



exempt from the Government Code’s mandatory rulemaking procedures despite there being no legal authority cited for Defendants’ proposition.

TLTA reserves the right to address the other arguments in Defendants’ Response at the temporary injunction hearing or other briefings to the Court.<sup>1</sup>

## II.

### ARGUMENT

#### A. Injunctive Relief is Available to TLTA.

Defendants ask this court to interpret Tex. Ins. Code §§ 36.204 and 37.053, which are silent as to the power of a Court to provide injunctive relief, to mean that injunctive relief is *never* available in a legal action challenging a commissioner’s order related to rates. Defendants’ proposed interpretation of statute is simply incorrect.

##### 1. **Tex. Ins. Code §§ 36.204 and 37.053 do not preclude injunctive relief.**

Tex. Ins. Code § 37.053 provides:

“EFFECTIVENESS OF RATE DURING APPEAL.

(a) An order of the commissioner that determines, approves, or sets a rate under this code and that is appealed remains in effect during the pendency of the appeal. An insurer shall use the rate provided in the order while the appeal is pending.

(b) The rate is lawful and valid during the appeal, and an insurer may not be required to make any refund from that rate after a decision on the appeal is rendered.

(c) If the order is vacated on appeal, the rate established by the commissioner before the vacated order was rendered remains in effect from the date of remand until the

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<sup>1</sup> Tellingly, Defendants’ Response failed to address some of the more egregious errors in the challenged rate order such as the unauthorized application of a “clear and convincing” evidentiary standard.

commissioner makes a further determination. The commissioner shall consider the court's order in setting a future rate.”

Texas Insurance Code § 37.053 does not strip a Travis-County district court of power to grant temporary injunctive relief against a Commissioner’s rate order. What it does is set the default rule: once the insurer or another party files a petition for judicial review, the challenged rate “remains in effect” and is “lawful and valid” unless and until a court affirmatively vacates or stays the order. The statute prevents an automatic stay of the order, but it does not affect a court’s power to vacate or enjoin enforcement.

The power to restrain or “stay” the actions of an administrative agency is “part of a court's traditional equipment for the administration of justice.” *See El Paso Elec. Co. v. Pub. Util. Comm'n of Tex.*, 727 S.W.2d 283, 285 (Tex. App.—Austin 1987, no writ). *In El Paso Elec. Co.*, the court noted that before the enactment of the Public Utilities Regulatory Act, Texas courts exercised their inherent equity powers, in proper cases, to restrain enforcement of confiscatory rate ordinances enacted by municipalities. *See id.* (citing *Glen Oaks Utilities, Inc. v. City of Houston*, 161 Tex. 417, 340 S.W.2d 783, 785 (1960)(holding “A court may exercise its equity powers to enjoin the enforcement of a rate-fixing ordinance which is attacked because the rates set are confiscatory, and may issue a temporary injunction pending final determination of the validity of the ordinance.”).

If the Legislature intended to deprive the Court of its fundamental jurisdiction to enjoin agency orders, then it would have done so explicitly. For example, Tex. Ins. Code Art. 5.40 governing certain hearings on protests by fire insurers (not applicable to title insurance) and others provides, "No injunction, interlocutory order or decree suspending or restraining, directly or

indirectly, the enforcement of any schedule, rate, order or regulation of said Board shall be granted."

Defendants wrongly suggest that TLTA's entitlement to an injunction is solely governed by common law. In fact, the availability of such injunctive relief is enshrined in statute, in Tex. Civ. Prac. & Rem. Code § 65.011:

"A writ of injunction may be granted if:

- (1) the applicant is entitled to the relief demanded and all or part of the relief requires the restraint of some act prejudicial to the applicant;
- (2) a party performs or is about to perform or is procuring or allowing the performance of an act relating to the subject of pending litigation, in violation of the rights of the applicant, and the act would tend to render the judgment in that litigation ineffectual;
- (3) the applicant is entitled to a writ of injunction under the principles of equity and the statutes of this state relating to injunctions;
- (4) a cloud would be placed on the title of real property being sold under an execution against a party having no interest in the real property subject to execution at the time of sale, irrespective of any remedy at law; or
- (5) irreparable injury to real or personal property is threatened, irrespective of any remedy at law."

The Code further provides that a district judge has jurisdiction to "hear and determine applications for writs of injunction." Tex. Civ. Prac. & Rem. Code § 65.021. Overriding such statutory rights and court jurisdiction would require a clear statement in the statute, neither of the statutes cited by Defendant makes such a statement. Neither makes any statement limiting injunctive relief available or a court's jurisdiction to fashion relief.

Defendants also cite to Tex. Ins. Code § 36.204, which provides:

“ACTION NOT VACATED.

- (a) The filing of a petition for judicial review of an action under this subchapter does not vacate the action.
- (b) After notice and hearing, the court may vacate the action if the court finds it would serve the interest of justice to do so.”

However, this statute does not support Defendants’ interpretation, it actually undermines it. Statutes must be read in a way to harmonize them, not create conflicts. *See In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 716 (Tex. 2015) (courts read statutory provisions in a way to harmonize them not create conflicts, and proper construction requires reading the statute as a whole rather than interpreting provisions in isolation). The two statutes harmonize if Tex. Ins. Code § 37.053 sets the default that the rate stays into effect during the appeal. Tex. Ins. Code § 36.204(b) makes it clear that while such an order is not disturbed by default, a district court may vacate “a decision, order, rate, [or] rule . . .” during such an appeal (after notice and hearing) “as justice requires.” Tex. Ins. Code § 36.204(b). Therefore, the statutory framework sets a default of a rate order being in effect, which the district court has jurisdiction to alter. Under Defendants’ interpretation the statutes conflict—it argues that Tex. Ins. Code § 37.053 means that a reviewing court lacks jurisdiction to disturb the effect of a rate order, but Tex. Ins. Code § 36.204 on the contrary specifically gives the reviewing court this power.

Thus, Defendants’ interpretation of statute fails because it would deprive the Court of injunctive relief power without express authority, and Defendants’ interpretation creates a conflict between the two statutes when the statutes can be harmonized.

**2. Tex. Ins. Code §§ 36.204 and 37.053 do not apply to the injunction TLTA seeks in connection with its declaratory judgment action.**

Even if one were to adopt Defendant's unprecedented interpretation of these statutes as being "anti-injunction statutes," Tex. Ins. Code §§ 36.204 and 37.053 only apply to TLTA's appeal of the Commissioner's order under Tex. Ins. Code § 36.202, not TLTA's declaratory judgment action under Tex. Gov't Code § 2001.038 challenging Defendants' invalid *ad hoc* rules. TLTA's declaratory judgment action gives it a right to injunctive relief independent of the appeal.

TLTA has brought two actions in this case: an appeal of the Commissioner's title rate order under Tex. Ins. Code § 36.202 and a declaratory judgment action under Tex. Gov't Code § 2001.038 challenging the Commissioner's title rate order and application of an improper burden and standard of proof on TLTA as invalid "*ad hoc*" rules.

By their own terms, Tex. Ins. Code § 36.204 and 37.053 only apply to appeals, not declaratory judgment actions. In construing a statute, courts must determine and give effect to the Legislature's intent and must first look at the statute's plain and common meaning. *See* Tex. Gov't Code § 311.011; *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000) (citing *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 960 (Tex. 1999); *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (Tex.1998)). It must be presumed that the Legislature intended the plain meaning of its words. *See Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000).

Tex. Ins. Code § 36.204 refers and applies to a "petition for judicial review" (i.e., an appeal). TLTA's appeal is a petition for judicial review brought under Tex. Ins. Code § 36.202. Tex. Ins. Code § 37.053 refers only to "appeals." There is no reference in Tex. Ins. Code §§ 36.204 or 37.053 to any legal action other than a petition for judicial review or appeal—there is no

reference to a declaratory judgment action or any other type of suit. Legal actions besides appeals are not within the scope of those statutes.

Declaratory judgment actions challenging a rule as invalid give rise to an independent basis for injunctive relief. A “rule” is a statement of general applicability that implements, interprets, or prescribes law or policy or that describes the procedure or practice requirement of a state agency. *See* Gov’t Code § 2001.003(6). Under the Government Code’s definition of a “rule,” an agency statement does not have to be formally designated a “rule” in order to meet the statutory definition and thus trigger the necessity for adoption by notice-and-comment rulemaking procedures under the Government Code. *See Abbott v. Doe*, 691 S.W.3d 55, 81–82 (Tex. App.—Austin 2024, pet. filed) (citing *Texas Comm’n on Env’t Quality v. Friends of Dry Comal Creek*, 669 S.W.3d 506, 520 (Tex. App.—Austin 2023, pet. denied)).

An agency rule is invalid if (1) the agency had no statutory authority to promulgate it; (2) it was not promulgated pursuant to proper procedure; or (3) it is unconstitutional. *See Abbott v. Doe*, 691 S.W.3d 55, 73 (Tex. App.—Austin 2024, pet. filed).

*Ad hoc* rulemaking occurs when an agency interprets a statute without adopting a formal rule setting out that interpretation following the procedure required in the Government Code Chapter 2001. *See e.g., Tex. State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520 (Tex. App.—Austin 2014, pet. granted), order withdrawn (Apr. 1, 2016); *Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606, 622 (Tex. App.—Austin 2014, pet. denied); *Tex. Alcoholic Beverage Comm’n v. Amusement & Music Operators of Tex., Inc.*, 997 S.W.2d 651, 660 (Tex. App.—Austin 1999, pet. dism’d w.o.j.).

Injunctive relief is available in a declaratory judgment action challenging a rule as invalid. *See Abbott v. Doe*, 691 S.W.3d 55, 91 (Tex. App.—Austin 2024, pet. filed); *Texas Health & Hum.*

*Servs. Comm'n v. Advocates for Patient Access, Inc.*, 399 S.W.3d 615, 618–620, 631 (Tex. App.—Austin 2013, no pet.); *Combs v. Entm't Publications, Inc.*, 292 S.W.3d 712, 724–25 (Tex. App.—Austin 2009, no pet.).

TLTA seeks to declare Defendants' *ad hoc* rule setting title rates and requiring an impermissible burden and standard of proof in title rule hearings and seeks to enjoin Defendants from enforcing such rules. TLTA's injunctive relief sought in connection with its declaratory judgment action is not within the scope of Tex. Ins. Code §§ 36.204 and 37.053. *See Combs v. Entm't Publications, Inc.*, 292 S.W.3d 712, 724–25 (Tex. App.—Austin 2009, no pet.). In *Combs v. Entertainment Publications, Inc.*, the plaintiff sought a declaration that the Comptroller of Public Accounts for the State of Texas promulgated an invalid rule through a series of letters that would require the plaintiff to collect and remit tax on the sales of products sold through school fundraising activities and also sought a temporary injunction prohibiting the Comptroller from implementing the invalid rule. *See id.* at 719. The Comptroller argued that injunctive relief was barred by the Tax Code because of the plaintiff's failure to comply with Tax Code requirements for pursuing an injunction. *See id.* at 724. In upholding the trial court's injunctive relief, the Austin Court distinguished an action for a injunction under the Tax Code and an injunction against the Comptroller from implementing and enforcing an invalid rule sought in connection with a declaratory judgment action. *See id.*

TLTA seeks injunctive relief in connection with its appeal under the Texas Insurance Code (Section 36.202) and, similarly to the plaintiff in *Combs*, also seeks injunctive relief in connection with its declaratory judgment action challenging Defendants' invalid *ad hoc* rules. Accordingly, the Court has authority to issue injunctive relief in this case.

## **B. APA Rulemaking Procedures Were Mandatory.**

As an explanation for why they did not follow the mandatory rulemaking notice and procedure requirements in the Administrative Procedures Act found at Chapter 2001, Subchapter B of the Texas Government Code, Defendants assert that they were following a “hybrid, Legislatively hand-crafted, specialized, and collaborative procedural path.” There is no exception in statute for Defendants’ noncompliant “hybrid” process, and Defendants cite to no authority for it.<sup>2</sup> To the contrary, the rulemaking procedures required under the Texas Government Code are mandatory, and failure to comply with them renders a rule invalid and unenforceable. *See* Tex. Gov’t Code § 2001.035; *Tex. State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520, 527 (Tex. App.—Austin 2014, pet. granted), order withdrawn (Apr. 1, 2016); *El Paso Hosp. Dist. v. Texas Health & Human Servs. Comm’n*, 247 S.W.3d 709, 714 (Tex.2008); *Combs v. Entm’t Publications, Inc.*, 292 S.W.3d 712, 723 (Tex. App.—Austin 2009, no pet.).

Defendants incorrectly assert that the timelines and procedures in Tex. Ins. Code Ch. 2703 governing title rates and the timelines and procedures in Subchapter B of Tex. Gov’t Code Ch. 2001 do not “match.”

Tex. Ins. Code Sec. 2703.202(c) expressly requires compliance with Tex. Gov’t Code Ch. 2001, Subch. B: “...a public hearing held under Subsection (a) or under Section 2703.206 *shall be conducted by the commissioner as a rulemaking hearing under Subchapter B, Chapter 2001, Government Code.*” (Emphasis added). Statutes must be read in a way to harmonize them, not create conflicts. *See In re Mem’l Hermann Hosp. Sys.*, 464 S.W.3d 686, 716 (Tex. 2015).

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<sup>2</sup> The Legislature knows how to except ratemaking from the requirements of the APA. For example, Tex. Ins. Code Art. 5.96 governing the process for promulgating rates for certain other lines of insurance besides title insurance expressly makes the process exempt from the APA under subsection k: “The Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon’s Texas Civil Statutes), does not apply to board action taken under this article.” There is no such exception in Tex. Ins. Code Ch. 2703 applicable to title rates.

Here, the timelines and procedures required by Tex. Ins. Code Ch. 2703 and Tex. Gov't Code Ch. 2001, Subch. B are mandatory, easily harmonized, do not conflict, and do not allow Defendants to use an alternative process that they created out of thin air.

The Government Code requirements to provide at least 30 days notice of a rule proposal, and “reasonable opportunity” for comment and rule hearing do not conflict and are easily harmonized with the Insurance Code’s requirement for at least 60 days notice of a rulemaking hearing for title rates, “reasonable notice,” and the requirement to render a decision within 120 days after the date a request for title rate changes through rulemaking. *Compare* Tex. Gov’t Code §§ 2001.023 and 2001.029 *with* Tex. Ins. Code §§ 2703.201, 2703.202(g), and 2703.207. The title ratemaking requirements in Tex. Ins. Code Ch. 2703 fit easily within the APA’s rulemaking procedure.

The Government Code requirements for the contents of notice are easily harmonized with the Texas Insurance Code as well. The Texas Insurance Code requires “reasonable notice” and notice published in the Texas Register. *See* Tex. Ins. Code §§ 2703.201, 2703.207. The Government Code requires specific contents for the notice which do not conflict with the Texas Insurance Code (e.g. the proposed rule, explanation for the proposed rule, other information related to the rule) and publication in the Texas Register. *See* Tex. Gov’t Code §§ 2001.023 and 2001.024.

The process for rendering a decision under the Texas Insurance Code does not conflict with the adoption of a rule under the Texas Government Code. The Texas Insurance Code requires the Commissioner to issue a final order and announce her decision in a public hearing. *See* Tex. Ins. Code § 2703.202(g) and (j). The Government Code requires an order adopting the rule with certain required information. *See* Tex. Gov’t Code 2001.033. There is no reason the Commissioner cannot

satisfy all of these requirements. Perceived inconvenience is not a recognized exception to mandatory statutory requirements.

Defendants have attempted to create a conflict between statutes where none exists because Defendants have no legal authority which allowed them to ignore the procedural rulemaking requirement in Subchapter B of the Texas Government Code.

**III.**  
**REQUEST FOR RELIEF**

Plaintiff requests the Court grant its request for temporary injunction further relief to which it may show it justly entitled.

Respectfully submitted,

By /s/ Ray Chester

Ray C. Chester  
State Bar No. 04189065  
Andrew M. Edge  
State Bar No. 24071446  
McGinnis Lochridge LLP  
1111 W. 6<sup>th</sup> Street, Bldg. B, Suite 400  
Austin, Texas 78703  
(512) 495-6000  
(512) 495-6093 (Fax)  
rchester@mcginnislaw.com  
aedge@mcginnislaw.com

***ATTORNEYS FOR PLAINTIFF***

**CERTIFICATE OF SERVICE**

I hereby certify that on the 23rd day of May, 2025, I electronically filed the above and foregoing document, which will send notification of such filing to:

James Z. Brazell  
Administrative Law Division  
Office of the Attorney General of Texas  
P. O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
[James.Brazell@oag.texas.gov](mailto:James.Brazell@oag.texas.gov)

/s/ Ray Chester

Ray Chester