

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION - FRANKFORT**

JUDICIAL WATCH, INC.,

Plaintiff,

v.

ALISON LUNDERGAN GRIMES, et al.,

Defendants.

Civil No. 3:17-CV-00094-GFVT

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

**COMMONWEALTH OF KENTUCKY;
COMMONWEALTH OF KENTUCKY
STATE BOARD OF ELECTIONS; and
KENTUCKY SECRETARY OF STATE
Alison Lundergan Grimes, in her official
capacity,**

Defendants.

COMPLAINT IN INTERVENTION

The United States of America alleges:

1. The Attorney General hereby files this complaint in intervention on behalf of the United States of America to enforce the provisions of the National Voter Registration Act of 1993 (“NVRA”), 52 U.S.C. § 20507.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 52 U.S.C. § 20510(a) and 28 U.S.C. §§ 1331 and 1345.

3. Venue is proper in this district pursuant to 28 U.S.C. §§ 97(a) and 1391(b).

PARTIES

4. Plaintiff-Intervenor United States of America seeks declaratory and injunctive relief pursuant to Section 11 of the NVRA, which authorizes the Attorney General to bring suit to enforce this federal statute. 52 U.S.C. § 20510(a).

5. Defendant Commonwealth of Kentucky is one of the States of the United States of America and is subject to the requirements of the NVRA. 52 U.S.C. §§ 20502(4), 20503, 20507.

6. Defendant Kentucky State Board of Elections is responsible for administering Kentucky's election laws and supervising the registration and purging of voters within the State. KRS § 117.015(1).

7. Defendant Kentucky Secretary of State, Alison Lundergan Grimes, is sued in her official capacity as chair of the Kentucky State Board of Elections and as the chief State election official responsible for coordinating Kentucky's responsibilities under the NVRA. *See* 52 U.S.C. § 20509; KRS § 117.015(2).

CAUSE OF ACTION:
SECTION 8 OF THE NATIONAL VOTER REGISTRATION ACT, 52 U.S.C. § 20507

Voter List Maintenance Requirements under the NVRA

8. The NVRA was enacted “to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office” while “ensur[ing] that accurate and current voter registration rolls are maintained.” 52 U.S.C. § 20501(b)(1), (4).

9. Section 8 of the NVRA (“Section 8”) addresses state voter list maintenance procedures for elections for federal office. 52 U.S.C. § 20507.

10. Section 8 prescribes the conditions under which registrants may be removed from voter registration lists and the procedures that must be followed before making those removals. 52 U.S.C. § 20507.

11. Programs to maintain accurate and current voter registration lists must be uniform and nondiscriminatory, and they must comply with the Voting Rights Act. 52 U.S.C. § 20507(b)(1).

12. Programs to maintain accurate and current voter registration lists may not remove registrants by reason of a registrant’s failure to vote, except as provided in the procedures under Sections 8(c) and (d). 52 U.S.C. § 20507(b)(2).

13. Section 8 permits states to remove the name of a person from the voter registration lists upon the request of the registrant, and, if state law so provides, for mental incapacity or for criminal conviction. 52 U.S.C. § 20507(a)(3)(A)-(B).

14. Section 8 also requires states to conduct a general voter registration list maintenance program that makes a reasonable effort to remove persons from the voter list who have become ineligible by reason of death or a change in residence outside of the jurisdiction, in accordance with procedures set forth in the NVRA. 52 U.S.C. § 20507(a)(4).

15. Section 8 further specifies the two circumstances under which a registrant may be removed from the voter registration list because the registrant has moved to another jurisdiction. 52 U.S.C. § 20507(d)(1).

16. First, a state can remove the name of a person from the voter registration list on grounds of a change of residence based upon the registrant’s written confirmation of a change of

address to a location outside of the registrar's jurisdiction. 52 U.S.C. § 20507(d)(1)(A).

17. Second, a state can remove the name of a person from the voter registration list on grounds of a change of residence upon completion of the process set forth in Section 8(d), 52 U.S.C. § 20507(d), which allows removal if:

- (a) The registrant fails to respond to a notice ("Section 8(d)(2) notice") which includes a postage prepaid and preaddressed return card sent by forwardable mail, on which the registrant may state his or her current address, and which contains specific instructions and information, 52 U.S.C. § 20507(d)(1)(B)(i), (d)(2), and
- (b) The registrant then fails to vote or appear to vote during the period ending on the day after the second federal general election subsequent to the Section 8(d)(2) notice being sent. 52 U.S.C. § 20507(d)(1)(B)(ii).

18. Section 8(f) provides that when a registrant has a change of residence to an address within the same jurisdiction, the voter registration list must be updated accordingly and the registrant's name may not be removed except as provided in Section 8(d). 52 U.S.C. § 20507(f).

19. Section 8 also provides an example of a list maintenance program that constitutes a reasonable effort to remove registrants who have become ineligible due to a change of residence. 52 U.S.C. § 20507(c)(1). Under this program, a state uses information from the United States Postal Service National Change of Address ("NCOA") program to identify registrants who may have changed residence. 52 U.S.C. § 20507(c)(1)(A). Where it appears from that NCOA information that a registrant has moved to a new address in the same jurisdiction, the registration record is updated to show the new address and the registrant is sent a

notice of the change by forwardable mail that includes a postage-prepaid, pre-addressed return form by which the registrant may verify or correct the address information. 52 U.S.C. § 20507(c)(1)(B)(i). Where it appears from the NCOA information that a registrant has moved to a new address in a different jurisdiction, the procedure set out in Section 8(d) and described above is used to confirm the address change. 52 U.S.C. § 20507(c)(1)(B)(ii).

20. Section 8 requires states to complete any program, the purpose of which is to systematically remove the names of ineligible registrants from the official list of eligible voters, not later than 90 days prior to the date of a primary election or general election for federal office. 52 U.S.C. § 20507(c)(2)(A).

Voter List Maintenance Procedures under Kentucky State Law

21. Kentucky law requires the State Board of Elections to establish a voter registration purge program using the change-of-address information supplied by the United States Postal Service through its licensees or other sources to identify registrants whose addresses may have changed. KRS § 116.112(1).

22. If it appears that a registrant has moved within the same county, the State Board of Elections is required to provide the county board of elections with the information necessary to change the registration record. The State Board of Elections is also required to send to the new address a notice of the change by forwardable mail and a postage-prepaid, pre-addressed return form by which the registrant may verify or correct the address information. KRS § 116.112(2).

23. If it appears that a registrant has moved to a different county or state, the State Board of Elections is required to send to the address at which the registrant was last registered,

by forwardable mail, a notice with a postage-prepaid and pre-addressed return card on which the registrant may state his or her current address. KRS § 116.112(3).

24. A registrant may not be removed from the registration records on the ground that the registrant has changed residence unless the registrant:

- (a) Confirms in writing that the registrant has changed residence to a place outside the county; or
- (b) Has failed to respond to the mailed notice and has not voted or appeared to vote and, if necessary, correct the registrant's address, in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

KRS § 116.112(4).

25. As part of its list maintenance program, the State Board of Elections is required by state law to maintain an inactive list. State law provides that when the State Board sends the notices described in KRS § 116.112(3) to registrants identified as having moved to a new county or state, the registrants who do not respond to the notice and do not vote or appear to vote for two federal election cycles are maintained on an inactive list. KRS § 116.112(5). When the State Board last sent such notices in 2009, those registrants who did not respond to the notice and did not vote or appear to vote for two federal election cycles were included on an inactive list and ultimately removed from the registration list.

26. Kentucky law permits registrants on the inactive list to vote, but not to be counted for other purposes such as creating precincts or calculating the state funding provided to county clerks based on the number of registered voters in the county. KRS § 116.112(7).

27. Kentucky law requires the State Board of Elections to complete, not later than ninety days prior to the date of a primary or general election, any program the purpose of which is to systematically remove the names of ineligible voters from the registration records. KRS § 116.112(6).

28. In recent years, however, Kentucky has not implemented a general program of list maintenance that makes a reasonable effort to remove registrants who have become ineligible due to a change of residence.

29. Kentucky has not used available and reliable sources of information, such as the NCOA program, to identify registrants who may have moved.

30. Since 2009, the State Board of Elections has not mailed any forwardable notices to registrants under the change of address process contemplated by Section 8(d) of the NVRA and KRS § 116.112. The State Board of Elections has not removed registrants who have become ineligible due to an unreported change of residence, as contemplated by the procedures set out in Section 8(d) of the NVRA and KRS § 116.112, since 2015. Kentucky currently has no registrants on its inactive list or in the Section 8(d) process.

31. Biennial reports published by the U.S. Election Assistance Commission (“EAC”), based on data provided by Kentucky and other states, confirm these facts. The EAC report covering the 2015-2016 election cycle, published in June 2017, indicates that Kentucky had no inactive voters as of the conclusion of the reporting period. This and prior EAC reports confirm that the State Board of Elections has not sent Section 8(d)(2) mailings since the 2009-2010 election cycle.

32. On June 28, 2017, the United States Department of Justice sent a letter to Kentucky, requesting information relating to the Commonwealth’s compliance with the list

maintenance provisions of the NVRA, including the number of confirmation notices sent during the 2013-2014 election cycle, as requested by the EAC. *See* Exhibit A. On January 24, 2018, Kentucky sent a letter to the Department of Justice responding to the request for information. In regards to the 2013-2014 EAC report, the response stated, “Kentucky did not include data regarding confirmation notices and removal for failure to vote because there is no data to report. . . . The Kentucky Legislature has not funded the initiative, nor made it mandatory, so the State Board of Elections has not done a cancellation mailing during the time frame requested.”

33. The only procedures that the State Board of Elections implements to identify individuals who have changed residence, and who have not reported the change to election authorities or driver licensing authorities in Kentucky, relate to some registrants who have moved out of state. Upon receiving notice from election officials in another state that a person who moved to that state may have been registered in Kentucky, the State Board of Elections attempts to identify the person on the statewide voter registration list and, if successful, sends the registrant a notice seeking confirmation of the address change. If the registrant returns the notice and confirms that he or she has moved out of the State, the registrant is removed from the voter registration list. If the State Board does not receive a response, the registrant is not placed into the process defined in Section 8(d) of the NVRA and KRS § 116.112. Rather, no further action is taken, and the registrant remains an active registered voter in Kentucky.

34. This program results only in the removal of registrants who have (1) moved out of Kentucky, (2) moved to a state that voluntarily sends this information to Kentucky, and (3) received and affirmatively responded to a notice. This does not reach registrants who have moved to other states or moved within Kentucky without notifying election or motor vehicle authorities, or who failed to respond affirmatively to the State Board’s notice.

Violation of Section 8 of the NVRA

35. Defendants' practices do not comply with the NVRA's requirement that states conduct a general program of voter registration list maintenance that makes a reasonable effort to remove persons from the voter rolls who have become ineligible due to a change in residence outside of the jurisdiction. 52 U.S.C. § 20507(a)(4)(B).

36. Unless and until ordered to do so by this Court, the Defendants will not take timely and comprehensive actions necessary to ensure that a list maintenance program is implemented as required by Section 8 of the NVRA.

PRAYER FOR RELIEF

WHEREFORE, the United States prays that the Court enter an ORDER:

- (1) Declaring that Defendants have violated Section 8 of the NVRA;
- (2) Enjoining Defendants, their agents and successors in office, and all persons acting in concert with them from future non-compliance with Section 8 of the NVRA;
- (3) Requiring Defendants, their agents and successors in office, and all persons acting in concert with them, to take all steps necessary to ensure immediate and ongoing compliance with Section 8 of the NVRA; and
- (4) Ordering any such additional relief as the interests of justice may require, together with the costs and disbursement in maintaining this action.

Date: June 12, 2018

Respectfully submitted,

JOHN M. GORE
Acting Assistant Attorney General
Civil Rights Division

/s/ David G. Cooper
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EXHIBIT A



Voting Section - NWB
950 Pennsylvania Ave, NW
Washington, DC 20530

JUN 28 2017

The Honorable Alison Lundergan Grimes
Secretary of State
700 Capital Ave., Ste. 152
Frankfort, KY 40601

Dear Secretary Grimes:

We write to you as the chief election official for the Commonwealth of Kentucky to request information regarding the State's procedures for compliance with the statewide voter registration list maintenance provisions of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20501 et seq. and the Help America Vote Act ("HAVA"), 52 U.S.C. § 20901 et seq. As part of our nationwide enforcement efforts, we are reviewing voter registration list maintenance procedures in each state covered by the NVRA.

The NVRA imposes several requirements on covered states that promote the maintenance of accurate statewide voter lists. Among other things, states must:

- "conduct a general program that makes a reasonable effort to remove the names of ineligible voters" from the statewide voter registration list due to the registrant's death or change of residence (Section 8(a)(4), 52 U.S.C. § 20507(a)(4));
- ensure that the state's general program complies with the requirements and protections imposed by Sections 8(b), (c), and (d) (52 U.S.C. § 20507(b)-(d));
- ensure that any change-of-address form submitted by a voter to a state's motor vehicle authority for driver's licensing purposes serves as a change of address for voter registration purposes, unless the voter states a contrary intention on the form (Section 5(d), 52 U.S.C. § 20504(d));
- ensure that when a registrar receives information that a registered voter has moved to a new address within the registrar's jurisdiction, the voter list is updated to reflect the new address (Section 8(f), 52 U.S.C. § 20507(f)); and
- maintain and make available for public inspection for at least two years "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters" (Section 8(i), 52 U.S.C. § 20507(i)).

The NVRA imposes these requirements on the state itself. Thus, where a state tasks local election officials with implementing aspects of its list maintenance procedures, the state's chief

elections official must “actively oversee the general program” and ensure that it is “reasonably conducted.” *United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008).

HAVA also imposes certain list maintenance obligations on states as part of the uniform statewide database requirements of Section 303(a)(2) of HAVA, 52 U.S.C. § 21083(a)(2), including coordinating the state voter registration list with state agency records on felony status and death.

As well as reviewing states’ procedures, our efforts to assess compliance with these provisions will also include an analysis of voter registration data reported by each state to the U.S. Election Assistance Commission (“EAC”) as part of its biennial Election Administration and Voting Survey (“EAVS”). Data regarding confirmation notices, removals from the voter registration list, and active and inactive registered voters are of particular relevance and are among the categories of data for which reporting is required by EAC regulations. *See* 11 C.F.R. § 9428.7. However, such data for some states were not included in the 2014 EAVS report,¹ the most recent survey results published by the EAC. Thus, some states are receiving a request for any missing data as part of the information requested below. Similarly, we will review the forthcoming 2016 EAVS data when they are available.

To assist our efforts, we respectfully request that you provide us with the following information related to the above requirements:

- All statutes, regulations, written guidance, internal policies, or database user manuals that set out the procedures Kentucky has put in place relating to:
 - (A) the general program required by Section 8(a)(4) to remove voters from the voter registration list who have become ineligible due to death or change of residence;
 - (B) the requirement of Section 5(d) that motor vehicle changes of address generally serve as updates to voter registration records;
 - (C) any other process that election officials are authorized or required to follow to remove voters by reason of death or change in residence, such as challenge procedures or other list maintenance activities not part of the “general program”; and
 - (D) the processes that the state follows for coordinating state databases under HAVA for list maintenance purposes, and any other database coordination or comparison that the state undertakes for list maintenance purposes.

If your state has relevant procedures in place that are not covered by these written materials, please provide a description of them.

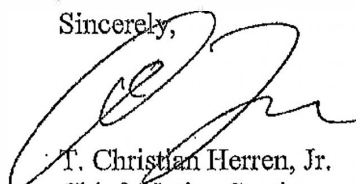
¹ U.S. Election Assistance Commission, “The EAC 2014 Election Administration and Voting Survey Comprehensive Report: A Report to the 114th Congress,” June 30, 2015, *available at* https://www.eac.gov/assets/1/1/2014_EAC_EAVS_Comprehensive_Report_508_Compliant.pdf.

- An explanation of which election officials are responsible for implementing Kentucky's general program of voter registration list maintenance, and for those responsible officials not employed by your office (such as a local election official), a description of the steps that you have taken to ensure that the State's list maintenance program has been properly carried out in full compliance with the NVRA.
- The following data relating to voter registration list maintenance that were requested by the EAC as part of its 2014 EAVS, but were not included for Kentucky in the EAC's survey report² (please provide data for each of your state's local jurisdictions, as defined by the 2014 EAVS):
 - The number of confirmation notices sent to voters in the period between the close of registration for the November 2012 general election and the close of registration for the November 2014 general election (requested by question A10a of the 2014 EAVS Survey Instrument)
 - The number of voters removed from the voter registration rolls in your jurisdiction in the period between the close of registration for the November 2012 general election and the close of registration for the November 2014 general election due to failure to respond to notice sent and failure to vote in the two most recent Federal elections (requested by question A11g of the 2014 EAVS Survey Instrument)

Please also indicate whether Kentucky is reporting similar data in response to the 2016 EAVS.

Please provide this information within 30 days of the date of this letter. The materials may be sent by email to voting.section@usdoj.gov or by FedEx or UPS to Voting Section, Civil Rights Division, Room 7254, U.S. Department of Justice, 1800 G Street NW, Washington, DC 20006. If you have any questions regarding this request, please contact Samuel Oliker-Friedland at 202-353-6196 or David Cooper at 202-305-4733. We very much appreciate your cooperation in our nationwide efforts to monitor NVRA compliance.

Sincerely,



T. Christian Herren, Jr.
Chief, Voting Section

cc: Ms. Maryellen Allen, Executive Director, State Board of Elections

² See 2014 EAVS Report, tbls. 4a & 4b; 2014 EAVS Survey Instrument, available at <https://www.eac.gov/assets/1/1/2014%20Election%20Administration%20and%20Voting%20SurveyFinal-2014-05-15.pdf>.