

UNITED STATES DISTRICT COURT
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; MICHAEL SCARPELLO, in his official capacity as the Dallas County Elections Administrator,

Defendants.

Case No. 5:21-cv-649-JKP-HJB

JOINT RULE 26(f) REPORT

TO THE HONORABLE HENRY J. BEMPORAD:

Plaintiff VOTE.ORG and Defendants 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, by and through their undersigned counsel, have conferred as required by Federal Rule of Civil Procedure 26(f) and now respectfully file this Joint Report.

Plaintiff and Defendants conferred on September 9, 2021, while the Motion to Intervene as Defendants by Medina County Elections Administrator Lupe C. Torres and Real County Tax Assessor-Collector Terrie Pendley (the "Counties' Motion"), *see* ECF No. 26, and Texas Attorney General Ken Paxton's Motion to Intervene (the "Attorney General's Motion"), *see* ECF No. 27,

were pending. Plaintiff opposed the Counties' Motion, *see* ECF No. 38. Because no parties objected to the Attorney General's Motion, the Attorney General was included in the conference for scheduling purposes. Because the Counties' Motion was opposed, they were not included in the conference. Should the Court grant the Counties' Motion, Plaintiff and Defendants will address the issues below with them.

1. What are the causes of action, defenses, and counterclaims in this case? What are the elements of the cause(s) of action, defenses, and counterclaims pled?

Plaintiff: Plaintiff challenges Section 14 of House Bill 3107 ("HB 3107) under the Civil Rights Act of 1964 and the First and Fourteenth Amendments to the U.S. Constitution.

Section 14 of HB 3107 requires voters to sign their registration applications with original, wet signatures (the "Wet Signature Rule"). Because the manner by which a voter affixes their signature to a voter registration application is immaterial to determining whether an elector is qualified to vote in Texas, the Wet Signature Rule violates the Civil Rights Act. In addition, because the Wet Signature Rule serves no legitimate, let alone compelling, governmental interest, the burdens they impose on voters—including individuals who Plaintiff assists with their voter registration—violate the First and Fourteenth Amendments to the U.S. Constitution.

Statement of the Issues:

1. Whether the Wet Signature Rule violates the Civil Rights Act.
2. Whether the Wet Signature Rule unduly burdens the right to vote in violation of the First and Fourteenth Amendments.

Defendant Callanen: Defendant Callanen has been sued in her official capacity only and does not assert any counterclaims. Defendant Callanen denies that her actions have violated any state or federal laws, and does not believe that Plaintiff is entitled to any recovery of costs or attorneys' fees from her or from Bexar County. Defendant Callanen reserves the right to raise any additional defenses that may become apparent throughout the factual development of this case.

Defendant Elfant: Defendant Elfant has been sued in his official capacity only and does not assert any counterclaims. Defendant Elfant denies that his actions have violated any state or federal laws, and does not believe that Plaintiff is entitled to any recovery of costs or attorneys' fees from him or from Travis County. Defendant Elfant reserves the right to raise any additional defenses that may become apparent throughout the factual development of this case.

Defendant Garza: Defendant Garza has been sued in his official capacity only. Defendant Garza has filed and is awaiting a ruling on his Rule 12(b)(1) Motion to Dismiss. Subject to the motion, Defendant Garza denies that his actions have violated any state or federal laws and denies that Plaintiff is entitled to any recovery of costs or attorney fees. If his Motion to Dismiss is denied,

Garza reserves the right to raise any appropriate legal defenses and counterclaims that may be supported by the facts developed in this case.

Defendant Scarpello: Plaintiff avers that HB3107 violates the First and Fourteenth, Amendments to the U.S. Constitution and Section 1971 of the Civil Rights Act of 1964, including by imposing an undue burden on voters. Defendant Scarpello denies that he has violated any state or federal laws or any rights secured by the Constitution. Defendant Scarpello contends that he is not empowered or authorized to change Texas law as passed by the Texas Legislature and signed by the Governor. Defendant Scarpello also is not afforded discretion in the enforcement or implementation of HB3107. Defendant Scarpello contends that he should be entitled to 11th amendment immunity to the extent that he is enforcing/applying state law as to HB3107. Defendant Scarpello further contends that the dispute over HB3107 should be between Plaintiff and the State/Attorney General and the case against Defendant Scarpello and the other counties be limited at this phase until a resolution of the constitutionality of HB3107. Defendant Scarpello asserts that sovereign immunity and/or equity and justice bar Plaintiff's recovery of attorneys' fees from Defendant. Defendant Scarpello reserves the right to raise any additional defenses that may become apparent throughout the factual development of this case.

2. Are there any outstanding jurisdictional issues?

Defendant Remi Garza has challenged the Court's subject matter jurisdiction to adjudicate the claims at-issue in this lawsuit. Defendant's Motion to Dismiss filed September 7, 2021, is pending before the Court. Plaintiff's response was filed September 21, 2021.

There are no outstanding disputes between the Plaintiff and the remaining Defendants over the Court's subject matter jurisdiction to adjudicate the claims at-issue in this lawsuit, or relating to the Court's personal jurisdiction over the current parties. Defendants assert sovereign immunity and/or qualified immunity in response to Plaintiff's request for recovery of attorneys' fees, which may implicate this Court's subject-matter jurisdiction to grant such relief.

3. Are there any unserved parties? If more than 90 days have passed since the filing of the Complaint or petition, should these unserved parties be dismissed?

There are no unserved parties. There are two pending motions to intervene: the Counties' Motion, *see* ECF No. 26, and the Attorney General's Motion, *see* ECF No. 27.

4. Are there any agreements or stipulations that can be made about any facts in this case or any element in the cause(s) of action?

As of this date, the parties have not agreed to any stipulations.

However, this case implicates the right to vote and all parties have agreed that trial in this matter should be expedited to the greatest extent possible to permit a resolution of the issues concerning the constitutionality of HB 3107 well in advance of the upcoming voter registration deadlines and 2022 elections. Accordingly, the parties ask that a trial date be set in early Spring 2022.

5. Are there any legal issues in this case that can be narrowed by agreement or by motion?

As of this date, the parties have not agreed that any legal issues in this case can be narrowed by agreement or by motion.

However, the parties agree that this case is not appropriate for alternative dispute resolution and ask that Rule CV-88 of the Local Rules of the Western District of Texas be waived. The parties agree that they shall not be required to object nor to file a report on the case's suitability for alternative dispute resolution.

6. Are there any issues about preservation of discoverable information?

As of this date, there are no known issues regarding the preservation of discoverable information.

7. Are there any issues about disclosure or discovery of electronically stored information? In what forms should electronically-stored information be produced and will production include metadata?

Subject to Defendants' compliance with applicable state and federal laws, the parties have agreed to produce documents in electronic form. The parties agree to—at minimum—produce Documents in their native format with all metadata intact.

The parties agree that, to the extent it is reasonable and not unduly burdensome, all productions shall be unitized, meaning that any documents produced in Portable Document Format ("PDF") shall be produced as individual, Bates numbered documents and not as a single, combined PDF. The parties further agree that documents produced in single-page Tagged Image File Format ("TIFF"), together with any related field-delimited load files (e.g., Concordance DAT, CSV, OPT, LOG), are similarly acceptable. Should Defendants believe such a production is unduly burdensome, Defendants will confer with Plaintiff in advance of the production.

Notwithstanding the foregoing, the parties may negotiate a separate production format (including native format) for any documents that are not reasonably producible or readable as standard image files, such as audio files or large spreadsheets.

Defendant Scarpello objects to producing discoverable information in an electronic and searchable format unless that is the native form and it is not unduly burdensome to produce same. Defendant Garza, who has a pending Motion to Dismiss and will produce discovery if his motion is denied, objects to producing discoverable information in an electronic and searchable format unless that is the native form and it is not unduly burdensome to produce the same. Plaintiff objects to Defendant Garza's refusal to produce discoverable information until the Court issues a ruling on his Motion to Dismiss—the status of Defendant Garza's Motion to Dismiss does not absolve him of his discovery obligations.

The parties agree to confer and negotiate in good faith to seek agreement on amendments or revisions to the above protocols for producing electronically stored documents when necessary to avoid undue burden or cost.

8. What are the subjects on which discovery may be needed?

Plaintiff: Plaintiff plans to seek discovery regarding voter registration, the use of voter signatures on voter registration applications, and enforcement of the Wet Signature Rule.

Defendant Callanen: Defendant Callanen has not been able to determine all subjects on which discovery may be needed at this time, but reasonably anticipates that the parties will retain expert witnesses to review voter information data obtained from various sources, primarily from the Secretary of State's office.

Defendant Elfant: Defendant Elfant has not been able to determine all subjects on which discovery may be needed at this time, but reasonably anticipates that the parties will retain expert witnesses to review voter registration and/or voter information data obtained from various sources, including from the Secretary of State's office.

Defendant Garza: Defendant Garza is pending a ruling on his Motion to Dismiss. If his motion his motion is denied, Garza reserves the right to discover all evidence in support of Plaintiff's claims including voter registration and/or voter information data obtained by Plaintiff and the basis for any expert opinions and conclusions.

Defendant Scarpello: *See* Paragraph 10. Defendant Scarpello is unable to determine the full scope of any needed discovery at this time. However, Defendant Scarpello anticipates that the parties will retain expert witnesses to review voter information data, including from non-parties such as the Texas Secretary of State, to rebut Plaintiff's claims that Defendants violated any state or federal laws or the Constitution. If necessary, Defendant Scarpello anticipates conducting discovery on Plaintiff's attorney fees claims.

9. Have initial disclosures been made? If not, should any changes be made in the timing, form, or requirement for initial disclosures?

All parties, except for Defendant Garza, have made their initial disclosures. Defendant Garza will make initial disclosure within ten days of any ruling denying his Motion to Dismiss. Plaintiff objects to Defendant Garza's unilateral extension of the deadline for production of his initial disclosures.

10. What, if any, discovery has been completed? What discovery remains to be done and when should it be completed? Have the parties considered conducting discovery in phases or agreeing to limit discovery?

Plaintiff has sought limited discovery from each Defendant in the form of Requests for Production of Documents regarding enforcement of Section 17 of HB 3107, voter registration, and the use of electronic signatures on voter registration applications. In total, Plaintiff has served one set of Interrogatories, containing 8 questions, and one set of Requests for Production, containing 5 requests. As Plaintiff seeks limited discovery, at this time, other than Defendant Scarpello, no party has proposed phased discovery, nor has any party proposed substantive limitations on discovery. Defendant Scarpello objects to Plaintiff's characterization of discovery as limited.

Defendant Scarpello requests that the Court limit the scope of discovery to information related to the implementation and enactment of HB3107 by Dallas County. Plaintiff has sought broad discovery seeking, *inter alia*, rejection of voter applications from September 2018 and the number of voter registrations from the TXDPS since 2016.

11. What, if any, discovery disputes exist?

Plaintiff contends that, under 28 U.S.C. § 2403(b), the Attorney General's participation in this case is "*limited* to presenting evidence and arguments in support of the constitutionality of the statute." *Vietnamese Fishermen's Ass'n v. Knights of Ku Klux Klan*, 543 F. Supp. 198, 215 n.17 (S.D. Tex. 1982) (emphasis added). Accordingly, the Attorney General is precluded from seeking discovery from any party in this case that is unrelated to the constitutionality of HB 3107.

The Attorney General, whose Motion to Intervene is currently pending, participated in the Rule 26(f) conference, and disagrees with Plaintiff's characterization of the Attorney General's role and rights under 28 U.S.C. § 2403(b) and argues that the Attorney General has the same rights as any party.

Defendant Scarpello refers the Court to Paragraph 10.

Currently, there are no discovery disputes between Plaintiff and the other Defendants except for Defendant Garza who has filed a Motion to Dismiss based on Rule 12(b)(1) jurisdictional grounds. Discussions regarding potential confidentiality issues are detailed below.

12. Have the parties discussed the desirability of filing a proposed order pursuant to Federal Rule of Evidence 502?

The parties have considered filing a proposed order pursuant to Federal Rule of Evidence 502 and may address protections under Federal Rule of Evidence 502 in a proposed confidentiality and protective order.

13. Have the parties discussed early mediation?

The parties agree that this case is not appropriate for early mediation or alternative dispute resolution and ask that Rule CV-88 of the Local Rules of the Western District of Texas be waived. The parties agree that they shall not be required to object nor to file a report on the case's suitability for alternative dispute resolution.

14. Have the parties considered seeking entry of a confidentiality and protective order and are there any other scheduling or discovery items requiring the court's attention?

Plaintiff seeks certain information related to voter participation and demographics, including voter's addresses.

Defendants Elfant and Scarpello have concerns about producing voter addresses for individuals who are entitled, as a matter of law, to have such information redacted from their voter information profiles, including, but not limited to, judges and law enforcement officers.

Defendant Garza is awaiting a ruling on his Motion to Dismiss. If his motion is denied, Defendant Garza agrees to confer and negotiate in good faith on potential joint protective orders as may be appropriate.

The parties agree to confer and negotiate in good faith to reach agreement on a joint proposed protective order where necessary to protect confidential information.

Dated: October 18, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically on October 18, 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/ Kathryn E. Yukevich
Kathryn E. Yukevich

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