

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

ISABEL LONGORIA and CATHY MORGAN,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
WARREN K. PAXTON, in his official capacity as Attorney General of Texas, KIM OGG, in her official capacity as Harris County District Attorney, SHAWN DICK, in his official capacity as Williamson County District Attorney, and JOSÉ GARZA, in his official capacity as Travis County District Attorney,	§	
	§	
Defendants.	§	

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

**PLAINTIFFS’ RESPONSE IN OPPOSITION TO DEFENDANT PAXTON’S
MOTION TO DISMISS OR ABSTAIN AND DEFENDANT DICK’S MOTION
TO DISMISS**

In light of the Court’s Order granting Plaintiffs’ Motion for Preliminary Injunction, Order (“PI Order”), Dkt. No. 53, the Court should deny Defendant Paxton’s Motion to Dismiss or Abstain (“AG MTD”), Dkt. No. 24, and Defendant Dick’s Motion to Dismiss (“Dick MTD”), Dkt. No. 31.

Background and Argument

Plaintiffs Isabel Longoria and Cathy Morgan filed the First Amended Complaint on December 27, 2021, and a Motion for a Preliminary Injunction (“PI Motion”) the next day. Dkt. Nos. 5 & 7. The First Amended Complaint challenges provisions of a recently passed election law (“SB1”) that (1) make it a criminal offense for public officials and election officials to “solicit” mail-in ballot applications from voters who have not

requested them and (2) make the same conduct a civil offense for election officials. Tex. Elec. Code § 276.016(a)(1) (the “anti-solicitation provision”); Tex. Elec. Code § 31.129 (together, the “challenged provisions”). Plaintiffs assert the challenged provisions violate their First Amendment right to freedom of speech.

On January 24, 2022, and January 27, 2022, respectively, Defendant Paxton and Defendant Dick filed motions to dismiss or abstain from Plaintiffs’ First Amended Complaint (the “Motions to Dismiss”). *See* Dkt. Nos. 24 & 31. In the Motions to Dismiss, Defendants argue that Plaintiffs failed to adequately plead that the Court had subject matter jurisdiction or that the challenged provisions violated the First Amendment. *See* AG MTD at 3-9, 11-14; Dick MTD at 6-13. In the alternative, Defendants asked the Court to abstain. *See* AG MTD at 9–11; Dick MTD at 13–15.

On February 11, 2022—while the Motions to Dismiss were pending and following an evidentiary hearing—the Court granted Plaintiffs’ PI Motion. *See* PI Order at 39–40. In opposing the preliminary injunction, Defendants presented the same arguments they make in the Motions to Dismiss. *See* Defendant Paxton’s Response to Plaintiffs’ Motion for a Preliminary Injunction (“AG Response”), Dkt. No. 48, at 5–11 (arguing that the Court lacked subject matter jurisdiction); *id.* at 11–12 (arguing that the Court should abstain); *id.* at 12–15 (arguing that the challenged provisions did not violate the First Amendment); Defendant Dick’s Response in Opposition to Plaintiffs’ Motion for a Preliminary Injunction (“Dick Response”), Dkt. No. 47, at 10–14 (arguing that the Court lacked subject matter jurisdiction); *id.* at 15-16 (arguing that the Court should abstain).

In fact, Defendant Dick expressly incorporated the arguments he made in support of the Dick MTD into the Dick Response. *See* Dick Response at 9.

The Court rejected each of Defendants’ arguments in its PI Order. *See* PI Order at 8–25 (holding that the Court has subject matter jurisdiction over Plaintiffs’ claims); *id.* at 25–28 (declining to abstain); *id.* at 28–33 (holding that it “is substantially likely that the [challenged provisions] violate[] the First Amendment, as incorporated by the Fourteenth Amendment, as unconstitutional viewpoint discrimination”). Finding that the remaining preliminary injunction factors were satisfied, the Court entered a preliminary injunction, enjoining Defendants from enforcing the challenged provisions against Plaintiffs for violating the challenged provisions “pending the final resolution of this case,” “even if [the challenged provisions] are later found to be constitutional.” *Id.* at 39–40. On February 14, 2022, Defendant Paxton filed a notice of appeal. Dkt. No. 57. On February 21, 2022, Defendant Dick filed a notice of appeal. Dkt. No. 60.¹

The Court should deny the Motions to Dismiss. Under the law of the case doctrine, “a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation.” *F.D.I.C. v. McFarland*, 243 F.3d 876, 884 (5th Cir. 2001) (internal citation omitted). In granting the preliminary injunction, the Court considered—and rejected—each of the arguments Defendants made in the Motions to Dismiss. In fact, the Court used a “much more stringent

¹ On February 17, 2022, the Court of Appeals granted Defendant Paxton’s motion for an administrative stay of the preliminary injunction pending resolution of Defendant Paxton’s motion for a stay pending appeal. The Court of Appeals also expedited consideration of the appeal, setting oral argument for March 8, 2022.

[standard] than the standard used under Rule 12(b)(6), which only requires a plaintiff to allege a plausible claim for relief.” *DGG Group, LLC v. Lockhart Fine Foods, LLC*, No. A-20-CV-330-RP, 2020 WL 2475821, at *4 (W.D. Tex. May 13, 2020) (citing *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010)). Because the Court found that Plaintiffs established a likelihood of success on the merits, Plaintiffs have *a fortiori* alleged subject matter jurisdiction and a plausible claim for relief. They have also demonstrated that abstention is inappropriate. Accordingly, the Motions to Dismiss must be denied.

Conclusion

For the reasons set forth above, Plaintiffs respectfully request that this Court deny the Motions to Dismiss.

Dated: February 23, 2022

Respectfully submitted,

/s/ Christian D. Menefee

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^ Application for admission forthcoming

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 23, 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 Response in Opposition to the Motions to Dismiss was served on all counsel who have consented to electronic service.

/s/ Ethan J. Herenstein
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