

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

Governor GREG ABBOTT, in his official capacity as Governor of the State of Texas; and Governor MIKE DUNLEAVY, in his official capacity as Governor of the State of Alaska,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States, *et al.*,

Defendants.

No. 6:22-cv-3-JCB

**DEFENDANTS' MOTION TO STRIKE
OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE RESPONSE**

Local Civil Rule 7(f) states that after a moving party submits a sur-reply (which Defendants filed on April 1, 2022, ECF No. 38), “[a]bsent leave of court, no further submissions on the motions are allowed.” On June 3, 2022, however, Plaintiffs submitted a filing titled “Plaintiffs’ Motion for Hearing on Motion for Preliminary Injunction.” ECF No. 41. Despite its innocuous title, this “Motion for Hearing” includes new argument about religious accommodation requests and attaches a new declaration from the new Texas Adjutant General. *Id.*

While Defendants did not oppose Plaintiffs’ request for a hearing, which this Court recently granted, Defendants did not consent to Plaintiffs filing additional argument or evidence in support of their motion for a preliminary injunction. This Court likewise did not give leave for any additional submissions on the motion for a preliminary injunction. Defendants do not oppose having a hearing in this case, but Defendants move to strike Plaintiffs’ motion for hearing as an improper sur-sur-reply submitted without consent or leave of court. The Court should not consider the new arguments raised

in that motion or the new declaration when deciding Plaintiffs' motion for preliminary injunction. In the alternative, Defendants seek leave to respond to the new arguments and facts raised for the first time in the motion for a hearing.

I. Background.

After Plaintiffs filed a motion for a motion for preliminary injunction, ECF No. 24, the parties jointly moved to set a briefing schedule, ECF No. 26. The joint motion set out the deadlines for parties to respond to the motion for preliminary injunction, culminating in a sur-reply filed by Defendants by April 1, 2022. ECF No. 26 at 2. The schedule did not contemplate any further submissions after Defendants' consolidated sur-reply. *Id.* The joint motion also requested that the Court set a "Preliminary injunction hearing" at the "Court's earliest convenience." *Id.*

On February 24, 2022, the Court entered an order adopting the jointly proposed schedule. ECF No. 28. Defendants' consolidated sur-reply was due on April 1, 2022, and the Court did not grant leave for any further filings. *Id.* The Court also ordered that any "Preliminary injunction hearing" would "be set by the court." *Id.*

On June 1, 2022, Plaintiffs' counsel emailed Defendants' counsel stating that Plaintiffs would "like to request that the Court set a hearing on the preliminary injunction" and noted that Plaintiffs would "like to make it a joint request if possible." June 1, 2022 Eml. C. Hilton to Z. Avallone (Email Thread Attached as Ex. A). After confirming that Plaintiffs did not intend to submit any additional evidence at the proposed hearing, Defendants responded that they did not "think a request for argument is necessary and generally defer to the Court on whether it needs a hearing." June 2, 2022 Eml. Z. Avallone to C. Hilton (Ex. A). *Id.*¹ Plaintiffs never indicated that they intended to submit

¹ At Plaintiffs' request, Defendants also provided dates when Defendants' counsel could be available to attend a hearing in person and asked Plaintiffs to convey Defendants' availability to the Court. Ex. A ("If the Court would like to schedule oral argument, counsel for Defendants can be available in June on the 9, 10, 13, 28 or 30, and additional dates in July, if needed."). Plaintiffs did not include

additional evidence or argument in support of their motion for a preliminary injunction.

II. The Court Should Strike Plaintiffs' Motion.

The proper course is to strike the motion and declaration. The Court already ordered that it would set a hearing on the preliminary injunction if it thought a hearing would be necessary, ECF No. 28, so there was no reason for Plaintiffs to submit this motion in the first place. Furthermore, the Court has also now ruled that it would like to hold a hearing. June 6, 2022 Notice. Defendants have no objection to holding a hearing in this matter.

The issue here is that Plaintiffs' argumentative motion and new evidence amounts to an improper sur-sur-reply that should not have been filed without leave of Court. *See Deutsche Bank Nat'l Tr. Co. as Tr. of Aames Mortg. Inv. Tr. 2005-1 v. Mortberg*, No. 419CV00875ALMCAN, 2020 WL 7658065, at *7 (E.D. Tex. Nov. 16, 2020), *report and recommendation adopted*, No. 4:19-CV-875, 2021 WL 716750 (E.D. Tex. Feb. 24, 2021) (striking new evidence submitted without leave); *Cooper v. Metro. Lloyds Ins. Co. of Texas*, No. 3:17-CV-1640-L, 2018 WL 620206, at *2 n.4 (N.D. Tex. Jan. 30, 2018) (declining to consider new argument and evidence submitted without leave). The Court should either strike the motion or decline to consider the new evidence and arguments when deciding the pending motion for preliminary injunction.

III. In the Alternative, the Court Should Give Leave for Defendants to Respond.

If the Court does not strike and intends to consider the new facts and argument when deciding the pending motion to for preliminary injunction, it should give Defendants leave to respond. *See Canter v. Big Lots Stores, Inc.*, No. 3:13-CV-865-P, 2014 WL 12603044, at *2 (N.D. Tex. Jan. 6, 2014) (granting to leave to respond to newly raised evidence). The newly submitted materials appear to be an attempt to show irreparable harm, which is required before any preliminary injunction order can

those dates in their motion for a hearing. Defendants' counsel can also be available on June 17 or 27 in person, and June 16 or 23 remotely.

be issued. *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989). But the new declaration does not show irreparable harm and the discussion about religious accommodations is factually incomplete and largely irrelevant to Plaintiffs' motion for a preliminary injunction. Should the Court consider these new arguments and facts, it is only fair to give Defendants a chance to respond.

CONCLUSION

For the foregoing reasons, the Court should strike Plaintiffs' motion for a hearing and attached declaration, or in the alternative, grant leave for Defendants to respond.

Dated: June 6, 2022

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

ANTHONY J. COPPOLINO
Deputy Director

/s/ Zachary A. Avallone

ANDREW E. CARMICHAEL
Senior Trial Counsel
ZACHARY A. AVALLONE (DC Bar No. 1023361)
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JAMES GILLINGMAN
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Eastern District of Texas
110 N. College Street, Suite 700
Tyler, Texas 75702

Counsel for Defendants

CERTIFICATE OF CONFERENCE

I certify that on June 6, 2022, I emailed Christopher Hilton, counsel for Plaintiffs, regarding this motion to strike. Plaintiffs oppose the relief sought by this motion.

/s/ Zachary A. Avallone

CERTIFICATE OF SERVICE

I certify that on June 6, 2022, this document and attachments were filed through the Court's CM/ECF system, which automatically serves all counsel of record.

/s/ Zachary A. Avallone

From: [Avallone, Zachary A. \(CIV\)](#)
To: ["Christopher Hilton"; Gillingham, James \(USATXE\)](#)
Cc: [Robison, Chris A \(LAW\); Leif Olson](#)
Subject: RE: Activity in Case 6:22-cv-00003-JCB Abbott v. Biden et al Response in Support of Motion
Date: Thursday, June 2, 2022 7:46:00 AM

Chris,

Thanks so much for the clarification—that was our recollection as well. At this point, however, we don't think a request for argument is necessary and generally defer to the Court on whether it needs a hearing. So if you file a request, please note our position as follows:

Defendants believe that the pending motion can be decided on the submitted papers, but defer to the Court on whether there is any need for a hearing. If the Court would like to schedule oral argument, counsel for Defendants can be available in June on the 9, 10, 13, 28 or 30, and additional dates in July, if needed.

If you have any questions or would like to discuss, please let us know.

Thanks,

Zach

Zachary A. Avallone | Trial Attorney
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zachary.a.avallone@usdoj.gov

From: Christopher Hilton <Christopher.Hilton@oag.texas.gov>
Sent: Wednesday, June 1, 2022 11:13 PM
To: Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Gillingham, James (USATXE) <JGillingham@usa.doj.gov>
Cc: Robison, Chris A (LAW) <chris.robison@alaska.gov>; Leif Olson <Leif.Olson@oag.texas.gov>
Subject: [EXTERNAL] Re: Activity in Case 6:22-cv-00003-JCB Abbott v. Biden et al Response in Support of Motion

Zach,

Apologies for the confusion. Unless the Court wants to take any evidence in person, we think

that submitting this on the papers and just having argument at any hearing makes sense. It's my recollection that we discussed and agreed on that point early on, and that's still where we are at.

Happy to discuss tomorrow as needed. Thank you for the prompt reply.

Thanks,
Chris

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From: Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>
Sent: Wednesday, June 1, 2022 5:58:17 PM
To: Christopher Hilton <Christopher.Hilton@oag.texas.gov>; Gillingham, James (USATXE) <James.Gillingham@usdoj.gov>
Cc: Robison, Chris A (LAW) <chris.robison@alaska.gov>; Leif Olson <Leif.Olson@oag.texas.gov>
Subject: RE: Activity in Case 6:22-cv-00003-JCB Abbott v. Biden et al Response in Support of Motion

Chris,

We haven't yet had the opportunity to discuss, but hopefully will have an answer for you tomorrow after we do. To make sure we're all on the same page here, when you say "hearing" do you mean an oral argument or are Plaintiffs asking for an evidentiary hearing?

Thanks so much,

Zach

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From: Christopher Hilton <Christopher.Hilton@oag.texas.gov>
Sent: Wednesday, June 1, 2022 6:21 PM
To: Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Gillingham, James (USATXE) <JGillingham@usa.doj.gov>
Cc: Robison, Chris A (LAW) <chris.robison@alaska.gov>; Leif Olson <Leif.Olson@oag.texas.gov>
Subject: [EXTERNAL] RE: Activity in Case 6:22-cv-00003-JCB Abbott v. Biden et al Response in Support of Motion

Gentlemen,

Just following up. Please respond by tomorrow morning so that we can file something.

Thanks,
Chris

Christopher D. Hilton

Chief, General Litigation Division
Office of the Attorney General of Texas
(512) 475-4120

From: Christopher Hilton
Sent: Wednesday, June 1, 2022 1:43 PM
To: Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Gillingham, James (USATXE) <James.Gillingham@usdoj.gov>
Cc: Robison, Chris A (LAW) <chris.robison@alaska.gov>; Leif Olson <Leif.Olson@oag.texas.gov>
Subject: RE: Activity in Case 6:22-cv-00003-JCB Abbott v. Biden et al Response in Support of Motion

Zach and James,

Hope this finds everyone doing well.

We'd like to request that the Court set a hearing on the preliminary injunction. I'd like to make it a joint request if possible, or at the very least confer on dates that would work for Defendants, even if y'all don't agree to the request for a hearing.

Please let me know whether you'd like to jointly request a hearing date and whether you will be unavailable at any time during the weeks of June 6 and June 13. Happy to hop on a brief call if that would be helpful.

Thanks,
Chris

Christopher D. Hilton

Chief, General Litigation Division
Office of the Attorney General of Texas
(512) 475-4120

From: Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>
Sent: Monday, March 7, 2022 1:50 PM
To: Robison, Chris A (LAW) <chris.robison@alaska.gov>; Leif Olson <Leif.Olson@oag.texas.gov>; Christopher Hilton <Christopher.Hilton@oag.texas.gov>; Gillingham, James (USATXE) <James.Gillingham@usdoj.gov>
Subject: RE: Activity in Case 6:22-cv-00003-JCB Abbott v. Biden et al Response in Support of Motion

Thanks, everyone.

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zachary.a.avallone@usdoj.gov

From: Robison, Chris A (LAW) <chris.robison@alaska.gov>
Sent: Monday, March 7, 2022 2:48 PM
To: Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Leif Olson <Leif.Olson@oag.texas.gov>; Christopher Hilton <Christopher.Hilton@oag.texas.gov>; Gillingham, James (USATXE) <JGillingham@usa.doj.gov>
Subject: [EXTERNAL] RE: Activity in Case 6:22-cv-00003-JCB Abbott v. Biden et al Response in Support of Motion

Zach and James:

Probably goes without saying in light of Leif's e-mail, but we are also unopposed.

Best Regards,

Chris Robison

Christopher A. Robison
Assistant Attorney General
Alaska Department of Law
(907) 269-5561

From: Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>
Sent: Monday, March 7, 2022 9:08 AM
To: Leif Olson <Leif.Olson@oag.texas.gov>; Robison, Chris A (LAW) <chris.robison@alaska.gov>; Christopher Hilton <Christopher.Hilton@oag.texas.gov>; Gillingham, James (USATXE) <James.Gillingham@usdoj.gov>
Subject: RE: Activity in Case 6:22-cv-00003-JCB Abbott v. Biden et al Response in Support of Motion

Thanks so much, Leif.

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From: Leif Olson <Leif.Olson@oag.texas.gov>
Sent: Monday, March 7, 2022 12:56 PM
To: Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Robison, Chris A (LAW) <chris.robison@alaska.gov>; Christopher Hilton <Christopher.Hilton@oag.texas.gov>; Gillingham, James (USATXE) <JGillingham@usa.doj.gov>
Subject: [EXTERNAL] RE: Activity in Case 6:22-cv-00003-JCB Abbott v. Biden et al Response in Support of Motion

Zach, Plaintiffs don't oppose.

From: Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>
Sent: Monday, March 7, 2022 11:52 AM
To: Robison, Chris A (LAW) <chris.robison@alaska.gov>; Christopher Hilton <Christopher.Hilton@oag.texas.gov>; Leif Olson <Leif.Olson@oag.texas.gov>; Gillingham, James (USATXE) <James.Gillingham@usdoj.gov>
Subject: RE: Activity in Case 6:22-cv-00003-JCB Abbott v. Biden et al Response in Support of Motion

Hi everyone,

Defendants plan to move for a 10-page extension to respond to Plaintiffs' submissions regarding the motion for preliminary injunction, bringing our total to 25 pages. Could you all please let me know if Plaintiffs oppose?

Thank you very much,

Zach

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From: Robison, Chris A (LAW) <chris.robison@alaska.gov>
Sent: Wednesday, February 23, 2022 8:39 PM
To: Christopher Hilton <Christopher.Hilton@oag.texas.gov>; Leif Olson <Leif.Olson@oag.texas.gov>;

Avallone, Zachary A. (CIV) <Zachary.A.Avallone@usdoj.gov>; Gillingham, James (USATXE) <JGillingham@usa.doj.gov>

Subject: [EXTERNAL] FW: Activity in Case 6:22-cv-00003-JCB Abbott v. Biden et al Response in Support of Motion

Dear Chris, Leif, Zachary, and James:

Please refer to the attached.

Best Regards,

Chris Robison

Christopher A. Robison
Assistant Attorney General
Alaska Department of Law
(907) 269-5561

From: txedCM@txed.uscourts.gov <txedCM@txed.uscourts.gov>

Sent: Wednesday, February 23, 2022 4:34 PM

To: txedcmcc@txed.uscourts.gov

Subject: Activity in Case 6:22-cv-00003-JCB Abbott v. Biden et al Response in Support of Motion

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Case Number: 6:22-cv-00003-JCB
Filer: Mike Dunleavy
Document Number: [27](#)

Docket Text:

RESPONSE in Support re [24] MOTION for Preliminary Injunction Governor Dunleavy's Brief in Support of Governor Abbott's Motion for Preliminary Injunction filed by Mike Dunleavy. (Robison, Christopher)

6:22-cv-00003-JCB Notice has been electronically mailed to:

Christopher Alan Robison chris.robison@alaska.gov, andy.miller@alaska.gov,
javier.diaz@alaska.gov, liz.forkan@alaska.gov

Christopher D. Hilton christopher.hilton@oag.texas.gov, laura.kiick@oag.texas.gov

Leif A Olson Leif.Olson@oag.texas.gov, elizabeth.saunders@oag.texas.gov,
joshua.clarke@oag.texas.gov

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Governor GREG ABBOTT, in his official
capacity as Governor of the State of Texas; and
Governor MIKE DUNLEAVY, in his official
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Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official capacity
as President of the United States, *et al.*,

Defendants.

No. 6:22-cv-3-JCB

**[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO STRIKE
OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE RESPONSE**

The Court GRANTS Defendants' Motion to Strike Plaintiff's Motion for Hearing on Motion for Preliminary Injunction and attached declaration, ECF Nos. 41 and 41-1. When considering and deciding Plaintiffs' motion for preliminary injunction, ECF No. 24, the Court will not consider any new arguments raised in ECF No. 41 or any previously undisclosed facts raised in ECF No. 41-1.