conclude that executive orders authorized by and lawfully adopted pursuant to the Governor’s statutory emergency powers constitute “laws” for purposes of subsection 1.07(a)(30) of the Penal Code.

Very truly yours,

A handwritten signature in black ink, appearing to read "Brent Webster", with a long horizontal flourish extending to the right.

BRENT WEBSTER

First Assistant Attorney General of Texas

LESLEY FRENCH  
Chief of Staff

D. FORREST BRUMBAUGH  
Deputy Attorney General for Legal Counsel

AUSTIN KINGHORN  
Chair, Opinion Committee