IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 18-2491, 18-2492

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

Plaintiffs/Appellees,

v.

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

Defendants/Appellants.

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

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SUMMARY OF THE ARGUMENT

This case concerns Indiana's common-sense efforts to remove ineligible voters from its rolls by comparing its voter registration lists with those of other States. SEA 442, which appellees challenge here, implements Indiana's participation in the Cross-check system, a multistate databased designed to identify voters registered in more than one State and return those matches to participating States. Indiana then applies its own confidence factors to those matches to ensure reliability. Only matches that meet those factors are passed on to county officials, who must make independent determinations whether the matched voters have indeed subsequently registered in another State before cancelling their Indiana registrations. Despite those safeguards, appellees argue that SEA 442 nonetheless violates the National Voter Registration Act (NVRA) because it does not provide notice and a waiting period to cancelled voters. This challenge fails for two reasons.

First, appellees do not have standing to challenge SEA 442. They argue both that they have direct standing because they have diverted resources from their primary activities to counteract the effects of SEA 442 and that they have associational standing to represent the interests of their members. With respect to direct standing, plaintiffs are organizations that exist for the self-avowed purpose of protecting and expanding the voting rights of their members. Allocating resources already earmarked for voter protection to the task of responding to implementation of SEA 442 is not a "diversion" in any usual sense of the term, for it fulfills precisely the mission

the organizations set out to pursue. Appellees cite no Supreme Court or Seventh Circuit precedent supporting standing where a statute prompts an organization to use resources *consistent with* its primary mission and regular activities. With respect to associational standing, appellees can point to no members that will be deprived of the right to vote by SEA 442. They argue that the mere risk of harm to members is sufficient for Article III standing but cannot even demonstrate that their members are somehow particularly susceptible to injury if SEA 442 goes into effect. Supreme Court and Seventh Circuit precedent foreclose standing based on speculation that someday one of an organization's members might be subjected to a wrongful cancellation of voter registration. To qualify under Article III, injury to members must be "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Second, the NVRA specifically exempts the State from its registration-cancellation notice-and-waiting-period requirements where there is a request to cancel a registration or written confirmation that the voter has changed residence. Registering to vote in another State is quite plainly both. Appellees hardly dispute that fundamental point, but argue that the State may not rely on a Crosscheck match as evidence of a subsequent out-of-state registration. But the NVRA does not require States to have physical possession of the actual out-of-state registration document, and otherwise imposes no particular reliability measures for States to follow. Under SEA 442, Indiana undertakes a thorough check of the reliability of the Crosscheck match at both the state and local levels, and in any event state law permits voters whose

registrations have been wrongly cancelled to cast a regular ballot on Election Day. Under the Indiana scheme, there is minimal risk that, with proper implementation of the law, any voter will be wrongly deprived the right to vote. Moreover, SEA 442 treats voters uniformly—each Crosscheck match is held to the same confidence factors, and each county official must make the same determinations before cancelling the voter's registration, so it is valid under the Voting Rights Act as well.

For these reasons, this Court should uphold Indiana's common-sense implementation of Crosscheck to remove ineligible voters from its rolls.

ARGUMENT

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

A. Appellees have not demonstrated a diversion of resources and cannot claim standing in their own right

The State does not contest the district court's factual determinations regarding either the missions of plaintiff organizations or the resources they spend counteracting the effects of SEA 442. The State contests only the district court's legal holding that these expenditures qualify as a diversion of resources for purposes of standing—which is reviewed *de novo*. *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 691 (7th Cir. 2015).

1. In short, SEA 442 would not cause appellees to "divert[] resources from their primary activities" such that "their missions [would be] adversely affected." Appellees' Br. 26. Appellees may well be "committed to protecting and expanding voting rights, promoting and facilitating voter participation, and registering voters," *id.* at

27, but they will not, as they claim, forego these activities when helping their members deal with the consequences of SEA 442. *See id.* To the contrary, appellees' efforts to counteract SEA 442 are wholly *consistent* with their missions, meaning that they are not "diverting" resources at all.

Seventh Circuit precedent does not support appellees' argument that to have standing, "an organization's diversion of resources must be *consistent* with its mission." Appellees' Br. 29 (emphasis in original). While in *Crawford v. Marion County Election Board*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008), the Democratic Party had standing because it had "to devote resources" to ensuring that its members have the requisite photo identifications, that was legally significant only in view of *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (cited in *Crawford*), which establishes a doctrine justifying standing based only on movement of resources from one purpose to another. In *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990), this Court said that, under *Havens*, the critical injury "is *deflection* of the agency's time and money *from* counseling *to* legal efforts directed against discrimination." In other words, the challenged law must force the plaintiff organization to divert resources from its primary mission to another purpose in order to confer injury sufficient for Article III standing. Appellees, however, seek to expand standing based on an entirely new set of circumstances, namely mere expenditure of resources in response to a disfavored law.

2. *Crawford*, moreover, held only that a *political party* had standing to challenge Indiana's voter identification law because it caused the party to divert resources from advertising for candidates to the purpose of helping voters obtain adequate identification. 472 F.3d at 951. Critically, this Court did not hold that the political party had standing only because the law it was challenging made more expensive efforts it would have undertaken anyway. *See* Appellees' Br. 30. And *Crawford* specifically left open the issue whether organizations *aside from* political parties would have standing to challenge voter restrictions. 472 F.3d at 951. Because nonpartisan organizations, unlike political parties, are not in the business of promoting candidates for office, it is less obvious that voting regulations would cause them injury. And unless *Havens* means that individuals opposed to a statute on ideological grounds can manufacture Article III injury simply by forming an organization that will work to help others comply with the law—a standard this Court has never embraced—the notion of "diverting" resources must be something more than *expending* resources.

3. This Court's precedents support the State's position. *People Organized for Welfare and Emp't Rights (P.O.W.E.R.) v. Thompson*, 727 F.2d 167, 170-71 (7th Cir. 1984), held that an organization dedicated to increasing the political power of the poor and unemployed had no standing to challenge the State's decision not to allow local election officials to register voters in the State's public aid and unemployment compensation offices. Appellees attempt to distinguish *P.O.W.E.R.* on the grounds

that plaintiff there alleged "an injury to a third party that made the plaintiff's abstract social goals less likely to be achieved." Appellees' Br. 30 n.10. But that is exactly what appellees here allege: that the State will erroneously disenfranchise voters (the third parties), which in turn will make appellees' abstract social goals ("protecting and expanding voting rights, promoting and facilitating voter participation, and registering voters," Appellees' Br. 27) more difficult to achieve.

Similarly, *Hope, Inc. v. DuPage Cnty., Ill.*, 738 F.2d 797, 799 (7th Cir. 1984), held that a non-profit organization dedicated to "promot[ing] and locat[ing] adequate housing for low and moderate income persons" did not have standing to challenge discriminatory housing practices. Appellees attempt to distinguish *Hope* as a traceability case, but the fundamental point is that mere abstract inconsistency between an organization's primary purposes and a challenged provision of law is insufficient to satisfy Article III—the plaintiff organization must be able to demonstrate some concrete negative consequences. 738 F.3d at 815.

And while the Eastern District of Wisconsin in *Frank v. Walker*, 17 F. Supp. 3d 837, 864 (E.D. Wis. 2014), found that plaintiff organizations had standing because they had devoted resources to dealing with the voter identification law at issue, the court did not address whether this expenditure was consistent with, or diverted from, the organizations' missions. Regardless, this Court overturned that decision without addressing the standing issue. *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014).

4. Appellees relegate these controlling precedents to a single footnote and invoke decisions from other circuits that are neither controlling nor convincing. In

League of Women Voters v. Newby, 838 F.3d 1, 8 (D.C. Cir. 2016), the D.C. Circuit held that a plaintiff organization need only show "that the defendant's actions directly conflict with the organization's mission" (internal quotation marks omitted) so as "to ensure that organizations cannot engage in activities simply to create an injury." But such reasoning actually yields the opposite result. Allowing standing for any organization whose mission is impaired by a law would permit aspiring plaintiffs simply to create an organization with a stated mission in opposition to a state law in order to bring suit.

In *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014), the Eleventh Circuit held that "an organization has standing to sue when a defendant's illegal acts *impair the organization's ability to engage in its own projects* by forcing the organization to *divert resources* in response" (emphasis added). This standard is consistent with the State's theory as stated, but the Eleventh Circuit misapplied it by concluding that the plaintiff organizations had "missions that include voter registration and education, or encouraging and safeguarding voter rights, and that they had diverted resources to address the Secretary's program," which was aimed at identifying non-citizens and removing them from voting rolls. *Id.* In other words, plaintiffs in that case "diverted" resources from educating and registering voters to . . . educating and registering voters. That was not a "diversion" in any usual (or meaningful) sense of the term.

Similarly, the remaining cases that appellees cite, *see* Appellees' Br. 28 n.6, 29 n.9, 31 & n.11, cannot be reconciled with Seventh Circuit precedents, which require

not that a plaintiff organization show that its mission is to contend with the consequences of a new law, but that enjoining the statute "will in any way improve its ability to perform its corporate purpose." *Hope*, 738 F.2d at 815 (7th Cir. 1984).

5. Appellees also argue that they have something called "organizational" standing because SEA 442 "'makes it difficult or impossible for the organization to fulfill one of its essential purposes or goals.'" Appellees' Br. 31–32 (citing *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1269 (D. Colo. 2010)) (emphasis added). Critically, in *Buescher* the district court articulated two theories under which an organization may achieve direct standing: (1) diversion of resources under *Havens*, and (2) "when a defendant's conduct makes it difficult or impossible for the organization to fulfill one of its essential purposes or goals." *Id.* (citing *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1353–54 (11th Cir. 2005)). But that distinction only confirms what the State has been arguing: There is a profound difference between being injured by having to divert resources away from current purposes and merely being frustrated in pursuit of ideological goals. In the Supreme Court and this Court, diversion is a recognized Article III injury. Frustration of ideological goals—the only standard appellees here can meet—is not, and indeed is exactly the type of "abstract social interest" that the Supreme Court in *Havens* warned against. *See* 455 U.S. at 379.

It also bears observing that in *Charles H. Wesley*, 408 F.3d at 1353—the case relied on by the district court in *Beuscher*—the law being challenged directly regulated the plaintiff's actions insofar as it precluded it from registering voters, which of

course is a classic form of Article III direct injury. In contrast, SEA 442 does not prevent Common Cause and the NAACP from registering eligible voters—or regulate their activities in any other way. Accordingly, this Court would not risk creating a circuit conflict by rejecting appellees' direct standing arguments in this case.

B. Appellees do not have standing on behalf of their members

In order to assert associational standing, "[t]he association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Appellees make the infinitely capacious argument that they have standing merely because their "members are registered Indiana voters who are *at risk* of being erroneously identified by Crosscheck as having registered in another state." Appellees' Br. 33 (emphasis added). But appellees have made no showing that their members are particularly at risk of having their registrations cancelled. They merely hypothesize that (1) Crosscheck will cause some erroneous cancellations, and (2) their members may be among those whose registrations are erroneously cancelled. When confronted with the argument that such general hypotheses are insufficient under Article III, they simply respond that they "need not wait until harm has occurred to seek compliance with the NVRA." Appellees' Br. 52. This assertion contravenes Supreme Court and Seventh Circuit precedent.

Mere risk of injury, however remote, is not grounds for Article III standing. The Supreme Court has "repeatedly reiterated that 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of possible future

injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (internal citation omitted). Under that standard, it cannot possibly be the case that *all* Indiana registered voters would have standing to challenge Crosscheck because all are at equal risk of erroneous cancellation. But that is precisely the implication of appellees' boundless standing theory.

Nor does the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), support appellees' theory. There, the Court held that plaintiffs had standing even though their children might not be denied admission to the school of their choice simply because they were "forced to compete for seats at certain high schools in a system that uses race as a deciding factor in many of its admissions decisions." *Id.* at 718–19. Whether or not the students were eventually denied admission, racial treatment itself constituted the cognizable Article III injury. *Id.* Here, in contrast, there is nothing inherently injurious about being a registered voter in a system where records from other States are used to identify ineligible voters and remove them from the rolls. Appellees are injured only if their members are in "actual or imminent" danger of being erroneously removed. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). They have not made this showing.

Moreover, even if some members were erroneously removed, they could cast a failsafe ballot under Indiana law by filling out an affidavit attesting that the voter still resides in the precinct where he or she was formerly registered. Ind. Code § 3-7-48-5. This ballot will be counted as if the voter's registration had never been cancelled.

Id. Appellees attempt to minimize the importance of Indiana's failsafe provision by pointing out that it does not remedy any alleged violations of the NVRA. Appellees' Br. 58–61. But this misconstrues the State's argument. Even if the failsafe voting procedure does not cure any violations of federal law, it does provide a complete on-the-spot remedy for any alleged injury to Common Cause and NAACP members. In short, given the failsafe voting procedure, there is no risk that members of these groups will be prevented from voting by erroneous application of Crosscheck. Accordingly, they stand to suffer no injury for which appellees may assert standing.

Once again, appellees fail to cite any cases from this circuit supporting their novel standing theory, and the decisions they cite from other jurisdictions do not support standing here. In *Arcia*, 772 F.3d at 1342, the plaintiff organizations had representational standing because, in contrast with appellees, they had identified specific members who were in distinguishable and particular danger of being removed from the voter rolls (due to their status as naturalized citizens). In *Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008), the court required "a probability of harm in the near and definite future," which appellees have no way of showing here.

The closest appellees come to having a useful precedent from another circuit is *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 568, 574 (6th Cir. 2004), where the Democratic party and labor unions asserted claims on behalf of members—identities unknowable in advance—who would cast provisional ballots on election day that, owing to the challenged law, would in turn be invalidated because cast in the

wrong precinct. In light of *Warth* and *Lujan,* it is certainly troubling that the Sixth Circuit was willing to confer standing based on hypothetical and speculative injury. But at least there one of the plaintiffs was a major political party whose membership would include vast swaths of the electorate, making it virtually certain that at least one out-of-precinct provisional ballot would be cast by one of its members. (Notably, the Sixth Circuit did not separately analyze standing of the labor unions.)

Here, in contrast, none of the appellees is a political party, and none has the same claim to the membership of vast numbers of registered voters. In these circumstances, unlike in *Sandusky*, the odds are exceedingly slim that even one Indiana voter will (1) have a voter registration erroneously cancelled owing to Crosscheck; (2) show up on Election Day and be denied the right to vote (notwithstanding the failsafe procedure), and (3) be a member of one of the plaintiff organizations. Accordingly, even if the Court is persuaded by the methodological approach of the Sixth Circuit (and it should not be), that case is ultimately distinguishable.

II. Indiana's Implementation of Crosscheck Complies with Section 8(d) of the NVRA

A. Appellees tacitly concede that registering to vote in another State is both a request to cancel a previous registration and written confirmation that the voter has changed residence

Election officials may, without providing the otherwise-required notice and waiting period, remove a name from the voter rolls at the person's request or acknowledgement of having moved outside the jurisdiction. 52 U.S.C. § 20507(d)(1)(B). Removing an individual from Indiana's voter registration rolls using Crosscheck is permissible because registering to vote in another State constitutes both a request for

removal, 52 U.S.C. § 20507(a)(3)(A), and written confirmation that the registrant has moved, 52 U.S.C. § 20507(d)(1)(A).

Appellees seem tacitly to concede that a superseding registration to vote in another State is both a request to cancel a previous registration in another jurisdiction and written confirmation that the voter has changed residence. Appellees' Br. 40. For example, while relying on guidance from the Department of Justice, appellees concede that "certain voter registration *applications* may be sufficient to permit cancellation of a voter's prior registration[.]" Appellees' Br. 40. And they make no effort to defend the district court's conclusion that "[a] voter's act of registering to vote . . . is no request for removal, and the voter is not confirming for Indiana that they have had a change in residence." Short App. 22, 50.

Appellees' silence on this point is understandable, for both common sense and the history of the NVRA confirm that registration in another state must be understood as a request to remove the voter's name from the rolls in the previous jurisdiction of residence. For example, both the Senate and House Reports on NVRA Section 8(a) observe that "[a] 'request' by a registrant would include actions that result in the registrant being registered at a new address, such as registering in another jurisdiction or providing a change-of-address notice through the drivers license process that updates the voter registration." S. Rep. No. 103-6, at 31; H.R. Rep. No. 103-9, at 14–15.

Accordingly, the only real dispute on the merits in this case is whether the NVRA requires that a State receive a new registration in another jurisdiction (or

other request to be removed or acknowledgment of having moved) *directly from the voter* before acting on it to remove the voter's defunct registration. The NVRA includes no such requirement, and imposing it would be precisely the sort of statutory tampering that the Supreme Court prohibited in *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

B. By arguing for a direct-receipt requirement, appellees improperly seek to engraft the NVRA with their preferred reliability test

Appellees' argument comes down to a concern about reliability. They worry that Crosscheck will yield incorrect matches, the result of which will be erroneously cancelled Indiana voter registrations. Their statutory hook for making that argument is that, when the NVRA permits a State to cancel a registration based on a request or acknowledgment of change of address, it somehow implies that the State must receive that document directly from the voter. But the statute includes no such requirement, and Indiana is permitted to ensure the reliability of Crosscheck matches in whatever reasonable way it chooses.

1. To begin, appellees incorrectly assert that Indiana law permits election officials to rely *solely* on raw Crosscheck data as justification for cancelling voter registrations. Appellees' Br. 44. The Indiana statute does not, for example, permit state and local officials to "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." Appellees' Br. 38–39. Nor is it correct to say that the State relies on an "inference that

a voter has registered in another state, based *only* on a comparison of computer databases[.]" *Id.* at 39 (emphasis added).

Rather, Indiana law employs multiple statutory safeguards that officials must satisfy before removing a name from the voter rolls. *See* Ind. Code § 3-7-38.2-5(d) (requiring application of confidence factors); *id.* § 3-7-38.2-5(e) (requiring county voter registration office to confirm identity and that out-of-state voter registration date was subsequent to Indiana).

First, before transmitting a Crosscheck-identified potential match to county election officials, the Indiana Election Division must conclude that the "first name, last name, and date of birth of the Indiana voter [is] identical to the first name, last name, and date of birth of the voter registered in the other state." *Id.* § 3-7-38.2-5(d)(1).

Second, for those matches, Indiana Code section 3-7-38.2-5(d)(2) requires Election Division officials to compare the supposedly matching records by looking at specified "confidence factors," including Social Security number, Indiana driver's license number, date of birth, first, middle, and last names, suffix, street address, and zip code. Each confidence factor match carries a specified point value. Officials may forward to county election officials only those Crosscheck matches having a confidence-factor score of 75 or greater. *Id.* § 3-7-38.2-5(d). Even appellees observe that application of the confidence factors "can reduce the risk of a false positive." Appellees' Br. at 47.

Third, even when they receive the matching records scoring at least 75 on the confidence factor scale, county voter registration offices must still make two separate additional determinations before removing such a matched name from the voter rolls: (1) that the individual "identified in the report provided by the NVRA official . . . is the same individual who is a registered voter of the county," and (2) that the individual "registered to vote in another state on a date following the date that voter registered in Indiana." Ind. Code § 3-7-38.2-5(e).

What is more, "[e]ven if confidence factors are the maximum possible, Indiana law does not require that the county act in a particular way in regard to that record. The county can use information it has independently of the Kansas submission to determine if, in fact, two records which match are the same person." App. 148. While some county clerks have testified that in the past the actual registration documents from the other States were available for review, App. 169–70, 175–76, 186, the NVRA does not mandate that a State must possess a copy of the request to be removed or confirmation of residency change in writing.

Accordingly, contrary to the entire premise of appellees' argument, Indiana law imposes numerous rigorous safeguards against false Crosscheck matches.

2. The NVRA provides that a State may remove a registration "at the request of the registrant[,]" 52 U.S.C. § 20507(a)(3)(A), or where the registrant has "confirm[ed] in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered," 52 U.S.C. § 20507(d)(1)(A). Appellees contend that "Congress was clear . . . the only information

accurate enough to permit removal . . . was information that came directly from the voter." Appellees' Br. 38. The plain text of neither statute, however, demands that the State receive the request or acknowledgement directly from the voter in order to act on it.[1]

Rather than rely on sections 20507(a)(3)(A) and 20507(d)(1)(A) themselves, appellees cite an entirely different subsection, section 20507(c)(1), for the proposition that, when removing a voter from the rolls based on change of address data, a State must use the notice procedure prescribed by section 20507(d)(2). The terms of section 20507(c)(1), however, govern only particular programs, namely programs by which a State is attempting to discharge its obligation under section 20507(a)(4) to maintain voter lists based on change-of-address information. For such programs, States may only use change-of-address information supplied by the United States Postal Service and must abide by the notice-and-waiting period requirements of section 20507(d)(2). *See* 52 U.S.C. § 20507(c)(1)(A) and (B)(ii). Crosscheck, however, is not such a program. Rather, Indiana complies with section 20507(a)(4) by means of an entirely *separate* program, namely that embodied in Indiana Code sections 3-7-38.2-1, -7, -14, which expressly makes use of USPS change-of-address information and follows the notice-

[1] Also instructive, section 20507(d)(2) governing the notice-and-waiting period rule requires a notice to be "a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the registrant may state his or her current address, together with a notice" regarding the registration. Given these specifics as to form in that context, it is significant that Congress did not impose a specific form for communicating a written request to be removed or address-change acknowledgment.

and-waiting period requirements of section 20507(d)(2). Nothing in the NVRA restricts States from *also* implementing a program to cancel voter registrations based on requests and acknowledgments from registrants themselves, such as Crosscheck. And when carrying out such a supplementary program, there is no requirement that the State follow section 20507(c)(1).

Furthermore, using appellees' "paradigmatic example of confirmation in writing," *i.e.*, "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," would negate the very exception to section 20507(d)(2) that sections 20507(a)(3)(A) and 20507(d)(1)(A) represent. Appellees' Br. 44. In other words, if complying with sections 20507(a)(3)(A) and 20507(d)(1)(A) required return of the prepaid card prescribed in section 20507(d)(2), what would be the point of the exceptions?

Appellees also argue that Crosscheck results cannot not "*themselves qualify* as a request or written confirmation from a voter . . . ." Appellees' Br. 38. This is a bit of a rhetorical sleight-of-hand, of course, because the State is in no way asserting that the Crosscheck report is the written confirmation or acknowledgement. That role, once again, is played by the written voter registration in another State that was undertaken subsequent to the Indiana registration on record. NVRA nowhere says the State may not use a report of such a subsequent registration as the starting point for cancelling a registration based on the request (or acknowledgement) that the subsequent registration represents.

A reasonable question is whether there is any limit to the type of subsequent-registration report that the State may rely on in this context. The State would surely not be justified in relying, for example, on an anonymous telephone call claiming particular Indiana voters had just registered in another State. But that does not mean that appellees are correct that the NVRA must be understood to impose a direct-receipt requirement. First, while requiring that the State receive a request or acknowledgment directly from the voter might be one reasonable way to check its reliability, it would not be a 100% foolproof way to do so. States might conceivably receive many requests or acknowledgements directly from voters, yet still cancel the wrong registrations owing to confusion over names, misspellings, typographical errors, tampering, or any number of other circumstances. In short, there is no way to ensure, with metaphysical certainty, that any request or acknowledgment is reliable and authentic when used to cancel an existing voter registration, even when sent directly from the voter to the State.

Second, other reasonable means of checking reliability abound, and many features of the Crosscheck system are systematically geared toward ensuring reliability. The very fact that the underlying requests at issue are voter registration forms is helpful. Such forms require voters to disclose various items of information that help authenticate the request and match it to a corresponding prior registration in another State—such as full name, Social Security number, date of birth, and driver's license number. *See, e.g.,* Indiana Voter Registration Form, https://forms.in.gov/download.aspx?id=9341 (last visited December 14, 2018). Even a voter sending a simple

request-for-cancellation letter directly to voter registration officials in the former State of residence may not include such information, and accordingly such a letter would bear less indicia of authenticity and reliability than the foundational documents used in Crosscheck. Moreover, Indiana's 75-point confidence factor check increases the reliability of the match even more. And the final obligation of local officials to verify for themselves that the match is accurate (and that the Indiana registration was first-in-time) before cancelling the Indiana registration is yet another check against erroneous cancellations.

The point is that, even if States must employ some means of checking the reliability of reports of requests or acknowledgments, there is no textual (or practical) reason to prefer appellees' preferred means (*i.e.*, direct receipt from the voter). Critically, the lack of any such statutory prescription dooms appellees' claim. For no matter the policy arguments in support of a direct-receipt requirement, the Supreme Court held in *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1847 (2018), that the NVRA does not permit courts to impose "their own standard of 'reasonableness'" on actions taken by States under the NVRA.

Appellees argue that *Husted* does not apply because the statute there "flagg[ed] infrequent voters as voters who *may* have moved precisely *because* the State follows the NVRA's notice-and-waiting requirements[.]" Appellees' Br. 42 (emphasis in original). But regardless of the distinctions between the statutes at issue in that case and this one, the Supreme Court's broad holding was clear: The NVRA does not "authorize[] the federal courts to go beyond the restrictions set out in subsections

(b), (c), and (d) [of the NVRA] and to strike down any state law that does not meet their own standard of 'reasonableness.'" *Id.* at 1847.

C. Indiana's implementation of Crosscheck treats voters uniformly

The NVRA requires that "[a]ny State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall be uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965." 52 U.S.C. § 20507(b). Appellees argue that SEA 442 fails this requirement "because Indiana counties, even individual county officials, employ wildly varying procedures for making the required determination that an Indiana voter has subsequently registered in another state." Appellees' Br. 53. But SEA 442 allows for no such variation.

SEA 442 requires that the county officials determine whether each individual identified by Crosscheck: (1) "is the same individual who is a registered voter of the county;" and (2) is "registered to vote in another state on a date following the date that voter registered in Indiana." Ind. Code § 3-7-38.2-5(e). If and only if these determinations are made, "the county voter registration office shall cancel the voter registration of that voter." *Id.* § 3-7-38.2-5(f). In other words, each county election official is required to make the same determinations before removal, and if these determinations are made, the registration *must* be canceled. There is no room for discretion.

Appellees argue, and the district court held, that SEA 442 is not uniform for three reasons: (1) "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." Appellees' Br. 55.

In support, appellees cite *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Edgar*, No. 95C174, 1995 WL 532120 (N.D. Ill. Sept. 7, 1995), Appellees' Br. 56, but there the court invalidated a statute that "authorize[d] but d[id] not require local election authorities to send address verification forms." 1995 WL 532120, at *2. In contrast, the statute at issue here *requires* county officials to make the relevant determinations before removing a voter form the rolls.

County officials testified that before removing a voter from the rolls, they determine whether the voter in the Crosscheck report is the same voter that is registered in the county and determine whether the out-of-state registration was subsequent to the Indiana registration. *See* App. 159, 165. The officials only deviate from this process based on any aspect of the voter record that suggests a need for further investigation. Appellees argue that because Indiana's chief election officials "are responsible for ensuring the counties' NVRA compliance," Appellees' Br. 31, they are responsible for any alleged violations of the NVRA. But because the statute puts the responsibility for these final determinations on the county officials, any disagreement among the Co-Directors is irrelevant to the uniform application of state law.

Even if some county election officials are not properly enforcing state statutory requirements, that failure does not render SEA 442 facially invalid. The flaw is not with SEA 442, but with the specific application of the statute by the county officials,

which could be addressed on a case-by-case basis. The proper remedy for such violations would be to enjoin officials to implement SEA 442 in some specific (and uniform) way, not to enjoin SEA 442 itself. As the State explained in its opening brief, nothing in the NVRA requires the Co-Directors to provide unanimous, detailed instruction to county voter registration officials.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief contains 5,951 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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