Nos. 20-2815 & 20-2816

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LEAGUE OF WOMEN VOTERS OF INDIANA,
et al.,
Plaintiffs-Appellees,

v.

CONNIE LAWSON, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
Nos. 1:17-cv-2897-TWP-MPB & 1:17-cv-3936-TWP-MPB,
The Honorable Tanya Walton Pratt, Judge.

BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANTS

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JURISDICTIONAL STATEMENT

This appeal involves two separate lawsuits brought by three different voter-advocacy organizations challenging portions of Indiana's laws governing voter-roll maintenance as incompatible with the National Voter Registration Act of 1993 (NVRA), Pub. L. No. 103-31, 107 Stat. 77 (codified at 52 U.S.C. §§ 20501–20511). Common Cause Indiana and, separately, the Indiana State Conference of the National Association for the Advancement of Colored People and League of Women Voters of Indiana (collectively, the Organizations), filed these actions under the NVRA's private right of action, 52 U.S.C. § 20510(b), and 42 U.S.C. § 1983 for injunctive and declaratory relief against Defendants—Connie Lawson, in her official capacity as Secretary of State of Indiana, J. Bradley King, in his official capacity as Co-Director of the Indiana Election Division, and Angela Nussmeyer, in her official capacity as Co-Director of the Indiana Election Division (collectively, the State). *Common Cause* R.1; *NAACP* R.1. The Organizations claim that what is now Indiana Code section 3-7-38.2-5.5 (2020) violates the NVRA. The district court had subject-matter jurisdiction over these cases under 28 U.S.C. §§ 1331 and 1343.

On August 20 and 24, 2020, the district court granted the Organizations' motions for summary judgment, and issued a permanent injunction in both cases prohibiting the State from implementing Indiana Code section 3-7-38.2-5.5(d)–(f) (2020). Short App. 1–27, 31–56. On the same two days, the district court entered the respective final judgments in favor of the Organizations and against the State. *Id.* at 28, 57; *see* Fed. R. Civ. P. 58. The State timely filed its notices of appeal in both

cases on September 21, 2020. *Common Cause* R.203; *NAACP* R.163. This Court consolidated the cases for briefing and disposition on September 22, 2020. ECF 2.

The Court has jurisdiction over these appeals under 28 U.S.C. § 1291 because they are both appeals from final judgments as to all claims and all parties.

INTRODUCTION

These cases involve Indiana's evolving efforts to fulfill its obligations under the NVRA to maintain accurate voter-registration lists. The State's process for maintaining voter rolls complied with the NVRA until 2017, when Senate Enrolled Act 442 eliminated the requirement that election officials have an authorization of cancellation or written confirmation of changed residence before removing a voter from the rolls, instead allowing removal on the basis of a reliable Crosscheck database match. *Compare* Ind. Code § 3-7-38.2-5(d)–(e) (2018), *with* Ind. Code § 3-7-38.2-5(d)–(e) (2016). The Organizations sued to enjoin Act 442, and this Court affirmed preliminary injunctions against the Act, holding that it likely violated the NVRA by allowing election officials to remove voters without hearing from the voters themselves or following the notice-and-waiting procedure. *Common Cause Indiana v. Lawson* (*Common Cause I*), 937 F.3d 944, 957–62 (7th Cir. 2019).

In 2020, following this Court's decision, the General Assembly passed Senate Enrolled Act 334, which repealed Act 442 and restored the pre-2017 system. Act 334 does four things: First, it removes Indiana from participating in the existing Crosscheck system and establishes a new data-sharing system. Ind. Code §§ 3-7-38.2-5.1, -5.5(a) (2020). Second, it restores the requirement that election officials have the

voter's authorization of cancellation or send an address confirmation notice to the voter. *Id.* § 3-7-38.2-5.5(d)–(e). Third, it clarifies that, to remove a voter from the rolls, a county official may rely on a signed copy of the voter's out-of-state registration authorizing cancellation sent from the other State. *Id.* § 3-7-38.2-5.5(f)(1). Fourth, it provides that if the other State sends the voter's authorization to the Indiana Election Division, the county may rely on the information forwarded to it by the Election Division even if the county itself does not have the signed copy. *Id.* § 3-7-38.2-5.5(f)(2).

Even though Act 334 restores the previously unobjectionable pre-2017 system, the Organizations deemed Act 334 an insufficient fix on the ground that, in their view, Section 5.5(f)(2) creates a loophole allowing Indiana to cancel a voter's registration without a copy of the voter's signed registration form authorizing cancellation. They did not, however, claim that Section 5.5(d), (e), or (f)(1) violates the NVRA.

Before Indiana had an opportunity to implement or interpret Act 334, the district court permanently enjoined it. In doing so, the court read Section 5.5(f)(2) to find a violation of the NVRA when a plausible and narrower interpretation of that provision—offered by the very state officials charged with implementing the statute, no less—comports with federal law. Beyond that, despite determining that only Section 5.5(f)(2) violates the NVRA, the district court broadly enjoined other provisions of the Act that indisputably comply with the NVRA's requirements.

STATEMENT OF THE ISSUES

I. Whether Indiana's amended voter list maintenance law (Act 334) is consistent with the National Voter Registration Act.

II. Whether the district court abused its discretion by issuing an over-broad and vague injunction.

STATEMENT OF THE CASE

Congress requires States to perform voter-list maintenance on a regular basis, which includes ensuring that the names of any voters who have changed residence and are no longer eligible to vote in the relevant jurisdiction are removed. *See* 52 U.S.C. § 20507(a)(4). This is precisely what Indiana's voter list maintenance law sets out to do.

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

A. The NVRA requires voter list maintenance

Congress enacted the National Voter Registration Act of 1993 (NVRA) to address both low voter turnout and inaccurate state voter rolls. 52 U.S.C. § 20501(b). The NVRA thus "has two main objectives: increasing voter registration and removing ineligible persons from the States' voter registration rolls." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018) (citation omitted).

Accordingly, the NVRA mandates that States maintain their voter rolls by removing invalid registrations, such as those of people who have died or changed residence. 52 U.S.C. § 20507(a)(4). Yet it also limits the manner in which States maintain those lists. As pertinent here, the NVRA authorizes a State to remove the name

of a registrant from the official list of eligible voters "at the request of the registrant." § 20507(a)(3)(A). But absent a request, States may remove registered voters in only two circumstances: (1) if the registrant "confirms in writing that the registrant has changed residence"; or (2) if the registrant "has failed to respond to a notice" that the registrant may be removed from the voter rolls and "has not voted or appeared to vote" in two general elections after the notice. § 20507(d)(1)(A)–(B).

B. Indiana officials implement NVRA requirements

The co-directors of the Indiana Election Division serve "as the chief state election official responsible for the coordination of state responsibilities under NVRA." Ind. Code § 3-7-11-1 (2020); *see also* 52 U.S.C. § 20509 (requiring each State to designate NVRA officials). The Indiana Secretary of State and the co-directors of the Election Division jointly maintain the voter registration list via an electronic statewide voter registration system. Ind. Code § 3-7-26.3-3 (2020). These state officials coordinate with the counties, each of which has either a county election board or a county board of elections and registration, *id.* §§ 3-6-5-1, 3-6-5.2-3, to maintain voter rolls. *Common Cause* R.79-7 at 25.

C. Indiana's voter list maintenance prior to Senate Enrolled Act 442

Indiana's voter rolls have long included many invalid and inaccurate records. The federal government has even sued Indiana for running afoul of the NVRA by failing to properly maintain its voter rolls, culminating in a stipulated judgment requiring the State to make efforts to improve its voter-roll maintenance. *United States v. Indiana*, No. 1:06-cv-1000-RLY-TAB (S.D. Ind. 2006); *see also Crawford v.*

Marion County Election Board, 553 U.S. 181, 192 (2008) (recognizing that "Indiana's voter rolls were inflated by as much as 41.4%" (citation omitted)).

To fulfill its maintenance obligations, the Indiana General Assembly required the State to submit its statewide voter registration list for analysis under the Crosscheck program, a database software program administered by the Kansas Secretary of State. Pub. L. No. 258-2013, § 60, 2013 Ind. Acts 3542, 3564–66 (codified as amended at Ind. Code § 3-7-38.2-5 (2016)). Compiling data from voter lists submitted by participating States, Kansas determined which individuals may be registered in more than one State, and sent a record of those matches back to the States' NVRA officials. *Common Cause I*, 937 F.3d at 957. Crosscheck, though, did not receive or distribute copies of voter registration documents. *Common Cause* R.74-10.

Once it received a list from Crosscheck, the Election Division filtered out false matches by comparing names and birthdates. Ind. Code 3-7-38.2-5(d) (2016). The State also employed a list (later codified) of specified "confidence factors" to assess the accuracy of the Crosscheck matches. *NAACP* R.42-22 at 32; *see* Pub. L. No. 116-2018, § 3, 2018 Ind. Acts 1137, 1138–40 (codified at Ind. Code § 3-7-38.2-5(d) (2018)). After conducting its assessment, the Election Division was obligated to send the "identical" matches that also met the threshold confidence factor score to the appropriate county voter registration office. Ind. Code § 3-7-38.2-5(d) (2016).

Before 2017, a Crosscheck match was not sufficient to remove a voter from the rolls. Instead, upon receipt of Crosscheck matches, county registration offices were required to determine (1) that the individual in the Crosscheck report was the

same person on the county's voter rolls; (2) that the individual registered in the other State after registering in Indiana; and (3) that the individual "authorized the cancellation of any previous registration by the voter when the voter registered in another state." *Id.* § 3-7-38.2-5(d). If the county official made all three determinations, the official was required to "cancel the voter registration of that voter." *Id.* § 3-7-38.2-5(e). But if the official could not make the third determination, the county office had to mail "an address confirmation notice to the Indiana address of the voter." *Id.* If the voter did not respond to the mailer to confirm a changed residence, the voter would not be removed from the rolls unless the voter did not vote over the course of the next two federal general election cycles. *Id.* § 3-7-38.2-15.

D. Senate Enrolled Act 442

In 2017, the General Assembly passed Senate Enrolled Act 442. Pub. L. No. 74-2017, § 15, 2017 Ind. Acts 280, 289–90 (codified as amended at Ind. Code § 3-7-38.2-5 (2018)). The amended law still utilized Crosscheck but changed the way election officials would use that data at the county level. Ind. Code § 3-7-38.2-5 (2018). Specifically, Act 442 permitted the county office to cancel a registration if it concluded that the individual identified by Crosscheck was the same individual registered in Indiana and registered in another State after registering in Indiana. *Id.* § 3-7-38.2-5(d)–(e). Act 442 thus eliminated the requirement that the county office find that the voter "authorized the cancellation of any previous registration by the voter when the voter registered in another state" or send a notice to the voter's Indiana address. *Compare id.* § 3-7-38.2-5(d), *with* Ind. Code § 3-7-38.2-5(d)–(e) (2016).

II. *Common Cause I*: The Organizations Challenge Act 442

In two separate lawsuits, the Organizations contended that Act 442 violated the NVRA because it permitted "Indiana counties to cancel voter registrations immediately once they receive information through Crosscheck that they 'determine' indicates a voter may have moved." *Common Cause* R.1 at 3 (emphasis omitted). Such immediate removal, the Organizations argued, conflicted with the NVRA's notice-and-waiting requirements. *Id.* The district court agreed and issued identical preliminary injunctions to prevent Act 442 from going into effect. *NAACP* R.63; *Common Cause* R.103.

On appeal, this Court affirmed, holding that Act 442 likely violated the NVRA because it allowed officials to cancel a voter's registration without receiving a request or written confirmation from the voter and without following the notice-and-waiting procedure. *Common Cause Indiana v. Lawson* (*Common Cause I*), 937 F.3d 944 (7th Cir. 2019). The Court deemed the "fatal" defect in Act 442 to be that it "omit[ted] any direct contact with the voter whose name ha[d] been flagged." *Id.* at 958. The Court rejected the State's position that a Crosscheck match constituted a registrant's request to be removed because "[r]egistering to vote in another state is not the same as a request for removal from Indiana's voting rolls," *id.* at 960, and because a Crosscheck match did not qualify as a "request of the registrant" insofar as the State did "not receive a copy of the other state's registration," *id.* at 961. The Court likewise rejected the State's argument that a Crosscheck match served as written confirmation that the registrant had changed residence because using the

Crosscheck information as both the initial suspicion and the confirmation would impermissibly allow a single piece of information to do "double-duty." *Id.* at 962.

III. Indiana Replaces Act 442 with Senate Enrolled Act 334

Soon after this Court remanded *Common Cause I*, the General Assembly went back to the drawing board and ultimately passed Senate Enrolled Act 334. Pub. L. No. 141-2020, §§ 6–8, 2020 Ind. Acts 1286, 1292–98 (codified at Ind. Code §§ 3-7-38.2-5, -5.1, -5.5 (2020)). Act 334 repealed Act 442, withdrew Indiana from Crosscheck, and established the Indiana Data Enhancement Association (IDEA) in its place. *See* Ind. Code §§ 3-7-38.2-5.1, -5.5(a) (2020).

Using matches identified by Indiana's anticipated IDEA program, Act 334 requires Indiana's NVRA officials to compare the voter's name and birthdate for an "identical" match, and then determine if the comparison meets a threshold "confidence factor" score before providing the information to county election officials. *Id.* § 3-7-38.2-5.5(c). And at the county level, Act 334 still obligates officials to independently determine that the individual who registered out-of-state is the same person registered in Indiana and that the person registered in the other State after registering in Indiana. *Id.* § 3-7-38.2-5.5(d).

Importantly, Act 334 restored the pre-2017 requirement that county officials also must determine that the individual "authorized the cancellation of any previous registration by the voter when the voter registered in another state" before cancelling the voter's registration. *Id.* § 3-7-38.2-5.5 (d)(3). And just as before, if county officials cannot determine that a voter authorized the cancellation, the officials

must send notice to the voter and await written confirmation or the NVRA-required waiting period before cancelling the registration. *Id.* §§ 3-7-38.2-2(g)(2), -5.5(e), -15.

Act 334 went even further than pre-2017 law and specified the type of written information a county registration office may rely upon to determine that the voter authorized cancellation. A county office "may rely on written information provided either directly by a voter registration office in another state or forwarded from the election division from the office in the other state." *Id.* § 3-7-38.2-5.5(f). If the county receives the information directly from the other State, then "the out-of-state voter registration official must provide a copy of the voter's signed voter registration application which indicates the individual authorizes cancellation of the individual's previous registration." *Id.* § 3-7-38.2-5.5(f)(1). And if the Indiana Election Division "forwards written notice from another state to an Indiana county voter registration official, the county should consider this notice as confirmation that the individual is registered in another jurisdiction and has requested cancellation of the Indiana registration," but "[a] copy of the actual voter signature is *not required to be provided to the county* for the voter's status to be canceled if the written notice is forwarded by the election division." *Id.* § 3-7-38.2-5.5(f)(2) (emphasis added).

IV. The District Court Permanently Enjoins Act 334

After the remand in *Common Cause I* and the passing of Act 334, the State moved to dismiss the Organizations' suits on mootness grounds. *Common Cause* R.180; *NAACP* R.134. For their part, the Organizations moved for summary judgment, seeking a permanent injunction because, in their view, Act 334 violates the

NVRA by "swap[ping] in one interstate database for another and continu[ing] to permit voter registration cancellations based solely on third-party information." *NAACP* R.137 at 1. The Organizations' motions came before the Election Division had a chance to consider Act 334's implementation and, as a result, without any discovery into how the officials charged with administering *that* state law would in fact administer it. *See Common Cause* R.184 (citing 2018–2019 deposition testimony).

The district court granted the Organizations' motions for summary judgment, issuing identical permanent injunctions prohibiting the amended law from going into effect. Short App. 28, 57. In its opinions, the court first ruled that Indiana's amendment did not moot the Organizations' suits because "SEA 334 continues the same NVRA violations that occurred under SEA 442." Short App. 17, 47.

On the merits, the district court concluded that, like Act 442, "[Act] 334 violates the NVRA by allowing cancellation of a voter's registration without direct contact with the registered voter and without utilizing the notice-and-waiting procedures." Short App. 24, 54. In reaching that conclusion, the court zeroed in on a single sentence of Section 5.5(f)(2) of the codified Act, namely, the sentence authorizing county officials to remove a voter from the rolls absent "[a] copy of the actual voter signature" if the information for removal comes from Indiana officials rather than out-of-state officials. Short App. 22–23, 52–53. Rejecting a narrow construction of that provision offered by the State, the court read that sentence to mean that voters

could be removed without any Indiana official having a signed form authorizing cancellation in violation of the NVRA.[1] *Id.*

Despite finding a single sentence in Section 5.5(f)(2) to contravene the NVRA, the district court issued a sweeping injunction, barring the State from implementing Indiana Code section 5.5(d), (e), and (f)(1), as well. The final judgments enjoin the State "from implementing SEA 334 §§ 5.5(d)–(f)[2] and from otherwise removing any Indiana registrant from the list of eligible voters because of a change in residence absent: (1) a request or confirmation in writing directly from the voter that the voter is ineligible or does not wish to be registered; or (2) the NVRA-prescribed process of (a) notifying the voter, (b) giving the voter an opportunity to respond, and (c) then waiting two inactive federal election cycles." Short App. 28, 57.

SUMMARY OF THE ARGUMENT

I. Indiana's enactment of Act 334 brought its voter list maintenance program back into compliance with the NVRA by restoring the requirement that election officials determine that a voter has "authorized the cancellation" of a prior Indiana registration or follow-up with the voter by mail. The Act also added that election officials could rely upon a signed voter registration form as evidence that a voter has "authorized the cancellation." This process of removing individuals from the voter

[1] The Organizations also asserted a non-uniformity claim under the NVRA, 52 U.S.C. § 20507(b)(1), and invoked 42 U.S.C. § 1983, but the district court did not address either. *See* Short App. 1–27, 31–56.

[2] In formulating the injunction, the district court conflated the session law with the codified law. Act 334 does not contain a section 5.5, but section 8 of Act 334 was codified at Indiana Code section 3-7-38.2-5.5. *See* Pub. L. No. 141-2020, § 8, 2020 Ind. Acts 1286, 1295.

rolls when an individual has expressly "authorized the cancellation" on a signed voter registration form comports with the NVRA because it is a "request by the registrant" for removal in Indiana. 52 U.S.C. § 20507(a)(3)(A). The Organizations did not fight this legislative fix, and the district court found no flaw in this procedure.

The only disputed provision of Act 334—Section 5.5(f)(2)—does not create the "yawning loophole" the Organizations fear because it can be fairly read to require Indiana to have a copy of a signed voter registration form authorizing cancellation of the voter's prior registration. Although part of Section 5.5(f)(2) plainly does not require the county to have a copy of the "actual voter signature" before cancelling a voter's registration, the preceding sentence of the law contemplates that the Election Division received "written notice" from another State before sending information to local officials. The meaning of "written notice" can be narrowly construed to require a voter's signed authorization cancelling prior registrations and foreclose insufficient written communications. The district court's refusal to accept this interpretation contravened traditional interpretive canons, as well as general separation-of-powers and federalism principles. Alternatively, even if the district court's broad interpretation were correct, the fact that the narrower interpretation would render the statute valid under the NVRA undermines the notion that the statute is facially invalid.

II. The district court further erred in crafting an overbroad and vague remedy. The district court skipped over the threshold requirement of finding a violation of federal law before granting injunctive relief. The court found only that Section

5.5(f)(2) ran afoul of the NVRA. Yet it enjoined other parts of Indiana's law—Section 5.5(d), (e), and (f)(1)—without any justification. And the rest of the injunction is too vague to be understood because it injects the word "directly" into the NVRA's exceptions to notice-and-waiting without clarifying its meaning. Because the district court erred when it found Act 334 violates the NVRA and in fashioning injunctive relief, the decision should be reversed.

ARGUMENT

This Court reviews the district court's decision to grant summary judgment de novo. *ADT Sec. Servs., Inc. v. Lisle-Woodridge Fire Prot. Dist.*, 672 F.3d 492, 498 (7th Cir. 2012). In evaluating a grant of summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (citation omitted). And "[w]here a permanent injunction has been issued based on a grant of summary judgment" the Court considers "whether the plaintiff has shown: (1) success ... on the merits; (2) irreparable harm; (3) that the benefits of granting the injunction outweigh the injury to the defendant; and, (4) that the public interest will not be harmed by the relief requested." *ADT*, 672 F.3d at 498 (citation omitted).

I. Act 334 Complies with the National Voter Registration Act

Act 334 complies with the NVRA because it authorizes election officials to remove a voter from the rolls only after hearing from the voter. Under the NVRA, a voter registration may be removed from the rolls owing to changed residence if the

voter "request[s] that his or her name be taken off the rolls." *Common Cause Indiana v. Lawson* (*Common Cause I*), 937 F.3d 944, 947 (7th Cir. 2019) (citing 52 U.S.C. § 20507(a)(3)(A)). Short of a request, "if a state wants to remove a name because it suspects that the voter has moved, it must follow the [the confirmation notice-and-waiting] procedures spelled out in section 20507(d)." *Id.*

Act 334 brings Indiana's law back into line with the NVRA. While Act 334 continues to utilize a data-sharing program, it restores the pre-2017 system under which a county office may cancel a voter's registration based on changed residence only if the voter has authorized the cancellation, Ind. Code § 3-7-38.2-5.5(e) (2020), the voter responds to the notice in writing confirming that she has moved, *id.* § 3-7-38.2-2(g)(2), or the voter fails to respond to the notice and fails to vote or appear to vote in two general elections, *id.* § 3-7-38.2-15. Act 334 also clarifies that a copy of the signed registration authorizing cancellation is required for a county to remove a voter from the rolls, *id.* § 3-7-38.2-5.5(f)(1), unless the county receives the "written notice" that the voter has authorized cancellation from the Election Division rather than another State, in which case the Election Division need not provide the county with "[a] copy of the actual voter signature," *id.* § 3-7-38.2-5.5(f)(2).

The district court nevertheless permanently enjoined the State from implementing Section 5.5(d)–(f) of the codified Act. Short App. 28, 57. Yet Section 5.5(d), (e), and (f)(1) unambiguously do precisely what the NVRA requires, and while Section 5.5(f)(2) is ambiguous, it is amenable to a saving construction.

A. Section 5.5(d), (e), and (f)(1) of codified Act 334 indisputably complies with the NVRA

1. Section 5.5(d) and (e) conditions removal on the voter's authorization, and Section 5.5(f)(1) allows county officials to rely on a signed voter registration containing such authorization

A signed voter registration form that authorizes the cancellation of prior registrations is a "request of the registrant" for removal. 52 U.S.C. § 20507(a)(3)(A). To determine the meaning of "at the request of the registrant," the Court "begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) (citation omitted). And in *Common Cause I*, the Court determined that "[t]he ordinary meaning of 'remov[al] . . . at the request of the registrant' is that *the registrant requests removal*." 937 F.3d at 960 (alteration and emphasis in original).

Act 334 adheres to "the NVRA's command that the state rely on the registrant herself" by requiring Indiana to have information from the voter authorizing cancellation of the voter's registration. *Id.* at 961. Section 5.5(d) and (e) of the codified Act conditions removal from the rolls on the voter authorizing cancellation or confirming, upon receiving notice, a changed residence. Ind. Code § 3-7-38.2-5.5(d)–(e) (2020); *see also id.* § 3-7-38.2-2(g)(2). Section 5.5 (d) and (e) fully complies with 52 U.S.C. § 20507(a)(3) as interpreted in *Common Cause I*.

Act 334 includes an additional directive permitting counties to use a signed voter registration application to determine that the voter had "authorized the cancellation" of a prior registration under 52 U.S.C. § 20507(a)(3). Specifically, Section 5.5(f)(1) of the codified Act provides that if a county voter registration office receives written information directly from another State, the other State must provide the

county with "a copy of the voter's signed voter registration application which indicates the individual authorizes cancellation of the individual's previous registration." Ind. Code § 3-7-38.2-5.5(f)(1) (2020).

Section 5.5(f)(1) accounts for the reality that some States, including Indiana, use voter registration forms that include an express authorization by the voter that her registration at a prior address should be canceled. For example, in Virginia, the voter registration form asks whether the registrant is registered to vote in another State, and if so, to indicate the State of previous registration and "authorize cancellation of my current registration."[3] *Virginia Voter Registration Application*, https://www.elections.virginia.gov/media/formswarehouse/veris-voter-registration/applications/Voter-Registration-Application.pdf. Section 5.5 (f)(1) honors the voter's express

[3] *See, e.g.*, *State of Delaware All-In-One Form to Register to Vote or Update Your Information,* https://elections.delaware.gov/pubs/stateform.pdf ("I hereby authorize cancellation of any previous registration."); *Hawaii Voter Registration Form*, https://elections.hawaii.gov/wp-content/uploads/Voter-Registration-and-Permanent-Absentee-Application_Form-Fillable.pdf (asks the voter if registered elsewhere and if so to "hereby authorize cancellation of my previous registration"); *Indiana Voter Registration Application*, https://forms.in.gov/download.aspx?id=9341 ("I authorize my voter registration at any other address to be cancelled."); *Michigan Voter Registration Application*, https://www.michigan.gov/documents/MIVoterRegistration_97046_7.pdf (requires the voter to certify "I authorize the cancellation of any previous registration"); *New Mexico Voter Registration Application*, https://portal.sos.state.nm.us/OVR/VRForms/VRFormEnglishFinal.pdf ("I further swear/affirm that I am authorizing cancellation of any prior registration to vote in the jurisdiction of my prior residence."); *North Carolina Voter Registration Application*, https://dl.ncsbe.gov/Voter_Registration/NCVoterRegForm_06W.pdf (requiring voter to agree "if I am registered elsewhere, I am canceling that registration at this time"); *South Dakota Voter Registration Form*, https://sdsos.gov/elections-voting/assets/VoterRegistrationFormFillable.pdf (requiring a voter to "authorize cancellation of my previous registration, if applicable"); *Vermont Application for Addition to the Checklist (Voter Registration Form)*, https://sos.vermont.gov/media/nesb43yw/2017-voter-app.pdf ("I authorize my name to be removed from the list of registered voters in any previous place where I was registered to vote."); *Wyoming Voter Registration Application*, https://sos.wyo.gov/Forms/Elections/General/VoterRegistrationForm.pdf ("that if registered in another county or state, I hereby request that my registration be withdrawn") (all form websites last visited December 4, 2020).

request and achieves the NVRA's mandate of maintaining accurate voter rolls, but only after receipt of the registrant's signed voter registration form which includes the individual's explicit authorization to cancel prior registrations.

The upshot is that Section 5.5(d), (e), and (f)(1) of codified Act 334 remedies the two defects this Court identified in Act 442 as it pertains to removing a voter from the rolls under 52 U.S.C. § 20507(a)(3)(A): Those provisions require county officials both to determine that the voter herself authorized cancellation of the Indiana registration and to have the voter's signed voter registration form authorizing cancellation if it receives the information directly from another State.

2. The Organizations do not dispute that Section 5.5(d)–(f)(1) is valid under the NVRA

Indeed, the validity of Section 5.5(d), (e), and (f)(1) is uncontested. With respect to the pre-2017 system resurrected by Section 5.5(d) and (e), the Organizations, the district court, and this Court were not troubled by that statutory process. The Organizations conceded early in this litigation that, prior to the passage of Act 442, "Indiana had a voter registration list maintenance statute that, on its face, included certain NVRA notice and confirmation procedures." *NAACP* R.1 at 8; *see also Common Cause* R.1 at 7-8. And on remand, the Organizations were satisfied by this aspect of the legislative fix contained in Act 334. *NAACP* R.137 at 1, 12–13; R.138 at 9. The district court likewise discussed Indiana's prior statutory scheme and considered it to be "consistent with the written confirmation notice-and-waiting procedures in the NVRA." Short App. 10, 40. This Court, too, spoke approvingly of Indiana's former process of following up by directly contacting the voter or "checking to

see if the registrar already received a written request from [the voter] to cancel her Indiana registration." *Common Cause I*, 937 F.3d at 957–59.

Nor have the Organizations ever contended that using a voter's signed registration form authorizing cancellation of prior registrations violates the NVRA. The Organizations instead have considered it to be the "minimum standard" for compliance. *See NAACP* R.137 at 27 ("That is, absent *possession* of a sufficient underlying document from the registrant herself, such as a voter registration form, Indiana may not purport to cancel at the 'request of the registrant.'"); *Common Cause* R.183 at 31 (same). In fact, the Organizations expressly disavowed a challenge to Section 5.5(f)(1) so long as the county registration office procures a signed voter registration form authorizing cancellation of previous registrations before cancelling the registration. *NAACP* R.144 at 7 n.5 ("To be clear, *Plaintiffs do not challenge on summary judgment this method as violating the NVRA*, so long as it requires, as the text of SEA 334 seems to, that the county voter registration office receive and review an actual voter registration form, signed by the voter, before cancelling a voter's registration record."); *Common Cause* R.198 at 7 n.5 (same).

The Organizations' refusal to challenge Section 5.5(f)(1) is unsurprising given that a voter's express written authorization to cancel a prior voter registrations cannot be understood as anything other than a "request by the registrant" for removal. A request is the "act" or "instance" of "asking for something" or "an expression of a desire or wish"—in this case, to be removed from the voter rolls in States of prior

registration. *Webster's Third New International Dictionary* 1929 (unabridged ed. 1986). And a registrant's signature on the request surely is "by the registrant."

So the unambiguous phrase "the registrant requests removal" is satisfied when an individual voter asks for or otherwise authorizes the cancellation of prior registrations in writing, for the voter has gone beyond the mere act of registering in another State and has unequivocally requested removal from Indiana's rolls. Indiana's revised law thus follows this Court's instruction that it "rely on the registrant herself" by looking to the steps the person took to revoke registration before removal. *Common Cause I*, 937 F.3d at 961.

B. Section 5.5(f)(2), properly construed, complies with the NVRA

The dispute over the validity of Act 334 hinges on a single sentence in Section 5.5(f)(2). Whereas Section 5.5(f)(1) governs when another State provides information directly to the county voter registration official, Section 5.5(f)(2) applies when the other State provides information to the Election Division, which then passes the information along to the county office. Ind. Code § 3-7-38.2-5.5(f) (2020). The first sentence of Section 5.5(f)(2) provides that "[i]f the election division forwards written notice from another state to an Indiana county voter registration official, the county should consider this notice as confirmation that the individual is registered in another jurisdiction and has requested cancellation of the Indiana registration." *Id.* § 3-7-38.2-5.5(f)(2). And the second sentence—the perceived problem—provides that "[a] copy of the actual voter signature is not required to be provided to the county

for the voter's status to be canceled if the written notice is forwarded by the election division." *Id.*

Construing the second sentence of Section 5.5(f)(2) to mean that Indiana can cancel a voter's registration without anyone in Indiana receiving the voter's signed authorization, the district court concluded that Section 5.5(f)(2) violates the NVRA because it "allows cancellation of voter registrations without direct contact from the voter and without the NVRA's notice-and-waiting protection." Short App. 22, 52. In doing so, the district court rejected the State's narrower interpretation, under which Indiana officials must have the same "written information" under (f)(2) as is required under (f)(1) before a voter's registration may be cancelled—a signed voter registration form authorizing cancellation of prior registrations.

The district court was wrong twice over: First, the court disregarded basic canons of statutory interpretation, along with separation-of-powers and federalism concerns, when it read the second sentence of Section 5.5(f)(2) in isolation and rejected the State's narrow construction of its own law that would avoid an NVRA conflict. Second, because the broader interpretation encompasses the narrower one, and because the narrower one does not run afoul of the NVRA, Section 5.5(f)(2) has valid applications and so cannot be facially invalid.

1. Section 5.5(f)(2) requires the Election Division to have the voter's signed registration form authorizing cancellation

When read in context, the second sentence of Section 5.5(f)(2) does not allow county officials to remove a voter from the rolls without the State receiving an authorization of cancellation. It merely excuses the Election Division from having to

send the signed authorization to the county, but the Election Division still must receive that before sending the information along to the county.

The interpretive rules applied in Indiana courts to ascertain the meaning of Indiana statutes support this narrow reading. Courts begin with the statutory language and, if the language is unambiguous, apply the plain meaning. But if the language is open to more than one reasonable interpretation, the courts apply interpretive canons to ascertain and effectuate the General Assembly's intent. *Anderson v. Gaudin*, 42 N.E.3d 82, 85 (Ind. 2015). One such canon requires the court to "consider the statute in its entirety, and … construe the ambiguity to be consistent with the entirety of the enactment." *Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 828 (Ind. 2011) (citation omitted). Another canon requires courts to construe statutes in a manner that avoids conflicts with other applicable laws. *West v. Office of Indiana Secretary of State*, 54 N.E.3d 349, 353 (Ind. 2016); *Morgan v. State*, 22 N.E.3d 570, 573–74 (Ind. 2014); *accord Skilling v. United States*, 561 U.S. 358, 405–06 (2010) (providing that a reviewing court must resort to "every reasonable construction" to save a statute's validity (citation omitted)). Additionally, under state law, a state agency's reasonable interpretation of a statute it is charged with implementing controls unless that interpretation is inconsistent with the statute itself. *Moriarty v. Indiana Dep't of Nat. Res.*, 113 N.E.3d 614, 619 (Ind. 2019).

Considering Act 334 in its entirety, Section 5.5(f)2) means that Indiana's state election officials (as opposed to county officials) must have a copy of the signed voter registration form authorizing cancellation before a voter's Indiana registration

can be cancelled. Section 5.5(f) clarifies what "written information" a county official may rely upon when determining whether a registrant "authorized the cancellation of any previous registration by the voter when the voter registered in another state." Ind. Code § 3-7-38.2-5.5(d)(3) (2020). Subsection (f)(1) clarifies that the written "information," must include a copy of the signed voter form authorizing registration when it is received directly from another State. Subsection (f)(2) is silent on the matter. It contemplates the Election Division serving as an intermediary between the other State and county officials, and requires the Election Division to have received "written notice" from another State. But the statute does not define "written notice," and the Organizations readily admit that it "is a broad[] concept" which could encompass a signed document by the voter authorizing cancellation of prior registrations or some other writing. *NAACP* R.137 at 13; R.138 at 10.

To resolve the ambiguity and harmonize the statute within the scope of the entire Act, "written information" referenced in the introductory clause of subsection (f) and in subsection (f)(1) should carry the same meaning as "written notice" in Section 5.5(f)(2). In other words, Section 5.5(f)(2) can be narrowly construed to require the Election Division to have received "written notice" in the form of a copy of the voter's signed voter registration form authorizing cancellation in the same way it is required when the county receives information directly from another State.

Any other resolution of the ambiguity would thwart the legislative aim of Act 334, which was enacted in the shadow of this Court's decision in *Common Cause I*. *See, e.g.*, *Leatherman v. State*, 101 N.E.3d 879, 884 (Ind. Ct. App. 2018) ("[W]hen

construing a statute, we presume that the legislature had in mind the history of the act and the decisions of the courts upon the subject matter of the legislation being construed." (cleaned up)); *accord Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020) ("We normally assume that Congress is aware of relevant judicial precedent when it enacts a new statute." (cleaned up)). Moreover, because Defendants are the officials charged with implementing it and have offered this narrow and reasonable interpretation, that interpretation should control under well-established principles of state law. *See, e.g.*, *Moriarty*, 113 N.E.3d at 619; *West*, 54 N.E.3d at 353.

In rejecting the State's saving construction, the district court ignored the whole of Section 5.5(f) and read only a part of (f)(2) in isolation, violating a basic tenet of statutory interpretation by construing that sentence in a vacuum. *See, e.g.*, *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 694 (7th Cir. 2020). Moreover, Section 5.5(f)(2) itself does not say what the district court thinks it says, for it does not relieve both the State and the county from having to obtain the voter's signed registration form authorizing cancellation of previous registrations. Rather, it merely relieves the *county* from having a copy of the "actual voter *signature*" and says nothing about what information the Election Division must possess before it forwards any information to the county. Therein lies the ambiguity, and the State's construction, which reads (f)(2) in the broader context of both Section 5.5(f) and Act 334 as a whole, requires the Election Division to have the same "written information" that the county must have when the other State communicates directly with the county.

This reasonable construction of Section 5.5(f)(2) saves the law from invalidity under the NVRA. As long as *Indiana* possesses of a copy of a signed communication from an Indiana registrant authorizing cancellation it has a "request of the registrant" sufficient to permit removal of the voter's name from the rolls under the NVRA. Moreover, Indiana law says that the state voter registration system "must be defined, maintained, and administered at the *state* level." Ind. Code § 3-7-26.3-4(a)(1) (2020). It does not matter whether the signed voter communication is in the hands of state or local election officials. The NVRA draws no such distinction.

If the district court harbored doubts over the State's narrow interpretation, it had several other options to avoid issuing a sweeping injunction against Act 334. For one thing, the court could have dismissed the suit as unripe because state officials have not yet had an opportunity to consider how the law will be implemented. *See, e.g.*, *Renne v. Geary*, 501 U.S. 312, 321–22 (1991) (holding that a challenge to a state law barring election candidate endorsements was not ripe because there was "no factual record of an actual or imminent application" of the state law); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 462–67 (1945) (explaining that federal courts should not invalidate a state law when it has not been implemented or construed and is open to a saving interpretations). Another option would have been for the district court to abstain until the state officials and the state courts sorted out the meaning of Act 334. *See, e.g.*, *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500–01 (1941); *Int'l College of Surgeons v. City of Chicago*, 153 F.3d 356, 360–61 (7th Cir. 1998). And still another option was for the district court to certify a

question of state law to the Indiana Supreme Court. *See, e.g.*, *McKesson v. Doe*, No. 19-1108, 2020 WL 6385692, at *2–*3 (U.S. Nov. 2, 2020); Ind. App. R. 64(A).

Instead of choosing from these options, the district court rejected a reasonable saving construction of an ambiguous state law, an interpretation which would have rendered all of Section 5.5(f) harmonious and internally consistent and which would have taken account of both the overall purpose of Act 334 and the background against which it was enacted. The district court erred in unnecessarily giving Section 5.5(f)(2) a broad interpretation as a hook for sweeping injunctive relief.

2. Even accepting the district court's broad interpretation, Section 5.5(f)(2) is not facially invalid under the NVRA

The district court compounded its interpretive error by facially invalidating Section 5.5(f)(2). Even if the court's broad reading of Section 5.5(f)(2) were correct, that provision still is not facially invalid. To succeed on a facial challenge, the Organizations had to show that "no set of circumstances exists under which the Act would be valid." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (citing *United States v. Salerno,* 481 U.S. 739, 745 (1987)).

Even accepting the district court's interpretation, there remain applications of Section 5.5(f)(2) that do not violate the NVRA because that broad interpretation includes the State's narrower interpretation. Consider: Even if Section 5.5(f)(2) is read not to *require* that the written information received by the Election Division be the same as the written information sent directly to the county by another State, no one has ever suggested that a signed registration form authorizing cancellation would fall outside of Section 5.5(f)(2). So there may be situations under the terms of

Section 5.5(f)(2) where the Election Division receives a signed voter registration authorizing cancellation and relays that information—with or without the actual document—to the county. In either situation, there is no NVRA violation because the State has the request of the registrant in hand. The district court's interpretation would also encompass a letter sent from the voter to the Election Division through another State's registrar indicating in no uncertain terms that the voter wishes to cancel her Indiana registration. Certainly, that would not run afoul of the NVRA.

The district court's action here exemplifies the reasons that "[f]acial challenges are disfavored." *Washington State Grange*, 552 U.S. at 450. Indiana has had no opportunity to implement Act 334. And its courts have had no occasion to construe the law in the context of actual disputes, or to accord the law a limiting construction to avoid conflict with federal law. The district court entertained the challenge without any evidence as to how the State anticipated implementing it, interpreting the statute "on the basis of [a] factually barebones record[]."[4] *Id.* (citation omitted); *see also Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990) (explaining that courts should not facially invalidate statutes "based upon a worst-case analysis that may never occur" (citation omitted)). In doing so, the district

[4] In its briefing below, the Organizations used remarks by Defendants and others to suggest that Defendants may interpret "written notice" in Act 334 in a manner that violates the NVRA. But this is inapposite to the Organizations' facial challenge to the law that Indiana officials never had an opportunity to implement. Further, the deposition testimony the Organizations relied upon was given in the context of their challenge to Act 442, testimony that was taken over two years before Act 334 was enacted. *Common Cause* R.183 at 34–35; *NAACP* R.137 at 34–35. And the recorded legislative testimony the Organizations relied upon as evidence of how Act 334 could be implemented amounts to nothing more than speculation and is improper under Indiana law. *See* Ind. Code § 2-5-1.1-16 (2020).

court "short circuit[ed] the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the [NVRA]." *Washington State Grange*, 552 U.S. at 451. Rather than "[e]xercis[e] judicial restraint" and free itself of a premature interpretation and unnecessary invalidation of state law, *id.*, the district court chose instead to invalidate on its face a statute that was amenable to a saving construction.

II. The Permanent Injunctions Are Overbroad and Vague

The district court's conclusion that Section 5.5(f)(2) of codified Act 334 violates the NVRA is both incorrect and insufficient to support the permanent injunctions. The injunctions are unlawful because they are both overbroad and vague: They are overbroad because they enjoin provisions of Act 334 without any determination that the provisions violate the NVRA, *see Henderson v. Box*, 947 F.3d 482, 487 (7th Cir. 2020), *petition for cert. filed* (U.S. June 15, 2020) (No. 19-1385), and vague because they prohibit the State from removing any Indiana registrant absent "a request or confirmation in writing *directly* from the voter" without describing what that means, *see* Fed. R. Civ. P. 65(d)(1)(C). So even if the district court's interpretation of Section 5.5(f)(2) stands, this Court should reverse the injunctions.

A. The permanent injunctions are overbroad because they enjoin more than the lone NVRA-offending provision

Basic equitable principles require an injunction to be limited to remedying the violation that justifies the injunction in the first place. *See, e.g.*, *Henderson*, 947 F.3d at 487 (explaining that "[a] remedy must not be broader than the legal justification for its entry"); *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 604–05

(7th Cir. 2007) (explaining that injunctive relief must be "tailor[ed] . . . to the scope of the violation found" (citation omitted)). The Supreme Court has called it a "settled rule that in federal equity cases the nature of the violation determines the scope of the remedy." *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (cleaned up). And "[w]here, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Id.* (cleaned up).

Accordingly, when a federal appellate court reviews an injunction issued against a state official, it must be especially rigorous in requiring that "*the remedy must be tailored to the violation*, rather than the violation's being a pretext for the remedy." *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 534 (7th Cir. 1997) (emphasis added). Federal courts must "always seek to minimize interference with legitimate state activities in tailoring remedies." *In re Diet Drugs Prods. Liab. Litig.*, 369 F.3d 293, 307 (3d Cir. 2004) (citation omitted).

The injunctions are fatally overbroad because they sweep further than the legal violation identified by the district court. Both injunction bar the State from implementing Section 5.5(d)–(f) of codified Act 334. Short App. 28, 57; *see* Ind. Code § 3-7-38.2-5.5(d)–(f) (2020). But the only provision the district court deemed inconsistent with the NVRA was Section 5.5(f)(2). On its face, then, the injunctions sweep much broader than the legal violation.

Nor can the broad injunctions be justified on the ground that enjoining Section 5.5(d), (e), and (f)(1) is necessary to remedy the violation caused by (f)(2). To recap, Section 5.5(d) and (e) restores the pre-2017 system that requires county officials to determine that the voter "authorized the cancellation" of her registration or to follow-up with the voter by mail before removal. *Compare* Ind. Code § 3-7-38.2-5(d)–(e) (2016), *with* Ind. Code § 3-7-38.2-5.5(d)–(e) (2020). And Section 5.5(f)(1) authorizes the county to consider a signed voter registration form that it receives from another State when determining whether the voter "authorized the cancellation." Ind. Code § 3-7-38.2-5.5(f)(1) (2020). Section 5.5(f)(2), on the other hand, allows a county to cancel a voter's registration *without* a copy of the voter's signed form if the "written information" from out-of-state first passes through the Election Division. Nothing about the statute remotely suggests that subsections (d), (e), and (f) have to be enjoined to remedy the violation caused by (f)(2).

The district court's sweeping injunction is particularly remarkable because not only did it fail to find that the Organizations had shown that these portions of Act 334 ran afoul of the NVRA, but the Organizations did not even contend that Section 5.5(d), (e), or (f)(1) violated the NVRA on its face. The only disputed provision was Section 5.5(f)(2), and a lawfully tailored injunction would have prevented only Section 5.5(f)(2) from going into effect. There certainly was no justification for the entry of injunctive relief that transcended the narrow NVRA violation found. Accordingly, the district court's decision to broadly sweep Section 5.5 (d), (e), and

(f)(1) within its permanent injunction absent any adjudication that the provisions violated federal law should be reversed.

B. The injunctions are unlawfully vague because they do not define what it means to receive a request or written confirmation "directly" from the voter

Yet another basic principle of equitable relief is "that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits." *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 444 (1974). In particular, injunctions must "describe in reasonable detail . . . the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(C). The specificity requirement is "designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (citations omitted).

The district court's injunction is too vague to be understood because it includes an unclear term without clarifying its meaning. After enjoining Act 334, the district court further prohibited the State from "otherwise removing any Indiana registrant from the list of eligible voters because of a change in residence absent: (1) a request or confirmation in writing *directly* from the voter that the voter is ineligible or does not wish to be registered." Short App. 28, 57 (emphasis added). Although the district court seemingly plucked this language from *Common Cause I*, the Court's opinion itself acknowledges the uncertain scope of the extra-statutory term "directly." The Court explicitly left "for another day the question whether a state is

entitled to rely on documents passed through multiple hands." *Common Cause Indiana v. Lawson* (*Common Cause I*), 937 F.3d 944, 961 (7th Cir. 2019). The injunction does not address that question or take any steps to define what it means to receive something "directly" from the voter.

As the Supreme Court explained in *Schmidt*, "the specificity provisions of Rule 65(d) are no mere technical requirements." 414 U.S. at 476. The Rule "requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Id.* Even though the Organizations have conceded in the litigation that the State's receipt of a signed voter registration form authorizing removal from out-of-state election officials is sufficient, *NAACP* R.144 at 7 n.5, the injunctions themselves do not identify the line between required direct communications and unlawful indirect communications, while at the same time exposing Defendants to contempt proceedings should they incorrectly perceive the district court's meaning. The permanent injunctions should be reversed.

CONCLUSION

For the foregoing reasons, the Organizations cannot prevail on the merits of their NVRA claim and, accordingly, the State respectfully requests that this Court reverse and vacate the permanent injunctions.

Respectfully submitted,

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FED. R. APP. P. 32(g) WORD COUNT CERTIFICATE

1. Pursuant to Fed. R. App. P. 32(g), the undersigned counsel for the appellees certifies that this brief complies with the type-volume limitations of Circuit Rule 32(c) because the brief contains 8,672 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook typeface, font size 12 for the text and font size 11 for the footnotes. *See* Cir. R. 32(b).

/s/ Aaron T. Craft
Aaron T. Craft
Section Chief, Civil Appeals

REQUIRED SHORT APPENDIX

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

By: */s/ Aaron T. Craft*
Aaron T. Craft
Section Chief, Civil Appeals

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

COMMON CAUSE INDIANA, Plaintiff, v. CONNIE LAWSON in her official capacity as Secretary of State of Indiana, J. BRADLEY KING in his official capacity as Co-Director of the Indiana Election Division, and ANGELA NUSSMEYER in her official capacity as Co-Director of the Indiana Election Division, Defendants.	)	Case No. 1:17-cv-03936-TWP-MPB

ORDER ON DEFENDANTS' MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on a Motion to Dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(1) by Defendants Connie Lawson ("Lawson"), Bradley King ("King"), and Angela Nussmeyer ("Nussmeyer") (collectively, "Defendants") (Filing No. 180). Also pending before the Court is a Motion for Summary Judgment filed pursuant to Rule 56 by the Plaintiff Common Cause Indiana ("Common Cause") (Filing No. 182). Common Cause initiated this lawsuit to challenge the legality of Indiana's voter registration laws on the basis that they violate the procedural safeguards established by the National Voter Registration Act of 1993, 52 U.S.C. §§ 20507–20511 ("NVRA"). On June 8, 2018, the Court entered a preliminary injunction against the Defendants, which they appealed (Filing No. 103). The Seventh Circuit affirmed the Court's issuance of the preliminary injunction and remanded the case for further proceedings (Filing No. 154). The pending Motions ensued after the remand. For the reasons discussed below, the Court

denies the Defendants' Motion to Dismiss and **grants** Common Cause's Motion for Summary Judgment.

I. BACKGROUND

The NVRA was enacted to reduce barriers to applying for voter registration, to increase voter turnout, and to improve the accuracy of voter registration rolls. The NVRA placed specific requirements on the states to ensure that these goals were met. It established procedural safeguards to protect eligible voters against disenfranchisement and to direct states to maintain accurate voter registration rolls. Under the NVRA, a voter's registration may be removed from the rolls if the voter requests to be removed, if they die, because of a criminal conviction or mental incapacity, or because of a change in residency. The NVRA provides, "In the administration of voter registration for elections for Federal office, each State shall . . . conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters." 52 U.S.C. § 20507(a)(4).

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

> A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant-
>
> (A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or
>
> (B) (i) has failed to respond to a notice described in paragraph (2); and
> (ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of

> the second general election for Federal office that occurs after the date of the notice.

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

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

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

Defendant Lawson is the Indiana Secretary of State, and, in this capacity, she is the chief election official in the State of Indiana. She is charged with performing all ministerial duties related to the state's administration of elections. Ind. Code §§ 3-6-3.7-1, 3-6-4.2-2(a). Defendants King and Nussmeyer are co-directors of the Indiana Election Division within the Secretary of State's office. In this capacity, King and Nussmeyer are the chief state election officials responsible for the coordination of Indiana's responsibilities under the NVRA. Defendants King

and Nussmeyer thus are charged with coordinating county voter registration. They are considered Indiana's "NVRA officials." Ind. Code § 3-7-11-1; Filing No. 91-1 at 1; Filing No. 91-2 at 1.

Each county in the State of Indiana has either a county election board or a county board of registration. Ind. Code §§ 3-6-5-1, 3-6-5.2-3. Pursuant to the official policies, guidance, and standard operating procedures issued by King and Nussmeyer as the co-directors, the individual county boards conduct elections and administer election laws within their county. Ind. Code §§ 3-6-5-14, 3-6-5.2-6. The county boards are responsible for maintaining the voter registration records in their county by adding, updating, and removing voter registrations (Filing No. 74-1 at 7).

While the county boards are responsible for actually physically maintaining their voter registration records, list maintenance is dictated by the policies, procedures, and guidance established by the election division co-directors and constrained by the election division's business rules governing the electronic statewide voter registration system (Filing No. 74-1 at 6–7). This electronic statewide voter registration system is "a single, uniform, official, centralized, and interactive statewide voter registration list." Ind. Code §§ 3-7-26.3-3, 3-7-26.3-4. King and Nussmeyer are responsible for building, managing, and maintaining the statewide voter registration system, which includes creating the protocols within the system and issuing official policies, guidance, and standard operating procedures to guide the county boards on their duties under state and federal law. They also provide training to the county boards (Filing No. 74-1 at 6–7); Ind. Code § 3-6-4.2-14. The official guidance from King and Nussmeyer as reflected in the protocols, documents, and trainings are mandatory (Filing No. 74-1 at 14).

Regarding the electronic statewide voter registration system, King and Nussmeyer establish the standard operating procedures and the business rules that determine how the system

operates. This includes dictating what information will be provided to county election officials to help them maintain their individual county voter rolls, and it also dictates what actions the county officials are able to take within the "online portal" of the statewide system (Filing No. 74-1 at 6–7, 19; Filing No. 74-4 at 7).

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

At the time that Common Cause filed this lawsuit in October 2017, Indiana participated in the Interstate Voter Registration Crosscheck Program ("Crosscheck") as a method for identifying voters who may have become ineligible to vote in Indiana because of a change in residence. Ind. Code § 3-7-38.2-5(d). Crosscheck is an interstate program that was created and administered by the Kansas Secretary of State. The program was designed to identify voters who have moved to and registered to vote in another state. This was accomplished by comparing voter registration data provided by participating states. The participating states would submit their voter registration data to Crosscheck, which then compared the first name, last name, and birthdate of registered voters to identify possible "matches" or duplicate voter registrations. The output data of possible matches was then sent back to the participating states. The individual states would then decide what to do with the Crosscheck data. Crosscheck did not receive or distribute primary voter

registration documents, and it did not include signatures or former addresses among the identifying information provided to participating states (Filing No. 74-10).

During the time that Indiana participated in Crosscheck, each year Indiana would provide its statewide voter registration list to the Kansas Secretary of State to compare the data with the other data from other participating states through Crosscheck. Crosscheck then sent a list of possible matches back to Indiana, and within thirty days of receiving this list, Indiana's statute required that the "NVRA official" (in this case King and Nussmeyer) "shall provide [to] the appropriate county voter registration office" the name and any other information obtained on any Indiana voters who share "identical . . . first name, last name and date of birth of [a] voter registered in [another] state." Ind. Code § 3-7-38.2-5(d). While the statute required King and Nussmeyer to provide this voter data to the county election officials, they only forwarded the data to the county officials if the data met a certain "confidence factor," which King and Nussmeyer determine based on additional matching data points such as address, middle name, or social security number (Filing No. 74-1 at 11–12; Filing No. 74-4 at 8).

After voter data was provided to the county officials, they determined whether the voter identified as a possible match was the same individual who was registered in the county and whether the voter registered to vote in another state on a date after they had registered in Indiana. Ind. Code § 3-7-38.2-5(d). Within the statewide voter registration system, the county official could select for each possible matched voter registration "match approved," "match rejected," or "research needed." (Filing No. 74-11 at 6.) The information provided from Crosscheck to the county officials in the statewide voter registration system was limited to the personal data of voters; it did not include any underlying source documents (Filing No. 74-2 at 7–8). County officials generally do not review or request any material outside of the Crosscheck data provided to them

by King and Nussmeyer. No written guidance, manual, step-by-step instruction, or standard operating procedure states that any additional inquiry is required or recommended.

Under the Crosscheck program, the statewide voter registration system did not provide information about the dates of registration in Indiana and other states to assist in determining what state registration occurred first (Filing No. 74-11 at 6; Filing No. 74-1 at 13). Some county officials just assumed that the Indiana registration predated the other state's registration, which would lead to cancelling the Indiana registration (Filing No. 74-3 at 11; Filing No. 74-2 at 9; Filing No. 74-6 at 9; Filing No. 74-5 at 13). Even if dates of registration information was provided, the information was incomplete or inconsistent because states that participated in Crosscheck did not always populate the registration date field, and they had different policies for determining which date to use, so there was no uniform practice among states. Some states did not even provide a definition for "date of registration." (Filing No. 74-4 at 9–10; Filing No. 74-1 at 16; Filing No. 74-12 at 2.)

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

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

> (d) The NVRA official shall execute a memorandum of understanding with the Kansas Secretary of State. Notwithstanding any limitation under IC 3-7-26.4

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

(Emphasis added.)

However, Indiana Senate Enrolled Act 442 (2017) ("SEA 442") amended this Code section, effective July 1, 2017, to read:

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

> information obtained under this subsection concerning that voter, if the first name, last name, and date of birth of the Indiana voter is identical to the first name, last name, and date of birth of the voter registered in the other state. **The county voter registration office shall determine whether the individual: (1) identified in the report provided by the NVRA official under this subsection is the same individual who is a registered voter of the county; and (2) registered to vote in another state on a date following the date that voter registered in Indiana.**
>
> **(e) If the county voter registration office determines that the voter is described by subsection (d), the county voter registration office shall cancel the voter registration of that voter.**

(Emphasis added.)

SEA 442 removed from the statute the requirement to determine whether the individual voter authorized the cancellation of any previous registrations when they registered in another state. The amendment also removed the requirement to send an address confirmation notice to the voter when cancellation had not been confirmed by the voter. Before the statute was amended, pursuant to business rules set by King and Nussmeyer, whenever a county official determined that a possible match was indeed truly a match and approved the match, that selection in the statewide voter registration system would generate a confirmation notice that was mailed to the voter. This mailing allowed a person to confirm their registration at the current address, update their registration, or cancel it. If the voter did not respond to the mailer, they would be placed in "inactive" status. After being placed in inactive status, only if the voter did not vote over the course of the next two federal general election cycles could Indiana cancel the voter's registration (Filing No. 74-4 at 14).

Also prior to the amendment by SEA 442, county officials were required to confirm that voters who appeared to have registered in another state had also authorized the cancellation of any previous registration by the voter when the voter registered in the other state. If the county official could not determine that the voter had authorized the cancellation of any previous registration, the

state statute required the county board to send an address confirmation notice to the Indiana address of the voter. This was consistent with the written confirmation notice-and-waiting procedures in the NVRA at 52 U.S.C. § 20507(d). However, this requirement was removed by SEA 442. SEA 442 removed the requirement to make the determination that an individual "authorized the cancellation of any previous voter registration" and the requirement to send an "address confirmation notice." Under SEA 442, a county official's approval of matches would generate a cancellation of the voter registration rather than a notice mailer. This resulted in cancellation of a voter registration without following the notice-and-waiting requirement for approved matches (Filing No. 74-4 at 12).

During the enactment process of SEA 442, Common Cause's single fulltime employee and policy director, Julia Vaughn, testified on behalf of Common Cause before the state legislature and also spoke with Lawson's general counsel to explain how SEA 442 would injure Indiana voters and threaten their right to vote as well as how it would violate the NVRA. These lobbying efforts took time away from other work and issues to which Common Cause could have devoted its time. After the statute's amendment, Common Cause devoted time and resources in conducting activities such as training sessions aimed at educating voters and community activists about the increased risk of erroneous voter registration cancelations. Because of SEA 442, Common Cause changed some of its training materials to address the increased risk of voters being wrongly removed from the voter rolls (Filing No. 74-24 at 2–4).

Common Cause filed this lawsuit on October 27, 2017, seeking declaratory and injunctive relief, requesting that the Court declare Indiana Code § 3-7-38.2-5(d)–(e) violates the NVRA and enjoining Indiana from implementing and enforcing the amended statute (Filing No. 1). After the lawsuit was initiated, the Indiana General Assembly enacted House Enrolled Act 1253 ("HEA

1253"), which went into effect on March 15, 2018. HEA 1253 added "confidence factors" to Indiana Code § 3-7-38.2-5(d), thereby codifying King and Nussmeyer's policy of providing to the county officials only those registrations that met certain "match criteria."

On March 8, 2018, Common Cause filed a Motion for Preliminary Injunction (Filing No. 74; Filing No. 75). After hearing the parties' oral arguments, the Court determined that each of the factors for the issuance of a preliminary injunction weighed in favor of Common Cause. Therefore, on June 8, 2018, the Court entered a preliminary injunction against the Defendants, "prohibiting [them] from taking any actions to implement SEA 442 until this case has been finally resolved." (Filing No. 103 at 27.) The Defendants appealed the issuance of the preliminary injunction, and on August 27, 2019, the Seventh Circuit affirmed the Court's issuance of the preliminary injunction and remanded the case for further proceedings (Filing No. 154).

On October 30, 2019, the Court stayed this matter until May 1, 2020, to see whether the Indiana General Assembly would make any changes to SEA 442 that might affect the case (Filing No. 162; Filing No. 171 at 2). "On March 21, 2020, Governor Holcomb signed into law SEA 334, which amends SEA 442." (Filing No. 168 at 2; *see also* Filing No. 168-1.)

SEA 334 amended SEA 442, voided Indiana's memorandum of understanding with the Kansas Secretary of State, withdrew Indiana from participation in Crosscheck, and established the Indiana Data Enhancement Association ("IDEA") in place of Crosscheck. IDEA is functionally identical to Crosscheck in that it receives member states' voter lists and returns purported matches. The "NVRA official" (in this case King and Nussmeyer) administers IDEA (Filing No. 184-3 at 8–11 (SEA 334 §§ 5.1(a)–(b), 5.5(a)–(b))). SEA 334 requires that, "[n]ot later than July 1, 2020, the NVRA official shall adopt an order for the administration of voter list maintenance programs to be performed by IDEA." *Id.* at 10 (SEA 334 § 5.5(b)). "If the NVRA official does not adopt

an order by July 1, 2020, . . . the secretary of state shall adopt or amend the order." *Id.* Thus, the oversight and administration of IDEA are placed in the Defendants.

Under SEA 334, IDEA uses a "matching" system, and within thirty days of comparing data from other states, the NVRA official is to provide to county officials a list of all Indiana voters having (1) an "identical" "first name, last name, and date of birth of the voter registered in the other state," and (2) whose records meet the "confidence factor" threshold. *Id.* at 11 (SEA 334 § 5.5(c)). IDEA does not collect or disseminate the actual voter registration documents underlying its "matches" and does not involve direct contact with voter registrants. *Id.* at 10–12 (SEA 334 § 5.5).

SEA 334 directs,

> (d) The county voter registration office shall determine whether the individual:
>
> > (1) identified in the report provided by the NVRA official under subsection (c) is the same individual who is a registered voter of the county;
> > (2) registered to vote in another state on a date following the date that voter registered in Indiana; and
> > (3) authorized the cancellation of any previous registration by the voter when the voter registered in another state.
>
> (e) If the county voter registration office determines that the voter is described by subsection (d), the county voter registration office shall cancel the voter registration of that voter. If the county voter registration office determines that the voter is described by subsection (d)(1) and (d)(2), but has not authorized the cancellation of any previous registration, the county voter registration office shall send an address confirmation notice to the Indiana address of the voter.

(Filing No. 184-3 at 11–12 (SEA 334 § 5.5(d)–(e)).)

SEA 334 further provides,

> (f) The county voter registration office may rely on written information provided either directly by a voter registration office in another state or forwarded from the election division from the office in the other state as follows:
>
> > (1) If this information is provided directly from the other state to the Indiana county voter registration official, the out-of-state voter registration official must provide a copy of the voter's signed voter registration application which

> indicates the individual authorizes cancellation of the individual's previous registration.
> (2) If the election division forwards written notice from another state to an Indiana county voter registration official, the county should consider this notice as confirmation that the individual is registered in another jurisdiction and has requested cancellation of the Indiana registration. A copy of the actual voter signature is not required to be provided to the county for the voter's status to be canceled if the written notice is forwarded by the election division.
>
> County voter registration officials shall review the date the individual registered out of state and the date the individual registered in Indiana to confirm which registration is more recent when performing the officials' analysis under this subsection.

Id. at 12 (SEA 334 § 5.5(f)).

After the enactment of SEA 334, the stay in this matter was lifted in early May 2020 (Filing No. 169), after which the Defendants filed their Motion to Dismiss (Filing No. 180), and Common Cause filed its Motion for Summary Judgment (Filing No. 182).

II. LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(1) challenges the court's subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The burden of proof is on the plaintiff, the party asserting jurisdiction. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003), *overruled on other grounds by Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012) (en banc). "The plaintiff has the burden of supporting the jurisdictional allegations of the complaint by competent proof." *Int'l Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1210 (7th Cir. 1980). "In deciding whether the plaintiff has carried this burden, the court must look to the state of affairs as of the filing of the complaint; a justiciable controversy must have existed at that time." *Id.*

"When ruling on a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the district court must accept as true all well-pleaded factual allegations, and draw reasonable inferences in favor of the plaintiff." *Ezekiel v. Michel*, 66 F.3d

894, 897 (7th Cir. 1995) (citation omitted). Furthermore, "[t]he district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Id.* (citation and quotation marks omitted).

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 489–90 (7th Cir. 2007). In ruling on a motion for summary judgment, the court reviews "the record in the light most favorable to the non-moving party and draw[s] all reasonable inferences in that party's favor." *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009) (citation omitted). "However, inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion." *Dorsey v. Morgan Stanley*, 507 F.3d 624, 627 (7th Cir. 2007) (citation and quotation marks omitted). Additionally, "[a] party who bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial." *Hemsworth*, 476 F.3d at 490 (citation omitted). "The opposing party cannot meet this burden with conclusory statements or speculation but only with appropriate citations to relevant admissible evidence." *Sink v. Knox County Hosp.*, 900 F. Supp. 1065, 1072 (S.D. Ind. 1995) (citations omitted).

"In much the same way that a court is not required to scour the record in search of evidence to defeat a motion for summary judgment, nor is it permitted to conduct a paper trial on the merits of [the] claim." *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001) (citations and quotation marks omitted). "[N]either the mere existence of some alleged factual dispute between the parties nor the existence of some metaphysical doubt as to the material facts is sufficient to defeat a motion for summary judgment." *Chiaramonte v. Fashion Bed Grp., Inc.*, 129 F.3d 391, 395 (7th Cir. 1997) (citations and quotation marks omitted).

III. DISCUSSION

The Defendants ask the Court to dismiss this action on the basis that the case is now moot and, therefore, subject matter jurisdiction no longer exists because SEA 442—the law challenged by Common Cause in its Complaint—was amended by SEA 334. In contrast, Common Cause asks the Court to enter summary judgment in its favor and to enter a permanent injunction prohibiting the Defendants from implementing Indiana's election laws that violate the NVRA. The Court will first address the Motion to Dismiss and then turn to the Motion for Summary Judgment.

A. Defendants' Motion to Dismiss

In their Motion to Dismiss, the Defendants argue that the Court lacks subject matter jurisdiction to hear this case because there is no longer a live case or controversy. They explain that Article III of the United States Constitution limits the jurisdiction of federal courts to cases and controversies, which "requires an actual controversy at all stages of review, not merely at the time the complaint is filed." *Ciarpaglini v. Norwood*, 817 F.3d 541, 544 (7th Cir. 2016) (internal citation and quotation marks omitted). The Defendants argue that dismissing moot cases is appropriate because a moot case runs afoul of the "live case or controversy" requirement.

The Defendants argue that, in this case, Common Cause's claim centers on Indiana's participation in Crosscheck and the enforcement of SEA 442 and the resulting violation of the NVRA. However, the Defendants assert, intervening events have occurred, thereby mooting the claim brought by Common Cause. The Indiana General Assembly amended SEA 442 with the enactment of SEA 334, and Indiana has withdrawn from participation in Crosscheck. They argue there is no likelihood that Indiana will again participate in Crosscheck as it has been indefinitely suspended. The relief sought by Common Cause has been fully satisfied because SEA 442 will not be enforced as it has been amended, and Indiana will no longer participate in Crosscheck. Thus, the Defendants argue, there is no longer a case or controversy over the enforcement of SEA 442 and participation in Crosscheck. The Defendants assert, with no live controversy and with the relief sought already provided, the Court lacks subject matter jurisdiction to consider this case any further.

The Defendants further argue that Common Cause's claim specifically addresses SEA 442, and any possible claims that Common Cause alleges regarding SEA 334 (the new 2020 law) must be addressed in a new, separate lawsuit subject to discovery and a full hearing of the issues. SEA 442 involved participation in Crosscheck, and SEA 334 "ameliorated the alleged violations that existed under the previous law. Any alleged violations under SEA 334, would be entirely new claims, and should be treated as such." (Filing No. 181 at 9.)

In response, Common Cause explains that this case is not about the Crosscheck program as the Defendants have characterized the case. Rather, Common Cause filed this lawsuit to enforce the NVRA's notice-and-waiting requirements. Common Cause explains that SEA 442 allowed Indiana to cancel voter registrations without complying with the notice-and-waiting requirements of the NVRA. Common Cause sought a preliminary injunction on the basis that Indiana's election

law failed to follow the provisions of the NVRA, and this Court and the Seventh Circuit held that the failure to follow the notice-and-waiting requirements violated the NVRA.

Common Cause points out that when a challenged law "is repealed or amended mid-lawsuit—a 'recurring problem when injunctive relief is sought'—the case is not moot if a substantially similar policy has been instituted or is likely to be instituted." *Smith v. Exec. Dir. of Ind. War Mems. Comm'n*, 742 F.3d 282, 287 (7th Cir. 2014) (internal citation omitted). Common Cause acknowledges that SEA 334 amended SEA 442; however, it asserts, SEA 334 kept the same impermissible voter cancellation procedures, and it injures Common Cause and Indiana voters in the same manner as SEA 442. SEA 334 replaced the Crosscheck program with the identical IDEA program. And SEA 334 still allows voter cancellation based on data provided by other states, without any direct voter contact, and without following the NVRA's notice-and-waiting procedures. Therefore, this lawsuit is not moot because SEA 334 continues the same NVRA violations that occurred under SEA 442, and the Court can award relief by enjoining the ongoing NVRA violations.

Concerning the Defendants' argument that any claims relating to SEA 334 must be brought in a new lawsuit, Common Cause asserts that granting the Defendants' Motion to Dismiss and requiring a new lawsuit challenging SEA 334 would unnecessarily waste judicial resources. The Defendants' suggestion would require a new lawsuit challenging the same provision of the Indiana Code based on the same section of the NVRA because of the same wrongful conduct of the same Defendants. The parties would face the same motions for preliminary injunction, to dismiss, and for summary judgment, and they would repeat the same discovery and prepare for trial based on insignificant amendments to a law that is frequently amended. The Court and the parties should not be subjected to such a waste of resources or the burden of relitigating indistinguishable claims.

In reply, the Defendants argue that this case really is about Crosscheck, and further, Common Cause misreads SEA 334. They assert that the "plain language of SEA 334 provides that if another state provides information to an Indiana county voter official, the other state must provide a copy of the voter's signed voter registration application which indicates the individual authorizes cancellation of the individual's previous registration. SEA 334 § 8(f)(1)." (Filing No. 194 at 2.) The Defendants argue the provisions of SEA 334 are significantly different from SEA 442, so this case about SEA 442 is moot, and any claims pertaining to SEA 334 must be brought in a new action.

After a careful review of SEA 442, SEA 334, the Complaint, and the Court's Order issuing the preliminary injunction, the Court concludes that this case is not mooted by the enactment of SEA 334. Common Cause's arguments are well-taken. A case does not become moot if the amendment to the challenged law does not fully resolve the problem at issue in the case. The gravamen of Common Cause's Complaint is that Indiana's election law violates the NVRA by allowing cancellation of voter registrations without direct contact from the voter or, alternatively, providing notice to the voter and then waiting two election cycles before cancelling the voter registration. This Court and the Seventh Circuit understood this to be the issue when granting and affirming injunctive relief.

While SEA 334 amended SEA 442 and replaced Crosscheck with IDEA, the issue raised by the Complaint remains—allowing cancellation of voter registrations without direct contact from the voter or, alternatively, providing notice to the voter and then waiting two election cycles before cancelling the voter registration. SEA 334 expressly provides,

> If the election division forwards written notice from another state to an Indiana county voter registration official, the county should consider this notice as confirmation that the individual is registered in another jurisdiction and has requested cancellation of the Indiana registration. A copy of the actual voter

> signature is not required to be provided to the county for the voter's status to be canceled if the written notice is forwarded by the election division.

(Filing No. 184-3 at 12 (SEA 334 § 5.5(f)(2)).) Section 5.5(f)(2) allows cancellation of voter registrations without direct contact from the voter and without the NVRA's notice-and-waiting protection. Therefore, an actual controversy—the same controversy raised in the Complaint—still remains between the parties, and the Court is able to provide effectual relief; thus, the case is not moot. Subject matter jurisdiction still exists in this Court. The Court agrees with Common Cause's position that requiring a new lawsuit for SEA 334 would be an unnecessary waste of the Court's and the parties' resources and time. The Defendants' Motion to Dismiss is **DENIED**.

B. Common Cause's Motion for Summary Judgment

Common Cause filed its Motion for Summary Judgment, asking the Court to enter summary judgment in its favor and to permanently enjoin the Defendants from implementing Indiana's election laws that would allow county officials to remove voters' registrations because of a change in residence without a request or confirmation in writing directly from the voter that the voter is ineligible or does not wish to be registered or without the NVRA's notice-and-waiting protections.

In support of its Motion for Summary Judgment, Common Cause asserts similar arguments it made in opposition to the Defendants' Motion to Dismiss. Common Cause argues that SEA 334, like its predecessor SEA 442, violates the NVRA by allowing cancellation of a voter's registration without direct contact with the registered voter. SEA 334 permits cancellation without a request from the registered voter and without following the notice-and-waiting procedures.

Common Cause asserts,

> The District Court has already made factual findings consistent with the foregoing descriptions of the NAACP, the League, and Common Cause Indiana, their missions, and their efforts to counteract the effects of SEA 442, . . . [and]

> Plaintiffs['] actions are ongoing, as SEA 334 is substantially similar to SEA 442. Since the enactment of SEA 334, Plaintiffs have redoubled their efforts.

(Filing No. 183 at 27.) Common Cause further points out,

> Both this Court and the Seventh Circuit have ruled on the meaning of relevant NVRA requirements, which now operate as law of the case. Specifically, the Seventh Circuit affirmed that the NVRA requires that Indiana have "direct contact with the voter" prior to any removal from the voter registration rolls. *See Common Cause*, 937 F.3d at 958 ("Indiana insists that [SEA 442] complies with the NVRA, despite the fact that it omits any direct contact with the voter . . . . The state attempts to trivialize that omission, but a review of the NVRA reveals that it is fatal.").

Id. at 29.

Common Cause supports its position with additional language from this Court's and the Seventh Circuit's decisions from earlier in this litigation:

> The Court "determine[d] that Plaintiffs have a high likelihood of success on the merits of their claim that SEA 442 violates some of the requirements of the NVRA and threatens disenfranchisement of eligible voters." *Id.* at 661. The Court found that SEA 442 removed the NVRA's "simple procedural safeguard[]" that "a state 'shall not remove the name of a registrant from the official list of eligible voters ... on the ground that the registrant has changed residence unless the registrant,' (1) 'confirms in writing that [they have] changed residence,' or (2) has failed to respond to a mailed notification and has not voted to two federal election cycles." *Id.* (quoting 52 U.S.C. § 20507(d)(1)); *see also id.* at 650.

(Filing No. 183 at 13–14.)

> The Seventh Circuit affirmed this Court "was correct to find that the Organizations are likely to succeed on the merits of their challenge," *Common Cause*, 937 F.3d at 949. The Court also held that the NVRA "forbids a state from removing a voter from that state's registration list unless: (1) it hears *directly* from the voter via a 'request' or a 'confirm[ation] in writing' that the voter is ineligible or does not wish to be registered; or (2) the state goes through the statutorily prescribed [notice and waiting process]. Both of these avenues focus on *direct* contact with the voter." *Id.* at 959 (emphases added; second alteration in original).

Id. at 14.

Common Cause argues that, based on the clear law of the case set forth above, a permanent injunction prohibiting implementation of SEA 334 is appropriate because SEA 334 commits the

same error as SEA 442, which has been determined to be fatal to the Indiana statute. It allows for cancellation of a voter's registration without any direct contact with the registered voter. Like SEA 442, SEA 334 ignores the NVRA's requirement of either a request from the registrant or confirmation in writing that the registrant has changed residence. And it allows cancellation without utilizing the notice-and-waiting procedures.

In response to the Motion for Summary Judgment, the Defendants advance similar arguments they made in support of their Motion to Dismiss. They argue that Common Cause's case is really about participation in Crosscheck and SEA 442's elimination of a mailer confirmation procedure. However, they assert, SEA 334 has withdrawn Indiana from participation in Crosscheck, and it requires county officials to determine whether the voter cancelled previous registrations or to send a confirmation to the individual's address before cancelling the registration, pointing to SEA 334 §§ 5.1, 5.5. The Defendants argue that the amendments to SEA 442 found in SEA 334 put Indiana's election laws into compliance with the NVRA's requirements, and, thus, summary judgment is not appropriate.

The Defendants argue,

> SEA 334 explicitly provides in Section 8(f)(1) that if a county receives information directly from another state, and not from the Indiana Election Division, "the out-of-state voter registration official must provide a copy of the voter's signed voter registration application which indicates the individual authorizes cancellation of the individual's previous registration."

(Filing No. 197 at 11.) They further argue,

> Under the doctrine of statutory construction, considering Section 8(f)(1) and 8(f)(2) together, Section 8(f)(1) implies that under Section 8(f)(2), if the Indiana Election Division notifies a county official that the voter cancelled registration, the Indiana Election Division also received a copy of the voter's signed voter registration application authorizing cancellation.

Id. at 12.

The Defendants again argue that Common Cause may not present a new claim or argument in its summary judgment motion nor can it amend the pleadings via a summary judgment motion. The Defendants assert that SEA 334 has not yet been implemented in regard to IDEA, and they are not the individuals who implement or enforce SEA 334 as the county election officials actually perform the voter registration list maintenance.

As discussed in the section above addressing the Motion to Dismiss, the Court concludes that SEA 334 continues the violation of the NVRA that the Court determined existed under SEA 442. Section 5.5(f)(2) allows cancellation of voter registrations without direct contact from the voter and without the NVRA's notice-and-waiting protection. As the Seventh Circuit succinctly explained, the NVRA "does not set an accuracy threshold; it relies instead on follow-up with the individual voter." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 959 (7th Cir. 2019). That "follow-up with the individual voter" is still lacking under Section 5.5(f)(2) of SEA 334.

The Defendants argue that the Court should read Section 5.5(f)(2) in conjunction with Section 5.5(f)(1) to find that Section 5.5(f)(1) implies that under Section 5.5(f)(2), if the Indiana Election Division notifies a county official that the voter cancelled registration, the Indiana Election Division also received a copy of the voter's signed voter registration application authorizing cancellation. However, implying this conclusion is contrary to the explicit language of Section 5.5(f)(2), which states, "[a] copy of the actual voter signature is not required to be provided to the county for the voter's status to be canceled if the written notice is forwarded by the election division," and no other sections of SEA 334 state or even imply that the Indiana Election Division receives a copy of the voter's signed voter registration application authorizing cancellation. There still is no direct contact with the registered voter, and there is no notice-and-

waiting procedure implemented under Section 5.5(f)(2). Therefore, the NVRA still is violated by the Indiana statute.

Common Cause is not, contrary to the Defendants' assertion, trying to change its theory of liability or amend its claims by filing for summary judgment on SEA 334. Common Cause's claims and theories still focus on Indiana's election laws violating the requirements of the NVRA for direct contact with the registered voter or utilizing the notice-and-waiting procedure. Common Cause is not required to file a new lawsuit to challenge SEA 334.

Regarding the Defendants' argument that summary judgment is inappropriate because they are not the individuals who implement or enforce SEA 334 as the county election officials actually perform the maintenance of voter registration lists, the Court already has considered and rejected this argument.

> The Defendants are the NVRA officials in the state and are responsible for the state's compliance with the NVRA. Furthermore, they establish the guidelines, policies, and procedures for maintaining the state's voter registration rolls. The local county election officials are required to follow the Defendants' directives. Therefore, the injury in this case is fairly traceable to the named Defendants.

(Filing No. 103 at 20.) The Defendants' reliance on *Ex parte Young* concerning sovereign immunity and summary judgment also is unavailing. The named Defendants are directly responsible for implementing SEA 334, and the prospective relief sought by Common Cause is permissible. *See McDonough Assocs., Inc. v. Grunloh*, 722 F.3d 1043, 1051 (7th Cir. 2013) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'").

Based on this Court's prior analyses and conclusions when issuing the preliminary injunction and the Seventh Circuit's guidance and decision when affirming the issuance of the

preliminary injunction, and based on the designated evidence before the Court, the Court concludes that SEA 334 violates the NVRA by allowing cancellation of a voter's registration without direct contact with the registered voter and without utilizing the notice-and-waiting procedures. Therefore, the Court determines that summary judgment in favor of Common Cause is appropriate.

The facts and evidence supporting the issuance of injunctive relief have not changed since the issuance of the preliminary injunction. Therefore, the Court adopts in full its analyses and conclusions found in the preliminary injunction Order (*see* Filing No. 103 at 12–27).

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

(Filing No. 103 at 24.) Remedies available at law cannot adequately compensate for the wrongful disenfranchisement of voters.

> The Court determines that the balance of equities weighs heavily in favor of granting an injunction for Common Cause. An injunction prohibiting the implementation of SEA [334] will not impose any new or additional harm or burdens on the Defendants concerning their efforts to maintain accurate voter registration rolls and to ensure fair elections. The Defendants still have numerous ways that comply with the NVRA to clean up the state's voter registration rolls. On the other hand, not issuing an injunction and allowing SEA [334] to be implemented risks the imposition of significant harm on Common Cause and its members through the disenfranchisement of rightfully registered voters.

Id. at 25.

The public interest would not be disserved by a permanent injunction in this case. "[A]llowing eligible voters to exercise their right to vote without being disenfranchised without notice" is a significant public interest. *Id.* at 26. Furthermore,

> If a voter is disenfranchised and purged erroneously, that voter has no recourse after Election Day. While the Defendants have a strong public interest in protecting the integrity of voter registration rolls and the electoral process, they have other

> procedures in place that can protect that public interest that do not violate the NVRA.

Id. at 26–27.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the Defendants' Motion to Dismiss (Filing No. 180) and **GRANTS** Common Cause's Motion for Summary Judgment (Filing No. 182). The Court **ISSUES A PERMANENT INJUNCTION** prohibiting the Defendants from implementing SEA 334 §§ 5.5(d)–(f) and prohibiting the Defendants from otherwise removing any Indiana registrant from the list of eligible voters because of a change in residence absent: (1) a request or confirmation in writing directly from the voter that the voter is ineligible or does not wish to be registered; or (2) the NVRA-prescribed process of (a) notifying the voter, (b) giving the voter an opportunity to respond, and (c) then waiting two inactive federal election cycles. A similar ruling was issued in the related case *Indiana State Conference of the National Association for the Advancement of Colored People, et. al. v. Lawson et al.*, 1:17-cv-2897-TWP-MPB. The trial and final pretrial conference are hereby **VACATED**. Final judgment will issue under separate order.

SO ORDERED.

Date: 8/24/2020

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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

COMMON CAUSE INDIANA, Plaintiff, v. CONNIE LAWSON in her official capacity as Secretary of State of Indiana, J. BRADLEY KING in his official capacity as Co-Director of the Indiana Election Division, and ANGELA NUSSMEYER in her official capacity as Co-Director of the Indiana Election Division, Defendants.	)	No. 1:17-cv-03936-TWP-MPB

FINAL JUDGMENT PURSUANT TO FED. R. CIV. PRO. 58

The Court having this day made its Entry directing the entry of final judgment, the Court now enters **FINAL JUDGMENT**.

Judgment is entered in favor of Plaintiff Common Cause Indiana and against Defendants Connie Lawson, Bradley King, and Angela Nussmeyer.

The Defendants are **ENJOINED** from implementing SEA 334 §§ 5.5(d)–(f) and from otherwise removing any Indiana registrant from the list of eligible voters because of a change in residence absent: (1) a request or confirmation in writing directly from the voter that the voter is ineligible or does not wish to be registered; or (2) the NVRA-prescribed process of (a) notifying the voter, (b) giving the voter an opportunity to respond, and (c) then waiting two inactive federal election cycles.

Judgment is entered accordingly, and this action is **TERMINATED**.

Dated: 8/24/2020

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

Roger A.G. Sharpe, Clerk of Court

By: _____
Deputy Clerk

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

ORDER ON DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on a Motion to Dismiss filed pursuant to Federal Rule of Civil Procedure 12(b)(1) by Defendants Connie Lawson ("Lawson"), Bradley King ("King"), and Angela Nussmeyer ("Nussmeyer") (collectively, "Defendants") (Filing No. 134). Also pending before the Court is a Motion for Summary Judgment filed pursuant to Rule 56 by the Plaintiffs Indiana State Conference of the National Association for the Advancement of Colored People ("NAACP") and League of Women Voters of Indiana ("League") (collectively, "Plaintiffs") (Filing No. 136). The Plaintiffs initiated this lawsuit to challenge the legality of Indiana's voter registration laws on the basis that they violate the procedural safeguards established by the National Voter Registration Act of 1993, 52 U.S.C. §§ 20507–20511 ("NVRA"). On June 8, 2018, the Court entered a preliminary injunction against the Defendants, which they appealed (Filing

No. 63). The Seventh Circuit affirmed the Court's issuance of the preliminary injunction and remanded the case for further proceedings (Filing No. 104). The pending Motions ensued after the remand. For the reasons discussed below, the Court **denies** the Defendants' Motion to Dismiss and **grants** the Plaintiffs' Motion for Summary Judgment.

I. BACKGROUND

The NVRA was enacted to reduce barriers to applying for voter registration, to increase voter turnout, and to improve the accuracy of voter registration rolls. The NVRA placed specific requirements on the states to ensure that these goals were met. It established procedural safeguards to protect eligible voters against disenfranchisement and to direct states to maintain accurate voter registration rolls. Under the NVRA, a voter's registration may be removed from the rolls if the voter requests to be removed, if they die, because of a criminal conviction or mental incapacity, or because of a change in residency. The NVRA provides, "In the administration of voter registration for elections for Federal office, each State shall . . . conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters." 52 U.S.C. § 20507(a)(4).

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

> A State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office on the ground that the registrant has changed residence unless the registrant-
>
> > (A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered; or
> >
> > (B) (i) has failed to respond to a notice described in paragraph (2); and

> (ii) has not voted or appeared to vote (and, if necessary, correct the registrar's record of the registrant's address) in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

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

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

Plaintiff NAACP is a nonpartisan, nonprofit organization that was chartered in 1940. It was founded to assist African-American citizens to ensure political, educational, social, and economic equality and to fight against racial discrimination. The NAACP has made it part of its mission to promote civic engagement by educating voters, monitoring polls, and facilitating voter registration. Voter registration is central to the NAACP's mission of empowering minority voters because of the barriers the registration process has posed to participation for these communities. The NAACP has approximately 5,000 members in Indiana. The NAACP already has expended scarce resources to combat Indiana's election laws and practices that threaten to wrongfully purge voters from the voter registration rolls (Filing No. 44; Filing No. 137-14).

Plaintiff League is a nonpartisan, nonprofit organization that was founded in 1920. It is affiliated with the national League of Women Voters. The League conducts voter registration drives, encourages and assists individuals in voting, and conducts other activities to boost civic engagement, which has been essential to its mission since its founding. The League has more than 1,300 members in Indiana. Like the NAACP, the League has expended scarce resources to combat

Indiana's election laws and practices that threaten to wrongfully purge voters from the voter registration rolls (Filing No. 43; Filing No. 137-15).

Defendant Lawson is the Indiana Secretary of State, and, in this capacity, she is the chief election official in the State of Indiana. She is charged with performing all ministerial duties related to the state's administration of elections. Ind. Code §§ 3-6-3.7-1, 3-6-4.2-2(a). Defendants King and Nussmeyer are co-directors of the Indiana Election Division within the Secretary of State's office. In this capacity, King and Nussmeyer are the chief state election officials responsible for the coordination of Indiana's responsibilities under the NVRA. Defendants King and Nussmeyer thus are charged with coordinating county voter registration. They are considered Indiana's "NVRA officials." Ind. Code § 3-7-11-1.

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

While the county boards are responsible for actually physically maintaining their voter registration records, this list maintenance is dictated by the policies, procedures, and guidance established by the election division co-directors and constrained by the election division's business rules governing the electronic statewide voter registration system (Filing No. 42-21 at 12–15). This electronic statewide voter registration system is "a single, uniform, official, centralized, and interactive statewide voter registration list." Ind. Code §§ 3-7-26.3-3, 3-7-26.3-4. King and Nussmeyer are responsible for building, managing, and maintaining the statewide voter

registration system, which includes creating the protocols within the system and issuing official policies, guidance, and standard operating procedures to guide the county boards on their duties under state and federal law. They also provide training to the county boards (Filing No. 42-21 at 12–15); Ind. Code § 3-6-4.2-14. The official guidance from King and Nussmeyer as reflected in the protocols, documents, and trainings are mandatory (Filing No. 42-21 at 82; Filing No. 42-23 at 21–22).

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

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

At the time that the Plaintiffs filed this lawsuit in August 2017, Indiana participated in the Interstate Voter Registration Crosscheck Program ("Crosscheck") as a method for identifying voters who may have become ineligible to vote in Indiana because of a change in residence. Ind.

Code § 3-7-38.2-5(d). Crosscheck is an interstate program that was created and administered by the Kansas Secretary of State. The program was designed to identify voters who have moved to and registered to vote in another state. This was accomplished by comparing voter registration data provided by participating states. The participating states would submit their voter registration data to Crosscheck, which then compared the first name, last name, and birthdate of registered voters to identify possible "matches" or duplicate voter registrations. The output data of possible matches was then sent back to the participating states. The individual states would then decide what to do with the Crosscheck data. Crosscheck did not receive or distribute primary voter registration documents, and it did not include signatures or former addresses among the identifying information provided to participating states (Filing No. 42-2).

Each year during the time that Indiana participated in Crosscheck, Indiana would provide its statewide voter registration list to the Kansas Secretary of State to compare the data with the other data from other participating Crosscheck states. Crosscheck then sent a list of possible matches back to Indiana, and within thirty days of receiving this list, Indiana's statute required that the "NVRA official" (in this case King and Nussmeyer) "shall provide [to] the appropriate county voter registration office" the name and any other information obtained on any Indiana voters who share "identical . . . first name, last name and date of birth of [a] voter registered in [another] state." Ind. Code § 3-7-38.2-5(d); Filing No. 137-2 at 10–11. While the statute required King and Nussmeyer to provide this voter data to the county election officials, they only forwarded the data to the county officials if the data met a certain "confidence factor," which King and Nussmeyer determine based on additional matching data points such as address, middle name, or social security number (Filing No. 42-21 at 67–71; Filing No. 42-22 at 23–24).

After voter data was provided to the county officials, they determined whether the voter identified as a possible match was the same individual who was registered in the county and whether the voter registered to vote in another state on a date after they had registered in Indiana. Ind. Code § 3-7-38.2-5(d). Within the statewide voter registration system, the county official could select for each possible matched voter registration "match approved," "match rejected," or "research needed". (Filing No. 42-20 at 7.) The information provided from Crosscheck to the county officials in the statewide voter registration system was limited to the personal data of voters; it did not include any underlying source documents (Filing No. 42-21 at 97–98). County officials generally do not review or request any material outside of the Crosscheck data provided to them by King and Nussmeyer. No written guidance, manual, step-by-step instruction, or standard operating procedure states that any additional inquiry is required or recommended (Filing No. 42-23 at 31; Filing No. 42-25 at 31–33; Filing No. 42-28 at 30–31, 43–44; Filing No. 42-15 at 41; Filing No. 42-16 at 4).

Under the Crosscheck program, the statewide voter registration system did not provide information about the dates of registration in Indiana and other states to assist in determining what state registration occurred first (Filing No. 42-20 at 7; Filing No. 42-21 at 126). Some county officials just assumed that the Indiana registration predated the other state's registration, which would lead to cancelling the Indiana registration (Filing No. 42-25 at 33; Filing No. 42-28 at 77; Filing No. 42-23 at 34; Filing No. 42-24 at 57–58). Even if dates of registration information were provided, the information was incomplete or inconsistent because states that participated in Crosscheck did not always populate the registration date field, and they had different policies for determining which date to use, so there was no uniform practice among states. Some states did

not even provide a definition for "date of registration." (Filing No. 42-21 at 100; Filing No. 42-22 at 29; Filing No. 42-19 at 2.)

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

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

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

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

(Emphasis added.)

However, Indiana Senate Enrolled Act 442 (2017) ("SEA 442") amended this Code section, effective July 1, 2017, to read:

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

(Emphasis added.)

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

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

Also prior to the amendment by SEA 442, county officials were required to confirm that voters who appeared to have registered in another state had also authorized the cancellation of any previous registration by the voter when the voter registered in the other state. If the county official could not determine that the voter had authorized the cancellation of any previous registration, the state statute required the county board to send an address confirmation notice to the Indiana address of the voter. This was consistent with the written confirmation notice-and-waiting procedures in the NVRA at 52 U.S.C. § 20507(d). However, this requirement was removed by SEA 442. SEA 442 removed the requirement to make the determination that an individual "authorized the cancellation of any previous voter registration" and the requirement to send an "address confirmation notice." Under SEA 442, a county official's approval of matches would generate a cancellation of the voter registration rather than a notice mailer. This resulted in cancellation of a voter registration without following the notice-and-waiting requirement for approved matches (Filing No. 42-22 at 38–39).

The Plaintiffs filed this lawsuit on August 23, 2017, seeking declaratory and injunctive relief, requesting that the Court declare Indiana Code § 3-7-38.2-5(d)–(e) violates the NVRA and enjoining Indiana from implementing and enforcing the amended statute (Filing No. 1). After the lawsuit was initiated, the Indiana General Assembly enacted House Enrolled Act 1253 ("HEA 1253"), which went into effect on March 15, 2018. HEA 1253 added "confidence factors" to Indiana Code § 3-7-38.2-5(d), thereby codifying King and Nussmeyer's policy of providing to the county officials only those registrations that met certain "match criteria."

On March 9, 2018, the Plaintiffs filed a Motion for Preliminary Injunction (Filing No. 41). After hearing the parties' oral arguments, the Court determined that each of the factors for the issuance of a preliminary injunction weighed in favor of the Plaintiffs. Therefore, on June 8, 2018, the Court entered a preliminary injunction against the Defendants, "prohibiting [them] from taking any actions to implement SEA 442 until this case has been finally resolved." (Filing No. 63 at 28.) The Defendants appealed the issuance of the preliminary injunction, and on August 27, 2019, the Seventh Circuit affirmed the Court's issuance of the preliminary injunction and remanded the case for further proceedings (Filing No. 104).

On October 30, 2019, the Court stayed this matter until May 1, 2020, to see whether the Indiana General Assembly would make any changes to SEA 442 that might affect the case (Filing No. 116; Filing No. 127 at 2). "On March 21, 2020, Governor Holcomb signed into law Senate Enrolled Act 334 ('SEA 334'), which amends SEA 442." (Filing No. 124 at 2; *see also* Filing No. 124-1.)

SEA 334 amended SEA 442, voided Indiana's memorandum of understanding with the Kansas Secretary of State, withdrew Indiana from participation in Crosscheck, and established the Indiana Data Enhancement Association ("IDEA") in place of Crosscheck. IDEA is functionally

identical to Crosscheck in that it receives member states' voter lists and returns purported matches. The "NVRA official" (in this case King and Nussmeyer) administers IDEA (Filing No. 137-4 at 8–11 (SEA 334 §§ 5.1(a)–(b), 5.5(a)–(b))). SEA 334 requires that, "[n]ot later than July 1, 2020, the NVRA official shall adopt an order for the administration of voter list maintenance programs to be performed by IDEA." *Id.* at 10 (SEA 334 § 5.5(b)). "If the NVRA official does not adopt an order by July 1, 2020, . . . the secretary of state shall adopt or amend the order." *Id.* Thus, the oversight and administration of IDEA are placed in the Defendants.

Under SEA 334, IDEA uses a "matching" system, and within thirty days of comparing data from other states, the NVRA official is to provide to county officials a list of all Indiana voters having (1) an "identical" "first name, last name, and date of birth of the voter registered in the other state," and (2) whose records meet the "confidence factor" threshold. *Id.* at 11 (SEA 334 § 5.5(c)). IDEA does not collect or disseminate the actual voter registration documents underlying its "matches" and does not involve direct contact with voter registrants. *Id.* at 10–12 (SEA 334 § 5.5).

SEA 334 directs,

> (d) The county voter registration office shall determine whether the individual:
>
> > (1) identified in the report provided by the NVRA official under subsection (c) is the same individual who is a registered voter of the county;
> > (2) registered to vote in another state on a date following the date that voter registered in Indiana; and
> > (3) authorized the cancellation of any previous registration by the voter when the voter registered in another state.
>
> (e) If the county voter registration office determines that the voter is described by subsection (d), the county voter registration office shall cancel the voter registration of that voter. If the county voter registration office determines that the voter is described by subsection (d)(1) and (d)(2), but has not authorized the cancellation of any previous registration, the county voter registration office shall send an address confirmation notice to the Indiana address of the voter.

(Filing No. 137-4 at 11–12 (SEA 334 § 5.5(d)–(e)).)

SEA 334 further provides,

> (f) The county voter registration office may rely on written information provided either directly by a voter registration office in another state or forwarded from the election division from the office in the other state as follows:
>
> > (1) If this information is provided directly from the other state to the Indiana county voter registration official, the out-of-state voter registration official must provide a copy of the voter's signed voter registration application which indicates the individual authorizes cancellation of the individual's previous registration.
> > (2) If the election division forwards written notice from another state to an Indiana county voter registration official, the county should consider this notice as confirmation that the individual is registered in another jurisdiction and has requested cancellation of the Indiana registration. A copy of the actual voter signature is not required to be provided to the county for the voter's status to be canceled if the written notice is forwarded by the election division.
>
> County voter registration officials shall review the date the individual registered out of state and the date the individual registered in Indiana to confirm which registration is more recent when performing the officials' analysis under this subsection.

Id. at 12 (SEA 334 § 5.5(f)).

After the enactment of SEA 334, the stay in this matter was lifted in early May 2020 (Filing No. 123), after which the Defendants filed a Motion to Dismiss (Filing No. 134), and the Plaintiffs filed a Motion for Summary Judgment (Filing No. 136).

II. LEGAL STANDARDS

A. Motion to Dismiss Standard

A motion to dismiss under Rule 12(b)(1) challenges the court's subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The burden of proof is on the plaintiff, the party asserting jurisdiction. *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003), *overruled on other grounds by Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012) (en banc). "The plaintiff has the burden of supporting the jurisdictional allegations of the complaint by competent proof." *Int'l Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1210 (7th Cir. 1980). "In deciding

whether the plaintiff has carried this burden, the court must look to the state of affairs as of the filing of the complaint; a justiciable controversy must have existed at that time." *Id.*

"When ruling on a motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the district court must accept as true all well-pleaded factual allegations, and draw reasonable inferences in favor of the plaintiff." *Ezekiel v. Michel*, 66 F.3d 894, 897 (7th Cir. 1995) (citation omitted). Furthermore, "[t]he district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Id.* (citation and quotation marks omitted).

B. Summary Judgment Standard

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 489–90 (7th Cir. 2007). In ruling on a motion for summary judgment, the court reviews "the record in the light most favorable to the non-moving party and draw[s] all reasonable inferences in that party's favor." *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009) (citation omitted). "However, inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion." *Dorsey v. Morgan Stanley*, 507 F.3d 624, 627 (7th Cir. 2007) (citation and quotation marks omitted). Additionally, "[a] party who bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively

demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial." *Hemsworth*, 476 F.3d at 490 (citation omitted). "The opposing party cannot meet this burden with conclusory statements or speculation but only with appropriate citations to relevant admissible evidence." *Sink v. Knox County Hosp.*, 900 F. Supp. 1065, 1072 (S.D. Ind. 1995) (citations omitted).

"In much the same way that a court is not required to scour the record in search of evidence to defeat a motion for summary judgment, nor is it permitted to conduct a paper trial on the merits of [the] claim." *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001) (citations and quotation marks omitted). "[N]either the mere existence of some alleged factual dispute between the parties nor the existence of some metaphysical doubt as to the material facts is sufficient to defeat a motion for summary judgment." *Chiaramonte v. Fashion Bed Grp., Inc.*, 129 F.3d 391, 395 (7th Cir. 1997) (citations and quotation marks omitted).

III. DISCUSSION

The Defendants ask the Court to dismiss this action on the basis that the case is now moot and, therefore, subject matter jurisdiction no longer exists because SEA 442—the law challenged by the Plaintiffs in their Complaint—was amended by SEA 334. In contrast, the Plaintiffs ask the Court to enter summary judgment in their favor and to enter a permanent injunction prohibiting the Defendants from implementing Indiana's election laws that violate the NVRA. The Court will first address the Motion to Dismiss and then turn to the Motion for Summary Judgment.

A. Defendants' Motion to Dismiss

The Defendants contend the Court lacks subject matter jurisdiction to hear this case because there is no longer a live case or controversy. They note that Article III of the United States Constitution limits the jurisdiction of federal courts to cases and controversies, which "requires an

actual controversy at all stages of review, not merely at the time the complaint is filed." *Ciarpaglini v. Norwood*, 817 F.3d 541, 544 (7th Cir. 2016) (internal citation and quotation marks omitted). Dismissing moot cases is appropriate because a moot case runs afoul of the "live case or controversy" requirement.

The Defendants argue the Plaintiffs' claim centers on Indiana's participation in Crosscheck and the enforcement of SEA 442 and the resulting violation of the NVRA. They assert, intervening events have occurred, thereby mooting the claim brought by the Plaintiffs. The Indiana General Assembly amended SEA 442 with the enactment of SEA 334, and Indiana has withdrawn from participation in Crosscheck. They argue there is no likelihood that Indiana will again participate in Crosscheck as it has been indefinitely suspended. The Defendants contend the relief sought by the Plaintiffs has been fully satisfied because SEA 442 will not be enforced as it has been amended, and Indiana will no longer participate in Crosscheck. Thus, the Defendants argue, there is no longer a case or controversy over the enforcement of SEA 442 and participation in Crosscheck. The Defendants assert, with no live controversy and with the relief sought already provided, the Court lacks subject matter jurisdiction to consider this case any further.

The Defendants further argue that Plaintiffs' claim specifically addresses SEA 442, and any possible claims that the Plaintiffs allege regarding SEA 334 (the new 2020 law) must be addressed in a new, separate lawsuit subject to discovery and a full hearing of the issues. SEA 442 involved participation in Crosscheck, and SEA 334 "ameliorated the alleged violations that existed under the previous law. Any alleged violations under SEA 334, would be entirely new claims, and should be treated as such." (Filing No. 135 at 9.)

In response, the Plaintiffs explain that this case is not about the Crosscheck program as characterized by the Defendants, rather, they filed this lawsuit to enforce the NVRA's notice-and-

waiting requirements. The Plaintiffs explain that SEA 442 allowed Indiana to cancel voter registrations without complying with the notice-and-waiting requirements of the NVRA. The Plaintiffs sought a preliminary injunction on the basis that Indiana's election law failed to follow the provisions of the NVRA, and this Court and the Seventh Circuit held that the failure to follow the notice-and-waiting requirements violated the NVRA.

The Plaintiffs point out that when a challenged law "is repealed or amended mid-lawsuit—a 'recurring problem when injunctive relief is sought'—the case is not moot if a substantially similar policy has been instituted or is likely to be instituted." *Smith v. Exec. Dir. of Ind. War Mems. Comm'n*, 742 F.3d 282, 287 (7th Cir. 2014) (internal citation omitted). The Plaintiffs acknowledge that SEA 334 amended SEA 442; however, they assert, SEA 334 kept the same impermissible voter cancellation procedures, and it injures the Plaintiffs and Indiana voters in the same manner as SEA 442. SEA 334 replaced the Crosscheck program with the identical IDEA program. And SEA 334 still allows voter cancellation based on data provided by other states, without any direct voter contact, and without following the NVRA's notice-and-waiting procedures. Therefore, this lawsuit is not moot because SEA 334 continues the same NVRA violations that occurred under SEA 442, and the Court can award relief by enjoining the ongoing NVRA violations.

Concerning the Defendants' argument that any claims relating to SEA 334 must be brought in a new lawsuit, the Plaintiffs argue that granting the Defendants' Motion to Dismiss and requiring a new lawsuit challenging SEA 334 would unnecessarily waste judicial resources. The Defendants' suggestion would require a new lawsuit challenging the same provision of the Indiana Code based on the same section of the NVRA because of the same wrongful conduct of the same Defendants. The parties would face the same motions for preliminary injunction, to dismiss, and for summary

judgment, and they would repeat the same discovery and prepare for trial based on insignificant amendments to a law that is frequently amended. The Court and the parties should not be subjected to such a waste of resources or the burden of relitigating indistinguishable claims.

In reply, the Defendants reassert that this case really is about Crosscheck, and further, the Plaintiffs misread SEA 334. They contend that the "plain language of SEA 334 provides that if another state provides information to an Indiana county voter official, the other state must provide a copy of the voter's signed voter registration application which indicates the individual authorizes cancellation of the individual's previous registration. SEA 334 § 8(f)(1)." (Filing No. 142 at 2.) The Defendants argue the provisions of SEA 334 are significantly different from SEA 442, so this case about SEA 442 is moot, and any claims pertaining to SEA 334 must be brought in a new action.

After a careful review of SEA 442, SEA 334, the Complaint, and the Court's Order issuing the preliminary injunction, the Court concludes this case is not mooted by the enactment of SEA 334. The Plaintiffs' arguments are well-taken. A case does not become moot if the amendment to the challenged law does not fully resolve the problem at issue in the case. The gravamen of Plaintiffs' Complaint is that Indiana's election law violates the NVRA by allowing cancellation of voter registrations without direct contact from the voter or, alternatively, providing notice to the voter and then waiting two election cycles before cancelling the voter registration. This Court and the Seventh Circuit understood this to be the issue when granting and affirming injunctive relief.

While SEA 334 amended SEA 442 and replaced Crosscheck with IDEA, the issue raised by the Complaint remains—allowing cancellation of voter registrations without direct contact from the voter or, alternatively, providing notice to the voter and then waiting two election cycles before cancelling the voter registration. SEA 334 expressly provides,

> If the election division forwards written notice from another state to an Indiana county voter registration official, the county should consider this notice as confirmation that the individual is registered in another jurisdiction and has requested cancellation of the Indiana registration. A copy of the actual voter signature is not required to be provided to the county for the voter's status to be canceled if the written notice is forwarded by the election division.

(Filing No. 137-4 at 12 (SEA 334 § 5.5(f)(2)).) Section 5.5(f)(2) allows cancellation of voter registrations without direct contact from the voter and without the NVRA's notice-and-waiting protection. Therefore, an actual controversy—the same controversy raised in the Complaint—still remains between the parties, and the Court is able to provide effectual relief; thus, the case is not moot. Subject matter jurisdiction still exists in this Court. The Court agrees with the Plaintiffs' position that requiring a new lawsuit for SEA 334 would be an unnecessary waste of the Court's and the parties' resources and time. The Defendants' Motion to Dismiss is **denied**.

B. Plaintiffs' Motion for Summary Judgment

The Plaintiffs filed their Motion for Summary Judgment, asking the Court to enter summary judgment in their favor and to permanently enjoin the Defendants from implementing Indiana's election laws that would allow county officials to remove voters' registration because of a change in residence without a request or confirmation in writing directly from the voter that the voter is ineligible or does not wish to be registered or without the NVRA's notice-and-waiting protections.

In support of their Motion for Summary Judgment, the Plaintiffs assert similar arguments they made in opposition to the Defendants' Motion to Dismiss. They argue that SEA 334, like its predecessor SEA 442, violates the NVRA by allowing cancellation of a voter's registration without direct contact with the registered voter. SEA 334 permits cancellation without a request from the registered voter and without following the notice-and-waiting procedures.

The Plaintiffs assert,

> The District Court has already made factual findings consistent with the foregoing descriptions of the NAACP, the League, and Common Cause Indiana, their missions, and their efforts to counteract the effects of SEA 442, . . . [and] Plaintiffs['] actions are ongoing, as SEA 334 is substantially similar to SEA 442. Since the enactment of SEA 334, Plaintiffs have redoubled their efforts.

(Filing No. 137 at 27.) The Plaintiffs further point out,

> Both this Court and the Seventh Circuit have ruled on the meaning of relevant NVRA requirements, which now operate as law of the case. Specifically, the Seventh Circuit affirmed that the NVRA requires that Indiana have "direct contact with the voter" prior to any removal from the voter registration rolls. *See Common Cause*, 937 F.3d at 958 ("Indiana insists that [SEA 442] complies with the NVRA, despite the fact that it omits any direct contact with the voter . . . . The state attempts to trivialize that omission, but a review of the NVRA reveals that it is fatal.").

Id. at 29.

The Plaintiffs support their position with additional language from this Court's and the Seventh Circuit's decisions from earlier in this litigation:

> The Court "determine[d] that Plaintiffs have a high likelihood of success on the merits of their claim that SEA 442 violates some of the requirements of the NVRA and threatens disenfranchisement of eligible voters." *Id.* at 661. The Court found that SEA 442 removed the NVRA's "simple procedural safeguard[]" that "a state 'shall not remove the name of a registrant from the official list of eligible voters ... on the ground that the registrant has changed residence unless the registrant,' (1) 'confirms in writing that [they have] changed residence,' or (2) has failed to respond to a mailed notification and has not voted to two federal election cycles." *Id.* (quoting 52 U.S.C. § 20507(d)(1)); *see also id.* at 650.

(Filing No. 137 at 13–14.)

> The Seventh Circuit affirmed this Court "was correct to find that the Organizations are likely to succeed on the merits of their challenge," *Common Cause*, 937 F.3d at 949. The Court also held that the NVRA "forbids a state from removing a voter from that state's registration list unless: (1) it hears *directly* from the voter via a 'request' or a 'confirm[ation] in writing' that the voter is ineligible or does not wish to be registered; or (2) the state goes through the statutorily prescribed [notice and waiting process]. Both of these avenues focus on *direct* contact with the voter." *Id.* at 959 (emphases added; second alteration in original).

Id. at 14.

The Plaintiffs argue that, based on the clear law of the case set forth above, a permanent injunction prohibiting implementation of SEA 334 is appropriate because SEA 334 commits the same error as SEA 442, which has been determined to be fatal to the Indiana statute. It allows for cancellation of a voter's registration without any direct contact with the registered voter. Like SEA 442, SEA 334 ignores the NVRA's requirement of either a request from the registrant or confirmation in writing that the registrant has changed residence. And it allows cancellation without utilizing the notice-and-waiting procedures.

In response to the Motion for Summary Judgment, the Defendants advance similar arguments they made in support of their Motion to Dismiss. They argue that the Plaintiffs' case is really about participation in Crosscheck and SEA 442's elimination of a mailer confirmation procedure. However, they assert, SEA 334 has withdrawn Indiana from participation in Crosscheck, and it requires county officials to determine whether the voter cancelled previous registrations or to send a confirmation to the individual's address before cancelling the registration, pointing to SEA 334 §§ 5.1, 5.5. The Defendants argue that the amendments to SEA 442 found in SEA 334 put Indiana's election laws into compliance with the NVRA's requirements, and, thus, summary judgment is not appropriate.

The Defendants argue,

> SEA 334 explicitly provides in Section 8(f)(1) that if a county receives information directly from another state, and not from the Indiana Election Division, "the out-of-state voter registration official must provide a copy of the voter's signed voter registration application which indicates the individual authorizes cancellation of the individual's previous registration."

(Filing No. 143 at 11.) They further argue,

> Under the doctrine of statutory construction, considering Section 8(f)(1) and 8(f)(2) together, Section 8(f)(1) implies that under Section 8(f)(2), if the Indiana Election Division notifies a county official that the voter cancelled registration, the Indiana

> Election Division also received a copy of the voter's signed voter registration application authorizing cancellation.

Id. at 12.

The Defendants again argue that the Plaintiffs may not present a new claim or argument in their summary judgment motion nor can they amend the pleadings via a summary judgment motion. The Defendants assert that SEA 334 has not yet been implemented in regard to IDEA, and they are not the individuals who implement or enforce SEA 334 as the county election officials actually perform the voter registration list maintenance.

As discussed in the section above addressing the Motion to Dismiss, the Court concludes that SEA 334 continues the violation of the NVRA that the Court determined existed under SEA 442. Section 5.5(f)(2) allows cancellation of voter registrations without direct contact from the voter and without the NVRA's notice-and-waiting protection. As the Seventh Circuit succinctly explained, the NVRA "does not set an accuracy threshold; it relies instead on follow-up with the individual voter." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 959 (7th Cir. 2019). That "follow-up with the individual voter" is still lacking under Section 5.5(f)(2) of SEA 334.

The Defendants argue that the Court should read Section 5.5(f)(2) in conjunction with Section 5.5(f)(1) to find that Section 5.5(f)(1) implies that under Section 5.5(f)(2), if the Indiana Election Division notifies a county official that the voter cancelled registration, the Indiana Election Division also received a copy of the voter's signed voter registration application authorizing cancellation. However, implying this conclusion is contrary to the explicit language of Section 5.5(f)(2), which states, "[a] copy of the actual voter signature is not required to be provided to the county for the voter's status to be canceled if the written notice is forwarded by the election division," and no other sections of SEA 334 state or even imply that the Indiana Election Division receives a copy of the voter's signed voter registration application authorizing

cancellation. There still is no direct contact with the registered voter, and there is no notice-and-waiting procedure implemented under Section 5.5(f)(2). Therefore, the NVRA still is violated by the Indiana statute.

The Plaintiffs are not, contrary to the Defendants' assertion, trying to change their theory of liability or amend their claims by filing for summary judgment on SEA 334. The Plaintiffs' claims and theories still focus on Indiana's election laws violating the requirements of the NVRA for direct contact with the registered voter or utilizing the notice-and-waiting procedure. The Plaintiffs are not required to file a new lawsuit to challenge SEA 334.

Regarding the Defendants' argument that summary judgment is inappropriate because they are not the individuals who implement or enforce SEA 334 as the county election officials actually perform the maintenance of voter registration lists, the Court already has considered and rejected this argument.

> The Defendants are the NVRA officials in the state and are responsible for the state's compliance with the NVRA. Furthermore, they establish the guidelines, policies, and procedures for maintaining the state's voter registration rolls. The local county election officials are required to follow the Defendants' directives. Therefore, the injury in this case is fairly traceable to the named Defendants.

(Filing No. 63 at 21.) The Defendants' reliance on *Ex parte Young* concerning sovereign immunity and summary judgment also is unavailing. The named Defendants are directly responsible for implementing SEA 334, and the prospective relief sought by the Plaintiffs is permissible. *See McDonough Assocs., Inc. v. Grunloh*, 722 F.3d 1043, 1051 (7th Cir. 2013) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'").

Based on this Court's prior analyses and conclusions when issuing the preliminary injunction and the Seventh Circuit's guidance and decision when affirming the issuance of the preliminary injunction, and based on the designated evidence before the Court, the Court concludes that SEA 334 violates the NVRA by allowing cancellation of a voter's registration without direct contact with the registered voter and without utilizing the notice-and-waiting procedures. Therefore, the Court determines that summary judgment in favor of the Plaintiffs is appropriate.

The facts and evidence supporting the issuance of injunctive relief have not changed since the issuance of the preliminary injunction. Therefore, the Court adopts in full its analyses and conclusions found in the preliminary injunction Order (*see* Filing No. 63 at 13–28).

> As has been held by numerous other courts, a violation of the right to vote is presumptively an irreparable harm. *See, e.g.*, *Frank*, 196 F. Supp. 3d at 917; *Browning*, 863 F. Supp. 2d at 1167. Because an individual cannot vote after an election has passed, it is clear that the wrongful disenfranchisement of a registered voter would cause irreparable harm without an adequate remedy at law. The Court also agrees that "conduct that limits an organization's ability to conduct voter registration activities constitutes an irreparable injury." *Project Vote, Inc.*, 208 F. Supp. 3d at 1350.

(Filing No. 63 at 25–26.) Remedies available at law cannot adequately compensate for the wrongful disenfranchisement of voters or the curtailment of voter registration activities and other similar civic engagement activities.

> The Court finds that the balance of equities weighs heavily in favor of granting an injunction. Plaintiffs' members and the voters they seek to assist face the imminent and irrevocable consequence of disenfranchisement of thousands of Indiana voters, only months before a federal election. In contrast, Defendants would face only the prospect of [having to comply with the requirements of the NVRA]. . . . An injunction prohibiting the implementation of SEA [334] will not impose any new or additional harm or burdens on the Defendants concerning their efforts to maintain accurate voter registration rolls and to ensure fair elections. The Defendants still have numerous ways that comply with the NVRA to clean up the state's voter registration rolls. On the other hand, not issuing an injunction and allowing SEA [334] to be implemented risks the imposition of significant harm on Plaintiffs and their members through the disenfranchisement of rightfully registered voters.

Id. at 26–27.

The public interest would not be disserved by a permanent injunction in this case. "[A]llowing eligible voters to exercise their right to vote without being disenfranchised without notice" is a significant public interest. *Id.* at 27. Furthermore,

> If a voter is disenfranchised and purged erroneously, that voter has no recourse after Election Day. While the Defendants have a strong public interest in protecting the integrity of voter registration rolls and the electoral process, they have other procedures in place that can protect that public interest that do not violate the NVRA.

Id.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the Defendants' Motion to Dismiss (Filing No. 134) and **GRANTS** the Plaintiffs' Motion for Summary Judgment (Filing No. 136). The Court **ISSUES A PERMANENT INJUNCTION** prohibiting the Defendants from implementing SEA 334 §§ 5.5(d)–(f) and prohibiting the Defendants from otherwise removing any Indiana registrant from the list of eligible voters because of a change in residence absent: (1) a request or confirmation in writing directly from the voter that the voter is ineligible or does not wish to be registered; or (2) the NVRA-prescribed process of (a) notifying the voter, (b) giving the voter an opportunity to respond, and (c) then waiting two inactive federal election cycles. The trial and final pretrial conference are hereby **VACATED**. Final judgment will issue under separate order and all other pending motions are terminated.

SO ORDERED.

Date: 8/20/2020

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

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

FINAL JUDGMENT PURSUANT TO FED. R. CIV. PRO. 58

The Court having this day made its Entry directing the entry of final judgment, the Court now enters **FINAL JUDGMENT**.

Judgment is entered in favor of Plaintiffs Indiana State Conference of the National Association for the Advancement of Colored People and League of Women Voters of Indiana and against Defendants Connie Lawson, Bradley King, and Angela Nussmeyer.

The Defendants are **ENJOINED** from implementing SEA 334 §§ 5.5(d)–(f) and from otherwise removing any Indiana registrant from the list of eligible voters because of a change in residence absent: (1) a request or confirmation in writing directly from the voter that the voter is ineligible or does not wish to be registered; or (2) the NVRA-prescribed process of (a) notifying the voter, (b) giving the voter an opportunity to respond, and (c) then waiting two inactive federal election cycles.

Judgment is entered accordingly, and this action is **TERMINATED**.

Dated: 8/20/2020

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

Roger A.G. Sharpe, Clerk of Court

By: _____
Deputy Clerk

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