

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GOV. BRIAN P. KEMP,

Plaintiff,

v.

CIVIL ACTION FILE NO.
2020CV338387

HON. KEISHA LANCE BOTTOMS,
FELICIA A. MOORE, CARLA
SMITH, AMIR R. FAROKHI,
ANTONIO BROWN, CLETA
WINSLOW, NATALYN MOSBY
ARCHIBONG, JENNIFER N. IDE,
HOWARD SHOOK, J.P.
MATZIGKEIT, DUSTIN R. HILLIS,
ANDREA L. BOONE, MARCI
COLLIER OVERSTREET, JOYCE
SHEPERD, MICHAEL JULIAN
BOND, MATT WESTMORELAND,
and ANDRE DICKENS,

Defendants.

**BRIEF OF AMICI CURIAE IN OPPOSITION TO PLAINTIFF'S MOTION
FOR EMERGENCY INTERLOCUTORY INJUNCTION AND
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Submitted by:

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NOW COME *AMICI CURIAE*, GEORGIA MUNICIPAL ASSOCIATION, INC. AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, INC., and by and through their counsel hereby file this brief as *amici curiae* in opposition of Plaintiff's motion for emergency interlocutory injunction and complaint for declaratory and injunctive relief.

Introduction

GMA is a nonprofit corporation created for the purpose of improving municipal government in the State of Georgia. Its membership is comprised of Georgia municipalities and consolidated governments that, by action of the governing bodies, choose to become members. GMA's membership includes 537 municipal corporations in which more than 99% of the State's municipal population resides and in which over 40% of the State's total population resides. GMA has several purposes such as: to exchange and disseminate information and ideas for the most efficient administration and conduct of local government affairs; to represent the collective interests of its members with the executive, legislative, and judicial branches of the state and federal governments; to facilitate improvements in local government within the State of Georgia by providing appropriate technical assistance, publications, and expert advice to members; and to promote the general welfare of local governments and urban areas of this state

as authorized by the corporation's Board of Directors.

IMLA is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof as well as state municipal leagues, as represented by their chief legal officers and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters.

Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state courts.

GMA and IMLA periodically file amicus curiae briefs in cases, such as the one at bar, which are of interest to local governments statewide and nationally. GMA, IMLA, and their members have a significant interest in this action because the usurpation of local control through Executive Order has the potential to diminish the powers of self-government of municipalities, as expressly granted by the Georgia Constitution. That usurpation is particularly damaging in this context,

where its consequences are to deny local governments their authority to take precautionary measures in the face of a deadly and accelerating virus that has already claimed the lives of nearly 3,200 Georgians.

Factual Background

On March 14, 2020, Plaintiff, in his role as Governor of the State of Georgia, issued Executive Order 03.14.20.01, declaring a public health state of emergency in Georgia due to COVID-19, which declaration was then ratified by the Georgia General Assembly on March 16, 2020. As set forth in that Executive Order, O.C.G.A. §38-3-51 grants the Governor broad, but defined, emergency powers “as may be deemed necessary to promote and secure the safety and protection of the civilian population.” O.C.G.A. §38-3-51(c)(4). Georgia law also provides that the “political subdivisions of the state...are authorized and empowered to make, amend, and rescind such orders, rules, and regulations as may be necessary for emergency management purposes and to supplement the carrying out of Articles 1 through 3 of [Chapter 38 of the Georgia Code], but not inconsistent with any orders, rules, or regulations promulgated by the Governor.” O.C.G.A. §38-3-28(a).

Since his initial Executive Order, Plaintiff, in his capacity as Governor of the State of Georgia, has issued numerous subsequent executive orders covering a

wide array of issues relating to the COVID-19 crisis. Most recently, the Plaintiff issued Executive Order 07.15.20.01, which become effective on July 16, 2020 at 12:00 A.M and will remain effective until July 31, 2020 at 11:59 P.M. This most recent executive order contains a purported preemption clause identical to those contained in previous executive orders issued by the Plaintiff in his role as Governor. That clause provides:

[C]ounty and municipal governments are authorized and empowered to make, amend, and rescind such orders, rules, and regulations as may be necessary for emergency management purposes and to supplement the carrying out of this Order, but such orders, rules, and regulations shall not be inconsistent with this Order or any other orders, rules, and regulations promulgated by the Governor or by any state agency exercising a power derived from the Public Health State of Emergency declaration. ***For the purpose of this provision, orders, rules, and regulations that are promulgated by county and municipal governments that are more or less restrictive than the terms of this Order shall be considered inconsistent with this Order.***

Executive Order 07.15.20.01, p.32. (emphasis added)

Additionally, in relation to masks and face coverings, Executive Order 07.15.20.01, like preceding executive orders, strongly encourages residents and visitors of the State of Georgia “to wear face coverings as practicable while outside their homes or place of residence, except when eating, drinking, or exercising outdoors.” Executive Order 07.15.20.01, p.2. However, unlike preceding executive orders, it also adds a new, specific, purported preemption clause on the issue of

wearing masks and face coverings as regulated by the state and by local governments, which states:

That pursuant to Code Section 38-3-28, other than orders issued pursuant to the authority of Code Section 38-3-60 et seq., any state, county, or municipal law, order, ordinance, rule, or regulation that requires persons to wear face coverings, masks, face shields, or any other Personal Protective Equipment while in places of ***public accommodation or on public property are suspended to the extent that they are more restrictive*** than this Executive Order.

Executive Order 07.15.20.01, p.32. (emphasis added)

Public health organizations and the U.S. Surgeon General encourage near universal use of cloth face coverings that cover the nose and mouth (“masks”) in public to prevent the transmission of COVID-19. Several Judicial Emergency Orders require courts adopt and implement operational guidelines that comply with current public health guidance, and thereby mandate use of masks in all court facilities, which include all locations in city buildings used for court purposes.

Since before Plaintiff issued Executive Order 07.15.20.01, a number of local governments in Georgia, mostly cities, have sought to require residents and visitors to wear masks while outside their homes or places of residence while in the jurisdiction. *A Growing Number of Georgia Cities Require Masks over Kemp’s Objection*, AJC, (July 7, 2020) <https://www.ajc.com/news/state--regional-govt--politics/growing-number-georgia-cities-require-masks-over-kemp->

[objection/rLK5RODzq1EVJiyebeli2H/](https://www.brookhavenga.gov/bc-citycouncil/page/brookhaven-requires-face-masks-city-hall-reopens-next-week/). However, even before some cities began requiring masks to be worn while outside homes and places of residence, a far greater number of local governments, to much less fanfare and press, began requiring masks to be worn while inside city buildings. See, *Brookhaven Requires Face Masks as City Hall Reopens Next Week*, Brookhaven, (May 29, 2020) https://www.brookhavenga.gov/bc-citycouncil/page/brookhaven-requires-face-masks-city-hall-reopens-next-week; See also, *Face Masks Required for Anyone Entering City Hall*, Grantville, (June 15, 2020) https://www.grantvillega.org/community/page/face-masks-required-anyone-entering-city-hall; *Council Not Considering Mask Ordinance, Masks Required Inside City Buildings*, Dalton, (July 10, 2020) https://www.cityofdaltonga.gov/index.asp?SEC=3DEE3528-5E65-47EB-B593-05826E3B03DD&DE=1FA6F482-081C-4ECD-8B72-3969C0AC2893&Type=B_PR.

While there may have only been a handful of municipal governments which had taken the steps they deemed necessary to promote and secure the safety and protection of their civilian populations by mandating masks outside homes and places of residence, there are likely dozens, if not hundreds, of municipal governments in Georgia which have required masks to be worn while in public

buildings owned or leased by the municipal government.

On the federal level, the White House Coronavirus Task Force released guidelines on April 16, 2020, to encourage state governors to adopt a phased approach to lifting restrictions to people and businesses. *Opening Up America Again*, White House Coronavirus Task Force, (April 16, 2020) <https://www.whitehouse.gov/wp-content/uploads/2020/04/Guidelines-for-Opening-Up-America-Again.pdf>. These guidelines, while only recommendations to the governors, offered a series of gating criteria to satisfy before a state proceeded to a phased reopening. Among these criteria were a “[d]ownward trajectory of influenza-like illness (ILI) reported within a 14-day period and [a d]ownward trajectory of COVID-like syndromic cases reported within a 14-day period.” Id, p.3. Additionally, the criteria recommended a “[d]ownward trajectory of documented cases within a 14-day period or [a d]ownward trajectory of positive tests as a percent of total tests within a 14-day period.” Id.

On April 20, 2020, the Plaintiff, in his capacity as Governor, issued Executive Order 04.20.20.01 which began the phased reopening process. It was soon thereafter reported that Georgia was among a number of states which failed to adhere to the recommendations of the White House Coronavirus Task Force when it chose to begin the reopening process. *Most States that are Reopening Fail to*

Meet White House Guidelines, N.Y. Times (May 7, 2020)

[https://www.nytimes.com/interactive/2020/05/07/us/coronavirus-states-reopen-](https://www.nytimes.com/interactive/2020/05/07/us/coronavirus-states-reopen-criteria.html)

[criteria.html](https://www.nytimes.com/interactive/2020/05/07/us/coronavirus-states-reopen-criteria.html). Since his April 20, 2020, reopening executive order, the Plaintiff has issued a number of subsequent executive orders, several of which have provided a further relaxation on restrictions due to the COVID-19 crisis.

More recently, the Center for Public Integrity, a nonprofit newsroom based in Washington, D.C., published an article about the coronavirus red zone which contained a document prepared for the White House Coronavirus Task Force which indicated that a number of states, including Georgia, should revert to more stringent measures. *Exclusive: White House Document Shows 18 States in Coronavirus “Red Zone”*, The Center for Public Integrity, (July 16, 2020)

[https://publicintegrity.org/health/coronavirus-and-inequality/exclusive-white-](https://publicintegrity.org/health/coronavirus-and-inequality/exclusive-white-house-document-shows-18-states-in-coronavirus-red-zone-covid-19/)

[house-document-shows-18-states-in-coronavirus-red-zone-covid-19/](https://publicintegrity.org/health/coronavirus-and-inequality/exclusive-white-house-document-shows-18-states-in-coronavirus-red-zone-covid-19/). The White

House Coronavirus Task Force document itself specifically recommends that Georgia “[a]llow local jurisdictions to implement more restrictive policies” and that Georgia “[m]andate statewide wearing of cloth face coverings outside the home.” *Governor’s Report*, White House Coronavirus Task Force,

[https://assets.documentcloud.org/documents/6990125/Governor-s-Report-14-July-](https://assets.documentcloud.org/documents/6990125/Governor-s-Report-14-July-20.pdf)

[20.pdf](https://assets.documentcloud.org/documents/6990125/Governor-s-Report-14-July-20.pdf), (July 14, 2020), p. 71.

Argument and Citation to Authority

I. CONSTITUTIONAL SEPARATION OF POWERS PROHIBITS THE PLAINTIFF FROM EXERCISING LEGISLATIVE OR JUDICIAL POWERS, EVEN IN A TIME OF EMERGENCY.

The Constitution of the State of Georgia provides the Governor with the chief executive powers. Ga. Const. art. V, § 2, ¶ I. This means the Governor has the power to execute the laws of the state but does not have the power to make or interpret laws. The Constitution of the State of Georgia provides that the “legislative power of the state shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives.” Ga. Const. art. III, § 1, ¶ I. Additionally, the Constitution of the State of Georgia vests the judicial power of the state exclusively in a number of courts, though the General Assembly may also grant judicial power to municipal courts and “may authorize administrative agencies to exercise quasi-judicial powers.” Ga. Const. art. VI, § 1, ¶ I.

It should also be noted that the Georgia Constitution provides that the “legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.” Ga. Const. art. I, § 2, ¶ III. By the Plaintiff’s own admission, the Georgia Constitution is not the basis for his emergency powers and, therefore, the exercise of emergency powers is not

an exception to the separation of powers.

The Georgia Supreme Court has recognized that under the Uniformity Clause of the Georgia Constitution, the General Assembly has the power to preempt local ordinances either expressly by implication. See *Gebrekidan v. City of Clarkston*, 298 Ga. 651, 653-54, 784 S.E.2d 373, 376-77 (2016); *Sturm v. City of Atlanta*, 253 Ga. App. 713, 717-18, 560 S.E.2d 525, 529 (2002); *Franklin Cty. v. Fieldale Farms Corp.*, 270 Ga. 272, 273, 507 S.E.2d 460, 461 (1998). Throughout these cases analyzing preemption challenges, a common theme emerges: “...the **General Assembly** may preempt local ordinances...”; “...the **statutory** text speaks to the need for statewide uniformity...”; “...the intent of the **General Assembly** speaks through its silence as well as its words”; “...the **legislature** meant not only to preclude local regulation...”; “statutes of the **state legislature** control over county [or city] ordinances”; “As creations of the State, powers of home rule cities may be constitutionally and retrospectively limited by the **General Assembly**...” *Id.* (emphasis added). These cases show that preemption is based on legislative act and intent, not through an executive usurpation of that legislature. Conspicuously absent from any discussion of preemption by the Georgia Supreme Court is the ability of the executive branch to dictate terms of preemption where the General Assembly has clearly authorized local governments to act in a manner that is not

inconsistent with the governor.

State law provides that the “political subdivisions of the state...are empowered to make, amend, and rescind such orders, rules, and regulations as may be necessary for emergency management purposes and to *supplement* the carrying out of [the emergency management chapter of the Georgia Code], but not *inconsistent* with any orders, rules, or regulations, promulgated by the Governor.” O.C.G.A. §38-3-28(a) (emphasis added). Despite the Plaintiff clearly being the Governor of the State of Georgia, and not a part of the legislative branch or the judicial branch, his executive orders, most recently Executive Order 07.15.20.01, conflict with this law and purport to prohibit local governments from enacting any provision, order, rule, and regulation which is “*more or less restrictive* than the terms” of the Order and state that any such local action would be “considered *inconsistent* with [the] Order.” Executive Order 07.15.20.01 (emphasis added).

The Merriam-Webster Dictionary defines ‘supplement’ as “something that completes or makes an addition.” *Supplement*. Merriam-Webster.com. 2020. <https://www.merriam-webster.com> (July 20, 2020). It is difficult to reconcile the statutory powers granted by the Georgia General Assembly to political subdivisions to “supplement” the Governor’s orders with the Plaintiff’s assertion both in his own executive orders and in this litigation that the word “inconsistent”

should mean anything which is “more or less restrictive” than his own decrees. Such a reading renders the legislative enacted O.C.G.A. §38-3-28(a) entirely meaningless. Despite his apparent desire, the Plaintiff quite simply does not have the Constitutional authority to legislate or to adjudicate an interpretation of O.C.G.A. §38-3-28(a). Short of legislative definition, the scope of supplementation that is not inconsistent with the Governor’s orders should be a matter for the courts to decide, rather than the attempted executive legislating in Executive Order 07.15.20.01.

II. THE PLAINTIFF’S OWN EMERGENCY ORDERS AND PUBLIC ACTIONS SUPPORT A REASONABLE READING THAT LOCAL MASK MANDATES ARE A CONSISTENT SUPPLEMENTATION OF THE GOVERNOR’S EXECUTIVE ORDERS.

The Georgia General Assembly, in enacting O.C.G.A. §38-3-28(a) intended for local governments to have the ability to enhance guidance from the Governor through supplementation, so long as the supplementation by the local governments is consistent with the Governor’s executive orders. The Governor’s executive orders have repeatedly strongly encouraged the wearing of masks by residents and visitors to the State of Georgia. *See* Executive Orders, 05.12.20.02 p.2; 05.28.20.02, p.2; 06.11.20.01, p.2; 06.29.20.02, p.2; 07.15.20.01, p.2. The intent of this strong encouragement was directed at getting as many residents and visitors to the State of Georgia as possible to wear masks when outside of their homes or

places of residence.

In addition to the clear strong encouragement the Plaintiff has displayed in his executive orders he has also made numerous public statements, social media posts, and even embarked on a “Wear a Mask” tour of Georgia, all seeking to encourage the usage of masks in the State of Georgia. Interestingly, while the Plaintiff began urging the wearing of masks as early as the late April and early May and the first executive order strongly encouraging mask usage was promulgated on May 12, 2020, the first day of the “Wear a Mask” tour was not until July 1, 2020. *Governor, State Health Officials Urging Everyone to Wear Face Masks while in Public*, WSB-TV (May 1, 2020) <https://www.wsbtv.com/news/georgia/governor-state-health-officials-urging-everyone-wear-face-masks-while-public/IX665XUPGVBLNUADVYQKJSI5A/>; @GovKemp, Twitter (July 1, 2020, 5:41 p.m.) <https://twitter.com/GovKemp/status/1278443707822415872>. Additionally, it was not until July 6, 2020, that the Plaintiff introduced the “Georgia Safety Promise, a safety campaign to remind Georgia businesses and the public of the importance of following COVID-19 safety guidelines...including...wearing face coverings.” *Gov. Kemp Launches “Safety Promise” Campaign to Urge Georgians to Heed Public Health Guidance*, (July 6,

2020) <https://www.georgia.org/newsroom/press-releases/gov-kemp-launches-safety-promise-campaign-urge-georgians-heed-public-health>. The lag time between the Plaintiff's initial strong encouragement and the commencement of the tour and launch of the "Safety Promise" Campaign indicate that the Plaintiff felt the need to do something more than just trust people on their own to wear masks.

On this, it seems that a number of municipalities and the Plaintiff agreed that more needed to be done to increase mask usage. In an effort to meet the intent of the Plaintiff's executive orders and public statements to increase mask usage in Georgia, and to follow current public health guidance, a number of local municipalities, utilizing the powers granted to them by the Georgia General Assembly in O.C.G.A. 38-3-28(a), sought to supplement the Governor's orders in a manner consistent with the intent of the Governor's orders to "promote and secure the safety and protection of the civilian population." O.C.G.A. 38-3-51(c)(4); Savannah, *Emergency Order Requiring that Face Coverings or Masks be Worn in Public in the City of Savannah*, p.2 (June 30, 2020) https://drive.google.com/file/d/1SEvQHQB9kmgPribAs_jh0IRbPv_oN5pJ/view; Atlanta, *Executive Order Number 2020-113*, p.3 (July 8, 2020) <https://www.atlantaga.gov/Home/ShowDocument?id=47225>; Athens-Clarke County, *An Ordinance for the Fifth Declaration of a Local State of Emergency*

Related to COVID-19, p.3 (July 7, 2020)

<https://athensclarkecounty.com/DocumentCenter/View/69391/22-Fifth-Declaration-to-Covid-19-Ordinance>.

If the goal of the Plaintiff’s repeated executive orders strongly encouraging the usage of masks was to increase the usage of such, then it is a reasonable reading that mandating usage of such would help achieve that goal. The Georgia Supreme Court has previously held that the “courts can not strike down legislation, whether State or municipal, unless it plainly and palpably violates some provision of the Federal or State constitution, or municipal ordinances unless enacted without power of the city to pass them, or in contravention of State statutes or public policy.” City of Atlanta v. Associated Builders & Contractors of Georgia, Inc., 240 Ga. 655, 657, 242 S.E.2d 139, 141 (1978). Here the municipal mask mandates are a clear supplementation within the powers granted to municipalities by O.C.G.A. §38-3-28(a), and not a contravention, of the Governor’s stated public policy of increasing mask usage. The Plaintiff’s interpretation of the abilities of local governments to supplement his orders, pursuant to O.C.G.A. §38-3-28(a), limiting local orders which are “more or less restrictive than the terms of [his] Order” would not allow for any supplementation of his executive orders, in direct contradiction to statutory law.

III. THE PLAINTIFF’S EMERGENCY POWERS IN GEORGIA LAW DO NOT USURP HOME RULE POWERS.

The Plaintiff’s attempt to usurp local control and Constitutional Home Rule powers of local governments threatens great injury upon not only the Defendants in this litigation but every municipality in the State of Georgia. Should the Plaintiff prevail, the Constitutional and statutory powers of self-government for municipalities will be greatly eroded and stand to be further eroded by future executive orders. The Georgia Constitution grants the General Assembly the power to “provide by law for the self-government of municipalities.” Ga. Const. art. IX, § 2, ¶ II. (Similarly, counties also have the basis of their home rule powers in the Georgia Constitution. *See* Ga. Const. art. IX, § 2, ¶ I.) It should also be noted that the Supplementary Powers provided to both cities and counties by the Georgia Constitution grants the General Assembly the ability to regulate, restrict, or limit the powers of local governments by general law, but that there is not similar provision granting similar authority to the Governor in the Constitution. Ga. Const. art. IX, § 2, ¶ III(c).

O.C.G.A. §38-3-51 provides the Plaintiff, in his office as Governor of Georgia, with his emergency powers. The relevant specific powers granted to the Governor can be found in paragraphs (c) and (d) of O.C.G.A. §38-3-51, but none

of these specific emergency powers granted to the Governor allow him to preempt local governments as contemplated in Executive Order 07.15.20.01. These emergency powers contain two provisions relevant to this litigation. These two provisions, O.C.G.A. §§38-3-51(c)(4) and 38-3-51(d)(1) are specifically cited by the Plaintiff as the source of the power he is choosing to utilize. Executive Order 07.15.20.01, p.1.

First, the Governor may “perform and exercise such other functions, powers, and duties as may be deemed necessary to promote and secure the safety and protection of the civilian population.” O.C.G.A. §38-3-51(c)(4). This provision is broad and intended to be a catch-all provision to allow the Governor, during times of emergency, to take actions which may not be contemplated by the rest of the statute in order to promote and secure the safety and protection of the people of the state. However, the Governor only may take actions to further the exact goal of promoting and securing the safety and protection of the people of the state.

According to his own remarks of July 17, 2020, the Plaintiff’s action to prohibit state and local mask mandates was not taken for the purpose of furthering the goal of promoting and securing the safety and protection of Georgians. Rather, the Plaintiff reasoned that mask mandates should not be necessary to achieve near universal compliance, and therefore the Plaintiff chose to prohibit mask mandates

enacted by “any state, county, or municipal law, order, ordinance, rule, or regulation.” Executive Order 07.15.20.01, p.32. The Plaintiff specifically stated that “while we all agree that wearing a mask is effective, [he was] confident that Georgians don’t need a mandate to do the right thing.” *Kemp: Georgia Don’t Need a Mask Mandate*, (July 17, 2020) <https://www.gpb.org/news/2020/07/17/kemp-georgians-dont-need-mask-mandate>.

The Plaintiff’s own statement indicates that that “right thing” was for all Georgians to wear a mask while outside of their homes. While the Plaintiff expects Georgians do to the right thing voluntarily in the wearing of masks, the same logic apparently does not apply to social distancing, practicing sanitation in accordance with the guidelines published by the Centers for Disease Control and Prevention, and refraining from gathering in groups of more than fifty people, all of which are mandated by executive order, and subject to criminal penalty for violations. Executive Order 07.15.20.01, p.2. Plaintiff’s Executive Orders show that mandating the “right thing” for public health, and demanding local government enforcement, is a critical tool for ensuring widespread compliance with public health guidance. As with mandates regarding social distancing, a mask mandate is a critical tool for furthering the goal of “promoting and securing the safety and protection of the people of the state.” Prohibiting state and local governments from

using this tool exceeds Plaintiff's power under the statute because the prohibition does not further the exact goal required by the statute.

As described above, it is logical and reasonable for local governments to view a consistent supplementation of the Governor's executive orders strongly encouraging masks to include mandating the usage of masks within their jurisdictions. However, it is not a logical or reasonable interpretation of O.C.G.A. §38-3-51(c)(4) that the power to "promote and secure the safety and protection of the civilian population" permits the Governor to stop local governments from taking actions to specifically promote and secure the safety and protection of the civilian population of their own jurisdictions by mandating behaviors recommended by public health guidance.

Second, O.C.G.A. §38-3-51(d)(1) allows the Governor to "[s]uspend any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules, or regulations of any state agency, if strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency or disaster." This statutory provision could not provide the Governor with powers to preempt local rules, orders, and ordinances mandating masks because it deals with suspending statutes concerning procedures for the conduct of *state* business and the actions of *state*

agencies.

If the General Assembly had intended for O.C.G.A. §38-3-51(d)(1) to provide the Governor with powers to suspend local orders and ordinances it would have utilized clear and unequivocal language, such as the language which can be found in O.C.G.A. §38-3-51(d)(2), which provide the Governor with the power to “[u]tilize all available resources of the state government and of each *political subdivision* of the state as reasonably necessary to cope with the emergency or disaster.” O.C.G.A. §38-3-51(d)(2) (emphasis supplied). Moreover, when the Georgia legislature wants to authorize the suspension of the laws of political subdivisions, it knows how to be explicit about that. *Compare* O.C.G.A. § 12-5-7(a)(2) (“If the director determines that a political subdivision or local government authority is exercising emergency powers granted by this paragraph in a manner to circumvent the necessity of obtaining such a variance, he or she may suspend the emergency powers granted by this paragraph to such political subdivision or local government authority.”).

The plain meaning of the Governor’s emergency powers in O.C.G.A. §38-3-51 is that none of the provisions in that statute, or any other statute, provide the Governor with the ability to suspend Home Rule powers of municipalities or provide the Governor with the ability to preempt municipalities from taking actions

that supplement and are consistent with his orders, and which promote and secure the safety and protection of people within their own jurisdictions.

The purported preemption in Executive Order 07.15.20.01 applies not only to local mask mandates for the general public in the local jurisdiction; rather, it also seeks to prevent local governments from mandating masks “on public property.” The plain meaning of such a prohibition is that municipalities are prohibited from requiring masks in their own city halls, police departments, senior buildings, community centers, jails, health departments, recreation and youth centers, and a host of other buildings owned or leased by the municipality itself. This “public property” preemption prohibits cities from adopting safety protocols that are recommended by the CDC and are available to similar private organizations and businesses, puts at risk workers and visitors to every municipal building in the State of Georgia, and does the exact opposite of promoting and securing the safety and protection of the civilian population.

The General Assembly has vested municipalities with the right to control their property. Municipalities in Georgia do not have a constitutional right to own property and they “exist by the grace of the state through special acts of the General Assembly.” Dep't of Transp. v. City of Atlanta, 255 Ga. 124, 130, 337 S.E.2d 327, 332 (1985). However, “[w]hen the General Assembly creates a city, it

limits the state's power within the sphere of that municipality. It carves out an area in which the state may not, by fiat, operate in any manner in which it pleases.” *Id.* These special acts creating municipalities in Georgia are more commonly known as the city charters of each municipality. City charters across the state, from the biggest cities to the smallest towns, contain provisions, enacted through Local Acts of the Georgia General Assembly, allowing municipalities to own, maintain, control, and operate property. *See* Atlanta, Georgia, Municipal Charter §1-102(c)(14); Butler, Georgia, Municipal Charter §1.03(8); Colbert, Georgia, Municipal Charter §1.12(b)(26); Perry, Georgia, Municipal Charter §1.13(26).

Executive Order 07.15.20.01, by seeking to prohibit municipalities from requiring persons to wear face coverings, masks, face shields or any other Personal Protective Equipment while on public property aims to usurp the local control and self-government granted to municipalities across the State of Georgia by the Georgia General Assembly through the delegation of authority given to them by the Georgia Constitution in Article IX, Section 2, Paragraph II. While the Plaintiff’s emergency powers are certainly great, they are not so great as to usurp Home Rule or to supplant a direct allocation of power granted to the Georgia General Assembly by the Georgia Constitution.

IV. STATE LAW CONFERS UPON EXECUTIVE HEADS OF POLITICAL SUBDIVISIONS EMERGENCY POWERS AND PROVIDES FOR THE SUSPENSION OF LAWS, RULES, AND REGULATIONS INCONSISTENT WITH THE EMERGENCY MANAGEMENT CHAPTER.

The Plaintiff suggests that O.C.G.A. §38-3-28(b) calls for the “suspension of inconsistent *local* emergency orders, rules, and ordinances.” Plaintiff’s Brief in Support of Motion for Emergency Interlocutory Injunction, *Kemp v. Bottoms*, No. 2020CV338387, p.10 (Fulton County Superior Court). To the contrary, the actual statutory language calls for the suspension of “[a]ll laws, ordinances, rules, and regulations inconsistent with Articles 1 through 3” of Chapter 3 of Title 38 of the Georgia Code. O.C.G.A. §38-3-28(b).

Georgia law confers “upon the Governor and upon the executive heads of governing bodies of the political subdivisions of the state the emergency powers provided in Articles 1 through 3 of [the emergency management] chapter.” O.C.G.A. §38-3-2(a)(2). The powers granted to the Governor and to the executive heads of municipalities are authorized contemporaneously in the statute in the same subparagraph and sentence. While the Governor clearly has greater emergency powers when authorized by other statutes, such as O.C.G.A. §38-3-51, the fact that the emergency powers in O.C.G.A. §38-3-2(a)(2) are authorized contemporaneously to both the Governor and to executive heads of political

subdivisions indicates a lack of weight on general emergency powers which are not specifically delegated to a party, such as those which are specifically delegated to the Governor in §38-3-51.

Understanding the contemporaneous granting of powers to the Governor and the executive heads of political subdivisions is important when analyzing the meaning of O.C.G.A. §38-3-28(b), which provides in part that “[a]ll laws, ordinances, rules, and regulations inconsistent with Articles 1 through 3 of this chapter, or of any order, rule, or regulation issued under the authority of Articles 1 through 3 of this chapter, shall be suspended during the period of time and to the extent that the conflict exists.” O.C.G.A. §38-3-28(b). As detailed above, the Plaintiff’s attempt, through executive order, to redefine O.C.G.A. 38-3-28(a) to limit local orders, rules, and regulations that are more restrictive than his own executive orders is ironically, actually “inconsistent with Articles 1 through 3 [of Chapter 38]” itself because it ignores and attempts to eliminate the ability of local governments to “supplement” the Governor’s orders. Executive Order 07.15.20.01, p.32; O.C.G.A. §38-3-28.

Additionally, the purported preemption of local government mandates to wear face coverings, masks, face shields, or any other Personal Protective Equipment found in Executive Order 07.15.20.01 does not have any basis in

powers granted to the Governor in Georgia law, as detailed above. Therefore, pursuant to O.C.G.A. §38-3-28(b), this purported preemption should also be found “inconsistent with Articles 1 through 3 [of Chapter 38].” These two provisions of Executive Order 07.15.20.01, i.e., the preemption of local orders that are more or less restrictive than the Executive Order and the preemption of local government mask mandates, are inconsistent with the powers granted to the Governor and, as clearly stated in Georgia law, should both “be suspended during the period of time and to the extent that the conflict exists.” O.C.G.A. §38-3-28(b).

Suspension of these two provisions of Executive Order 07.15.20.01 would help restore clarity to municipalities across the State of Georgia that they can, indeed, supplement the Governor’s executive orders, so long as such supplementation is consistent with his orders. It should not be within the power of the Governor, emergency or not, to wield legislative and judicial powers to determine by fiat what statutory language adopted by the Georgia General Assembly should be amended to say or what it should be interpreted to say. As provided for in the Georgia Constitution it is vital that the “legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.” Ga. Const. art. I, § 2, ¶ III.

V. STATE LAW REQUIRES ALL ORDERS, RULES, AND REGULATIONS BE MADE WITH DUE CONSIDERATION OF RECOMMENDATIONS OF FEDERAL AUTHORITIES AND, TO THE EXTENT PERMITTED BY LAW, TO BE CONSISTENT WITH SUCH RECOMMENDATIONS.

To comply with state law, the portions of Executive Orders that are inconsistent with the recommendations of federal authorities should be suspended during the period of time and to the extent a conflict exists. In the interest of uniformity, O.C.G.A. §38-3-28(c) requires actions taken by the state, counties, and municipalities in Georgia pursuant to the Emergency Management Act to be taken with consideration for, and where legally possibly, to be consistent with “orders, rules, regulations, actions, recommendations, and requests” of relevant federal authorities. O.C.G.A. §38-3-28(c). This provision of Georgia law applies to all “action taken under Articles 1 through 3 of this chapter and all orders, rules, and regulations made pursuant thereto” including executive orders issued by the Governor. *Id.*

As referenced above, when the White House Coronavirus Task Force released recommendations and guidelines for the reopening of America on April 16, 2020, it set reopening criteria calling for 14-day downward trajectories in influenza and COVID-like symptoms and 14-day downward trajectories in cases and positive tests of COVID-19. *Opening Up America Again*, White House

Coronavirus Task Force, p.3 (April 16, 2020) <https://www.whitehouse.gov/wp-content/uploads/2020/04/Guidelines-for-Opening-Up-America-Again.pdf>. Yet Plaintiff's Executive Orders "reopened" without regard to satisfaction of the required criteria. Accordingly, portions of the Orders were inconsistent with the guidance of this federal authority. In contrast, when state and local governments supplement Plaintiff's Executive Orders in order to comply with current public health guidance of federal authorities, they act in accordance with O.C.G.A §38-3-28(c) and support its express goal of "uniformity." Local actions taken which are consistent with such recommendations of federal authorities should not be suspended and penalized because they are inconsistent with state actions which themselves are inconsistent with the recommendations of federal authorities.

Mandating masks in public is "consistent with such orders, rules, regulations, actions, recommendations, and requests [of federal authorities]. O.C.G.A. §38-2-28(c). Indeed, twenty-eight states, Washington D.C., and Puerto Rico have issued state-wide mask mandates to promote compliance with the recommendations of the United States Centers for Disease Control and Prevention ("CDC"), which is the primary source of general federal public health guidance related to COVID-19. <https://abcnews.go.com/US/28-states-washington-dc-puerto-rico-issued-mask/story?id=71842266>. Since April 3, 2020, the CDC has

recommended universal use of masks in public as a key component to mitigating the spread of COVID-19. Lena H. Sun and Josh Dawsey, *New Face Mask Guidance Comes After Battle Between White House and CDC*, April 3, 2020, <https://www.washingtonpost.com/health/2020/04/03/white-house-cdc-turf-battle-over-guidance-broad-use-face-masks-fight-coronavirus/>; *Considerations for Wearing Cloth Face Coverings*, Updated July 16, 2020, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronaviruses%2F2019-ncov%2Fprevent-getting-sick%2Fcloth-face-cover.html (stating that cloth face coverings are most effective at reducing the spread of COVID-19 when “widely used by people in public settings.”)

More recently, the White House Coronavirus Task Force made recommendations specifically for the State of Georgia that our state “[a]llow local jurisdictions to implement more restrictive policies” and that Georgia “[m]andate statewide wearing of cloth face coverings outside the home.” *Governor’s Report*, White House Coronavirus Task Force, <https://assets.documentcloud.org/documents/6990125/Governor-s-Report-14-July-20.pdf>, (July 14, 2020), p. 71. The White House Coronavirus Task Force was created by President Donald J. Trump in an effort to help states and local

governments address the many challenges associated with the COVID-19 pandemic and is one of the designated federal authorities whose recommendations state and local governments are required by O.C.G.A. §38-2-28(c) to consider when drafting “consistent” rules in an emergency.

By specifically prohibiting local jurisdictions from implementing more restrictive policies than the Governor and specifically prohibiting the state itself in addition to local governments from mandating the wearing of cloth face coverings outside the home, Executive Order 07.15.20.01 directly conflicts with the White House Coronavirus Task Force’s specific guidance for Georgia and violates O.C.G.A. §38-2-28(c).

In contrast to Plaintiff’s Executive Orders, all Judicial Emergency Orders addressing reopening of courts during COVID-19 expressly require courts to follow current CDC and other public health guidance. Executive Order 07.15.20.01 acknowledges the conflict between such orders and the Executive Order’s prohibition of state and local rules that mandate masks, and expressly acknowledges that state and local governments may mandate masks in order to comply with Judicial Emergency Orders. Executive Order 07.15.20.01, p.32. The Judicial Task Force has had to clarify that city buildings that house municipal courts must require masks despite the preemptive language found in Executive

Order 07.15.20.01. The Fourth Judicial Emergency Order requires all Georgia courts to use a template for operational guidelines that requires masks and social distancing and incorporates CDC guidance by reference. It states for the first time that a court may not compel attendance until its operations comply. The conflict between the Judicial Emergency Orders and Executive Order 07.15.20.01 is a clear example of the reason for the requirement in O.C.G.A. §38-3-28(c) that emergency orders must comply with the recommendations of applicable federal authorities.

Code Section 38-3-28(c) creates a statutory requirement for any orders issued pursuant to Articles 1 through 3 of Chapter 38, including those of the Governor, to be consistent with the recommendations of the federal authorities. Executive Order 07.15.20.01, in part, is not in substantial compliance with O.C.G.A. §38-3-28(c) because it is directly inconsistent with the recommendations of federal authorities (the CDC and the White House Coronavirus Task Force) when it prohibits local governments from promulgating any orders, rules, and regulations which are “more ... restrictive” than the Governor’s own orders and when it prohibits the mandating of masks. Georgia’s rules of the construction of statutes indicate that a “substantial compliance with any statutory requirement, especially on the part of public officers, shall be deemed and held sufficient, and no proceeding shall be declared void for want of such compliance, *unless*

expressly so provided by law.” O.C.G.A. §1-3-1(c) (emphasis added). Under Georgia’s emergency management law, again, any “laws, ordinances, rules, and regulations inconsistent with Articles 1 through 3 of [Chapter 38] ... shall be suspended during the period of time and to the extent that the conflict exists.”

Furthermore, because the White House Coronavirus Task Force issued guidelines and recommendations, which are still currently applicable, that new phases of reopening should not commence without meeting certain gating criteria, any attempts by local governments to be consistent with those federal recommendations, utilizing available data showing increases in cases, including that from the Georgia Department of Public Health, should not be suspended but should be found in compliance with state law and federal recommendations.

Conclusion

The Plaintiff, in his role as Governor, has attempted to usurp local control and Home Rule authority by using emergency powers which do not exist in the Georgia Constitution or in statutory law. There is no indication in Georgia law that the Governor has the power to suspend Home Rule, even in times of an emergency. For the reasons set forth herein, *amici curiae* implore the court to reject the Plaintiff’s Motion for Emergency Interlocutory Injunction and Complaint

for Declaratory and Injunctive Relief and find that he has, in his role as Governor, overstepped his Constitutional and statutory powers, even in a time of emergency and that the provisions of Executive Order 07.15.20.01 limiting the ability of local governments to supplement his Executive Order and to mandate the wearing of masks, are both suspended for being inconsistent with Articles 1 through 3 of Chapter 38 of the Georgia Code.

Respectfully submitted, this 21st day of July, 2020.

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CERTIFICATE OF SERVICE

This is to certify that I have this day cause a true and correct copy of the foregoing document to be served on all counsel of record by this Court's Odyssey E-File GA System:

This 21st day of July, 2020.

/s/ Rusi C. Patel
Rusi C. Patel

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