

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,

And

KEN PAXTON, in his official capacity of  
Attorney General of Texas,

[Proposed] Intervenor-Defendant.

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

**REPLY IN SUPPORT OF TEXAS ATTORNEY GENERAL  
KEN PAXTON'S MOTION TO INTERVENE<sup>1</sup>**

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<sup>1</sup> Defendant Lisa Wise filed a responsive pleading nearly identical to the Plaintiffs' and raised the identical issue Plaintiffs raised. *See* ECF 65. To avoid unnecessary duplication, OAG contends that this response fully addresses the issue raised both by Plaintiffs and Defendant Wise, and therefore, unless directed by the Court, will not submit separate briefing to address Defendant Wise's tag-along response.

Plaintiffs filed a response to the Texas Attorney General Ken Paxton's (OAG) Motion to Intervene on September 25, 2021. In that response, Plaintiffs Texas State LULAC and Voto Latino (Plaintiffs) claim confusion about whether an intervention by the Office of the Attorney General is equivalent to an intervention by the State of Texas. ECF 61 at 2. Intervention is appropriate regardless of whether the proposed caption says, "Ken Paxton, in his official capacity," or "State of Texas." *See Rayborn v. Bossier Parish Sch. Bd.*, 881 F.3d 409, 417 (5th Cir. 2018) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985), for the proposition that "suits against officials in their official capacities 'generally represent only another way of pleading an action against an entity of which an officer is an agent'"). Plaintiffs helpfully prove the point by noting that the Texas Attorney General has intervened under both the official capacity of the Texas Attorney General and as the State of Texas. ECF 61 at 2-3 n. 1. Courts grant such motions to intervene, regardless of how the caption reads.<sup>2</sup> That is not surprising. Federal Rule of Civil Procedure 5.1, which "implements 28 U.S.C. § 2403," expressly authorizes intervention by "the attorney general." Fed. R. Civ. P. 5.1(c) & adv. comm. notes.

The caption makes no difference to Plaintiffs' claims. By defending local officials, who are obligated to follow state law, from Plaintiffs' constitutional claims, neither OAG nor the State of Texas would itself become subject to Plaintiffs' claims. In other words, intervention would not transform OAG or the State 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).

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<sup>2</sup> *See, e.g., Landry v. Cypress Fairbanks Indep. Sch. Dist.*, No. 4:17-cv-3004 (S.D. Tex. Sept. 25, 2018), ECF 48 (allowing the "State of Texas" to intervene); *Valentine v. Smith*, No. 1:04-cv-265 (N.D. Tex. July 19, 2005), ECF 52 (allowing "The State of Texas" to intervene); *Zen Music Festivals, L.L.C. v. Stewart*, No. 3:02-cv-1998 (N.D. Tex. Sept. 18, 2002), ECF 14 (allowing "The Attorney General of Texas" to intervene); *Gibson v. Dallas County Educ. Dist.*, No. 3:92-cv-2388 (N.D. Tex. Feb. 2, 1993), ECF 20 (granting "motion to intervene . . . by Texas Atty Gen" on docket labelling the intervenor-defendant as "Attorney General of Texas"). The same is true in other States. *See Doe No. 1 v. Putnam County*, No. 7:16-cv-8191 (S.D.N.Y. Dec. 5, 2017), ECF 49 (granting a motion to intervene and listing "State of New York Attorney General" as the intervenor); *RI Cogeneration v. East Providence*, No. 1:89-cv-327 (D. R.I. Jan. 4, 1990), ECF 29 (granting "motion to Intervene by Attorney General RI" and labelling the movant "Attorney General for the State of Rhode Island").

Intervening does not 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 or equitable relief. *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**

The Court should grant OAG’s motion.

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Dated: August 31, 2021

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Respectfully submitted.

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**CERTIFICATE OF SERVICE**

I certify that on August 31, 2021, this document was served through the Court's CM/ECF

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