

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ISABEL LONGORIA and CATHY MORGAN,

Plaintiffs,

v.

WARREN K. PAXTON, in his official capacity
as the Attorney General of Texas, *et al.*,

Defendants.

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Case No. 5:21-cv-1223-XR

ATTORNEY GENERAL PAXTON’S STATUS REPORT

Pursuant to the Court’s January 11, 2022, text order, the Attorney General submits this “status report[] with proposed deadlines to fully brief Plaintiffs’ pending motion for a preliminary injunction.” Longoria took four months to prepare her motion for preliminary injunction. The Attorney General should have at least two months to prepare a response.

BACKGROUND

Longoria first raised her First Amendment challenge to Section 276.016(a)(1) on September 3, 2021, in a related case. *See* Complaint, *La Unión Del Pueblo Entero v. Abbott*, No. 5:21-cv-844-XR, ECF 1 ¶¶ 185–87, 223–29 (W.D. Tex. Sept. 3, 2021) (“LUPE”). Longoria and her counsel originally agreed not to seek preliminary-injunctive relief before the March primary election in exchange for negotiating an accelerated trial schedule. *See* ECF 9-1 at 32–33 (“On behalf of LUPE plaintiffs, it is correct that we are not planning to pursue preliminary injunctive relief prior to the March primary.”). Longoria later voluntarily dismissed her claims, ostensibly to resolve issues of joint-litigation privilege caused by Longoria being a plaintiff as well as a defendant in cases that had been consolidated. *See* Notice of Voluntary Dismissal, *LUPE*, ECF 138.

Longoria did not serve the Attorney General with her new lawsuit until January 3, 2022. *See*

ECF 15. Despite her representation in the LUPE litigation, Longoria—still represented by the same counsel—also served a motion for preliminary injunction. *See* ECF 7. Now, Longoria insists that she needs relief “by no later than February 14, 2022.” *Id.* at 2.

ARGUMENT

This case presents important questions of both state and federal law. It requires the interpretation of a new and high-profile state statute as well as the application of the government-speech doctrine. Moreover, the Attorney General will have to marshal significant resources to develop evidence regarding how the challenged provision advances compelling state interests. The Court should give the parties time to ensure that the issues are properly and fully presented. Rushing through the litigation will prejudice the Attorney General’s ability to defend this suit. That prejudice is especially stark in light of Plaintiffs’ failure to identify any reason a ruling is required so quickly.

As an initial matter, responding to Plaintiffs’ motion for preliminary injunction requires significant legal argument and factual development. Plaintiffs attack a new statute that state courts have not yet interpreted or applied. Resolving Plaintiffs’ motion involves analyzing serious questions of sovereign immunity, federal jurisdiction, abstention, statutory interpretation, the government-speech doctrine, and First Amendment scrutiny.

The Attorney General has already devoted significant resources to this case. His motion to dismiss—filed yesterday, without an extension of time—addresses some of the issues listed above. It raises threshold legal defenses, including immunity from suit. *See* ECF 24. Those issues should be resolved before the Court considers a preliminary-injunction motion. *See Freeman v. United States*, 556 F.3d 326, 342 (5th Cir. 2009) (“[I]mmunity is intended to shield the defendant from the burdens of defending the suit.”); *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (“Federal courts must determine that they have jurisdiction before proceeding to the merits.”).

Other issues relevant to Plaintiffs’ motion, however, will require more time to develop legally

and factually. To fully respond to Plaintiffs' arguments about strict scrutiny, for example, the Attorney General will have to develop evidence regarding the state interests that justify Section 276.016(a)(1) and how the statute advances those interests. *Cf.* ECF 7 at 10 (Plaintiffs' invoking strict scrutiny). Going through the legislative history alone will be a significant task.

Further, the Attorney General also needs to conduct discovery of Plaintiffs. At the moment, case-dispositive facts remain unclear, including whether Plaintiffs' proposed conduct even falls within the ambit of Section 276.016(a)(1). Resolving exactly what Plaintiffs' want to do and say through discovery will affect whether, and to what extent, federal adjudication is necessary or appropriate. Similarly, depositions of Plaintiffs will be crucial for determining whether they truly face irreparable injury redressable by their proposed preliminary injunction and why they delayed seeking preliminary-injunctive relief until January.

Plaintiffs' proposed schedule does not allow the Attorney General to prepare his defense. They propose that the Attorney General file his response to the motion for preliminary injunction by January 31, 2022. That is only four business days from now, and defense counsel will be spending each of those days in El Paso for a preliminary-injunction hearing in the consolidated redistricting case. *See* Order, *LULAC v. Abbott*, No. 3:21-cv-259-DCG-JES-JVB, ECF 126 (W.D. Tex. Jan. 6, 2022).

Defense counsel's schedule is especially full because they relied on Longoria's (and the other SB1 plaintiffs') representation that they would not be seeking preliminary-injunctive relief before the March primary election. In the *LUPE* litigation, defendants are operating under "a compressed final trial schedule," which was "predicated upon" plaintiffs' representation that they would not seek preliminary injunctive relief. ECF 9-1 at 32. As a result, defense counsel has had to spend significant time on motions to dismiss and discovery in the *LUPE* litigation. As the Court is well aware, defense counsel faces numerous upcoming filing deadlines in the *LUPE* litigation, as reflected by the timeline

below.¹

Event	Deadline
Reply in Support of Motion to Dismiss the First Amended Complaint of LULAC Texas, et al.	1/26/22 ²
Response to the United States' Opposed Motion to Compel Production	1/31/22 ³
Deadline to file a motion (1) to designate responsible third parties, pursuant to Texas Civil Practices & Remedies Code § 33.004(a); (2) seeking leave to amend pleadings; or (3) to join parties.	1/31/22
Reply in Support of Motion to Dismiss the Federal Government's Claims	2/1/22
Response to Houston Justice and Mi Familia Vota Plaintiffs' Second Amended Complaint	2/1/22 ⁴
Response to OCA-Greater Houston Plaintiffs' Second Amended Complaint	2/1/22 ⁴
Response to LULAC Plaintiffs' Second Amended Complaint	2/2/22 ⁴
Response to Motion for Leave to File Brief of Proposed <i>Amicus Curiae</i> The Young Black Lawyers' Organizing Coalition	2/4/22
Response to LUPE Plaintiffs Second Amended Complaint	2/8/22 ⁴

Moreover, Plaintiffs do not truly need relief by February 14, as Longoria's litigation conduct demonstrates. From September 2021 to January 2022, Longoria saw no need to rush litigation of her claim. To justify her request for expedited consideration, Longoria points to a deadline on voters, not elected officials like her. But she has known since the beginning that voters must request applications to vote by mail by February 18, 2022. *See* Texas Secretary of State, *Important Election Dates 2021-2022*, <https://www.sos.state.tx.us/elections/voter/important-election-dates.shtml#2022> ("Last Day to

¹ This table includes filing deadlines through the end of February; it does not include the State Defendants' additional discovery deadlines.

² The State Defendants filed an unopposed motion seeking to extend this reply deadline to February 4, 2022. ECF 206.

³ The State Defendants intend to request an extension of their deadline to respond to this motion.

⁴ The State Defendants intend to request an extension of their deadlines to respond to the private plaintiffs' second amended complaints.

Apply for Ballot by Mail (**Received, not Postmarked**)”).

While Morgan was not part of the *LUPE* litigation, her claim to preliminary injunctive relief fares no better. Morgan also chose not to serve the Attorney General with a complaint until January 3, 2022. *See* ECF 15. Despite this four-month gap between the passage of SB1 and service of this suit, Morgan has provided no explanation for the delay. If she had truly been worried about securing relief by February 14, she could have filed suit in September (as dozens of other plaintiffs did in the *LUPE* litigation) instead of waiting until January.

In any event, the February 18 application deadlines for voters do not affect Plaintiffs’ ability to speak. Longoria and Morgan maintain that they will be chilled both before and after that deadline. *See* ECF 7 at 20. The most Plaintiffs can muster on the importance of receiving injunctive relief by February is that they believe the effectiveness of their speech will diminish over time, *id.* at 19-20, but that fails to distinguish this case from any other free-speech case. A plaintiff’s belief that she is entitled to quick relief does not trump a defendant’s right to an adequate opportunity to prepare a defense.

The Attorney General requests that the Court enter the following schedule to allow him to prepare his defense:

Event	Deadline
Open Discovery Related to the Preliminary-Injunction Hearing	1/25/22
Close Discovery Related to the Preliminary-Injunction Hearing	3/2/22
Attorney General’s Response to Plaintiffs’ Motion for Preliminary Injunction	3/3/22
Plaintiffs’ Reply in Support of Their Motion for Preliminary Injunction	3/10/22
Evidentiary Hearing	After 3/10/22

This case is still in its early stages. The parties have not yet conferred under Rule 26. As a result, discovery is not yet open. *See* Fed. R. Civ. P. 26(d)(1). Thus, the Attorney General respectfully requests that the Court enter an order opening discovery but limiting that discovery to the preliminary-

injunction issues. Doing so would help ensure that this expedited discovery does not become bogged down by issues that can await a full trial on the merits. Should the Attorney General's request be granted, he intends to serve limited written discovery and depose both Plaintiffs.

If Plaintiffs wished to resolve their motion sooner, they should have acted expeditiously by filing it back in September instead of waiting until January. But even now, Plaintiffs are not out of options. They can always accelerate consideration of their motion by waiving the right to file a reply brief. Alternatively, they could narrow the scope of the preliminary-injunction motion. For example, Plaintiffs' counsel has represented that Plaintiffs believe the challenged provisions are both *per se* unconstitutional and invalid under a strict-scrutiny analysis. The latter requires significant development of the record. If Plaintiffs were to rest on their first theory exclusively, then the Attorney General could prepare that more limited defense more quickly. If anyone should bear the burden of Plaintiffs' delay, it is Plaintiffs, not Defendants.

CONCLUSION

The Attorney General respectfully requests that the Court enter his proposed schedule. In the alternative, the Attorney General respectfully requests that the Court otherwise allow sufficient time for him to prepare his defense, including through discovery and factual development.

Date: January 25, 2022

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on January 25, 2022, and that all counsel of record were served by CM/ECF.

/s/ William T. Thompson
WILLIAM T. THOMPSON

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