



# The Texas Disaster Act— This is What Democracy Looks Like?

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October 30, 2020





- 01** The Texas Disaster Act of 1975
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- 03** Judicial Review
- 04** Legislative Oversight

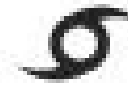




250 Fire



40 Flood



23 Hurricane



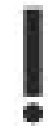
20 Severe Storm(s)



15 Tornado



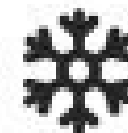
3 Biological



3 Other



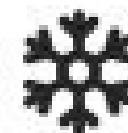
2 Coastal Storm



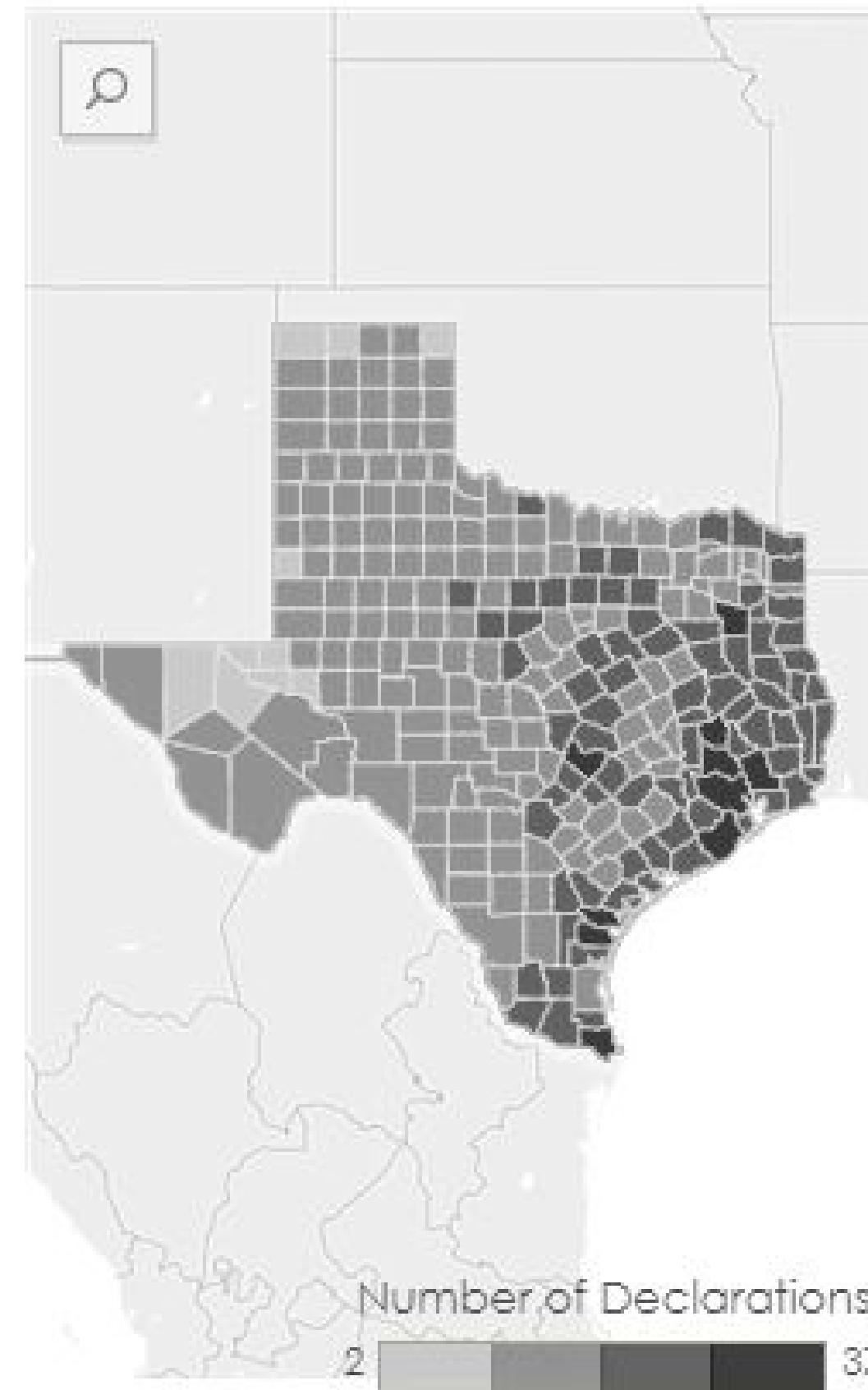
2 Freezing



1 Drought



1 Severe Ice Storm



Source of Image: Disaster Declarations for States and Counties, FEMA, <https://www.fema.gov/data-visualization/disaster-declarations-states-and-counties>

# Historical background

## **Texas Civil Protection Act of 1951**

The Legislature passed Texas' first comprehensive emergency management statute in 1951. The three-page statute authorized the governor to, among other things, direct evacuation plans and operations and issue directives and executive orders "within the limits of constitutional power."

## **Texas Disaster Act of 1975**

A series of hurricanes and earthquakes in the late 1960s and early 1970s were catalysts for emergency response legislation and an increased focus on natural disasters. In 1975, the Legislature passed the Texas Disaster Act, which was based on the Example State Disaster Act from the Council of State Governments.





# "State of disaster" declaration



## **under what circumstances can a state of disaster be declared?**

when the governor finds that “a disaster has occurred or that the occurrence or threat of disaster is imminent.” Tex. Gov't Code § 418.014(a).

## **"disaster" defined**

"the occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from any natural or man-made cause, including fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, riot, hostile military or paramilitary action, extreme heat, cybersecurity event, or other public calamity requiring emergency action, or emergency management." Tex. Gov't Code § 418.004.



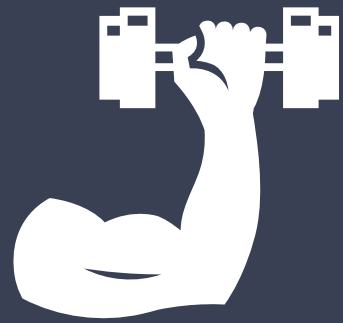
# "State of disaster" declaration

## **when have governors declared disasters in the past?**

Texas governors have issued 94 state of disaster declarations since 2001, for:

- hurricanes, wildfires, tornadoes, winter storms, and drought
- brain-eating amoeba
- racial injustice protests
- September 11 attacks
- 2013 explosion in West, Texas
- and, of course, COVID-19

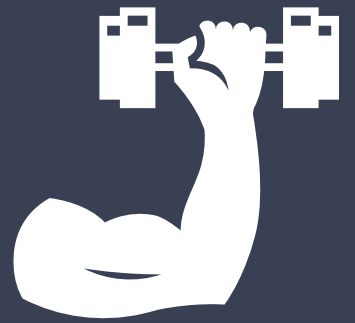




# Governor's expansive authority under the Texas Disaster Act



- Disaster declaration expires after 30 days, but the governor can renew it at his discretion an unlimited number of times
- Texas Legislature may terminate a state of disaster. But the Legislature only meets for 140 days every other year, and the governor has the sole authority to convene the Legislature for a special session.
- Governor Abbott has renewed the COVID-19 state of disaster seven times (so far) and has refused to call a special session.

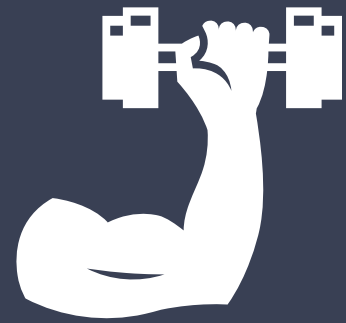


# Governor's expansive authority under the Texas Disaster Act



- During a state of disaster, the governor:
  - is the commander in chief of state agencies, boards, and commissions having emergency responsibilities.
  - is authorized to “issue executive orders, proclamations, and regulations” which “have the force and effect of law.”
  - has broad authority under the Act to direct:
    - use of public and private resources, including the commandeering of private property (subject to compensation requirements);
    - evacuation or other movement of persons, including control of “the movement of persons and the occupancy of premises in the [disaster] area);”
    - suspension or restriction of the sale or transportation of alcoholic beverages, firearms, explosives, and combustibles;
    - temporary housing and emergency shelter;
    - financial aid to individuals or families adversely affected by the disaster; and
    - clearance of debris or wreckage from public or private land.



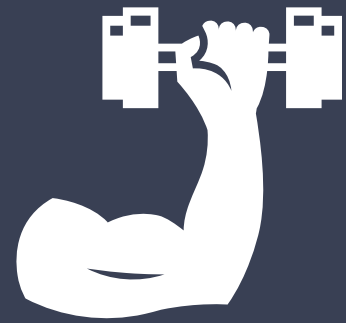


# Governor's expansive authority under the Texas Disaster Act

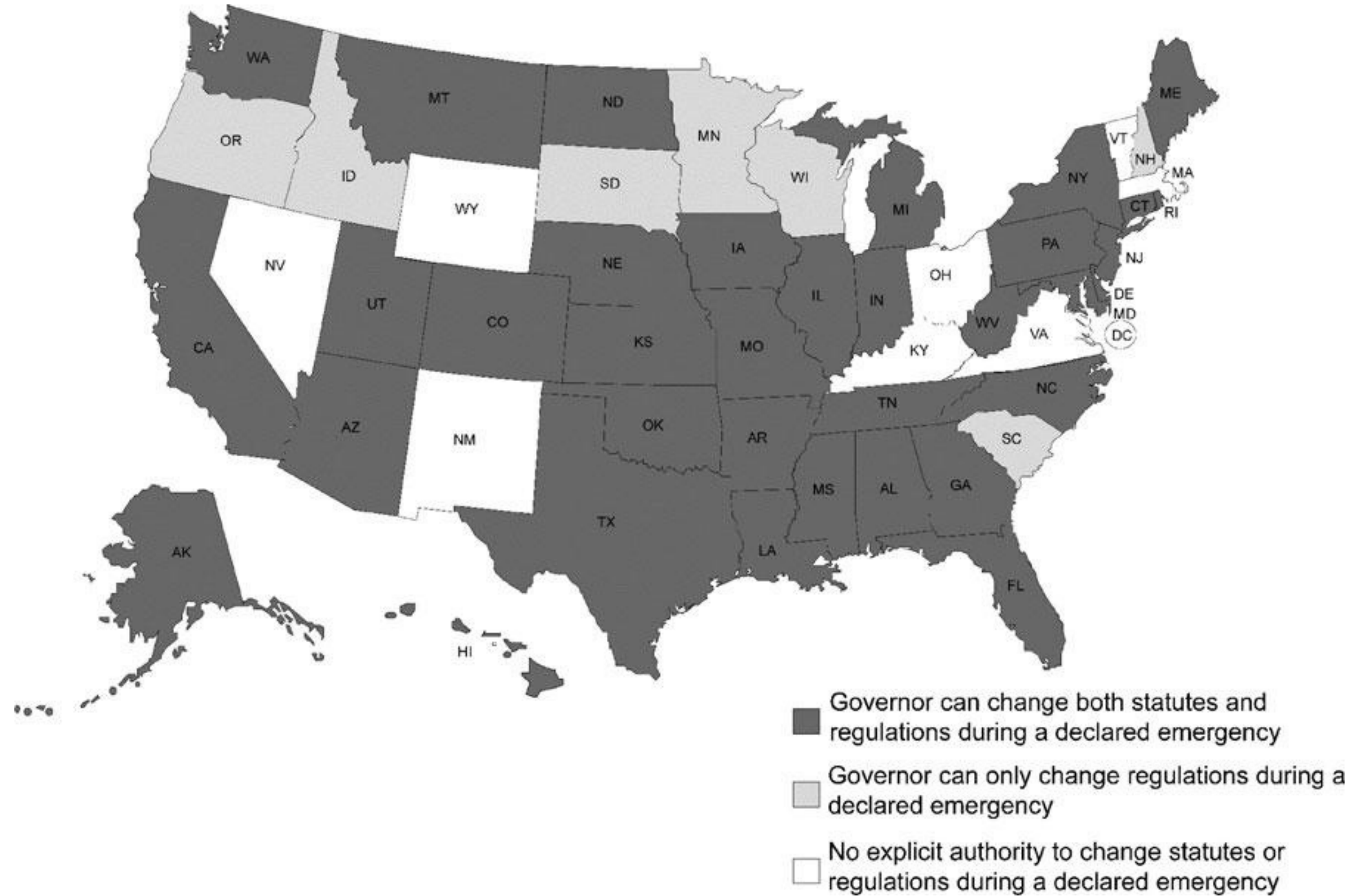


## **the controversial suspension-of-laws provision**

the governor is authorized "to suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders, or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster." Tex. Gov't Code § 418.016(a).

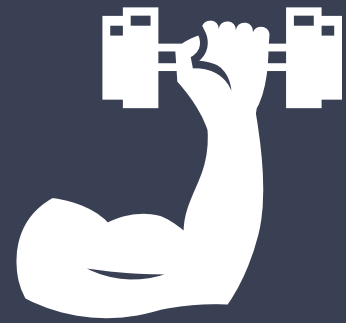


# Governor's expansive authority under the Texas Disaster Act



Source of Image: Gregory Sunshine, et al., *An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Responses*, Health Security, Vol. 17, No. 2 (2019),.





# **Governor's expansive authority under the Texas Disaster Act**



- **GA-13—March 29, 2020—Abbott suspends several provisions of the Texas Code of Criminal Procedure to prevent the release of prisoners**
- **NAACP Texas, Harris County judges, others sue Abbott (D-1-GN-20-002034, 459th Judicial District of Travis County)**
- **Texas ranks first in the nation for COVID-19 inmate deaths**



Governor Abbott has issued 25 executive orders and 15 proclamations related to COVID-19.

### **GA-08**

**March 19, 2020**

Abbott orders Texas bars, restaurants, gyms, and schools closed

### **GA-09**

**March 22, 2020**

Abbott orders “all surgeries and procedures that are not immediately medically necessary” to stop

### **GA-13**

**March 29, 2020**

Abbott suspends several provisions of the Texas Code of Criminal Procedure

### **GA-14**

**March 31, 2020**

Abbott tells Texans to stay home, closes schools until May 4

### **GA-28**

**June 26, 2020**

Abbott orders Texas bars to close, orders restaurants to reduce to 50% occupancy, closes rafting and tubing, and bans 100+ gatherings

### **GA-29**

**July 2, 2020**

Abbott orders Texans in most counties to wear masks in public

### **Proclamation**

**October 1, 2020**

Delivery of mail-in ballots pre-election day restricted to a single location per county





# Judicial review

At least 15 lawsuits have been filed in state and federal court challenging the constitutionality of Governor Abbott's coronavirus-related executive orders and proclamations.



# Judicial review



**Lawsuits challenging Gov. Abbott's executive orders have invoked a variety of constitutional provisions and statutes, but primarily:**

- Tex. Const., art. I, § 3 (equal protection)
- Tex. Const., art. I, § 19 (due process)
- Tex. Const., art. I, § 28 (suspension of laws)
- Tex. Const., art. II, § 1 (separation of powers)
- 42 U.S.C. § 1983 (civil action for deprivation of rights)
- 5th and 14th Amendments (due process and equal protection)



# Judicial review



## **In re Hotze, 20-0430, 2020 WL 4046034 (Tex. July 17, 2020)**

- Dismissed for lack of jurisdiction--the Texas Supreme Court cannot mandamus the governor
  - Tex. Const., art. V, § 3(a)
  - Tex. Gov't Code § 22.002(a)





# Judicial review



## **In re Hotze, 20-0430, 2020 WL 4046034 (Tex. July 17, 2020)**

- Justice Devine, concurring: "a governor's emergency-related actions are not categorically immune from judicial review"
  - Tex. Const., art. I, § 28 (suspension of laws)
  - Tex. Const., art. II, § 1 (separation of powers)



**"We have spoken with many members of the Legislature about these needed reforms. One popular proposal is to allow for a time limit on gubernatorial disaster declarations,--for example, if a major disaster affecting a large part of the state exceeds a certain number of days, the Legislature must be called into session to address further action. . . . we perceive that there is a near unanimous belief among legislators that this is a priority issue for the legislature to discuss."**

-Letter from Texas Freedom Caucus to Gov. Abbot (7-9-20)

**Legislative chambers in at least 26 states have introduced bills or resolutions that would limit governors' powers during the COVID-19 pandemic or other emergencies. Measures have been adopted or enacted in at least nine states, notably:**

### **KANSAS**

Governor must terminate an emergency proclamation within 15 days, unless ratified by concurrent resolution of the Legislature. When the Legislature is not in session, the emergency declaration may be extended for no more than 30 days upon specific application by the Governor to the State Finance Council (SFC) and an affirmative vote of a majority of the legislative members of the SFC.

### **PENNSYLVANIA**

Provides that a disaster emergency declaration shall be in effect for no more than 21 days unless otherwise extended by the General Assembly.

### **WASHINGTON**

No orders concerning waiver or suspension of statutory obligations or limitations may continue for longer than 30 days unless extended by the legislature through concurrent resolution. If the legislature is not in session, the waiver or suspension of statutory obligations or limitations may be extended by the leadership of both chambers until the legislature can extend the waiver or suspension by concurrent resolution.



**The Texas Disaster Act should be amended to ensure legislative oversight over the Governor's expansive authority during declared disasters. For example:**

- (i) requiring the legislature to approve any extension of a disaster declaration;**
- (ii) requiring the governor to call a special session if the governor seeks an extension during an interim; and**
- (iii) permitting the legislature to meet remotely to consider the governor's request for an extension.**

**The Texas Constitution and Texas Government Code should also be amended to allow the Supreme Court to mandamus the governor.**

# Questions?

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