

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

COMMON CAUSE INDIANA,

Plaintiff

v.

Case Number 1:17-cv-3936

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

**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 supporting memorandum of points and authorities in support of its motion for leave to intervene in this case.

Introduction

The Foundation requests that the Court grant it leave to intervene as a Defendant as of right pursuant to Federal Rule of Civil Procedure 24(a)(2). The Foundation has a direct and tangible interest in this litigation that will necessarily be impaired if the Plaintiff prevails and that interest is not adequately represented by any Defendant. This case implicates federally required voter roll list maintenance, an area in which the Foundation has exceptional interest. The Foundation reviews list maintenance activities across the nation and is familiar with challenges to such activities in other federal courts. The Foundation is presently counsel of record in two cases involving the application of the same federal laws implicated here, one in the Southern

District of Florida and one in the Southern District of Texas. The Foundation has a firm understanding of the history and application of the relevant federal laws and believes the Plaintiff's interpretation to be wholly irreconcilable with the language and purpose of the statute.

The Foundation's charitable mission includes promoting election integrity, ensuring that voter roll list maintenance laws and election administration procedures are followed, and providing assistance to states that seek to enforce their constitutional mandate to determine the rules and laws pertaining to their own state elections. Specifically, the Foundation seeks to ensure that the nation's voter rolls are accurate and current, working with election administrators nationwide and educating the public about the same.

These interests will be directly and adversely impacted by this case, which seeks to override the State of Indiana's duty and responsibility to conduct reasonable list maintenance. The Defendants do not adequately represent these interests and will not likely make the particular arguments against the Plaintiff's interpretation of federal law as will the Foundation.

In the alternative, the Foundation requests the Court grant permissive leave to intervene pursuant to Federal Rule of Civil Procedure 24(b)(1)(B), on the grounds that the Foundation has claims and defenses that share common questions of law and fact with the main action here. As a nonprofit organization with special interest in the administration of election laws, the Foundation should be permitted to intervene as even Common Cause itself has in prior litigation involving important legal issues. *See Kobach v. United States Election Assistance Comm'n*, 2013 U.S. Dist. LEXIS 173872 (D. Kan. Dec. 12, 2013) (in which Common Cause was granted permissive intervention). Indeed, the Foundation has previously been allowed to intervene as a Defendant-Intervenor, in similar cases. *See League of Women Voters of the United States v. Newby*, 195 F. Supp. 3d 80, 88 (D.D.C. 2016).

If intervention is granted, the Foundation will participate in this case on the schedule that will be established for the existing parties; will avoid unnecessary delays or duplication of efforts in areas satisfactorily addressed and represented by the existing Defendants, to the extent possible; and will coordinate all future proceedings with the existing Defendants, to the extent possible.

The Federal Rules of Civil Procedure and the Local Rules of this Court do not require the Foundation to attempt to meet-and-confer with the other parties prior to the filing of this motion.

I. The Court Should Grant Intervention as of Right.

Upon filing of a timely motion, Federal Rule of Procedure 24(a)(2) requires that this Court “permit anyone to intervene who ‘claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.’” *Platinum Fin. Tr. LLC v. Carter*, No. 1:17-cv-00075-JMS-MPB, 2017 U.S. Dist. LEXIS 91285, at *4 (S.D. Ind. June 14, 2017). As to adequacy of representation, the “‘requirement of the Rule is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.’” *Lake Inv’rs Dev. Grp., Inc. v. Egidi Dev. Grp.*, 715 F.2d 1256, 1261 (7th Cir. 1983) (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972)).

When seeking intervention as of right under Rule 24, an applicant must “(1) make timely application, (2) have an interest relating to the subject matter of the action, (3) be at risk that that interest will be impaired, ‘as a practical matter,’ by the action’s disposition and (4) lack adequate

representation of the interest by the existing parties.” *Nissei Sangyo Am. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994).

“A motion to intervene as a matter of right . . . should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved under the . . . complaint.” *Lake Inv’rs*, 715 F.2d at 1258. Here, the Foundation’s Motion satisfies each requirement of Rule 24(a).

A. The Foundation’s Motion Is Timely.

First, Rule 24 requires that a motion to intervene be timely filed. As interpreted by the Seventh Circuit, this requirement “essentially sets out a reasonableness standard: potential intervenors need to be reasonably diligent in learning of a suit that might affect their rights, and upon so learning they need to act reasonably promptly.” *Nissei Sangyo Am. v. United States*, 31 F.3d 435, 438 (7th Cir. 1994).

There has been exceptionally little time since the Foundation became aware of this case, and therefore of its interest in it. The Complaint was filed on October 27, 2017. To date, no other pleadings other than the initial Complaint have been filed. The docket shows that summons have been issued, but does not show that the Defendants have been served with the Complaint, thus the deadline for the Defendants to file a responsive pleading is unknown. The Foundation submits that the time to file this Motion could hardly have been shorter. No scheduling order has been set, no discovery has been undertaken, no dispositive orders have been entered, no trial date has been set, and Defendants have not filed an answer. The Foundation is filing this motion as soon as possible following the filing of the Complaint. A motion to intervene filed less than 2 weeks after the case was initiated is timely.

B. The Foundation Has a Strong Interest in the Voter Roll List Maintenance Procedures Challenged by the Plaintiff.

Second, Rule 24 requires that a movant “claim[] an interest relating to the property or transaction that is the subject of the action, and [be] so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest” Fed. R. Civ. P. 24(a)(2). Whether an intervenor in a given case has a significant interest is a fact-specific inquiry, such that “comparison to other cases is of limited value.” *Sec. Ins. Co. of Hartford v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). Accordingly, the intervenor must simply show “a direct, significant, and legally protectable interest” that is unique from the parties in the case. *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985).

The Foundation has an interest in ensuring that the constitutional balance vesting state control over elections is preserved and that the democratic right to participate effectively and in state-prescribed elections is ensured for all citizens in Indiana.

The Foundation is an Indiana-based, non-partisan, nonprofit legal foundation that has as its mission the advancement and protection of the integrity of American elections and preserving the constitutional balance giving states control over their own elections. The Foundation helps citizens defend the integrity of their votes by educating them on efforts to erode their right to vote, taking action to ensure that voter registration and election processes are followed and enforced, and by helping states enforce their constitutionally protected voting laws.

The Foundation has numerous unique interests in this case. The Plaintiff’s lawsuit profoundly threatens state control over structuring its own election system based on a patently flawed application of the National Voter Registration Act (“NVRA”). The Plaintiff’s lawsuit seeks to impose restrictions on Indiana’s ability to conduct fair and robust elections by limiting the state’s programs for ensuring that its list of eligible voters is kept accurate and current. The Plaintiff seeks to impose limits clearly beyond what was contemplated by Congress. Therefore,

the Foundation has a vested interest in preserving the constitutional balance between the states and the federal government regarding the control of the electoral process.

Furthermore, keeping accurate and current registration lists serves to bolster confidence in the integrity of the electoral process and also reinforces the integrity of each eligible citizen's right to vote. The Foundation has a significant interest in advancing these dual purposes, which further the Foundation's exempt public purpose. The Indiana legislature passed several measures to bolster its list-maintenance program in response to demonstrable problems with list maintenance procedures and problems with the voter rolls. The Defendant is unlikely to provide this Court a full and complete catalog of various list maintenance failures which animated and prompted the statutory procedures now being challenged by the Plaintiff.

C. The Foundation's Interests Will Be Impaired if Plaintiff Prevails in this Action.

When the disposition of a case will "as a practical matter foreclose rights of [a] proposed intervenor[] in a subsequent proceeding", the proposed intervenor's interest will be impaired. *Meridian Homes Corp. v. Nicholas W. Prassas & Co.*, 683 F.2d 201, 204 (7th Cir. 1982). Here, if Plaintiff prevails, it will have successfully blocked the state from using legitimate programs for fulfilling the mandate of the NVRA to maintain accurate and current registration lists. If Plaintiff prevails it will upset the federalist balance struck by the Constitution and restrict Indiana's ability to maintain accurate and current registration lists. The Foundation would not be able to bring a subsequent action in order to restore that balance or to ensure that this list maintenance tool be used. Further, it will undo the progress Indiana has made in recent years in bringing its list-maintenance programs into compliance with its NVRA obligations.

D. Existing Parties Will Not Adequately Protect the Foundation's Interests.

Absent the opportunity to intervene, the Foundation's interests almost certainly will not be adequately represented. Accordingly, the Foundation is able to meet its "minimal" burden of showing that its interests are not already represented in this litigation.

First, the Defendants' interests are different and distinct from the Foundation's interests. As such, the Defendants are not likely to press fully all defenses available in this case. Nor is the Defendant likely to press against the factual assertions contained in the Complaint as fully as they might. The Foundation is unrestrained by political concerns and can provide this Court with the full range of potential factual defects in the Complaint.

Specifically, the Foundation has reviewed the Answer filed by the same Defendants in the related case pending before this Court, *Indiana State Conference of the National Association for the Advancement of Colored People, et al. v. Lawson, et al.*, No. 1:17-cv-02897 (S.D. Ind. Filed Aug. 23, 2017). Defendants' affirmative defenses include ripeness, sovereign immunity, lack of discriminatory conduct, and notice deficiencies, among other defenses. Most of all, the Foundation's arguments are different in that they explain how Plaintiff's provide an incorrect interpretation of the list-maintenance provisions of the NVRA, within the context of other litigation exploring this question and the broader implications of Plaintiff's interpretation. While the Defendants there do state that "[a]ctions performed in accordance with SB 442 do not violate the NVRA", Answer, Doc. 14, *Indiana State Conference of the National Association for the Advancement of Colored People, et al. v. Lawson, et al.*, No. 1:17-cv-02897 (S.D. Ind. Filed Oct. 10, 2017), the Foundation provides a particular statutory argument to that end.

In addition, the Foundation's ultimate objectives are not necessarily aligned with that of Defendants either, even though they are on the same side of the litigation. *See Lake Inv'rs*, 715 F.2d at 1261 (7th Cir. 1983). The government's representation in this case will likely focus on

preserving the *status quo* and maintaining the functioning of Indiana's elections in accordance with Indiana law. The government is unlikely to fully reveal the extent of prior failures to conduct list maintenance and the reasonableness of legislative changes to correct that failure. The Foundation's interest and representation will also be focused on the broader jurisprudential implications of Plaintiff's challenge and its ramifications on the federalism balance of power regarding state elections. Thus, there will likely be differing points of view between the Foundation and the Defendants on the litigation as a whole.

Accordingly, Defendants will undoubtedly *not* make all of the Foundation's arguments. Nor are they capable and willing to make such arguments. In particular, the Foundation will argue that Plaintiff's challenge to Indiana's list-maintenance procedures is flawed for several reasons unlikely to be echoed by the Defendants.

First, Plaintiff's argument regarding the parameters of permissible and required list maintenance procedures under the NVRA is incorrect. The optional procedure described in 52 U.S.C. § 20507(c) is neither a floor nor a ceiling for the list-maintenance programs states must or may utilize.

Also, the Foundation will provide factual arguments regarding assertions in the Complaint which Defendants are unlikely to provide.

It is extremely unlikely that the Defendants will press arguments regarding the implications of Plaintiff's theories and interpretation of the NVRA's list-maintenance standard. As a result, the Foundation will offer a critically important position for the Court to consider that the other parties will not. This position is further enlightened by the Foundation's unique knowledge gained from litigation elsewhere involving the same statute. If Plaintiff seeks to

impose its imaginary floor-and-ceiling notice-and-waiting standard through this litigation, this Court will benefit from the Foundation's presence in this case.

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

If the Court nonetheless determines that the Foundation is not entitled to intervene as of right, it should grant permissive intervention. Fed. R. Civ. P. 24(b). Rule 24(b) authorizes the Court to grant permissive intervention to anyone who "has a claim or defense that shares with the main action a common question of law or fact." A district court has "broad discretion" to permit intervention. *Griffith v. Univ. Hosp., L.L.C.*, 249 F.3d 658, 662 (7th Cir. 2001). The Court must determine whether a proposed intervenor's claims and the main action share a common question of fact or law and then whether the intervention will unduly delay the litigation or prejudice the original parties.

A. Timeliness and Delay

In considering the timeliness of the intervention, the Court should consider the totality of the circumstances, *NAACP v. New York*, 413 U.S. 345, 366 (1973), including the length of time since the movant knew of its interest in the case; prejudice to the existing parties caused by any delay in intervening (but not delay caused by the intervention itself); prejudice to the proposed intervenor, and the existence of any unusual circumstances, *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 143 (1st Cir. 1982).

As is stated above, the Foundation is filing this motion as soon as possible following the filing of the Complaint. The Foundation submits that any additional issues it intends to raise and litigate will cause no delay in this litigation.

B. Common Question of Law or Fact

The movant is not required to assert a separate or additional claim or defense in order to show commonality. Instead, permissive intervention is appropriate where the proposed intervenor's "defense raises the same legal questions as the defense of the named defendants." *Kobach v. U.S. Election Assistance Commission*, No. 13-CV-4095-EFM-DJW, 2013 WL 6511874, at *10 (D. Kan. Dec. 12, 2013) (quoting *Miller v. Silbermann*, 832 F. Supp. 663, 673 (S.D.N.Y. 1993)). In another case, "organizations with a 'special interest in the administration of election laws' were granted leave to intervene permissively in an action wherein Florida sought preclearance of recent changes to its election laws, including voter registration restrictions." *Id.* (quoting *Florida v. United States*, [820 F. Supp. 2d 85, 86-87 (D.D.C. 2011).) Similarly, the Foundation has a special interest in the administration of election laws. Overall, the questions of law and fact raised by the Foundation's defense are certainly the same as that of the existing action between the current parties. The Foundation's interests are different and distinct, but the legal issue is the same.

The Foundation's charitable mission and activities involve protecting the constitutional arrangement whereby states are able to structure their own election systems. The Foundation's proposed answer demonstrates that it denies the legal assertions made by the Plaintiff in its Complaint. The Foundation possesses a unique knowledge, perspective, and expertise regarding election matters, which has been recognized by other courts that have accepted its appearance as Defendant Intervenor elsewhere. Finally, the Foundation's mission and activities fundamentally deal with a special interest in the administration of voting rights. *See Florida*, 820 F. Supp. 2d at 86-87.

III. Conclusion

For the foregoing reasons, the Court should grant the Foundation's Motion to Intervene as of right or, in the alternative, permissively.

Dated: November 9, 2017

/s/ Joseph A. Vanderhulst

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CERTIFICATE OF SERVICE

I certify that on November 9, 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. The following non-registered users were served via USPS:

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