Nos. 18-2491, 18-2492

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

COMMON CAUSE INDIANA, INDIANA STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), and LEAGUE OF WOMEN VOTERS OF INDIANA,

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-02897, 1:17-cv-03936
The Honorable Tanya Walton Pratt, Judge Presiding

CONSOLIDATED BRIEF OF PLAINTIFFS-APPELLEES

Sophia Lin Lakin
Adriel I. Cepeda Derieux
Dale Ho
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
125 Broad Street, 18th Floor
New York, NY 10004
(212) 519-7836

Myrna Pérez
Jonathan Brater
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
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(646) 292-8373

Counsel continued on next page

Stuart C. Naifeh
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New York, NY 10004
(212) 485-6055

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Gavin M. Rose
ACLU OF INDIANA
1031 E. Washington Street
Indianapolis, IN 46202
(317) 635-4059

Matthew R. Jedreski
Kate Kennedy
DAVIS WRIGHT TREMAINE LLP
1200 Third Avenue, 22nd Floor
Seattle, WA 98101
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Chiraag Bains*
DĒMOS
740 6th Street NW, 2nd Floor
Washington, DC 20001
(202) 864-2746

**Admitted in Massachusetts, not D.C.; practice limited pursuant to D.C. App. R. 49(c)(3).*

Counsel for Plaintiff-Appellee Common Cause Indiana

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Ellyde R. Thompson
Ellison Ward Merkel
Alexandre J. Tschumi
QUINN EMANUEL URQUHART & SULLIVAN, LLP
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New York, NY 10010
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MCCAIN LAW OFFICES, P.C.
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Merrillville, IN 46410
(219) 884-0696

Counsel for Plaintiffs-Appellees the Indiana State Conference Of The National Association For The Advancement Of Colored People (NAACP), and League Of Women Voters Of Indiana

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2491

Short Caption: Common Cause v. Lawson

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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Common Cause Indiana

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Christine A. Roussell, L. Danielle Toaltoan); Fillenwarth Dennerline Groth & Trowe LLP (William R. Groth)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Common Cause

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Sophia Lin Lakin Date: 7/20/2018

Attorney's Printed Name: Sophia Lin Lakin

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: American Civil Liberties Union Foundation, Inc.
125 Broad Street, 18th Floor, New York, NY 10004

Phone Number: (212) 519-7836 Fax Number: (212) 549-2654

E-Mail Address: slakin@aclu.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2491

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Common Cause

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Adriel I. Cepeda Derieux Date: 11/19/2018

Attorney's Printed Name: Adriel I. Cepeda Derieux

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: American Civil Liberties Union Foundation, Inc.
125 Broad Street, 18th Floor, New York, NY 10004

Phone Number: (212) 284-7334 Fax Number: (212) 549-2654

E-Mail Address: acepedaderieux@aclu.org

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Appellate Court No: 18-2491

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Common Cause

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Dale E. Ho Date: 7/30/2018

Attorney's Printed Name: Dale E. Ho

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

Address: American Civil Liberties Union Foundation, Inc.
125 Broad Street, 18th Floor, New York, NY 10004

Phone Number: (212) 549-2693 Fax Number: (212) 549-2654

E-Mail Address: dale.ho@aclu.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2492

Short Caption: Indiana State Conference of NAACP v. Lawson

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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League of Women Voters of Indiana

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Quinn Emanuel Urquhart & Sullivan, LLP; Brennan Center For Justice at NYU School of Law;

McCain Law Offices, P.C.

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Indiana State Conference of NAACP is a unit of NAACP (Inc. in NY; PPB in MD).

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Myrna Perez Date: 7/31/2018

Attorney's Printed Name: Myrna Perez

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** _____ *Revised

Address: Brennan Center for Justice
120 Broadway, Suite 1750, New York, NY 10271

Phone Number: 646-292-8310 Fax Number: 212-462-7308

E-Mail Address: myrna.perez@nyu.edu

rev. 01/15 GA

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2492

Short Caption: Indiana State Conference of NAACP v. Lawson

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Jonathan Brater Date: 07/30/2018

Attorney's Printed Name: Jonathan Brater

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

Address: Brennan Center for Justice
120 Broadway, Suite 1750, New York, NY 10271

Phone Number: 646-292-8373 Fax Number: 212-462-7308

E-Mail Address: jonathan.brater@nyu.edu

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2491

Short Caption: Common Cause v. Lawson

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Common Cause

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N/A

Attorney's Signature: s/ Stuart Naifeh Date: 09.18.18

Attorney's Printed Name: Stuart Naifeh

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** _____

Address: 80 Broad Street, Fourth floor
New York, NY 10004

Phone Number: 212-485-6055 Fax Number: _____

E-Mail Address: snaifeh@demos.org

rev. 01/15 GA

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2491

Short Caption: Common Cause v. Connie Lawson et al.

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Common Cause

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N/A

Attorney's Signature: s/ Miranda Galindo Date: 11.12.18

Attorney's Printed Name: Miranda Galindo

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

Address: 80 Broad Street, Fourth floor
New York, NY 10004

Phone Number: 212-485-6240 Fax Number: _____

E-Mail Address: mgalindo@demos.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2491

Short Caption: Common Cause Indiana v. Connie Lawson, et al.

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Common Cause

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N/A

Attorney's Signature: s/ Jan P. Mensz Date: July 13, 2018

Attorney's Printed Name: Jan P. Mensz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

Address: ACLU of Indiana, 1031 E. Washington St., Indianapolis, IN 46202

Phone Number: 317/635-4059 Fax Number: 317/635-4105

E-Mail Address: jmensz@aclu-in.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2491

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N/A

Attorney's Signature: s/ Gavin M. Rose Date: July 13, 2018

Attorney's Printed Name: Gavin M. Rose

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

Address: ACLU of Indiana, 1031 E. Washington St., Indianapolis, IN 46202

Phone Number: 317/635-4059 Fax Number: 317/635-4105

E-Mail Address: grose@aclu-in.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: No. 18-2491

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n/a

Attorney's Signature: s/Matthew Jedreski Date: 7/30/18

Attorney's Printed Name: Matthew Jedreski

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: Davis Wright Tremaine LLP, 1201 Third Ave, Suite 2200, Seattle, WA 98101

Phone Number: (206) 757-8147 Fax Number: (206) 757-7700

E-Mail Address: mjedreski@dwt.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2491

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n/a

Attorney's Signature: s/ Kate Kennedy Date: 7/27/18

Attorney's Printed Name: Kate Kennedy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: Davis Wright Tremaine LLP, 1201 Third Ave, Suite 2200, Seattle, WA 98101

Phone Number: (206) 757-8075 Fax Number: (206) 757-7075

E-Mail Address: katekennedy@dwt.com

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Common Cause Indiana

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

ACLU of Indiana (Jan P. Mensz, Gavin Rose), American Civil Liberties Union (Dale Ho, Sophia Lin Lakin, Adriel Cepeda-Derieux), Demos (Stuart Naifeh, Chiraag Bains), Davis Wright Tremaine LLP (Matthew Jedreski, Kate Kennedy, Christine Roussel, Danielle Toaltaon), Fillenwarth Dennerline Groth & Trowe LLP (William Groth)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Common Cause

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Chiraag Bains Date: 11.30.18

Attorney's Printed Name: Chiraag Bains

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2492

Short Caption: Indiana State Conference of NAACP v. Lawson

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Indiana State Conference of the National Association for the Advancement of Colored People (NAACP) and League of Women Voters of Indiana

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Indiana State Conference of NAACP is a unit of NAACP (Inc. in NY; PPB in MD).

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Sascha N. Rand Date: 7/31/2018

Attorney's Printed Name: Sascha N. Rand

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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N/A

Attorney's Signature: s/ Ellyde R. Thompson Date: 7/31/2018

Attorney's Printed Name: Ellyde R. Thompson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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N/A

Attorney's Signature: s/ Ellison Ward Merkel Date: 7/31/2018

Attorney's Printed Name: Ellison Ward Merkel

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Alexandre J. Tschumi Date: 07/23/2018

Attorney's Printed Name: Alexandre J. Tschumi

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** _____

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NA

Attorney's Signature: s/ Trent A. McCain Date: 07/23/2018

Attorney's Printed Name: Trent A. McCain

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** _____

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PRELIMINARY STATEMENT

This appeal concerns Indiana's attempt to eliminate federally mandated protections against the erroneous cancellation of voter registrations. Prior to an amendment to Indiana law in 2017, Indiana permitted the cancellation of a registration for a voter identified as possibly registered to vote in another state only after providing notice to the voter of the proposed cancellation and after the voter failed to respond to the notice or engage in any voting activity during the next two federal election cycles, as required by the National Voter Registration Act ("NVRA"). As amended, Indiana's law eliminates the notice-and-waiting requirements, even when the only indication that a voter is no longer eligible to vote is based on second-hand and circumstantial information received from an unreliable interstate database known as "Crosscheck."

In enjoining the law, the District Court (Pratt, J.) held that Appellees Common Cause Indiana, Indiana State Conference of the National Association for the Advance of Colored People (NAACP), and the League of Women Voters of Indiana demonstrated a likelihood of success on their claims that Indiana's amendments run afoul of the NVRA. On appeal, Appellants argue that the Appellee organizations do not have standing to challenge the new law and that Indiana's reliance on Crosscheck to purge registrants satisfies the NVRA requirements. Appellants are wrong on both counts.

Appellees—nonpartisan, nonprofit organizations committed to eliminating barriers to voting and increasing civic engagement through vigorous voter registration and education efforts—have standing to challenge the new Indiana law. This Court's well-settled precedent requires only that Appellees demonstrate Appellants' actions compelled them to divert resources to address the new law's fallout. Appellees plainly satisfy that standard, as the District Court correctly held, and also have standing by virtue of their representation of their members, Indiana voters who are at immediate risk of erroneous disenfranchisement.

As to the underlying merits, Appellants ignore the plain language of the NVRA, which requires that states follow specific notice-and-waiting procedures prior to removing a voter unless the voter requests removal or confirms the change in residence in writing. And, in any event, Appellees also are likely to succeed on the separate claim that Appellants have violated the NVRA's requirement that registration cancellation programs be "uniform." This Court should affirm the District Court's grant of the preliminary injunction.

JURISDICTIONAL STATEMENT

The jurisdictional statement of the Defendants-Appellants is complete and correct.

ISSUES PRESENTED

1. Did the District Court correctly conclude that Appellees have standing, either by virtue of their diversion of resources to counteract the unlawful

effect of Senate Enrolled Act 442 (2017) ("SEA 442"), which undermines Appellees' missions, or on the basis that Appellees may represent their members, Indiana voters who are at immediate risk of erroneous disenfranchisement?

2. Did the District Court correctly conclude that Appellees are likely to succeed on the merits of their claim that Indiana's amendment to its list maintenance law violates (a) the NVRA's notice-and-waiting-period requirements, or (b) the NVRA's requirement that list maintenance be implemented in a reasonable, uniform, and nondiscriminatory manner?

STATEMENT OF THE CASE

A. The NVRA Reflects National Policy To Reduce Barriers To Voter Registration And Ensure Accurate Registration Rolls

Congress's first stated purpose in enacting the NVRA was to "increase the number of eligible citizens who register to vote in elections for Federal office." 52 U.S.C. § 20501(b)(1). Congress also sought to "protect the integrity of the electoral process," and "ensure that accurate and current voter registration rolls are maintained." *Id.* § 20501(b)(3)-(4); *see also Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). The statute harmonizes these goals by calling for "reasonable" list maintenance procedures, but restricting when and how states can remove voters from their registration rolls, and prescribing protections for voters in the process.

1. The NVRA Includes Specific Safeguards To Prevent Improper Removal Of Voters From The Voter Rolls

The NVRA restricts states' ability to remove voters from the rolls to five separate grounds, two of which are relevant here: removal at a voter's request and removal due to a voter's change in residence.[1] 52 U.S.C. § 20507(a)(3)(A), (a)(4)(B). Removals on the ground of changed residence are the most voluminous, and unsurprisingly, are ripe for error leading to disenfranchisement. Not every voter who moves personally informs election administrators of the change in voting residence. Recognizing this, Congress permitted states and localities to use certain circumstantial or second-hand information—typically, supplied by other government agencies—to flag voters who may have changed their voting residence. However, conscious of the potential for errors when information about an address change does not come directly from the voter, Congress imposed an additional procedural safeguard. Specifically, Section 8 of the NVRA provides:

> 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—
>
> (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);

[1] The other three are: (i) disqualifying criminal conviction, 52 U.S.C. § 20507(a)(3)(B); (ii) mental incapacity, *id.*; and (iii) death, *id.* § 20507(a)(4)(A).

> ***and***
>
> (ii) has not voted or appeared to vote . . . in an election in 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.

Id. § 20507(d)(1) (emphasis added). The statutorily-prescribed notice must include a pre-addressed and pre-paid return card that a voter can use to confirm her address. *Id.* § 20507(d)(2). The return card must also explain (a) what a voter who has not moved must do to remain on the registration rolls (*i.e.*, either return the card or vote in one of the next two elections), and (b) what a voter who has moved must do to remain eligible to vote. *Id.* If a state does not comply with these requirements, "it may not remove the registrant on change-of-residence grounds." *Husted*, 138 S. Ct. at 1838-39.

Thus, the NVRA prohibits states from removing voters based on presumed residence changes ***unless*** they comply with a detailed, specific notice procedure, and one of two things subsequently happens: (a) the voter confirms the move in writing or (b) the waiting period lapses with no relevant activity from the voter. This requirement provides a registrant opportunity to correct an incorrect initial conclusion that the voter has changed residence. This is essential, given the possibility of error in systematic list maintenance efforts based on second-hand information and the danger of erroneous disenfranchisement. Indeed, the Supreme

Court recently recognized that "[t]he most important of [the NVRA's] requirements is its prior notice obligation." *Id.* at 1838.

On top of this crucial notice-and-waiting period protection, the NVRA imposes additional requirements to protect voters from improper removal. First, Section 8(c) mandates that even if the notice-and-waiting procedure is followed, states must still permit the person to vote "upon oral or written affirmation by the registrant . . . that the registrant continues to reside" at the address where she was previously registered. 52 U.S.C. § 20507(e)(3). Second, any program to systematically remove ineligible voters from the rolls must be completed no later than 90 days before any federal election. *Id.* § 20507(c)(2)(A). Finally, any program for maintaining accurate and up-to-date voter rolls "shall be uniform [and] nondiscriminatory." *Id.* § 20507(b)(1). This provision "impose[s] the uniform, nondiscriminatory and conforming with the Voting Rights Act standards on any activity that is used to start, or has the effect of starting, a purge of the voter rolls." H.R. Rep. No. 103-9, at 15 (1993).

B. Indiana's List Maintenance Programs Rely On Circumstantial Evidence That Voters Have Moved

1. Appellants Oversee And Administer Indiana's Elections

Appellant Connie Lawson, the Indiana Secretary of State, is Indiana's chief election official charged with performing all election administration ministerial duties. Ind. Code §§ 3-6-3.7-1, 3-6-4.2-2(a). Appellants J. Bradley King ("King")

and Angela M. Nussmeyer ("Nussmeyer"), co-directors of the Indiana Election Division ("IED"), are jointly the "NVRA official" responsible for the coordination of Indiana's NVRA responsibilities. *Id*. § 3-7-11-1.

There are 92 counties in Indiana. Each has either an Election Board or Board of Registration (hereinafter referred to as "county boards" or "counties"). Ind. Code § 3-6-5-1; *see also id.* § 3-6-5.2. County boards conduct elections and administer state and federal election laws within their jurisdictions, and are responsible for adding, updating, and removing voter records in their jurisdictions. *Id.* §§ 3-6-5-14, 3-6-5.2-6; *NAACP* Dkt.[2] 42-21, at 12:5-13, 13:3-15.

Indiana keeps "a single, uniform, official, centralized, and interactive statewide voter registration list," the State Voter Registration System ("SVRS"). Ind. Code §§ 3-7-26.3-3, 4. SVRS is the sole system for storing and managing the official list of registered voters for all elections in Indiana. *Id.* § 3-7-26.3-5. The co-directors establish official policies, standard operating procedures, and guidance for list maintenance and create protocols that govern the operation of SVRS, which counties use to maintain registration records. SA5. They also provide training to counties on their duties under state and federal law, including the NVRA. Ind.

[2] "*NAACP* Dkt." and "*Common Cause* Dkt." refer to the District Court docket in *NAACP v. Lawson*, 1:17-cv-02897, and *Common Cause v. Lawson*, 1:17-cv-03936, respectively.

Code § 3-6-4.2-14; *NAACP* Dkt. 42-21, at 11:5-20, 12:14-14:11. "The official guidance from King and Nussmeyer as reflected in the protocols, documents and training are mandatory." SA5; *NAACP* Dkt. 42-21, at 81:2-25; *id.* 42-26, at 15:14-18, 16:13-25.

Indiana law establishes several programs for removing ineligible voters from rolls, including programs for removing "ineligible voters from [county] lists of eligible voters due to a change of residence." Ind. Code § 3-7-38.2. Indiana uses multiple sources to identify voters who may have changed residence, including jury duty notices returned due to unknown or insufficient address, Indiana Bureau of Motor Vehicles information concerning Indiana licenses surrendered to another jurisdiction, and the U.S. Postal Service's National Change of Address Service. *Id.* §§ 3-7-38.2-2, 3-7-38.2-5(a). When Indiana identifies voters who may have changed voting residence through these sources, it follows the notice-and-waiting procedures mandated by the NVRA and contained in Indiana Code § 3-7-38.2-2.

2. The Crosscheck Program Provides Limited Data

Indiana uses "Crosscheck" as another "method for identifying voters who may have become ineligible to vote in Indiana because of a change in residence." SA6. Crosscheck, administered by the Kansas Secretary of State ("KSOS"), purports to identify voters registered to vote in more than one state. *See* AA31-34. Participating states annually submit their official lists of registered voters to

Crosscheck, which uses them to identify purported double-registrants by comparing data in only three fields—first name, last name, and birth date. As such, it returns a high rate of incorrect matches—or "false positives." *See Common Cause* Dkt. 74-22, at 3-4. Crosscheck admits as much in its Participation Guide: "a significant number of apparent double votes are false positives and not double votes." AA34.

Crosscheck then sends each participating state a list of all registrants for whom those three data points match with a registrant in another participating state. *Id.* In addition to the three matching fields, the lists of "matches" Crosscheck sends may include other data, such as middle name, suffix, date of most recent voter activity, and a variable indicating whether the registrant voted in the state's last general election. AA38. Crosscheck hides the last four digits of voters' social security numbers, providing only a code indicating whether Crosscheck thinks there is a match on this field. *See Common Cause* Dkt. 74-22, at 7-8. States therefore cannot independently use the voter's social security number to investigate the accuracy of the match.

Participating states do not provide Crosscheck with original voter registration forms submitted by voters when they registered, and thus Crosscheck does not include original registration forms with the lists of "matches" it provides to states. SA14; *NAACP* Dkt. 42-21, at 96:20-25; *see also* AA32-33. Those lists

also do not include signatures or any former addresses that voters may have provided on registration forms. AA33. Crosscheck purports to provide the date a possible double registrant registered in each state, which would allow states to determine which registration is older and should be cancelled, but in reality, that information is not supplied. Again, Crosscheck does not provide copies of original registration forms that can be used to ascertain registration dates. Moreover, it instructs participants to populate a "Date of Registration" field not with the date the voter actually registered, but with "the date of the most recent voter-initiated change." AA37. It is undisputed that states interpret this imprecise instruction differently, and while Crosscheck disseminates state-provided definitions for the data populated in the "Date of Registration" field when available, some states (including Indiana) do not even provide a definition. *See NAACP* Dkt. 42-21, at 99:5-10; *id.* 42-19. In addition, there is evidence that dates of registration in voter records do not accurately reflect the date a voter actually submitted a registration form. For instance, a recent state-by-state study found "an implausibly large number of registrants . . . (1 in 50) are listed as registering on January 1st." *NAACP* Dkt. 42-12, at 4. Yet, the first of January is "one of the least likely days for a registration application to be processed" because government offices are closed. *Id.* at 10.

C. Indiana's Amended Crosscheck Program Eliminates The Notice-And-Waiting Safeguard

As a Crosscheck participant since 2015, Indiana annually sends its statewide registration list to KSOS and receives back a list of possible matches. Ind. Code § 3-7-38.2-5(d). Within 30 days of receipt, the co-directors must "provide to the appropriate county voter registration office" the names and other information regarding any Indiana voters who—according to Crosscheck—share identical names, dates of birth, and other criteria with a voter in another state. *Id.*

Until 2017, Indiana law required counties to make three determinations before removing an individual using Crosscheck: that the individual (1) "is the same individual who is a registered voter in 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." Ind. Code § 3-7-38.2-5(d) (2016). Critically, if the individual had "not authorized the cancellation of any previous registration," the county was required to "send an address confirmation notice to the Indiana address of the voter." *Id.* Consistent with the NVRA, the county could not remove the voter from Indiana's voter rolls until the voter failed both to respond to the notice and to vote in either of the next two general elections. *Id.*

In 2017, Indiana enacted SEA 442. SEA 442 eliminated the requirement that counties determine whether the voter authorized cancellation of her previous

registration and, if not, send an address-confirmation notice to the voter prior to removal. *NAACP* Dkt. 42-10. State law now permits counties to remove voters flagged by Crosscheck immediately—without notice and without waiting through two general election cycles with no voter activity. Ind. Code § 3-7-38.2-5(d), *as amended by* SEA 442 (2017).

Before SEA 442's enactment, officials responsible for maintaining the voter rolls and ensuring NVRA compliance raised serious concerns about eliminating these measures. While the legislature considered SEA 442, Nussmeyer explained that she would "rather the voter be made aware their Indiana registration is being cancelled because first name/last name/DOB matches can be flawed" and "[o]ur team is hesitant to [allow registration cancellation without voter authorization] because data isn't perfect, and notice should be given to the voter." *NAACP* Dkt. 42-5; *id.* 42-6; *see also id.* 42-28, at 37:6-38:6 (county official stating "I am more comfortable when the voter tells me that they have actually moved out of my state or told me that they're still at their address rather than me just assuming").

D. Appellants' "Confidence Factors" Provide A False Sense of Confidence

When Appellants receive Crosscheck lists, they apply a system of so-called "confidence factors" that consider data points beyond name and birth date. Under this system, Crosscheck matches are awarded arbitrary point values when certain data fields in the Indiana registration record match or do not conflict—and

sometimes even when they do conflict—with the out-of-state registration record. A total of 75 points[3] is required before Appellants will send the Crosscheck-matched records to a county. Although the use of the term "confidence factor" and the assignment of a numerical "score" to Crosscheck matches suggests mathematical or statistical precision, there is nothing scientific about Indiana's "confidence factor" system. No statistician or other expert was involved in assigning specific point values to data points or choosing the 75-point threshold, which in no way represents a probability that the match is accurate. *NAACP* Dkt. 42-22, at 22:12-19; *id.* 42-21, at 62:22-63:20, 115:5-11.

There are ten "confidence factors." Four of them—"Full Social Security number," "Indiana driver's license or identification card number," prior address, or prior zip code—are not achievable because Crosscheck does not provide the relevant field. *See Common Cause* Dkt. 85-1; AA37. Further, the system awards points when one or both registration records contain no data for a given data point (*e.g.*, awarding five points each for middle name and suffix where neither record contains data in those fields or where one record contains a middle name/suffix and

[3] After Plaintiffs-Appellees filed suit, the Indiana General Assembly enacted House Enrolled Act ("HEA") 1253, effective March 15, 2018, which codified the "confidence factors" into Indiana law. Prior to HEA 1253, the law had required the co-directors to send all Crosscheck matches to the counties with no additional filtering. *Compare* Ind. Code § 3-7-38.2-5(d) (2017), *with* Ind. Code § 3-7-38.2-5(d) (2018).

the other does not). *Common Cause* Dkt. 86, at 2-3; *NAACP* Dkt. 42-7. It awards points even where data ***conflicts***—giving five points if the middle names begin with the same letter but the full middle names are different (*e.g.*, "Alexandra" and "Anthony" would be considered a match). *Common Cause* Dkt. 86, at 2-3.

E. County "Determinations" Under Indiana Code § 3-7-38.2-5(d) Are Haphazard And Inaccurate

After applying the so-called "confidence factors," Appellants transmit the Indiana registration record and a subset of the corresponding data from the out-of-state record to the respective counties electronically in SVRS. *NAACP* Dkt. 42-5 at 70:3-7; *id.* 42-21, at 111:19-113-22. As a result of SEA 442, counties can then immediately remove that voter. While counties must still make the two determinations that remain under SEA 442—*i.e.*, whether the non-Indiana registrant flagged in the Crosscheck match: (1) "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"—in reality, this process is far from robust. Most counties simply rubberstamp the results of the Crosscheck match.

The law does not explain how counties are supposed to make these determinations, nor do Appellants issue instructions or procedures to guide counties in fulfilling this responsibility. *NAACP* Dkt 42-22, at 43:20-44:20; *id.* 42-21, at 13:16-16:16; *id.* 42-24, at 14:24-15:22. Instead, because each of the 92

counties has complete discretion to make the requisite determinations, county officials can and frequently do rely exclusively on the data provided through SVRS, performing no independent research and exercising no independent judgment. *See Common Cause* Dkt. 74-5, at 31:10-32:13; *see also id.* 74-22, at 3 ("Eleven counties accepted all Crosscheck matches provided to them."). Others have based their determinations on a wide variety of methods and criteria, including the particular county employee's opinion of how "unusual" or "common" the voter's name is. *See id.* 74-5, at 31:10-32:13; *id.* 74-6, at 32:2-17.

The co-directors answer counties' questions about cancelling a particular registration or NVRA compliance. *NAACP* Dkt. 42-21, at 19:23-20:24; *see also, e.g.*, *Common Cause* Dkt. 74-7, at 8; *NAACP* Dkt. 42-21, at 11:14-12:13; 23:17-23; *id.* 42-24, at 61:4-62:6. However, they have different opinions concerning the NVRA's requirements and what sort of review, if any, the counties should conduct before cancelling a registration based on a Crosscheck match. *Compare, e.g.*, *NAACP* Dkt. 42-21, at 130:22-24, 133:13-15 (Nussmeyer testifying that counties should conduct "careful review," consult with other states' election officials, and "see the actual out of state registration"), *with id.* 42-22, at 31:13-32:13; 32:25-33:9 (King testifying that it is in the counties' discretion to conduct additional research and that IED would not require them to do so). Democratic county employees usually contact Nussmeyer for advice, Republican county employees

usually contact King, but some contact both.[4] *See NAACP* Dkt. 42-21, at 11:14-12:13, 21:7-22:3; *id.* 42-24, at 16:16-17:4, 61:4-62:6; *id.* 42-26, at 7:2-3, 14:13-18. Nussmeyer and King often respond without consulting each other and provide conflicting advice about how to handle Crosscheck data. *See NAACP* Dkt. 42-21, at 19:16-20:1; 20:14-21; 130:22-24, 133:13-15; *id.* 42-22, at 31:13-32:13; 32:25-33:9. They also typically tell counties that their informal advice is non-binding and advise them to seek their own legal counsel. *NAACP* Dkt. 42-21, at 16:7-19; *id.* 42-22, at 43:2-19.

F. Indiana's "Failsafe" Does Not Ensure Erroneously Cancelled Voters' Ballots Are Counted

Voters whose registrations are erroneously cancelled are excluded from the election process in a number of important ways, because they will not receive election-related mail, including notices regarding polling location changes, or be able to access voter-specific voting and registration information online. *NAACP* Dkt. 42-21, at 79:10-24. In addition, those not on the voter rolls on Election Day typically must vote by provisional ballot,[5] Ind. Code § 3-7-48-1(b), which are often not counted, *id.* § 3-11.7-5-2.

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[4] IED co-directors come from different political parties. Ind. Code § 3-6-4.2-3(b). Nussmeyer and King are members of Indiana's Democratic and Republican Parties, respectively. *NAACP* Dkt. 42-24, at 17:1-4; *id.* 42-26, at 13:9-14.

[5] Registration in Indiana closes 29 days before an election. Ind. Code § 3-7-13-10.

Under regulations issued by the IED, a voter flagged as having moved from one precinct to another within the same county can vote in the prior precinct upon swearing an oath that she continues to reside at the prior address. *See* AA85; *see also* Ind. Code § 3-7-48-5. This is the state's codification of Section 8(e) of the NVRA, 52 U.S.C. § 20507(e)(3), allowing voters who have received but failed to respond to the required notice to cast a regular ballot provided they affirm that they still reside in the district). *See also id.* § 20507(d) (stating "affirmation or confirmation" of address may be required).

This procedure is not a guaranteed "failsafe" for erroneously cancelled voters for several reasons. *First*, poll-workers frequently fail to follow this procedure, and instead require improperly cancelled registrants to vote by provisional, rather than regular, ballot. *See NAACP* Dkt. 53-4, at Column 499; *id*. 43, ¶ 28. *Second*, qualified voters whose names are not on the rolls are subject to challenges by poll-watchers on the basis of residency. Ind. Code § 3-7-48-7.5. Challenged voters may not use the failsafe procedure but instead must cast provisional ballots. *Id.*; *NAACP* Dkt. 42-21, at 151:8-153:7. *Third*, when faced with provisional ballots, Indiana voters sometimes decline to vote altogether. *NAACP* Dkt. 53-4, at Column 499. And those who take the additional time required to do so are at significant risk that their ballots will not be counted. In 2016, Indiana rejected 79 percent of provisional ballots cast. *Id.* 53-5, at 27 tbl.3.

G. Plaintiffs' Work To Protect Voters' Rights

Plaintiffs-Appellees—Common Cause Indiana ("Common Cause"); the Indiana State Conference of the National Association for the Advancement of Colored People ("NAACP"); and the League of Women Voters of Indiana ("LWV")—are nonpartisan, nonprofit organizations that are each committed to eliminating barriers to voting and increasing civic engagement through vigorous voter registration and education efforts. They each work to advance these aims in various ways. For example, Common Cause furthers its mission by providing education and training to activists throughout Indiana, assisting voters during voting days, monitoring and addressing issues at the polls, and lobbying for the increase of satellite voting locations. SA32. LWV commonly allocates resources to advocating in favor of policies that make it easier for citizens to register and vote and providing direct assistance to voters during voting days. *See NAACP* Dkt. 43, ¶¶ 8, 19. SEA 442 has forced the Appellee organizations to expend and divert considerable resources to mitigate the adverse effects of the new law. *See* SA21. Since its enactment, Appellees have had to allocate a significant portion of their limited resources to educating voters, members, and volunteers on the increased risk of erroneous removal of voters from registration rolls. *See NAACP* Dkt. 43, ¶ 22; *Id.* 44, ¶¶ 6-7, 22; *Common Cause* Dkt. 74-24, ¶¶ 19-24.

Collectively, Appellees have approximately 18,000 members who are qualified registered voters in Indiana. SA3-4, 32.

H. Proceedings Below

On May 25, 2017, in accordance with 52 U.S.C. § 20510(b), the NAACP and LWV sent a letter to Appellant Lawson notifying her that Indiana Code § 3-7-38.2-5(d), as amended by SEA 442, violates the NVRA because it requires the removal of voters from registration rolls without proper notice and because it does so in non-uniform and discriminatory fashion. *See* AA16.

Lawson responded on July 13, 2017. *NAACP* Dkt. 42-7. Speaking for "Indiana's NVRA officials," Lawson's response confirmed that SEA 442 allowed the removal of voters from registration rolls without notice, opportunity to respond, or a waiting period. *Id.* at 5. The response underscored the officials' view that the NVRA "does not prohibit immediate cancellation of a duplicate *previous* voter registration based upon . . . information received from a voter registration official who has accepted a *subsequent* registration." *Id.* at 4. Lawson adopted identical positions in responding to a subsequent notice letter Common Cause sent to her office on June 9, 2017. *Common Cause* Dkt. 1-1.

On August 23, 2017, the NAACP and LWV filed suit challenging Indiana Code § 3-7-38.2-5(d) as unlawful under the NVRA and seeking injunctive and declaratory relief. *See* AA1-21. The *NAACP* Plaintiffs' Complaint asserted both

NVRA-based claims previewed in their May 25, 2017 notice letter. *Id.* On October 27, 2017, Common Cause also filed suit, raising substantively similar claims. AA198-215. The two actions have since proceeded on parallel tracks in the District Court. In March 2018, plaintiffs in both actions moved to preliminarily enjoin Appellants from enforcing Indiana Code § 3-7-38.2-5(d)-(e). *NAACP* Dkt. 41; *Common Cause* Dkt. 75.

On June 8, 2018, the District Court issued an order in each case enjoining the Appellants from implementing SEA 442. SA1-29; SA30-57. The court first found that Appellees have "been compelled to divert [their] resources to address SEA 442," their "mission focus has been affected," and they stand to suffer "imminent" injury "fairly traceable to the named Defendants." SA21, 49. The court accordingly held that Appellees had standing to challenge SEA 442. *Id*.

The District Court then found that Appellees' likelihood of success on the merits is high. *Id.* The NVRA, the court noted, erected "simple procedural safeguards to protect registered voters, and states are required to follow these safeguards," including the requirement of providing notice and allowing voters two election cycles to vote or correct their registration prior to removal. *Id.* at 22, 50. With Crosscheck, "[t]here is no request for removal, and the voter is not confirming for Indiana that they have had a change in residence." *Id*. Because the NVRA requires the notice-and-waiting procedure "when a voter d[oes] not confirm

in writing of their change in residence" or directly request removal from Indiana's voter rolls, and because SEA 442 eliminated that procedure, the court found Appellees were likely to succeed on their claim that SEA 442 violates the NVRA. *Id*.

The District Court also concluded that Appellees had demonstrated that "the implementation of SEA 442 will likely fail to be uniform," based on findings that the co-directors "provide differing guidance" on how to make determinations under Indiana Code § 3-7-38.2-5(d), and that counties have "wide discretion' in making those determinations, which they use "in very divergent ways." SA23, 51.

Finally, the court held that SEA 442—which, if implemented, would "wrongful[ly] disenfranchise[] registered voters," "slow down the voting process at the polls and suppress voter participation," and compel Appellees to divert limited resources—irreparably harmed Appellees and their members. SA23, 25-26; SA51, 53-54. By contrast, the court found no significant injury to Appellants in the "prospect of waiting until after adjudication of the merits . . . to implement extremely prejudicial aspects of an election bill . . . passed only recently." SA26, 54. The court accordingly enjoined Appellants from implementing SEA 442 pending final resolution of the two actions. SA29, 56.

SUMMARY OF ARGUMENT

This Court should affirm entry of the preliminary injunction. Appellees unquestionably have standing to challenge Indiana's non-compliance with the NVRA. The District Court correctly found that Appellees have had to divert resources from their activities promoting voter registration and civic engagement to counteract the effects of SEA 442—a finding Appellants do not challenge. Such diversion of resources qualifies as concrete and demonstrable injury sufficient to satisfy the standing inquiry and this Court should reject Appellants' effort to impose a different standard without basis in this Court's precedent. Beyond this diversion of resources, SEA 442 undermines Appellees' missions in ensuring citizens are registered to vote by permitting the unlawful removal of eligible voters, including those registered by Appellants, from Indiana's rolls and, indeed, puts Appellees' own members at risk of such unlawful removal.

As to the merits of Appellees' challenges to SEA 442, Appellees amply demonstrated that they are likely to succeed on their claim that the amended Indiana statute violates the NVRA. *First*, the District Court correctly held that Appellees were likely to succeed in showing that SEA 442 violates the NVRA because it eliminates the notice-and-waiting procedure. The NVRA plainly requires such a procedure and Appellants do not dispute that the amended law eliminates it. Indeed, "the NVRA is clear about the need to send a 'return card' (or

obtain written confirmation of a move) before pruning a registrant's name" from the rolls. *Husted*, 138 S. Ct. at 1839. Crosscheck does not excuse non-compliance with the notice-and-waiting procedure because a positive Crosscheck match is not a voter's request for removal from the registration rolls or a confirmation in writing of change in residence. And Crosscheck's demonstrable unreliability underscores why strict compliance with the mandate of the NVRA is required.

Second, this Court should affirm the District Court's holding that Appellees are likely to succeed on the merits of their challenge for the independent reason that Appellants' implementation of SEA 442 will likely fail to be uniform due to individual Appellants' differing guidance, the discretion afforded to county officials purging voters, and the wide variety in how those officials exercise that discretion. Such an implementation runs afoul of the NVRA's requirement that removal programs be conducted uniformly—*i.e.*, in "the same form [and] manner"—throughout the state.

Finally, to the extent Appellants seek to persuade the Court that it should ignore these blatant NVRA violations because of a failsafe protection built into Indiana law, the Court should reject such an argument. The NVRA separately requires such a failsafe, and thus it does not serve to cure other NVRA violations. And, in any event, such an argument is relevant only to the question of whether the

District Court correctly held Appellees meet the irreparable harm requirement for issuance of a preliminary injunction—a holding Appellees have not challenged.

STANDARD OF REVIEW

This Court reviews the legal question of a plaintiff's standing *de novo* and reviews the factual determinations on which a standing determination rests for clear error. *Winkler v. Gates*, 481 F.3d 977, 982 (7th Cir. 2007). This Court "review[s] the grant of a preliminary injunction for the abuse of discretion, reviewing legal issues *de novo*, . . . while factual findings are reviewed for clear error. . . . Substantial deference is given to the district court's weighing of evidence and balancing of the various equitable factors." *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017). The clear-error standard applies with respect to factual findings "even when a district court's findings rest not on credibility determinations, but on physical or documentary evidence." *Libman Co. v. Vining Indus., Inc.*, 69 F.3d 1360, 1367 (7th Cir. 1995).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT APPELLEES HAVE STANDING

The District Court correctly concluded that Appellees have standing to challenge SEA 442 in their own right and on behalf of their members. Appellants'

newly-invented standing requirements ignore the precedents of the Supreme Court and this Circuit, and must be rejected.

A. Appellees Have Standing In Their Own Right

Appellees have organizational standing because SEA 442 "perceptibly impaired" their ability to fulfill their organizational missions. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). An organization's mission can be impaired for standing purposes in two ways. First, where, as here, organizations divert resources from activities that otherwise would advance their mission to counteract a challenged law, they suffer injury-in-fact for purposes of standing. *See Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990). Second, the challenged conduct can impair an organization's mission by directly interfering with its activities. *See Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1269 (D. Colo. 2010). In either case, "the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests," and presents "concrete and demonstrable injury." *Havens*, 455 U.S. at 379. SEA 442 has impaired Appellees' missions in both of these ways.

1. Appellees Have Demonstrated A Diversion Of Resources

The District Court found that Appellees diverted resources from their primary activities and consequently saw their missions adversely affected. That finding is supported by the record and must be affirmed.

"*Havens* makes clear . . . that the only injury which need be shown to confer standing . . . is deflection of . . . time and money[.]" *Dwivedi*, 895 F.2d at 1526. In *Arcia v. Florida Secretary of State*, the Eleventh Circuit found standing in circumstances on all fours with the present case. 772 F.3d 1335, 1341-42 (11th Cir. 2014) (citing *Havens*). *Arcia* involved a challenge to a Florida list-maintenance program on the ground that it removed voters within 90 days of a federal election, in violation of the NVRA's safeguards. *Id.* at 1339-40. The court explained that three organizations demonstrated standing by "submitt[ing] affidavits showing they have missions that include voter registration and education, or encouraging and safeguarding voter rights, and that they have diverted resources to address the [challenged] programs" by working to ensure improperly removed voters would be able to vote on election day. *Id.* at 1341. "This redirection of resources to counteract the . . . removal program is a concrete and demonstrable injury, not an 'abstract social interest.'" *Id.* at 1342. (quoting *Havens*, 455 U.S. at 379).

Here, as the District Court found, Appellees are committed to protecting and expanding voting rights, promoting and facilitating voter participation, and registering voters. *See* SA3-4, 32; *NAACP* Dkt. 43, ¶¶ 5-6; *id.* 44, ¶¶ 6-9. All have also shown they forewent some of these activities to further their missions to counteract the effects of SEA 442. For example, since SEA 442's enactment, Common Cause has diverted its limited resources—including the time of its sole employee—to educate voters and poll monitors about the law's effects, at the expense of training on other poll access and voting issues. SA38-39. Its curriculum and presentation materials for poll monitor-volunteer training—which commonly cover topics such as polling place procedures, voter ID requirements, and how to assist votes turned away at the polls—have been substantively reworked to address the increased risk of eligible voters being removed from the polls. *Id.*; *Common Cause* Dkt. 74-24, ¶ 23. Common Cause also reasonably expects that it will field a significantly increased number of calls from erroneously removed voters during voting days, at the expense of the organization's ability to address other poll access issues. *Id.* ¶¶ 27-28.

NAACP and LWV similarly demonstrated they have diverted resources towards educating voters about new procedures under SEA 442 at the expense of voter registration efforts critical to both organizations' missions. *See NAACP* Dkt. 44, ¶¶ 21-23; *Id.* 43, ¶ 22. Courts in nearly every circuit have found such

diversions of resources to mitigate the effects unlawful electoral practices sufficient for organizational injury.[6]

Appellants do not challenge the District Court's finding that Appellees have diverted substantial resources to address SEA 442's effects, Br. 15—a finding supported by substantial record evidence.[7] Instead, Appellants advance the novel argument that, rather than harming them, SEA 442 helps "*advance* [Appellees'] primary mission" to overcome voting barriers by throwing up a new barrier for them to expend resources overcoming. Br. 11 (emphasis in original). In support, Appellants misconstrue this Court's decision in *Crawford v. Marion County Election Board*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008), and argue it permits organizational standing only where organizations are forced to

[6] *See, e.g.*, *League of Women Voters v. Newby*, 838 F.3d 1, 8-9 (D.C. Cir. 2016); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040-41 (9th Cir. 2015); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014); *Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014); *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008); *Common Cause/N.Y. v. Brehm*, No. 17-CV-6770, 2018 WL 4757955, at *4 (S.D.N.Y. Sept. 30, 2018); *Common Cause of Colo. v. Buescher*, 750 F. Supp. 1259, 1269 (D. Colo. 2010); *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Scales*, 150 F. Supp. 2d 845, 849-50 (D. Md. 2001).

[7] Appellants misleadingly state that standing determinations are reviewed *de novo*. Br. 14. Factual determinations on which standing rests are reviewed, like other factual determinations, for clear error. *Winkler*, 481 F.3d at 982.

expend resources "outside their stated missions."[8] Br. 11. But neither *Crawford* nor any of the other cases on which Appellants rely support their proposed rule. On the contrary, it flies in the face of overwhelming authority on organizational standing, including cases that rely on *Crawford* to hold exactly the opposite: to support standing, an organization's diversion of resources must be *consistent* with its mission.[9] Appellants' invented rule of standing has no basis in law.

In *Crawford*, the Democratic Party and other plaintiffs challenged Indiana's newly enacted voter ID law. Appellants suggest that this Court found that the Democratic Party had standing because the ID requirement forced it to expend resources outside its primary mission, which Appellants characterize as "promoting candidates." Br. 15. But nowhere in *Crawford* was the Party's primary mission characterized as "promoting candidates," and nowhere does *Crawford* describe the resources the Party was forced to expend "getting [its

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[8] Appellants suggest that *Crawford* permits standing only for political parties. *Crawford* cannot be so limited. While this Court characterized the standing of the other organizational plaintiffs in *Crawford* as "less certain," 472 F.3d at 951, it did not find, as Appellants suggest (at 15), that the missions of the other organizational plaintiffs, were "not similarly undermined." Instead, *Crawford* held that "the Democratic Party" *as well as* "the other organizational plaintiffs" had similar grounds for challenging Indiana's voter ID law: "requir[ing them] to work harder to get every last one of their supporters to the polls." *Crawford*, 472 F.3d at 952.

[9] *See, e.g.*, *Frank v. Walker*, 17 F. Supp. 3d 837, 865 (E.D. Wis. 2014), *rev'd on other grounds*, 768 F.3d 744; *see also Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1352 (11th Cir. 2009) (citing *Crawford*); *Browning*, 522 F.3d at 1165-66 (citing *Crawford*).

supporters] to the polls" as somehow outside its primary mission. *See Crawford*, 472 F.3d at 951. The Court found standing because the Party's efforts to get out the vote were made more expensive by the challenged law. *Id.* So too here: SEA 442 has made the efforts of Appellees to reduce voting barriers and increase participation more expensive, because they must expend resources ensuring that their volunteers are equipped to assist voters who are removed without notice.[10]

Contrary to Appellants' suggestion, moreover, no case stands for the rule that an organization can only challenge specific conduct if its mission is somehow *inconsistent with* the activities on which its standing is founded. In fact, the opposite is true: at least one circuit requires organizational plaintiffs to at a minimum allege "the defendant's actions 'directly conflict with the organization's mission.'" *League of Women Voters v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) (citation omitted). "[I]n nearly all of the cases where an organization has standing to pursue a claim . . . *of course* those organizations' activities are wholly

[10] The other cases Appellants cite are similarly unavailing. In *Hope, Inc. v. DuPage County, Ill.*, this Court found plaintiffs failed the "traceability" prong of the standing test, not injury in fact. 738 F.2d 797 (7th Cir. 1984). Here, there can be no question that Appellees' diversion of resources is traceable to SEA 442's elimination of the notice requirement. *See* SA21, 49. And in *People Organized for Welfare and Employment Rights (P.O.W.E.R.) v. Thompson*, the Court held that the plaintiff lacked standing because, unlike Appellees here, it did not allege an injury to itself, but rather an injury to a third party that made the plaintiff's abstract social goals less likely to be achieved. 727 F.2d 167, 170-71 (7th Cir. 1984).

consistent with their mission." *Nat'l Fair Hous. All. v. Travelers Indem. Co.*, 261 F. Supp. 3d 20, 28 (D.D.C. 2017) (emphasis added). Put another way, it cannot be the case that standing doctrines bar voting rights organizations from suing to protect voting rights. *See id.* ("[I]t would be surprising if an organization with no interest in housing discrimination were to bring suit under the FHA . . . ."); *see also N.Y. State Citizens' Coal. for Children v. Velez*, No. 10-CV-3485, 2017 WL 4402461, at *3 n.2 (E.D.N.Y. Sept. 29, 2017); *Nat'l Fair Hous. All., Inc. v. Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 54 (D.D.C. 2002). Numerous courts have found nonprofit groups with similar missions to Appellees' have standing to challenge voter purge practices.[11] Appellants offer this Court no compelling reason to hold differently.

2. SEA 442 Undermines Appellees' Mission

Appellees also have organizational standing because SEA 442 "makes it difficult or impossible for the organization to fulfill one of its essential purposes or

[11] *See, e.g.*, *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 712 n.6 (6th Cir. 2016), *rev'd on other grounds*, 138 S. Ct. 1833 (2018); *Arcia*, 772 F.3d at 1341; *N.C. State Conference of the NAACP v. N.C. State Bd. of Elections*, 283 F. Supp. 3d 393, 402 (M.D.N.C. 2017); *Bellitto v. Snipes*, 221 F. Supp. 3d 1354, 1362-63 (S.D. Fla. 2016); *Am. Civil Rights Union v. Phila. City Comm'rs*, No. 16-cv-1507, 2016 WL 4721118, at *4 (E.D. Pa. Sept. 9, 2016); *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919, 924-25 (S.D. Ind. 2012); *Buescher*, 750 F. Supp. 2d at 1271; *U.S. Student Ass'n Found. v. Land*, 585 F. Supp. 2d 925, 944-45 (E.D. Mich. 2008).

goals." *Buescher*, 750 F. Supp. 2d at 1269; *see also Havens*, 455 U.S. at 379. Here, a core part of Appellees' missions involves ensuring as many eligible citizens as possible are able to register and to vote—either directly or through assistance and training to community organizations. *See, e.g.*, *NAACP* Dkt. 43, ¶¶ 5-6; *id.* 44, ¶¶ 6-9. Because SEA 442 will likely result in the unlawful removal of eligible voters from Indiana's rolls—including those registered by the NAACP and LWV—this aspect of Appellees' missions stands to be directly impaired, or even undone, by the new law. *See NAACP* Dkt. 43 ¶¶ 22, 32-33; *id*. 44, ¶¶ 21-23. In this instance, "there can be no question that the organization has suffered injury in fact." *Havens*, 455 U.S. at 379.

B. The Plaintiff Organizations Also Have Standing On Behalf Of Their Members

Because the District Court correctly concluded Appellees suffered particularized organizational injuries, this Court need not address Appellees' standing to sue as associations on their members' behalf. *See, e.g.*, *Common Cause/Ga.*, 554 F.3d at 1351. Nevertheless, the record below demonstrates that Appellees also have associational standing.

Associational standing allows organizations to represent their members' interests where (1) the latter could sue in their own right, (2) the interests protected are germane to the organization's purposes, and (3) the relief sought does not demand individual member participation. *See Hunt v. Wash. State Apple Advert.*

Comm'n, 432 U.S. 333, 342-43 (1977). Here, these requirements are easily met. Plaintiffs' members are registered Indiana voters who are at risk of being erroneously identified by Crosscheck as having registered in another state. Protecting the voting rights of eligible, registered Indiana voters is germane to all three Appellees' purposes. And the relief sought in these cases—permanently enjoining on a statewide basis the implementation of SEA 442—does not require the individual members' participation.

Appellants' observation (at 20) that specific members have not yet been purged is irrelevant. To establish associational standing, an organization seeking prospective relief need only demonstrate that its membership risks increased likelihood of harm. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 702, 718-19 (2007) (holding, where prospective relief sought on behalf of "members whose . . . children may be denied admission to the high schools of their choice," that "[t]he fact that it is possible that children of group members will not be denied admission . . . based on their race . . . does not eliminate the injury claimed").

Any uncertainty results *precisely* because SEA 442 allows removal without notice to voters or opportunity to confirm their registration. *See* Ind. Code § 3-7-38.2-5(f). That lack of notice is at the heart of Appellees' challenge. Once the law is enforced, any of Appellees' members stands to be erroneously removed from the

rolls without warning. Such imminent and realistic danger is sufficient to confer standing. *See, e.g.*, *Arcia*, 772 F.3d at 1342 ("The three organizational plaintiffs also represent a large number of people . . . who face a realistic danger of being identified in the Secretary's removal programs . . . ."); *Browning*, 522 F.3d at 1160 ("When the alleged harm is prospective, we have not required that the organizational plaintiffs name names because every member faces a probability of harm in the near and definite future.").

Sandusky County Democratic Party v. Blackwell, 387 F.3d 565 (6th Cir. 2004), is instructive. There, partisan organization and labor union plaintiffs challenged Ohio's provisional ballot procedure, claiming they violated the Help America Vote Act. Speaking to plaintiffs' standing to sue prospectively on their members' behalf, the Sixth Circuit explained:

> Appellees have not identified specific [members] who will seek to vote at a polling place that will be deemed wrong by election workers, but this is understandable; by their nature, mistakes cannot be specifically identified in advance. Thus, a voter cannot know in advance that his or her name will be dropped from the rolls . . . . It is inevitable, however, that there will be such mistakes. The issues Appellees raise are not speculative or remote; they are real and imminent.

Id. at 574. These considerations apply with equal or greater force here.[12]

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[12] *Gill v. Whitford*, 138 S. Ct. 1916 (2018), did not upend the well-settled concepts of associational standing at issue here. Appellants cite *Gill* for the unremarkable proposition that "[a] person's right to vote is 'individual and personal in nature.'"

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

The District Court concluded that Indiana's use of Crosscheck under SEA 442 likely violates the NVRA by requiring the removal of Indiana voters from the rolls without notice and without the mandatory two-election-cycle waiting period. SA21-23, 49-51. The court further found that the implementation of SEA 442 by Indiana's counties "will likely fail to be uniform," and held that Indiana's Crosscheck program therefore foreseeably runs afoul of the NVRA's uniformity mandate. SA23, 51. Both conclusions are correct. Appellees demonstrated a strong likelihood of success on the merits of their challenge to SEA 442 and the District Court's grant of a preliminary injunction should be affirmed.

A. Indiana Code § 3-7-38.2-5(d) Violates Section 8(d) Of The NVRA

In their efforts to defend SEA 442, Appellants ignore the plain language of the NVRA, which requires states to follow specific notice-and-waiting procedures prior to removing a voter for changed residence unless the voter confirms the change in writing. Because Indiana Code § 3-7-38.2-5, as amended by SEA 442,

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Br. 21 (citing *Gill*, 138 S. Ct. at 1929). *Gill* applied that principle to hold that a voter could not assert the rights of others in claiming standing to challenge gerrymandered districts in which the voter did not reside. 138 S. Ct. at 1929-31. It did not hold that individual whose own voting rights are threatened must have suffered an actual deprivation of the right to vote to have standing to sue.

"eliminates the requirement of written confirmation or a notice and waiting period," it violates the NVRA. SA15.

1. The SEA 442 Amendments Run Afoul Of The NVRA

The NVRA prohibits states from removing a voter from registration rolls on the basis of a change in residence unless the voter "confirms" the change "in writing" or fails to respond to a prescribed notice *and* does not vote in two subsequent election cycles. 52 U.S.C. § 20507(d)(1). Those notice-and-waiting procedures are critical to the carefully-designed scheme Congress set in place. *See Husted*, 138 S. Ct. at 1838-39. Indeed, "the NVRA is clear about the need to send a 'return card' (or obtain written confirmation of a move) before pruning a registrant's name" from the rolls. *Id.* Yet Appellants do not dispute that, as amended by SEA 442, Indiana Code § 3-7-38.2-5(d), dispenses with the safeguards of its predecessor law. Counties can now blindly rely on a Crosscheck match to immediately remove a voter from registration rolls; no confirmatory investigation or notice and waiting period is needed.

SEA 442's legislative history reflects intent to require immediate cancellation without inquiry or waiting period:

> [T]he bill would require that county's CVRO to cancel the person's Indiana registration outright. (Current law requires the CVRO to send a mailing to that person if the person had not authorized the cancellation of any previous registration.)

SB 442 Fiscal Impact Statement 4 (Apr. 10, 2017), *available at* http://iga.in.gov/legislative/2017/bills/senate/442#document-e4ff7b27. SEA 442 thus brought the statute out of compliance with the NVRA, as the District Court found. SA15. None of Appellants' arguments—which the District Court considered and rejected—change that inexorable conclusion. This Court thus may affirm on this ground alone.

2. Crosscheck Matches Constitute Neither A Request Of The Registrant Nor Confirmation In Writing That The Registrant Has Changed Residence

Appellants try to shoehorn Crosscheck matches into one of the bases for removal exempt from the NVRA's notice-and-waiting requirement. Neither works. First, the NVRA allows the removal of a registered voter from the rolls absent notice-and-waiting if "at the request of the registrant." 52 U.S.C. § 20507(a)(3)(A). Second, the state need not wait the full two election cycles if the voter "confirms in writing that the registrant has changed residence." *Id.* § 20507(d)(1). Appellants argue that removal based on a Crosscheck match is exempt from the notice-and-waiting requirement on both of these grounds because they can, in their view, make Crosscheck matches reliable enough to serve as a proxy for either. But the question posed by Appellees below—and answered in the negative by the District Court—is not whether Crosscheck is *reliable per se*, but rather whether Indiana's view that Crosscheck is reliable can supplant Congress's

judgment about what safeguards are necessary. Congress was clear that given the potential for error and, consequently, disenfranchisement, the only information accurate enough to permit removal without the safeguard of notice and the opportunity to confirm the removal was information that came directly from the voter. In other words, the question confronting this Court is whether Crosscheck results *themselves qualify* as a request or written confirmation from a voter. Because they do not, the NVRA's notice-and-waiting safeguard applies with full force.

As a remedial statute—designed to "ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction," S. Rep. No. 103-6, at 19 (1993); *Condon v. Reno*, 913 F. Supp. 946, 962 (D.S.C. 1995)—the NVRA should "be construed broadly to extend coverage and [its] exclusions or exceptions should be construed narrowly," *In re Carter*, 553 F.3d 979, 985 (6th Cir. 2009). Under any construction, however, Crosscheck results do not qualify as either exemption to the NVRA's notice-and-waiting requirement.

(a) A Crosscheck Match Is Not A Request For Removal From A Voter

Appellants assert that "[a] registrant's act of registering to vote in another State must be understood as a . . . request to remove that person's name from the rolls in the previous State of residence." Br. 22. They assume that a registrant flagged as a duplicate by Crosscheck is in fact the same person who is registered to

vote in another state and that the person registered in the other state at a date following the Indiana registration. Thus, the question here is not whether registering to vote in another state is, *ipso facto*, a request for removal in the prior state; it is whether a state's *inference* that a voter has registered in another state, based only on a comparison of computer databases, can be treated as the equivalent of a request for removal received directly from a voter. Under the plain language of the NVRA, it cannot: a Crosscheck match, even were it reliable, is neither a "request," nor is it "of the registrant."

The "ordinary, contemporary, common meaning," *Artis v. Dist. of Columbia*, 138 S. Ct. 594, 603 n.8 (2018), of the term "request" is "the act or an instance of asking for something."[13] In turn, "*of the registrant*" means that the person "asking for something" must, in this instance, *be the registrant*. But a voter's name on a Crosscheck match list reflects only that a computerized comparison of two voter registration lists found a registrant with a similar name and the same birth date registered in another state. AA33. It does not—cannot—itself constitute an "act" *of the voter* to "ask[] for" removal by registering in another state. In fact, a Crosscheck match cannot itself constitute a "request of the registrant" because it is

[13] "Request," *www.Merriam-Webster.com*, Merriam-Webster (last visited Nov. 28, 2018).

not first-hand evidence of a change in registration, such as a voter registration application from the voter indicating a change in residence.

Department of Justice ("DOJ") guidance is in accord.[14] Under the NVRA, DOJ has reasoned:

> A "removal at the request of the registrant" . . . involves *first-hand information from a registrant* that can originate in at least three ways: 1) a registrant requesting to remove his or her name from the voting registration list, 2) a registrant completing and returning a notice card indicating an address change outside the jurisdiction, or 3) a registrant submitting a new application registering to vote a second time in a new jurisdiction, and providing information regarding the registrant's prior voter registration address on the new application, which the State can treat as a request to cancel or transfer his or her prior registration.

DOJ, *The National Voter Registration Act of 1993 (NVRA)* (Q. 31), https://www.justice.gov/crt/national-voter-registration-act-1993-nvra) (last visited Nov. 29, 2018) (emphasis added). And while the third point in the guidance suggests certain voter registration *applications* may be sufficient to permit cancellation of a voter's prior registration, a Crosscheck match is not—nor does it provide—a voter registration *application*. Moreover, Crosscheck does not collect the voter's signature or "information regarding the registrant's prior voter

[14] DOJ has interpreted the "request" provision in this manner consistently since at least 2010. *See* Br. for Eric H. Holder, Jr. *et al.* as Amici Curiae Supporting Respondents 16 n.3, *Husted*, 138 S. Ct. 1838 (explaining DOJ guidance first issued in 2010). Any contrary interpretation would be an ad hoc contravention of longstanding guidance established well before a live controversy arose in this case.

registration address on the new application." *Id.*; *see* AA37. Crosscheck thus provides, at best, circumstantial information that a registrant *may* have submitted a new registration application—precisely the type of situation in which the safeguards of the notice-and-waiting provisions are necessary.

The statutory context in which removals "at the request of the registrant" are permitted also precludes treating second-hand address-change information as a voter request. As the District Court underscored, other repositories of change-of-address data may not be used to infer a voter request for removal, even when it can be inferred that the original source of the data was the voter. Specifically, "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" notwithstanding that "[t]he information [it] provide[s] . . . originates from the voter." SA22-23. Appellants offer no compelling reason to treat Crosscheck differently. Just as when states use Postal Service change-of-address data the NVRA's notice-and-waiting procedures must be adhered to, the same safeguards must attach before removing Crosscheck-matched voters from registration rolls because, no matter how reliable, a second-hand report that a voter may have moved is simply not a "request *of the registrant*."

Appellants rely on the Supreme Court's recent decision in *Husted* to argue that they can treat second-hand information as a "request of the registrant." Br. 25.

They are wrong to do so. *Husted* explained in no uncertain terms that "[t]he most important of [the NVRA's] requirements" states must meet in order to remove a name on change-of-residence grounds "is a prior notice obligation." 138 S. Ct. at 1838. In *Husted*, the Court ruled that the NVRA permits Ohio's practice of flagging infrequent voters as voters who *may* have moved precisely *because* the state follows the NVRA's notice-and-waiting requirements "to the letter" before the voter is removed. *See id.* at 1842. The second-hand nature of Crosscheck's information about a voter's actions and intent demonstrate that, as the District Court held, Crosscheck matches cannot come within the limited exceptions to the NVRA' notice-and-waiting requirement.

Indiana's own pre-SEA 442 statutes and policies belie Appellants' strained assertion that a Crosscheck match can represent a "request of the registrant." As discussed *supra*, prior to its amendment, Indiana Code § 3-7-38.2-5 mandated notice and a waiting period before a registration was cancelled, as required by the NVRA for removals based on changed residence. Consistent with the NVRA's distinction between removals based on changed residence and those "at the request of the registrant," only those voters who directly *authorized cancellation* were immediately removed. After SEA 442, remnants of the distinction remain; for example, IED does not permit counties to remove voters based on Crosscheck within 90 days of federal elections in accordance with the NVRA's prohibition on

systematic voter removals during that period. *See* 52 U.S.C. § 20507(c)(2); *NAACP* Dkt. 42-22, at 37:14-38:3; Br. 8. Yet, Indiana does not prevent jurisdictions from removing voters within 90 days when a voter expressly requests removal in writing. Ind. Code § 3-7-38.2-3; *NAACP* Dkt. 42-3, at 29; *id.* 42-4, at 27.[15]

(b) Crosscheck Does Not Qualify As Confirmation In Writing Of Change In Residence

The NVRA's notice-and-waiting provision has a separate built-in exception for cases in which "*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." 52 U.S.C. § 20507(d)(1)(A) (emphasis added). By its terms, this exception applies when election officials have (1) a writing that is (2) a confirmation of changed residence (3) from "the registrant." *Id.*; *see also* "Confirm," Merriam-Webster's Dictionary Online, *available at* http://merriam-webster.com ("to give approval to: ratify"; "to give new assurance of the validity of: remove doubt about by authoritative act or undisputable fact"). Absent any one of these factors, the state "may not remove [a] registrant's name on change-of-

[15] Of course, insofar as it is a systematic program for removing voters, Crosscheck must comply with the NVRA's 90-day rule. *See* 52 U.S.C. § 20507(c)(2).

residence" grounds unless it follows the notice-and-waiting procedure. *Husted*, 138 S. Ct. at 1839-40.

The paradigmatic example of confirmation in writing is a response to the notice prescribed in § 20507(d)(2), which gives a registrant the opportunity to confirm or correct a state's belief that the individual has changed residence. *See Husted*, 138 S. Ct. at 1839 ("[I]f the State receives a card stating that [a] registrant has not moved, the registrant's name *must* be kept on the [voter] list."). That is, under Section 20507(d)(1)(A), a state may remove a voter immediately, without waiting two federal election cycles, when, *in response to* the § 20507(d)(2) notice, it receives the pre-paid return card *from the voter confirming* that she has indeed moved. 52 U.S.C. § 20507(c)(1)(B)(i).

This reading of the NVRA is precisely how the DOJ has interpreted it: "The NVRA . . . provision prevent[s] the immediate outright cancellation of a voter's registration based solely on the assumption that a postal change-of-address form ***or an apparent match between databases*** shows a move, whether officials obtain that information directly or rely on information provided by challengers or other private parties to the same effect." DOJ, *Summary of Selected Federal Protections for*

Eligible Voters 6, *available at* https://www.justice.gov/crt/file/889561/download (last visited Nov. 27, 2018).[16]

But Appellants incorrectly contend that a report of purportedly duplicate registration records received from Crosscheck amounts to confirmation in writing from the registrant. Br. 26-27. That argument defies both common sense and fundamental canons of statutory interpretation. The fact of a Crosscheck match cannot constitute "confirmation in writing," let alone one directly made by "the registrant." Any other reading would allow the exception to swallow the rule: states could dispense with the notice-and-waiting requirement on the presumption that a second-hand report of changed residence indicated that the voter must have—at some unknown point to some unknown government official—confirmed the change. In addition, even if a Crosscheck list of duplicate registrations could constitute "confirmation" of an address change "in writing," it necessarily reads out the requirement that the confirmation come *from* "*the registrant*."[17] 52 U.S.C. § 20507(d)(1) (emphasis added); *see Senne v. Vill. of Palatine*, 695 F.3d 597, 605

[16] As with its interpretation of "request," *supra* n.13, DOJ's reading of this point is longstanding and consistent.

[17] Insofar as the "confirms in writing" exception is interpreted as effectively duplicative of the "at the request of the registrant" exception, as Appellants advocate, a Crosscheck database match cannot suffice to invoke this exception, for all of the reasons that it fails to constitute a "request of the registrant," described in the preceding section.

(7th Cir. 2012) ("A basic canon of construction requires us to give meaning to every word of a statute.").

3. Appellants Cannot Avoid Compliance With The NVRA By Attempting To Mitigate Crosscheck's Flaws

To justify their failure to comply with the NVRA's notice-and-waiting requirement, Appellants essentially argue that, because of their confidence factors, they are not going to mistakenly disenfranchise any voter—as if a second layer of database matching magically converted Crosscheck "matches" into requests for removal or written confirmations from voters. But Appellants cannot substitute their (unwarranted) confidence in Crosscheck's accuracy for Congress's judgment that only a voter's first-hand request for removal is sufficiently reliable to dispense with the notice requirement. In any event, the facts do not support the confidence factors' claimed accuracy.

(a) Indiana's "Confidence Factors" Cannot Bypass Congress's Design

Appellants point to the fact that Indiana applies "confidence factors" before forwarding Crosscheck matches to the counties. Br. 28. But a Crosscheck match provides *no assurance* that a matching registrant is the same person. Indeed, the record shows that many purported matches are "false positives" and do not reflect two registrations by the same registrant. *See* AA34 (Crosscheck Participant Guide: "Experience in the crosscheck program indicates that a significant number of

apparent double votes are false positives and not double votes."); *Common Cause* Dkt. 74-22, at 2-4. At best, the "confidence factors" can reduce the risk of a false positive, but because Crosscheck lacks any uniquely identifying information, *i.e.*, full social security number, *see* AA37, it cannot eliminate that risk altogether.

Even if the "confidence factors" could eliminate this risk, Crosscheck's "Date of Registration" field—the only field from which a county can infer which registration is older and thus which to cancel—does not necessarily reflect a registration date *at all*. Rather it contains "the date of the most recent voter-initiated change," which participating states define in a variety of different—and often unspecified—ways. A37; *NAACP* Dkt. 42-19. There is thus no assurance that the date in Crosscheck's "Date of Registration" field actually reflects when a voter registered. Indeed, nearly all the states supplying definitions update voter records based on some activity *other than* voter registration, such as name or mailing-address changes. Moreover, 13 of the 31 Crosscheck participants in 2017, *including Indiana*, do not detail what the field means in their state's database or how it is populated in the list provided to Crosscheck, while others do not populate the field at all. *NAACP* Dkt. 42-19. Blindly relying on Crosscheck's Date of Registration field without an understanding of how other states are using it creates a significant risk that voter could be cancelled in Indiana even where the Indiana registration is more current.

Even if participating states were consistent in their treatment of the "Date of Registration" field, the underlying registration data from which the field is populated provides an insufficient basis for concluding that a voter registered on the date indicated by Crosscheck. A recent state-by-state study of voter rolls (from which Crosscheck matching is conducted) found "an implausibly large number of registrants . . . (1 in 50) are listed as registering on January 1st." *NAACP* Dkt. 42-12, at 20. Yet, a voter generally cannot make a request on January 1 because government offices are closed. *See id.* (noting that January 1 is "one of the least likely days for a registration application to be processed"). In Indiana, roughly one percent of voters have January 1 registration dates. *Id.* at 23 fig.8. Five Crosscheck participants had *more than five percent* of voters with January 1 registration dates in 2016. *Compare id., with NAACP* Dkt. 42-13, at 10 (Rep. Esau presentation showing Arizona, New York, Massachusetts, Mississippi, and Illinois as participants). These registration dates are assuredly incorrect in many, if not all, cases, but true registration dates cannot be verified through Crosscheck because Indiana registrars do not receive any underlying registration documentation (showing the date the voter actually signed the registration form) against which Crosscheck's dates might be compared.

Appellants respond that these formal deficiencies are irrelevant as to whether a Crosscheck match can be treated as a request of the voter for removal (or

presumably, a written confirmation of an address change). Ironically, after insisting on their Crosscheck program's accuracy as the reason for treating it as a request of the voter or written address confirmation, Appellants accuse the District Court of improperly imposing a reliability requirement. Br. 25. But it was Congress that determined that only first-hand information from the voter is reliable enough to obviate notice-and-waiting-period requirements. A computerized comparison of registration databases, even a comparably reliable one, cannot transform second-hand change-of-address information into a first-hand request or confirmation from the voter. It is for this reason that the District Court rejected Appellants' reliance on the "confidence factors," finding they do not eliminate the need to comply with the notice-and-waiting requirement. SA20, 22.

4. Appellants Have Not Supplied Guidance On Counties' Determinations For Removal

SEA 442 *repealed* the requirement that counties first determine a voter "authorized" cancellation or else provide the voter notice and wait two election cycles before removal. Nevertheless, Appellants contend that Indiana Code § 3-7-38.2-5(d) is NVRA-compliant because voters are not removed unless counties "determine that an individual registered in their county has subsequently registered in another state." Br. 23, 28. But as undisputed record evidence shows, SEA 442's result is that counties now undertake the same investigation they previously conducted—*i.e.*, none at all—*minus* the additional step of ascertaining

whether the voter has authorized cancellation. That latter critical factor is what allowed Indiana to remove a voter from registration lists without NVRA notice-and-waiting requirements.

As the District Court found, there are no standards for how counties make the required determinations. Indeed, as demonstrated by undisputed evidence below, under the prior version of Indiana Code § 3-7-38.2-5—which required counties to make these same determinations concerning the voter's identity and registration date—many counties were *not* making the required determinations at all. Instead, they simply assumed that a Crosscheck match accurately reflected two registrations for the same voter and that the out-of-state registration was the most recent. *NAACP* Dkt. 42-23, at 30:7-13; *id.* 42-23, at 30:20-31:16; *id.* 42-25, at 29:4-30:24 (county officials testifying to not requesting any material outside of data provided from Crosscheck); *see also id.* 42-14 (demonstrating many counties "approving" 99-100% of Crosscheck matches without further "research"). The language in Indiana Code § 3-7-38.2-5 dictating those practices has remained the same after SEA 442, and the co-directors have not provided any revision in guidance or instructions to the counties indicating they should radically alter their practices. Under SEA 442's predecessor law, the county determinations under these practices resulted in issuance of a confirmation notice to the voter. Under SEA 442, they would result in immediate cancellation.

Appellants' suggestion that this demonstrates at most infirmity in the counties' application of state law, and not an infirmity in the state law itself, Br. 26, is unavailing. As Indiana's chief election officials, Appellants are responsible for ensuring the counties' NVRA compliance. 52 U.S.C. § 20509; *see Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008). Appellees are under no obligation to bring state law claims against individual counties to secure compliance with federal law. Moreover, Appellants have offered no construction of Indiana Code § 3-7-38.2-5 that, if counties complied with it, would satisfy the NVRA.

In addition, the Indiana legislature is presumed to legislate knowing how its laws are being interpreted and applied. *Ind. Ins. Co. v. Allis*, 628 N.E.2d 1251, 1255 (Ind. Ct. App. 1994) ("We must presume that when our legislature replaced the original Act with our current Act, it was aware of our court's interpretation of the original Act, and did not intend to make any changes beyond what it declared either in express terms or by unmistakable implication.") (citations omitted). In passing SEA 442, the legislature did not amend the language requiring counties to determine that an individual registered in the county had subsequently registered in another state, indicating that what is (or isn't) required of county officials remains unchanged. *NAACP* Dkt. 42-1.

5. Appellees Need Not Wait Until Harm Has Occurred To Seek Compliance With The NVRA

Appellants attempt to forestall liability by arguing that "the information to be provided" to the counties "has yet to be determined, as does the protocol for county election officials to follow to make their determinations." Br. 29. Appellants then misleadingly note that "some county election officials have testified that in the past the actual registration documents from the other states were available for review." *Id.* In each of the cited instances, however, county officials were testifying about registration documents that they had taken the initiative to request from other states. Appellants never instructed counties that they should or must seek out original out-of-state registration documentation, even when the statute required counties to determine whether a voter had authorized cancellation. Moreover, Appellants have consistently taken the position—from their responses to Appellees' pre-litigation notice letters through their brief in this appeal—that Crosscheck alone provides sufficient ground to remove voters without notice. Thus, Appellants' suggestion that, had they been permitted to implement SEA 442, they might have decided "to use primary registration documents in addition to Crosscheck data" rings hollow.

Appellants also cannot dispute that Crosscheck itself does not, and is not set up to, include or provide original documentation on which a given voter's entry in the system is based. AA169-70, AA175-76, AA186; *NAACP* Dkt. 42-21, at 96:20-

25. There is simply no way in which the Crosscheck database could provide first-hand evidence of a voter's "request" or "confirmation in writing," and the requirements of Indiana Code § 3-7-38.2-5—as well as the co-directors' guidance—would have to be significantly revised (in order to ensure counties are routinely gathering such evidence). Appellants cannot ground their compliance with the NVRA in magical thinking about efforts that counties could theoretically undertake (despite never having been instructed to do so) to request first-hand evidence of a voter's subsequent registration when the "determination" required by the challenged statute has if anything become less rigorous under the new law.

B. Indiana's Crosscheck Program Results In Non-Uniform Treatment Of Voters Between And Within Counties, In Violation Of The NVRA's Uniformity Requirement

Indiana Code § 3-7-38.2-5 also fails the NVRA's uniformity requirement, 52 U.S.C. § 20507(b)(1), because Indiana counties, and even individual county officials, employ wildly varying procedures for making the required determination that an Indiana voter has subsequently registered in another state. Appellants' refrain that the state's Crosscheck program is uniform because "each county election official is required to make the same determinations before removal," Br. 30, falls far short of what is needed to comply with the NVRA's uniformity mandate.

Section 8(a) of the NVRA requires "each ***State***" 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 change in the residence of the registrant." 52 U.S.C. § 20507(a) (emphasis added). Section 8(b), in turn, provides 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—(1) shall be ***uniform*** . . . ." *Id.* § 20507(b) (emphasis added). Giving these words their "ordinary, contemporary, common meaning," as this Court must, *Artis*, 138 S. Ct. at 603 n.8 (2018), the NVRA requires that removal programs be conducted in "the same form [and] manner" throughout the state.[18] In other words, whether a voter is removed from the rolls cannot depend on where the voter lives, or on the party-affiliation of the state or local official administering the removal program. While the state may delegate the administration of some aspects of its voter registration program to local election administrators, it may not thereby circumvent its NVRA-based obligation to employ uniform voter-list-maintenance procedures statewide. *See United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008) (state may not

[18] "Uniform," Merriam-Webster's Dictionary Online, *available at* http://merriam-webster.com.

avoid requirement to conduct a reasonable list maintenance program by delegating implementation to local officials).

Under these standards, there can be no question that Indiana's implementation of its Crosscheck removal program is not uniform. As the District Court correctly found, Appellants' "implementation of SEA 442 will likely fail to be uniform" on three independent bases: (1) that King and Nussmeyer each provide differing guidance to county officials on how to determine whether a particular registered voter should be removed; (2) Officials in Indiana's 92 counties are left to use wide discretion in how they "determine" that an Indiana voter registered to vote in another state; and (3) the manner by which county officials exercise this discretion varies wildly from county to county and even within counties. SA 8, 23, 51; *see also supra* pp. 14-16.[19] This non-uniformity is due not only to the lack of uniform guidance and procedures, but also to the often-inconsistent *affirmative* guidance provided by the co-directors.[20] Whether

[19] Although the evidence concerns county practices prior to SEA 442's enactment, nothing in the amended statute changes how counties are to make the required determinations. County officials also indicated that they did not intend to change their practices in light of SEA 442's enactment. *E.g.*, *Common Cause* Dkt. 74-5, at 36:12-18. Further, Appellants' contention that the statutory instruction to "determine" a match is already sufficient to ensure uniformity suggests they have no intention of providing new or additional guidance.

[20] Appellants argue that the divergent guidance provided by the co-directors is irrelevant, because state law charges the counties, not the co-directors, with

identically situated voters flagged as duplicates by Crosscheck will be purged thus depends on the counties in which they live and the particular election officials involved in making decisions. SA23, 51. These findings are supported by the substantial evidence previously described and are not clearly erroneous; indeed, Appellants identify no contrary evidence.

Appellants argue that "Indiana law satisfies the uniformity requirement because each county election official is required to make the same determinations before removal." Br. 30. A nearly identical argument was rejected in *Association of Community Organizations for Reform Now v. Edgar*, where the Northern District of Illinois held that a facially uniform state law that, like Indiana Code § 3-7-38.2-5, gave counties discretion concerning the details of its implementation was non-uniform. No. 95C174, 1995 WL 532120, at *2 (N.D. Ill. Sept. 7, 1995). As in *Edgar*, the evidence in this case clearly demonstrates that giving counties discretion in no way leads to uniform implementation.

Relying on *Project Vote v. Blackwell*, 455 F. Supp. 2d 694 (N.D. Ohio 2006), Appellants also contend that Indiana Code § 3-7-38.2-5 is uniform because

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making the required determinations. But the NVRA charges the co-directors with ensuring compliance with the NVRA's uniformity requirement. *See* 52 U.S.C. § 20509. Moreover, the uncontroverted evidence shows that counties act on the co-directors' guidance. *See, e.g.*, SA5; *NAACP* Dkt. 42-21, at 81:2-25; *id.* 42-26, at 15:14-18, 16:13-25.

it does not expressly target a certain class of voters. Br. 30. But *Blackwell* does not limit the uniformity requirement to such circumstances. *Blackwell* held that the state law at issue was non-uniform—as well as discriminatory—because, in effect, it imposed different registration requirements on voters depending on who collected the voter registration form. 455 F. Supp. 2d at 707. The court did *not* hold that non-uniform practices must be enshrined in state law or that they must expressly single out particular voters for differential treatment to run afoul of the NVRA's uniformity requirement. *Edgar*, which examined this very question, concluded that a state law that was uniform on its face but resulted in differential treatment of voters based on their county of residence violated the uniformity requirement. 1995 WL 532120, at *2.

Because, as in *Edgar*, the discretion granted to counties under SEA 442 and the non-uniform guidance those counties receive on how to exercise that discretion results in otherwise identically situated voters being treated differently in different counties—or even within counties—Indiana's use of Crosscheck violates the plain language of Section 8(b) of the NVRA.

For this independent reason, the District Court's preliminary injunction should be affirmed.

C. Indiana's "Failsafe" Voting Method Cannot Excuse Appellants' NVRA Non-Compliance

Appellants make the passing assertion that "SEA 442 does not deprive voters of their rights under the NVRA" because of Indiana's "failsafe" voting, Br. 14, an undeveloped and therefore waived argument. *See United States v. Dabney*, 498 F.3d 455, 460 (7th Cir. 2007) ("Because the argument was not raised or developed in the opening brief, it is waived.").[21] But even if it had not been waived, the argument fails because the "failsafe" is another NVRA requirement, not a special protection Indiana affords to mitigate the harms of erroneous cancellations. Defendants do not get a free pass for violating one required protection of the NVRA just because they employ another required protection. Specifically, the NVRA provides:

> If the registration records indicate that a registrant has moved from an address in the area covered by a polling place, the registrant shall, upon oral or written affirmation by the registrant before an election official at that polling place that the registrant continues to reside at the address previously made known to the registrar, be permitted to vote at that polling place.

52 U.S.C. § 20507(e)(3). Indiana's "failsafe" provision, which was implemented in 1995 as part of a legislative overhaul to bring the state into compliance with the

[21] Appellants have not appealed the District Court's rejection of this argument in the context of irreparable harm.

recently-enacted NVRA, *see* P.L. 12-1995, expressly references this NVRA requirement:

> **As provided under 52 U.S.C. 20507(e)(3)**, a voter [who formerly resided in a precinct according to the voter registration record; and no longer resides in that precinct according to the voter registration record] may vote in the precinct where the voter formerly resided (according to the voter registration record) if the voter makes an oral or a written affirmation to a member of the precinct election board that the voter continues to reside at the address shown as the voter's former residence on the voter registration record.

Ind. Code § 3-7-48-5(b) (emphasis added). As the District Court held, the NVRA provides this "failsafe" as an *additional* safeguard and mandates its availability *in addition to* the notice-and-waiting, uniformity and other requirements that protect voters from erroneous removals. *See* SA25, 53.

Appellants cannot claim that they need not comply with one set of NVRA requirements simply because SEA 442 does not strip voters of an additional NVRA-mandated protection. Appellants offer no argument that overcomes the District Court's well-reasoned ruling to that effect. *See* SA25, 53 ("The harm that occurs from eliminating one required procedural safeguard is not negated by the continued use of a different additional procedural safeguard."). By Appellants' logic, all protections under the NVRA would be optional: so long as the state complies with any one of the safeguards required by the NVRA, it need not comply with the others. But the NVRA cannot plausibly be read to offer states a

buffet of protections; its safeguards, including the notice-and-waiting and uniformity requirements prior to removal, are mandatory.[22]

In addition, Appellants are wrong to suggest that the existence of Indiana's failsafe, even were it broader than the NVRA analogue, wholly removes the voting barriers inherent in being erroneously removed from the rolls. As explained (*supra* p. 16), cancelled voters do not receive important election information and face additional obstacles to voting.

Moreover, in practice, cancelled voters *are* given provisional ballots rather than the "failsafe." Purportedly, poll workers are instructed to provide the "failsafe" to voters missing from the poll list because they were cancelled, but record evidence shows voters having been given provisional ballots because they were "cancelled per state voter list maintenance project." *NAACP* Dkt. 43, ¶ 28. Voters subjected to poll-watcher challenges on the basis of residency must also cast a provisional ballot, Ind. Code § 3-7-48-7.5; *NAACP* Dkt. 42-21, at 151:8-153:7, an increased possibility for those who must publicly navigate the failsafe process because they have been removed after Crosscheck erroneously flagged them as no longer resident in Indiana.

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[22] Insofar as Appellants suggest that they can avoid liability for eliminating the notice-and-waiting procedure simply because they comply with the NVRA's prohibition on removing voters within 90 days of federal elections, 52 U.S.C. § 20507(c)(2), that argument fails for the same reasons.

Voters offered provisional ballots may not cast one, *NAACP* Dkt. 53-4, at Column 499, and even if they do, most are rejected. *Id.* 53-5, at 27 tbl.3. Thus, even were the failsafe relevant to an analysis of the NVRA violations at issue here (it is not), the failsafe provides no guarantee that voters will not be disenfranchised.

CONCLUSION

For the foregoing reasons, the District Court's preliminary injunction should be affirmed.

DATED: New York, New York
November 30, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 13,996 words.

s/ Sophia Lin Lakin

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November 30, 2018

CERTIFICATE OF SERVICE

I, Sophia Lin Lakin, a member of the Bar of this Court, hereby certify that on November 30, 2018, I electronically filed the foregoing "Consolidated Brief of Plaintiffs-Appellees" with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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November 30, 2018