



September 9, 2020

The Honorable Greg Abbott
Office of the Governor
P.O. Box 12428
Austin Texas 78711

Dear Governor Abbott,

Pacific Legal Foundation (PLF) writes to urge you to lift your shutdown of commercial rafting and tubing services and allow outfitters to safely operate for what remains of the soon-to-be concluded tubing season.

Governor Abbott, you contend that Texas is “the last bastion of freedom in this country.”¹ But while the rest of the state has been allowed to reopen safely, you have ordered commercial tubers to remain closed despite the lack of evidence (at least any evidence that has been made public) that tubing outfitters were directly responsible for the rise in COVID-19. In many areas of the state known for tubing, like New Braunfels, people are still allowed to access the rivers and visit local waterparks. They are just not allowed to rent tubes from local outfitters. The decision to single out rafting outfitters is not only arbitrary and irrational, it likely exceeds your authority under the Texas Disaster Act and is an improper exercise of legislative authority. Indeed, members of both the Texas Supreme Court and United States Supreme Courts have expressed skepticism regarding the ability of state executives to exercise this kind of broad and seemingly limitless power.

For these reasons, you should allow commercial rafting and tubing outfitters to reopen immediately with reasonable safety guidelines in place.

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PLF is among the nation’s most preeminent public interest law firms litigating in defense of limited government and individual constitutional rights. Among other things, PLF advocates for the vital separation of powers between government institutions

¹ *E.g.*, *Greg Abbott On The Glenn Beck Program*, [GregAbbott.com](https://www.gregabbott.com/greg-abbott-glenn-beck-program/), <https://www.gregabbott.com/greg-abbott-glenn-beck-program/>.

guaranteed by the state and federal constitutions. PLF is deeply concerned about the improper exercise of power by state executives in response to COVID-19, and the impact the related shutdowns have had on small business owners in Texas and across the country.

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Shutdown, Re-opening, and Re-shutdown of Tubing Outfitters

The 2020 tubing season had barely started when, due to the outbreak of COVID-19, on March 13, 2020, you declared a State of Disaster in Texas, triggering your emergency powers under the Texas Disaster Act.² On March 19, 2020, you issued Executive Order GA 8, which prohibited social gatherings of more than ten people, effectively shutting down commercial tubing operations, along with many other businesses, statewide.

On April 17, 2020, you began to allow retail services to reopen (GA 16). Ten days later on April 27, 2020, you reopened all retail operations and restaurants for dine in services at 25% capacity (GA 18). Further re-openings followed on May 5, including salons, pools, and the wedding industry (GA 21). And by May 18, practically everything was reopened in Texas (GA 23). An order on June 3 increased the occupancy threshold to 50% for most businesses (GA 26). Unfortunately, the situation in Texas took a turn for the worst, and by mid-June COVID-19 cases were again on the rise. On June 26, you issued Executive Order GA 28, which limited capacity for some businesses, but singled out only two industries for a full shutdown: stand-alone bars and commercial rafting and tubing rental services. Since then, you appear to have issued no public statements or indicated when commercial tubing outfitters will be allowed to reopen.

We have been in contact with many tubing outfitters in Texas who have expressed great concern about the future of their businesses as a result of the shutdown. They view the shutdown of their businesses as unfair and, with the end of the 2020 tubing season growing near, potentially catastrophic.

² Copies of all executive orders are available at <https://gov.texas.gov/coronavirus-executive-orders>.

The Continuing Shutdown of Tubing Outfitters Is Unfair and Unsupported

Executive Order GA 28 targeted only stand-alone bars and commercial tubing outfitters for a full shutdown. You have offered no explanation for shutting down outfitters while allowing many other analogous businesses to remain open. If the full shutdown of commercial tubing outfitters was justified by scientific evidence showing that COVID-19 cases could be traced to these businesses, this evidence has apparently never been made public.

Your treatment of tubing outfitters appears highly irrational and arbitrary. Outdoor activity is known to pose a much lower risk than indoor activity, perhaps even twenty times less risk.³ But people in Texas today can visit an indoor shopping mall or go bowling, but not rent a tube to float down a river. Nor are other outdoor activities that are likely to attract large crowds banned. In New Braunfels, an area known in the state for its tubing, more than a thousand people at a time can attend the Schlitterbahn Waterpark and float on a tube down a “lazy river” attraction that overlooks the Comal River. But the nearby outfitters cannot rent tubes to those same patrons to let them go down that same river.⁴ And individuals can even buy their own tubes and float down the same river. Only commercial rental services are banned from renting rafts and providing shuttle bus services.

It also cannot be said that tubing rentals are uniquely unable to apply social distancing measures to protect public health. Outfitters have proposed several reasonable safety measures such as limiting the amount of tubes they rent on a given day, preventing large groups from congregating, and reducing the number of patrons who would be allowed on shuttle buses.⁵ Other businesses and services from waterparks to city buses have been allowed to reopen with these same kinds of social distancing and safety requirements. But you have not responded to these thoughtful plans. And indeed, you have given no indication as to when outfitters may be allowed to reopen. Singling out

³ Tara Parker Pope, *How Safe Are Outdoor Gatherings?*, NY Times, July 3, 2020, <https://www.nytimes.com/2020/07/03/well/live/coronavirus-spread-outdoors-party.html>.

⁴ New Braunfels Rides & Attractions, Schlitterbahn Waterpark New Braunfels, <https://www.schlitterbahn.com/new-braunfels/rides> (last visited Sept. 8, 2020).

⁵ Niki Griswold, *Tubing Business Owners React to Governor's Order*, Spectrum News, June 27, 2020, <https://spectrumlocalnews.com/tx/austin/news/2020/06/26/tubing-business-owners-react-to-governor-s-order>.

these businesses for a complete shutdown while allowing other similarly situated businesses to operate with safety guidelines in place is arbitrary and irrational.

Limited Authority to Address a Public Health Emergency

In addition to the inherent unfairness and irrationality of treating rafting outfitters differently than almost all other businesses, there is a serious question about your authority to shut these and other businesses down. Instead, under the Texas Constitution, like the U.S. Constitution, decisions such as these should be made by legislatures.

Under the Texas Constitution, the Governor does not possess unlimited emergency authority to respond to public health emergencies. The People of Texas vested the ability to make new law exclusively in the Texas Legislature, not the office of the Governor.⁶ Under Article II, Section 1 of the Texas Constitution,⁷ the Governor is prohibited from exercising legislative power.⁸ Rather, the exercise emergency power must be tied directly to the authority you are given by the Legislature in the Texas Disaster Act. That authority does not include the ability to make new substantive law, which is precisely what a shutdown order is. The Texas Disaster Act gives you the authority to declare a state of disaster and control the movement of people within a specific affected area, or order their evacuation.⁹ This authority does not include the ability to shut down the entire state economy or target specific industries for shutdown without sufficient cause. In Texas, when a state executive exceeds their authority, their actions are void.¹⁰

⁶ *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 465 (Tex. 1997). See also *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

⁷ “The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.”

⁸ See *Fulmore v. Lane*, 104 Tex. 499, 511 (1911).

⁹ Texas Gov’t Code § 418.014(a)-(b); *id.* § 418.018.

¹⁰ *In re Salon a La Mode*, 2020 WL 2125844, at *1 (Tex. May 5, 2020) (Blacklock, J., concurring).

The drafters of the Texas Constitution believed “that one of the greatest threats to liberty is the accumulation of excessive power in a single branch of government.”¹¹ This prohibition is just as important now as it was in 1876 when the Texas Constitution was adopted. Your decision to shut down commercial tubing outfitters strains this vital separation.

Judicial Skepticism of Seemingly Limitless Authority

The ability of state executives to wield precisely this kind of seemingly limitless emergency power has recently been questioned by the Texas Supreme Court, as well courts across the country. Since the beginning of the pandemic, no fewer than four members of the Texas Supreme Court have strongly voiced their concern over the Governor’s continued use of executive order and indicated the Court’s quickly diminishing patience with these continuing actions. For example, the Court recently stated that “[t]he Constitution is not suspended when the government declares a state of disaster,”¹² and one member noted that “[i]f we tolerate unconstitutional government orders during an emergency, whether out of expediency or fear, we abandon the Constitution at the moment we need it most.”¹³ Although a challenge to the Governor’s authority has not wound its way up to the Texas Supreme Court yet, it is only a matter of time. But that shouldn’t have to happen for you to do the right thing and allow outfitters to reopen.

The Shutdown of Tubing Outfitters Should be Lifted

We recognize that COVID-19 presents many unique challenges to the State of Texas and to the whole country. And we appreciate that you have prioritized allowing businesses to remain open as much as possible throughout the course of the pandemic. The continued shutdown of tubing outfitters is inconsistent with that laudable goal and helping Texas “remain the last bastion of freedom in this country.”

Commercial tubing outfitters in Texas, like all small businesses, operate on tight financial margins. Even the loss of a busy weekend in a normal season can threaten their

¹¹ *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 486 n.67 (Tex. 2011) (Willet, J., and Lehrmann, J., concurring in part, dissenting in part) (quoting *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990)).

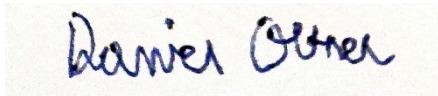
¹² *In re Abbott*, 601 S.W.3d 802, 805 (Tex. 2020) (per curiam).

¹³ *In re Salon a La Mode*, 2020 WL 2125844, at *1 (Tex. May 5, 2020) (Blacklock, J., concurring).

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future viability. This season, commercial tubing outfitters have been shut down for all but a month of their entire season. Labor Day weekend, one of the most profitable periods of the entire summer, has just passed. Only a few weeks remain of the 2020 tubing season. Allowing them to reopen now will at least give them a chance to salvage what little is left of their season and to recoup some of their losses. There is no justification for the continued shutdown of these businesses. Accordingly, the shutdown should be immediately lifted and outfitters should be allowed to reopen with reasonable safety guidelines in place.

Sincerely,

A handwritten signature in blue ink that reads "Daniel Ortner". The signature is written in a cursive style with a large, sweeping initial "D".

Daniel Ortner
Attorney

A handwritten signature in blue ink that reads "Timothy Snowball". The signature is written in a cursive style with a large, sweeping initial "T".

Timothy Snowball
Attorney