UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS STATE LULAC; VOTO LATINO,

Plaintiffs,

v.

BRUCE ELFANT, in his official capacity as the Travis County Tax Assessor-Collector; JACQUELYN CALLANEN, in her official capacity as the Bexar County Elections Administrator; ISABEL LONGORIA, in her official capacity as the Harris County Elections Administrator; YVONNE RAMÓN, in her official capacity as the Hidalgo County Elections Administrator; MICHAEL SCARPELLO, in his official capacity as the Dallas County Elections Administrator; LISA WISE, in her official capacity as the El Paso County Elections Administrator,

Defendants.

Civil Action

Case No. 1:21-cv-00546-LY

PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE AS DEFENDANTS BY MEDINA COUNTY ELECTIONS ADMINISTRATOR LUPE C. TORRES AND REAL COUNTY TAX ASSESSOR-COLLECTOR TERRIE PENDLEY

TO THE HONORABLE LEE YEAKEL:

Plaintiffs Texas State LULAC and Voto Latino, by and through their undersigned counsel, file this Opposition to the Partially Opposed Motion to Intervene as Defendants filed by Lupe C. Torres, in her official capacity as the Medina County Elections Administrator, and Terrie Pendley, in her official capacity as the Real County Tax Assessor-Collector (together, "Proposed Intervenors").

INTRODUCTION

Voter turnout in Texas is consistently among the lowest in the nation, for a clear reason: it is, and has long been, very hard to vote in the Lone Star State. Rather than expanding this fundamental right for lawful voters and ensuring that the State's growing minority communities can make their voices heard, the Texas Legislature has adopted a policy of retrenchment, undertaking a concerted campaign to further inhibit the franchise for some of the State's most vulnerable and underrepresented citizens. Among the latest round of suppressive legislation is Senate Bill 1111 ("SB 1111"), which prohibits Texans from establishing residence to influence elections, prevents voters from registering at previous addresses even if they have only temporarily relocated, and imposes additional burdens on Texans who register using post office boxes.

In response to this undemocratic assault on the franchise, Plaintiffs Texas State LULAC and Voto Latino, both of which represent the interests of Latino voters across Texas and advocate for their civil rights, filed suit against the voter registrars of some of the State's largest and most diverse counties. They seek relief against those counties—and *only* those counties—because, as the Fifth Circuit recently explained, county registrars are solely responsible for reviewing and accepting voter registration applications. *See Tex. Democratic Party v. Hughs*, No. 20-50667, 2021 WL 2310010, at *1 (5th Cir. June 4, 2021). Suing all 254 counties in Texas would be logistically impractical. Thus, to ensure that SB 1111 will not impermissibly burden voters and voter registration activities in the jurisdictions where their constituents and efforts are concentrated, Plaintiffs seek injunctive relief against election officials in Travis, Bexar, Harris, Hidalgo, Dallas, and El Paso Counties only.

The limited scope of this case confirms that Proposed Intervenors lack even the most basic requirement for intervention under Federal Rule of Civil Procedure 24: a cognizable interest in this litigation. Simply put, Plaintiffs' suit has nothing to do with the enforcement of SB 1111 in

Medina and Real Counties; if it did, Proposed Intervenors would be named defendants. And beyond their vague, unsupported assertions, Proposed Intervenors fail to explain precisely how this lawsuit could have even the slightest effect on their ability to administer elections in their own jurisdictions. Their motion offers nothing more than a general desire to enforce SB 1111 statewide—an interest that is more than adequately represented by both the counties named as defendants and the Attorney General, who has already moved to intervene to represent the interests of the State of Texas and defend SB 1111's constitutionality.

Rather than streamline or otherwise contribute to this Court's efficient disposition of Plaintiffs' claims, Proposed Intervenors' entrance into this matter would serve only to confound the proceedings and inhibit Plaintiffs' ability to seek timely relief ahead of the 2022 elections. For these reasons and those that follow, Proposed Intervenors' motion should be denied.

BACKGROUND

I. The Texas Legislature enacted SB 1111, which unjustifiably burdens voter registration for lawful Texas voters.

During its 2021 session, the Texas Legislature introduced no fewer than 50 bills to impede access to the ballot box, targeting virtually every method of voting and increasing the risk of voter intimidation. One of those bills, SB 1111, imposes new restrictions on voter registration. *See* SB 1111, 87th Leg., Reg. Sess. (Tex. 2021). Three facets of SB 1111 in particular unlawfully inhibit political speech and burden voters in violation of the First, Fourteenth, and Twenty-sixth Amendments to the U.S. Constitution.

The Residence Restriction. First, SB 1111 strikes the common-law definition of residence that previously governed the Election Code and, rather than articulate another affirmative definition of residence, forbids anyone from establishing a residence "for the purpose of influencing the outcome of a certain election" (the "Residence Restriction"). SB 1111 § 1

(amending Tex. Elec. Code § 1.015(b)). This vague prohibition discourages a broad range of constitutionally protected activities. For instance, politically active registrants who have recently moved to Texas from other states may consider which elected officials might represent them or wish to become politically active in certain communities when deciding where they will reside. Candidates or campaign workers may move to new districts to seek elective office or promote an office seeker's candidacy. This commonplace political migration now places voters, candidates, and volunteers at risk of violating Texas law when they exercise their most basic constitutional rights.

The Temporary Relocation Restriction. Next, SB 1111 restricts registration opportunities for students and other Texans who relocate temporarily. The law prohibits individuals from "establish[ing] a residence at any place the person has not inhabited" and "designat[ing] a previous residence as a home . . . unless the person inhabits the place at the time of designation and intends to remain" (the "Temporary Relocation Restriction"). SB 1111 § 1 (adding Tex. Elec. Code § 1.015(f)). Because the Election Code already precludes a person from "acquir[ing] a residence in a place to which the person has come *for temporary purposes only* and without the intention of making that place the person's home," Tex. Elec. Code § 1.015(d) (emphasis added), voters who do not intend to remain in their temporary locations—including and especially Texas's 1.5 million college students—are seemingly precluded from registering to vote altogether.

The Post Office Box Restriction. Finally, SB 1111 imposes onerous voter-identification requirements on registered voters who use post office boxes or other commercial mailboxes to register. These individuals may be denied the right to vote unless they possess (and provide a copy of) one of only six documents containing their residence address: a driver's license, personal

identification card, license to carry a concealed handgun, appraisal district document, utility bill, or tax document. SB 1111 §§ 4–5 (amending Tex. Elec. Code § 15.053(a) and adding Tex. Elec. Code § 15.054). However, like all other registrants, Texans who registered to vote using post office boxes have already attested to their residency under penalty of perjury. *See, e.g.*, *Voter Registration Application*, Tex. Sec'y of State, https://vrapp.sos.state.tx.us/index.asp (last visited Aug. 25, 2021).

II. Plaintiffs challenged SB 1111 by filing suit against the counties where they focus their advocacy efforts—and *not* against Medina County or Real County.

Following the enactment of SB 1111, Plaintiffs filed this lawsuit challenging the new law under the First, Fourteenth, and Twenty-sixth Amendments. *See generally* Compl. for Declaratory & Injunctive Relief, ECF No. 1. Their complaint named as defendants the voter registrars of Travis, Bexar, Harris, Hidalgo, Dallas, and El Paso Counties. *See id.* ¶¶ 22–27. Rather than sue all 254 counties in Texas, which would have burdensomely and unnecessarily expanded these proceedings without serving the interests of Plaintiffs and their constituencies, Plaintiffs instead directed their claims against the officials of only those counties where relief from this Court would have the greatest impact for their community; specifically, the State's most populous counties with large Latino and student populations. *See* Mot. to Intervene as Defs. ("Mot.") 2, ECF No. 48 (noting that "[t]he current named Defendants in this case are election administrators of six of the eight largest counties in Texas"). Proposed Intervenors, by contrast, "are the voter registrars for the sixty-fifth and 218th largest counties in Texas"—Medina County and Real County, respectively. *Id.* at 2, 4. They now seek to intervene as defendants in this case for the expressed purpose of "protect[ing] their rural interests in maintaining and administering their voter rolls." *Id.* at 2.

LEGAL STANDARD

Intervention as of right under Federal Rule of Civil Procedure 24(a)(2) is permitted when

> (1) the motion to intervene is timely; (2) the potential intervener asserts an interest that is related to the property or transaction that forms the basis of the controversy in the case into which she seeks to intervene; (3) the disposition of that case may impair or impede the potential intervener's ability to protect her interest; and (4) the existing parties do not adequately represent the potential intervener's interest.

Saldano v. Roach, 363 F.3d 545, 551 (5th Cir. 2004) (quoting *Doe v. Glickman*, 256 F.3d 371, 375 (5th Cir. 2001)). "Not any interest, however, is sufficient" to satisfy the second requirement; instead, "the interest must be direct, substantial, and legally protectable," "one which the *substantive* law recognizes as belonging to or being owned by the applicant." *Id.* (cleaned up). As for the fourth requirement, if "the would-be intervenor has the same ultimate objective as a party to the lawsuit," then "the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party to overcome the presumption" of adequacy. *Texas v. United States*, 805 F.3d 653, 661–62 (5th Cir. 2015) (cleaned up). "Failure to satisfy any one requirement precludes intervention of right." *Haspel & Davis Milling & Planting Co. v. Bd. of Levee Comm'rs*, 493 F.3d 570, 578 (5th Cir. 2007).

Rule 24(b) generally "provides for permissive intervention when (1) timely application is made by the intervenor, (2) the intervenor's claim or defense and the main action have a question of law or fact in common, and (3) intervention will not unduly delay or prejudice the adjudication of the rights of the original parties." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 n.2 (5th Cir. 1989). More specifically, Rule 24(b)(2) "permit[s] a federal or state governmental officer or agency to intervene if a party's claim or defense is based on . . . a statute or executive order administered by the officer or agency; or . . . any regulation, order, requirement, or agreement issued or made under the statute or executive order." Fed. R. Civ. P. 24(b)(2). Under either provision, "[p]ermissive intervention is at the discretion of the court even

if the potential intervenor satisfies the requirements of Rule 24(b)." *Walker v. Alta Colls., Inc.*, No. A-09-CA-894-LY, 2011 WL 13269547, at *2 (W.D. Tex. Aug. 10, 2011).

ARGUMENT

Proposed Intervenors serve counties that are wholly unaffected by Plaintiffs' suit and can identify no legally protectable interest that will be impaired by this action. They do not administer SB 1111 in Defendants' counties, nor do they possess any interest in dictating how other counties implement voter registration rules. At most, Proposed Intervenors advance a generalized desire to see the law enforced—an interest shared by all Texans, including the existing defendants and the Attorney General, who also seeks intervention—all but confirming that their participation in this case would duplicate arguments, multiply filings, and prolong these proceedings to Plaintiffs' prejudice. The Federal Rules of Civil Procedure, case law, principles of judicial economy, and the strong public interest in ensuring an efficient, timely resolution of this dispute over voter registration rules all point in one direction: intervention should be denied.

I. Proposed Intervenors should not be granted intervention as of right under Rule 24(a)(2).

A. Proposed Intervenors lack a legally protectable interest that will be impaired by this action.

None of the purported interests described by Proposed Intervenors in their motion comes close to constituting a "direct" and "substantial" interest in the limited subject of Plaintiffs' suit. *Saldano*, 363 F.3d at 551.

Proposed Intervenors first suggest that the outcome of this lawsuit will impact their abilities to maintain voter rolls and enforce voter registration rules in Medina and Real Counties, but as election officials "responsible for voter registrations in their respective rural counties" only, Mot. 2, those interests are unrelated to this lawsuit. Registrars Torres and Pendley have not been named as defendants; Plaintiffs have not sought injunctive relief against them; and their motion

makes no serious attempt to explain how any of their election administration efforts could be impaired by this case. *See id.* at 8.

What Proposed Intervenors identify as protectable legal interests are simply misunderstandings of the law. An injunction against the named defendants would not bind all 254 counties in the State. Despite Proposed Intervenors' vague references to prejudice and res judicata, they cite no authority for the proposition that a court may order injunctive relief against nonparties under these circumstances. *Cf. Waffenschmidt v. MacKay*, 763 F.2d 711, 717 (5th Cir. 1985) (exploring limited situations when injunctions can bind nonparties). Nor do they explain how future claims would be "jeopardized or impaired . . . by the outcome of the current litigation" or otherwise demonstrate how this lawsuit poses any threat to their legally protected interests. *Am. Stewards of Liberty v. Dep't of Interior*, No. 1:15-CV-1174-LY, 2016 WL 11272149, at *1 (W.D. Tex. Apr. 26, 2016) (denying intervention as of right). In fact, the opposite is true: the *only* way this case could impair the interests of the voter registrars of Medina and Real Counties is if they joined it. *See Parklane Hosiery, Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979) ("Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit *involving the same parties* or their privies based on the same cause of action." (emphasis added)).[1]

Proposed Intervenors are simply wrong when they claim that "an unfavorable judgment against the named defendants could be binding as precedent within the Western District," and thus

[1] For this reason, Proposed Intervenors' reliance on *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994), is wholly misplaced. As they observe, in that case "the court held that the association's interest would be impaired if not allowed to intervene because, as a practical matter, the interpretation of the regulation would affect the association's ability to collect timber." Mot. 9; *see also Sierra Club*, 18 F.3d at 1207 (finding this requirement satisfied where proposed intervenors "have *legally protectable property interests* in existing timber contracts that are threatened by" outcome of lawsuit (emphasis added)). Here, by contrast, Proposed Intervenors have no analogous legally protectable interest, since no ruling from this Court could implicate their enforcement of SB 1111 in their own counties.

they would "not be able to address the consequence of Plaintiffs[']s claims on their counties unless allowed to intervene." Mot. 8. A ruling from this Court would not bind other judges in the U.S. District Court for the Western District of Texas or anywhere else. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (quoting 18 J. Moore et al., *Moore's Federal Practice* § 134.02(1)(d) (3d ed. 2011))). And even if it did, Proposed Intervenors cite no authority suggesting that the prospect of binding legal precedent that might be used against them at some point in the future constitutes an interest sufficient to warrant intervention. Mere "[s]peculation that granting relief in this case might affect" Proposed Intervenors in future litigation is not a "direct, substantial, legally protectable interest" in *these* proceedings. *Russell v. Harris County*, Civil Action No. H-19-226, 2020 WL 6784238, at *3 (S.D. Tex. Nov. 18, 2020) (quoting *Texas v. U.S. Dep't of Energy*, 754 F.2d 550, 552 (5th Cir. 1985)) (denying intervention as of right).

Without a stake in this lawsuit, Proposed Intervenors resort to a generic appeal for uniformity across counties. *See* Mot. 8. But Real and Medina Counties lack a cognizable interest in the enforcement or administration of the Election Code in other jurisdictions. *Cf., e.g.*, *KERM, Inc. v. FCC*, 353 F.3d 57, 58 (D.C. Cir. 2004) (explaining that "a generalized interest in the faithful enforcement of the law" is not particularized injury that confers Article III standing). And because it is not a cognizable right, the generalized desire to see laws enforced elsewhere is not a permissible ground for intervention.

Indeed, uniformity is not even required under Texas law in many instances—including the administration of elections. As Proposed Intervenors themselves acknowledge, the Texas Election Code "recognizes the differences between large counties and small counties" and imposes different

rules and procedures on different counties depending on their size. Mot. 4. To the extent the Election Code does require uniformity, the Secretary of State is charged with obtaining it, *see* Tex. Elec. Code § 31.003, and the Attorney General—who has also moved to intervene in this matter to represent the interests of the State, *see infra* Part I.B—is tasked with ensuring that criminal penalties are enforced, *see* Tex. Elec. Code § 273.021. Thus, denying intervention will not prejudice Real and Medina Counties no matter the outcome of this suit—their enforcement of SB 1111 will be unaffected either way—and it certainly will not result in the "chaos" they allege or even a significant departure from the State's intentionally decentralized election system. *See, e.g.*, *Lightbourn v. County of El Paso*, 118 F.3d 421, 428 n.7 (5th Cir. 1997) (describing "the decentralized nature of the Texas election system"); Brief for Defendant-Appellant at 3–4, *Tex. Democratic Party v. Hughs*, No. 20-50667 (5th Cir. Oct. 26, 2020) (brief of Secretary of State emphasizing that "[v]oter registration in Texas is handled at the county level").

In sum, this lawsuit will have no effect on Proposed Intervenors' enforcement of SB 1111 in their own counties. They are not persons concerned with the outcome of this litigation in any legally cognizable sense; inviting them into this case would certainly not serve the interest of efficiency; and they have not demonstrated that any of their legally protectable interests could be impaired or impeded by this litigation.

B. Proposed Intervenors' purported interests are adequately represented by the existing parties.

Even if Proposed Intervenors' interest in enforcing election laws were implicated in this case, that interest is shared with and adequately represented by not only Defendants, but also the Attorney General, who has moved to intervene for the exact same reason as Proposed Intervenors: to defend the constitutionality of SB 1111.

"[W]hen the party seeking to intervene has the same ultimate objective as a party to the suit, the existing party is presumed to adequately represent the party seeking to intervene unless that party demonstrates adversity of interest, collusion, or nonfeasance." *Kneeland v. NCAA*, 806 F.2d 1285, 1288 (5th Cir. 1987). Proposed Intervenors have identified no such collusion or nonfeasance. They suggest that "[w]hile all counties desire accurate voter rolls, the smaller [] counties [they] administer have a unique interest in maintaining their accuracy," Mot. 10, but never explain why Defendants would have any less of an interest in the accuracy of their counties' voter rolls.[2] Nor, for that matter, do Proposed Intervenors explain why "the vast size difference between the current named Defendants and" themselves, Mot. 2; *see also id.* at 10, or the fewer resources they have to administer elections, *see id.* at 4, 10, has any impact on the enforcement of SB 1111 in Defendants' counties or Defendants' ability to represent these interests.

Moreover, Proposed Intervenors' desire to "defend[] the constitutionality of SB 1111," *id.* at 8, is not the type of interest that warrants their intervention. Federal law expressly authorizes *the State itself*, and not merely any concerned bystander, to fulfill that role and intervene where, as here, the constitutionality of a state law is challenged and "the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity." Fed. R. Civ. P. 5.1(a)(1)(B); *see also* 28 U.S.C. § 2403(b). Consistent with these rules, the Attorney General has moved to intervene in this matter, and Proposed Intervenors' motion makes plain that their interest in defending SB 1111 is materially indistinguishable from that of the State and its top law

[2] Proposed Intervenors suggest only that "[a]n incorrectly registered voter in Real County is much more likely to decide an election than an incorrectly registered voter in Harris County because the single voter in Real is a much larger percentage of the electorate," and thus that larger counties will tolerate a greater degree of inaccuracy. Mot. 10. But presumably Defendants, charged with safeguarding their respective voter rolls, take their official responsibilities no less seriously than Proposed Intervenors—regardless of the sizes of their counties.

enforcement officer. *See generally* Tex. Att'y Gen. Ken Paxton's Mot. to Intervene, ECF No. 53; *see also Del Bosque v. AT&T Advert. L.P.*, No. A-08-CA-402-LY, 2010 WL 55962, at *2 (W.D. Tex. Jan. 4, 2010) (report and recommendation finding that "the 'inadequacy of representation' requirement is not met" where existing party to litigation "has at least as strong an interest, if not a stronger one, than" proposed intervenor in outcome of case). Having failed to identify a single interest that is not shared or adequately represented by existing litigants, Proposed Intervenors are not entitled to intervene as of right.[3]

II. Proposed Intervenors should not be granted permissive intervention under Rule 24(b).

Proposed Intervenors' participation in this matter would unnecessarily duplicate arguments, multiply filings and discovery, and prolong litigation proceedings without aiding the Court's disposition of Plaintiffs' claims.

Proposed Intervenors rely on Rule 24(b)(2), which authorizes intervention "by a government officer or agency when the 'party's claim or defense is based on a statute or executive order administered by the officer or agency.'" Mot. 10 (quoting Fed. R. Civ. P. 24(b)(2)). Setting aside the fact that, again, they administer SB 1111 in only Medina and Real Counties and not any of the six counties in which Plaintiffs actually seek relief, the Court may exercise its discretion to deny permissive intervention, *see* Fed. R. Civ. P. 24(b)(3)—particularly where, as here, the intervenors' interests are adequately represented and adding more parties to the case will unnecessarily duplicate efforts. *See Walker*, 2011 WL 13269547, at *2 (denying permissive intervention where it would "require the taking of additional discovery" and "result in a further delay in these proceedings and prejudice to Defendants, including additional attorney's fees and

[3] Plaintiffs do not dispute that Proposed Intervenors' motion is timely.

legal expenses"). That is precisely the risk posed by expanding this lawsuit to include Proposed Intervenors and any counties that attempt to follow suit.

Plaintiffs must balance the needs of their constituents with the towering burden of litigating against individual counties to enforce their most fundamental constitutional rights. *See Tex. Democratic Party*, 2021 WL 2310010, at *2–4 (concluding that Secretary of State "lacks sufficient connection to the enforcement of" voter registration rule to seek statewide relief against her); *Mi Familia Vota v. Abbott*, 977 F.3d 461, 467–69 (5th Cir. 2020) (explaining that "an injunction must be directed to those who have the authority to enforce those statutes," who, in context of election rules, "would be county or other local officials"). Accordingly, Plaintiffs, as the masters of their complaint, chose to seek relief against election officials from six of the largest counties in the State. *See* Mot. 2; *see also Lincoln Prop. Co. v. Roche*, 546 U.S. 81, 91 (2005) ("In general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue." (quoting 16 J. Moore et al., *Moore's Federal Practice* § 107.14(2)(c) (3d ed. 2005))). But with the crowding of additional parties, litigation becomes more complex, expensive—in some cases, even cost prohibitive—and takes longer at every step. Briefing schedules become more complicated, the number of pages that the parties and the Court must contend with in filings become multiplied, scheduling becomes more difficult, and negotiating even basic stipulations becomes even more time-consuming. During discovery, additional intervenors result in duplicative depositions, discovery requests, and document productions. In a case involving the right to vote and engage in political speech, where time is of the essence and the existing litigants already represent the pertinent interests, intervention by unnamed counties is not appropriate and should be denied. *See, e.g.*, *Resolution Tr. Corp. v. City of Boston*, 150 F.R.D. 449, 455 (D. Mass. 1993) (concluding that "[e]ven if the Commonwealth does qualify for

permissive intervention under" earlier version of Rule 24(b)(2), "it has presented no creditable argument that its status as an intervenor-defendant would in any way reshape the issues in this case or contribute to its just resolution" and thus "has not shown any justification for the delay and added demands on resources of the court and the parties that its intervention would be likely to cause").

CONCLUSION

For the foregoing reasons, Proposed Intervenors' motion should be denied.

Dated: August 25, 2021.

Respectfully submitted,

/s/ John R. Hardin

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule CV-7(D)(3), counsel for Plaintiffs certifies that this opposition brief does not exceed 20 pages, exclusive of the caption, the signature block, any certificate, and any accompanying documents.

/s/ John R. Hardin
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