

No. 03-20-00376-CV

IN THE THIRD COURT OF APPEALS

Austin, Texas

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Texas General Land Office, and George P Bush, Texas Land  
Commissioner, in his Official Capacity,

*Appellants/Defendants,*

v.

City of Houston

*Appellees/Plaintiff*

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On Appeal from the 53<sup>rd</sup> Judicial District Court, Travis County, Texas

Trial Court Cause No. D-1-GN-20-003520

The Honorable Tim Sulak, Judge Presiding

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***Amicus Curiae* Brief of Senator Paul Bettencourt, et al. in Support of the  
Appellants**

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**TO THE HONORABLE JUSTICE OF THE COURT:**

Senator Paul Bettencourt and other members of the Texas Legislature respectfully submit this *amicus curiae* brief in support of the Appellants, General Land Office and Texas Land Commissioner George P. Bush, pursuant to Texas Rule of Appellate Procedure 11.

**IDENTITY AND INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

Senator Paul Bettencourt represents Senate District 7, which encompasses most of West Harris County and part of the city of Houston. Other signatories represent the greater Houston metropolitan area and surrounding regions that were significantly affected by Hurricane Harvey. As elected members of the Texas Legislature, the undersigned are answerable to the residents of Houston and have a duty to oversee how governmental subdivisions conduct Harvey recovery efforts. Several signatories are members of the Senate Finance Committee and tasked with ensuring the effective use of taxpayer funds. COVID-19 and the state’s response has had a significant impact on the economy and the state cannot afford to forfeit \$1.25 billion in federal funding due to ineffective administration by the City of Houston.



Senator Paul Bettencourt



Senator Brandon Creighton



Senator Joan Huffman



Senator Lois W. Kolkhorst



Senator Larry Taylor



Representative Dwayne Bohac

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<sup>1</sup> Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, *amicus* confirms that no person or entity other than *amicus* made a monetary contribution to the preparation or filing of this brief.



Representative Sam Harless



Representative Briscoe Cain



Representative Dennis Paul



Representative Valoree Swanson

### **SUMMARY OF ARGUMENT**

The Court of Appeals should deny the Appellee’s motion to reinstate the district court’s temporary injunction. Granting emergency relief is against the public interest as it deprives Houston residents of much needed support to repair their homes and jeopardizes federal funding by slowing its effective distribution as the August 17, 2024 deadline approaches.

In addition, Texas Government Code 22.004(i) makes clear that when the state is a judgment debtor it may supersede a judgment or order on appeal and it is not subject to being counter-superseded under any rule.

### **ARGUMENT**

#### **I. The City of Houston Has Failed Its Residents**

For those left to rebuild their lives in the aftermath of Hurricane Harvey, there exist three realities: those who were able to rebuild quickly thanks to private insurance or similar funding, those that have been able to rebuild thanks to programs

managed by the Texas General Land Office (“GLO”), and those that have been left to languish due to the City of Houston's (“COH”) inability to effectively and efficiently manage their disaster assistance programs. For the last group, every hurricane season brings additional problems. Local media have reported that since Hurricane Harvey some homes damaged by the storm have had their damage worsened by Tropical Storm Imelda or other significant rainfall events. The current hurricane season is certain to bring even more problems. These challenges are only compounded by the global pandemic.

In court testimony, a COH witness estimated that tens of thousands of households were impacted by Hurricane Harvey. (R.R. II: 107).<sup>2</sup> In response to the disaster, Congress allocated \$5 billion in funding to assist with the state’s recovery. The United States Department of Housing and Urban Development (“HUD”) appropriated these funds to the State of Texas and Governor Abbott designated the GLO to oversee the administration of the funding. Subsequently, GLO entered into a subrecipient agreement with the COH to allow COH to administer approximately \$1.2 billion of the federal funds. If the federal funding is not spent before August 17, 2024, it must be returned to the federal government. (R.R. II: 146).

According to COH’s own witness, only 245 families have been assisted by COH’s homebuyer assistance and homeowner assistance programs. (R.R. II: 107).

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<sup>2</sup>Reporter’s Record Vol. 2, Plea to the Jurisdiction and Application for Temporary Injunction

In total, COH has rebuilt 65 homes in the last two years. (R.R. II: 108). This lack of progress has occurred despite a HUD monitoring report from November 2019 that found that “GLO has provided significant oversight and technical assistance to the city to ensure applicant files are complete with appropriate eligibility documentation.” (DX3).<sup>3</sup> COH’s mismanagement extends beyond building structures. In the same November 2019 monitoring report, HUD found that COH’s Community Development Block Grant Disaster Recovery (“CDBG-DR”) website fails to comply with requirements outlined in *Federal Register* Notices. Despite efforts by GLO to assist COH in correcting this error, the website still failed to comply with HUD requirements in March 2020. COH’s failure to comply with federal regulatory standards has drawn scrutiny from the Office of the Inspector General for HUD, which has announced a monitoring review to “assess the efficiency and effectiveness” of the COH’s Hurricane Harvey CDBG-DR program and “determine why the program did not assist disaster participants in a timely manner.” (DX9).<sup>4</sup>

While the City of Houston has been struggling to meet a fraction of the needs of its residents and drawing scrutiny from federal officials, GLO has built 1,618

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<sup>3</sup> Defendant’s Exhibit 3 - HUD Monitoring Report

<sup>4</sup> Defendant’s Exhibit 9 – Letter from HUD OIG



homes for Texas families through the state-run Homeowner Assistance Program. (R.R. II: 166).

COH's failure to provide residents with disaster relief in a timely manner has had a profound impact on the lives of Houston residents. Unfortunately for those that have suffered from the lack of organization and productivity by COH, very little has been done to alleviate growing concerns and create a correct path going forward.

Delays in the distribution of federal funds could also have a wider impact on the state budget. If the CDBG-DR funds appropriated by Congress are not spent by August 17, 2024, then the state will lose access to the funds. Any efforts by the courts to preserve the status quo among the parties pending further litigation will not only delay the distribution of federal funds, but will jeopardize the receipt of those federal dollars entirely. Given COH's track record on spending disaster recovery funds, even if they were to ultimately prevail in this case, COH is unlikely to have enough time remaining in the grant term to effectively and efficiently disburse the remaining federal funds. (R.R. II: 170). The burden would then fall on to the state to make up for the shortfall in funding to assist with disaster recovery that was created by COH's inability to fulfill its fiduciary duties to its residents.

There is a significant public interest in the funds being distributed in a timely manner. Every day that goes by without adequate disaster recovery efforts compounds the harm to Houston residents. Delays in receiving assistance further

damages their homes and jeopardizes their financial future. Given the COH's failure to operate a program that meets federal requirements and properly distribute the grant funds to applicants in a timely manner, the GLO should be given authorization to take immediate corrective action.

## **II. The General Land Office Should be Permitted to Continue its Efforts**

Under the Texas Rules of Appellate Procedure, “a judgment debtor is entitled to supersede a judgment or an interlocutory order and thus defer its enforcement while pursuing an appeal.” *Tex. Educ. Agency v. Houston Indep. Sch. Dist.*, 03-20-00025-CV, 2020 WL 1966314, at \*1 (Tex. App.—Austin Apr. 24, 2020, no pet.). When the judgment debtor is the state, the Legislature established a clear and unambiguous statutory right to supersedeas that “is not subject to being counter-superseded under Rule 24.2(a)(3), Texas Rules of Appellate Procedure, *or any other rule*” (emphasis added). *See* Tex. Gov. Code § 22.004(i). There is no question that in this case that the GLO, as the judgment debtor, is entitled to supersede the district court’s order and the order is not subject to being counter-superseded.

The City of Houston, relying on *Texas Education Agency v. Houston Indep. Sch. Dist.*, will claim that despite statutory language to the contrary, it is entitled to emergency relief in order to preserve the status quo under Texas Rule of Appellate Procedure 29.3. *See* No. 03-20-00025-CV at \*6. This argument is contrary to the long-held principle “when a rule of procedure conflicts with a statute, the statute

prevails.” *Johnstone v. State*, 22 S.W.3d 408, 409 (Tex. 2000). As the Court noted in *In re Geomet Recycling LLC*, “[i]t is not our place to ‘judicially amend the statute to add an exception not implicitly contained in the language of the state.’” 578 S.W.3d 82, 87 (Tex. 2019) (citing *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 867 (Tex. 1999)). Although Rule 29.3 empowers the court of appeals to preserve parties’ rights, it does not include the power to make orders contrary to statute. *See id* at 89. When courts examine questions of statutory construction, they ascertain and give effect to the Legislature’s intent as expressed by the language of the statute. *See City of Rockwall v. Hughes*, 246 S.W.3d 621, 625-626 (Tex. 2008). Courts construe a statute’s words according to their plain and common meaning unless a contrary intention is apparent from the context, or unless such construction leads to absurd results. *See Trapp v. Shell Oil Co.*, 198 S.W.2d 424 (Tex. 1946). Appellee’s request for emergency relief, if granted, would preclude the GLO from offering disaster recovery assistance to Houston residents it does not already serve. Such a ruling would result in an absurd situation where the only government body actually helping Houstonians is being barred from doing so.

In *Texas Education Agency*, the court makes two arguments against application of Rule 24.2(a)(3). First, that the rule prevents a party from ever meaningfully challenging acts by the executive branch and, second, that the application causes irreparable harm by preventing the court from preserving the

status quo. *See* No. 03-20-00025-CV at \*5. The present case differs significantly from *In re Geomet* and *Texas Education Agency*, in that the irreparable harm that the emergency relief seeks to stop is not to a private actor, but to a governmental subdivision. The status quo in question is one where the Appellee is permitted to continue offering substandard disaster relief services to the residents of Houston. The irreparable harm, at worst, would be the continued distribution of federal funds through the GLO instead of COH. The end recipients of the aid, Houston residents, would see no significant change in services. Given the facts outlined in Section 1, it is likely that Houston residents would actually see an increase in services, rather than a decrease, should emergency relief not be granted. This distinguishes the present facts from *In re Geomet*, which involved a dispute between two private parties, and *Texas Education Agency*, where the harmed party was a public charter school and, by extension, its students. In fact, the irreparable harm likely to come as a result of granting appellee's petition for emergency relief is likely the loss of federal funds when COH is unable to spend them in a timely and effective manner. Upholding the status quo runs against the long-term public interest of the state and the residents of Houston.

### **PRAYER**

Houstonians have spent the last three hurricane seasons waiting for the City of Houston to provide disaster recovery assistance. Instead of recognizing the limits

of its competence and returning control of the funding they have mismanaged, COH has elected to spend additional time and money in litigation. Houstonians should not be forced to spend another hurricane season waiting for this case to wade through the legal system. *Amicus* respectfully requests that the Court deny the City of Houston's request for emergency relief.

Respectfully Submitted,

/s/ Benjamin Barkley

Benjamin Barkley

On Behalf of Senator Paul Bettencourt

### CERTIFICATE OF COMPLIANCE

This brief contains 1,708 words, excluding portions of the brief exempted by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure.

/s/ Benjamin Barkley

Benjamin Barkley

### CERTIFICATE OF SERVICE

I certify that on this 27<sup>th</sup> day of July, 2020, a true and correct copy of the foregoing *Amicus Curiae* Brief of Senator Paul Bettencourt was served electronically on the following counsel of record:

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