

No. _____

In the Supreme Court of Texas

**In Re: ELIZABETH BIESEL,
LAURA BIESEL,
MEG BAKICH,
LISA BURROUGHS,
LYNN DAVENPORT,
Petitioners.**

**Original Proceeding
Art. V, Section 3 of the Texas Constitution**

Emergency Petition for Writ of Mandamus

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IDENTITY OF PARTIES AND COUNSEL

A. Relators

Elizabeth Biesel

[REDACTED]
[REDACTED]

Lynn Davenport

[REDACTED]
[REDACTED]

Lisa Burroughs

[REDACTED]
[REDACTED]

Laura Biesel

[REDACTED]
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Meg Bakich

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B. Respondents

County of Dallas, c/o Clay Jenkins, Dallas County Judge

411 Elm; Dallas, Texas 75202; Court: (214) 653-7949; Fax: (214) 653-6586

Laura C Grenado, Early Voting Manager

[REDACTED]

Toni Pippins Poole, Election Manager (also in individual capacity)

1520 Round Table Drive, Dallas, Texas 75247 (office)

Linda Collins (Republican AJ for UP United Methodist Church)

[REDACTED]

Joseph Sperandeo (Democrat Judge for UP United Methodist Church)

[REDACTED]

Michele Valentino (Democrat Judge for UP United Methodist Church)

[REDACTED]

Jim Mabile, UPMC Facilities Manager

[REDACTED]

Counsel for Respondents: All respondents are employees or agents of the County of Dallas. Relators have provided this petition to Dallas County Judge Clay Jenkins through Texas efile system to Clay.Jenkins@dallascounty.org and John Creuzot, Dallas County Dist. Attorney to john.creuzot@dallascounty.org.

C. Other Noticed Parties: Attorney General Ken Paxton

Office of the Attorney General; 300 W. 15th Street; Austin, Texas 78701

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STATEMENT OF THE CASE

The core issue in this case is whether a political subdivision in Texas can flout a duly-enacted Governor's Order.

Relators are three political activists who historically have worked as paid election clerks in Dallas County during early voting and on Election Day.

On July 2, 2020, Gov. Abbott issued executive order GA-29, which requires use of face coverings in Texas, subject to several exceptions. One exception prevents face-covering requirements at polling sites for election activities.

Irrespective of GA-29, the Dallas County Comm'rs Court ordered election personnel to wear face coverings. The Dallas County Elections Administrator instructed election judges to fire election clerks who refused to wear masks.

Attorney General Ken Paxton issued a letter to clarify that the plain reading of GA-29 does not allow election officials to require face masks for clerks.

By their illegal (*ultra vires*) actions, Dallas County and its election officials are infringing Relators' rights and interfering with Relators' contracts to work during early voting and planned work on Election Day, November 3, 2020.

Relators seek mandamus to instruct Dallas County to follow Gov. Abbott's executive order GA-29 regarding face coverings, allowing clerks to work without face coverings, re-employing clerks who were fired, and void face-covering terms in any Dallas County contracts with election poll host sites.

STATEMENT OF JURISDICTION

Texas Constitution

Section 3 of Article 5 of the Texas Constitution allows the Supreme Court to issue writs of mandamus as may be necessary to enforce its jurisdiction, and empowers the Legislature to confer original jurisdiction to issue writs of mandamus on defined conditions. TEX. CONST. art. V, §3.

Election Code

The Texas Legislature gave this Court jurisdiction to issue a writ of mandamus to compel the performance of any duty imposed by law in connection with the holding of an election or a political party convention, regardless of whether the person responsible for performing the duty is a public officer. TEX. ELEC. CODE § 273.061.

Appeal of Election Presiding Judge

The presiding judge of an election polling site has the power and authority of a district judge. TEX. ELEC. CODE § 32.075. Relators will assert herein that an appeal of a decision by a district judge regarding his duties is appealable based on the Supreme Court's appellate jurisdiction of judgments of trial courts and thus the respondent presiding judges, as the case presents a question of law that is important to the jurisprudence of the state. TEX. GOV'T CODE § 22.001.

Additional Jurisdictional Support

The Texas Legislature has given the Supreme Court jurisdiction to issue writs of mandamus generally against district judges and other officers of the state government. TEX. GOV'T CODE § 22.002(a); *Seagraves v. Green*, 116 Tex. 220, 237-38, 288 S.W. 417, 423-24 (Tex. 1926).

A writ of mandamus will issue when a judge clearly abuses her discretion and there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004). A judge abuses her discretion when she fails to analyze or apply the law correctly. *In re Poly-America, L.P.*, 262 S.W.3d 337, 346–47 (Tex. 2008).

Election Administrators are tasked with enforcing Texas law while assisting in the elections processes. The duties of the Election Administrator are established in section 31 of the Texas Election Code, which includes “the duties and functions relating to elections that are placed on the county clerk *by statutes outside this code.*” TEX. ELEC. CODE § 31.043(3) (emphasis added).

Thus, the Texas Supreme Court can act when County Judges and Election Administrators have abused their discretion by extending their power to violate the rights of the residents within their jurisdictions.

This Court has original jurisdiction under the Election Code and appellate jurisdiction under the Government Code to issue a writ of mandamus and require

the County of Dallas and named respondents, all of whom are attempting to demand Relators wear mask-wearing practices without authority *ultra vires*. TEX. ELECT. CODE § 273.061; TEX. GOV'T CODE § 22.002(a).

This petition was not first presented to the court of appeals due to the extremely time-sensitive nature of this matter. Early voting is occurring now, and Election Day is two weeks away. Serious harm is occurring and will continue to occur absent prompt relief, as Relators are election workers who ensure that elections are properly conducted, and they ought not be subjected to whimsical rules designed only to intimidate and give excuses for public criticism.

As discussed herein, Dallas County officials are imposing and enforcing orders without a lawful basis, doing so unlawfully and in a way that cannot be considered effective even to accomplish its stated goal of reducing the spread of a virus that this Court can now recognize is not going to decimate the population.

ISSUE PRESENTED

Under Texas law, is Court Order 2020-0924 issued by County Judge Clay Jenkins on September 1, 2020 requiring Election Day Judges and Alternate Judges, Clerks, Early Voting Presiding Election Officers and Alternate Presiding Election Officers, and poll-workers to wear masks enforceable in light of GA-29, issued by Governor Greg Abbott on July 2, 2020?

STATEMENT OF FACTS

A. General Background - COVID-19 appears and Governor Abbott reacts.

Governor Greg Abbott issued a disaster proclamation on March 13, 2020¹, certifying under TEX. GOV'T CODE § 418.014 that the novel coronavirus (COVID-19) posed an imminent threat of disaster to the State of Texas. Gov. Abbott has renewed the disaster declaration monthly. See Tab 2.

Though Governor Abbott has been slowly relaxing restrictions on commercial operations throughout the State of Texas, the prospect of lines of people standing close together while voting has presented health concerns.

To address these concerns, Gov. Abbott issued a proclamation on March 18 that allowed municipal elections usually occurring in May to be delayed until the November 3 uniform election date. See Tab 3 (recounting this history).

On July 27, Gov. Abbott proclaimed early voting for the November 3rd general election would start on October 13, a week earlier than section 85.001(a) of the Texas Election Code allows, to accommodate safe voting for all Texans. Gov. Abbott claimed the authority to make this change by the declaration of disaster. See Tab 3.

¹ All dates referenced in this Application are to 2020 unless otherwise stated.

On July 2nd, 2020 Governor Greg Abbott issued GA-29 “related to the use of face coverings during the COVID-19 disaster.” The order reads:

“Every person in Texas shall 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; provided, however, that this face-covering requirement does not apply to the following

...

8. any person who is voting, assisting a voter, serving as a poll watcher, or actively administering an election, but wearing a face covering is strongly encouraged;”

See Tab 2, Tex. Exec. Order No. GA-29 (July 2nd, 2020) (italics and underlining in original). A plain reading of the Governor’s GA-29 mask order clearly make an exception for poll workers and allows them to work without a face covering, even though wearing one is strongly encouraged.

B. Dallas County ignores Gov. Abbott’s GA-29 and requires masks.

Ignoring GA-29, Dallas County Judge Clay Jenkins and the Commissioners Court issued Court Order 2020-0924 (“Dallas Mask Order”). The Dallas Mask Order, an excerpt of which is faithfully copied below, requires election workers to wear masks:

3. The Dallas County Commissioners Court adds the following procedural requirement for all poll-workers:

“During all times while on duty in their capacity as Election Day Judges and Alternate Judges must wear personal protection mask. Any Clerk appointed by the Judge or placed by Dallas County must wear personal protection mask during work hours at their appointed polling location.”

“During all times while on duty in their capacity as Early Voting Presiding Election Officers and Alternate Presiding Election Officers must wear personal protection mask. Any Early Voting poll-worker appointed by the Presiding Election Officer or placed by Dallas County must wear personal protection mask during work hours at their appointed polling location.”

See Tab 1, Dallas County Comm’rs Court Order 2020-0924, September 1, 2020.

The Dallas Mask Order violates Governor Greg Abbott’s GA-29 face covering executive order by requiring election personnel to wear masks. Notably,

the Dallas Mask Order does not control poll watchers or those involved in electioneering at polling locations. Based on the testimony of Relators, county election administrators claim that they may require facemasks of their employee election clerks, irrespective of GA-29. (See Tab 6).

C. Dallas County Election Staff harassed and fired Relators.

Relators Beth Biesel, Meg Bakich, Elizabeth Biesel, Lisa Burroughs, and Laura Biesel were all told that they were required to wear masks as poll workers by Dallas County Employees on October 13th, 2020 at UP United Methodist Church.

Respondent Laura Granado, Dallas County's Early Voting Manager, told Relators that face masks were still mandatory even when Beth Biesel informed Granado and other personnel about the poll worker exemption in GA-29. Granado told Relators that the Governor's Order did not matter and they were to follow the County Order. Respondent Joseph Sperandeo, Election Judge, informed them that they were not permitted to work under the County's orders. See Tab 6-6.

On October 16th Beth Biesel, Elizabeth Biesel and Lisa Burroughs went to UP United Methodist Church to work, knowing that Texas Attorney General Paxton had published a letter on October 14th, 2020 reiterating that the Governor's GA-29 #8 exempted poll workers. *See* Tab 4. On their arrival, they discovered that the letter had had no effect on Dallas County Election officials.

Both Democratic Election Judge Joseph Sperandeo and Alternate Judge Linda Collins told Relators that they could not be in the polling place without a mask. Relators told the Judges about GA-29 and the Attorney General's letter but the election judges replied that the Dallas Mask Order was "the only thing that mattered."

Respondent Jim Mabile, PMC Facilities Manager, threatened to call 911 to have Relators arrested after they refused to wear a mask. Relators feared receiving a criminal trespass notice and arrest, so they left the polling site.

Relators relied on the promise of work and suffered losses of income by being deprived of the employment.

Elizabeth Biesel, Beth Biesel, and Lisa Burroughs went to Our Redeemer Lutheran Church ("ORLC") in Irving, Texas, to offer their services as election clerks. Lisa Burroughs was the only one officially scheduled for work. Election Judge Michelle Valentino yelled at Lisa that she would not be able to work without a mask. Judge Valentino refused to read GA-29 or the AG's letter. *See* Tab 6.

Meg Bakich and Lynn Davenport worked briefly on October 16th but were relieved of their duties for not wearing masks by Joseph Sperandeo. Bakich and Davenport showed Sperandeo a copy of GA-29 and explained that the County's orders do not supersede the Governor's, but Sperandeo responded that it did not matter.

On October 17th, Relators returned to the polling site for their scheduled times, but were verbally harassed by Linda Collins and Laura Granado. Collins brought Detective J. Cox to remove Relators. Relators left and were told by four other officers that they were not allowed back into the polling site and that they had to follow rules established by Dallas County and enforced by Respondent Toni Pippins Poole, the Dallas County Elections Administrator.

During these discussions, Respondents informed Relators that Governor Abbott's executive orders were suggestions only. They also asserted that Dallas County has contracts with its polling sites which include face-mask terms.

Respondents verbally and publicly abused Relators, deprived them of the opportunity to earn income even though they had formed a contract to appear and work. Respondents harassed and intimidated Relators, even though Respondents often removed or adjusted their own masks and demonstrated that the order was for little more than show. Relators' termination as long-time election clerks allowed a lopsided party presence at their polling places, thus jeopardizing the integrity of the election site. Respondent election judges enforced unlawful orders outside their authority against Relators at the instruction of Dallas County.

ARGUMENTS AND AUTHORITIES

Respondents have no legal authority to issue orders requiring election workers to wear masks – the Dallas Mask Order is without legal support and contrary to state law under the Disaster Act.

The state legislature grants Commissioners Courts limited authority to issue orders concerning specific subject matter, e.g., regulation of wild animals and outdoor burning, discussed in Chapter 240 of the Texas Government Code. However, Texas law does not provide a grant of power to create regulations beyond those enumerated.²

Section 418 of the Texas Government Code purports to authorize a governor to issue executive orders with the “force and effect of laws” and then also gives the same power to county judges and mayors, who operate as the governor’s network of local emergency leaders. TEX. GOV’T CODE §§ 418.012, 418.1015.

Judge Jenkins is operating on a declared emergency as part of Gov. Abbott’s team, but is ignoring Governor Abbott’s GA-29 Executive Order based on Jenkins’ own preferences. Jenkins and the Respondents named above claim that the Dallas Mask Order trumps Governor Abbott’s. Respondents claim that GA-29 is a mere suggestion, and that they can intimidate and berate Relators and then terminate their long history of working during Dallas elections based on their own rule.

² The Texas Association of Counties assists counties by periodically printing a Guide to Texas Laws for County Officials that explains the various powers that commissioners have and where those powers lie. The 2018 version is online (checked on April 28) and provided to the Court by Relators, who urge its acceptance as a learned treatise. <https://www.county.org/TAC/media/TACMedia/About%20Texas%20Counties/Guide-to-Laws-2018.pdf>

Respondents' new position is contrary to its previous ideas on these matters. Respondents did not take the position that Gov. Abbott's proclamation of early voting was mere suggestion; the County formed contracts and set up polling sites based on the instruction of the Governor.

Similarly, GA-29 is not mere suggestion. If Governor Abbott has the power to suspend and amend state law to allow for early voting, then he has the authority to dictate what Texas law is (and is not) with regard to face coverings.

If GA-29 had ambiguity in it to allow for local variance, Respondents would have an argument. In other executive orders, Gov. Abbott has allowed for variation in execution of these orders. For example, in Gov. Abbott's March 18th proclamation regarding the delay of municipal elections, municipalities were allowed to delay their elections to November, but cities were not required to do so. Tab 3. The conduct of the November 3 election is less flexible for a number of obvious reasons, the most obvious being the national scope of the election.

Additionally, Relators have a fundamental right to participate in state elections on an equal basis with other qualified voters, so strict scrutiny is appropriate for considerations concerning participation in election activities. *San Antonio Indep. Sch. Dist. v. Rodriguez* 411 U.S. 1, fn. 78 (1973); *see also Burson v. Freeman*, 504 U.S. 191 (1992) (balancing 100' boundary on electioneering).

Here, even if there existed no “law” in the form of GA-29, the Dallas Mask Order as written could not begin to survive strict scrutiny, as it does not require voters or poll watchers to wear masks. In fact, the only people required to wear masks are the election clerks. And as the declarations (Tab 6) indicate, the clerks’ mask usage is of dubious efficacy, as the clerks tend to touch and fiddle with their masks as they work. This obvious truth is one of the reasons why a recent CDC report evaluating various studies on mask use and the efficacy of masks in stopping the spread of flu, the researchers found “In pooled analysis, we found no significant reduction in influenza transmission with the use of face masks.” The authors explained:

Disposable medical masks (also known as surgical masks) are loose-fitting devices that were designed to be worn by medical personnel to protect accidental contamination of patient wounds, and to protect the wearer against splashes or sprays of bodily fluids. There is limited evidence for their effectiveness in preventing influenza virus transmission either when worn by the infected person for source control or when worn by uninfected persons to reduce exposure. Our systematic review found no significant effect of face masks on transmission of laboratory-confirmed influenza.³

This Court need not come to a scientific conclusion regarding the efficacy of facemasks to resolve this case. All it need do is recognize that Dallas County has acted and depended on the executive orders of Governor Abbott as though they are

³ See Tab 7, Xiao, J., Shiu, E., Gao, H., Wong, J. Y., Fong, M. W., Ryu, S....Cowling, B. J. (2020). Nonpharmaceutical Measures for Pandemic Influenza in Nonhealthcare Settings—Personal Protective and Environmental Measures. *Emerging Infectious Diseases*, 26(5), 967-975. <https://dx.doi.org/10.3201/eid2605.190994> (last checked October 19, 2020). The article is admissible as a government report.

law, and the County cannot now throw off that belief and disregard Governor Abbott's duly-enacted Order in order to empower the belittling of the minority political party in the county.

Relators have demonstrated that they have standing by the personal injuries that they have suffered. They have shown that this Court has jurisdiction in at least two different ways (Election Code and Government Code). They have also shown that immediate relief is necessary, as early voting is going on now, and the general election is two weeks away. There exists no time to start at the Fifth District Court of Appeals. This Court's attention is needed now.

PRAYER & CONCLUSION

Relators pray this Court GRANT their application for Writ of Mandamus and require Respondents to:

- 1) Cease all enforcement of any requirement for election personnel to wear a face covering, respecting the election exemption of GA-29 and making face coverings optional, just as they are for voters and poll watchers.
- 2) Re-employ Respondents to their positions as they have historically served.
- 3) Declare that all polling site contracts with Dallas County to be reformed so that no face covering terms are enforceable as contrary to state law.

Further, Relators pray for any other and further relief, general or special, in law or in equity, to which they may show themselves to be justly entitled.

Respectfully submitted,

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ATTORNEY FOR RELATORS

CERTIFICATIONS

CERTIFICATE OF SUPPORT

Pursuant to Tex. R. App. P. 52.3(j), I certify that I have reviewed this Response and concluded that every factual statement in the Response is supported by competent evidence included in the Mandamus Record submitted with the appendix concurrently filed.

/s/Warren V. Norred

Warren V. Norred

CERTIFICATE OF SERVICE

In accordance with Tex. R. App. Pro. 9.5(e), the undersigned hereby certifies that a true and correct copy of the foregoing Petition for Writ of Injunction has been sent by e-service, on this October 19, 2020 to Relators to Dallas County through John Creuzot, Dallas County District Atty via email to john.creuzot@dallascounty.org and also by fax to (214) 653-5774.

/s/Warren V. Norred

Warren V. Norred

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, pursuant to Tex. R. App. Pro. 9.4(i)(2)(D), the number of words in this document is no more than 3070, based upon the word counter of MS Word.

/s/Warren V. Norred

Warren V. Norred