

**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-TWP-MPB

BRIEF OF THE PUBLIC INTEREST LEGAL FOUNDATION AS *AMICUS CURIAE*

The Public Interest Legal Foundation (the “Foundation”), by and through undersigned counsel, respectfully submits the following amicus curiae brief, pursuant to the Court’s February 27, 2018 Order permitting the Foundation to participate in this case as amici curiae. (Doc. 71 at 12.)

Plaintiff Common Cause, through its Motion for Preliminary Injunction, continues to advance a revisionist interpretation of the list maintenance requirements of the National Voter Registration Act (“NVRA”). 52 U.S.C. §§ 20501 *et seq.* In the Plaintiff’s revised statute, most of the purposes and goals of the statute are ignored, together with the express terms of the legislation. Plaintiff’s restricted view would result in it being effectively impossible for states to keep accurate and current registration lists. The Foundation has particular interest in this case and submits this amicus curiae brief to bring to the Court’s attention the ways that the Plaintiff

has contorted Section 8 of the National Voter Registration Act beyond recognition and frustrates Congress's purposes in enacting Section 8.

Congress intended the NVRA to *both* increase lawful voter registration and to “protect the integrity of the electoral process; and . . . ensure that accurate and current voter registration rolls are maintained.” 52 U.S.C. § 20501(b). To further these goals, the NVRA requires that “each State shall . . . conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters” by reason of the death or a change in the residence of a registrant. 52 U.S.C. § 20507(a)(4). States who fail to conduct such compliant list maintenance programs have been subject to enforcement actions under the NVRA. 52 U.S.C. § 20510; *see, e.g., United States v. Missouri*, 535 F.3d 844 (8th Cir. 2008), *Judicial Watch, Inc., v. King*, 993 F. Supp. 2d 919 (S.D. Ind. 2012).

The National Voter Registration Act provides states with latitude in the particular means they use to fulfill the obligation to conduct a reasonable program of list maintenance. The narrow procedure for removal insisted upon by the Plaintiff would remove this latitude and impose a single rigid methodology for removal. But the NVRA does not mandate particular procedures as a minimum nor as a maximum.

Most importantly, this rigid method would invariably result in inaccurate, obsolete, and duplicate registrations for years. Congress made clear in the NVRA that a written confirmation of change of address outside the jurisdiction or a request from the registrant is sufficient to permit removal of a registration. 52 U.S.C. §§ 20507(a)(3)(A), (d)(1)(A). The Crosscheck system simply provides states with an efficient and formal way to exchange such written confirmations and requests from registrants. This is not second-hand information. As clerks have testified, the system provides the actual subsequent registrations confirming the new out-of-jurisdiction

address. Thus, it is a reasonable list maintenance procedure. But instead of allowing Indiana to proceed with removals based on these writings from registrants, the Plaintiff would impose a redundant mailing-and-waiting process that would keep the registrants on the rolls for up to four years.

According to the Plaintiff's argument, even if a county election official received a written request to be removed from the rolls directly from the registrant, the NVRA would prevent an immediate removal. This is a necessary conclusion from Plaintiff's position. There is no distinction between a written confirmation of address change or request for cancellation submitted to another jurisdiction in the form of a subsequent registration and one sent directly to the old jurisdiction.¹ Indeed, to say that there is a difference would impose a significant and unreasonable burden upon voters. In order to maintain only one registration, a voter would be required to both register in a new jurisdiction as well as send a written request to be removed from their former jurisdiction. Having received such a written request, the Plaintiff would require a county official to send a notice to the registrant and then wait two election cycles before removing the registrant, despite the written request for removal. This cannot be the procedure contemplated by Congress in enacting Section 8. There is no requirement for states to send notices and wait for responses from individuals who have confirmed in a writing that they have registered in another state.

Plaintiff's position fundamentally undermines the express purposes of the NVRA. The final enumerated purpose of the NVRA is "to ensure that accurate and current voter registration

¹ The baseless concerns of Plaintiff's expert regarding false matches with the Crosscheck information would apply equally with a direct written request received from a registrant. Most likely, the Crosscheck matches provide even more information than a typical letter would contain.

rolls are maintained.” The NVRA goes on to impose list maintenance obligations upon election officials in order to effect this purpose. Plaintiff seeks to prevent Indiana from using procedures that are expressly permitted under the NVRA in order to keep accurate lists. Instead, Plaintiff seeks to impose a single procedure for list maintenance that will result in non-current lists because of its imposed waiting period.

The Plaintiff seeks to take a single isolated *example* of a permissible list maintenance procedure featured in the NVRA and turn it into the sole permitted list maintenance procedure. Nothing in the express terms of the statute support such a reading. Furthermore, courts that have considered similar issues have held that the mailing and wait procedure is merely an example of a permissible procedure. *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 707 (6th Cir. 2016). That procedure is neither sufficient in itself to satisfy list maintenance obligations, nor is it the only permissible procedure. *Bellitto v. Snipes*, 2017 U.S. Dist. LEXIS 107355, at *47-49 (S.D. Fla., July 12, 2017). Instead, the state may act upon information that a registrant has registered in another jurisdiction as Congress contemplated that a subsequent registration should serve as a written request for removal from the prior jurisdiction. H.R. Rep. No 103-9, at 14-15 (1993). Indiana may remove obsolete registrations when it determines that a registrant has moved away and the registrant has produced a written document establishing that the person lives and is registered in another jurisdiction.

Using Crosscheck to obtain and verify written confirmations of address changes from registrants is reasonable and conforms with the guidelines established by the NVRA. The system allows election officials to ascertain whether a registrant has requested removal by a written address change confirmation in another state. This process involves careful scrutiny of a variety

of data in the registration records. Tellingly, the Plaintiff still cannot point to a single registrant who has been improperly removed in Indiana through the use of the Crosscheck program.

Finally, nationwide results have indicated that states should be doing more, and not less, to achieve the goal of accurate and current registration lists. Indeed, the failure of many states to comply with their voter list maintenance obligations, and the resulting poor condition of many state lists, are a national, non-partisan issue. For example, the Pew Research Center on the States released an astonishing report in 2012 noting that “[a]pproximately 2.75 million people have active registrations in more than one state.” *Inaccurate, Costly, and Inefficient: Evidence That America’s Voter Registration System Needs an Upgrade*, Pew Research Center on the States, Feb. 14, 2012, at 1, available at <http://www.pewstates.org/research/reports/inaccurate-costly-and-inefficient-85899378437>. The same report observed that “24 million—one of every eight—active voter registrations in the United States are no longer valid or are significantly inaccurate,” and that “[m]ore than 1.8 million deceased individuals are listed as active voters.” *Id.*; see also Jonathan Brater, *Presidential Voting Commission Can Modernize Elections: Testimony to the Presidential Commission on Election Administration*, The Brennan Center, Sept. 4, 2013 (“A system in which 1 in 8 records has serious errors raises the prospect of fraud and manipulation.”), available at <http://www.brennancenter.org/analysis/testimony-presidential-voting-commission-can-modernize-elections>. The Crosscheck system is just one example of the variety of approaches that states have adopted in an attempt to modernize and address the issue of inaccurate registration lists. Far from being enjoined, Indiana should be applauded for its efforts and its program should serve as a model for compliance with the NVRA, both for ensuring that properly registered individuals are not removed and ensuring that obsolete and inaccurate registrations are promptly and effectively removed.

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/s/ Joseph A. Vanderhulst

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CERTIFICATE OF SERVICE

I certify that on April 26, 2018, 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
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