

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

TEXAS STATE LULAC; VOTO LATINO, §  
*Plaintiff,* §

v. §

Civil No. 1:21-CV-00546-LY §

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.* §

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

TO THE HONORABLE LEE YEAKEL:

Defendants agree with the substance of Plaintiffs' lawsuit, decline to defend the case, or unnecessarily make admissions that waive potential defenses. Defendants are unwilling to defend this lawsuit, which is a primary reason why the Court should grant Intervenor-Defendants' Motion to Intervene (Dkt. 62). Plaintiffs' Response makes two incorrect assumptions: one in fact and one in law. First, Plaintiffs make the factual mistake that the current Defendants will vigorously defend the suit. *See e.g. id.* at p. 3. But Defendants recently filed Answers make clear that they have no interest in defending SB 1111. *See e.g. Dkt. 52* at p. 1 ("Defendant Elfant does not intend to defend the constitutionality of S.B. 111's provisions.")

Second, Plaintiffs allege their proposed relief only affects the election officials in the named counties. Their position is contrary to the law. A ruling from this court or a ruling from the Fifth Circuit that SB 1111 is unconstitutional would likely be binding on the elections administrators of Medina and Real Counties. *See e.g. Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 829 (5th Cir. 1967) (finding that intervenors would be prejudiced if not allowed to intervene because any holding on the legal issues would effectively preclude future review).

Currently, no Defendant intends to defend SB 1111. As Defendant-Intervenors will likely be stuck with the outcome of this case, their motion to intervene should be granted.

**I. DEFENDANTS DO NOT INTEND TO DEFEND THE CONSTITUTIONALITY OF SB 1111.**

After Intervenor-Defendants filed their motion to intervene, Defendants filed their Answers to the Complaint. Their Answers are clear: none intend to defend the constitutionality of SB 1111. Their intentions are not hidden. Defendants in some cases admit Plaintiffs' allegations or, in other cases, state that they refuse to defend the suit. The individual answers are instructive:

**Travis County (Dkt. 52)**

Mr. Elfant twice states the obvious, “Defendant Elfant does not intend to defend the constitutionality of S.B. 1111’s provisions.” *Id.* at p. 1. And “Defendant Elfant...does not intend to defend the constitutionality of this statute.” *Id.* at ¶ 79. Mr. Elfant asserts that he cannot be forced to pay attorneys’ fees but raises no defenses to the merits of the suit. *Id.*

**Bexar County (Dkt. 57)**

Ms. Callanen fails to raise a single defense to the suit. *See id.*

**Harris County (Dkt. 58)**

Ms. Longoria may best example of the pretextual nature of this suit. Like Ms. Callanen and Mr. Elfant, Ms. Longoria does not present a single defense to the suit and essentially admits the elements of each claim. Out of 78 total paragraphs in the complaint, Ms. Longoria unequivocally admits all but 15. As an example, Ms. Longoria admits without explanation that “SB 1111 is not justified by any compelling or even legitimate state interests.” *Id.* at ¶ 11. Ms. Longoria herself alleges that “passing highly restrictive voting laws was a Legislative priority during the 87th, Texas Legislature.” *Id.* at ¶ 3. Ms. Longoria opines on the noble intent of the Plaintiffs, “Defendant admits that all Texans should have equal access to the ballot box as guaranteed by the U.S. Constitution, and Plaintiffs file this lawsuit with that intention.” *Id.* at ¶ 12. Finally, Ms. Longoria admits allegations that she concedes she need not address in an Answer, “The allegations of Paragraph 66 consist of legal conclusions that are not subject to admission or denial. To the extent a further response is required, Defendant admits the allegations in Paragraph 66 of the Complaint.” *Id.* at ¶ 66 (*see also* ¶¶ 67, 68, 75-78).

**Hidalgo County (Dkt. 55)**

Ms. Ramón also declines to defend this suit plainly stating, “Defendant takes no position on the constitutionality of the challenged provision of SB 1111.” *Id.* at p. 1. Like others, Ms.

Ramón does not raise a defense to the suit other than asserting that the recovery of attorneys' fees is barred. *Id.* at p. 9.

**Dallas County (Dkt. 54)**

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’ claims against him occurred and will occur in this district.” *Id.* at ¶ 16. 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.

**El Paso County (Dkt. 56)**

Finally, Ms. Wise, also does not intend to defend this suit. Ms. Wise responds to several allegations in the Counts with, “Notwithstanding, Defendant Wise avers that SB 1111 imposes administrative burdens on El Paso County and on voters that are not necessary to conduct secure elections and that may suppress lawful voter turnout.” *Id.* at ¶ 55-60, 62-64, 69-73, 78. Ms. Wise does not raise any defenses that address the constitutionality of SB 1111. Instead, her defenses are limited to avoiding attorneys’ fees and laying the blame at third parties. *Id.* at p. 15.

**II. A DECISION BY THIS COURT THAT SB 1111 IS UNCONSTITUTIONAL WOULD LIKELY BIND THE INTERVENOR-DEFENDANTS.**

Plaintiffs’ opposition rests in large part on their argument that their proposed relief only effects the elections officials in the counties they have sued. But Plaintiffs seek a blanket declaration that SB 1111 is unconstitutional. Obviously, a declaration from this Court – in the Western District of Texas where both Medina and Real counties sit – that SB 1111 is unconstitutional would potentially bind the Intervenor-Defendants. Even if a ruling from this Court were not binding on Intervenor-Defendants, a Fifth Circuit holding most likely would be. And Plaintiff-Intervenors would have little ability to intervene later at the appellate stage.

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.*

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

Even if Plaintiffs are correct that their case would only bind the current Defendants in this case – a dubious proposition at best – they ignore the implications of that position. Only some elections are wholly 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.<sup>1</sup> The Texas Fourth Court of Appeals encompasses 32 counties, including Bexar, Medina, and Real Counties.<sup>2</sup> Under Plaintiffs’ view, if this Court were to find SB 1111 unconstitutional, then Bexar County’s elections administrator Ms. Callanen would administer the election for Texas Senate or appellate court under different rules than the administrators of Medina, Real, and the other counties. This is an obvious problem that supports intervention in this case.

### **IV. PLAINTIFFS APPEAR TO HAVE CHOSEN POLITICALLY ALIGNED COUNTIES RIGHTLY ASSUMING THEY WOULD NOT DEFEND.**

Plaintiffs allege they “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

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

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

State’s most populous counties with large Latino and student populations.” Dkt. at p. 5. But Defendants are not the largest counties. Plaintiffs only sued six of the eight largest counties. *See* Dkt. 42 at p. 2. Tarrant County is Texas’ third largest county and has large student populations at Texas Christian University and Texas Wesleyan University among others. Likewise, Collin County, the sixth largest county in Texas, also has multiple universities including Collin College, Dallas Baptist University, and the University of Texas at Dallas. Both counties also have substantial Latino populations (Tarrant County is 29.5% and Collin County is 15.5%) and Medina (52.6%) and Real (27.8%) are even greater.<sup>3</sup>

The apparent difference between the Defendants and the counties that were not sued is the counties’ partisan leanings. Each of the counties where Defendants serve as election administrators voted for President Biden in the 2020 elections.<sup>4</sup> Counties that voted for President Trump (including large counties Tarrant and Collin and small counties Medina and Real) were not sued.<sup>5</sup> It is clear that Plaintiffs purposefully chose to sue majority Democrat voting counties, who have now made clear that they will not offer a defense, but do not want counties who will defend the case. This gamesmanship should not be rewarded by denying Defendant-Intervenor’s intervention motion.

## V. CONCLUSION

For the foregoing reasons, Defendant-Intervenors’ motion to intervene (Dkt. 42) should be granted.

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<sup>3</sup> <https://www.census.gov/quickfacts/fact/table/realcountytexas,medinacountytexas,tarrantcountytexas,collincountytexas/PST045219> (last accessed 8/31/2021.)

<sup>4</sup> <https://www.politico.com/2020-election/results/texas/> (last accessed 8/31/2021)

<sup>5</sup> *Id.*

Respectfully submitted,

/s/Robert Henneke

ROBERT HENNEKE

Texas Bar No. 24046058

[rhenneke@texaspolicy.com](mailto:rhenneke@texaspolicy.com)

CHAD ENNIS

Texas Bar No. 24045834

[cennis@texaspolicy.com](mailto:cennis@texaspolicy.com)

CHANCE WELDON

Texas Bar No. 24076767

[cweldon@texaspolicy.com](mailto:cweldon@texaspolicy.com)

TEXAS PUBLIC POLICY FOUNDATION

901 Congress Avenue

Austin, Texas 78701

Telephone: (512) 472-2700

Facsimile: (512) 472-2728

*Attorneys for Intervenor-Defendants*

### **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was filed electronically on September 1, 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