

SUBJECT: Creating Texas Pandemic Response Act; establishing legislative oversight

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 11 ayes — Paddie, Hernandez, Deshotel, Harless, Hunter, P. King, Lucio, Metcalf, Raymond, Shaheen, Slawson

0 nays

1 absent — Smithee

1 present not voting — Howard

WITNESSES: For — John Mason, AT&T; Chris Jones, Combined Law Enforcement Associations of Texas; Eddie McBride, Lubbock Chamber of Commerce; Tara Mica, National Rifle Association; Annie Spilman, NFIB; Anthony Holm, Texans for Lawsuit Reform; Scott Norman, Texas Association of Builders; Glenn Hamer, Texas Association of Business; Carrie Kroll, Texas Hospital Association; James Quintero, Texas Public Policy Foundation; George Kelemen, Texas Retailers Association; John Esparza, Texas Trucking Association; Noe Perez; (*Registered, but did not testify*: Justin Keener, Americans for Prosperity and the Libre Initiative; Oscar Rodriguez, Texas Association of Broadcasters; Robert Braziel, Texas Automobile Dealers Association; Tray Bates, Texas Realtors; Andi Turner, Texas State Rifle Association; Thomas Parkinson)

Against — Daniel Collins, County of El Paso; James Buntrock, Glorious Way Church; Paul Hodson, Grassroots Gold; Darcie Wilbanks, Prime-Systems; David Wylie, Republican Party of Texas; Tom Glass, Texas Constitutional Enforcement; Christin Bentley, Texas Freedom Coalition; Auburne Gallagher, Fran Rhodes, and Sheena Rodriguez, True Texas Project; and 23 individuals; (*Registered, but did not testify*: Joe Hamill, AFSCME Austin Local 1624, HOPE Local 123, Harris County Local 1550, San Antonio Local 2021, and El Paso Local 59; Melissa Shannon, Bexar County Commissioners Court; John Stufflebeam, COS; Charles Reed, Dallas County Commissioners Court; Luis Figueroa, Every Texan;

Ender Reed, Harris County Commissioners Court; Bill Kelly, Mayor's Office, City of Houston; Col. Allen West, Republican Party of Texas; Angela Smith, Fredericksburg Tea Party; Regan De Marines and Jackie Schlegel, Texans for Vaccine Choice; Carisa Lopez, Texas Freedom Network; Julie Wheeler, Travis County Commissioners Court; Stephanie Gharakhanian, Workers Defense Action Fund; and 14 individuals)

On — Blake Hutson, AARP Texas; JP Urban, AECT; Russell Schaffner, Tarrant County; Nim Kidd, TDEM and Tx EM Council; Austin Kinghorn, Texas Attorney General's Office; Walt Baum, Texas Cable Association; Jim Perdue, Jr., Texas Trial Lawyers Association; John Zerwas, MD, UT System; (*Registered, but did not testify*: Tammy Embrey, City of Corpus Christi; Guadalupe Cuellar, City of El Paso; Felisha Bull, Gun Owners of America; Murtaza Sutarwalla, Office of Attorney General; Carol Sims, Texas Civil Justice League)

DIGEST:

CSHB 3 would create the Texas Pandemic Response Act to establish the roles of the governor, state agencies, the judicial branch, and political subdivisions of the state in the prevention of, preparation for, response to, and recovery from a pandemic disaster. The bill also would create the Pandemic Disaster Legislative Oversight Committee to oversee pandemic disaster declarations.

"Pandemic disaster" would mean the occurrence or imminent threat of an outbreak of an infectious disease that spread to a significant portion of the state population and that threatened widespread or severe damage, injury, or loss of life or property in more than one-fourth of counties resulting from any natural or man-made cause related to the outbreak.

Powers and duties of governor. The governor could issue, amend, or rescind an executive order, proclamation, or rule to further the purposes of the bill. An executive order, proclamation, or rule issued by the governor would have the force and effect of law.

Declaration of a state of pandemic disaster. The governor by executive order or proclamation could declare a state of pandemic disaster if the

governor determined that one was occurring or that the occurrence or threat of a pandemic disaster was imminent.

An executive proclamation or order issued would have to include a description of the nature of the pandemic disaster, a designation of the affected or threatened areas, and a description of the conditions that caused the pandemic disaster or allowed the termination of the disaster. A proclamation or order also would have to be posted on the websites of the governor and any affected state agency.

The governor would have to promptly disseminate a proclamation or order by any means intended to bring it to the public's attention and file it with the Texas Division of Emergency Management (TDEM), the secretary of state, and the county clerk or municipal secretary in each area in which the proclamation or order applied.

A state of pandemic disaster would continue until the governor determined the threat had passed or the pandemic disaster had been addressed to the extent that emergency conditions no longer existed and the governor terminated the state of pandemic disaster by executive order or proclamation.

A state of pandemic disaster could not continue for more than 30 days unless renewed by the governor. If the Legislature was convened in regular or special session, the Legislature by law could terminate a declared state of pandemic disaster at any time. If the Legislature was not convened in session, the Pandemic Disaster Legislative Oversight Committee established by the bill could terminate the declaration.

The governor could not declare a new state of pandemic disaster based on the same or a substantially similar finding as a prior state of pandemic disaster that was terminated or not renewed by the Legislature or to circumvent a meeting of the legislative oversight committee convened to review a pandemic disaster declaration.

On termination of a declared state of pandemic disaster or a provision of a

proclamation, order, or rule by the Legislature or the legislative oversight committee, the governor would have to issue an executive order ending the declared state of pandemic disaster or rescinding those provisions.

Limitation on certain executive actions. An executive order, proclamation, or rule issued under the bill that had the effect of closing or limiting the operating capacity of a business or other entity, mandating the wearing of a face covering, or limiting surgeries or other medical procedures could continue for more than 30 days only if the governor issued:

- a proclamation convening the Legislature in special session to consider whether to modify or terminate the executive order, proclamation, or rule; or
- if the Legislature was convened in regular or special session, a message to the Legislature requesting consideration of whether to modify or terminate the executive order, proclamation, or rule.

The governor would be prohibited from issuing a new executive order, proclamation, or rule based on the same or a substantially similar finding as a prior executive order, proclamation, or rule that was terminated by the Legislature.

Limitations on authority. The governor could exercise the same authority granted under the Texas Disaster Act, except certain Texas Disaster Act provisions would not apply to a declared state of pandemic disaster, including those governing the declaration of a state of disaster, the restricted sale and transportation of certain materials, and other provisions listed in the bill.

Religious freedom. Actions taken under a declared state of pandemic disaster would have to satisfy religious freedom protections under state and federal law.

Sale, transportation of certain materials. The sale, dispensing, or transportation of firearms and ammunition could not be suspended or limited in response to a declared state of pandemic disaster.

Local, interjurisdictional pandemic emergency management. The presiding officer of the governing body of a political subdivision would be designated as the pandemic emergency management director for that political subdivision. The director would serve as the governor's designated agent in the administration and supervision of duties under the bill. A director could designate a pandemic emergency management coordinator to serve as the director's assistant.

A director would perform the duties prescribed by the emergency management plan and implement the state of pandemic proclamation and each executive order issued under the bill.

A person, other than a director, could not seize state or federal resources without prior authorization from TDEM or the state or federal agency responsible for those resources.

The bill would prohibit the presiding officer of the governing body of a political subdivision from issuing an order during a declared state of pandemic disaster or local state of pandemic disaster that required specific businesses or industries to close or distinguished between types of businesses or industries in limiting operation capacities.

Preemption. Any local order or rule issued in response to a state or local state of pandemic disaster would be superseded and void to the extent that it was inconsistent with proclamations, orders, or rules issued by the governor or the Department of State Health Services.

Any order issued by a municipality would be superseded and void to the extent that it was inconsistent with orders issued by the county judge of the county in which the municipality was located.

Limitation on property tax rate. The bill would prohibit a political subdivision that the governor determined had issued an order requiring the closure of a private business in response to a pandemic disaster from adopting a property tax rate for the current tax year that exceeded the no-

new-revenue tax rate or the voter-approval rate for that tax year, whichever was less. For purposes of determining the unused increment rate, the difference between the political subdivision's actual tax rate and voter-approval tax rate would be zero.

A political subdivision would no longer be subject to the tax limitation in the first tax year following the governor's rescission of the determination.

The governor would adopt rules and procedures to determine whether the presiding officer of a political subdivision had issued an order requiring the closure of a business in response to a pandemic disaster.

Limitations. The bill would not:

- grant the governor authority to enact law or expand the authority granted to the governor under the Texas Disaster Act;
- limit the authority of the governor to apply for, administer, or spend a grant, gift, or payment in aid of pandemic disaster mitigation, preparedness, response, or recovery;
- interfere with the course or conduct of a labor dispute, except that actions otherwise authorized by the bill or other law could be taken when necessary to forestall or mitigate imminent or existing danger to public health or safety;
- interfere with dissemination of news or comment on public affairs, provided any communications facility or organization could be requested to provide public service messages with information or instructions connected with a pandemic disaster or potential pandemic disaster;
- affect the jurisdiction or responsibilities of a law enforcement agency, fire department, or unit of the U.S. armed forces, or any of their personnel when on active duty, if state, local, or interjurisdictional emergency management plans relied on the agencies, departments, or units to perform duties related to pandemic disasters;
- limit, modify, or abridge the authority of the governor to exercise any other power vested in the governor under the state constitution

or laws independent of or in conjunction with any provision of the bill;

- authorize the seizure or confiscation of any firearm or ammunition from an individual who was lawfully carrying or possessing the firearm or ammunition or authorize any person to prohibit or restrict the business operations of a firearms or ammunition manufacturer, distributor, wholesaler, supplier, or retailer or a sport shooting range;
- affect the level of scrutiny for judicial review of constitutional violations;
- delegate to any governmental official the authority to modify election procedures; or
- authorize any governmental official to mandate that an individual obtain a vaccination.

Civil liability during pandemic disaster. A business or an entity operating during a pandemic disaster would not be liable for an injury caused by exposing or potentially exposing an individual to a disease if on the date of the exposure or potential exposure:

- the business or entity was authorized to conduct business;
- the business or entity made a reasonable effort to comply with applicable and controlling state and local laws, rules, ordinances, declarations, and proclamations related to the pandemic disaster; and
- the act or omission giving rise to the exposure or potential exposure was not willful, reckless, or grossly negligent.

A person who provided goods or rendered services during a pandemic disaster in support of disaster response efforts and at the request of the governor would not be liable for an injury caused by the goods or services, regardless of the circumstances, provided the act or omission giving rise to the injury was not willful, reckless, grossly negligent, or inconsistent with a limit specified in the governor's request.

The immunity provided by the bill would be in addition to the immunity

and limitations of liability provided by other law. Provisions under the Texas Disaster Act governing civil liability would apply during a declared state of pandemic disaster. The bill would not create a civil cause of action.

These provisions would apply only to a cause of action that accrued on or after March 13, 2020.

Applicability of Texas Disaster Act. The bill would amend the definition of "disaster" for the Texas Disaster Act to specify that the term would not include a pandemic disaster.

Certain provisions of the Texas Disaster Act would apply to a declared state of pandemic disaster, including provisions governing the disaster recovery loan program and disaster contingency fund, shelter operations, and others listed in the bill.

To the extent of any conflict between the bill and the Texas Disaster Act, the bill would control.

Legislative oversight committee. CSHB 3 would create the Pandemic Disaster Legislative Oversight Committee to consider the impact of a declared pandemic disaster on the state and its residents and provide legislative oversight of pandemic disaster declarations.

Membership. The 10-member committee would be composed of:

- the lieutenant governor;
- the House speaker;
- the chairs of the Senate committees on Finance, State Affairs, Health and Human Services, and Education; and
- the chairs of the House committees on Appropriations, State Affairs, Public Health, and Public Education.

The lieutenant governor and House speaker would serve as joint chairs.

Powers and duties. The committee could act only when the Legislature was not convened in regular or special session. The committee would be authorized to:

- review any state of pandemic disaster declaration issued by the governor that was in effect for more than 30 days following the governor's renewal of the declaration;
- review proclamations, orders, or rules issued or adopted by the governor and any orders issued by a county or municipality for the pandemic disaster declaration; and
- terminate the state of disaster or provisions of proclamations, orders, or rules issued or adopted by the governor or orders issued by a county or municipality for the pandemic disaster declaration, as provided under the bill.

Meetings. The joint chairs would have to convene the committee on or as soon as practicable after the date a state of pandemic disaster was first renewed by the governor, unless the Legislature was convened in a regular or special session.

The bill would establish requirements related to quorum and meeting notices and allow the committee to meet by videoconference call.

Other provisions. Personnel surge capacity planning conducted under the bill for declared states of pandemic disaster would have to include plans for providing personal protective equipment to physicians, other health care professionals, and pandemic disaster relief workers and volunteers.

The bill would require the training course on the responsibilities of state and local governments under a state of disaster to include training on the responsibilities of state and local governments during a declared pandemic under the bill.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2021.

SUPPORTERS
SAY:

CSHB 3 would address calls to establish a separate framework to govern state and local responses to a pandemic disaster. The COVID-19 pandemic illustrated that pandemic disasters and their impacts are different from other disasters in terms of geographic scope, duration, and appropriate response methods. The current disaster response framework under the Texas Disaster Act is effective in responding to hurricanes, fires, and tornadoes but did not fit the circumstances brought on by the unprecedented pandemic.

The bill would address emergency powers during a pandemic disaster and establish state governance to ensure liberties were protected and the economy was safeguarded during future pandemic emergencies. It would tailor local government emergency powers, creating a limited legislative check on executive authority and making explicit the protection of key constitutional rights.

Powers and duties of governor. The bill would not expand executive emergency powers, as it would not give the governor any new powers the governor did not have during the COVID-19 pandemic under the Texas Disaster Act. The bill would, however, limit executive authority and certain actions to better balance government power with individual liberties in times of a pandemic disaster, including protecting religious freedom and Second Amendment rights.

The bill appropriately would place the main authority for pandemic disaster response in the executive branch. For other disasters, such as hurricanes or floods, the state's emergency response usually is bottom up, and local governments organize their response, as the disaster is localized. However, since pandemics affect the entire state, it is necessary that the response be top down to allow for a unified, cohesive response. The bill would maintain the ability for government to be flexible and quickly adapt to changing landscapes.

Local, interjurisdictional pandemic emergency management. The bill would clarify the roles of state and local governments to eliminate

confusion and ensure a more unified statewide response by a clear, single source of authority with an appropriate check in place. By preempting local orders, the bill would ensure that the state's resources were devoted to where they were most needed. Further, the bill would not affect the ability for local governments to draw down federal relief funds.

During the COVID-19 pandemic, many experienced uncertainty and confusion due to competing state and local disaster declarations and emergency orders. Businesses found it difficult to operate in the patchwork of different local actions, affecting their ability to quickly adjust, adapt, and deliver for communities across the state. The bill appropriately would address this issue by making it clear that state authority would override local orders during pandemics. It would omit a portion of the Texas Disaster Act that some reported was too broadly interpreted by local officials to impose a wide variety of rules and restrictions, including extending disaster declarations indefinitely and proposing excessive fines and criminal penalties for noncompliance.

Limitation on property tax rate. The bill would protect private businesses and effectively eliminate a disaster tax loophole some localities improperly attempted to use to increase taxes without holding an election during the COVID-19 pandemic. By raising rates, these localities imposed an additional burden on struggling businesses and homeowners who were already facing an economic downturn. Higher property taxes are not what communities need in the wake of a pandemic.

Civil liability during pandemic disaster. The bill would establish strong, appropriate civil liabilities protections from open-ended and abusive litigation for businesses, entities, and persons who made reasonable efforts to comply with guidelines and orders. Businesses that were doing everything possible to stay open safely and protect their customers and employees, especially those that greatly impacted and cared for their communities, should be protected.

Legislative oversight committee. By creating the Pandemic Legislative Oversight Committee, the bill would provide a better balance of powers

and create an important check on executive authority. Concerns were raised that legislative oversight was bypassed during the COVID-19 pandemic, as it occurred during an interim. The legislative oversight committee would ensure the voices of the Legislature were not sidelined during future pandemic disasters and that elected representatives were involved in the decision-making process.

The bill would provide a process to ensure the Legislature played a key role in the state's response to a pandemic disaster. Under the bill, the Legislature could terminate a declared state of pandemic disaster at any time if it was in session, and if not in session, the legislative oversight committee could terminate the declaration. The bill would prohibit the governor from declaring a new pandemic disaster based on a prior pandemic disaster that was terminated or not renewed by the Legislature or to circumvent a meeting of the legislative oversight committee. Further, certain executive orders, proclamations, or rules could not be continued for more than 30 days without legislative consideration by requiring the governor either to convene the Legislature in special session or to send a message requesting the consideration if the Legislature was in session.

**CRITICS
SAY:**

CSHB 3 would not go far enough to mitigate the impacts of the COVID-19 pandemic or safeguard against such negative effects during a future pandemic disaster. The pandemic led to economic devastation, including permanent business closures and the loss of millions of jobs, mental health issues from isolation and social distancing protocols, and impacts on children exacerbated by the shuttering of schools. The Legislature should restore the proper balance of power by curtailing and clearly defining executive emergency powers and preserving local emergency powers.

Powers and duties of governor. CSHB 3 would grant too much authority to the governor and insufficient limits on executive emergency powers. It would not go far enough to ensure certain actions, including suspension of certain laws that impacted individual rights, personal liberties, and freedoms, including lockdowns and mask mandates, were not taken during future pandemics. It also would not go far enough to address executive emergency powers more broadly and unnecessarily would

create a new chapter of law dedicated to pandemic disasters. Instead, the bill should amend the current Texas Disaster Act to address executive emergency powers more broadly.

Local, interjurisdictional pandemic emergency management. The Texas Pandemic Disaster Act mentions a local state of pandemic disaster but would not provide a process for declaring one. Not providing explicit authority to issue a declaration of a local state of pandemic disaster could affect the ability of local officials to act quickly and effectively. Currently under the Texas Disaster Act, a local official may declare a local state of disaster, which activates provisions of local or interjurisdictional emergency management plans and authorizes aid and assistance under the declaration. A local declaration also triggers the ability of local officials to apply for and receive state or federal aid. If a local government was not able to issue a pandemic disaster declaration, depending on how the governor issued the executive declaration, gaps could emerge in the ability to receive financial assistance.

The pandemic illustrated the need for local governments to nimbly respond. Under the bill, local officials no longer could take actions tailored to their communities but would be required to serve as pandemic emergency management directors empowered to follow executive direction. This would mean actions at the state level were not informed by the on-the-ground challenges in communities. The bill should provide for a pandemic response more consistent with current disaster response frameworks to maintain the ability for local governments to respond in ways that met their communities' needs.

Limitation on property tax rate. Provisions limiting tax revenue for cities or counties that issued an order requiring the closure of a private business could be interpreted too broadly and penalize a city or county that closed a single business for a single day in response to a pandemic by freezing the tax rate for a year. The bill also would not specify that the provisions applied only in future pandemics, which could give the governor's office the ability to restrict budgeting decisions in tax year 2021 for actions taken by local officials to mitigate the spread of COVID-

19. The bill could restrict local revenue because local officials acted in good faith to help their communities during the pandemic.

Civil liability during pandemic disaster. The civil liability protections for businesses would not go far enough and could result in businesses choosing to close rather than stay open during a pandemic disaster. Protections under the bill would be afforded only if the businesses complied with rules and recommendations of governing bodies. These can be ever-changing, rendering protections under the bill less meaningful. Private businesses should be afforded the same strong liability protections afforded public sector actors under the bill.

Legislative oversight committee. While establishing the legislative oversight committee would be a good first step, it would not go far enough to ensure the Legislature was a co-equal branch of government during a pandemic disaster. It should require the Legislature, rather than the governor, to renew a disaster declaration beyond the first 30 days and also require the governor to call a special session under similar circumstances. The bill could prescribe a process allowing the Legislature to convene in a special session without a voluntary call from the governor when a statewide disaster continued for an extended time. While the Texas Constitution reserves this authority for the governor, it is important this right be granted to the Legislature in limited circumstances.

The legislative oversight committee should be allowed to review and take action on declarations and orders issued by local officials and state agencies in response to a pandemic disaster. The bill also should provide a way for the oversight committee to have a role in appropriating federal relief money when the Legislature was not in session.

NOTES:

According to the Legislative Budget Board, the bill would have a negative impact of about \$2.5 million to general revenue through fiscal 2023 for TDEM to support the direction, oversight, and management of the development of regional plans for surge capacity during pandemic disasters, including plans for personal protective equipment. TDEM also estimates it would need nine additional full-time equivalent employees to

undertake its responsibilities under the bill, including to support long-term deployment relating to pandemic emergency management.