

PARTIES

3. Plaintiffs John and Jane Does 1-3 are citizens of Texas who are the parents of minor, school-aged girls, who object to the Governor's abuse of power, and his unlawful executive order. Their names and identities are not specified herein to protect their privacy rights and interests.

4. Defendant, Governor Rick Perry, is sued in his official capacity as Governor of Texas, and may be served with citation at the Office of the Governor, State Insurance Building, 1100 San Jacinto, 4th Floor, Austin, Texas 78701.

5. Service will also be made upon the Attorney General of the State of Texas, at 300 W. 15th Street, Austin, Texas 78701, so as to give him notice of the constitutional and legal challenges to the Subject Executive Order.

JURISDICTION AND VENUE

6. This Court has jurisdiction under Chapters 37 and 65 of the Texas Civil Practices & Remedies Code, and the Texas Constitution.

7. Venue is proper in Travis County because the cause of action accrued in Travis County, and the Defendant is an official of the State of Texas.

FACTS

8. The school-aged girls of Texas are not guinea pigs who may be subjected to medical procedures at the apparent whim of Texas' Governor. They, and their parents, also may not be treated differently than other citizens of Texas. These girls, and their parents, may not be penalized for non-compliance with the Governor's wishes, and their privacy rights may not be invaded should they object to the Governor's mandates. The Governor's unauthorized, and unlawful, action, as described below, must not be tolerated by the Court, which is authorized by law to undo that unauthorized and unlawful conduct.

9. On February 2, 2007, the Defendant (referred to below as the "Governor") signed Executive Order RP65 "relating to the immunization of young women from the cancer-causing Human Papilloma Virus ("HPV") (the "Subject Executive Order"). Via the Subject Executive Order, the Governor has directed the Health and Human Services Executive Commissioner to adopt rules that mandate the age appropriate vaccination of all female children in Texas for HPV, prior to admission to the sixth grade.¹

10. The Subject Executive Order also directs the Department of State Health Services to "modify the current process in order to allow parents to submit a request for or conscientious objection affidavit form via the Internet while maintaining privacy safeguards under the current law." Requiring parents to publicly file a request for exemption from this inoculation program is itself, unlawful. Girls whose parents refuse to make the required filings are fully unprotected, and are subject to being inoculated automatically. The vaccine which is discussed in the Subject Executive Order is called "Gardasil." It is manufactured by Merck & Co. and was approved by the U.S. Food and Drug Administration for public use in June of 2006. Merck & Co. has, since then, engaged in an aggressive lobbying campaign designed to cause state legislatures to implement a mandatory Gardasil inoculation program.

11. The media has reported that the Governor was directly and aggressively lobbied by Merck & Co. to implement a law requiring the mandatory Gardasil inoculation program the Governor has now ordered via the Subject Executive Order. Plaintiffs will show that the Governor executed the Subject Executive Order specifically to bypass the Texas Legislature, whom he believed

¹ Presumably, school-aged girls who are older than sixth graders, who do not show proof of vaccination, also will be denied admission to school in grade levels 7 through 12.

would not pass legislation compelling such an inoculation program. Finally and significantly, the media has reported that Merck & Co.'s principal lobbyist is the Governor's former Chief of Staff.

12. An executive order has the same force and effect as a law, passed by the Legislature and signed by the Governor. In this instance, Governor Perry bypassed the legislative process and enacted this particular law on his own volition. His doing so is a violation of the Texas Constitution, and Texas statute. It also constitutes the unlawful usurpation of powers which have been directly granted by statute, to other governmental entities or authorities, and only they have implemented strict statutorily-mandated procedures.

13. The Governor does not have an open-ended right to sign executive orders. With regard to the circumstances presented, the Governor could only derive the power to issue an executive order from Section 418.012, TEX. GOV'T CODE if its conditions were satisfied. More particularly, he could do so lawfully only for the purpose of meeting the dangers to the state and people presented by what Chapter 418 defines as a "disaster."

14. A "disaster" means the occurrence or imminent threat of widespread or severe damage, injury or loss of life resulting from a natural or man-made epidemic or public calamity. See, Section 418.004(1), TEX. GOV'T CODE.

15. Plaintiff would show that there exists no "disaster" which warrants, justifies or authorizes the Governor's exercise of the powers bestowed upon him by Section 418.012, if he relied upon that statute to issue the Subject Executive Order. There is no epidemic of cervical cancer in Texas. There is no epidemic of cervical cancer caused by the HPV virus in Texas. There is no epidemic of either disease among school-age girls in Texas. There is no occurrence or imminent threat of widespread or severe damage, injury or loss of life resulting from HPV-induced cervical cancer among school-aged girls in Texas. There is no evidence that school-aged girls in Texas have,

let alone routinely transmit, the HPV virus. Most certainly, if they do transmit the virus, they do not transmit it in school.

16. In addition to the foregoing, Texas has a statute known as the Communicable Disease Prevention and Control Act. See, Chapter 81, TEX. HEALTH & SAFETY CODE. Its purpose is to cause the state to protect the public health by acting, responsibly, to prevent and control communicable diseases, but only after certain procedures (as set out in that statute) are carefully followed.

17. Chapter 81 prescribes the specific procedures which must be followed in fulfilling its purposes, none of which include execution by the Governor of an executive order, dictating a mandatory inoculation program under penalty for non-compliance. In fact, that statute mandates that the Commissioner of Health and Human Services (not the Governor) is responsible for the general state-wide administration of this chapter. See, Section 81.004, TEX. HEALTH & SAFETY CODE.

18. In signing the Subject Executive Order, the Governor has usurped a power and governmental function expressly bestowed by statute, upon the Commissioner of Health and Human Services. There has been no responsible exercise of governmental power to prevent and control a communicable disease (assuming cervical cancer caused by HPV is one), in the manner contemplated by Chapter 81, or otherwise. Consequently, the population of people effected by the Governor's executively-ordered, mandatory inoculation program remain substantially more vulnerable to unknown and untoward side effects of this brand new vaccine, than they are to the disease or diseases the subject vaccine purports to protect them from.

19. It should also be noted that on February 20, 2007, Merck & Company, bowing to pressure from parents and medical groups, announced that it was immediately suspending its lobbying campaign to persuade state legislatures to mandate that adolescent girls get the company's Gardasil vaccine as a requirement for school attendance. It likewise was reported that two of the

prominent medical groups which had supported broad use of the vaccine – the American Academy of Pediatrics and the American Academy of Family Practitioners–questioned Merck’s timing. News reports of these facts also state that Dr. Anne Francis, who chairs an American Academy of Pediatrics committee called Merck’s change of heart “a good move for the public.” Furthermore, she was reported as stating that “I believe their timing was a little bit premature, so soon after Gardasil’s release, before we have a picture of whether there are going to be any untoward side effects.” Dr. Francis was further reported as having stated that given that the country has been “burned” by some drugs whose serious side effects emerged only after they were in wide use, including Merck’s withdrawn pain killer Vioxx, it would be better to wait awhile before mandating Gardasil usage. Finally, Dr. Francis is reported to have stated that she was concerned about requiring the vaccine for a disease that is not communicable and so does not have a big public health impact. The Governor has not rescinded or vacated the Subject Executive Order.

20. The powers of the Governor are limited and set forth either in Article 4 of the Texas Constitution, or via statute. Nowhere in the Constitution is the Governor of Texas granted the power to legislate, or to avoid the requirements of a statute duly passed by the Texas Legislature, merely by issuing an executive order. Likewise, the Texas Constitution does not grant the Governor the authority or power to issue an executive order under the circumstances leading to his issuance of the Subject Executive Order.

21. The Subject Executive Order violates TEX. CONST. ART. I, §§ 3a and 19 and ART. II § 1.

22. First, the Subject Executive Order carves out a class of citizens (school-aged girls and their parents) who are the only citizens subject to its terms (including the mandatory medical procedure it requires), and who will suffer a penalty for non-compliance with its terms. Via the

Subject Executive Order, school-aged girls in Texas, and their parents, are being denied equality under the law because of the sex of those children. See, ART. I, §3a.

23. Second, the Subject Executive Order also deprives those school-aged girls who are subject to its terms of the right to attend school, unless they agree to subject themselves to undesirable and unwanted medical procedures, or their parents seek approval of the State of their request to become exempted from the mandatory inoculation program, in a manner or via a process which also deprives their Plaintiff parents, and them, of equality under the law. Via the Subject Executive Order, the Plaintiffs, and all others in Texas who are similarly situated, are being deprived of privileges or immunities, or are otherwise being disfranchised, without due course of the law of the land. See, ART. I, §19.

24. Finally, the Subject Executive Order is clearly the exercise by the Governor of a power which is exclusively vested by the Texas Constitution, in the Legislature, in the absence of certain emergency circumstances, authorized by statute. None of the circumstances by statute exist in this case. The Subject Executive Order is an act of legislation. The enactment of legislation is, however, a function and power which is exclusively vested in the Legislative branch of government. As such, it violates the Constitutional prohibition against one branch of government (in this case the Executive Branch) exercising a power properly attached to another branch of government (in this case the Legislative Branch). See, ART. II, §1.

CAUSES OF ACTION

First Count: Request for Declaratory Judgment

26. Pursuant to TEX. CIV. PRAC. & REM. CODE § 37.001 *et seq.*, Plaintiffs seek a declaratory judgment that:

- a. as issued by Governor Perry, Executive Order RP65 violates TEX. CONST. ART. I, §§ 3a and/or 19 and/or ART. II § 1;
 - b. as issued by Governor Perry, Executive Order RP65 is not authorized by Texas statute, including but not limited to Section 418.012, TEX. GOV'T CODE;
 - c. as issued by Governor Perry, Executive Order RP65 is the unlawful exercise of a government function expressly assigned to the Commissioner of Health and Human Services by TEX. HEALTH & SAFETY CODE § 81.004; and,
 - d. Because of any one or more of the infirmities and/or legal defects identified above, Executive Order RP65 is void and has no legal effect.
25. Plaintiffs are entitled to recover reasonable and necessary attorney fees and costs as are equitable and just, under TEX. CIV. PRAC. & REM. CODE § 37.009.

Second Count: Application for Temporary and Permanent Injunction

26. In addition to the foregoing relief, Plaintiffs request temporary and permanent injunctive relief pursuant to TEX. CIV. PRAC. & REM. CODE § 37.001, et seq. (particularly § 37.011), TEX. CIV. PRAC. & REM. CODE § 65.001, et seq. (particularly § 65.011), and the Court's inherent powers and/or the rules of equity.

27. The Plaintiffs are, in their individual capacity, taxpayers in the State of Texas who object to the utilization of public funds for implementation of one or more of the mandates set forth in the Subject Executive Order. More particularly, Plaintiffs object to the expenditure of any public funds by the Health and Human Services' Executive Commissioner to adopt rules mandating the age-appropriate vaccination of all female children for HPV prior to admission to the sixth grade, as ordered by the Governor. In addition, Plaintiffs object to the expenditure of public funds by or on behalf of the Department of State Health Services to "modify the current process in order to allow parents to submit a request for a conscientious objection affidavit form via the Internet while maintaining privacy safeguards under current law," as ordered by the Governor.

28. For the reasons stated above which are incorporated by reference, it is probable that Plaintiffs will prevail after trial on the merits. If Plaintiffs' application for temporary injunction is not granted, harm is imminent because the Subject Executive Order will remain a final order, and will be implemented via (among other things) the expenditure of public funds on an immediate basis, as is evidenced by language in the Subject Executive Order directing the various state agents or agencies to move expeditiously in complying with the mandates set forth therein.

29. If a temporary injunction is not issued, Plaintiffs, and all other persons similarly situated, will suffer irreparable harm because of the interference with their Constitutional and statutory rights, being subjected to a law which has been improperly implemented, and which forces the expenditure of public funds on an illegal and unconstitutional basis.

30. Plaintiffs have no adequate remedy at law because no amount of pecuniary damages or ability to appeal will adequately compensate them, and other Texas citizens similarly situated, and the damages to be sustained by that population of interested parties is incalculable.

31. Plaintiffs are willing to post a bond, provided that Plaintiffs respectfully submit that, based on equitable principals and the circumstances of this case, it would be appropriate to have no bond, or a nominal bond.

32. Permanent injunctive relief is necessary and appropriate to enjoin the Governor from committing the legal violations described herein, in the same or similar fashion.

CONDITIONS PRECEDENT

33. All conditions precedent to the assertion of these claims or the filing of this lawsuit have been met by Plaintiffs.