

J.J. Koch,

*Plaintiff,*

v.

Clay Jenkins, in his Official Capacity

*Counter-Plaintiff and Defendant,*

v.

Greg Abbott, in his Official Capacity as

Governor of the State of Texas,

*Counter-Defendant.*

IN THE DISTRICT COURT OF

DALLAS COUNTY, TEXAS

116<sup>th</sup> JUDICIAL DISTRICT

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TEMPORARY RESTRAINING ORDER

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This Court, having heard the Application for Temporary Restraining Order filed by Counter-Plaintiff and Defendant Clay Jenkins in his official capacity as County Judge of Dallas (referred to as “Judge Jenkins”) and all evidence and arguments of counsel with notice properly provided to Plaintiff J.J. Koch and Counter-Defendant Greg Abbott in his official capacity as Governor of the State of Texas, finds that (1) Counter-Plaintiff and Defendant Clay Jenkins has shown a probable right to the relief sought in his First Supplemental Counterclaim, Request for Declaratory Judgment, and Request for Temporary Restraining Order and Temporary Injunction (“Application”); and (2) Judge Jenkins and the Citizens of Dallas will suffer immediate, imminent, and irreparable harm for which there is no adequate remedy at law if a temporary restraining order does not issue against Counter-Defendant Governor Abbott.

The Court is of the opinion that immediate and irreparable injury, loss, or damage will result to Judge Jenkins and the citizens of Dallas County if Judge Jenkins is not allowed to exercise his statutory authority under Texas Government Code §418.108(g) and the Dallas County Declaration of Local Disaster to mandate face coverings and other mitigation strategies within

Dallas County, including within the Commissioners Court and other public places. Judge Jenkins and the citizens of Dallas County have and will continue to be damaged and injured by Governor Abbott's conduct, including, but not limited to Governor Abbott's enforcement of his Executive Order GA-38. These findings are based on the following facts<sup>1</sup>:

1. Clay Jenkins is the duly elected Dallas County Judge. Judge Jenkins serves as the County chief-executive and presiding officer of its governing body. In his role, Judge Jenkins leads the County government in providing, among other services, safety protection for all citizens of Dallas County. As the chief presiding officer of Dallas County, Judge Jenkins is authorized to take certain actions as provided in the Texas Disaster Act for the safety and welfare of Dallas County citizens. Judge Jenkins has standing to bring this suit and to assert all claims.

2. The Texas Disaster Act clarifies the roles of various governmental authorities in responding to disasters. The COVID-19 epidemic falls within the purview of the Texas Disaster Act which sets forward the following among the purposes of the Act:

- (1) to reduce vulnerability of people and communities of this state to damage, injury, and loss of life...resulting from natural or man-made catastrophes;
- (2) to prepare prompt and efficient...care, and treatment of persons... victimized or threatened by disaster;
- (3) provide a setting conducive to the rapid and orderly restoration and rehabilitation of persons...affected by disasters;
- (4) to clarify and strengthen the roles of the governor...and local governments in prevention of, preparation for, response to and recovery from disasters;

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<sup>1</sup> The Court's findings of fact, in large part, are based on the Affidavit of Philip Huang, MD, MPH, the Director and Health Authority for the Dallas County Health and Human Services Department, together with the attachments thereto.

(5) authorize and provide for cooperation in disaster mitigation, preparedness, response, and recovery; and

(6) authorize and provide for coordination of activities relating to disaster mitigation, preparedness, response, and recovery by agencies and officers of this state, and similar state-local...activities in which the state and its political subdivisions may participate....<sup>2</sup>

3. County Judge Jenkins declared a local disaster on March 12, 2020. This declaration provided Judge Jenkins with legislative authority to perform certain acts under §418.108 of the Texas Government Code, including to control whether people are required to wear face coverings in public or in the Commissioners' Court.

4. On July 29, 2021, Greg Abbott issued "Executive Order No. GA-38 relating to the continued response to the COVID-19 disaster." ("GA-38"). In that Order, Governor Abbott relied, in part, on Sections 418.016 (a) and 418.018 (c) of the Texas Government Code as authority for the issuance of GA-38.

5. In GA-38, Governor Abbott ordered, among others, that "...no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering" and that "...any conflicting local order in response to the COVID-19 disaster, and all relevant laws are suspended to the extent necessary to preclude any such inconsistent local orders." Counter-Defendant Abbott's Executive Order No. 38 also provided: "...No governmental entity, including a county, city, school district, and public health authority, and no governmental official may require any person to wear a face covering or to mandate that another person wear a face covering..." Counter-Defendant Abbott further ordered that any face-covering requirements (absent limited exceptions)

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<sup>2</sup> See Tex.Gov't Code Ann. § 418.002.

imposed by any local governmental entity or official be superseded by his Order and that any laws that allow local government officials from enacting their own emergency declarations be suspended.

6. Dallas County is currently experiencing a surge in infections of 2019 novel coronavirus (COVID-19). As of August 6, 2021, Dallas County Health and Human Services is reporting a cumulative total of 276,813 confirmed cases of COVID-19 in Dallas County. The cumulative total probable case count in Dallas County is 46,060 cases. The total number of COVID-19 cases or probable cases is 322,873. Dallas County has experienced 4,224 deaths from COVID-19 as of August 6th.

7. Beginning in July of 2021, the number of positive PCR tests reported to Dallas County Health and Human Services began to rise dramatically. During the month of July 2021, positive PCR tests climbed from near 5% to almost 25%. Since the end of July and into August, the positive tests rate continues to climb.

8. The number of cases is growing quickly in Dallas County. From July 18, 2021, to July 31, 2021, Dallas County experienced approximately 360 cumulative COVID-19 cases per 100,000 individuals. The total new cases reported during that same period in Dallas County was 9,484. The provisional seven-day average of daily new confirmed and probable cases (by date of test collection) for CDC week 30 (week ending 7/31/2021), was 806, which is a rate of 30.6 daily new cases per 100,000 residents.

9. There continues to be risk to unvaccinated populations in Dallas County from the COVID-19 pandemic. For example, as of July 31, 2021, about 84% of COVID-19 cases diagnosed were Dallas County residents not fully vaccinated.

10. Dallas County medical infrastructure and hospitals are beginning to experience the strain of the surge of infections. As of August 8, 2021, Dallas County had 16 available staffed

adult ICU beds. As of August 9, 2021, Dallas County has approximately 682 confirmed COVID 14 inpatient hospitalizations with only 14 available staffed adult ICU beds.

11. According to UT Southwestern 's most recent COVID- 19 forecast and modeling as of August 9, 2021, the rate of COVID- 19 infections in Dallas County is reaching or has reached exponential growth rates. COVID-19 hospitalizations have increased in Dallas County by over 101% over the past two weeks and it is estimated that total COVID-19 hospitalizations are predicted to reach over 1,500 hospitalized cases by August 26.

12. Judge Jenkins regularly relies on information provided to him by various business leaders, community activists, healthcare providers and scientists including Philip Huang, MD, MPH, the Director and Health Authority for the Dallas County Health and Human Services Department. In making decisions to protect the safety and well-being of Dallas County Citizens, Judge Jenkins bases his decisions on sound medical evidence and is driven by the most up to date public and non-public data from, among others, the Dallas County Health and Human Services department, the University of Texas Southwestern Medical Center, and North Central Texas Trauma Regional Advisory Council.

13. As a result of the information shared with Judge Jenkins, on August 3, 2021, Judge Jenkins moved the county-wide risk level from color-coded Orange: Extreme Caution to the most serious color-coded risk level of Red: High Risk of Transmission. This move was made to assist in fighting the escalating trajectory or cases and the spread of the Delta-variant of COVID-19, which appears to account for approximately 78% of sequenced strains of COVID-19 in the last two weeks from the UT Southwestern Medical Center.

14. Judge Jenkins is deeply concerned about the health and safety and welfare of the citizens, including the unvaccinated and children, of Dallas County based on UT Southwestern 's

most recent COVID- 19 forecast and modeling and the reported exponential growth rates. According to information on which Judge Jenkins relies, COVID-19 hospitalizations have increased in Dallas County by over 101% over the past two weeks and it is estimated that total COVID-19 hospitalizations are predicted to reach over 1,500 hospitalized cases by August 26.

15. Governor Abbott also remains concerned about the impact of the current surge of COVID-19 infections as evidenced by his directive to state agencies to use staffing agencies to find additional medical staff from outside of Texas and his request to the Texas Hospital Association that hospitals postpone elective medical procedures. These actions are inconsistent with a refusal to permit local governmental authorities to implement reasonable mitigation measures such as face mask requirements and establish that GA-38 is not necessary action to combat the pandemic.

16. Dallas County has higher infection and transmission rates than other counties and a localized response in Dallas County must be different than in a county that is not experiencing the exponential growth of COVID-19 infections and transmission rates that Dallas County experiencing.

17. Judge Jenkins cannot be precluded from implementing the mitigation strategies he believes are sound, reliable, and backed by scientific evidence on which he relies and must be able to mitigate the damage, injury, and potential loss of life related to the COVID-19 virus. Judge Jenkins and the Citizens of Dallas County will be irreparably harmed if Judge Jenkins is barred from engaging in mandatory mitigation practices, including face covering and mask mandates. Face coverings and masks are an effective mitigation strategy and can further reduce the spread of COVID-19.

18. Under the Texas Disaster Act, County Judge Jenkins is vested with authority to issue orders to protect the safety and welfare of Dallas County Citizens, which includes among other mitigation strategies, the option to mandate face coverings and masks in public. Fighting the virus is a public health crisis that threatens the lives and safety of Dallas County citizens. Dallas County citizens will be irreparably harmed if Judge Jenkins cannot initiate appropriate mitigation strategies, including the initiation of face covering and mask mandates to stop the transmission of COVID-19. The harm of not being able to initiate such safeguards strongly outweighs the harm of complying with Governor Abbott's Executive Order GA-38.

It is, therefore, **ORDERED, ADJUDGED, and DECREED** that that the Clerk of this Court issue a Temporary Restraining Order, operative until August 24, 2021, and pending the hearing ordered below, restraining Counter-Defendant Greg Abbott in his official capacity as Governor of the State of Texas or any of his agents, servants, employees, attorneys, representatives, or any persons in active concert or participation with Counter-Defendant Abbott who receive actual notice of this Order from:

Enforcing of Governor Abbott's Executive Order No. GA-38, paragraphs (3)(b), (3)(g), and (4).

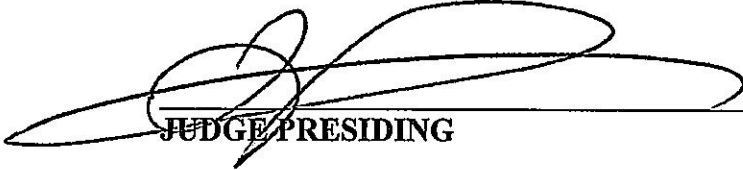
The Court hereby sets the hearing on Plaintiff's application for temporary injunction for the 24<sup>th</sup> day of August 2021 at 1:00 p.m. in this Court. The purpose of the hearing shall be to determine whether this Temporary Restraining Order should be made a temporary injunction pending a full trial on the merits; and

Bond is set at FIVE HUNDRED DOLLARS (\$500.00). This Temporary Restraining Order shall enter upon Counter-Plaintiff and Defendant Clay Jenkins posting said bond with the clerk of this Court and shall expire as set forth below.

This Order expires on the 24TH day of August 2021, unless otherwise agreed by the parties or ordered by the Court.

**IT IS SO ORDERED.**

**SIGNED** this the 10th day of August 2021 at 6:43 p.m.



**JUDGE PRESIDING**