

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

**MI FAMILIA VOTA, TEXAS STATE
CONFERENCE OF THE NATIONAL
ASSOCIATION FOR THE
ADVANCEMENT OF COLORED
PEOPLE, GUADALUPE TORRES,**

NO. SA-20-CV-00830-JKP

Plaintiffs,

v.

**GREG ABBOTT, GOVERNOR OF
TEXAS; AND RUTH HUGHS, TEXAS
SECRETARY OF STATE;**

Defendants.

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiffs Mi Familia Vota, Texas State Conference of the National Association for the Advancement of Colored People and Guadalupe Torres's Emergency Motion for Temporary Restraining Order and Preliminary Injunction and Defendants Governor Greg Abbott and Secretary of State Ruth Hughs' Response.¹ *ECF Nos.* 53, 55. At the status hearing held October 22, 2020, the parties agreed to address and present this motion as a Motion for Preliminary Injunction, only. Upon consideration of the Motion for Preliminary Injunction, briefs, evidence and arguments presented at a hearing held October 26, 2020, the Court concludes Plaintiffs' Motion for Preliminary Injunction shall be GRANTED in part and DENIED in part.

¹ In this Order, the Court will refer to the parties as follows:

- (1) Plaintiffs Mi Familia Vota, Texas State Conference of the National Association for the Advancement of Colored People and Guadalupe Torres: collectively, "Plaintiffs";
- (2) Plaintiffs individually: "Mi Familia Vota", "Texas NAACP", and "Ms. Torres"; and
- (3) Defendants Greg Abbott and Ruth Hughs: collectively, "the State";
- (4) Defendants individually: Greg Abbott, in his official capacity as Governor of the State of Texas: "Governor Abbott"; Ruth Hughs, in her official capacity as Texas Secretary of State: "Secretary Hughs".

The Court concludes Exemption 8 in Governor Abbott’s Executive Order GA-29, which exempts those who are “voting, assisting a voter, serving as a poll watcher, or actively administering an election” from compliance with the statewide mask mandate, violates Section 2 of the Voting Rights Act because it creates a discriminatory burden on Black and Latino voters. For this reason, exemption 8 is invalid and void. The remaining provisions of Executive Order GA-29, including the enforcement provisions and other exemptions, remain intact.² All other requested injunctive relief is denied.

PROCEDURAL BACKGROUND

Plaintiffs filed their Original Complaint on July 16, 2020. *ECF No. 1*. In this action, Plaintiffs generally contend Texas election procedures create unsafe conditions at polling sites which preclude certain protected classes of people from voting during the early voting period or in person on election day, November 3, 2020 (collectively “the 2020 election”). Plaintiffs bring this action to ensure “practical and constitutionally-required measures that both protect the public health and guarantee the right to vote” to all Texas citizens, specifically Black and Latino citizens.

On September 7, 2020, this Court granted the State’s Motion to Dismiss Plaintiffs’ Complaint based upon a finding the Court lacked subject matter jurisdiction. *ECF No. 44*. This Court concluded Plaintiffs did not challenge the constitutionality of any specific Election Code provision, but instead, generally challenged the prudence of “Texas’s election laws” and

²Within its Article III powers, this Court has jurisdiction and power to pass upon the constitutionality of an act of Congress or Executive body; however, it may not “order relief that would require the Governor of a State to essentially enact legislation.” *Mi Familia Vota v. Abbott*, 20-50793, 2020 WL 6058290, at *6 (5th Cir. Oct. 14, 2020). Consequently, this Court is not presented with and does not address the issue regarding the constitutionality of the issuance of the Executive Order. *See Tex. League of United Latin Am. Citizens v. Hughes*, 20-50867, 2020 WL 6023310, at *13 (5th Cir. Oct. 12, 2020)(Judge Ho concurrence stating, “under our Constitution, it is for the Texas Legislature through the legislative process—and not for the Governor or the judiciary by executive or judicial fiat—to determine how best to maximize voter access as well as ballot security.”) For this reason, the Court makes clear it is not directing Governor Abbott to act nor endorsing the constitutionality of the Executive Order, but is merely acting within this Court’s Article III power to “pass on the constitutionality” of Exemption 8 contained within the Executive Order. *See Mi Familia Vota v. Abbott*, 20-50793, 2020 WL 6058290, at *6;

“Texas’s election policies” for combating the COVID-19 virus within the 2020 election. *Id.* This Court concluded it lacked Article III power to grant the injunctive relief Plaintiffs requested based upon the general challenge, finding the requested relief concerned the administration of elections and implementation of election procedures which are constitutionally committed to the state legislative branch and its designated governmental bodies. *Id.* Therefore, any judicial directive would require an initial policy determination outside of prescribed separation of power and allowed judicial discretion. *Id.* In addition, the requested judicial directive would require an undertaking that would inherently demonstrate a lack of respect due the legislative branch and its designated governmental actors. *Id.* Based upon these findings, this Court concluded the case, as plead and argued, presented a nonjusticiable political question – specifically, the relief sought to remedy the alleged injuries was beyond the Court’s Article III power to grant. *See* ECF No. 44; *Mi Familia Vota v. Abbott*, SA-20-CV-00830-JKP, 2020 WL 5366291, at *4-8 (W.D. Tex. Sept. 7, 2020), *aff’d in part*, *rev’d in part* and *remanded*, 20-50793, 2020 WL 6058290 (5th Cir. Oct. 14, 2020).

On October 14, 2020, the Fifth Circuit Court of Appeals affirmed this Court’s judgment in part and reversed and remanded this matter on a limited issue not previously presented to this Court, stating:

Were the district court to conclude that the exemption from wearing a mask in public places contained in Executive Order GA-29 for pollworkers, voters, and others in polling places violated Section 2 of the Voting Rights Act, the district court might excise that provision if it concluded that this would redress the injuries the Plaintiffs have alleged. It is at least conceivable that such a remedy would not materially or substantially affect the ongoing election, but that would be a matter for the district court to determine.

Mi Familia Vota v. Abbott, No. 20-50793, 2020 WL 6058290, at *5 (5th Cir. Oct. 14, 2020).

In this instruction, the Fifth Circuit handed down three issues to be determined on remand: whether the mask-mandate Exemption 8 violates Section 2 of the Voting Rights Act as applied; whether this Court can resolve the injuries the Plaintiffs allege by “excising”

(invalidating) the mask-mandate Exemption 8 from the Executive Order, and; whether excising the mask-mandate Exemption 8 would “materially or substantially affect the ongoing election.”
Id.

FACTUAL BACKGROUND

Upon the filing of Plaintiffs’ Amended Complaint, this matter is now before this Court for determination of these three issues with Plaintiffs’ Motion for Preliminary Injunction.

Texas government officials have taken steps to mitigate public health risks associated with the COVID-19 pandemic. *See Mi Familia Vota v. Abbott*, 2020 WL 6058290, at *1. Among these steps, are advisories from Secretary Hughes and Executive Orders issued by Governor Abbott. The Executive Order that is the subject of this action, GA-29, issued on July 2, 2020 (“the Executive Order”). In the Executive Order Governor Abbott expressed his views regarding ways in which Texas citizens can safely resume activities following the mandated extended quarantine and maintain public health by mitigating the risk of COVID-19 spread.³ Governor Abbott stated,

- “as Texas reopens in the midst of COVID-19, increased spread is to be expected, and the key to controlling the spread and keeping Texans safe is for all people to consistently follow good hygiene and social-distancing practices,”
- “due to recent substantial increases in COVID-19 positive cases, and increases in the COVID-19 positivity rate and hospitalizations resulting from COVID-19, further measures are needed to achieve the least restrictive means for reducing the growing spread of COVID-19, and to avoid a need for more extreme measures,”
- “I have joined the medical experts in consistently encouraging people to use face coverings, and health authorities have repeatedly emphasized that wearing face coverings is one of the most important and effective tools for reducing the spread of COVID-19;”
- “given the current status of COVID-19 in Texas, requiring the use of face coverings is a targeted response that can combat the threat to public

³ Executive Order GA-29 (July 2, 2020): <https://open.texas.gov/uploads/files/organization/opentexas/EO-GA-29-use-of-face-coverings-during-COVID-19-IMAGE-07-02-2020.pdf>.

health using the least restrictive means, and if people follow this requirement, more extreme measures may be avoided,” and

- “wearing a face covering 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.”

Executive Order GA-29; *see Mi Familia Vota v. Abbott*, 2020 WL 6058290, at *1–2.

Based upon these assessments, Governor Abbott required

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.

Executive Order GA-29; *see Mi Familia Vota v. Abbott*, 2020 WL 6058290, at *1–2. The Executive Order then enumerated eleven exemptions from the mask mandate, which include children younger than ten, those with medical conditions or disabilities, while seated at a restaurant to eat or drink, while engaging in exercise outdoors, and while engaging in religious worship. The exemptions also provided the option for counties to opt-out of the mask mandate if a county judge certified it met requisite criteria to do so.⁴ The mask-mandate exemption that is the subject of this action is Exemption 8:

⁴ The exemptions from the mandatory mask mandate are:

1. any person younger than 10 years of age;
2. any person with a medical condition or disability that prevents wearing a face covering;
3. any person while the person is consuming food or drink, or is seated at a restaurant to eat or drink;
4. any person while the person is (a) exercising outdoors or engaging in physical activity outdoors, and (b) maintaining a safe distance from other people not in the same household;
5. any person while the person is driving alone or with passengers who are part of the same household as the driver;
6. any person obtaining a service that requires temporary removal of the face covering for security surveillance, screening, or a need for specific access to the face, such as while visiting a bank or while obtaining a personal care service involving the face, but only to the extent necessary for the temporary removal;
7. any person while the person is in a swimming pool, lake, or similar body of water;
- ...
9. any person who is actively providing or obtaining access to religious worship, but wearing a face covering is strongly encouraged;
10. any person while the person is giving a speech for a broadcast or to an audience; or
11. any person in a county (a) that meets the requisite criteria promulgated by the Texas Division of Emergency Management (TDEM) regarding minimal cases of COVID-19, and (b) whose county judge has affirmatively opted-out of this face-covering requirement by filing with TDEM the required face-covering attestation form—



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