

intervene”); *see, e.g., Aubin v. Columbia Cas. Co.*, No. 16-290-BAJ-EWD, 2017 WL 1416814, at *4 (M.D. La. Apr. 19, 2017) (finding that Louisiana Attorney General had the unconditional right to intervene in challenge to constitutionality of Louisiana statute). Plaintiff does not oppose this motion.

ARGUMENT

I. OAG Meets the Requirements for Mandatory Intervention

The Court should grant the motion to intervene because courts must allow intervention when the movant has an unconditional right to intervene by a federal statute. Fed. R. Civ. P. 24(a)(1). OAG has an unconditional right to intervene pursuant to 28 U.S.C. § 2403(b) because (1) this lawsuit does not include the State or any of its agencies, officers or employees as a party, and (2) the constitutionality of the Texas Elections Code, a set of laws affecting the public interest, has been drawn into question. *See* 7C Wright & Miller, *Federal Practice and Procedure* § 1906 (3d ed.). Because OAG meets the statutory requirements of 28 U.S.C. § 2403(b), OAG has a statutory right to “intervene for the presentation of evidence . . . and for argument on the question of constitutionality.”

A. This motion is timely.

Plaintiff filed this suit in federal court on July 8, 2021. *See* ECF 1. The following day, Plaintiff filed a notice pursuant to Rule 5.1 of the Federal Rules of Civil Procedure styled “*Plaintiff’s Rule 5.1 Notice of Constitutional Question.*” ECF 4. Rule 5.1 allows the attorney general to intervene “within 60 days after the notice is file or after the court certifies the challenge, whichever is earlier.” Fed. R. Civ. P. 5.1(c). The 60th day to intervene does not expire until September 7, 2021. Accordingly, this motion is timely filed.

B. No State entity is a party.

The named defendants to this action do not include either the State of Texas or “any agency, officer, or employee thereof.” 28 U.S.C. § 2403(b). Instead, the named defendants include a county

tax-assessor collector and three county elections administrators. ECF 1 ¶¶ 21–24. None of the named defendant officials are recognized as state officials or employees under Texas law. County tax-assessor collectors are county officials. *See* Tex. Loc. Gov't Code § 159.032; *Hartford Cas. Ins. Co. v. Price*, 435 F. Supp. 2d 566, 572–74 (N.D. Tex. 2006) (holding that the Tarrant County Tax-Assessor Collector's Office is not an arm of the state of Texas). Similarly, the position of county election administrator is a county-level position that the Texas Legislature has granted county commissioners' courts the discretion to create for the benefit of a county. *See* Tex. Elec. Code § 31.031 (“The commissioners court by written order may create the position of county elections administrator *for the county.*” (emphasis added)).

Plaintiff agrees that this requirement is satisfied. In its Rule 5.1 Notice of Constitutional Question, Plaintiff states that “[t]he parties to this action do not include the State of Texas, one of its agencies, or one of its officers or employees in an official capacity.” ECF 4 ¶ 2.

C. This suit draws into question the constitutionality of a Texas statute affecting the public interest.

Plaintiff makes no secret of its intention to challenge the constitutionality of Texas's voter-registration law: House Bill 3107. *See* ECF 1 ¶¶ 4–11, 37–47. Again, Plaintiff agrees that this requirement is satisfied. According to Plaintiff's Rule 5.1 Notice of Constitutional Question, its complaint “alleges that House Bill 3107 violates the First and Fourteenth Amendments to the U.S. Constitution.” ECF 4 ¶ 1. No one disputes that HB 3107 “affect[s] the public interest.” 28 U.S.C. § 2403(b). The enforcement of a State's election laws is in the public interest. *See, e.g., Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). HB 3107 is nothing like laws found not to affect the public interest. *Cf. Cox v. Schweiker*, 684 F.2d 310, 319 (5th Cir. Unit B 1982) (describing a bill “no longer on the Georgia books,” the constitutionality of which would “have little if any effect beyond the facts of the case under consideration”).

* * *

Federal courts provide State Attorneys General the option to intervene, even when those courts are inclined to reject a constitutional challenge on the merits. *See, e.g., Bridges v. Phillips Petroleum Co.*, 733 F.2d 1153, 1156 n.7 (5th Cir. 1984) (per curiam). This Court should do the same here.

II. Intervention Does Not Waive OAG's Rights

OAG moves “to intervene for presentation of evidence . . . and for argument on the question of constitutionality.” 28 U.S.C. § 2403(b). By defending local officials, who are obligated to follow state law, from Plaintiff’s constitutional claims, OAG will not itself become subject to Plaintiff’s claims. In other words, intervention does not transform OAG into a defendant against which any relief could be ordered. When “[t]he State is a party only by virtue of 28 U.S.C. § 2403(b),” it “is not subject to liability.” *Tennessee v. Garner*, 471 U.S. 1, 22 (1985).

OAG does not hereby waive Texas’s sovereign immunity, either from suit or liability. Although OAG will become “subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality,” 28 U.S.C. § 2403(b), it is not subject to liability for attorney’s fees or other expenses. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (rejecting an award of attorney’s fees against a State because “liability on the merits and responsibility for fees go hand in hand”).

CONCLUSION

OAG prays that this Motion to Intervene be granted. A proposed Answer in Intervention is attached.

Dated: September 2, 2021

Respectfully submitted.


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CERTIFICATE OF CONFERENCE

I certify that on August 30, 2021, I conferred with counsel for Plaintiff and Defendant Remi Garza regarding the contents of this motion, and counsel indicated that they are unopposed to the relief sought herein. I further certify that I conferred with counsel for Defendants Michael Scarpello and Bruce Elfant and they indicated that they take no position on whether to oppose this motion. I also certify that on August 30, 2021, I attempted to confer with counsel for Defendant Jacquelyn Callanen at the email address available in the Court's CM/ECF system and received no response.


Counsel for OAG

CERTIFICATE OF SERVICE

I certify that on September 2, 2021 I electronically filed the foregoing document through the Court's CM/ECF system, which automatically serves all counsel of record.


Counsel for OAG

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admit any matter contained therein.

OAG responds to the specifically numbered allegations of the Complaint as follows:

NATURE OF CASE

1–11. Plaintiff's introduction (ECF 1 at ¶¶ 1–11) is a statement of the case and contains conclusions of law and characterizations of facts to which no response is required. To the extent that a response is required, OAG denies the allegations and the characterizations of the facts and legal authorities therein, except that OAG admits that Plaintiff's Complaint purports to raise claims under the Civil Rights Act as well as the First and Fourteenth Amendments to the United States Constitution. OAG denies that any violation of law has occurred. Further, the referenced bill, HB 3107, speaks for itself, and OAG refers the Court to the language of the bill for a complete and accurate statement of its contents.

JURISDICTION AND VENUE

12. Paragraph 12 contains assertions of law, conclusory statements, and/or argument to which no response is required. To the extent that this Paragraph contains any allegations requiring a response, OAG admits that Plaintiff purports to bring claims under 52 U.S.C. § 10101 and 42 U.S.C. §§ 1983 and 1988, but denies that any deprivation of rights occurred.

13–16. Without admitting that Plaintiff is entitled to any relief, OAG does not dispute the jurisdiction and venue allegations in Paragraphs 13–16, except that if Plaintiff fails to state a claim or lacks standing to pursue the claims of this action, or if any form of immunity bars relief in whole or in part, that would preclude the District Court from exercising jurisdiction over the dispute.

PARTIES

17. OAG lacks knowledge or information sufficient to admit or deny the allegations in Paragraph 17, and therefore, on that basis denies the allegations therein.

18. OAG lacks knowledge or information sufficient to admit or deny the allegations in

Paragraph 18, and therefore, on that basis denies the allegations therein.

19. OAG lacks knowledge or information sufficient to admit or deny the allegations in Paragraph 19, and therefore, on that basis denies the allegations therein.

20. OAG lacks knowledge or information sufficient to admit or deny the allegations in Paragraph 20, and therefore, on that basis denies the allegations therein.

21. OAG admits that Jacquelyn Callanen is the Bexar County Elections administrator and that she serves as the voter registrar for Bexar County. OAG lacks knowledge or information sufficient to admit or deny the allegations concerning the reason for suing Callanen, and therefore, on that basis denies that allegation. The referenced provisions of the Election Code, Sections 12.001, 13.002, 13.004, 13.071–13.072, and 15.022 speak for themselves, and OAG refers the Court to the language of the Election Code for a complete and accurate statement of its contents.

22. OAG admits that Bruce Elfant is the Travis County Tax Assessor-Collector and that he serves as the voter registrar for Travis County. OAG lacks knowledge or information sufficient to admit or deny the allegations concerning the reason for suing Elfant, and therefore, on that basis denies that allegation. The referenced provisions of the Election Code, Sections 12.001, 13.002, 13.004, 13.071–13.072, and 15.022 speak for themselves, and OAG refers the Court to the language of the Election Code for a complete and accurate statement of its contents.

23. OAG admits that Remi Garza is the Cameron County Elections administrator and that she serves as the voter registrar for Cameron County. OAG lacks knowledge or information sufficient to admit or deny the allegations concerning the reason for suing Garza, and therefore, on that basis deny that allegation. The referenced provisions of the Election Code, Sections 12.001, 13.002, 13.004, 13.071–13.072, and 15.022 speak for themselves, and OAG refers the Court to the language of the Election Code for a complete and accurate statement of its contents.

24. OAG admits that Michael Scarpello is the Dallas County Elections administrator and

that she serves as the voter registrar for Dallas County. OAG lacks knowledge or information sufficient to admit or deny the allegations concerning the reason for suing Scarpello, and therefore, on that basis deny that allegation. The referenced provisions of the Election Code, Sections 12.001, 13.002, 13.004, 13.071–13.072, and 15.022 speak for themselves, speaks for itself, and OAG refers the Court to the language of the Election Code for a complete and accurate statement of its contents.

STATEMENT OF FACTS AND LAW

25. OAG admits the allegations in Paragraph 25 of the Complaint.

26. Paragraph 26 contains assertions of law, conclusory statements, and/or argument to which no response is required. Further, the referenced provision of the Election Code, Section 13.143(d-2), speaks for itself, and OAG refers the Court to the language of the statute for a complete and accurate statement of its contents. To the extent this Paragraph contains any allegations requiring a response, OAG denies them.

27. OAG lacks knowledge or information sufficient to admit or deny the allegations in Paragraph 27 regarding Plaintiff's actions, and therefore, on that basis denies them. OAG denies the allegations in Paragraph 27 characterizing the actions of Secretary Pablos and his spokesperson.

28. Paragraph 28 contains assertions of law, conclusory statements, and/or argument to which no response is required. To the extent that this Paragraph contains any allegations requiring a response, OAG denies them.

29. OAG lacks knowledge or information sufficient to admit or deny the allegations in Paragraph 29, and therefore, on that basis denies the allegations therein.

30. Paragraph 30 contains assertions of law, conclusory statements, and/or argument to which no response is required. To the extent that this Paragraph contains any allegations requiring a response, OAG denies them.

31. Paragraph 31 contains assertions of law, conclusory statements, and/or argument to

which no response is required. Further, the referenced legal authorities speak for themselves, and OAG refers the Court to the language of the statutes for a complete and accurate statement of their contents. To the extent that this Paragraph contains any allegations requiring a response, OAG denies that there is any conflict between the rules mentioned in Paragraph 31 and what Plaintiff calls “the Wet Signature Rule.”

32. Paragraph 32 contains assertions of law, conclusory statements, and/or argument to which no response is required. To the extent that this Paragraph contains any allegations requiring a response, OAG denies “that the Wet Signature Rule serves no useful or justifiable purpose.”

33. OAG lacks knowledge or information sufficient to admit or deny the allegations in Paragraph 33, and therefore, on that basis denies the allegations therein.

34. Paragraph 34 contains assertions of law, conclusory statements, and/or argument to which no response is required. The referenced legal authorities speak for themselves, and OAG refers the Court to the language of said authorities for a complete and accurate statement of their contents. To the extent that this Paragraph contains any allegations requiring a response, OAG lacks knowledge or information sufficient to admit or deny the allegations in Paragraph 34, and therefore, on that basis denies the allegations therein.

35. Paragraph 35 contains assertions of law, conclusory statements, and/or argument to which no response is required. To the extent that this Paragraph contains any allegations requiring a response, OAG denies them.

36. Paragraph 36 contains assertions of law, conclusory statements, and/or argument to which no response is required. To the extent that this Paragraph contains any allegations requiring a response, OAG denies them.

CLAIMS FOR RELIEF

COUNT I

**52 U.S.C. § 10101; 42 U.S.C. § 1983
Violation of Section 1971 of the Civil Rights Act of 1964
Against All Defendants**

37. OAG repeats and reaffirms its answers to each and every allegation contained in the paragraphs above and incorporate the same herein as though fully set forth.

38–40. Answering the allegations contained in paragraphs 38–40, OAG denies the allegations except to state that the cited legal authorities and statutes speak for themselves, and OAG refers the Court to said authorities for a complete and accurate statement of their contents, and further denies that Plaintiff is entitled to the relief requested.

COUNT II

**U.S. Const. Amends. I, XIV; 42 U.S.C. § 1983
Undue Burden on the Right to Vote
Against All Defendants**

41. OAG repeats and reaffirms its answers to each and every allegation contained in the paragraphs above and incorporate the same herein as though fully set forth.

42–47. Answering the allegations contained in paragraphs 42–47, OAG denies the allegations except to state that the cited legal authorities and statutes speak for themselves, and the OAG refers the Court to said authorities for a complete and accurate statement of their contents, and further denies that Plaintiff is entitled to the relief requested.

PRAYER FOR RELIEF

No response is required to the Prayer for Relief. However, to the extent a response is required, OAG denies the allegations contained in the Prayer for Relief, and specifically denies that Plaintiff is entitled to the relief requested.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint fails to state a claim for which relief may be granted.
2. Plaintiff's claims are barred by sovereign immunity.
3. OAG asserts that Plaintiff lacks standing to pursue any of the claims asserted in this action.
4. OAG reserves the right to amend these defenses or raise additional defenses as they become known to OAG during the development of this case.

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Dated: September 1, 2021

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on September 2, 2021 I electronically filed the foregoing document through the Court's CM/ECF system, which automatically serves all counsel of record


Counsel for OAG

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IT IS THEREFORE ORDERED that the caption in this case is amended to reflect the addition of Texas Attorney General Ken Paxton as Intervenor-Defendant.

IT IS FURTHER ORDERED that OAG's proposed answer filed contemporaneously with OAG's motion to intervene is hereby deemed filed, and the Clerk is ordered to separately docket the answer as filed on the date of this Order.

IT IS SO ORDERED.

SIGNED this ____ day of _____, 2021

JASON K. PULLIAM
UNITED STATES DISTRICT JUDGE

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