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

VOTE.ORG, *Plaintiff,* v. JACQUELYN CALLANEN, in her official capacity as the Bexar County Elections Administrator, BRUCE ELFANT, in his official capacity as the Travis County Tax Assessor-Collector, REMI GARZA, in his official capacity as the Cameron County Elections Administrator, and MICHAEL SCARPELLO, in his official capacity as the Dallas County Elections Administrator, *Defendants.*	§ § § § § § § § § § § § §	Civil No. 5:21-cv-649-JKP-HJB

REPLY BY INTERVENOR-DEFENDANTS IN SUPPORT OF THEIR MOTION TO INTERVENE

TO THE HONORABLE JASON PULLIAM:

Intervenor-Defendants have an interest in participating in this suit and Defendants will not protect those interests. Despite its arguments to the contrary, Plaintiff is raising a facial challenge to the Wet Signature requirement of HB 3107. Plaintiff's claims do not depend on how, where, or if someone uses Plaintiff's e-signature platform. Plaintiff challenges any provision of law "requiring a voter to sign an application form with an original, wet signature in order to register to vote." Dkt. 1 at p. 13. A ruling in the Western District of Texas that HB 3107 violates the Voting Rights Act or is unconstitutional would obviously affect how Intervenor-Defendants perform voter registration. But it is more than that. A ruling from this Court that HB 3107 is unconstitutional would eliminate HB 3107 and make it next to impossible for Intervenor-Defendants to re-instate it. Moreover, striking down HB 3107 in the named counties would lead to inconsistent voter registration procedures in multi-county elections for offices such as Texas Senate. Yet, Defendants are unwilling to defend this lawsuit. The Motion to Intervene (Dkt. 26) should be granted.

I. PLAINTIFF MAKES A FACIAL CHALLENGE TO HB 3107.

Plaintiff misstates the substance of its claims to support its proposition that Defendant-Intervenors have no interest in this case. In its brief, Plaintiff converts its facial challenge to HB 3107 to an as-applied challenge so that it will appear the dispute is only with the named county officials and Plaintiff's use of their e-signature function. But Plaintiff's claims have little to do with either. Plaintiff's Prayer is clear; they seek a blanket declaration that the wet signature rule of HB 3107 is unconstitutional and violates the Voting Rights Act. Dkt. 1 at p. 13. Plaintiff is not just after the wet signature provisions of HB 3107. They go further and ask that "any other provision requiring a voter to sign an application form with an original, wet signature in order to register to vote" be declared to violate the constitution and the Voting Rights Act. *Id.* This relief does not depend on how HB 3107 is implemented or who implements it. Similarly, neither Count

I nor Count II contains any allegation that Plaintiff's e-signature function is at issue or that specific acts in any county have been alleged to violate HB 3107. Plaintiff makes a direct, facial challenge to the constitutionality of *any* wet signature requirement.

Plaintiff confuses this issue in its Response by invoking the use of its e-signature application ("[V]ote.org filed suit against and seeks relief from those counties—and *only* those counties—where it has implemented the e-signature function of its web application." Dkt. 38 at p. 2 (emphasis in original)). But this is a red herring. Plaintiff does not allege that anyone it has registered using e-signature at any time has been denied registration under HB 3107. Nor have Defendants claimed that Plaintiff's e-signature function violates HB 3107 – an as applied challenge. Instead, Plaintiff claims a wet signature requirement *in any circumstance* is a constitutional violation. That is a facial challenge. The e-signature function is irrelevant.

Plaintiff's facial challenge to any wet signature requirement in voter registration obviously would affect elections in Medina and Real Counties. A decision that HB 3107 is facially invalid would likely prevent Intervenor-Defendants from later arguing that the law is constitutional.

II. A DECISION THAT HB 3107 IS UNCONSTITUTIONAL WOULD LEAVE NOTHING FOR INTERVENOR-DEFENDANTS TO CHALLENGE.

Plaintiff seeks a blanket declaration that HB 3107 is unconstitutional. *See* Dkt. 1 at p. 13. Obviously, a declaration from this Court – in the Western District of Texas where both Medina and Real counties sit – that HB 3107 is unconstitutional wipes the wet-signature provision from the code. There would be nothing left to challenge. Defendant-Intervenors are unaware of a way to revive a law once it has been held unconstitutional.

The Fifth Circuit has recognized this problem and solved it by allowing intervention. In *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 828-9 (5th Cir. 1967) the Court noted that Fifth Circuit panel decisions must be followed by other panels and can only be overturned via an *en banc* panel or the Supreme Court. The Court observed that these are rare occurrences and weighed

in favor of allowing intervention. *Id.* "That is but a way of saying in a very graphic way that the failure to allow [Proposed Intervenor] an opportunity to advance its own theories both of law and fact in the trial (and appeal) of the pending case will if the disposition is favorable to the Government 'as a practical matter impair or impede [its] ability to protect [its] interest.'" *Id.*

Plaintiff cites to *Russell v. Harris County*, Civil Action No. H-19-226, 2020 WL 6784238 (S.D. Tex. Nov. 18, 2020) and *Texas v. U.S. Department of Energy*, 754 F.2d 550 (5th Cir. 1985). Dkt. 38 at p. 10. Each case is distinguishable.

Russell states that an "intervenor fails to show a sufficient interest when he seeks to intervene solely for ideological, economic, or precedential reasons; that would-be intervenor merely prefers one outcome to the other." *Russell* at *5. But, Intervenor-Defendants don't have just a "generalized preference," in the outcome. The law at issue directly dictates how they will do their jobs. Nor is Intervenor-Defendants' interest merely preventing precedent that may or may not be persuasive in future cases. Intervenor-Defendants seek to avoid a final judgment that if approved by the Fifth Circuit would render void the law they apply.

Texas v. Dep't of Energy dealt with utilities attempting to intervene as to the location of nuclear waste facilities in West Texas. They had no defined role in the statutory scheme other than providing funding for the Nuclear Waste Policy Act, and otherwise no legally protectable interest. Here, Intervenor-Defendants directly implement the statutory scheme and have a unique, rural interest different from urban counties.

III. A RULING APPLIED ONLY TO DEFENDANTS WOULD MEAN SOME ELECTIONS WOULD HAVE MULTIPLE SETS OF RULES.

Even if Plaintiff is correct that its case would only affect the current Defendants – a dubious proposition – it ignores the practical implications of that position. Not all elections are contained in a single county. For example, Texas Senate District 19 contains all or parts of *seventeen*

counties including Bexar and both Medina and Real Counties.[1] The Texas Fourth Court of Appeals encompasses 32 counties, including Bexar, Medina, and Real Counties.[2] Under Plaintiff's view, if this Court were to find HB 3107 unconstitutional, then Bexar County's elections administrator, Ms. Callanen, would administer these elections under different rules than the administrators of Medina, Real, and the other counties. This obvious problem supports intervention.

IV. DEFENDANTS DO NOT DEFEND THE CONSTITUTIONALITY OF HB 3107.

The Defendants in this case will not protect Intervenor-Defendants rights. Indeed, it appears that the current Defendants will offer little to no defense in this case. After Intervenor-Defendants filed their motion to intervene, Defendants filed their Answers to the Complaint. It is clear from their answers and other election cases[3] that they do not intend to defend the constitutionality of HB 3107. Their intentions are not hidden in their Answers:

Travis County (Dkt. 29)

Mr. Elfant states the obvious, "Defendant Elfant had no role in enacting S.B. 1111 (sic), and does not intend to defend the constitutionality of this statute." *Id.* at ¶ 48. Mr. Elfant asserts that he cannot be forced to pay attorneys' fees but raises no defenses to the merits of the suit. *Id.*

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1 *See* Texas Senate District 19 map: https://wrm.capitol.texas.gov/fyiwebdocs/pdf/senate/dist19/m1.pdf (last accessed 8/31/2021)

2 *See* https://www.txcourts.gov/4thcoa/ (last accessed 8/31/2021)

3 Intervenor-Defendants are involved in a similar dispute regarding intervention in a case in the Austin Division. *See Texas State Lulac, et al. v. Elfant, et al.,* 1:21-cv-546-LY (WD Tex.). In the Austin case, Plaintiffs (represented by the same counsel as this case) sued common parties Callanen, Elfant, and Scarpello regarding the constitutionality of recently enacted SB 1111. Defendants in that matter have similarly declined to defend that statute. *See id.* at Dkt. 68.

Bexar County (Dkt. 28)

Ms. Callanen fails to raise a single defense to the suit. *See id.* Also, in the past, Ms. Callanen has publicly stated her opposition to wet signature requirements and even questioned whether her office itself would challenge wet signature requirements.[4]

Dallas County (Dkt. 30)

Mr. Scarpello also does not present a robust defense. For example, he admits that venue is proper in this district but at the same time denies that "a substantial part of the events that give rise to Plaintiffs' (sic) claims against him occurred and will occur in this district." *Id.* at ¶ 15. In other words, he admits that venue is proper in the Western District of Texas – removing a possible defense – while denying the only facts that would support a basis for venue.

Cameron County (Dkt. 31)

Finally, while Mr. Garza does file a Motion to Dismiss the Complaint in lieu of an answer, Mr. Garza's basis is that Plaintiff lacks standing to bring the suit challenging HB 3107. *See id.* at ¶ 3.1. While Mr. Garza is correct that the plaintiff about plaintiff's lack of standing, he does not assert that the HB 3107 is constitutional.

V. CONCLUSION

Intervenor-Defendants have a substantial interest in the outcome of this litigation. It will affect how they register voters in the upcoming elections. Current Defendants will not adequately represent Intervenor-Defendants interests because the current Defendants do not appear willing to defend the constitutionality of HB 3107. Defendant-Intervenors' motion to intervene (Dkt. 42) should be granted.

[4] *See* https://sanantonioreport.org/secretary-of-state-signatures-of-texans-who-registered-on-vote-org-are-invalid/

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically on September 20, 2021, with the Clerk of the Court for the U.S. Western District of Texas by using the CM/ECF system, causing electronic service upon all counsel of record.

/s/Robert Henneke
ROBERT HENNEKE