

# URGENT

CARLOS LEÓN

May 26, 2021

Office of the Governor  
State Insurance Building  
1100 San Jacinto  
Austin, Texas 78701

Dear Governor Abbott,

I respectfully urge you to NOT sign into law House Bill 3893 to NOT grant CAP METRO a 99-year lease to the underground rights of Republic Square Park and Brush Square to NOT reward CAP METRO for NOT complying with your Executive Order 36.

I respectfully request you IMMEDIATELY make CAP METRO comply with your Executive Order 36.

## Rationale

CAP METRO is blatantly, intentionally, and publicly NOT complying with your Executive Order 36, though it applies to CAP METRO.

Your Executive Order 36 says “No governmental entity...and no governmental official may require any person to wear a face covering or to mandate that another person wear a face covering” (point 1) and that “This executive order shall supersede any face-covering requirement imposed by any local governmental entity or official...”

However, CAP METRO’s website (<https://capmetro.org/COVID19>) says, “Per the latest order from the CDC, customers are required to wear face masks while on transit vehicles and when at our facilities, effective until September 2021. Face masks must cover your nose and mouth and attach around the ears. Bandanas and other single-ply fabric coverings do not meet this new requirement and will be prohibited”.

CAP METRO is saying the same to their bus drivers, supervisors, and police officers, who are ILLEGALLY following and enforcing the same FALSE information. CAP METRO has threatened to ILLEGALLY BAN me from using their local, intrastate, public transportation system for lawfully exercising my legal right to board and ride WITHOUT wearing a facial covering and/or showing your Executive Order 36 to the bus drivers. Many drivers are ILLEGALLY REFUSING me service for legally NOT wearing a facial covering. When I’ve tried showing them a paper copy of your Executive Order 36 or telling them about it, they tell me they’re NOT hearing it or looking at it. They say they only do what CAP METRO tells them to do, though your Executive Order 36 has “...the force and effect of law” under Section 418.012 of the Texas Government Code.

Your Executive Order 36 applies to CAP METRO because CAP METRO is a local governmental entity, based on the following three facts:

- 1) Texas Transportation Code 451.001 legally defines CAP METRO as a Metropolitan Rapid Transit Authority.
- 2) Texas Transportation Code 451.052 (c) says an authority is a governmental unit under Chapter 101, Civil Practice and Remedies Code.
- 3) With respect to CAP METRO, Civil Practice and Remedies Code 101.001 (3)(D) defines “governmental unit” to mean an “...institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.”

CAP METRO makes three main FALSE arguments to NOT comply with your Executive Order 36:

- 1) Because CAP METRO is “private,” EO-36 doesn’t apply

Per Texas Transportation Code 451.052 (a)(3), (b), CAP METRO is a public political entity exercising public and essential governmental functions for public purposes that are matters of public necessity. Texas Transportation Code 451.052(c) also defines CAP METRO as a governmental unit whose operations are NOT proprietary functions for any purpose. Therefore, because “proprietary duties” means “Those duties of a municipality which are not strictly governmental duties” (Black’s Law Dictionary), ALL CAP METRO operations are governmental, meaning NONE of them are private.

- 2) Because CAP METRO is “federal,” EO-36 doesn’t apply

Texas Transportation Codes 451.001 and 451.052 (c) legally define CAP METRO as a Texas (state) governmental unit. Texas Civil Practice and Remedies Code 101.001 (3)(D) says CAP METRO’s “status and authority...are derived from the Constitution of Texas or from laws passed by the legislature under the constitution.”

In addition, not only does CAP METRO’s own website claim “Capital Metro is Austin’s regional public transportation provider” (<https://capmetro.org/about>), but nearly 80% of CAP METRO’s income comes from the 0.25 part of the 8.25% Texas sales tax (<https://www.capmetro.org/financial-stats> ). Therefore, not only does CAP METRO do intrastate transportation ONLY (within Texas ONLY), but the lion’s share of its funding comes from Texas.

Though CAP METRO also receives federal funds as an FTA grantee, the Federal Transit Administration (FTA) says mask policies are “local decisions,” providing “...clarity to the public regarding existing requirements under the law or agency policies.”

[<https://www.transit.dot.gov/frequently-asked-questions-fta-grantees-regarding-coronavirus-disease-2019-covid-19#COVID-19CDC> - updated March 2021]. Therefore, FTA itself rightly recognizes Texas sovereignty over Texas intrastate travel law and policy for Texas Metropolitan Rapid Transit Authorities, including CAP METRO.

3) CAP METRO is following a CDC order taking precedence over EO-36

CAP METRO is referring to this CDC order, “REQUIREMENT FOR PERSONS TO WEAR MASKS WHILE ON CONVEYANCES AND AT TRANSPORTATION HUBS” (<https://www.govinfo.gov/content/pkg/FR-2021-02-03/pdf/2021-02340.pdf> ).

However, the beginning of that CDC order lists its application limitations [42 U.S.C. 264(a), 42 CFR 70.2, 71.31(b), 71.32(b)], restricting it to travelers entering the U.S. from outside the U.S. or travelers going from one state to another within the U.S. (interstate travel). Therefore, that CDC order does NOT apply to travelers moving around entirely within a state (intrastate travel), though intrastate travel is an unenumerated constitutional right growing out of substantive due process [Lutz v. City of York, 899 F.2d 255 (1990)].

Each of the four application limitations are listed below:

42 U.S.C. 264(a) says:

The Surgeon General, with the approval of the Secretary, is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.

42 CFR § 70.2 says:

Whenever the Director of the Centers for Disease Control and Prevention determines that the measures taken by health authorities of any State or possession (including political subdivisions thereof) are insufficient to prevent the spread of any of the communicable diseases from such State or possession to any other State or possession, he/she may take such measures to prevent such spread of the diseases as he/she deems reasonably necessary, including inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of animals or articles believed to be sources of infection.

Encompassing 42 CFR 71.31(b) and 42 CFR 71.32(b), 42 CFR 71.1(a) says:

The provisions of this part contain the regulations to prevent the introduction, transmission, and spread of communicable disease from foreign countries into the States or territories (also known as possessions) of the United States. Regulations pertaining to preventing the interstate spread of communicable diseases are contained in 21 CFR parts 1240 and 1250 and 42 CFR part 70.

42 CFR 71.31(b) says:

The Director may require detention of a carrier until the completion of the measures outlined in this part that are necessary to prevent the introduction or spread of a communicable disease. The Director may issue a controlled free pratique to the carrier stipulating what measures are to be met, but such

issuance does not prevent the periodic boarding of a [carrier](#) and the inspection of [persons](#) and records to verify that the conditions have been met for granting the pratique.

42 CFR 71.32(b) says:

Whenever the [Director](#) has reason to believe that any arriving [carrier](#) or article or thing on board the [carrier](#) is or may be infected or contaminated with a [communicable disease](#), he/she may require [detention](#), [disinfection](#), [disinfestation](#), fumigation, or other related measures respecting the [carrier](#) or article or thing as he/she considers necessary to prevent the introduction, transmission, or spread of communicable diseases.

Therefore, because CAP METRO is MISAPPLYING that CDC order, where it has NO legal authority to regulate intrastate public transportation within Texas, everything CAP METRO says after “CDC” in its “Per the latest order from the CDC...” blurb on its COVID-19 website (<https://capmetro.org/COVID19>) is FALSE. Yet, in writing and in practice, CAP METRO is ILLEGALLY enforcing their LIES by ILLEGALLY and wrongly requiring Passengers to wear a specific kind of facial covering (face mask that is NOT a bandanna), though Passengers legally and rightly do NOT have to wear any facial covering because of your Executive Order 36.

Though in writing and in person and on camera and in front of an APD officer (APD Case No. 21-1450404) I have repeatedly made CAP METRO aware of what they’re saying and doing wrong and how they are breaking the law, they continue doing so without fear, shame, penalty or repercussion.

Therefore, by blatantly, intentionally, and publicly NOT complying with your Executive Order 36, and ILLEGALLY punishing and threatening me for trying to lawfully exercise my legal rights to board and ride without a facial covering and/or speak to bus drivers about your Executive Order 36, CAP METRO is a PUBLIC SAFETY THREAT to all Texans, your executive power, and the rule of law. Left unaddressed, CAP METRO’s cancerous criminality will quickly spread, undermining your ability to govern and your legacy.

#### Requested actions

I respectfully request you IMMEDIATELY make CAP METRO comply with your Executive Order 36.

I respectfully urge you to NOT sign into law House Bill 3893 to NOT grant CAP METRO a 99-year lease to the underground rights of Republic Square Park and Brush Square to NOT reward CAP METRO for NOT complying with your Executive Order 36.

Respectfully,

Carlos León