

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

COMMON CAUSE INDIANA,

Plaintiff

v.

CONNIE LAWSON, in her official capacity as
Secretary of State of Indiana, J. BRADLEY
KING, in his official capacity as Co-Director of
the Indiana Election Division, and ANGELA M.
NUSSMEYER, in her official capacity as Co-
Director of the Indiana Election Division,

Defendants

Case Number 1:17-cv-3936

**REPLY MEMORANDUM SUPPORTING THE PUBLIC INTEREST LEGAL
FOUNDATION'S MOTION TO INTERVENE AS DEFENDANT**

The Public Interest Legal Foundation (the "Foundation"), by and through undersigned counsel, respectfully submits the following memorandum of points and authorities in support of its motion for leave to intervene in this case and in reply to Plaintiff's opposition memorandum filed on November 30, 2017.

A. The Foundation Has a Direct and Substantial Interest in this Action.

The Foundation has a direct, significant, and legally protectable interest in this case that warrants intervention as a matter of right. Counties in Indiana currently have a chronic problem with bloated voter registration lists. Fully, 23 counties in Indiana have more registrants than they have citizens of voting age. Defendants have no cause to alert the Court to these facts or discuss their connection to the challenged law and, more broadly, to county-level compliance with statutory list-maintenance obligations under the National Voter Registration Act ("NVRA").

These facts, however, are integral to this litigation and to the Foundation's purpose. Part of the Foundation's core activity and recognized charitable purpose is to engage in research, education, and litigation in support of election integrity and to protect the integrity of each citizen's right to vote from impingement by inadequate election administration, including the lawful and timely removal of ineligible registrants.

The Foundation's interest in this case is far from academic. It is legally protected by federal statute. The NVRA expressly provides the Foundation with a private right of action to enforce adherence to the list maintenance and election administration requirements of the NVRA on the part of election officials. 52 U.S.C. § 20510(b). Upon that statutorily granted right, the Foundation actively seeks to remedy faulty list maintenance practices around the country by pursuing litigation against election officials who fail to abide by federal list-maintenance standards. The outcome of this action will thus directly impact the exempt activities conducted by the Foundation as a nonprofit entity.

Furthermore, the Foundation conducts research and provides education regarding problems with list maintenance activities in counties throughout the country, including those in Indiana. In 2015, the Foundation sent notice letters to 11 Indiana counties, advising them of apparent violations of the NVRA by virtue of having impossibly high registration rates based on data released by the federal Election Assistance Commission and the United States Census Bureau. *See <https://publicinterestlegal.org/blog/scores-of-counties-put-on-notice-about-corrupted-voter-rolls/>*. The Foundation discovered that this problem has grown to 23 Indiana counties based on data released in 2017. Relatedly, the Foundation's activities have also included sending public records requests to Indiana counties to obtain records that shed light on the activities of local election officials.

In short, just like nonprofit entities that engage in voter registration drives that have been granted intervention in similar cases, the Foundation engages in concrete activities designed to protect the right to vote through compliance with federal statutes. These activities include educating the public on citizen voting rights. *See Kobach v. United States Election Assistance Comm'n*, No. 13-cv-4095-EFM-DJW, 2013 U.S. Dist. LEXIS 173872, at *7 (D. Kan. Dec. 12, 2013) (granting the motion to intervene by Common Cause, describing it as “a nonpartisan, nonprofit advocacy that conducts voter education towards preserving citizen voting rights.”) Through its litigation activities, the Foundation seeks to enforce the list maintenance requirements of the NVRA and, if violations are discovered, to press for corrective action, which often includes the effective use of available list-maintenance tools like that challenged by the Plaintiff.

The current litigation directly implicates the Foundation’s core purpose because it involves the interpretation of the list maintenance requirements and tools available under the NVRA. If Plaintiff prevails, the Foundation would be foreclosed from pursuing litigation against Indiana election officials seeking the use of a vital list maintenance tool that should be utilized in connection with the list-maintenance program required by the NVRA. Therefore, the Foundation has standing in the subject matter of this action.

In light of the foregoing, the Foundation is situated similarly to the organizations that were granted intervention in *United States v. Florida* and in *Kobach v. United States Election Assistance Comm'n* and not as those who were denied in *United States v. Florida* and in *Veasey v. Perry*. Like the intervenors in the former cases, the Foundation’s election-related activities will be directly impacted by the radical jurisprudential interpretations and restricting of the NVRA’s list maintenance provisions sought by Plaintiff and by barring vital list maintenance tools from

being used, not just in Indiana, but potentially around the country. The Foundation's activities will be made much more difficult if the Plaintiff prevails in this case. (*See* Doc. 35 at 13.)

Contrary to the Plaintiff's assertions, the Foundation's interests are not "generalized," "amorphous," or simply an agreement with a particular public policy. (Doc. 35 at 6.) Not only has Congress granted the Foundation a private, legal right to pursue its interests, 52 U.S.C. § 20510(b), the IRS has recognized the Foundation's litigation objectives as being sufficient to warrant recognition as a charitable organization. It is not simply a question of trying to keep in place or remove this or that public policy. (*Contra* Doc. 35 at 8.) Rather, this litigation will directly affect the Foundation's activities both in Indiana and across the country.

Finally, it is irrelevant that the Foundation is a non-member organization. According to Plaintiff's argument, a non-member organization could never have standing to bring any lawsuit, which is not the case. (*Contra* Doc. 35 at 4.)

B. The Defendants Will Not Adequately Represent the Foundation's Interests.

In light of the Foundation's interests, the goals of the Foundation and that of the Defendants are not aligned in this case. Defendants' goal in this case is simply to uphold Senate Enrolled Act 442 as compliant with the NVRA. The Foundation's goal is to advance its mission and exempt activities related to protecting election integrity and enforcing list maintenance requirements. In its litigation to enforce the list maintenance requirements of the NVRA, the Foundation finds itself opposite election administration officials just as Plaintiff does in this case. Accordingly, the Foundation's interest and goal is very much not to simply "see Defendants prevail." (*Contra* Doc. 35 at 9.) And so there is no presumption of adequacy of representation.

There is a conflict between Defendants and the Foundation. The Foundation's research shows that fully 23 Indiana counties are in apparent violation of the NVRA's list maintenance

activities because they have more registrants than eligible citizens. Several federal courts have held that improbably high registration rates are indicative of inadequate list maintenance. *See Am. Civ. Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 793 (W.D. Tex. 2015) (finding a “strong inference”); *see also Voter Integrity Project NC, Inc. v. Wake Cnty. Bd. of Elections*, No. 5:16-CV-683-BR, 2017 U.S. Dist. LEXIS 23565, at *17 (E.D.N.C. Feb. 21, 2017); *Bellitto v. Snipes*, No. 16-cv-61474-BLOOM/Valle, 2017 U.S. Dist. LEXIS 107355, at *52-54 (S.D. Fla. July 11, 2017). But, as has been indicated in the answer filed by the Defendants in the companion case to this one, Defendants have not taken the position that counties in Indiana have long-standing list maintenance issues so that list maintenance tools such as the one challenged here are needed. *See Defendants’ Answer and Statement of Affirmative Defenses, Indiana State Conference of the National Association for the Advancement of Colored People (NAACP) and League of Women Voters of Indiana v. Lawson, et al.*, No. 1:17-cv-02897 (S.D. Ind. Filed Oct. 12, 2017) (Doc. 14). It is very unlikely that the Defendants will take this position here.

Furthermore, Defendants have not demonstrated that they are “vigorously defending” the use of the list maintenance tool at issue in this case. (*Contra* Doc. 35 at 11.) Defendants have not filed a responsive pleading in this case, but they have filed an answer in the companion case. No. 1:17-cv-2897, *supra*. Plaintiff provides no reason to think that Defendants’ answer will be any different here. Instead, Plaintiff points to statements made by one of the Defendants in another context. (Doc. 35 at 11.) But those statements in fact show how the Foundation has just as much standing and interest in this case as Plaintiff does. Part of Plaintiff’s mission is to ensure that registrants are not improperly removed, while part of the Foundation’s mission is to ensure that improper registrations are corrected. The Foundation has the right to intervene in this case just as surely as Plaintiff has standing to bring the case in the first place.

C. In the Alternative, the Court Should Grant Permissive Intervention.

Plaintiff's suggestion that intervention would cause undue delay and prejudice are unfounded. First, the Foundation's proposed defense is not identical to that of Defendants. The Foundation is challenging Plaintiff's entire application of and interpretation of the NVRA and is not simply arguing that the revised statute comports with the NVRA. These are not academic interests because the parameters of list maintenance under the NVRA, regarding what is required, permitted, or disallowed, directly affects the integrity of individual votes and, therefore, the Foundation's exempt purposes and activities.

Further, allowing the Foundation to intervene would not cause any delay on the scheduling order set by the Court. The Foundation was diligent in filing this Motion in a timely manner, well in advance of Plaintiff's later motion for preliminary injunction. Indeed, it is Plaintiff who has caused delay already by increasing the amount of discovery and court filings in this case by requesting special discovery in advance of their forthcoming preliminary briefing.¹

Dated: December 7, 2017

/s/ Joseph A. Vanderhulst

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¹ It is important to note that the fact that Plaintiff did not seek a preliminary injunction at the time of initiating this action, and would like to conduct a special round of limited discovery, contravenes the nature of *preliminary* relief.

CERTIFICATE OF SERVICE

I certify that on December 7, 2017, I caused the foregoing to be filed with the United States District Court for the District of Indiana via the Court's CM/ECF system, which will serve all registered users.

/s/ Joseph A. Vanderhulst
Joseph A. Vanderhulst