

**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

**[PROPOSED] ANSWER BY DEFENDANT-INTERVENOR
THE PUBLIC INTEREST LEGAL FOUNDATION**

Proposed Defendant-Intervenor the Public Interest Legal Foundation (“Foundation”), by and through counsel, and without waiving any motions or defenses, hereby answers Plaintiff’s Complaint. (Doc. 1.)

Many of the paragraphs in the Complaint state conclusions of law, to which no response is required by rule. Many others make factual allegations related to the Plaintiff that are outside the scope of the Foundation’s knowledge; as a result, they can neither be admitted nor denied by the Foundation and thus are deemed denied. Any other allegations not admitted are deemed denied.

1. To the extent this paragraph states factual allegations; the Foundation lacks knowledge or information sufficient to form a basis as to the truth of these allegations. To the extent this paragraph states a legal conclusion, no response is required. Other than as admitted,

the allegations contained in paragraph 1 are denied. Plaintiff misstates the requirements of the National Voter Registration Act of 1993 (“NVRA”), 52 U.S.C. § 20501 *et seq.*

2. To the extent this paragraph states factual allegations; the Foundation lacks knowledge or information sufficient to form a basis as to the truth of these allegations. To the extent this paragraph states a legal conclusion, no response is required. Other than as admitted, the allegations contained in paragraph 2 are denied. Contrary to Plaintiff’s assertions, the NVRA provides states with latitude in the particular means they use to fulfill the obligation to conduct a reasonable program of list maintenance. The NVRA does not mandate particular procedures.

3. To the extent this paragraph states factual allegations; the Foundation lacks knowledge or information sufficient to form a basis as to the truth of these allegations. To the extent this paragraph states a legal conclusion, no response is required. Other than as admitted, the allegations contained in paragraph 3 are denied.

4. To the extent this paragraph states factual allegations; the Foundation lacks knowledge or information sufficient to form a basis as to the truth of these allegations. To the extent this paragraph states a legal conclusion, no response is required. Other than as admitted, the allegations contained in paragraph 4 are denied. Plaintiff mischaracterizes the data upon which Defendants rely to determine if a registrant has changed residence from Indiana to a new state as “second-hand” when in fact the data relied upon are writings by the registrant confirming a new residence address.

5. To the extent this paragraph states factual allegations; the Foundation lacks knowledge or information sufficient to form a basis as to the truth of these allegations. To the extent this paragraph states a legal conclusion, no response is required. Other than as admitted, the allegations contained in paragraph 5 are denied. Prior to July 1, 2017, Indiana utilized

procedures which it did not need to utilize in order to cancel registrants who have moved to another state and who confirmed in a writing in that new state of residence that they were no longer citizens of Indiana.

6. To the extent this paragraph states factual allegations; the Foundation lacks knowledge or information sufficient to form a basis as to the truth of these allegations. To the extent this paragraph states a legal conclusion, no response is required. Other than as admitted, the allegations contained in paragraph 6 are denied, particularly that there is no “requisite” written confirmation required under the NVRA for a registrant who has moved to another state of residence and confirmed in a writing there that they had done so.

7. Denied.

8. Denied, particularly as there is no notice and waiting period in the NVRA when a registrant confirms through a writing that they have changed their residence to a new state and no longer reside in Indiana.

9. To the extent this paragraph states factual allegations; the Foundation lacks knowledge or information sufficient to form a basis as to the truth of these allegations. To the extent this paragraph states a legal conclusion, no response is required. Other than as admitted, the allegations contained in paragraph 9 are denied.

10. To the extent this paragraph states factual allegations; the Foundation lacks knowledge or information sufficient to form a basis as to the truth of these allegations. To the extent this paragraph states a legal conclusion, no response is required. Other than as admitted, the allegations contained in paragraph 10 are denied. Notably, Plaintiff does not appear to shy away from seeking to eliminate even legitimate barriers to voting, such as age, citizenship, and age, which have emphatically been upheld by the United States Supreme Court. Moreover,

Plaintiff lacks standing. Moreover, there is no case or controversy in so far as this Plaintiff cannot identify a single Indiana registrant who would be improperly removed from the Indiana registration rolls after the registrant has moved out of Indiana and confirmed such new residence in a written voter registration application in another state.

11. To the extent this paragraph states factual allegations; the Foundation lacks knowledge or information sufficient to form a basis as to the truth of these allegations. To the extent this paragraph states a legal conclusion, no response is required. Other than as admitted, the allegations contained in paragraph 11 are denied. Defendant Connie Lawson is not the chief election official for purposes of compliance with the NVRA. Ind. Code §§ 3-6-3.7-1, 3-7-11-1.

12. Admitted.

13. To the extent this paragraph states factual allegations; the Foundation lacks knowledge or information sufficient to form a basis as to the truth of these allegations. To the extent this paragraph states a legal conclusion, no response is required. Other than as admitted, the allegations contained in paragraph 13 are denied.

14. The Foundation admits that this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

15. The Foundation denies that declaratory relief is appropriate in this case.

16. Admitted.

17. Admitted.

18. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 18.

19. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 19. Contrary to Plaintiff's description, while NVRA certainly imposes a firm obligation on election administrators to keep their rolls accurate and current, the statute does not prescribe a single procedure for carrying out that mandate.

20. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 20.

21. Admitted in so far as the paragraph contains an accurate quotation of part of the NVRA statute.

22. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 22. The National Change of Address ("NCOA") mailing procedure described in the NVRA is nothing more than an example of a permissible removal procedure. The procedure is neither a ceiling nor a floor. Moreover, the NCOA procedure is a less reliable indication of a registrant's intent to declare a new residence than is a new voter registration application in a new state that facially declares a new residence in that state.

23. Admitted in so far as the paragraph contains an accurate quotation of part of the NVRA statute.

24. Admitted.

25. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 25. Admitted in so far as the Crosscheck system does indeed identify Indiana registrants who, under penalty of perjury, have confirmed in writing through a sworn voter registration application in another state that they are now residents of that new state and therefore no longer residents of Indiana.

26. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 26. Plaintiff makes the faulty assumption that the Crosscheck system only matches registrations based on first name, last name, and date of birth.

27. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 27.

28. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that

a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 28.

29. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 29.

30. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 30.

31. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 31. The removal of the registration is based on the written registration submitted in another jurisdiction. The optional NCOA mailing procedure described in the NVRA does not create a universal mandate that any and all registration removals must be preceded by the mailing of a notice and a two-cycle wait.

32. Plaintiff misrepresents the requirements of the NVRA. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 32. Again, the notice and two-cycle wait described in the optional NCOA procedure in the NVRA are not mandates. The NCOA procedure is not the floor

and ceiling of required and permissible list maintenance procedures under the NVRA.

Defendants may remove registrants when they determine that the registrant has moved away and the registrant has produced a written document establishing this fact, such as a new voter registration in another state. Defendants may act upon information that a registrant has registered in another jurisdiction as Congress contemplated that a subsequent registration should serve as a request for removal from the prior jurisdiction. *See* 52 U.S.C. § 20507(d)(1) and (a)(3)(A).

33. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 33.

34. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 34.

35. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 35.

36. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 36.

37. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 37.

38. Plaintiff misrepresents the requirements of the NVRA. The NVRA does not require notice and waiting in every instance before a registration is cancelled and Plaintiffs representations to the contrary are flat wrong. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 38. The NCOA mailing example in the NVRA does not create a "notice-and-waiting" mandate. The NCOA mailing procedure is simply an example of a permissible removal program under the NVRA. *See Bellitto v. Snipes*, 2017 U.S. Dist. LEXIS 107355 at *46-49 (quoting and citing *Philip Randolph Inst. v. Husted*, 838 F.3d 699, 707 (6th Cir. 2016)). An election official may remove a registration from the list of eligible voters when that election official determines that a registrant no longer resides in Indiana based on a writing that that registrant has produced in another state.

39. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 39. Cross check is reliable and allows election officials to ascertain the likelihood of a match through careful scrutiny of a variety of data in the registration records and is therefore reasonable. Plaintiff cannot point to a

single registrant who has been improperly cancelled through Indiana's reliance on the Crosscheck program and thus no injury in fact has ever occurred.

40. Plaintiff misrepresents the requirements of the NVRA. There is no "notice and waiting" period in every instance before a registrant may be removed. A registrant who has moved from Indiana and registers to vote in a new state, for example, is one such circumstance where no notice and waiting period applies. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 40. Again, the notice-and-waiting procedure described in the NVRA is simply an example of a permissible procedure. It is not a floor for liability or a ceiling for permissible programs. *See Bellitto*, 2017 U.S. Dist. LEXIS 107355 at *46-49.

41. Denied. A journalist in a pop culture magazine, which Plaintiff provides as an example, is not an election expert. Moreover, other purported "experts" who have criticized election integrity efforts are often partisan and aligned with partisan interests more than objective assessment of the facts related to efforts at removing ineligible registrants.

42. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 42. Plaintiff repeats the unsubstantiated and faulty claim that Crosscheck only utilizes first name, last name, and date of birth as matching criteria. (Doc. 1-1.)

43. Michael P. McDonald and Justin Levitt, upon whom Plaintiff relies, are partisan academics who have, in the past, acted with extraordinary partisan bias in both their scholarship in addition to their official actions. In the latter's case, Levitt has failed to carry out his duties and obligations to enforce provisions of the NVRA intended to keep registration rolls clean across the United States. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 43.

44. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 44. As the Indiana Secretary of State's letter confirms, Indiana election officials do not remove registrations based on a raw match from Crosscheck alone. (Doc. 1-1.)

45. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 45. Indiana statutes expressly authorize the Indiana chief election officials to implement and administer the list maintenance obligations of the NVRA. Ind. Code § 3-7-11-2.

46. Denied.

47. Myrna Perez, upon whom Plaintiff relies, is a partisan academic at an organizations which has, in the past, acted with extraordinary partisan bias despite their tax

exempt status and produced questionable scholarship in efforts to oppose any state efforts to cancel the registrations of registrants who are no longer eligible to vote.¹ This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 47.

48. Denied, and strict proof of the same is demanded.

49. Denied.

50. Denied.

51. Denied.

52. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 52.

53. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 53.

54. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that

¹ See, Jason Sneed, *The Daily Signal*, "Brennan Center's Attacks on Heritage Voter Fraud Database Are Baseless," September 11, 2017, <http://dailysignal.com/2017/09/11/brennan-centers-attacks-heritage-voter-fraud-database-baseless/>.

a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 54.

55. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 55.

56. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 56.

57. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 57.

58. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 58.

59. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 59.

60. This paragraph contains Plaintiff's characterization of this action, the laws at issue, legal arguments, or conclusions of law, to which no response is required. To the extent that a response is required, the Foundation lacks knowledge or information sufficient to form a basis as to the truth of the allegations or denies the allegations in paragraph 60.

61. The allegations in paragraph 61 are legal arguments or conclusions of law, to which no answer is required. If deemed to allege facts, the Foundation denies the allegations.

62. The allegations in paragraph 62 are legal arguments or conclusions of law, to which no answer is required. If deemed to allege facts, the Foundation denies the allegations.

63. The allegations in paragraph 63 are legal arguments or conclusions of law, to which no answer is required. If deemed to allege facts, the Foundation denies the allegations.'

As to Plaintiff's prayer for relief, the Foundation denies that Plaintiff is entitled to any relief.

AFFIRMATIVE DEFENSES

Defendant-Intervenor Public Interest Legal Foundation asserts the following affirmative defenses:

1. Plaintiff Common Cause has failed to state a claim upon which relief can be granted and, therefore, the Complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6). Because the notice-and-waiting procedure described in 52 U.S.C. § 20507(c) provides only an example of a permissible list maintenance program, rather than delineating a set of requirements for the only permissible list maintenance procedure under the NVRA, even if taken as true, Plaintiff's claims would not constitute a violation of 52 U.S.C. § 20507.

2. The NVRA permits cancellation of a registrant when that registrant registers to vote in another state after changing residency. The subsequent voter registration in a new state

constitutes a written document confirming that the registrant has changed residences, thus permitting removal from the registration rolls in the previous state pursuant 52 U.S.C. § 20507(d)(1)(A) (written confirmation of changed residence). This Affirmative Defense is a complete bar to Plaintiff's claim. Indiana's procedure for identifying registrants who have subsequently registered in another jurisdiction, and are therefore no longer eligible to vote in Indiana, is a valid use of this provision. The NVRA explicitly permits removal when a registrant has confirmed "in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered." 52 U.S.C. § 20507(d)(1)(A).

3. Congress contemplated that the act of registering to vote in another jurisdiction could serve as a request to remove a prior registration in conformity with the language of 52 U.S.C. § 20507(a)(3)(A) ("at the request of the registrant"), as is shown in the legislative history. H.R. Rep. No. 103-9, at 14-15 (1993). The NVRA expressly provides that a registration may be removed "at the request of the registrant." 52 U.S.C. § 20507(a)(3)(A). Indiana's procedure for identifying registrants who have subsequently registered in another jurisdiction, and are therefore no longer eligible to vote in Indiana, is a valid use of this provision.

4. Plaintiff's entire Complaint is based upon the faulty legal theory that the NVRA mandates specific procedural requirements for all list maintenance programs through 52 U.S.C. § 20507(c). But 52 U.S.C. § 20507(c) does not purport to establish an exclusive "notice-and-mailing" procedure. Under Plaintiff's interpretation of the statute, which Plaintiff's counsel has attempted to advance in litigation throughout the country, the procedure described in Section 20507(c) serves as a floor for compliance with the list-maintenance obligations established by the NVRA. In other words, if an election official is at a minimum conducting a mailing under Section 20507(c), then the official is satisfying the list-maintenance obligations of the NVRA. In

this case, Plaintiff is asserting that the Section 20507(c) procedure is also a ceiling, such that state election officials may not engage in list-maintenance procedures other than the mailing described in that Section. Both are wrong. As federal courts have held, Section 20507(c) simply provides an example of a permissible list-maintenance procedure. *See Bellitto v. Snipes*, 2017 U.S. Dist. LEXIS 107355 at *46-49 (quoting and citing *Philip Randolph Inst. v. Husted*, 838 F.3d 699, 707 (6th Cir. 2016)).

Dated: November 9, 2017

/s/ Joseph A. Vanderhulst
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Counsel for Proposed Defendant-Intervenor Public Interest Legal Foundation

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:

Connie Lawson
Secretary of State of Indiana
200 W. Washington St., Room 201
Indianapolis, IN 46204

J. Bradley King
Co-Director of the Indiana Election Division
302 W. Washington St., Room E204
Indianapolis, IN 46204-2767

Angela Nussmeyer
Co-Director of the Indiana Election Division
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/s/ Joseph A. Vanderhulst
Joseph A. Vanderhulst