



July 22, 2020

**Mission Statement**

*“Provide safe, clean, reliable, accessible and friendly public transportation services to our region.”*

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*Sent via email: [opinion.committee@oag.texas.gov](mailto:opinion.committee@oag.texas.gov)*

The Honorable Ken Paxton  
Attorney General of Texas  
Office of the Attorney General  
ATTN: Open Records Division

Re: Written Comments Supporting Authority of the Metropolitan Transit Authority of Harris County to Prohibit Service and Access to its Transit Authority System to a Person who Refuses to Comply with Facial Coverings (RQ-0360-KP)

Dear Attorney General Paxton:

Your office is currently considering a request for an opinion on whether the Metropolitan Transit Authority of Harris County, Texas (“METRO”) may prohibit service and access to its transit authority system to a person who refuses to comply with the METRO rule requiring all persons (who are medically capable of doing so) to wear face coverings on METRO vehicles, facilities or properties, without conflicting with or imposing restrictions inconsistent with Executive Order GA-18 or other executive orders issued in response to COVID-19.

Background

During the current outbreak of the respiratory virus COVID-19, METRO has continued to provide essential public transportation services to the Houston region. In response to the outbreak, the Centers for Disease Control and Prevention (“CDC”) has recommended wearing cloth face coverings in public settings especially in areas of significant community-based transmission.<sup>1</sup> Under Chapter 451.107(a) of the Transportation Code, the METRO Board by resolution may adopt rules for (1) the safe and efficient operation and maintenance of the transit authority system; (2) the use of the transit authority’s system and the authority’s services by the public and the payment of fares, tolls and other charges and (3) the regulation of privileges on property owned, leased or otherwise controlled by the authority. Pursuant to this authority and consistent with CDC guidance, METRO has instituted a rule prohibiting service and access to its transit authority system to persons who refuse to wear face coverings on METRO vehicles, facilities or properties.<sup>2</sup>

<sup>1</sup> <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>

<sup>2</sup> <https://www.ridemetro.org/Pages/Coronavirus.aspx>

At the time of the request, Governor Abbott had issued Executive Order GA-18, and successive Orders GA-21, GA-23, GA-26 and GA-28, each of which superseded the prior executive order. Section 15 of Executive Order GA-28 (“Order GA-28”) states: “Nothing in this executive order or the DSHS minimum standards precludes requiring a customer to follow additional hygiene measures when obtaining services. Individuals are encouraged to wear appropriate face coverings, but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering.”<sup>3</sup> The Governor’s order also superseded “any conflicting order issued by local officials in response to the COVID-19 disaster” that restricts essential services allowed by the executive order, and suspends “any other relevant statutes, to the extent necessary to ensure that local officials do not impose restrictions in response to the COVID-19 disaster that are inconsistent with” Order GA-28. The initial request to your office indicated that in light of the above language, there was some question as to whether METRO’s denial of services to those failing to comply would violate or be viewed as “inconsistent with” the Governor’s executive order.

### Subsequent Event

Subsequent to the date of the opinion request, the Governor issued Executive Order GA-29 (“Order GA-29”) on July 2, 2020, which requires every person in Texas now to wear a face covering over the nose and mouth when inside a commercial entity or other building or space open to the public, or when in an outdoor public space, wherever it is not feasible to maintain six feet of social distancing from another person not in the same household, subject to certain exemptions. Additionally, while METRO’s denial of service or access to its transit system is neither a civil nor a criminal penalty, Order GA-29 amended Order GA-28 to strike the clause “but no jurisdiction can impose a civil or criminal penalty for failure to wear a face covering.” Order GA-29 also expressly permits local law enforcement officials, like METRO’s police officers, to remove violators of the face covering requirement from a business and to impose a fine not to exceed \$250 for first-time violators following a verbal or written warning and subsequent fines not to exceed \$250 per violation.<sup>4</sup> Thus, we understand that the Attorney General’s office may decline to consider this request any further since subsequent events have made clear that METRO’s face covering rule is consistent with the Governor’s most recent executive orders.

### Enforcement of Executive Orders

We also note that METRO’s vehicles, facilities, and properties are impacted by Orders GA-28 and GA-29 and that METRO police officers may enforce provisions of the executive orders. Order GA-29 states: “Local law enforcement and other local officials, as appropriate, can and should enforce this executive order, Executive Order GA-28, and other effective executive orders, as well as local restrictions that are consistent with this executive order and other effective

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<sup>3</sup> <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-28.pdf>

<sup>4</sup> <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2020/GA-29.pdf>

executive orders.” Order GA-29 clearly states that a face covering must be worn inside a commercial entity or space open to the public, which applies to METRO’s facilities and buildings, and that violators may be removed from a business or property. Thus, the plain meaning of Order GA-29 indicates that face coverings are also required inside METRO vehicles made available for use by the public and that any violator may be removed for noncompliance because it is not feasible to maintain six feet of distancing on a public transit system. It is also important in reducing the risk of community-based transmission of COVID-19. Additionally, the Governor indicated in Order GA-29 that a face covering requirement is the “least restrictive means” to combat the public health threat and is “important not only to protect oneself, but also to avoid unknowingly harming fellow Texans, especially given that many people who go into public may have COVID-19 without knowing it because they have no symptoms.” Therefore, the prohibition of public transit services for those who fail to comply with the face covering requirement is consistent with the intent of Order GA-29 to reduce further spread of the coronavirus. Accordingly, as explained above, a plain reading of the requirements now imposed by Orders GA-28 and GA-29 supports that there is no longer a question of METRO’s rule conflicting with or imposing restrictions inconsistent with the Governor’s executive orders.

#### METRO’s Authority to Implement Rule

Furthermore, METRO’s face covering requirement and prohibition of service to those not in compliance are within its rulemaking authority. As discussed above, under the rulemaking authority given to it by Chapter 451.107(a) of the Texas Transportation Code, METRO has the authority to impose a face covering requirement. Accordingly, the METRO Board has adopted a health and safety rule requiring all METRO employees, contractors, riders and visitors to wear a facial covering to the extent medically practicable while on or using METRO’s services, system, and property. METRO has also implemented a Code of Conduct For Persons on METRO Vehicles, Facilities or Properties (the “Code of Conduct”), and as noted in the Code of Conduct, “in the interest of public safety as well as compliance with state law and city ordinances, persons may not engage in prohibited conduct on any METRO vehicles and its facilities.”<sup>5</sup> The Code of Conduct states that under the authority of Chapter 451.108 of the Transportation Code, a METRO peace officer may issue a verbal or written warning, an immediate suspension from service or a longer suspension from service that is appealable, to a person who commits a violation. Under this framework of regulations, METRO has the authority to enforce compliance with its own rules and to impose a penalty, including an immediate suspension from service, for such violations.

In a declared disaster, governors may issue executive orders, proclamations and regulations and amend and rescind them.<sup>6</sup> Governors’ executive orders have the full force and effect of the law.<sup>7</sup> Under Orders GA-28 and GA-29, a face

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<sup>5</sup> <https://www.rideMETRO.org/Pages/MPDCodeOfConduct.aspx>

<sup>6</sup> Texas Government Code, Section 418.012.

<sup>7</sup> *Id.*; see also, AG Opinion KP-0306.

covering is now required in METRO's buildings, facilities and vehicles, subject to certain exemptions. If those exemptions are not met, a METRO peace officer has the authority to remove an individual not complying with the executive orders. Thus, with the authority given to METRO under the Transportation Code, in enforcing Orders GA-28 and GA-29 and the guidelines set by its own Health & Safety Rule and Code of Conduct, METRO may prohibit service and access to its transit authority system and remove a person who refuses to comply with a rule requiring all persons (medically capable of doing so) to wear a face covering on METRO vehicles, facilities and properties.

### Conclusion

We understand that, in light of the new executive order issued after the date of the opinion request, your office may consider the matter now moot and refuse to consider this request any further. However, if your office still considers the request, we respectfully ask that you confirm METRO's authority to prohibit service and access to its transit authority system to a person who refuses to comply with its face covering requirement, given that METRO has the authority to impose such a rule and that the rule is in compliance, and not inconsistent, with Orders GA-28 and GA-29.

Thank you.

Sincerely,



Cydonii V. Fairfax  
Executive Vice President and General  
Counsel

enclosures

cc:

The Honorable Jim Murphy, Chair, House Committee on Pensions, Investments & Financial Services, Texas House of Representatives

Ms. Carrin F. Patman, Chair of the Board of Directors, Metropolitan Transit Authority of Harris County, TX

Mr. Thomas C. Lambert, President & Chief Executive Officer, Metropolitan Transit Authority of Harris County, TX

Mr. Thomas Jasien, Deputy Chief Executive Officer, Metropolitan Transit Authority of Harris County, TX

Ms. Susan M. Redford, Executive Director, Texas Association of Counties

Mr. Michael Pichinson, General Counsel, Texas Association of Counties

Mr. Bennett Sandlin, Executive Director, Texas Municipal League

Mr. Scott Houston, Deputy Executive Director, Policy & General Counsel, Texas Municipal League

Mr. Allen E. Hunter, Executive Director, Texas Transit Association

Mr. Jorge Cruz-Aedo, President, Texas Transit Association

Ms. Johanna Meade, General Counsel Division, Office of the Governor