

Plaintiff Longoria first filed this claim against Attorney General Ken Paxton on September 3, 2021, in the related case of *La Unión del Pueblo Entero v. Abbott*, No. 5:21-cv-844 (W.D. Tex.) (“*LUPE*”) No. 5:21-cv-844 (W.D. Tex.), Dkt. No. 1¹ (challenging Tex. Elec. Code § 276.016(a)(1) (the “anti-solicitation provision”)). This was Longoria’s sole allegation as a Plaintiff in that action.

In a status conference in the *LUPE* case held before the Court on November 16, 2021, the Court encouraged the parties to quickly identify and litigate “any dispositive motions . . . that could be filed without the benefit of discovery.” Tr. from Nov. 16, 2021, Status Conference, Dkt. No. 9-1, at 35. Consistent with that directive, Longoria voluntarily dismissed her claim in *LUPE* for the purpose of re-filing it as a separate but related case.²

Longoria and Morgan filed the Complaint in this action on December 10, 2021, naming the Attorney General as the sole Defendant, Dkt. No. 1, with the intention of filing a motion for a preliminary injunction shortly thereafter. These plans were interrupted on December 15, 2021, when the Texas Court of Criminal Appeals ruled in *State v. Stephens*, 2021 WL 5917198 (Tex. Crim. App. Dec. 15, 2021), that the Attorney General did not have the authority to unilaterally prosecute alleged violations of the Texas Election Code.

After delays resulting from the holidays, Plaintiffs filed their First Amended Complaint (“FAC”) on December 27, 2021, which additionally named as Defendants the District Attorneys

¹ The operative Complaint in the *LUPE* case is currently the First Amended Complaint, Dkt. No. 140, although Plaintiffs have filed for leave to file a Second Amended Complaint, Dkt. No. 204.

² As discussed in Plaintiffs’ Response in Opposition to Attorney General Paxton’s Motion to Stay, Dkt. No. 17, Longoria also chose to pursue a separate lawsuit to resolve complexities that arose from *LUPE* being one of six consolidated cases challenging SB1. Longoria was and remains a Defendant in several of those consolidated cases but, because of her voluntary dismissal from *LUPE*, is no longer a Plaintiff in any.

of Harris, Travis, and Williamson Counties (“DA Defendants”).³ Dkt. No. 5. Due to delays related to the Court’s move, the FAC was not docketed until the following day. Plaintiffs filed the Motion for a Preliminary Injunction (“PI Motion”) on December 28, 2021, as soon as the FAC was docketed. That same day, Plaintiffs’ counsel sent copies of the FAC and PI Motion to counsel for each Defendant and offered to coordinate on a briefing schedule. Group Exhibit A (Emails from Plaintiffs to Defendants). Beyond declarations from the two Plaintiffs, Plaintiffs put forth no factual evidence to support the PI Motion and assert that the motion turns only on legal disputes that can be resolved without discovery.

Formal service of the FAC and PI Motion on all Defendants was delayed until January 3, 2022, because some Defendants’ offices were closed for the holidays. Nonetheless, Defendants were aware of these claims for longer—and in the case of the Attorney General, for far longer.

The Attorney General moved on January 4, 2022, to stay consideration of the PI Motion and consolidate this case with *LUPE*. Dkt. No. 9. The Court denied this motion during a January 11, 2022, status conference and instructed the parties to confer on a briefing schedule. If the parties were unable to agree, the Court asked them to submit competing proposals. During this conference, the Attorney General’s counsel revealed for the first time that the Attorney General would like to take discovery—written and oral—before responding to the PI Motion.

³ Section 5(a) of the Administrative Policies and Procedures for Electronic Filing in Civil and Criminal Cases in the United States Court for the Western District of Texas requires amended complaints that add new parties to be filed by traditional, non-electronic means. Sec. 5(a). Thus, Plaintiffs could not file the FAC before the holidays and had to wait until the Court re-opened for regular business.

The Parties' Attempts to Agree to a Schedule

The parties met and conferred via telephone on January 12 and January 19, 2022.⁴ They have been unable to agree on a briefing schedule.

As noted above, Plaintiffs seek relief in time for the February 18, 2022, deadline for applying to vote by mail for the March 1 primary elections and seek a schedule that will allow for a resolution consistent with that request. The Attorney General's Office has indicated that it will not agree to a schedule that allows for relief in that time frame. In fact, counsel for the Attorney General indicated that the Attorney General would seek a deadline for responding to the PI Motion of March 3, 2022. Despite acknowledging that 7-hour depositions were likely unnecessary, the Attorney General would also not agree to a time limit less than the limit set by Fed. R. Civ. P. 30(d)(1) on any depositions conducted for purposes of the PI Motion. The other Defendants were not prepared to take a position on these questions.

On January 21, 2022, Plaintiff Morgan produced a small set of documents in line with what the Attorney General's counsel said he was likely to request. Plaintiff Longoria is collecting documents and a similar production is forthcoming.

Proposed Schedule

Plaintiffs continue to believe that discovery is unnecessary to resolve the PI motion. The very few relevant facts in the case—whether Plaintiffs intend to engage in speech covered by the anti-solicitation provision and whether the anti-solicitation provision chills that speech—cannot be seriously disputed as factual matters. The disputed issues in this case are questions of law.

“A preliminary injunction is customarily granted on the basis of procedures that are less formal and on evidence that is less complete than a trial on the merits.” *Fed. Sav. & Loan Ins.*

⁴ The Williamson County DA did not attend the January 12, 2022, meet and confer.

Corp. v. Dixon, 835 F.2d 554, 558 (5th Cir. 1987). “Affidavits and other hearsay materials are often received in preliminary injunction proceedings . . . [where] this type of evidence [is] appropriate given the character and objectives of the injunctive proceeding.” *Id.* A “hearing is not required before an injunction, particularly where factual disputes are lacking.” *Id.* at 558-59 (“[G]ranted a preliminary injunction without an evidentiary hearing was within the district court’s discretion.”). *See also ADT, LLC v. Capital Connect, Inc.*, 145 F. Supp. 3d 671, 683 (N.D. Tex. 2015) (finding that a district court may rely on affidavits, hearsay, and other inadmissible evidence and rule without a hearing where there is no material factual dispute). Accordingly, Plaintiffs request that the Court enter a briefing schedule that resolves the PI Motion on the papers with no discovery.

Plaintiffs are nonetheless willing to respond to limited written discovery beyond the documents they have already produced, provided it allows for resolution of the PI Motion by February 14, 2022. Plaintiffs will agree to respond within a week to any reasonable written discovery requests. To the extent Defendants believe oral testimony is required, Plaintiffs propose that the Court hold an evidentiary hearing rather than allow for depositions. Plaintiffs will testify and be subject to cross-examination by Defendants at any such hearing.

Plaintiffs note that under the local rules, Defendants’ responses to the PI Motion would have been due January 18, 2022, and their answers are due today, January 24, 2022. Plaintiffs are willing to agree to an extended response deadline, provided it allows the Court sufficient time to make a ruling by February 14, 2022. Even if the Court is unable to provide Plaintiffs relief by February 14, 2022, they will continue to suffer irreparable harm with each day that passes. They cannot agree to a schedule that extends that harm for months, such as the one proposed by the

Attorney General. Plaintiffs propose that Defendants be given 28 days from service of the FAC and the PI Motion to respond, and that the Court set the following schedule:

January 31, 2022: Defendants' Answer and Opposition to PI Motion due.

February 4, 2022: Plaintiffs' Reply to Defendants' Opposition to PI Motion due.

February 7-14, 2022: Evidentiary hearing, should the Court deem it necessary.

The Travis County DA has agreed to Plaintiffs' proposed schedule. The other Defendants have not informed Plaintiffs of their position.

Dated: January 24, 2022

Respectfully submitted,

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* Application for *pro hac vice* forthcoming
^ Application for admission pending
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CERTIFICATE OF SERVICE

The undersigned certifies that on January 24, 2022, the foregoing document was filed electronically with the United States District Court for the Western District of Texas via CM/ECF. As such, this Status Report Concerning Plaintiffs' Motion for a Preliminary Injunction was served on all counsel who have consented to electronic service.

/s/ Sean Morales-Doyle
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