IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 18-2491, 18-2492

COMMON CAUSE INDIANA and INDIANA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs/Appellees,

v.

CONNIE LAWSON, in her official capacity as Secretary of State of Indiana, *et al.*,

Defendants/Appellants.

On Appeal from the United States District Court for the Southern District of Indiana, Nos. 1:17-cv-03936-TWP-MPB, 1:17-cv-02897-TWP-MPB
The Honorable Tanya Walton Pratt, Judge

BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANTS

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JURISDICTIONAL STATEMENT

Common Cause Indiana and, separately, the Indiana State Conference of the National Association for the Advancement of Colored People (NAACP) and League of Women Voters of Indiana, filed these actions under the National Voter Registration Act of 1993 (NVRA)'s private right of action, 52 U.S.C. section 20510(b), and 42 U.S.C. section 1983 for injunctive and declaratory relief against Defendants, 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, Angela Nussmeyer, in her official capacity as Co-Director of the Indiana Election Division. Plaintiffs claim Indiana Code § 3-7-38.2-5(d)–(e), which governs removal of names from voter registration rolls, violates the National Voter Registration Act, 52 U.S.C. § 20507. The district court had subject-matter jurisdiction over this case under 28 U.S.C. sections 1331 and 1343.

On June 8, 2018, the district court issued preliminary injunctions in both cases "prohibiting the Defendants from taking any actions to implement SEA 442 until th[ese] case[s] ha[ve] been finally resolved." Short App. 28, 56.

On July 9, 2018, Defendants timely filed a Notice of Appeal to the Seventh Circuit in both cases seeking review of the Order Granting Plaintiff's Motion for Preliminary Injunction, Short App. 1, 30. *Common Cause* ECF No. 105, Notice of Appeal; *NAACP* ECF No. 65, Notice of Appeal. This Court consolidated the cases on July 13, 2018. ECF No. 2. This is not an appeal from a decision by a magistrate judge. This

is an appeal of an interlocutory order granting an injunction, and the Court has appellate jurisdiction under 28 U.S.C. section 1292(a)(1).

STATEMENT OF THE ISSUE

1. Whether Plaintiffs—nonpartisan advocacy and civic organizations—have standing to challenge Indiana's use of the Interstate Voter Crosscheck Program as a violation of the National Voter Registration Act.

2. Whether Indiana's use of the Interstate Voter Crosscheck Program—a program administered by the Kansas Secretary of State to identify voters who have moved to and registered to vote in another State—is consistent with the National Voter Registration Act.

STATEMENT OF THE CASE

Indiana's Voter List Maintenance Law requires that Indiana submit its statewide voter registration list for analysis under the Interstate Voter Crosscheck Program. Crosscheck is a database software system whereby numerous participating States send their voter registration rolls to the Office of the Kansas Secretary of State. The Kansas Secretary of State compiles the data, identifies individuals who may be registered in more than one State, and sends a record of those matches to participating States. Indiana law requires the Indiana Election Division to weed out false matches using specified "confidence factors." The Division must send any matches having a confidence factor score of 75 to the appropriate county voter registration office, which must remove the matched name from its roll of registered voters if it determines that the same individual registered to vote in another State subsequent

to registering in Indiana. Crosscheck exists within a larger context of federal and state laws that safeguard both the integrity of voting rolls and the right to vote.

I. Indiana's Implementation of the National Voter Registration Act

A. The NVRA Requires Voter List Maintenance

More than two decades ago, Congress grew concerned about both inaccurate state voter rolls and low voter turnout. *See* Proposed S. 250, 102d Cong. § 2(b) (1992). Congress enacted the National Voter Registration Act of 1993 (NVRA), Pub. L. 103-31, 107 Stat. 77, originally codified at 42 U.S.C. §§ 1973gg to 1973gg-10, but later recodified at 52 U.S.C. §§ 20501–20511, with the express purposes of "establish[ing] procedures that will increase the number of eligible citizens who register to vote in elections for federal office" *and* "to ensure that accurate and current voter registration rolls are maintained." 42 U.S.C. § 1973gg(b)(1),(4) (emphasis added); *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018) ("The [NVRA] has two main objectives: increasing voter registration and removing ineligible persons from the States' voter registration rolls.").

In particular, the NVRA mandates voter roll maintenance as a means of removing invalid registrations. H.R. Rep. No. 103-9, at 2 (1993), *reprinted in* U.S.C.C.A.N. 105, 106; *see also* S. Rep. No. 103-6, at 18 (1993); see also H.R. Rep. No. 103-9, at 15 (1993). Several provisions of the statute illustrate this purpose.

First, section 20507(a)(4) directs States to "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" a registrant's death or changed residence. 52 U.S.C. § 20507(a)(4).

Second, section 20507(b) limits "State program[s] or activit[ies] to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office." *Id.* In particular, Section 20507(b)(1) requires maintenance efforts to "be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. § 20507(b)(1).

Third, section 20507(d) outlines ways States may remove registrants who move. States may only remove registered voters in two circumstances: (1) if the registrant "confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or (2) if the registrant "has failed to respond to a notice" that the registrant may be removed from the voter rolls and "has not voted or appeared to vote . . . 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." 52 U.S.C. § 20507(d)(1)(A)–(B).

Each State must designate officials to implement the provisions of the NVRA. 52 U.S.C. § 20509.

B. Indiana Officials Implement the NVRA

The co-directors of the Indiana Election Division serve "as the chief state election official responsible for the coordination of state responsibilities under NVRA." Ind. Code § 3-7-11-1. The governor appoints the co-directors, who "may not be members of the same political party." Ind. Code § 3-6-4.2-3.

The Indiana Secretary of State and the co-directors of the election division jointly maintain the voter registration list via a computerized database called the Statewide Voter Registration System (SVRS). Ind. Code § 3-7-26.3-3; Indiana Election System, Statewide Voter Registration System, https://www.in.gov/sos/elections/2654.htm. The State first implemented the system in December 2005 to replace voter registration lists previously maintained at the local level. *Id.*

The Co-Directors also keep counties and their election officials apprised of voter registration laws in several ways: an annual Election Administrator's Conference; bi-annual clerk's association conferences; a Voter Registration Association conference, which the co-directors attend; a published voter registration manual; and other manuals available to the counties. In addition, Quest, the vendor who administers the SVRS, creates a step-by-step manual to operate SVRS and provides standard operating procedures to county election officials. The vendor also hosts online training that county officials may attend throughout the year. App. 139–40.

C. Indiana's Implementation of Crosscheck

Indiana's voter rolls have long included many invalid records. The federal government has even sued Indiana for running afoul of the NVRA by failing to cull its voter registration lists. In 2006, Indiana agreed to a stipulated judgment requiring the State to make efforts to identify and remove the names of ineligible voters from its voter registration list. *United States v. Indiana, et al.*, Case No. 1:06-cv-01000-RLY-TAB (S.D. Ind. 2006); *see also Crawford v. Marion County Election Board*, 553

U.S. 181, 192 (2008) (expressly recognizing that "Indiana's voter rolls were inflated by as much as 41.4%").

Crosscheck is an interstate software program created and administered by the Kansas Secretary of State that scans participating States' voter lists for dual registrations. In an effort to comply with the NVRA, the Indiana Legislature enacted a statute requiring Indiana's participation Crosscheck in 2013. *See* Ind. Code § 3-7-38.2-5. Under the statute, Indiana's NVRA officials executed a memorandum of understanding with the Kansas Secretary of State whereby Indiana annually submits its voter registration list for analysis under Kansas's Crosscheck system. *Id.* The Kansas Secretary of State compiles voter lists submitted by Indiana and other States, determines which individuals may be registered in more than one State, and sends a record of those matches back to the relevant States' NVRA officials. App. 32. The individual States decide what to do with the Crosscheck data. App. 33.

In 2017, the legislature enacted Senate Enrolled Act 442, which requires a county official to cancel a person's voter registration upon determining, based on Crosscheck, that the person registered to vote in another State after registering in Indiana. Ind. Code § 3-7-38.2-5(f). In 2018, it enacted House Enrolled Act 1253, which requires Election Division officials to evaluate each Crosscheck match using seven specified "confidence factors," each of which carries a specified point value. Ind. Code § 3-7-38.2-5(d).

Specifically, Indiana Code section 3-7-38.2-5(d)(1) requires that, for a Crosscheck-identified potential match even to be considered for cancellation, the "first

name, last name, and date of birth of the Indiana voter [be] identical to the first name, last name, and date of birth of the voter registered in the other state." Even if a match meets those threshold requirements, however, the Election Division must then test the match against the statutory confidence-factor point system:

> (A) Full Social Security number: 40 points.
> (B) Last four (4) digits of Social Security number: 10 points.
> (C) Indiana driver's license or identification card number: 50 points.
> (D) Date of birth: 25 points.
> (E) Last Name: 15 points.
> (F) First Name: 15 points.
> (G) Middle Name: 5 points.
> (H) Suffix: 5 points.
> (I) Street Address 1: 10 points.
> (J) Zip Code (first five (5) digits): 5 points.

Ind. Code § 3-7-38.2-5(d)(2).

The Election Division must provide any Crosscheck names receiving a confidence factor of at least 75 to the appropriate county official, which the Division submits through each county's SVRS "hopper," or electronic inbox. App. 146. County officials must determine whether the matched name "is the same individual who is a registered voter of the county," and whether that individual "registered to vote in another state on a date following the date that voter registered in Indiana." Ind. Code § 3-7-38.2-5(e). That is, "[e]ven if confidence factors are the maximum possible, Indiana law does not require that the county act in a particular way in regard to that record. The county can use information it has independently of the Kansas submission to determine if, in fact, two records which match are the same person." App. 148.

To date, the Election Division has uploaded no data to county hoppers under this system, which became effective March 15, 2018. Ind. Code § 3-7-38.2-5; App.

154–55, 160, 179–80, 190–91, 194, 197. The Co-Directors have not yet even provided any specific direction to county officials as to how to implement the newly amended statute. App. 194, 197.

D. Safeguards Against Erroneous Cancellation

The Election Division shuts down the SVRS hoppers 90 days before the election, meaning no more registrations can be cancelled based on Crosscheck data. App. 114. Therefore, once the 90-day deadline has passed, voters may verify online that their registrations remain valid for the upcoming election, or, in the event of erroneous cancellation, re-register until 30 days before the election. App. 106.

But even if a voter does not discover an erroneously cancelled registration until the day of the election, that voter can still vote. App. 85–89. Any voter whose voter registration record shows that the voter "formerly resided in a precinct according to the voter registration record" and "no longer resides in that precinct according to the voter registration record," but who in fact still resides in that precinct, is eligible for Indiana's failsafe voting procedure. Ind. Code § 3-7-48-5. When that voter discovers that his or her registration has been mistakenly removed from the poll book, the poll workers can call the county voter registration office to verify that the voter was previously registered in that precinct. App. 85. Then, precinct election officials will ask the voter to fill out an affidavit affirming that the voter continues to reside at the same address in that precinct. Ind. Code § 3-7-48-5. If the precinct uses paper poll books, the voter will typically complete the affidavit on the poll book itself. *Id.* If the precinct uses electronic poll books, the poll workers will provide pre-printed affidavits

for the voter to use. App. 104. Once the voter has signed an affidavit, the voter may cast a ballot in the election. *Id.* This ballot is not in any way provisional; it is counted as if the voter's registration had never been cancelled. Once the election has concluded, the county voter registration office will update the poll list in accordance with the affidavit. Ind. Code § 3-10-1-31.1(e).

E. This Lawsuit

Plaintiffs filed their motions for preliminary injunction on March 8, 2018, alleging that Indiana's use of Crosscheck, as codified by Indiana Code section 3-7-38.2-5, contravenes the NVRA. App. 223–25. Plaintiffs allege that Crosscheck violates the NVRA because it "permits Indiana counties to cancel voter registrations immediately once they receive information through Crosscheck that they 'determine' indicates a voter may have moved." App. 200. Such immediate removal, plaintiffs argue, conflicts with the NVRA's notice and waiting period requirements. *Id.* In both cases, the district court issued a preliminary injunction against "any actions to implement SEA 442," *i.e.*, Crosscheck, on June 8, 2018. Short App. 28, 56.

In its memorandum decisions, the district court first ruled that Plaintiffs, multiple advocacy and civic organizations, had standing because they have been "compelled to divert . . . resources to address SEA 442" such that their "mission focus has been affected." Short App. 21, 49. The district court cited *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), concluding that the "Seventh Circuit explicitly recognized this 'division of resources' theory." Short App. 19, 21, 49.

On the merits of the NVRA issue, though the Plaintiffs did not present any evidence any voter would be erroneously removed from the rolls by way of Crosscheck, the district court determined that "any actions to implement SEA 442" must be enjoined for lack of "the notice and a waiting period required by the NVRA when a voter did not confirm in writing of their change in residence or did not request to be removed from the voter rolls." Short App. 22, 50. In particular, "[t]he act of registering to vote in a second state as determined by Crosscheck[,]" the district court held, "cannot constitute a written request to be removed from Indiana's voter rolls[.]" Short App. 22, 50. Likewise, the court said, registering in another State does not constitute "a confirmation in writing from the voter that they have changed their address" because "this [out-of-state voter] information is not coming from the voter but rather from Crosscheck, which may or may not be reliable." Short App. 22, 50.

The district court also declared that "implementation of SEA 442 will likely fail to be uniform based on the evidence that King and Nussmeyer provide differing guidance to county officials on how to determine whether a particular registered voter is a duplicate registered voter in a different state." Short App. 23, 51. NAACP and League of Women Voters also asserted a claim under 42 U.S.C. § 1983, but the district court did not address it because plaintiffs failed to develop it. Short App. 12.

SUMMARY OF THE ARGUMENT

Indiana seeks to comply with the NVRA by removing from its voter rolls the names of registered individuals who have moved out of State, as demonstrated by

subsequent registrations in other States. Crosscheck provides an efficient, exceedingly low-risk way to accomplish that task through a multistate database that identifies voters who are registered in more than one State. Once the Election Division receives the list of duplicate registrations, it analyzes the voters identified under certain confidence factors, then turns the list of voters that meet those factors over to the counties to determine whether the same voter has subsequently registered in another State. Only those voter registrations that pass this final determination may be removed from the voting rolls, and even then, voters whose names have been removed in error have a failsafe process for continuing to vote in Indiana.

First, the Plaintiff organizations lack standing to challenge Crosscheck. They allege direct injury to themselves because Crosscheck supposedly "forces" them to "divert" resources from their primary missions to helping ensure that members remain registered to vote. But *Havens* and *Crawford* permit organizations to assert direct injury only when a statute prompts them to divert resources outside their stated missions. Here, all Plaintiff organizations include eliminating voting barriers to be among their *primary* missions. So, whatever barriers to voting Crosscheck may represent, when Plaintiffs expend resources on overcoming those barriers, they *advance* their primary mission, not divert resources away from it. Consequently, the diversion-of-resources theory does not help plaintiffs—they cannot create an Article III injury simply by declaring opposition to Crosscheck and then fulfilling their self-stated mission.

Plaintiffs also do not have associational standing because they can point to no members that have been harmed by Crosscheck or who stand to suffer imminent harm if Crosscheck were implemented. Indeed, given the speculative nature of the injury Plaintiffs theorize—erroneous cancellation of an individual's voter registration without notice—there is no way to be sure that any of their members may ever be injured by Crosscheck. But that uncertainty does not cut in favor of associational standing, which is not dispensed based on statistical estimates of the likelihood of member injury in the future—particularly given that nothing about Plaintiffs' members makes them statistically more likely to suffer erroneous cancellation than the general population. What is more, even if some members' registrations were erroneously cancelled owing to Crosscheck, Indiana's failsafe voting method would secure their voting rights by allowing them to cast a vote on Election Day anyway. There is no equitable or exigent reason in this case for blowing open Article III associational standing doctrine to permit a pre-enforcement challenge based on speculative harm to unidentified members of a plaintiff organization.

On the merits, Plaintiffs' theory of the case is that NVRA requires advance notice to a registered voter that the voter's registration is about to be cancelled, and that Crosscheck does not provide such advance notice. All agree, however, that the NVRA dispenses with the notice-and-waiting-period requirement when the voter either requests cancellation or confirms change of address. Cancellation pursuant to Crosscheck qualifies under both exceptions.

When an individual is registered to vote in Indiana, but then moves to another State and registers to vote there, such an act cannot reasonably be understood as anything *other* than a request to cancel the Indiana registration. To conclude otherwise would be to conclude that the individual intends to vote in two different States, which would be election fraud. Voter registration is a zero-sum game. Registering in a new State perforce means cancelling in the former State. Citizens cannot go around the country accumulating more and more voter registrations like stamps in a passport. Whether the individual registering in a new State specifically contemplates the implications or not, the act of registering anew *must* be understood as a request to cancel the old registration, and the history of the NVRA confirms as much. At the very least, registering to vote in another State constitutes written confirmation that a voter has changed address. Again, the only alternative inference is that the voter intends to commit election fraud.

The district court rejected these arguments both because the court refused to accept the inescapable implications of a subsequent voter registration and because the court disqualified a Crosscheck report as acceptable evidence of a subsequent voter registration. But the district court ignored Indiana's requirement that the Crosscheck identification meet certain confidence factors before the Election Division passes it along to the county voter registration office and that the county voter registration office independently verify that the voter identified is registered in more than one State and that the out-of-state registration was subsequent to the Indiana regis-

tration. Ind. Code § 3-7-38.2-5. These verification procedures ensure that voter registrations are not mistakenly removed. Moreover, even if a voter's registration is nevertheless canceled erroneously, that voter can still vote on Election Day using Indiana's failsafe voting method. Therefore, SEA 442 does not deprive voters of their rights under the NVRA.

STANDARD OF REVIEW

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This Court reviews a district court's grant of a preliminary injunction de novo as to its legal conclusions, for clear error as to its factual findings, and for abuse of discretion as to its balance of the equities. *See United Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 563 F.3d 257, 269 (7th Cir. 2009).

Because further litigation is unlikely to yield any additional evidence bearing on the merits of the case, appellants argue only that Plaintiffs lack standing and that their claims lack legal merit.

ARGUMENT

I. Plaintiffs Lack Standing To Challenge Indiana's Voter List Maintenance Law Under the NVRA

This Court should vacate the preliminary injunction because Plaintiffs lack standing even to bring this challenge—a question reviewed de novo. *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 691 (7th Cir. 2015). Plaintiffs have failed

to establish any injury in fact to themselves as organizations, or injuries to any of their members. They also have failed to establish any causal relationship between any alleged injury and the challenged actions of the named defendants.

A. Plaintiffs lack standing on their own

For their claims of direct injury, Plaintiff community organizations say that Crosscheck requires their resources to address the supposed deleterious effects of the program. The problem with this theory is that each of these organizations lists overcoming election barriers as a primary mission, which means that expending resources opposing Crosscheck does not constitute cognizable Article III harm because it is not prompting diversion of resources away from some higher priority. In the leading case from this Court on the subject, *Crawford v. Marion County Election Board*, 472 F.3d 949, 951 (7th Cir. 2007), the Democratic Party was able to establish standing by demonstrating that Indiana's Voter ID law required it to divert resources away from its primary mission of promoting candidates and toward making sure its members have photo identifications. Notably, this Court specifically left open the "less certain" question whether other organizations whose missions are not similarly undermined by a law impacting voting rights might have standing to challenge such a law. *Id.* Here, the evidence shows why non-partisan organizations devoted to assisting members overcome voting barriers are not similarly situated to political parties when it comes to asserting Article III standing to challenge election laws.

In their own terms, Common Cause is "a national non-profit, nonpartisan grassroots organization that advocates in favor of ethics, good government, campaign

finance reform, constitutional law, and *the elimination of barriers to voting*." App. 201 (emphasis added). The NAACP is "a nonpartisan, nonprofit organization" that "has made it its mission to promote civic engagement by educating voters, monitoring polls, and *facilitating voter registration*." App. 3 (emphasis added). The League of Women Voters is "a nonpartisan, nonprofit organization" that "conducts voter registration drives, encourages and *assists individuals in voting*, and conducts other activities to boost civic engagement[.]" App. 4 (emphasis added). In sum, all three plaintiff organizations are specifically dedicated to the purpose of helping people to vote.

In its complaint, Plaintiff Common Cause Indiana claimed that lobbying efforts connected with SEA 442 took time away from other important issues for which Common Cause was lobbying and advocating at the time. App. 211–13. Common Cause also claimed that it needed to devote significant staff and time and resources to ameliorate the effects of SEA 442 by conducting training sessions aimed at educating voters and community activists; that it has had to change its curriculum and presentation materials to address SEA 442; that it will have to spend a greater portion of time discussing SEA 442's effects which will divert time spent talking about other issues; and it believes the number of phone calls it receives on Election Day from voters whose names had been erroneously removed from the voter roll will increase significantly once SEA 442 is implemented. App. 211–13. Similarly, NAACP and the and League of Women Voters of Indiana claim they will need to devote staff and time

and resources to ameliorate the effects of SEA 442 by re-registering voters, conducting training sessions aimed at educating voters; and that it will have to spend a greater portion of time educating and monitoring volunteers on SEA 442's effects. App. 4–5.

But all of these efforts further the self-stated missions of the plaintiff organizations. Unlike in *Crawford*, where the voter ID statute forced the Democratic Party to divert resources away from its primary purpose of promoting candidates and toward ensuring that supporters were able to vote, here the plaintiff organizations are spending their resources to further a primary purpose: assisting their members to vote. The diversion-of-resources theory cannot be so broad as to confer standing to challenge election law on any organization that chooses to make its primary purpose removal of barriers to voting.

In finding standing, the district court relied on *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); Short App. 21, 49, but there standing rested not merely on the plaintiff organization's efforts to overcome the impact of the challenged conduct, but on the direct impediment the challenged conduct posed to the organization's mission. There, the defendant housing owner's discriminatory "steering practices" had "perceptibly impaired" the plaintiff housing organization's "ability to provide counseling and referral services for low- and moderate-income homeseekers." *Havens Realty*, 455 U.S. at 389. In that circumstance, "[s]uch concrete and demon-

strable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.* at 389.

Havens does not stand for the proposition that any use of resources in response to some action by a defendant constitutes direct injury. This and other circuits have properly limited *Havens* standing to situations where a defendant's actions "perceptibly impair" an organization's primary mission by requiring that funds be diverted to other purposes. *Hope, Inc. v. DuPage County, Ill.*, 738 F.2d 797 (7th Cir. 1984). In *Hope*, plaintiff was a non-profit organization dedicated to "promot[ing] and locat[ing] adequate housing for low and moderate income persons." *Id.* at 799. Plaintiff brought suit against DuPage County for discriminatory housing practices, alleging standing based on injury to its corporate purpose. *Id.* But this Court held that plaintiff "has failed to show a causal connection between its alleged injury and any challenged activity on the part of the DuPage County Board." *Id.* at 815.

Similarly, in *P.O.W.E.R.*, 727 F.2d at 168–69, the plaintiff organization challenged the State's decision not to allow registrars of the city's Board of Election Commissioners to register voters inside the waiting rooms of Illinois Department of Public Aid and Department of Labor offices. This Court held that plaintiffs did not have standing because "[t]he defendants did not prevent P.O.W.E.R. from doing anything it wanted to do; they merely refused to take steps that would have made P.O.W.E.R.'s actions more effective in attaining its aims of registering the poor and the unemployed." *Id.* at 172.

In *Blunt*, 767 F.3d 247, where advocacy organizations alleged race and disability discrimination against a school district, the court held that an organization "may not satisfy the injury in fact requirement by making expenditures solely for the purposes of litigation" and instead must "show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *Id.* at 285 (quoting *Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010)). Otherwise, "[i]f an organization obtains standing merely by expending resources in response to a statute, then Article III standing could be obtained through nothing more than filing a suit." *Indiana Democratic Party v. Rokita,* 458 F.Supp.2d 775, 817 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion County Election Bd.,* 472 F.3d 949 (7th Cir. 2007), *aff'd* 533 U.S. 181 (2008).

Here, as in *Hope*, *P.O.W.E.R.*, and *Blunt*, Plaintiffs have failed to identify cognizable injury to their organizations owing to Crosscheck. They claim only an interest in both opposing Crosscheck and helping others contend with it. But the State has done nothing to prevent Plaintiff organizations from forwarding that interest. The State's mere refusal to take steps to make Plaintiff organizations' efforts easier or more effective "is not an injury that will support a federal court action." *P.O.W.E.R.*, 727 F.2d at 172. Without some showing that they would suffer some injury to their own interests if they did not "expend[] resources in response to the statute," these Plaintiffs do not fit within the ambit of Article III. *Rokita*, 458 F.Supp.2d at 817.

B. Plaintiffs lack associational standing

In their reply brief in support of their request for preliminary injunction, Plaintiffs also argued that they have standing "to represent their members, who are at direct risk of removal," *NAACP* ECF No. 52, *NAACP* Reply Memorandum at 15; *CC* ECF No. 85, *Common Cause* Reply Memorandum at 6 ("Common Cause has associational standing"), but the district court never addressed this theory. An association has standing on behalf of its members only when those members "would otherwise have standing to sue in their own rights." *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988) (citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Yet, Plaintiffs acknowledged that "no Common Cause member has yet been purged pursuant to amended IC § 3-7-38.2-5(d)-(e)," and only speculated—without evidentiary support—that "once enforced, [Section 3-7-38.2-5 could] easily impact Common Cause's member." *CC* ECF No. 85 at 6; s*ee also NAACP* ECF No. 52 at 15–16 ("Plaintiffs' members are threatened with immediate injury by the implementation of SB 442.").

Such speculation about injury to a group's membership cannot support associational standing. In order to assert associational standing, "[t]he association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). But as Plaintiffs themselves acknowledge, they cannot identify any members who have been or will be disenfranchised if Crosscheck is implemented. At most, they

allege a statistical probability that some members may be erroneously removed from the voter rolls. Without more, this speculative injury is not sufficient for standing.

Last term in *Gill v. Whitford*, the Supreme Court underscored the point that standing to challenge election-related statutes depends on claims of concrete harm to individual voters. 138 S. Ct. 1916 (2018). In *Gill*, Chief Justice Roberts wrote for the Court that "[a] person's right to vote is 'individual and personal in nature.'" *Id.* at 1929 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). Only "'voters who allege facts showing disadvantage to themselves as individuals have standing to sue' to remedy that disadvantage." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 206 (1962)). By alleging a general and speculative injury to members, rather than particular and personal disadvantages, Plaintiffs fail to establish that any members would have standing to sue in their own rights and therefore fail to establish the basis for associational standing.

II. Using Crosscheck Complies with the National Voter Registration Act

Under the NVRA, election officials may remove a name from the voter rolls either at the person's request or acknowledgement of having moved outside the jurisdiction or where the person "has failed to respond to a notice" that their registration may be canceled and "has not voted or appeared to vote . . . 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." 52 U.S.C. § 20507(d)(1)(B). Removal of an individual from Indiana's voter registration rolls using Crosscheck is permissible because registering to vote in another State both

constitutes a request for removal in Indiana, 52 U.S.C. § 20507(a)(3)(A), and because it constitutes written confirmation that the registrant has moved, 52 U.S.C. § 20507(d)(1)(A). Moreover, as the NVRA also requires, Indiana's application of Crosscheck is "uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. § 20507(b)(1).

A. Registering to vote must necessarily be understood as a request to cancel a previous registration in another jurisdiction

The NVRA permits removal of a registrant from the official list of registered voters without advance notice "at the request of the registrant." 52 U.S.C. § 20507(a)(3)(A). A registrant's act of registering to vote in another State must be understood as a written request to remove that person's name from the rolls in the previous State of residence. The district court concluded that "[a] voter's act of registering to vote is simply that—a registration to vote. There is no request for removal." Short App. 22, 50. But what else could it possibly mean? No one, least of all Congress, thinks it permissible for a person to be registered to vote in more than one State. *See* 52 U.S.C. § 10307(e) (providing criminal penalties for "[w]hoever votes more than once in an election"). In any event, Congress and the NVRA do not specify the form for requesting removal, other than requiring it be "in writing." And while the district court's real objection is that Crosscheck data is unreliable, that concern is neither legally relevant nor supported by evidence, in particular because county officials must confirm the subsequent registration before removing the registrant from the voter rolls. Ind. Code § 3-7-38.2-5(e).

1. Unlike other provisions of the NVRA that require writing, section 20507(a)(3) does not specify the form by which a voter would request removal from a State's voter rolls.

The Senate and House Reports supporting the NVRA expressly observe that "A 'request' by a registrant would include actions that result in the registrant being registered at a new address, such as registering in another jurisdiction or providing a change-of-address notice through the drivers license process that updates the voter registration." S. Rep. No. 103-6, at 31; H.R. Rep. No. 103-9, at 14–15. Hence, Congress clearly understood registration in another state as a request to remove a voter's name from the voter rolls in the previous jurisdiction of residence.

Consistent with the intent of Congress evinced in these Senate and House Reports, Indiana's removal process requires that each county voter registration office in Indiana determine that an individual registered in their county has subsequently registered in another state before they remove that individual's name from the voter registration rolls. Ind. Code § 3-7-38.2-5(e). Critically, if a county voter registration office determined that the out-of-state registration occurred before the voter's registration in Indiana then the individual would not be removed. *Id*. Thus, on its face, Indiana Code section 3-7-38.2-5 requires a request from the registrant, in the form of subsequent registration in another state, before the registrant's name is removed from the official voter roll. This is in compliance with 52 U.S.C. section 20507(a)(3).

Practice and common sense dictate that by registering in another state an individual is requesting the removal of their name from the voting rolls of their previous

place of residence. Every state that participates in Crosscheck requires voter registrants to provide an address and to affirm residency of that state in writing.[1] Many also require the registrant affirm that the listed residence is the only legal residence or to forswear any claim of the right to vote in any other jurisdiction.[2]

In fact, the act of voting in two states is prohibited by federal law, 52 U.S.C. § 10307(e) (providing criminal penalties for "[w]hoever votes more than once in an election"), and that eliminating the opportunity for fraud is exactly the reason why NVRA requires voter list maintenance. 52 U.S.C. § 20501 (providing that the purpose of the NVRA includes "protect[ing] the integrity of the electoral process" and "ensur[ing] that accurate and current voter registration rolls are maintained"). Further,

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[1] *See, e.g.*, Arizona Voter Registration Form, https://www.azsos.gov/sites/azsos.gov/files/voter_registration_form.pdf; Oklahoma Voter Registration Form, http://www.okdhs.org/OKDHS%20PDF%20Library/OklahomaVoterRegistrationApplicationDHSWeb_afs_03222016.pdf; Missouri Voter Registration Form, https://www.sos.mo.gov/cmsimages/ElectionGoVoteMissouri/register2vote/Adair.pdf; Louisiana Voter Registration Form, https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ApplicationToRegisterToVote.pdf (all from websites last visited April 11, 2018).

[2] *See, e.g.,* Colorado Voter Registration Form, https://www.sos.state.co.us/pubs/elections/vote/VoterRegFormEnglish.pdf; Mississippi Voter Registration Form, http://www.sos.ms.gov/Elections-Voting/Documents/Voter_Registration.pdf; South Carolina Voter Registration Form, https://www.scvotes.org/files/VR_Blank_Form.pdf (all form websites last visited April 11, 2018). In fact, some States make it explicit that registering in their State cancels any previous registration. See, e.g., Michigan Voter Registration Form, https://www.michigan.gov/documents/MIVoterRegistration_97046_7.pdf (requiring voter to certify that "I authorize the cancellation of any previous registration."); North Carolina Voter Registration Form, https://www.ncsbe.gov/Portals/0/Forms/NCVoterRegForm06W.pdf (requiring voter to agree "if I am registered elsewhere, I am canceling that registration at this time[.]"); Virginia Voter Registration Form, https://www.elections.virginia.gov/Files/Forms/VoterForms/VoterRegistrationApplication.pdf; South Dakota Voter Registration Form, https://sdsos.gov/elections-voting/assets/VoterRegistrationFormFillable.pdf (requiring a voter to "authorize cancellation of my previous registration, if applicable."); Indiana Voter Registration Form, https://forms.in.gov/download.aspx?id=9341 (all form websites last visited April 11, 2018).

in addition to state laws that make it illegal to file false voter registration information, *see, e.g.,* Ind. Code § 3-14-3-1.1, federal law makes it illegal and punishable by fines and up to five years in prison for providing false information, such as address, on a voter registration or for voting more than once. 52 U.S.C. § 10307(c), (e).

Consequently, the act of registering to vote in another state must be understood as a request to be removed from the voter registration rolls of the previous state of residence. The district court did not identify any reason why a person might legitimately be registered to vote in two places or any reason why registering to vote should not be understood as a request for removal. Short App. 22, 50.

2. The district court incorrectly examined whether Crosscheck data is reliable and whether county officials would likely confirm the subsequent registration. The reliability of the Crosscheck data is not legally relevant to the state's compliance with the NVRA because there is no "reliability" requirement in the statute, which mandates only that a voter's registration may not be removed except "at the request of the registrant." 52 U.S.C. § 20507(a)(3)(A). The Supreme Court has already expressly precluded federal courts from engrafting the NVRA with additional prerequisites for canceling in valid voter registrations. In *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1847 (2018), the Court observed that the NVRA does not "authorize[] the federal courts to go beyond the restrictions set out in subsections (b), (c), and (d) [of the NVRA] and to strike down any state law that does not meet their own standard of 'reasonableness.'" The district court violated that principle with its reliability analysis.

The district court also suggested that because some county election officials may not comply with this state law, injunction against the entire statutory scheme is necessary. Short App. 16, 23, 51. But evidence that some county election officials have not followed the previous law is not evidence that the law is invalid. Any failure of local officials to comply with state law going forward can be remedied with more targeted state law claims. A facial federal law challenge to the entire statutory scheme is not an acceptable substitute.

Because the district court relied on erroneous and invented requirements for a voter to request to be removed from a state's voter rolls and a misunderstanding of information relied upon by the county election officials, this Court should reverse the district court's decision and uphold Indiana Code section 3-7-38.2-5.

B. Crosscheck satisfies NVRA's writing requirement for confirming residency changes

The NVRA also permits election officials to cancel a voter registration without notice or a waiting period where the registrant has "confirm[ed] 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). Just as a new registration in a new state constitutes a request to cancel a prior voter registration, so too does it constitute written notice of a change of residence outside the registrar's jurisdiction. Yet the district court concluded that "[t]he act of registering to vote in a second state as determined by Crosscheck cannot constitute . . . a confirmation in writing from the voter that they have changed their address," Short App. 22, 50, and sug-

gested that the state must receive such confirmation in writing from the voter directly, Short App. 20, 48. The NVRA, however, includes no such requirement, and there is no basis for rejecting a superseding voter registration as confirmation of change of address.

1. A superseding out-of-state voter registration constitutes written confirmation of voter's residency change

A superseding registration to vote as a resident of another state is undeniably confirmation in writing of a change of residence; indeed, registration forms typically—if not necessarily—require written confirmation of current residency, which in effect is notice of a change from a prior residency. *See supra* note 1 and accompanying text; App. 106. Indeed, Congress imposes criminal penalties on "[w]hoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting[.]" 52 U.S.C. § 10307(c). Surely, therefore, States may rely on a signed voter registration as written confirmation of a voter's current residency.

2. The district court imposed a reliability requirement not found in the NVRA

The district court emphasized that, when it comes via Crosscheck, the change of address "is not coming from the voter but rather from Crosscheck, which may or may not be reliable." Short App. 22, 50. Yet the NVRA imposes no restrictions on the evidence election officials may use to document a registrant's written confirmation of

address change, nor does it impose a threshold level of reliability such evidence must meet. Again, federal courts may not engrafting the NVRA with additional rules pertaining to removing voters from the rolls. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1847 (2018). The district court's judgment that Crosscheck data is not valid because it does not come directly from the voter and is somehow not reliable contravenes that command.

What is more, Indiana law does not permit election officials to rely solely on raw Crosscheck data. First, of course, the Election Division must apply the confidence factors to the data, and then forward only those matches with a score of 75 or greater. Second, the law provides that, even after they receive such high-scoring matches from the Election Division, county election officials must still make two separate additional determinations before removing such a matched name from the voter rolls: first, that the individual "identified in the report provided by the NVRA official . . . is the same individual who is a registered voter of the county," and second, that the individual "registered to vote in another state on a date following the date that voter registered in Indiana." Indiana Code § 3-7-38.2-5(e).

The district court failed to consider these safeguards and instead faulted defendants because the Crosscheck hopper "does not include the underlying documentation that would evidence a request or confirmation by the voter to cancel its registration[.]" *CC* ECF No. 74, *Common Cause* Memorandum in Support of Preliminary Injunction at 24; *NAACP* ECF No. 41, *NAACP* Memorandum in Support of Prelimi-

nary Injunction at 8; *see also* Short App. 14, 42. As it happens, however, the information to be provided in the hopper has yet to be determined, as does the protocol for county election officials to follow to make their determinations. App. 154–55, 160, 179–80, 190–91. Indeed, some county election officials have testified that in the past the actual registration documents from the other states were available for review. App. 169–70, 175–76, 186. Yet the district court relied only on what Plaintiffs *expect* to be in the Crosscheck hopper and enjoined enforcement of the statute before officials could decide whether and how to use primary registration documents in addition to Crosscheck data.

C. Indiana's use of the Crosscheck System is uniform, nondiscriminatory, and compliant with the Voting Rights Act of 1965

The NVRA requires that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. § 20507(b)(1). The district court hardly addressed this issue other than to "briefly note[] that it appears the implementation of SEA 442 will likely fail to be uniform based on the evidence that King and Nussmeyer provide differing guidance to county officials on how to determine whether a particular registered voter is a duplicate registered voter in a different state." Short App. 23, 51. Further, "[t]his is also true based on the evidence that Indiana's 92 county officials are left to use wide discretion in how they determine a duplicate registered voter, and they have used that discretion in very divergent ways." Short App. 23, 51.

Non-uniformity in a state's voter list maintenance activity arises where a state-required program or activity applies only to a certain class of voters. *See, e.g.*, *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 707 (N.D. Ohio 2006) (finding violation of NVRA uniformity requirement where state law directed voters to disclose if they were aided in filling out registration cards by a person "compensated" to do so, in that the law would in effect only apply to voters who were so aided). But that is not the case here and the district court does not even suggest as much.

Indiana law satisfies the uniformity requirement because each county election official is required to make the same determinations before removal. Indiana Code section 3-7-38.2-5(d) *requires* county election officials to determine whether the voter in the report is the same as the voter registered in the county *and* that the foreign registration is from a later date than the Indiana registration. Ind. Code § 3-7-38.2-5(d). Further, if the county election official makes such a determination, county voter registration office *shall* cancel that voter registration. *Id.* § 3-7-38.2-5(f).

What is more, county officials testified that they: (1) determine whether the voter in the report is the same as the voter registered in the county; (2) determine whether the foreign registration is from a later date than the Indiana registration, and (3) if so, cancel the voter registration. *See*, *e.g.*, App. 159 (Sheller testifying that she follows the laws and considers them mandatory), App. 165 (Mowery testifying that the election code is binding); *see also* App. 130, 134 (Nussmeyer testifying that Defendants "have a framework and state law that [they] are instructed to follow, and

in that they are uniform in [their] policies and procedures to the counties."). Any variation arises only from the legitimate need to evaluate each record based on all circumstances.

Finally, any potential for disagreement by the Co-Directors on how to make a final determination whether to cancel a registration has no effect on the uniform application of the law. State law requires *county* officials to make those final determinations, not the Co-Directors. Ind. Code § 3-7-38.2-5(d). And nothing in the NVRA requires the Co-Directors to provide unanimous, detailed instruction to county voter registration officials about how to make match determinations.

CONCLUSION

For the foregoing reasons, Plaintiffs cannot prevail on the merits of their NVRA claims and, accordingly, the State respectfully requests that this Court reverse and vacate the preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding certificates, contains 8,066 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

By: *s/ Thomas M. Fisher*
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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which sent notification of such filing to the following:

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REQUIRED SHORT APPENDIX

Pursuant to Circuit Rule 30, Appellants submit the following as their Required Short Appendix. Appellants' Required Short Appendix contains all of the materials required under Circuit Rule 30(a) and 30(b).

By: s/ *Thomas M. Fisher*
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), and LEAGUE OF WOMEN VOTERS OF INDIANA,	)	
Plaintiffs,	)	
v.	)	Case No. 1:17-cv-02897-TWP-MPB
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 NUSSMEYER, in her official capacity as Co-Director of the Indiana Election Division,	)	
Defendants.	)	

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on a Motion for Preliminary Injunction filed pursuant to Federal Rule of Civil Procedure 65 by Plaintiffs Indiana State Conference of the National Association for the Advancement of Colored People ("NAACP") and League of Women Voters of Indiana ("League") (collectively, "Plaintiffs") (Filing No. 41). The Plaintiffs challenge the legality of Indiana Senate Enrolled Act 442 (2017) ("SEA 442"), codified at Indiana Code § 3-7-38.2-5(d)–(e), which amends Indiana's voter registration laws. The National Voter Registration Act of 1993, 52 U.S.C. §§ 20507–20511 ("NVRA"), established procedural safeguards to protect eligible voters against disenfranchisement and to direct states to maintain accurate voter registration rolls. The NVRA placed specific requirements on the states to ensure that these goals were met. The Plaintiffs argue that SEA 442 violates the NVRA by circumventing its procedural

safeguards. The Plaintiffs seek preliminary injunctive relief to prohibit the Defendants from implementing or enforcing SEA 442. For the following reasons, the Court **grants** the Plaintiffs' Motion for Preliminary Injunction.

I. BACKGROUND

The NVRA was enacted to reduce barriers to applying for voter registration, to increase voter turnout, and to improve the accuracy of voter registration rolls. Under the NVRA, a voter's registration may be removed from the rolls if the voter requests to be removed, if they die, because of a criminal conviction or mental incapacity, or because of a change in residency. The NVRA provides, "In the administration of voter registration for elections for Federal office, 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." 52 U.S.C. § 20507(a)(4).

The NVRA further provides, "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall be uniform [and] nondiscriminatory." 52 U.S.C. § 20507(b)(1). Furthermore, the NVRA directs,

> A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office 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 registrar's jurisdiction in which the registrant is registered; or
> >
> > (B) (i) has failed to respond to a notice described in paragraph (2); and
> >
> > (ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of 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.

52 U.S.C. § 20507(d)(1). Paragraph (2) describes that the notice must be "a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address." 52 U.S.C. § 20507(d)(2).

Thus, in the context of removing voter registrations because of a change in residency, Section 20507(d)(1) requires either (1) the voter confirms in writing their change in residency, or (2) notice was mailed to the voter who then did not return the notice card and did not vote during the next two federal general elections.

Plaintiff NAACP is a nonpartisan, nonprofit organization that was chartered in 1940 (Filing No. 44). It has approximately 5,000 members in Indiana. *Id*. It was founded with the purposes of assisting African-American citizens to ensure political, educational, social, and economic equality of rights for all persons and to fight against racial discrimination. *Id*. Since its founding, promoting civic engagement has been vital to the NAACP's mission. *Id.* The NAACP fulfills this mission by registering voters, educating voters, monitoring the polls, and advocating for policies that ensure the election system is accessible. Historically, both in Indiana and throughout the country, voter registration and election practices have interfered with the ability of minority, low-income, and other traditionally disenfranchised communities to participate in democracy. Voter registration is central to the NAACP's mission of empowering minority voters because of the barriers the registration process has posed to participation for these communities. *Id*. They are also concerned that using the Interstate Voter Registration Crosscheck Program ("Crosscheck") as provided under SEA 442 will disproportionately harm minority voters because African-Americans and other minority groups are more likely to have common shared names, and therefore could be more likely to be identified by the Crosscheck program. *Id*.

The League of Women Voters of Indiana ("League") is a nonpartisan, nonprofit organization that was founded in 1920 (Filing No. 43). It is affiliated with the national League of Women Voters. Since its inception, the main purpose of the League has been to encourage people to vote (including by registering them to vote), keep them informed as voters, and also seek out information from candidates and public officials to serve the electorate and the citizenry. *Id.* The League conducts voter registration drives, encourages and assists individuals in voting, and conducts other activities to boost civic engagement, which has been essential to its mission since its founding. It considers voter registration drives to be critical in ensuring voters get on the rolls. *Id.* The League has more than 1,300 members in Indiana. *Id.*

Defendant Connie Lawson ("Lawson") is the Indiana Secretary of State, and in that capacity she is the chief election official in the State of Indiana. She is charged with performing all ministerial duties related to the state's administration of elections. Ind. Code §§ 3-6-3.7-1, 3-6-4.2-2(a).

Defendants Bradley King ("King") and Angela Nussmeyer ("Nussmeyer") are co-directors of the Indiana Election Division within the Secretary of State's office, and in that capacity they are jointly the "NVRA official" designated under Indiana law as responsible for the coordination of Indiana's responsibilities under the NVRA. Ind. Code § 3-7-11-1. These co-directors are individually appointed by the Governor based on recommendations from Indiana's Democratic and Republican parties, respectively. Each co-director has a four-year term that coincides with the term of the Indiana Secretary of State. *Id.* § 3-6-4.2-3.2. King and Nussmeyer thus are charged with coordinating county voter registration. They are considered Indiana's "NVRA officials". Ind. Code § 3-7-11-1.

Each county in the State of Indiana has either a county election board or a county board of registration. Ind. Code §§ 3-6-5-1, 3-6-5.2-3. Pursuant to the official policies, guidance, and standard operating procedures issued by King and Nussmeyer as the co-directors, the individual county boards conduct elections and administer election laws within their county. Ind. Code §§ 3-6-5-14, 3-6-5.2-6. The county boards are responsible for maintaining the voter registration records in their county by adding, updating, and removing voter registrations (Filing No. 42-21 at 12–15).

While the county boards are responsible for actually physically maintaining their voter registration records, this list maintenance is dictated by the policies, procedures, and guidance established by the election division co-directors and constrained by the election division's business rules governing the electronic statewide voter registration system (Filing No. 42-21 at 12–15). King and Nussmeyer are responsible for building, managing, and maintaining the statewide voter registration system, which includes creating the protocols within the system and issuing official policies, guidance, and standard operating procedures to guide the county boards on their duties under state and federal law. They also provide training to the county boards. *Id.*; Ind. Code § 3-6-4.2-14. The official guidance from King and Nussmeyer as reflected in the protocols, documents, and trainings are mandatory (Filing No. 42-21 at 82; Filing No. 42-23 at 21–22).

Regarding the electronic statewide voter registration system, King and Nussmeyer establish the standard operating procedures and the business rules that determine how the system operates. This includes dictating what information will be provided to county election officials to help them maintain their individual county voter rolls, and it also dictates what actions the county officials are able to take within the "online portal" of the statewide system (Filing No. 42-21 at 77, 110–11).

King and Nussmeyer receive and respond to questions from county election officials through telephone calls and emails. In advising county officials, King and Nussmeyer often respond to the county's inquiries independently and without consulting one another (Filing No. 42-21 at 20–21). King and Nussmeyer do not always agree on the required policies and procedures, including about voter registration and list maintenance, when they respond to inquiries from the counties. *Id.* at 22–23. King and Nussmeyer ultimately relegate responsibility for NVRA compliance to the counties by directing counties to use their best judgment in implementing the instructions the co-directors provide. *Id.* at 12–13, 24; Filing No. 42-24 at 62–63.

Indiana participates in the Interstate Voter Registration Crosscheck program ("Crosscheck") as a method for identifying voters who may have become ineligible to vote in Indiana because of a change in residence. Ind. Code § 3-7-38.2-5(d). Crosscheck is an interstate program that was created and is administered by the Kansas Secretary of State. The program is designed to identify voters who have moved to, and registered to vote in, another state. This is accomplished by comparing voter registration data provided by participating states. The participating states submit their voter registration data to Crosscheck, which then compares the first name, last name, and birthdate of registered voters to identify possible "matches" or duplicate voter registrations. The output data of possible matches is then sent back to the participating states. The individual states decide what to do with the Crosscheck data (Filing No. 42-2).

Each year Indiana provides its statewide voter registration list to the Kansas Secretary of State to compare to data from other participating states through Crosscheck. Crosscheck then sends a list of possible matches back to Indiana, and within thirty days of receiving the list, Indiana's statute requires that the "NVRA official" (in this case King and Nussmeyer) "shall provide [to] the appropriate county voter registration office" the name and any other information

obtained on any Indiana voters who share "identical . . . first name, last name and date of birth of [a] voter registered in [another] state." Ind. Code § 3-7-38.2-5(d). While the statute requires King and Nussmeyer to provide this voter data to the county election officials, they have acknowledged that they only forward the data to the county officials if the data meets a certain "confidence factor," which King and Nussmeyer determine based on additional matching data points, such as address, middle name, or social security number (Filing No. 42-21 at 67–71; Filing No. 42-22 at 23–24). No data has been sent yet by King and Nussmeyer to the county election officials for the 2018 election cycle (Filing No. 51-3 at 3).

Once the county officials receive the voter data, they determine whether the voter identified as a possible match is the same individual who is registered in the county and whether the voter registered to vote in another state on a date after they had registered in Indiana. Ind. Code § 3-7-38.2-5(d). Within the statewide voter registration system, the county official may select for each possible matched voter registration "match approved," "match rejected," or "research needed". (Filing No. 42-20 at 7.) The information provided from Crosscheck to the county officials in the statewide voter registration system is limited to the personal data of voters. It does not include any underlying source documents (Filing No. 42-21 at 97–98).

The current configuration of the statewide voter registration system does not provide information about the dates of registration in Indiana and other states to assist in determining what state registration occurred first (Filing No. 42-20 at 7; Filing No. 42-21 at 126). Some county officials just assume that the Indiana registration predates the other state's registration, which leads to cancelling the Indiana registration (Filing No. 42-25 at 33; Filing No. 42-28 at 77; Filing No. 42-23 at 34; Filing No. 42-24 at 57–58). Even if dates of registration information was provided, this information is not complete or consistent because states that participate in Crosscheck do not

always populate the registration date field, and they have different policies in how they determine which date to use, so there is no uniform practice among states (Filing No. 42-21 at 100; Filing No. 42-22 at 29; Filing No. 42-19 at 2).

King and Nussmeyer do not provide guidance or a standardized procedure to the county election officials for how to determine whether the record of an Indiana voter is actually the same individual who is registered in another state or how to determine whether the out-of-state registration is more recent (Filing No. 42-22 at 44–45). Some counties simply approve all matches that appear as possible matches from Crosscheck (Filing No. 42-14). Each county has the discretion to cancel or not cancel a voter's registration based on their analysis of the data received from other states and Crosscheck (Filing No. 42-22 at 44).

The state statutory authority and directives upon which the above-described processes are based is found at Indiana Code § 3-7-38.2-5(d)–(e). Prior to its amendment in 2017, Indiana Code § 3-7-38.2-5(d)–(e) read:

> (d) The NVRA official shall execute a memorandum of understanding with the Kansas Secretary of State. Notwithstanding any limitation under IC 3-7-26.4 regarding the availability of certain information from the computerized list, on January 15 of each year, the NVRA official shall provide data from the statewide voter registration list without cost to the Kansas Secretary of State to permit the comparison of voter registration data in the statewide voter registration list with registration data from all other states participating in this memorandum of understanding and to identify any cases in which a voter cast a ballot in more than one (1) state during the same election. Not later than thirty (30) days following the receipt of information under this subsection indicating that a voter of Indiana may also be registered to vote in another state, the NVRA official shall provide the appropriate county voter registration office with the name of and any other information obtained under this subsection concerning that voter, if the first name, last name, and date of birth of the Indiana voter is identical to the first name, last name, and date of birth of the voter registered in the other state. **The county voter registration office shall determine whether the individual: (1) identified in the report provided by the NVRA official under this subsection is the same individual who is a registered voter of the county; (2) registered to vote in another state on a date following the date that voter registered in Indiana; and**

> **(3) authorized the cancellation of any previous registration by the voter when the voter registered in another state.**
>
> (e) If the county voter registration office determines that the voter is described by subsection (d)(1) through (d)(3), the county voter registration office shall cancel the voter registration of that voter. **If the county voter registration office determines that the voter is described by subsection (d)(1) and (d)(2), but has not authorized the cancellation of any previous registration, the county voter registration office shall send an address confirmation notice to the Indiana address of the voter.**

(Emphasis added.) However, SEA 442 amended this Code section effective July 1, 2017, which now reads:

> (d) The NVRA official shall execute a memorandum of understanding with the Kansas Secretary of State. Notwithstanding any limitation under IC 3-7-26.4 regarding the availability of certain information from the computerized list, on January 15 of each year, the NVRA official shall provide data from the statewide voter registration list without cost to the Kansas Secretary of State to permit the comparison of voter registration data in the statewide voter registration list with registration data from all other states participating in this memorandum of understanding and to identify any cases in which a voter cast a ballot in more than one (1) state during the same election. Not later than thirty (30) days following the receipt of information under this subsection indicating that a voter of Indiana may also be registered to vote in another state, the NVRA official shall provide the appropriate county voter registration office with the name of and any other information obtained under this subsection concerning that voter, if the first name, last name, and date of birth of the Indiana voter is identical to the first name, last name, and date of birth of the voter registered in the other state. **The county voter registration office shall determine whether the individual: (1) identified in the report provided by the NVRA official under this subsection is the same individual who is a registered voter of the county; and (2) registered to vote in another state on a date following the date that voter registered in Indiana.**
>
> **(e) If the county voter registration office determines that the voter is described by subsection (d), the county voter registration office shall cancel the voter registration of that voter.**

(Emphasis added.)

SEA 442 has removed from the statute the requirement to determine whether the individual voter authorized the cancellation of any previous registrations when they registered in another state. The amendment also removes the requirement to send an address confirmation notice to the

voter when cancellation has not been confirmed by the voter. Before the statute was amended, pursuant to business rules set by King and Nussmeyer, whenever a county official determined that a possible match was indeed truly a match and approved the match, that selection in the statewide voter registration system would generate a confirmation notice that was mailed to the voter. This mailing allowed a person to confirm their registration at the current address, update their registration, or cancel it. If the voter did not respond to the mailer, they would be placed in "inactive" status. After being placed in inactive status, only if the voter did not vote over the course of the next two federal general election cycles could Indiana cancel the voter's registration (Filing No. 42-22 at 47).

Also prior to the amendment, county officials were required to confirm that voters who appeared to have registered in another had also authorized the cancellation of any previous registration by the voter when the voter registered in the other state. If the county official could not determine that the voter had authorized the cancellation of any previous registration, the state statute required the county board to send an address confirmation notice to the Indiana address of the voter. This was consistent with the written confirmation notice and waiting procedures in the NVRA at 52 U.S.C. § 20507(d). This requirement has been removed by SEA 442.

On August 23, 2017, the Plaintiffs filed this lawsuit seeking declaratory and injunctive relief, requesting that the Court declare Indiana Code § 3-7-38.2-5(d)–(e) violates the NVRA and enjoining Indiana from implementing and enforcing the amended statute (Filing No. 1). On March 9, 2018, the Plaintiffs filed their Motion for Preliminary Injunction (Filing No. 41). On May 2, 2018, the parties presented oral argument to the Court on the Motion (Filing No. 56).

After this lawsuit was initiated, the Indiana General Assembly enacted House Enrolled Act 1253 ("HEA 1253"), which went into effect on March 15, 2018. HEA 1253 added "confidence

factors" to Indiana Code § 3-7-38.2-5(d), thereby codifying the Election Division's policy of providing to the county officials only those registrations that meet certain match criteria.

II. LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id.* (Citation and quotation marks omitted). Granting a preliminary injunction is "an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 389 (7th Cir. 1984) (citation and quotation marks omitted).

When a district court considers whether to issue a preliminary injunction, the party seeking the injunctive relief must demonstrate that "it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that issuing an injunction is in the public interest." *Grace Schs. v. Burwell*, 801 F.3d 788, 795 (7th Cir. 2015). The greater the likelihood of success, the less harm the moving party needs to show to obtain an injunction, and vice versa. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008).

III. DISCUSSION

Congress enacted the National Voter Registration Act to enhance voting opportunities for every American. Plaintiffs challenge the legality of SEA 442, codified at Indiana Code § 3-7-38.2-5(d)–(e), which amends Indiana's voter registration laws. Plaintiffs explain that the NVRA established procedural safeguards to protect eligible voters against disenfranchisement. The NVRA placed specific requirements on the states to ensure that these goals were met. Plaintiffs

argue that SEA 442 violates the NVRA by circumventing its procedural safeguards—the notice-and-waiting period requirement as well as the requirement that a state's list maintenance system be uniform and nondiscriminatory.

Plaintiffs also assert that they have a claim under 42 U.S.C. § 1983 arising from the implementation of SEA 442. They contend that the exclusive use of Crosscheck leads to discriminatory results because Crosscheck is less reliable when applied to minority voter populations where identical first and last names are more prevalent. However, Plaintiffs fail to develop this argument, the Defendants do not address § 1983, and Plaintiffs fail to discuss or argue anything about § 1983 in the reply brief. Because this argument and claim has not been developed, the Court will not address a § 1983 claim.

Plaintiffs argue that a preliminary injunction is appropriate because it will ultimately prevail on the merits, and without an injunction, Plaintiffs and their members will suffer irreparable harm from the unlawful purging of voter registrations without notice. They further argue that the Defendants must comply with the NVRA and, at a minimum, send confirmation notices before cancelling voter registrations based on change of residency and the Crosscheck data. The Defendants assert that Indiana has gone to great lengths to ensure that it is both actively and justifiably removing those from its rolls who are no longer qualified to vote. And as a failsafe, Indiana provides a simple process for any individual who may have been mistakenly removed to still vote, therefore, Common Cause's request for a preliminary injunction should be denied.

To obtain a preliminary injunction, Common Cause must establish the following four factors as to each provision it seeks to enjoin: "[1] that it is likely to succeed on the merits, [2] that it is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in its favor, and [4] that issuing an injunction is in the public interest." *Grace Schools*,

801 F.3d at 795. The first two factors are threshold determinations; "[i]f the moving party meets these threshold requirements, the district court 'must consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied.'" *Stuller, Inc.*, 695 F.3d at 678 (quoting *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)). The Court will address the first two threshold factors in turn, before addressing the final factors.

A. Likelihood of Success on the Merits

Plaintiffs argue that they will prevail on the merits of their claim because SEA 442 plainly violates the NVRA. The NVRA establishes requirements that states must satisfy when maintaining their voter registration rolls. One such requirement is that a state "shall not remove" a voter from its list of eligible voters due to change in residence unless: (a) the voter confirms such a residence change in writing; or (b) the voter fails to respond to a confirmation notice with specific content prescribed by the statute and the voter does not vote in the jurisdiction during the next two federal election cycles. 52 U.S.C. § 20507(d)(1). These procedural safeguards of written confirmation from the voter or the notice and waiting period are in place to protect against wrongful disenfranchisement.

Plaintiffs assert that, contrary to these requirements, SEA 442 requires King and Nussmeyer to provide county officials with data about every voter who Crosscheck identifies as a possible match. After receiving this data produced by Crosscheck, the county officials "shall cancel the voter registration of that voter" immediately, without any notice and without waiting the two federal election cycles, if the county official believes that the duplicate records in Crosscheck belong to the same voter and that the voter's out-of-state registration post-dates the Indiana registration.

Plaintiffs argue that the Crosscheck system has inherent flaws and limitations, which make it an unreliable source on which to base voter registration cancellations without further investigation. Plaintiff's offer evidence that Crosscheck produces many false positives because many people have a matching first name, last name, and birthdate, but in reality, they are not the same person. Crosscheck and the state's voter registration system are unreliable because they do not collect or disseminate the actual voter registration documents, thereby depriving states of the opportunity to verify the conclusory data with the underlying documents. The system also has limited data and functionality, which reduces its reliability for county officials to cancel voter registrations based solely on Crosscheck and the data uploaded into the statewide voter registration system.

Furthermore, the data definitions are not consistently used or applied by each of the participating states, and thus, some data may be missing or may be used in disparate ways by the different states. This is especially true of the dates of registration. Plaintiffs point out that, because of these inherent limitations with Crosscheck, historically, it has been used only as a starting point in Indiana's voter cancellation process. Crosscheck will now be used to determine whether a duplicate voter registration exists and then cancellation of the Indiana registration will promptly follow.

Before enactment of SEA 442, Indiana used Crosscheck matches as a starting point to determine whether a voter registration could be cancelled. If there was a "match," county election officials would confirm whether the individual registered to vote in Indiana actually was the same individual registered to vote in another state. The county official would then determine whether the registration in the other state occurred after the registration in Indiana. Then the county official would determine whether the voter had authorized cancellation of any previous registrations. If

all these conditions were met, the county official would cancel the Indiana registration, but if the last condition was not met, the county official would mail a notice to the voter and provide the waiting period for an "inactive" voter.

Plaintiffs argue that SEA 442 violates the NVRA by removing the last condition: confirming that the voter authorized cancellation of any previous registrations. They contend that SEA 442 violates the NVRA by removing the notice and waiting period requirement where authorized cancellation has not been confirmed. As this relates to Crosscheck, they argue a Crosscheck "match" does not constitute a voter's authorization to cancel any previous registrations. Crosscheck provides only second-hand information that should be accompanied with the notice and waiting period protection when the state does not have an affirmative authorized cancellation from the voter. Plaintiffs point out that even Nussmeyer warned the legislative aides working on the passage of SEA 442 that "federal law does not permit the cancellation" of voters from the registration rolls as mandated by SEA 442 (Filing No. 42-27 at 2). Nussmeyer also stated in an email to a county election official that "it's a violation of state and federal law for a voter registration official to cancel a voter's registration unless they have signed authorization from the voter that they want their registration cancelled. Unless there's a change at the federal level, this is how the process has to play out." (Filing No. 42-10 at 3.) Because SEA 442 eliminates the requirement of written confirmation or a notice and waiting period, it violates the NVRA, and Plaintiffs assert that they will prevail on the merits.

In addition, Plaintiffs assert that SEA 442 violates the NVRA because it is not a uniform approach to cleaning up voter registration rolls. Because the state does not provide enough specific guidance to the county election officials regarding how to determine whether a voter registration is a matched duplicate in another state, they assert it is not uniform. The state also leaves it up to

the county election officials to determine which voter registrations should be purged from the rolls, and those local county officials interpret and apply the standards and information differently. Plaintiffs point to examples of how local officials apply the purging standards differently. One county official will send a notice and wait two election cycles before cancelling an Indiana voter registration if that official received a notice of registration from another state (Filing No. 42-24 at 83). However, under these same facts, another county official will immediately cancel the Indiana registration upon receipt of notification from another state (Filing No. 42-23 at 36–37). Some county officials explain that they will cancel registrations of "matched" individuals if the name is unusual but not if it is a common name (Filing No. 42-23 at 32–33; Filing No. 42-25 at 33; Filing No. 42-28 at 45–46). The non-uniformity is also exhibited by the fact that some counties simply approve all matches that appear as possible matches from Crosscheck, while other counties do not (Filing No. 42-14).

In addition, the state's approach is not uniform because the two state co-directors, King and Nussmeyer, provide different guidance to local county election officials when those county officials call one of the co-directors to ask questions about implementing voter regulations and laws. They often do not consult with each other about responses to provide to the county officials, and they occasionally do not agree with each other about policies and procedures.

Plaintiffs assert that they have a high likelihood of success on the merits because SEA 442 plainly violates the NVRA's requirement to provide notice and a waiting period where the voter has not already authorized cancellation of their previous registrations. And additionally, they argue they will succeed on the merits because the state's approach to purging its registration rolls is not uniform or reasonable.

The Defendants first argue that Plaintiffs lack standing because they have suffered no injury in fact and Plaintiffs lack standing on their own behalf because their choice of how to allocate their limited resources is not an injury inflicted by the Defendants, and it is an "injury" of Plaintiffs' own making. They argue that Plaintiffs' assertion of injury is highly speculative and cannot support standing. The Defendants also assert that Plaintiffs lack organizational standing to represent their members because the individual members do not have standing to sue in their own right because of a lack of injury to them. The Defendants argue that because the new Crosscheck program procedures have not yet been implemented, nobody has been deprived of the right to vote because of SEA 442.

Similarly, the Defendants contend there is no threat of actual or imminent harm because it has not cancelled any voter registrations and will not do so before July 1, 2018, and even if a voter registration is cancelled, the voter will still be permitted to vote (albeit through the "alternative voting procedure"). The Defendants also argue that any alleged injury cannot be traced back to the named Defendants because the cancellation of voter registrations is carried out by county election officials, not the named statewide election officials. Thus, the Defendants assert, there is no injury and no standing.

Concerning the merits of the claim, the Defendants assert that, even if standing could be established, the challenged statute complies with the requirements of the NVRA by establishing a procedure to remove voter registrations from the rolls when individuals have registered to vote in another state. They note that the challenged statute has been amended yet again since Plaintiffs filed their Complaint. The amendment took effect on March 15, 2018, but it has not yet been implemented by King and Nussmeyer. The amendment directs King and Nussmeyer to apply a set of "confidence factors"—*i.e.* additional personal information such as social security number,

street address, driver's license number, zip code—to the data received from Crosscheck before sending the information to the county election officials, who then determine whether a registration should be cancelled. The Defendants argue that this added measure of confidence factors allows the Defendants to more accurately determine that an individual is indeed the same person who is registered to vote in another state, and thus, the registration in Indiana can then be cancelled.

The Defendants argue removal of a voter's registration is permissible based on the voter's registration to vote in a different state because that registration in another state can be considered a request for removal from the voter rolls of previous states or can be considered a "confirmation in writing" that the voter has changed their residence. The Defendants rely on SEA 442's requirement that the county election officials determine whether the voter has registered in a different state after the voter registered to vote in Indiana. Because they confirm the subsequent registration in a different state, the county official can remove the voter from the rolls because that subsequent registration can be treated as a request for removal from Indiana's voter registration roll. The Defendants argue that this same logic applies to the "confirmation in writing" aspect of the statute, which allows cancellation of the voter registration. The Defendants assert that an out-of-state voter registration form is written confirmation of the voter's change in residency. They argue that this is consistent with sections of the NVRA where registering in another state can be considered (1) a request for removal from the voter roll in their previous state of residence under 52 U.S.C. § 20507(a)(3)(A), or (2) a confirmation in writing that the registrant has changed residence under 52 U.S.C. § 20507(d)(1)(A).

Regarding uniformity among the county election officials, the Defendants argue that King and Nussmeyer provide training to them and also provide a manual of policies and procedures to give guidance. The county election officials are uniformly required to follow the law by

determining whether the duplicate matches from Crosscheck are indeed the same person and then whether the out-of-state registration occurred after the Indiana registration. Then they may cancel the Indiana voter registration. The Defendants further assert that the state and its election officials should be able to give full faith and credit to the records of other states to determine that voters have changed their residence to other states.

Plaintiffs reply that lawsuits brought by nonprofit and civic organizations challenging voter-purge practices are commonplace, and the Defendants' standing argument lacks support in the law. An independent basis for organizational standing exists when a defendant's conduct makes it difficult or impossible for the organization to fulfill one of its essential purposes or goals. *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1269 (D. Colo. 2010). The *Buescher* court also explained, "An organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts." *Id.* (citation and quotation marks omitted). Plaintiffs also rely on the United States Supreme Court case of *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), which made clear that when an organization diverts its resources to counter the challenged conduct, "there can be no question that the organization has suffered injury in fact," and "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on [an] organization's resources—constitutes far more than simply a setback to [its] abstract social interests." *Id.*

The Seventh Circuit explicitly recognized this "diversion-of-resources" theory in *Crawford v. Marion County Election Board*. There, the court held that the Democratic Party had standing in its own right to challenge Indiana's photo ID law because it was "compelled" to divert its resources to combat the law's negative effects in order to achieve the organization's goals, and standing

"requires only a minimal showing of injury." 472 F.3d 949, 951 (7th Cir. 2007). The diversion of its resources and the frustration of its mission are the precise injuries that Plaintiffs have suffered in this case. Plaintiffs assert they also has standing because their members face a real threat of being disenfranchised by SEA 442.

Regarding the Defendants' assertion that any injury cannot be fairly traceable to them, Plaintiffs explain that the Defendants are the NVRA officials in the state and are ultimately responsible for the state's compliance with the NVRA. A state's NVRA official is the proper defendant where the actual voter registration has been delegated to—and actual NVRA violations committed by—local officials. *See Harkless v. Brunner*, 545 F.3d 445, 451–52, 455 (6th Cir. 2008).

Plaintiffs state the Court should disregarding the Defendants' argument that they might provide future guidance to county officials that will be in compliance with the NVRA but not consistent with the language of the challenged statute. As well, Plaintiffs argue the Court should disregard the "confidence factors" argument because those factors do not reliably identify an actually matched voter registration. These confidence factors do not address or resolve the issue of a lack of notice to voters when the voter has not confirmed anything in writing or asked to be removed. The confidence factors cannot be a substitute for the NVRA's requirements.

Plaintiffs further reply that the Defendants' argument completely ignores the NVRA's requirement to provide notice and a waiting period when a voter has not confirmed in writing that the voter has changed residence. Rather, the Defendants wrongly argue that the simple act of registering in a different state is written confirmation of a change in residence. The NVRA states that the written request or confirmation must come from the voter, yet the state's information is coming from Crosscheck, a third-party, not the voter. Plaintiffs point out that where a state relies

on third-party information—such as a change of address form provided by the United States Postal Service (which originated with the voter)—to determine that a voter has changed residence, the NVRA requires that the state still use the notice and waiting period procedure. Plaintiffs argue that the Crosscheck data cannot serve as a request from the voter to cancel previous registrations or be construed as authorization to cancel previous registrations. Such data is not a request from the voter; a request from the voter would require that the voter ask to be removed from the voter rolls. Similarly, Plaintiffs also argue that the Crosscheck data is not confirmation in writing from the voter.

The Court first determines that Plaintiffs have standing to pursue their claim for declaratory and injunctive relief. Plaintiffs have presented evidence that they already have been compelled to divert its resources to address SEA 442 and that their collective mission focus has been affected. They have shown that injury is imminent after SEA 442 is implemented. This diversion of resources has been determined sufficient to confer standing upon organizations, *Havens Realty Corp.*, 455 U.S. at 379, and standing "requires only a minimal showing of injury." *Crawford*, 472 F.3d at 951. The Defendants are the NVRA officials in the state and are responsible for the state's compliance with the NVRA. Furthermore, they establish the guidelines, policies, and procedures for maintaining the state's voter registration rolls. The local county election officials are required to follow the Defendants' directives. Therefore, the injury in this case is fairly traceable to the named Defendants. Thus, Plaintiffs have standing to proceed.

Regarding the likelihood of success on the merits, the Court determines that Plaintiffs have a high likelihood of success on the merits of their claim that SEA 442 violates some of the requirements of the NVRA and threatens disenfranchisement of eligible voters.

The NVRA plainly requires that a state "shall not remove the name of a registrant from the official list of eligible voters . . . on the ground that the registrant has changed residence unless the registrant," (1) "confirms in writing that [they have] changed residence," or (2) has failed to respond to a mailed notification and has not voted to two federal election cycles. 52 U.S.C. § 20507(d)(1). These are simple procedural safeguards to protect registered voters, and states are required to follow these safeguards. Before its amendment by SEA 442, Indiana Code § 3-7-38.2-5(d)–(e) provided for the notice and a waiting period required by the NVRA when a voter did not confirm in writing of their change in residence or did not request to be removed from the voter rolls. SEA 442 removes this procedural safeguard. The Defendants' reliance on the new "confidence factors" is misplaced because they do nothing to address the NVRA's requirement in particular cases to provide for notice and a waiting period.

The act of registering to vote in a second state as determined by Crosscheck cannot constitute a written request to be removed from Indiana's voter rolls or a confirmation in writing from the voter that they have changed their address. A voter's act of registering to vote is simply that—a registration to vote. There is no request for removal, and the voter is not confirming for Indiana that they have had a change in residence. Notably this information is not coming from the voter but rather from Crosscheck, which may or may not be reliable. During oral argument, Defendant's counsel admitted concerns regarding the reliability and security of Cross Check. (Filing No. 62 at 49-51)[1]. It is significant that the NVRA still requires the notice and waiting

[1] Defendants' counsel Jefferson Garn ("Garn") argued the following: "This isn't a part of the record, but my -- what's going on, I believe, and from my understanding, is that there are, as with many organizations, the federal government, state governments, there are concerns about data breach, and there's a Department of Homeland Security review being done of Crosscheck right now." (Filing No. 62 at 49). Thereafter, the Court asked; "so are you saying the Crosscheck database process is flawed and they may be subject to data breaches?" and Garn responded "… It's not because our system is flawed. It's because we just want to make sure that we're trying to stay one step ahead of people who are trying to hack. And so that's the concern." (Filing No. 62 at 51).

period before cancelling a voter registration when a change in address has been confirmed through the U.S. Postal Service, which might be more reliable than Crosscheck. The information provided by the U.S. Postal Service originates from the voter, yet notice and a waiting period is still required by the NVRA before cancelling the registration. 52 U.S.C. § 20507(c)(1). Because SEA 442 removes the NVRA's procedural safeguard required in particular cases of providing for notice and a waiting period, the Court determines that Plaintiffs have a high likelihood of success on the merits of their claim.

The Court briefly notes that it appears the implementation of SEA 442 will likely fail to be uniform based on the evidence that King and Nussmeyer provide differing guidance to county officials on how to determine whether a particular registered voter is a duplicate registered voter in a different state. This is also true based on the evidence that county officials are left to use wide discretion in how they determine a duplicate registered voter, and they have used that discretion in very divergent ways.

B. Irreparable Harm with No Adequate Remedy at Law

Plaintiffs assert that the first and obvious irreparable harm is the wrongful disenfranchisement of registered voters. But beyond disenfranchisement, Plaintiffs also explain that if a voter is improperly removed from the registration rolls, that voter will not receive information about upcoming elections, dates, or precinct locations (Filing No. 42-21 at 80; Filing No. 42-25 at 35–36). Even if a wrongly removed voter does show up at the polls to vote, they will be forced to cast a provisional ballot or utilize the cumbersome "fail-safe" voting system. These options are onerous and are not required of other eligible voters who have not been wrongly removed from the registration rolls. These burdens slow down the voting process at the polls and suppress voter participation.

Plaintiffs also argue that courts have routinely held that interference with an organization's voter registration activities constitutes irreparable harm. An organization is harmed if the "actions taken by [the defendant] have perceptibly impaired [its] programs." *Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276 (D.C. Cir. 1994) (citing *Havens Realty Corp.*, 455 U.S. at 379). "[C]onduct that limits an organization's ability to conduct voter registration activities constitutes an irreparable injury." *Project Vote, Inc. v. Kemp*, 208 F. Supp. 3d 1320, 1350 (N.D. Ga. 2016); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155 (N.D. Fla. 2012). Where organizational plaintiffs are compelled to divert and expend their resources to address a defendant's allegedly wrongful conduct, this is "enough to satisfy their burden of showing a likelihood of suffering irreparable harm." *Action NC v. Strach*, 216 F. Supp. 3d 597, 643 (M.D.N.C. 2016).

Plaintiffs argue that it will suffer irreparable harm without an injunction prohibiting implementation of SEA 442 because their organizations' limited resources will be diverted to helping educate Indiana voters and ensuring that eligible voters are not disenfranchised. Much of Plaintiffs' work will have to be done again because of wrongful cancellations of voter registrations. Irreparable harm very likely will occur to Plaintiffs' members by their wrongful disenfranchisement.

The Defendants respond that no irreparable harm exists because SEA 442 has not yet been implemented, and when it is implemented, even if a voter is wrongfully removed from the registration rolls, they may still vote under the "fail-safe" provisions of Indiana's election law. Thus, they assert, nobody will be deprived of the right to vote.

Plaintiffs reply that SEA 442 is enacted into law, and the Defendants have stated that they will start implementing it in July 2018. Irreparable harm of wrongful disenfranchisement is

imminent after the Defendants begin implementing the law. The fact that it has not yet occurred because the Defendants have agreed to not implement SEA 442 yet is of no consequence to the irreparable harm that certainly will occur. In addition, courts overwhelmingly have held disenfranchisement is an irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373–74, n.29 (1976); *Frank v. Walker*, 196 F. Supp. 3d 893, 917 (E.D. Wis. 2016); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) (once the opportunity to vote in a given election is denied, that opportunity is gone forever). Plaintiffs further reply that the Defendants' reliance on its "fail-safe" alternative voting procedure to justify SEA 442 is misplaced because the NVRA requires such a "fail-safe" voting procedure as an additional protection to voters, not as a replacement to the other requirements of the NVRA.

The Defendants' argument that no irreparable harm exists because SEA 442 has not yet been implemented is unavailing. The very purpose of a preliminary injunction is to prevent an imminent harm from occurring or to quickly abate an irreparable harm that has already begun. Next, the Court agrees with Plaintiffs that the Defendants' "fail-safe" voting procedure cannot justify implementation of SEA 442 because the NVRA requires that "fail-safe" voting procedure as an additional protection to voters, not as a replacement or alternative to the other requirements of the NVRA. The harm that occurs from eliminating one required procedural safeguard is not negated by the continued use of a different additional procedural safeguard.

As has been held by numerous other courts, a violation of the right to vote is presumptively an irreparable harm. *See, e.g.*, *Frank*, 196 F. Supp. 3d at 917; *Browning*, 863 F. Supp. 2d at 1167. Because an individual cannot vote after an election has passed, it is clear that the wrongful disenfranchisement of a registered voter would cause irreparable harm without an adequate remedy

at law. The Court also agrees that "conduct that limits an organization's ability to conduct voter registration activities constitutes an irreparable injury." *Project Vote, Inc.*, 208 F. Supp. 3d at 1350.

C. Balance of Potential Harms

Plaintiffs argue that a balance of the potential harms from an injunction weighs heavily in their favor. Depriving eligible citizens of the right to vote is a very significant harm, while not allowing the state to purge voter registrations in a manner that short-circuits the NVRA's requirements causes no harm to the state. Maintaining accurate voter registration rolls is important and prescribed by the NVRA; however, the state has many procedures that allow it to reasonably and more accurately clean up its voter registration rolls such as using the statewide notification mailers or cancelling registrations based on death, incarceration, incapacity, or written request.

The Defendants respond that, when an injunction is sought against a political branch of government, public policy considerations favor denial of the injunction because judicial interference with a public program diminishes the scope of democratic governance, and the government's interests are presumed to be the public's interests. They argue an injunction would hinder efforts to protect the integrity of the electoral process and to ensure accurate and current voter registration rolls.

The Court finds that the balance of equities weighs heavily in favor of granting an injunction. Plaintiffs' members and the voters they seek to assist face the imminent and irrevocable consequence of disenfranchisement of thousands of Indiana voters, only months before a federal election. In contrast, Defendants would face only the prospect of waiting until after adjudication of the merits of Plaintiffs' challenge to implement extremely prejudicial aspects of an election bill that was passed only recently. Weighing the balance of hardships, together with the public's interest in avoiding barriers to voter registration and increasing the number of eligible citizens

registered to vote, the need is clear for a preliminary injunction to halt the implementation of SEA 442 while the Court reaches a determination on the full merits of the case. An injunction prohibiting the implementation of SEA 442 will not impose any new or additional harm or burdens on the Defendants concerning their efforts to maintain accurate voter registration rolls and to ensure fair elections. The Defendants still have numerous ways that comply with the NVRA to clean up the state's voter registration rolls. On the other hand, not issuing an injunction and allowing SEA 442 to be implemented risks the imposition of significant harm on Plaintiffs and their members through the disenfranchisement of rightfully registered voters.

D. Public Interest

The NVRA's purpose is to both increase the number of eligible citizens to register to vote and participate in the electoral process; and …ensure that accurate and current voter registration rolls are maintained. 52 U.S.C. § 20501(b). The public has a "strong interest in exercising the fundamental political right to vote." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Plaintiffs argue the public interest is best served by protecting the right to vote and not disenfranchising eligible voters. Similar to their response regarding the balance of harms, the Defendants argue that the public interest is best served by allowing SEA 442 to be implemented to ensure the integrity of voter registration rolls and the electoral process.

The Court agrees with Plaintiffs that the greater public interest is in allowing eligible voters to exercise their right to vote without being disenfranchised without notice. If a voter is disenfranchised and purged erroneously, that voter has no recourse after Election Day. While the Defendants have a strong public interest in protecting the integrity of voter registration rolls and the electoral process, they have other procedures in place that can protect that public interest that do not violate the NVRA.

E. Posting Bond

A preliminary injunction will not impose any monetary injuries on the Defendants, and in the absence of such injuries, no bond should be required. *See Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996). Therefore, Plaintiffs need not post a bond.

IV. CONCLUSION

Because each of the factors for the issuance of a preliminary injunction weighs in favor of Plaintiffs, the Court **GRANTS** Plaintiffs' Motion for Preliminary Injunction (Filing No. 41). Pursuant to Federal Rule of Civil Procedure 65(d), the Court **ISSUES A PRELIMINARY INJUNCTION** prohibiting the Defendants from taking any actions to implement SEA 442 until this case has been finally resolved. A similar ruling is issued in related case *Common Cause Indiana v. Lawson et al.,* 1:17-cv-3936-TWP-MPB. Plaintiffs need not post a bond.

SO ORDERED.

Date: 6/8/2018

Tanya Walton Pratt

TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

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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 NUSSMEYER, in her official capacity as Co-Director of the Indiana Election Division, Defendants.	)	Case No. 1:17-cv-03936-TWP-MPB

ORDER GRANTING PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION

This matter is before the Court on a Motion for Preliminary Injunction filed pursuant to Federal Rule of Civil Procedure 65 by Plaintiff Common Cause Indiana ("Common Cause") (Filing No. 75). Common Cause challenges the legality of Indiana Senate Enrolled Act 442 (2017) ("SEA 442"), codified at Indiana Code § 3-7-38.2-5(d)–(e), which amends Indiana's voter registration laws. The National Voter Registration Act of 1993, 52 U.S.C. §§ 20507–20511 ("NVRA"), established procedural safeguards to protect eligible voters against disenfranchisement and to direct states to maintain accurate voter registration rolls. The NVRA placed specific requirements on the states to ensure that these goals were met. Common Cause maintains that SEA 442 violates the NVRA by circumventing its procedural safeguards. Common Cause seeks preliminary injunctive relief to prohibit the Defendants from implementing or enforcing SEA 442. For the following reasons, the Court **grants** Common Cause's Motion for Preliminary Injunction.

I. BACKGROUND

The NVRA was enacted to reduce barriers to applying for voter registration, to increase voter turnout, and to improve the accuracy of voter registration rolls. The NVRA allows a voter's registration to be removed from the rolls if the voter requests to be removed, if the voter dies, because of a criminal conviction or mental incapacity, or because of a change in residency. The NVRA provides, "In the administration of voter registration for elections for Federal office, 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." 52 U.S.C. § 20507(a)(4).

The NVRA further provides, "Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall be uniform [and] nondiscriminatory." 52 U.S.C. § 20507(b)(1). Furthermore, the NVRA directs,

> A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office 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 registrar's jurisdiction in which the registrant is registered; or
> >
> > (B) (i) has failed to respond to a notice described in paragraph (2); and
> >
> > > (ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of 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.

52 U.S.C. § 20507(d)(1). Paragraph (2) describes that the notice must be "a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address." 52 U.S.C. § 20507(d)(2). Thus, in the context of removing voter registrations because of a change in residency, Section 20507(d)(1) requires that either (1) the voter confirm in

writing their change in residency, or (2) notice was mailed to the voter who then did not return the notice card and did not vote during the next two federal general elections.

Plaintiff Common Cause Indiana is the Indiana affiliate of Common Cause, which is a national nonpartisan, nonprofit grassroots organization that advocates for ethics, good government, campaign finance reform, constitutional law, and the elimination of barriers to voting. (Filing No. 74-24 at 1, ¶ 3.) Common Cause works on multiple fronts, including by partnering with other community organizations to provide education and training to on-the-ground voting rights activists around the State of Indiana as well as by lobbying for nonpartisan redistricting and increasing the number of satellite voting locations. Common Cause has one fulltime employee and a limited budget, and it relies on its member volunteers for much of its activities. The organization has approximately 12,000 members who live and vote in Indiana (Filing No. 74-24 at 1–2).

Defendant Connie Lawson is the Indiana Secretary of State, and in that capacity she is the chief election official in the State of Indiana. She is charged with performing all ministerial duties related to the state's administration of elections. Ind. Code §§ 3-6-3.7-1, 3-6-4.2-2(a).

Defendants Bradley King ("King") and Angela Nussmeyer ("Nussmeyer") are co-directors of the Indiana Election Division within the Secretary of State's office, and in that capacity are jointly the "NVRA official" designated under Indiana law as responsible for the coordination of Indiana's responsibilities under the NVRA. Ind. Code § 3-7-11-1; Filing No. 91-1 at 1; Filing No. 91-2 at 1. These co-directors are individually appointed by the Governor based on recommendations from Indiana's Democratic and Republican parties, respectively. *Id.* Each co-director has a four-year term that coincides with the term of the Indiana Secretary of State. *Id.* § 3-6-4.2-3.2. King and Nussmeyer thus are charged with coordinating county voter registration.

Each county in the State of Indiana has either a county election board or a county board of registration. Ind. Code §§ 3-6-5-1, 3-6-5.2-3. Pursuant to the official policies, guidance, and standard operating procedures issued by King and Nussmeyer as the co-directors, the individual county boards conduct elections and administer election laws within their county. Ind. Code §§ 3-6-5-14, 3-6-5.2-6. The county boards are responsible for maintaining the voter registration records in their county by adding, updating, and removing voter registrations (Filing No. 74-1 at 7). While the county boards are responsible for actually physically maintaining their voter registration records, this list maintenance is dictated by the policies, procedures, and guidance established by the election division co-directors and constrained by the election division's business rules governing the electronic statewide voter registration system (Filing No. 74-1 at 6–7).

King and Nussmeyer are additionally responsible for building, managing, and maintaining the statewide voter registration system, which includes creating protocols within the system and issuing official policies, guidance, and standard operating procedures to guide the county boards on their duties under state and federal law. They also provide training to the county boards. *Id.*; Ind. Code § 3-6-4.2-14. The official guidance from King and Nussmeyer as reflected in the protocols, documents, and trainings are mandatory (Filing No. 74-1 at 14).

King and Nussmeyer are also responsible for establishing the standard operating procedures and the business rules that determine how the electronic statewide voter registration system operates. This includes dictating what information will be provided to county election officials to help them maintain their individual county voter rolls, and it also dictates what actions the county officials are able to take within the "online portal" of the statewide system (Filing No. 74-1 at 6–7, 19; Filing No. 74-4 at 7).

King and Nussmeyer receive and respond to questions from county election officials through telephone calls and emails. In advising county officials, they often respond to the county's inquiries independently and without consulting one another (Filing No. 74-1 at 8–9; *see also* Filing No. 74-7; Filing No. 74-8). They do not always agree on the required policies and procedures, including about voter registration and list maintenance, when they respond to inquiries from the counties (Filing No. 74-1 at 8–9). Nussmeyer and King ultimately relegate responsibility for NVRA compliance to the counties by directing counties to use their best judgment in implementing the instructions the co-directors provide. *Id.* at 6–7, 9.

Indiana participates in the Interstate Voter Registration Crosscheck Program ("Crosscheck") as a method for identifying voters who may have become ineligible to vote in Indiana because of a change in residence. Ind. Code § 3-7-38.2-5(d). Crosscheck is an interstate program that was created and is administered by the Kansas Secretary of State. The program is designed to identify voters who have moved to, and registered to vote in, another state. This is accomplished by comparing voter registration data provided by participating states. The participating states submit their voter registration data to Crosscheck, which then compares the first name, last name, and birthdate of registered voters to identify possible "matches" or duplicate voter registrations. The output data of possible matches is then sent back to the participating states. The individual states decide what to do with the Crosscheck data (Filing No. 74-10).

Each year Indiana provides its statewide voter registration list to the Kansas Secretary of State to compare to data from other participating states through Crosscheck. Crosscheck then sends a list of possible matches back to Indiana, and within thirty days of receiving the list, Indiana's statute requires that the "NVRA official" (in this case King and Nussmeyer) "shall provide [to] the appropriate county voter registration office" the name and any other information

obtained on any Indiana voters who share "identical . . . first name, last name and date of birth of [a] voter registered in [another] state." Ind. Code § 3-7-38.2-5(d). While the statute requires King and Nussmeyer to provide this voter data to the county election officials, they have acknowledged that they only forward the data to the county officials if the data meets a certain "confidence factor," which King and Nussmeyer determine based on additional matching data points, such as address, middle name, or social security number (Filing No. 74-1 at 11–12; Filing No. 74-4 at 8). No data has been sent yet by King and Nussmeyer to the county election officials for the 2018 election cycle (Filing No. 79-2 at 3).

Once the county officials receive the voter data, they determine whether the voter identified as a possible match is the same individual who is registered in the county and whether the voter registered to vote in another state on a date after they had registered in Indiana. Ind. Code § 3-7-38.2-5(d). Within the statewide voter registration system, the county official may select for each possible matched voter registration "match approved," "match rejected," or "research needed." (Filing No. 74-11 at 6.) The information provided from Crosscheck to the county officials in the statewide voter registration system is limited to the personal data of voters. It does not include any underlying source documents (Filing No. 74-2 at 7–8).

The current configuration of the statewide voter registration system does not provide information about the dates of registration in Indiana and other states to assist in determining what state registration occurred first (Filing No. 74-11 at 6; Filing No. 74-1 at 13). Some county officials just assume that the Indiana registration predates the other state's registration, which leads to cancelling the Indiana registration (Filing No. 74-3 at 11; Filing No. 74-2 at 9; Filing No. 74-6 at 9; Filing No. 74-5 at 13). Even if dates of registration information was provided, this information is not complete or consistent because states that participate in Crosscheck do not always populate

the registration date field, and they have different policies in how they determine which date to use, so there is no uniform practice among states (Filing No. 74-4 at 9–10; Filing No. 74-1 at 16; Filing No. 74-12 at 2).

King and Nussmeyer do not provide guidance or a standardized procedure to the county election officials for how to determine whether the record of an Indiana voter is actually the same individual who is registered in another state or how to determine whether the out-of-state registration is more recent (Filing No. 74-4 at 13–14). Some counties simply approve all matches that appear as possible matches from Crosscheck (Filing No. 74-13). Each county has the discretion to cancel or not cancel a voter's registration based on their analysis of the data received from other states and Crosscheck (Filing No. 74-4 at 13).

The state statutory authority and directives upon which the above-described processes are based is found at Indiana Code § 3-7-38.2-5(d)–(e). Prior to its amendment in 2017, Indiana Code § 3-7-38.2-5(d)–(e) read:

> (d) The NVRA official shall execute a memorandum of understanding with the Kansas Secretary of State. Notwithstanding any limitation under IC 3-7-26.4 regarding the availability of certain information from the computerized list, on January 15 of each year, the NVRA official shall provide data from the statewide voter registration list without cost to the Kansas Secretary of State to permit the comparison of voter registration data in the statewide voter registration list with registration data from all other states participating in this memorandum of understanding and to identify any cases in which a voter cast a ballot in more than one (1) state during the same election. Not later than thirty (30) days following the receipt of information under this subsection indicating that a voter of Indiana may also be registered to vote in another state, the NVRA official shall provide the appropriate county voter registration office with the name of and any other information obtained under this subsection concerning that voter, if the first name, last name, and date of birth of the Indiana voter is identical to the first name, last name, and date of birth of the voter registered in the other state. **The county voter registration office shall determine whether the individual: (1) identified in the report provided by the NVRA official under this subsection is the same individual who is a registered voter of the county; (2) registered to vote in another state on a date following the date that voter registered in Indiana; and**

> **(3) authorized the cancellation of any previous registration by the voter when the voter registered in another state.**
>
> (e) If the county voter registration office determines that the voter is described by subsection (d)(1) through (d)(3), the county voter registration office shall cancel the voter registration of that voter. **If the county voter registration office determines that the voter is described by subsection (d)(1) and (d)(2), but has not authorized the cancellation of any previous registration, the county voter registration office shall send an address confirmation notice to the Indiana address of the voter.**

(Emphasis added.) However, SEA 442 amended this Code section effective July 1, 2017, which now reads:

> (d) The NVRA official shall execute a memorandum of understanding with the Kansas Secretary of State. Notwithstanding any limitation under IC 3-7-26.4 regarding the availability of certain information from the computerized list, on January 15 of each year, the NVRA official shall provide data from the statewide voter registration list without cost to the Kansas Secretary of State to permit the comparison of voter registration data in the statewide voter registration list with registration data from all other states participating in this memorandum of understanding and to identify any cases in which a voter cast a ballot in more than one (1) state during the same election. Not later than thirty (30) days following the receipt of information under this subsection indicating that a voter of Indiana may also be registered to vote in another state, the NVRA official shall provide the appropriate county voter registration office with the name of and any other information obtained under this subsection concerning that voter, if the first name, last name, and date of birth of the Indiana voter is identical to the first name, last name, and date of birth of the voter registered in the other state. **The county voter registration office shall determine whether the individual: (1) identified in the report provided by the NVRA official under this subsection is the same individual who is a registered voter of the county; and (2) registered to vote in another state on a date following the date that voter registered in Indiana.**
>
> **(e) If the county voter registration office determines that the voter is described by subsection (d), the county voter registration office shall cancel the voter registration of that voter.**

(Emphasis added.)

SEA 442 has removed from the statute the requirement to determine whether the individual voter authorized the cancellation of any previous registrations when they registered in another state. The amendment also removes the requirement to send an address confirmation notice to the

voter when cancellation has not been confirmed by the voter. Before the statute was amended, pursuant to business rules set by King and Nussmeyer, whenever a county official determined that a possible match was indeed truly a match and approved the match, that selection in the statewide voter registration system would generate a confirmation notice that was mailed to the voter. This mailing allowed a person to confirm their registration at the current address, update their registration, or cancel it. If the voter did not respond to the mailer, they would be placed in "inactive" status. After being placed in inactive status, only if the voter did not vote over the course of the next two federal general election cycles could Indiana cancel the voter's registration (Filing No. 74-4 at 14).

Also prior to the amendment, county officials were required to confirm that voters who appeared to have registered in another state had also authorized the cancellation of any previous registration by the voter when the voter registered in the other state. If the county official could not determine that the voter had authorized the cancellation of any previous registration, the state statute required the county board to send an address confirmation notice to the Indiana address of the voter. This was consistent with the written confirmation notice and waiting procedures in the NVRA at 52 U.S.C. § 20507(d). This requirement has been removed by SEA 442.

During the enactment process of SEA 442, Common Cause's single fulltime employee and policy director, Julia Vaughn, testified on behalf of Common Cause before the state legislature and also spoke with Lawson's general counsel to explain how SEA 442 would injure Indiana voters and threaten their right to vote as well as how it would violate the NVRA. These lobbying efforts took time away from other work and issues to which Common Cause could have devoted its time. After the statute's amendment, Common Cause has devoted time and resources to conducting activities such as training sessions aimed at educating voters and community activists about the

increased risk of erroneous voter registration cancelations. Because of SEA 442, Common Cause has changed some of its training materials to address the increased risk of voters being wrongly removed from the voter rolls (Filing No. 74-24 at 2, 4).

On October 27, 2017, Common Cause filed this lawsuit seeking declaratory and injunctive relief, requesting that the Court declare Indiana Code § 3-7-38.2-5(d)–(e) violates the NVRA and enjoining Indiana from implementing and enforcing the amended statute (Filing No. 1). On March 8, 2018, Common Cause filed its Motion for Preliminary Injunction (Filing No. 74; Filing No. 75). On May 2, 2018, the parties presented oral argument to the Court on the Motion (Filing No. 95).

After this lawsuit was initiated, the Indiana General Assembly enacted House Enrolled Act 1253 ("HEA 1253"), which went into effect on March 15, 2018. HEA 1253 added "confidence factors" to Indiana Code § 3-7-38.2-5(d), thereby codifying the Election Division's policy of providing to the county officials only those registrations that meet certain match criteria.

II. LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Id*. (citation and quotation marks omitted). Granting a preliminary injunction is "an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 389 (7th Cir. 1984) (citation and quotation marks omitted).

When a district court considers whether to issue a preliminary injunction, the party seeking the injunctive relief must demonstrate that "it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its

favor, and that issuing an injunction is in the public interest." *Grace Schs. v. Burwell*, 801 F.3d 788, 795 (7th Cir. 2015). The greater the likelihood of success, the less harm the moving party needs to show to obtain an injunction, and vice versa. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008).

III. DISCUSSION

Congress enacted the National Voter Registration Act to enhance voting opportunities for every American. Common Cause challenges the legality of SEA 442, codified at Indiana Code § 3-7-38.2-5(d)–(e), which amends Indiana's voter registration laws. As noted above, the NVRA established procedural safeguards and mandatory procedures for state election officials which are designed to "increase the number of eligible citizens who register to vote in elections for Federal office;" "to protect the integrity of the electoral process;" and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(1), (3)-(4). Common Cause argues that SEA 442 violates the NVRA by circumventing its procedural safeguards—the notice-and-waiting period requirement, as well as the requirement that a state's list maintenance system be uniform and nondiscriminatory. The Defendants assert that Indiana has gone to great lengths to ensure that it is both actively and justifiably removing those from its rolls who are no longer qualified to vote. And as a failsafe, Indiana provides a simple process for any individual who may have been mistakenly removed to still vote, therefore, Common Cause's request for a preliminary injunction should be denied.

To obtain a preliminary injunction, Common Cause must establish the following four factors as to each provision it seeks to enjoin: "[1] that it is likely to succeed on the merits, [2] that it is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in its favor, and [4] that issuing an injunction is in the public interest." *Grace Schools*,

801 F.3d at 795. The first two factors are threshold determinations; "[i]f the moving party meets these threshold requirements, the district court 'must consider the irreparable harm that the nonmoving party will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied.'" *Stuller, Inc.*, 695 F.3d at 678 (quoting *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001)). The Court will address the first two threshold factors in turn, before addressing the final factors.

A. Likelihood of Success on the Merits

Common Cause argues that a preliminary injunction is appropriate because it will ultimately prevail on the merits, and without an injunction, Common Cause, its members, and thousands of other lawfully registered voters will suffer irreparable harm from the unlawful purging of voter registrations without notice. It further argues that the Defendants must comply with the NVRA and, at a minimum, send confirmation notices before cancelling voter registrations based on change of residency and the Crosscheck data. Because its proposed injunction would "eliminate[] a risk of individual disenfranchisement without creating any new substantial threats to the integrity of the election process," Common Cause asserts the balance of harms and public interest support granting the Motion. *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 388–89 (6th Cir. 2008); *see also League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12–13 (D.C. Cir. 2016).

The NVRA establishes requirements that states must satisfy when maintaining their voter registration rolls. One such requirement is that a state "shall not remove" a voter from its list of eligible voters due to change in residence unless: (a) the voter confirms such a residence change in writing; or (b) the voter fails to respond to a confirmation notice with specific content prescribed by the statute and the voter does not vote in the jurisdiction during the next two federal election

cycles. 52 U.S.C. § 20507(d)(1). These procedural safeguards of written confirmation from the voter or the notice and waiting period are in place to protect against wrongful disenfranchisement.

Common Cause asserts that, contrary to these plain requirements, SEA 442 requires King and Nussmeyer to provide county officials with data about every voter who Crosscheck identifies as a possible match. After receiving this data produced by Crosscheck, the county officials "shall cancel the voter registration of that voter" immediately, without any notice and without waiting the two federal election cycles, if the county official believes that the duplicate records in Crosscheck belong to the same voter and that the voter's out-of-state registration post-dates the Indiana registration.

Common Cause argues that the Crosscheck system has inherent flaws and limitations, which makes it an unreliable source on which to base voter registration cancellations without further investigation. It maintains that Crosscheck produces many false positives because many people have a matching first name, last name, and birthdate, but in reality, they are not the same person. Crosscheck and the state's voter registration system is unreliable because they do not collect or disseminate the actual voter registration documents, thereby depriving states of the opportunity to verify the conclusory data with the underlying documents. The system also has limited data and functionality, which reduces its reliability for county officials to cancel voter registrations based solely on Crosscheck and the data uploaded into the statewide voter registration system.

Additionally, the data definitions are not consistently used or applied by each of the participating states, and thus, some data may be missing or may be used in disparate ways by the different states. This is especially true of the dates of registration. Common Cause points out that, because of these inherent limitations with Crosscheck, historically, it has been used only as a

starting point in Indiana's voter cancellation process. However, it appears that Crosscheck will now be used to determine whether a duplicate voter registration exists and then cancellation of the Indiana registration will promptly follow.

Common Cause is correct. Before enactment of SEA 442, Indiana used Crosscheck matches as a starting point to determine whether a voter registration could be cancelled. If there was a "match," county election officials would confirm whether the individual registered to vote in Indiana actually was the same individual registered to vote in another state. The county official would then determine whether the registration in the other state occurred after the registration in Indiana. Then the county official would determine whether the voter had authorized cancellation of any previous registrations. If all these conditions were met, the county official would cancel the Indiana registration, but if the last condition was not met, the county official would mail a notice to the voter and provide the waiting period for an "inactive" voter.

Common Cause argues that SEA 442 violates the NVRA by removing the last condition: confirming that the voter authorized cancellation of any previous registrations. It also argues that SEA 442 violates the NVRA by removing the notice and waiting period requirement where authorized cancellation has not been confirmed. As this relates to Crosscheck, Common Cause asserts that a Crosscheck "match" does not constitute a voter's authorization to cancel any previous registrations. Crosscheck provides only second-hand information that should be accompanied with the notice and waiting period protection when the state does not have an affirmative authorized cancellation from the voter. Even Nussmeyer warned the legislative aides working on the passage of SEA 442 that "federal law does not permit the cancellation" of voters from the registration rolls as mandated by SEA 442 (Filing No. 74-21 at 2). Because SEA 442 eliminates

the requirement of written confirmation or a notice and waiting period, it violates the NVRA, and Common Cause asserts that it will prevail on the merits for this reason.

Common Cause also asserts that SEA 442 violates the NVRA because it is not a uniform approach to cleaning up voter registration rolls. It is not uniform because the state does not provide enough specific guidance to the county election officials regarding how to determine whether a voter registration is a matched duplicate in another state. The state also leaves it up to the county election officials to determine which voter registrations should be purged from the rolls, and those local county officials interpret and apply the standards and information differently. Common Cause presents examples of how local officials apply the purging standards differently. A Marion County official will send a notice and wait two election cycles before cancelling an Indiana voter registration if that official received a notice of registration from another state (Filing No. 74-3 at 13). However, under these same facts, a Hamilton County official will immediately cancel the Indiana registration upon receipt of notification from another state (Filing No. 74-5 at 14–15). Some county officials explain that they will cancel registrations of "matched" individuals if the name is unusual but not if it is a common name (Filing No. 74-5 at 11–12; Filing No. 74-6 at 9).

Common Cause further argues that the state's approach is not uniform because the two state co-directors, King and Nussmeyer, provide different guidance to local county election officials when those county officials call one of the co-directors to ask questions about implementing voter regulations and laws. They often do not consult with each other about responses to provide to the county officials, and they occasionally do not agree with each other about policies and procedures.

Common Cause asserts that it has a high likelihood of success on the merits because SEA 442 plainly violates the NVRA's requirement to provide notice and a waiting period where the

voter has not already authorized cancellation of their previous registrations. And additionally, it argues it will succeed on the merits because the state's approach to purging its registration rolls is not uniform or reasonable.

In response to Common Cause's argument, the Defendants first argue that Common Cause lacks standing because it has suffered no injury in fact. The Defendants contend that Common Cause lacks standing on its own behalf because its choice of how to allocate its limited resources is not an injury inflicted by the Defendants, and it is an "injury" of its own making. They argue that Common Cause's assertion of injury is highly speculative and cannot support standing. Regarding organizational standing to represent its members, Defendants assert that the individual members do not have standing to sue in their own right because of a lack of injury to them and nobody has been deprived of the right to vote because of SEA 442.

The Defendants further argue that there is no threat of actual or imminent harm because it has not cancelled any voter registrations and will not do so before July 1, 2018, and even if a voter registration is cancelled, the voter will still be permitted to vote (albeit through the "alternative voting procedure"). The Defendants also argue that any alleged injury cannot be traced back to the named Defendants because the cancellation of voter registrations is carried out by county election officials, not the named statewide election officials. Thus, the Defendants assert, there is no injury and no standing.

Concerning the merits of the claim, the Defendants assert that, even if standing could be established, the challenged statute complies with the requirements of the NVRA by establishing a procedure to remove voter registrations from the rolls when individuals have registered to vote in another state. The Defendants note that the challenged statute has been amended yet again since Common Cause filed its Complaint. The amendment took effect on March 15, 2018, but it has not

yet been implemented by King and Nussmeyer. The amendment directs King and Nussmeyer to apply a set of "confidence factors"—*i.e.* additional personal information such as social security number, street address, driver's license number, zip code—to the data received from Crosscheck before sending the information to the county election officials, who then determine whether a registration should be cancelled. The Defendants argue that the added measure of confidence factors allows them to more accurately determine that an individual is indeed the same person who is registered to vote in another state, and thus, the registration in Indiana can then be cancelled.

The Defendants argue removal of a voter's registration is permissible based on the voter's registration to vote in a different state because that registration in another state can be considered a request for removal from the voter rolls of previous states or can be considered a "confirmation in writing" that the voter has changed their residence. The Defendants explain that SEA 442 plainly requires the county election officials to determine whether the voter has registered in a different state after the voter registered to vote in Indiana. Because they confirm the subsequent registration in a different state, the county official can remove the voter from the rolls because that subsequent registration can be treated as a request for removal from Indiana's voter registration roll. This same logic applies to the "confirmation in writing" aspect of the statute, which allows cancellation of the voter registration. The Defendants assert that an out-of-state voter registration form is written confirmation of the voter's change in residency. This is consistent with sections of the NVRA where registering in another state can be considered (1) a request for removal from the voter roll in their previous state of residence under 52 U.S.C. § 20507(a)(3)(A), or (2) a confirmation in writing that the registrant has changed residence under 52 U.S.C. § 20507(d)(1)(A).

The Defendants argue that there is uniformity among the county election officials because King and Nussmeyer provide training to them and also provide a manual of policies and procedures to give guidance. The county election officials are uniformly required to follow the law by determining whether the duplicate matches from Crosscheck are indeed the same person and then whether the out-of-state registration occurred after the Indiana registration. Then they may cancel the Indiana voter registration. This process allows the state and its election officials to give full faith and credit to the records of other states to determine that voters have changed their residence to other states.

Common Cause replies that the Defendants' standing argument lacks support in the law. The Supreme Court made clear that when an organization diverts its resources to counter the challenged conduct, "there can be no question that the organization has suffered injury in fact," and "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on [an] organization's resources—constitutes far more than simply a setback to [its] abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Common Cause also notes that the Seventh Circuit explicitly recognized this "diversion-of-resources" theory in *Crawford v. Marion County Election Board*. There, the court held that the Democratic Party had standing in its own right to challenge Indiana's photo ID law because it was "compelled" to divert its resources to combat the law's negative effects in order to achieve the organization's goals, and standing "requires only a minimal showing of injury." 472 F.3d 949, 951 (7th Cir. 2007). The diversion of its resources and the frustration of its mission are the precise injuries that Common Cause has suffered in this case. Common Cause asserts it also has standing because its members face a real threat to being disenfranchised by SEA 442.

Regarding the Defendants' assertion that any injury cannot be fairly traceable to them, Common Cause explains that the Defendants are the NVRA officials in the state and are ultimately responsible for the state's compliance with the NVRA. Additionally, while the county election officials are responsible for physically cleaning up the registration rolls, the Defendants establish the policies and procedures for implementing Indiana election law, which directs and guides the county election officials' work. A state's NVRA official is the proper defendant where the actual voter registration has been delegated to—and actual NVRA violations committed by—local officials. *See Harkless v. Brunner*, 545 F.3d 445, 451–52, 455 (6th Cir. 2008).

Common Cause asks the Court to disregard the Defendants' irrelevant argument that they might provide future guidance to county officials that will be in compliance with the NVRA but not consistent with the language of the challenged statute. As well, it argues the Court should disregard the misleading "confidence factors" argument because those factors do not reliably identify an actually matched voter registration. These confidence factors do not address or resolve the issue of a lack of notice to voters when the voter has not confirmed anything in writing or asked to be removed.

Common Cause further replies that the Defendants' argument completely ignores the NVRA's requirement to provide notice and a waiting period when a voter has not confirmed in writing that the voter has changed residence. Rather, the Defendants wrongly argue that the simple act of registering in a different state is written confirmation of a change in residence. The NVRA states that the written request or confirmation must come from the voter, yet the state's information is coming from Crosscheck, a third-party, not the voter. Common Cause points out that where a state relies on third-party information—such as a change of address form provided by the United States Postal Service (which originated with the voter)—to determine that a voter has changed

residence, the NVRA requires that the state still use the notice and waiting period procedure. Thus, the Crosscheck data cannot serve as a request from the voter to cancel previous registrations or be construed as authorization to cancel previous registrations. Such data is not a request from the voter; a request from the voter would require that the voter ask to be removed from the voter rolls. Similarly, Common Cause also argues that the Crosscheck data is not confirmation in writing from the voter.

Based on the case law cited by the parties, the Court first determines that Common Cause has standing to pursue its claim for declaratory and injunctive relief. Common Cause has presented evidence that it already has been compelled to divert its resources to address SEA 442 and that its mission focus has been affected. It has shown that injury is imminent after SEA 442 is implemented. This diversion of resources has been determined sufficient to confer standing upon organizations, *Havens Realty Corp.*, 455 U.S. at 379, and standing "requires only a minimal showing of injury." *Crawford*, 472 F.3d at 951. The Defendants are the NVRA officials in the state and are responsible for the state's compliance with the NVRA. Furthermore, they establish the guidelines, policies, and procedures for maintaining the state's voter registration rolls. The local county election officials are required to follow the Defendants' directives. Therefore, the injury in this case is fairly traceable to the named Defendants. Therefore, Common Cause has standing to proceed.

Regarding the likelihood of success on the merits, the Court determines that Common Cause has a high likelihood of success on the merits of its claim that SEA 442 violates some of the requirements of the NVRA and threatens disenfranchisement of eligible voters.

The NVRA plainly requires that a state "shall not remove the name of a registrant from the official list of eligible voters . . . on the ground that the registrant has changed residence unless the

registrant," (1) "confirms in writing that [they have] changed residence," or (2) has failed to respond to a mailed notification and has not voted or appeared to vote in two federal election cycles. 52 U.S.C. § 20507(d)(1). These are simple procedural safeguards to protect registered voters, and states are required to follow these safeguards. Before its amendment by SEA 442, Indiana Code § 3-7-38.2-5(d)–(e) provided for the notice and a waiting period required by the NVRA when a voter did not confirm in writing of their change in residence or did not request to be removed from the voter rolls. SEA 442 removes this procedural safeguard. The Defendants' reliance on the new "confidence factors" is misplaced because they do nothing to address the NVRA's requirement in particular cases to provide for notice and a waiting period.

The act of registering to vote in a second state as determined by Crosscheck cannot constitute a written request to be removed from Indiana's voter rolls or a confirmation in writing from the voter that they have changed their address. A voter's act of registering to vote is simply that—a registration to vote. There is no request for removal, and the voter is not confirming for Indiana that they have had a change in residence. Notably this information is not coming from the voter but rather from Crosscheck, which may or may not be reliable. It is significant that the NVRA still requires the notice and waiting period before cancelling a voter registration when a change in address has been confirmed through the U.S. Postal Service, which might be more reliable than Crosscheck. The information provided by the U.S. Postal Service originates from the voter, yet notice and a waiting period are still required by the NVRA before cancelling the registration. 52 U.S.C. § 20507(c)(1). Because SEA 442 removes the NVRA's procedural safeguard required in particular cases of providing for notice and a waiting period, the Court determines that Common Cause has a high likelihood of success on the merits of its claim.

The Court briefly notes that it appears the implementation of SEA 442 will likely fail to be uniform based on the evidence that King and Nussmeyer provide differing guidance to county officials on how to determine whether a particular registered voter is a duplicate registered voter in a different state. This is also true based on the evidence that Indiana's 92 county officials are left to use wide discretion in how they determine a duplicate registered voter, and they have used that discretion in very divergent ways.

B. Irreparable Harm with No Adequate Remedy at Law

Common Cause asserts that, in the context of a plaintiff organization, harm exists where the defendant's conduct has made it more burdensome for the organization to carry out its activities. *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264–65 (1991). Common Cause further asserts that an organization can establish that it has been harmed when the organization devotes its resources to correcting the defendant's actions. *See Havens Realty Corp.*, 455 U.S. at 379.

Common Cause argues that it will suffer irreparable harm without an injunction prohibiting implementation of SEA 442 because its organization's limited resources—especially staff and volunteer time—will be diverted to helping educate Indiana voters and ensuring that eligible voters are not disenfranchised. This will inevitably take away resources and time from other aspects of Common Cause's work and mission. Common Cause also argues an irreparable harm from the disenfranchisement of its members and other Indiana citizens, and courts regularly have determined that violating a person's right to vote (and other First Amendment rights) is an irreparable harm because an individual cannot vote after an election has passed. It points to numerous court opinions that have held violation of First Amendment rights and voter rights constitutes an irreparable harm without an adequate remedy at law. *McCutcheon v. Fed. Election*

Comm'n, 134 S. Ct. 1434, 1440–41 (2014) ("There is no right more basic in our democracy than the right to participate in electing our political leaders."); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *Elrod v. Burns*, 427 U.S. 347, 373–74, n.29 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury[,]" and "[t]he timeliness of political speech is particularly important."); *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) ("for some kinds of constitutional violations, irreparable harm is presumed," especially with First Amendment claims); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (same); *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) (same); *Frank v. Walker*, 196 F. Supp. 3d 893, 917 (E.D. Wis. 2016) (disenfranchisement is an irreparable harm); *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) (denying right to vote cannot be redressed after the fact); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (same); *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Newby*, 838 F.3d at 12–13 (violation of NVRA is an irreparable harm).

The Defendants dispute that irreparable harm exists because SEA 442 has not yet been implemented, and when it is implemented, even if a voter is wrongfully removed from the registration rolls, they may still vote under the "fail-safe" provisions of Indiana's election law. Thus, they assert, nobody will be deprived of the right to vote.

Common Cause replies that SEA 442 has been enacted into law, and the Defendants have stated that they will start implementing it in July 2018. Harm has already been imposed on Common Cause by impacting its ability to fulfill its mission and by diverting its limited resources, but additional harm is imminent after the Defendants begin implementing the law. Wrongful

disenfranchisement will occur, which is an irreparable harm. Common Cause further replies that the Defendants' reliance on its "fail-safe" alternative voting procedure to justify SEA 442 is misplaced because the NVRA requires such a "fail-safe" voting procedure as an additional protection to voters, not as a replacement to the other requirements of the NVRA.

The Court first notes that the Defendants' argument that no irreparable harm exists because SEA 442 has not yet been implemented is unavailing. The very purpose of a preliminary injunction is to prevent an imminent harm from occurring or to quickly abate an irreparable harm that has already begun. Next, the Court agrees with Common Cause that the Defendants' "fail-safe" voting procedure cannot justify implementation of SEA 442 because the NVRA requires that "fail-safe" voting procedure as an additional protection to voters, not as a replacement or alternative to the other requirements of the NVRA. The harm that occurs from eliminating one required procedural safeguard is not negated by the continued use of a different additional procedural safeguard.

As has been held by numerous other courts, the Court determines that a violation of the right to vote is presumptively an irreparable harm. *See McCutcheon*, 134 S. Ct. at 1440–41; *Reynolds*, 377 U.S. at 555; *Elrod*, 427 U.S. at 373–74, n.29; *Ezell*, 651 F.3d at 699; *Newby*, 838 F.3d at 12–13. Because an individual cannot vote after an election has passed, it is clear that the wrongful disenfranchisement of a registered voter would cause irreparable harm without an adequate remedy at law.

C. Balance of Potential Harms

Common Cause argues that a balance of the potential harms from an injunction weighs heavily in favor of Common Cause. Depriving eligible citizens of the right to vote is a very significant harm, while not allowing the state to purge voter registrations in a manner that short-circuits the NVRA's requirements causes no harm to the state. Maintaining accurate voter

registration rolls is important and prescribed by the NVRA; however, the state has many procedures that allow it to reasonably and more accurately clean up its voter registration rolls such as using the statewide notification mailers or cancelling registrations based on death, incarceration, incapacity, or written request.

The Defendants respond that, when an injunction is sought against a political branch of government, public policy considerations favor denial of the injunction because judicial interference with a public program diminishes the scope of democratic governance, and the government's interests are presumed to be the public's interests. In this case, an injunction would hinder efforts to protect the integrity of the electoral process and to ensure accurate and current voter registration rolls.

Common Cause contends the Defendants' argument is nothing more than a vague desire to be free from "federal judicial micromanagement," and in reality, the Defendants will suffer no harm from an injunction. They have self-imposed a stay of enforcing SEA 442 without suffering any harm thus far, so an injunction will not cause them any harm.

The Court determines that the balance of equities weighs heavily in favor of granting an injunction for Common Cause. An injunction prohibiting the implementation of SEA 442 will not impose any new or additional harm or burdens on the Defendants concerning their efforts to maintain accurate voter registration rolls and to ensure fair elections. The Defendants still have numerous ways that comply with the NVRA to clean up the state's voter registration rolls. On the other hand, not issuing an injunction and allowing SEA 442 to be implemented risks the imposition of significant harm on Common Cause and its members through the disenfranchisement of rightfully registered voters.

D. Public Interest

Common Cause explains that voting is a fundamental constitutional right that is protected by the First Amendment, *John Doe No. 1 v. Reed*, 561 U.S. 186, 224 (2010), and the Seventh Circuit has held that "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y*, 453 F.3d at 859. Common Cause points out that the United States Supreme Court has held that the public has a "strong interest in exercising the fundamental political right to vote." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The public interest is best served by protecting the right to vote and not disenfranchising eligible voters. Common Cause argues that, because its proposed injunction would "eliminate[] a risk of individual disenfranchisement without creating any new substantial threats to the integrity of the election process," the balance of harms and public interest support issuance of an injunction. *U.S. Student Ass'n Found.*, 546 F.3d at 388–89.

Similar to their response regarding the balance of harms, the Defendants argue that the public interest is served by allowing SEA 442 to be implemented to ensure the integrity of voter registration rolls and the electoral process.

In reply, Common Cause asserts that there is no evidence indicating the 2018 election will not be fair, honest, or have integrity if the Defendants are not permitted to implement and enforce SEA 442. There is no basis to suspect that voter fraud will increase if SEA 442 is not implemented this year. The greater public interest is in allowing eligible voters to exercise their right to vote without being disenfranchised without notice.

The Court agrees with Common Cause that the greater public interest is in allowing eligible voters to exercise their right to vote without being disenfranchised without notice. If a voter is disenfranchised and purged erroneously, that voter has no recourse after Election Day. While the

Defendants have a strong public interest in protecting the integrity of voter registration rolls and the electoral process, they have other procedures in place that can protect that public interest that do not violate the NVRA.

E. Posting Bond

Common Cause's final argument is that the issuance of a preliminary injunction will not impose any monetary injuries on the Defendants, and in the absence of such injuries, no bond should be required. *See Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996). The Defendants failed to respond to the argument that no bond should be required. The Court agrees that no monetary injury will result from the issuance of an injunction, and the Defendants have not argued that a bond is appropriate. Therefore, Common Cause need not post a bond.

IV. CONCLUSION

Because each of the factors for the issuance of a preliminary injunction weighs in favor of Common Cause, the Court **GRANTS** Common Cause's Motion for Preliminary Injunction (Filing No. 75). Pursuant to Federal Rule of Civil Procedure 65(d), the Court **ISSUES A PRELIMINARY INJUNCTION** prohibiting the Defendants from taking any actions to implement SEA 442 until this case has been finally resolved. A similar ruling is issued in related case *Indiana State Conference of the National Association for the Advancement of Colored People, et. al. v. Lawson et al.*, 1:17-cv-2897-TWP-MPB. Common Cause need not post a bond.

SO ORDERED.

Date: 6/8/2018

TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

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