Nos. 20-2815, 20-2816

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

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

CONSOLIDATED BRIEF OF PLAINTIFFS-APPELLEES

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

Myrna Pérez
Eliza Sweren-Becker
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8373

Counsel continued on next page

Stuart C. Naifeh
DĒMOS
80 Broad Street, 4th Floor
New York, NY 10004
(212) 485-6055

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

Matthew R. Jedreski
DAVIS WRIGHT TREMAINE LLP
1200 Third Avenue, 22nd Floor
Seattle, WA 98101
(206) 622-3150

William R. Groth
VLINK LAW FIRM, LLC
445 N. Pennsylvania Street, Suite 425
Indianapolis, IN 46204
(317) 353-9363

Counsel for Plaintiff-Appellee Common Cause Indiana

Ellyde R. Thompson
Ellison Ward Merkel
Alexandre J. Tschumi
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
(212) 849-7000

Trent A. McCain
MCCAIN LAW OFFICES, P.C.
363 South Lake Street, Suite 2
Gary, IN 46403
(219) 884-0696

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

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2815

Short Caption: League of Women Voters of Ind., et al. v. Connie Lawson, et al.

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

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

Appellee-Plaintiff Common Cause Indiana

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

American Civil Liberties Union Foundation (Sophia Lin Lakin, Dale E. Ho, Adriel I. Cepeda Derieux); Davis Wright Tremaine, LLP (Matthew R. Jedreski, Grace Thompson, Kate Kennedy); DEMOS (Stuart C. Naifeh, Kathryn C. Sadasivan, Chiraag Bains); American Civil Liberties Union of Indiana (Gavin M. Rose, Stevie J. Pactor); Fillenwarth Dennerline Groth & Trowe, LLP (William R. Groth)

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

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

Common Cause

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

n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Sophia L. Lakin Date: September 30, 2020

Attorney's Printed Name: Sophia L. Lakin

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

Address: 125 Broad Street, New York, NY, 10004

Phone Number: (212) 519 - 7836 Fax Number: n/a

E-Mail Address: slakin@aclu.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2815

Short Caption: League of Women Voters of Ind., et al. v. Connie Lawson, et al.

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n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Adriel I. Cepeda Derieux Date: September 30, 2020

Attorney's Printed Name: Adriel I. Cepeda Derieux

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

Address: 125 Broad Street, New York, NY, 10004

Phone Number: (212) 284-7334 Fax Number: n/a

E-Mail Address: acepedaderieux@aclu.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2815

Short Caption: League of Women Voters of Ind., et al. v. Connie Lawson, et al.

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n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Dale E. Ho Date: September 30, 2020

Attorney's Printed Name: Dale E. Ho

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

Address: 125 Broad Street, New York, NY, 10004

Phone Number: (212) 549 - 2693 Fax Number: n/a

E-Mail Address: dho@aclu.org

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2816

Short Caption: League of Women Voters of Ind., et al. v. Connie Lawson, etal.

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Appellee-Plaintiff Common Cause Indiana

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

American Civil Liberties Union Foundation; Davis Wright Tremain, LLP; Demos; American Civil Liberties Union of Indiana; Fillenwarth, Dennerline, Groth & Trowe, LLP

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

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

Common Cause

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

n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: s/ Stuart C. Naifeh Date: 10/13/2020

Attorney's Printed Name: Stuart C. Naifeh

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

Address: 80 Broad St, 4th Flr, New York, NY 10004

Phone Number: 212-485-6055 Fax Number: n/a

E-Mail Address: snaifeh@demos.org

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2816

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

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

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Common Cause Indiana

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ACLU of Indiana; American Civil Liberties Union; Demos; Davis Wright Tremaine LLP;

Fillenwarth Dennerline Groth & Trowe LLP

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

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Common Cause

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

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: s/ Gavin M. Rose Date: October 6, 2020

Attorney's Printed Name: Gavin M. Rose

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

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

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

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

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APPEARANCE CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2815

Short Caption: League of Women Voters et al v. Connie Lawson et al

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

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Common Cause Indiana

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Davis Wright Tremaine LLP, American Civil Liberties Union, ACLU of Indiana, Demos

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

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Common Cause

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n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Matthew Jedreski Date: December 7, 2020

Attorney's Printed Name: Matthew Jedreski

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

Address: Davis Wright Tremaine LLP, 920 Fifth Avenue, Suite 3300, Seattle, WA 98104

Phone Number: (206) 622-3150 Fax Number: (206) 757-7700

E-Mail Address: mjedreski@dwt.com

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2815, 20-2816

Short Caption: League of Women Voters of Indiana v Lawson

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Fillenwarth Dennerline Groth & Towe LLP, Macey Swanson LLP, Vlink Law Firm, LLC, American Civil Liberties Union, ACLU of Indiana, Demos, and Davis Wright Tremaine LLP

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

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N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/William R. Groth Date: 01/19/2021

Attorney's Printed Name: William R. Groth

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

Address: 445 N. Pennsylvania Street, Suite 425

Indianapolis, IN 46204

Phone Number: (317) 353-9363 Fax Number: N/A

E-Mail Address: wgroth@fdgtlaborlaw.com

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2815 & 20-2816

Short Caption: League of Women Voters of Indiana, et al. v. Lawson, et al.

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Myrna Pérez Date: October 5, 2020

Attorney's Printed Name: Myrna Pérez

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

Address: Brennan Center for Justice at NYU Law

120 Broadway, Suite 1750, New York, NY 10271

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

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

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2815 & 20-2816

Short Caption: League of Women Voters of Indiana, et al. v. Lawson, et al.

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Eliza Sweren-Becker Date: October 8, 2020

Attorney's Printed Name: Eliza Sweren-Becker

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

Address: Brennan Center for Justice at NYU Law

120 Broadway, Suite 1750, New York, NY 10271

Phone Number: 646-925-8765 Fax Number:

E-Mail Address: eliza.sweren-becker@nyu.edu

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2815 & 20-2816

Short Caption: League of Women Voters of Indiana, et al. v. Lawson, et al.

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n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Ellyde R. Thompson Date: 1/19/2021

Attorney's Printed Name: Ellyde R. Thompson

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

Address: 51 Madison Avenue, 22nd Floor

New York, NY 10010

Phone Number: 212-849-7000 Fax Number:

E-Mail Address: ellydethompson@quinnemanuel.com

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Appellate Court No: 20-2815 & 20-2816

Short Caption: League of Women Voters of Indiana, et al. v. Lawson, et al.

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☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

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

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

League of Women Voters of Indiana

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

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

McCain Law Office, P.C.

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

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

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

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

n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Ellison Ward Merkel Date: 1/19/2021

Attorney's Printed Name: Ellison Ward Merkel

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

Address: 51 Madison Avenue, 22nd Floor

New York, NY 10010

Phone Number: 212-849-7000 Fax Number:

E-Mail Address: ellisonmerkel@quinnemanuel.com

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2815 & 20-2816

Short Caption: League of Women Voters of Indiana, et al. v. Lawson, et al.

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n/a

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n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: /s/ Alexandre J. Tschumi Date: October 12, 2020

Attorney's Printed Name: Alexandre J. Tschumi

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

Address: 51 Madison Avenue, 22nd Floor, New York, NY 10010

Phone Number: 212-849-7507 Fax Number:

E-Mail Address: alexandretschumi@quinnemanuel.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2815 & 20-2816

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n/a

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n/a

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

n/a

Attorney's Signature: Trent A. McCain Date: January 19, 2021

Attorney's Printed Name: Trent A. McCain

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

Address: 363 S. Lake Street, Suite 2
Gary, IN 46403

Phone Number: (219) 884-0696 Fax Number: (219) 884-0692

E-Mail Address: Trent@McCain.Law

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PRELIMINARY STATEMENT

Indiana's Senate Enrolled Act 334 ("SEA 334") conflicts with the National Voter Registration Act of 1993, 52 U.S.C. §§ 20501–20511 ("NVRA"), for the same reason that its predecessor, Senate Enrolled Act 442 ("SEA 442"), did. As this Court explained previously,[1] SEA 442 violated the NVRA because it allowed Indiana counties to cancel a voter's registration absent "direct contact with the voter"—specifically, without "(1) hear[ing] 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) "go[ing] through the statutorily prescribed" notice-and-waiting process. *Common Cause Ind. v. Lawson* ("*Common Cause I*"), 937 F.3d 944, 959 (7th Cir. 2019). SEA 334 suffers from the same fatal defect, because it lets counties strike voters from the rolls immediately, based on information that the Indiana Elections Division ("IED") has received from a third party and forwarded to the counties, even if no Indiana official has received or reviewed a request or confirmation made by the voter.

The State does not dispute that the NVRA requires direct contact with a voter—such as a copy of their signed registration form submitted to another state—before the voter can be taken off the rolls. Nor does the State contest that this Court

[1] The parties were before the Court on appeal of a preliminary injunction entered against Indiana Secretary of State Lawson and Election Division Co-Directors King and Nussmeyer (together, "the State") and in favor of Common Cause Indiana, the Indiana State Conference of the National Association for the Advancement of Colored People, and the League of Women Voters of Indiana (together, "Voter Organizations"). The Court affirmed.

correctly ruled in *Common Cause I* that the predecessor law, SEA 442, violated the NVRA's requirement of direct voter contact. And the State does not dispute that, if the district court interpreted SEA 334 correctly, the statute conflicts with the NVRA for the same reason that SEA 442 did.

The State instead asks the Court to rewrite SEA 334 in order to save it. But that is impermissible, because the plain text of SEA 334 is incompatible with the NVRA. SEA 334 expressly permits counties to cancel a voter's registration based merely on notice from another state, forwarded by the IED, that an Indiana voter is registered there—without any Indiana official receiving or reviewing a request or confirmation from the voter. While the statute requires that, in situations where a county itself deals with another state, a county must obtain "a copy of the voter's signed voter registration application" before removing the voter, it does not mandate such direct contact when a county receives third-party information via the IED. *See* Ind. Code § 3-7-38.2-5.5(f) (2020). Rather, Section 5.5(f)(2) of the law provides that "[a] copy of the actual voter signature is not required." This provision on its face allows counties to cancel a voter's registration even if no one in Indiana has reviewed the voter's out-of-state voter registration form or otherwise had any direct contact with the voter. It violates the NVRA for the same reasons that the Court already explained in *Common Cause I*.

SEA 334's conflict with federal law is no accident. The Indiana General Assembly enacted the law in full awareness that SEA 334 would clash with the NVRA. While the General Assembly debated the bill, Appellant Co-Director King,

referencing *Common Cause I*, told legislators that this Court would have "serious issues" with SEA 334. Still, the State now claims—seemingly just for purposes of litigation—that the law is ambiguous, and it asks the Court to engage in linguistic gymnastics to save it. But there is no reason for the Court to do so. The State has failed to issue rules or guidance to advance the interpretation it asks this Court to adopt—despite a statutory mandate to do so. In fact, it has not even offered an affidavit from Secretary Lawson or the IED Co-directors reflecting an intent to issue such rules or guidance or to implement SEA 334 consistently with how it construes the statute in its legal briefs.

In any event, SEA 334 is not ambiguous or susceptible to the State's interpretation. Because SEA 334 conflicts with the NVRA on its plain terms, it cannot be saved by conjuring hypothetical scenarios in which it could be applied without violating federal law. The district court correctly applied statutory construction principles to grant summary judgment in the Voter Organizations' favor, invalidated the portions of SEA 334 that make up the unlawful voter removal scheme, and permanently enjoined the State from:

> 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. 25. That ruling was well within the district court's discretion and grounded in this Court's direction as to what the NVRA requires.

This Court should affirm the district court's grant of summary judgment and the permanent injunction.

JURISDICTIONAL STATEMENT

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

ISSUES PRESENTED

1. Did the district court correctly conclude that SEA 334 permits the cancellation of voter registrations without a "request" or a "confirm[ation] in writing" from the voter, and without notice and waiting, and therefore violates the NVRA?

2. Did the district court abuse its discretion by issuing an injunction consistent with this Court's recitation of what the NVRA requires?

STATEMENT OF THE CASE

I. Absent Notice and Waiting, the NVRA Requires Indiana to Review a Direct Request from the Voter Before Canceling a Voter's Registration.

"The NVRA sets the boundaries within which states must operate when they administer the voter-registration process." *Common Cause I*, 937 F.3d at 947. States may not remove voters from official lists of eligible voters, "except under prescribed circumstances." *Id.* Namely, a voter may be struck from the list of eligible voters because of a change in residence only: (1) "at the request of the registrant," or if "the registrant confirms in writing that [they] changed residence," or (2) if the registrant "has failed to respond to a notice . . . and has not voted or appeared to vote [in the

next two] general election[s]." *Id.* at 958–59 (citing 52 U.S.C. § 20507(a)(3), (d)). "Both of these avenues focus on direct contact with the voter." *Id.* at 959.

The State lacks a "request of the registrant," "when [it] does not itself possess a copy of a communication from a suspected Indiana registrant." *Id.* at 961. In those instances, Indiana may not "immediate[ly] remov[e] that voter's name from the rolls." *Id.* Further, notification from a third party—*i.e.*, an entity that "is not the resident, nor . . . the resident's agent"—is not *the registrant's* confirmation in writing, and therefore insufficient grounds to remove the voter without notice. *Id.*

II. Voter Registration Cancellation Practices in Indiana and Procedural History

A. Indiana's Voter Registration Cancellation Process Before 2017

Before 2017, Indiana law set forth a list maintenance process directing that:

> [C]ounty voter registration office[s] shall determine whether the individual:
>
> > (1) identified in the report provided by the NVRA official . . . 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.

Ind. Code § 3-7-38.2-5(d)(1)–(3) (2016). Under that law, if the county made all three findings, it had to "cancel the voter registration of that voter." *Id.* § 3-7-38.2-5(e) (2016). But if the county made only the first two findings and not the third—*i.e.*, if the county had information suggesting the voter may have registered in another state, but no written authorization from the voter to cancel their registration—it had to "send an address confirmation notice to the Indiana address of the voter." *Id.*

To "identify[] voters who may have become ineligible to vote in Indiana because of a change in residence" and were therefore potentially subject to removal, Indiana used a third-party program known as Crosscheck. *Ind. State Conf. of the NAACP v. Lawson* ("*NAACP I*"), 326 F. Supp. 3d 646, 652 (S.D. Ind. 2018); Ind. Code § 3-7-38.2-5(d) (2016). Under this program, the State annually received lists of Indiana voters having an "identical" "first name, last name, and date of birth of the voter registered in the other state." Ind. Code § 3-7-38.2-5(d) (2016). The IED then applied what the State called "confidence factors" to the Crosscheck data, assigning points when certain data fields matched, *NAACP* R.42-21[2] at 66:1–66:4, 67:7–23. When records exceeded a specified point threshold, the IED placed Crosscheck matches into the interstate "hopper," a data folder in the list maintenance State Voter Registration System's digital dashboard. *See NAACP* R.42-21 at 70:3–19.

Counties would review the IED-provided information in the interstate hopper, and select one of three options: "match approved," "match rejected," or "research needed." *NAACP* R.42-21 at 70:3–19. "Match approved" entries were automatically sent address confirmation notices. *NAACP* R.42-21 at 70:20–71:3; R.42-22 at 46:2–10; Ind. Code § 3-7-38.2-5(e) (2016). If the voter did not respond to the mailer, they were put in inactive status but left on the rolls. *NAACP* R.42-21 at 70:20–71:16. Consistent with the NVRA's prescribed notice-and-waiting procedure, voters who did not respond to the notice were removed from voter lists only if they

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

did not vote in the next two federal general election cycles. *NAACP* R.42-22 at 46:11–24.

B. Indiana's Voter Registration Cancellation Process Under SEA 442

In 2017, the Indiana General Assembly enacted SEA 442, which authorized counties to cancel a voter's registration without a communication from the voter and without following the NVRA's notice-and-waiting procedure. *See NAACP* R.42-22 at 37:14–38:3, 38:13–16; *NAACP I*, 326 F. Supp. 3d at 661–62.

Specifically, SEA 442 amended the law to allow counties to cancel a voter's registration upon making only the first two determinations—namely, that the out-of-state voter flagged by Crosscheck as a match appeared to be an Indiana-registered voter, and that the voter had more recently registered in the other state. *See* Ind. Code § 3-7-38.2-5(d)–(e) (2018). SEA 442 dispensed with the requirement that, prior to removing a voter, a county must either determine that the voter "authorized the cancellation of any previous voter registration" or send the voter an "address confirmation notice." *Id.* § 3-7-38.2-5(e) (2018).[3] Thus, under SEA 442,

---

[3] The following illustrates SEA 442's pertinent changes to Indiana law:

SEA 442 (redline)

(d) . . . 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. ~~and~~

~~(3) authorized the cancellation of any previous registration by the voter when the voter registered in another state.~~

county approval of matches in the interstate "hopper" would automatically cancel registrations, as opposed to merely generating confirmation mailers. *NAACP* R.42-22 at 37:14–38:3; Short App. 40.

C. The District Court's Preliminary Injunction Against Implementation of SEA 442, and this Court's Decision Affirming

On June 8, 2018, the district court enjoined "Defendants from taking any actions to implement SEA 442 until th[e] case has been finally resolved." *NAACP I*, 326 F. Supp. 3d at 664. The district court recognized that the information gathered through the Crosscheck program was "not coming from the voter," *id.* at 661, and found that "SEA 442 remove[d] the NVRA's procedural safeguard required in particular cases of providing for notice and a waiting period." *Id.* at 662. Accordingly, the district court "determine[d] that Plaintiffs ha[d] 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. On August 27, 2019, this Court, holding that the Voter Organizations had standing and were likely to succeed on the merits, affirmed. *Common Cause I*, 937 F.3d at 949, 956.

> (e) If the county voter registration office determines that the voter is described by subsection ~~(d)(1) through (d)(3),~~ (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.~~

Compare Ind. Code. § 3-7-38.2-5(d)–(e) (2018), *with* Ind. Code § 3-7-38.2-5(d)–(e) (2016).

On October 30, 2019, the district court *sua sponte* stayed litigation until May 1, 2020 to allow the parties an opportunity to "settle[] or otherwise resolve[]" the case. *NAACP* R.117; R.116; Short App. 11.

D. Indiana's Voter Registration Cancellation Process Under SEA 334

On March 21, 2020, with the district court's stay still in place, Governor Eric Holcomb signed into law SEA 334, which amended SEA 442. The new law has two main features.

First, SEA 334[4] officially withdrew Indiana from Crosscheck, *see* Ind. Code § 3-7-38.2-5.1(a)–(b) (2020), but it replaced Crosscheck with a doppelganger: the Indiana Data Enhancement Association ("IDEA"). IDEA is "functionally identical to Crosscheck." Short App. 11. "[I]t receives member states' voter lists and returns purported matches." *Id.*; Ind. Code. § 3-7-38.2-5.5(b) (2020). As SEA 334's legislative sponsor, Senator Walker, explained, IDEA is, at bottom, "a voter maintenance list crosscheck database, model[ed]" on "existing products and former systems." *Hr'g before the Ind. House Comm. on Elections & Apportionment*, Ind. Gen. Assembly (Feb. 20, 2020), http://iga.in.gov/information/archives/2020/video/committee_elections_and_apportionment_0500/ (hereinafter "H.R. Hr'g"). Like Crosscheck, IDEA collects information from third parties. It does not involve direct contact with registrants, Ind. Code § 3-7-38.2-5.5(a)–(c) (2020), and it does not

[4] The sections of SEA 334 relevant to this litigation were codified in Title 3, Article 7, Chapter 38.2 of the Indiana Code. Accordingly, references in this brief to SEA 334 § 5.5 refer to Indiana Code, § 3-7-38.2-5.5 (2020).

collect or disseminate the actual voter registration documents underlying its "matches," *id.* § 3-7-38.2-5.5(b), (f) (2020). SEA 334 delegates oversight of IDEA to the IED Co-Directors and Secretary of State.[5] *Id.* § 3-7-38.2-5.5(a)–(b) (2020).

Second, SEA 334 perpetuated SEA 442's mechanism permitting counties to cancel a voter's registration based on information received from other states without any Indiana official receiving and reviewing a request or confirmation made by the voter. SEA 334 restored the pre-SEA 442 requirement directing counties to either determine that the voter has authorized removal or, if they cannot, mail the voter a confirmation notice before removing them from the rolls. *Id.* § 3-7-38.2-5.5(d)(3), (e) (2020). But the statute also added—for the first time—a definition of what constitutes "confirmation" that the voter has requested cancellation sufficient for immediate removal: specifically, notice from another state that an Indiana voter is registered there, unaccompanied by any communication from the actual voter. *Id.* § 3-7-38.2-5.5(d)–(e), (f)(2) (2020).

Thus, what the statute gave with one hand—requiring counties to determine that a voter has authorized their removal before immediately cancelling the voter's registration—it took away with the other. SEA 334 declares that information from a

[5] Appellants Secretary Lawson and Co-Director King were primary drafters of SEA 334 and proponents of IDEA. Testifying on his and the Secretary's behalf in support of SEA 334, Co-Director King stated, "[t]he Secretary of State's office has proposed in the bill, as introduced, stepping in to form [IDEA] . . . ." *Hr'g before the Ind. S. Comm. on Elections*, Ind. Gen. Assembly (Jan. 23, 2020), http://iga.in.gov/information/archives/2020/video/committee_elections_3500/. Senator Walker, the bill's nominal author, stated, "334 does have Amendment No. 1, which is pertaining to the adoption of the voter list maintenance program, *to get that in the form as the Secretary of State's looking to implement and adopt that program*." *Id.* (emphasis added).

third-party source—which, like Crosscheck, "is not the resident, nor . . . the resident's agent," *Common Cause I*, 937 F.3d at 961—nevertheless provides sufficient "confirmation that the individual is registered in another jurisdiction and has requested cancellation of the Indiana registration." Ind. Code § 3-7-38.2-5.5(f)(2) (2020).[6]

SEA 334 mandates that the IED Co-directors adopt an order by July 1, 2020, concerning how the IDEA program will be administered, and if they fail to do so, it

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[6] The following shows, in relevant part, SEA 334's amendment of SEA 442:

SEA 334 (redline against SEA 442)

(d) The county voter registration office shall determine whether the individual:
(1) identified in the report provided by the NVRA official under this 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.

(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

falls to the Secretary to issue the order. *See id.* § 3-7-38.2-5.5(b) (2020). On or about March 30, 2020, the IED updated its Voter Registration Guidebook, which provides guidance to "local election officials who process voter registration forms and conduct elections."[7] The 2020 VR Guidebook updated the portion of the chapter entitled Voter List Maintenance that pertains to "Cancellation by Voter." That update adds the language taken virtually verbatim from Section 5.5(f) of SEA 334, creating what the guidebook styles an "exception" to the general requirement that a voter's request for cancellation must be in writing and signed by the voter.[8] Other than clarifying that Section 5.5(f) is an exception to the general voter request requirements, the guidebook provides no additional information or guidance on how the process outlined in Section 5.5(f)(2) is to be carried out. To date, no other order has been adopted or, to the Voter Organizations' knowledge, even proposed.

> 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.*

Compare Ind. Code § 3-7-38.2-5.5(d)–(f) (2020) (emphasis added), *with* Ind. Code § 3-7-38.2-5(d)–(e) (2018).

[7] Ind. Election Div., *2020 Indiana Voter Registration Guidebook* (2020), https://www.in.gov/sos/elections/files/2020 Voter Registration Guidebook.MOVEDPRIMARY.pdf ("2020 VR Guidebook"). The State failed to produce the 2020 VR Guidebook in discovery or to submit it to the district court in connection with the summary judgment proceedings.

[8] Compare 2020 VR Guidebook, at 43, to Ind. Election Div., *2019 Indiana Voter Registration Guidebook* 41 (2019), https://www.in.gov/sos/elections/files/2019 Voter Registration Guidebook.final.pdf.

E. The Voter Organizations' Work to Protect Voters' Rights

The Voter Organizations are three nonprofit organizations focused on increasing civic participation in large part through promoting and facilitating voter participation. *See NAACP* R.43 ¶¶ 5–6; R.44, ¶¶ 6–9; *Common Cause* R.74-24 ¶ 5; *see also NAACP* R.137-7 at 53:11–17, 54:6–56:8, 78:3–79:5, 93:8–12. Each organization has had to expend scarce resources to combat the effects of SEA 442. *See NAACP* R.43 ¶ 22; R.44 ¶¶ 21–22; *Common Cause* R.74-24 ¶¶ 19–24; *Common Cause I*, 937 F.3d at 956 (in affirming Voter Organizations' standing, noting the organizational resources diverted to "perform concrete work, voter-by-voter, polling place by polling place" to "help[] others contend with or prepare for Act 442") (quotation marks omitted). Since SEA 334's enactment, the Voter Organizations have redoubled their efforts and will be and have already been forced to divert scarce resources to address SEA 334's effects. These efforts include expanding and re-focusing their volunteer and community training, voter education, and poll monitoring programs toward the increased risk of erroneous voter registration cancelations, and re-registering erroneously removed voters. *See NAACP* R.137-12 ¶¶ 19–26; R.137-14 ¶¶ 13–14; R.137-15 ¶¶ 14–15, 17, 22. Increased resources expended on these activities leaves fewer to devote to other organization priorities, including training on other voting issues, registering new voters, or work advancing other policies that are important to their missions. *See NAACP* R.44 ¶¶ 21–23; R.137-12 ¶¶ 19–27; R.137-14 ¶¶ 13–14; R.137-15 ¶¶ 22–23.

III. The District Court's Final Judgment

On July 1, 2020, pursuant to the district court's schedule, the State moved to dismiss the cases, and the Voter Organizations moved for summary judgment. *NAACP* R.134; R.136. On August 20, 2020, the district court denied the State's motion and granted summary judgment in the Voter Organizations' favor, concluding that SEA 334 suffers from the same defect as SEA 442, by "allow[ing] cancellation of voter registrations without direct contact from the voter and without the NVRA's notice-and-waiting protection." Short App. 19. Relying on this Court's explanation of the NVRA's requirements, the district court found that under SEA 334's plain language, "[t]here 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." Short App. 22–23.

The district court expressly rejected the State's reading of the statute. The State asked the lower court "to find that Section 5.5(f)(1) implies that under Section 5.5(f)(2)," the IED may only notify a county that the voter cancelled their registration if the IED "also received a copy of the voter's signed voter registration application authorizing cancellation." Short App. 22. The district court found that reading of SEA 334 implausible and:

> 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.

Short App. 22–23. Finding the "facts and evidence supporting the issuance of injunctive relief ha[d] not changed since the issuance of the preliminary injunction," Short App. 24, the lower court adopted its previous analyses and conclusions and

> prohibit[ed] the Defendants 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.

Short App. 25, 28.

The lower court's injunction matched precisely the relief that the Voter Organizations requested, *see NAACP* R.137 at 33–34, which the State did not object to or seek to modify or clarify. The State then filed this appeal.

SUMMARY OF ARGUMENT

This Court should affirm summary judgment and the permanent injunction entered in the Voter Organizations' favor.

SEA 334 continues to "flout[] the NVRA's command that the state rely on the registrant herself," *Common Cause I*, 937 F.3d at 961, because it permits counties to cancel a voter's registration based on notice forwarded by the IED from an out-of-state official, even when the notice *fails to include* any communication made by the voter. Without identifying which of SEA 334's words or phrases are purportedly unclear, the State asks this Court to find ambiguity where there is none, then rewrite the statute against its explicit terms and its drafters' voiced intent.

But SEA 334 is not ambiguous. The Court need look no further than the statute's text to affirm that SEA 334 conflicts with the NVRA. Moreover, reading Section 5.5(f)(2) in context and considering the undisputed evidence of legislative purpose—as the State urges—further confirms that SEA 334 both allows and was *intended* to allow the removal of voters from the rolls without an Indiana official reviewing a communication made by the voter.

The State may not avoid SEA 334's conflict with the NVRA by claiming that it will implement the state law in a way that satisfies federal requirements. The State's *post-hoc* interpretation of SEA 334, offered only in the context of litigation, is not a reasonable reading of the statute. And neither the district court nor this Court should accept at face value the nonbinding promise of the State's attorneys that Indiana will construe the law consistently with the NVRA, particularly when the State has repeatedly construed the NVRA against this Court's clear direction.

The State's misguided attempt to apply the standard for a facial constitutional challenge is unavailing. The Voter Organizations asserted a pre-enforcement challenge to Indiana's voter removal scheme because it undeniably conflicts with federal law. That challenge is appropriate, because it attacks a well-defined and likely application of the statute that violates the NVRA. Moreover, even if there were some application of the statute that avoided a conflict with the NVRA, SEA 334 as a whole would still frustrate the federal scheme and be preempted.

Because SEA 334 plainly conflicts with the NVRA, the district court appropriately declined to abstain. The case raises primarily questions of law and

was therefore ripe for decision. *Pullman* abstention is inapplicable: There is no "substantial uncertainty" as to SEA 334's meaning and the case raises no "difficult constitutional question" that abstention could avoid. And the district court did not abuse its discretion in declining to *sua sponte* certify a question to the Indiana Supreme Court when the State never requested certification and where the district court was not "genuinely uncertain" as to SEA 334's proper construction.

Finally, the district court did not abuse its discretion in granting the permanent injunction, which closely tracks this Court's statements on the law and ensures that the State ceases to misapprehend the NVRA. The State waived any arguments concerning the injunction's scope by failing to raise them before the district court. And even if those arguments were properly before this Court, the district court properly entered relief broad enough to prevent any unlawful voter removal programs that the State may conjure up without precluding the State from fashioning the NVRA-compliant program that it says it plans to implement.

STANDARD OF REVIEW

This Court reviews an appeal of a grant of summary judgment *de novo*, interpreting the facts and drawing all reasonable inferences in favor of the nonmoving party. *Est. of Simpson v. Gorbett*, 863 F.3d 740, 745 (7th Cir. 2017).

It reviews a grant of a permanent injunction and the scope of relief for abuse of discretion. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The Court applies deferential review to the scope of an injunction "because the district

court is in the best position to weigh [the relevant] interests." *H-D Mich., LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 843 (7th Cir. 2012).

The Court reviews *de novo* the question whether an injunction complies with Federal Rule of Civil Procedure 65(d), including the requirements to "state its terms specifically" and "describe in reasonable detail . . . the acts restrained." *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 384 (7th Cir. 2018); *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 504 (7th Cir. 2008). But the question "[w]hether a particular injunction is overbroad or vague is necessarily a highly fact-bound inquiry . . . and the appropriate scope of the injunction is left to the district court's sound discretion." *Eli Lilly & Co.*, 893 F.3d at 384 (citation and quotation marks omitted); *see also Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302, 307 (7th Cir. 2010) ("[An] injunction must . . . be broad enough to be effective, and the appropriate scope of the injunction is left to the district court's sound discretion.").

ARGUMENT

I. SEA 334 Permits Removal of Voters in Violation of the NVRA.

A. Section 5.5(f)(2)'s Plain Language Conflicts with the NVRA.

As this Court has said, to interpret a statute, "we first look to the actual language of the statute. If we find the terms of the statute unambiguous, judicial inquiry is complete." *United States v. Henderson*, 376 F.3d 730, 732 (7th Cir. 2004) (quotation marks omitted). That SEA 334 is a state statute does not alter the starting point for the court's analysis. "In the absence of an authoritative interpretation," this Court "interpret[s] [SEA 334] as [it] thinks the state's highest

court would construe it." *Laborers Loc. 236, AFL-CIO v. Walker*, 749 F.3d 628, 634 (7th Cir. 2014). In that task, familiar rules of construction apply. Where "a statute is unambiguous," the Indiana Supreme Court invariably "give[s] the statute its clear and plain meaning." *Butler v. Ind. Dep't of Ins.*, 904 N.E.2d 198, 202 (Ind. 2009). Thus, the Court ought to interpret SEA 334 as it would a federal statute.

SEA 334 is not ambiguous. By its plain terms, SEA 334 permits removal of Indiana registrants from the voter rolls without an Indiana official receiving or reviewing the registrants' signed out-of-state registration forms. Specifically, Section 5.5(f) establishes two avenues by which an Indiana county may rely on "written information provided . . . by a voter registration office in another state" to conclude that a voter has authorized removal, only one of which requires a communication directly from the voter. Ind. Code § 3-7-38.2-5.5(f) (2020). *First*, under Section 5.5(f)(1), Indiana county voter registration offices may rely on written information "provided directly from the other state to the Indiana county voter registration official." Where the county communicates directly with an out-of-state official, it *must* receive "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) (2020).

Second, under Section 5.5(f)(2), county registrars consider "*written notice* from another state," received by the IED and forwarded to the county, as "confirmation that [an] individual is registered in another jurisdiction and . . . has

requested cancellation of the Indiana registration." *Id.* § 3-7-38.2-5.5(f)(2) (2020) (emphasis added). Explicitly, "*[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.* (emphasis added). The use of the definite article "the" when describing the written notice forwarded to the county indicates that it is the same written notice the IED received "from another state." In other words, under the process Section 5.5(f)(2) sets forth, the IED receives "written notice from another state" that an Indiana voter is registered there, and then forwards *that same* "written notice" to the county.

The statute accordingly provides that "written notice" need not include "a copy of the actual voter signature," and that the latter need not be provided for the county to remove the voter without first following the NVRA notice-and-waiting procedure. Moreover, nothing in Section 5.5(f)(2) sets forth a precondition that the IED receives or reviews "a copy of the actual voter signature" prior to the county cancelling the voter's registration. The law says that "*the* written notice" from another state will be "forwarded" to the counties—not "summarized" or "described"; the plain meaning of this language is that the State will simply pass along whatever "written notice" it receives from another state in its entirety.[9] This is in stark contrast to Section 5.5(f)(1), which specifies that when another state sends

[9] This plain meaning is consistent with the IED's past practice upon receiving information from out-of-state elections officials, which has been to simply forward whatever "data" it receives to the relevant county officials so that counties—the entities that must make cancellation determinations—can ultimately decide whether to remove a voter. *See infra* at 24–27.

information directly to a county, that information must be more than mere "written notice" that an Indiana voter is registered there; it must include "a copy of the voter's signed voter registration application." Had the Indiana General Assembly intended Section 5.5(f)(2) to require that the IED obtain a voter's out-of-state registration form before notifying a county that the voter may be removed, it would have said so in the same clear terms as it used in Section 5.5(f)(1). *See United States v. Melvin*, 948 F.3d 848, 852 (7th Cir. 2020) ("use of different words" in a statute is evidence of "intended different meanings"); *Rockville Training Ctr. v. Peschke*, 450 N.E.2d 90, 92 (Ind. Ct. App. 1983) ("The use of different words is indicative of an intent the different words have separate and distinct meanings.").

Thus, SEA 334 expressly allows cancellations without the review—by the IED or the county—of a signed copy of a voter registration form or any other kind of communication *made by the voter*, and without notice and waiting. This is the same kind of "indirect contact with the voter" that this Court previously held unlawful. *See Common Cause I*, 937 F.3d at 959. Like its predecessor statute, SEA 334 "does away with the process of personal contact with the suspected ineligible voter and allows Indiana election officials to remove a person from the rolls . . . *without direct notification of any kind*." *Id.* (emphasis in original). Because doing so plainly violates the NVRA, the Court need look no further.

The State does not contest that the Voter Organizations' understanding of SEA 334 plausibly follows from its plain language. Rather, the State asserts, without explanation, that Section 5.5(f)(2) is "ambiguous." Br. 15, 23, 26. But it fails

to identify *which* words of this provision are purportedly ambiguous. Instead, the State reads additional words into the statute to try to manufacture ambiguity. But nothing in Section 5.5(f)(2) as written is susceptible to multiple interpretations.

Specifically, the State contends that the words "written notice" can be "narrowly construed" to mean "a copy of the voter's signed voter registration application authorizing cancellation"—*i.e.*, that the IED will not forward voters' information to counties for cancellation unless the IED first receives "written notice" in the form of a copy of the voter's out-of-state registration form. Br. 23. But the statute itself prohibits such a reading. The statute plainly states that a copy of a signed voter registration form is "not required" for "written notice" to be forwarded from the IED to a county. Put another way, "written notice" under Subsection (f)(2) cannot plausibly be read to *necessarily include* an out-of-state registration application when the IED receives "written notice from another state," but to *exclude* the out-of-state form when the IED "forwards" *that same* "written notice" to the county. Indiana's General Assembly knew how to use the words "voter registration application," but it opted instead to use the phrase "written notice" in Section 5.5(f)(2). *See Briggs v. Rev. Bd. of Ind. Dep't of Workforce Dev.*, 648 N.E.2d 1225, 1228 (Ind. Ct. App. 1995) ("Courts presume that every word in a statute was intended to have meaning. All statutory language is deemed to have been used intentionally . . . .") (citations omitted).

The Court should not overlook SEA 334's plain meaning and read in a requirement—appearing nowhere in the statute's text—that the IED must be in

possession of a copy of a voter's signed voter registration form. The Court "cannot rewrite a [state] law in order to 'save' it[.]" *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Tp.*, 980 F.2d 437, 441–42 (7th Cir. 1992) (quoting *City of Houston v. Hill*, 482 U.S. 451, 468–69 (1987)); *c.f. K-S Pharmacies, Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728, 730 (7th Cir. 1992) (Federal courts do not "slice and dice a state law" and "attribute to the state a law we could have written to avoid the problem.").

B. SEA 334, As A Whole, Permits Registration Cancellations Without Notice Absent Direct Voter Contact.

To "save[] the law from invalidity under the NVRA[,]" Br. 25, the State urges this Court to read Section 5.5(f)(2) in the context of SEA 334 as a whole, *id.* at 21–24. But the statutory scheme that SEA 334 sets forth is consistent with the plain meaning of Section 5.5(f)(2), *i.e.*, that SEA 334 permits immediate voter registration cancellations based on notice of a match with another state's voter files, in the absence of direct voter contact. Nothing in SEA 334 contemplates the State's counter-textual reading that the IED will receive and review voters' out-of-state registration forms.

SEA 334 Section 5.5(a) creates a new interstate voter list maintenance system, IDEA, that is in nearly all its particulars identical to the Crosscheck program that provided the data for the removal process set forth under SEA 442, *see* Ind. Code § 3-7-38.2-5.5(a)–(b) (2020), which this Court found likely violated the NVRA. Under Section 5.5(b), participant states provide "registration data" to IDEA, but the provision does *not* require participants to include copies of the out-of-state "signed voter registration application[s]"—a phrase the Legislature knew how to

use when that was what it intended. *Compare id.* § 3-7-38.2-5.5(b) (2020), *with id.* § 3-7-38.2-5.5(f)(1) (2020); *see* Short App. 22 ("[N]o 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."). Under Section 5.5(c), based on data collected through IDEA, SEA 334 directs the State to provide to counties "the name of and any other information obtained under this subsection concerning" a voter who "may also be registered to vote in another state." Ind. Code § 3-7-38.2-5.5(c) (2020).

Section 5.5(d) then requires county election officials to assess the IDEA report to determine whether a voter contained therein (1) is the same individual as the county voter, (2) registered to vote out of state following the voter's Indiana registration, and (3) authorized cancellation of any previous registration upon registering out of state. *Id.* § 3-7-38.2-5.5(d) (2020). Section 5.5(f)(2) directs that, in determining whether a voter has authorized cancellation, "the county should consider" "written notice" received from another state first by the IED and then forwarded to the county "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) (2020) (emphasis added). Consistent with the fact that IDEA does not require participant states to provide underlying voter registration forms, Section 5.5(f)(2) goes on to state explicitly 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.* (emphasis added). Put

simply—and considering the statute in its entirety—SEA 334 expressly permits county officials to cancel an Indiana voter's registration without notice and waiting, upon receipt from the IED of a "written notice" of an out-of-state registration produced by a third party—not the voter—where that "written notice" is neither expected nor required to contain the voter's own communication.

Because Section 5.5(f)(1) contains an explicit requirement that an out-of-state official communicating directly with an Indiana county provide a copy of a voter's signed registration form, the State contends that Section 5.5(f)(2) contains a parallel, yet implicit, requirement when an out-of-state official communicates with the IED. But nothing in Section 5.5(f)(2) or any other provision of SEA 334 requires the IED to obtain such information or other states to provide it. To support its construction, the State offers a hypothetical in which an official in another state sends the IED "written notice" of an out-of-state registration "in the form of a copy of the voter's signed voter registration form authorizing cancellation." Br. 23. The State maintains that in this circumstance, Section 5.5(f)(2) merely "excuses the Election Division from having to send the signed authorization to the county." Br. 21–22. But SEA 334 says nothing about this situation, explicitly or implicitly. It is a hypothetical conjured from whole cloth. The State's interpretation of Section 5.5(f)(2) is not based on a holistic consideration of SEA 334. Rather, it is premised on reading two very differently worded provisions of the statute to mean the same thing with no basis in the statutory language for doing so.

Moreover, the State's urged reading—whereby Section 5.5(f)(2) silently requires the IED to receive a voter's out-of-state registration, but does not require it to forward that form to the appropriate county, Br. 21–22—is inconsistent with the statute's other provisions. Specifically, SEA 334 requires the counties, not the IED, to make the relevant determinations that are prerequisites to cancel a voter's registration, Ind. Code § 3-7-38.2-5.5(d) (2020), whereas the State's proffered construction of Section 5.5(f)(2) would effectively have the IED determine that a voter had requested cancellation and would require counties to accept that determination without reviewing or performing their own independent assessment of the relevant information. That construction of Section 5.5(f)(2) is not only contrary to the counties' statutory obligation to make the relevant determinations themselves, it is also inconsistent with how the IED has operated under essentially identical provisions in prior iterations of the law. *See NAACP* R.42-22 at 56:20–58:22 (King confirming that it is the counties that make determination as to whether the person identified in "hopper" is the same person and has a prior registration in Indiana); *NAACP* R.42-21 at 13:9–15 (Nussmeyer testifying that "the county voter registration official is ultimately responsible for the records within their jurisdiction").

Consistent with counties having the obligation to make the determinations, the IED's past practice has been to simply forward whatever "data," "summary," or "list" it received from out-of-state officials to the relevant Indiana county, "leaving it to the county" to make the necessary determinations. *See NAACP* R.42-22 at 56:20–

58:22; *NAACP* R.42-21 at 59:5–15 (Nussmeyer describing the process for handling information received from another state, testifying that "[i]t's my understanding that they print the information that's provided from the other state, and it's directly sent to the county"). Under this paradigm, the IED has never been responsible for determining whether a voter has requested or authorized cancellation, and withholding any relevant information from counties would handicap the counties' ability to discharge their responsibilities. The Indiana Legislature enacted SEA 334 against this backdrop, and if it had intended to alter it, it would have done so explicitly. *See Couch v. Wilkinson*, 939 F.2d 673, 675 (8th Cir. 1991) ("State legislatures are presumed to know the state of pre-existing law when they enact later law."); *cf. Procter & Gamble Co. v. Kraft Foods Glob., Inc.*, 549 F.3d 842, 848–49 (Fed. Cir. 2008) (improper to presume Congress would alter the backdrop of existing law *sub silentio*).

C. Undisputed Evidence of Legislative Intent Confirms the Plain Meaning of Section 5.5(f)(2).

The State also urges this Court to consider SEA 334's "legislative aim" when interpreting Section 5.5(f)(2). Br. 22–24. But the Court need not look beyond a statute's words where its plain language is clear. Indeed, "[t]he best evidence of legislative intent is the language of the statute itself, and all words must be given their plain and ordinary meaning unless otherwise indicated by statute." *Hendrix v. State*, 759 N.E.2d 1045, 1047 (Ind. 2001) (citation omitted). Ultimately, "what matters is the law the Legislature *did* enact," and the State cannot ask the Court to

"rewrite that to reflect [its] perception of legislative purpose." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 403 (2010).

Nevertheless, the undisputed evidence of legislative intent here is consistent with the statute's plain meaning, and reflects that the Legislature knew that SEA 334 would conflict with the NVRA. During the drafting process, SEA 334's authors did not, as the State asserts, attempt to cure the legal defects that this Court identified in SEA 442; rather, they made clear that they disagreed with this Court's ruling. Facing questions from legislators regarding SEA 334's compliance with federal law and the preliminary injunction, Co-Director King said that "the most important point to understand" was "that no final ruling ha[d] yet been issued in this litigation." H.R. Hr'g. He recalled that "Indiana election legislation has gone to the U.S. Supreme Court," and surmised "[t]hat's the only place where we will have a final answer, either by a hearing, or by denial of certiorari to this particular litigation, assuming it continues without settlement." King added: "I don't want anyone to be under the misimpression that a court has definitively ruled anything with regard to the provisions that are in current law or as amended by [SEA] 334. Although, certainly the Seventh Circuit has indicated that it has serious issues with them." *Id.*

At no point did Co-Director King represent that SEA 334 complied with the NVRA or cured the NVRA violations this Court and the district court had identified. *Id.* To the contrary, SEA 334's drafters seemingly wrote their disagreement with this Court's holdings into the law.

Moreover, undisputed evidence indicates that SEA 334's champions understood that "written notice" does not necessarily include the voter's out-of-state signed registration application. For example, in a letter to Plaintiff Common Cause's policy director, SEA 334 sponsor Representative Wesco wrote that the statute "allow[s] counties to choose to cancel a voter registration based on notice received from another state," and directed her to the "attached cancellation request [sic] from other states and localities." *NAACP* R.137-13 at 3. Of the six attached sample "notices" considered by SEA 334's sponsor to be sufficient to cancel a voter's registration without notice-and-waiting, only two included the registrant's signed out-of-state registration form or a similar direct voter communication. *Id*. at 3–8. Representative Wesco's examples are consistent with the kind of information that Indiana has regularly received from out-of-state officials concerning voters who purportedly registered outside of Indiana, *i.e.*, lists of names or mere emails *without* copies of the out-of-state voter registration forms.[10] *See, e.g.*, *NAACP* R.42-22 at 41:19–42:13.

D. The State's Litigation Position is Not the Law.

The State attempts to paper over SEA 334's conflict with the NVRA with a defense amounting to "trust us." The State asserts that "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." Br. 22

[10] However, in the pre-2017 regime, Indiana law made "provision for contacting the voter or confirming her wish permanently to change domicile and cancel her Indiana registration." *Common Cause I*, 937 F.3d at 948–49.

(citing *Moriarty v. Ind. Dep't of Nat. Res.*, 113 N.E.3d 614, 619 (Ind. 2019)). But this Court is not bound by a State's interpretation of a statute where, as here, the "interpretation would be inconsistent with the statute itself." *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000); *see also Shady Grove Orthopedic Assocs.*, 559 U.S. at 403 (*post hoc* legal arguments "cannot override the statute's clear text").

Moreover, the IED has not issued the kind of formal or binding interpretation of SEA 334 to which this Indiana courts would give deference. Indiana cases that address the issue hold that deference is due to an agency's interpretation of a statute when it is incorporated into formal agency action, *not* the agency's litigation position asserted only by its counsel from the attorney general's office. *E.g.*, *Moriarty*, 113 N.E.3d at 617–18 (agency position consistently documented over many years through correspondence, notices of violation, and administrative proceedings); *West v. Off. of Ind. Sec'y of State*, 54 N.E.3d 349, 351 (Ind. 2016) (upholding agency interpretation of statute offered in administrative proceedings among private parties while agency acting as impartial adjudicator). Here, the State's position is nowhere found in formal agency action, and even its litigation position is unsupported by any affidavit or other statement by the Appellants themselves, rather than their attorneys.

In fact, the only guidance the State has issued as to the meaning of SEA 334 is consistent with its plain language. The IED's 2020 VR Guidebook plainly provides that Section 5.5(f)(2) is an "exception" to the otherwise applicable requirement that requests for cancellation by in writing and signed by the voter.

2020 VR Guidebook at 43. This Court should reject any suggestion that the State might issue different or additional guidance in the future. More than six months have elapsed since the deadline in Section 5.5(b), requiring the IED Co-directors to issue an order concerning administration of the statute, and more than five months have passed since the State first proffered its interpretation of SEA 334 in this litigation. *See NAACP* R.143. Thus, while the State continues to advance a potentially NVRA-compliant policy in litigation, the guidance it has issued is to the contrary, and it has not bound itself by formally issuing the order that Section 5.5(b) requires.[11]

"A court should not uphold a highly problematic interpretation of a statute merely because the Government promises to use it responsibly." *United States v. Valle*, 807 F.3d 508, 528 (2d Cir. 2015); *cf. United States v. Stevens*, 559 U.S. 460, 480 (2010) (federal law "does not leave us at the mercy of *noblesse oblige*"); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001). The State's promises are of especially little comfort here, given the long history of this case. For three years, the State litigated against the proposition that the NVRA requires direct communication from the voter, or the notice and waiting process, before removal for change of residence. After this Court affirmed this rule unequivocally, Appellants

[11] The State implies that it was somehow prevented from implementing the statute by Voter Organizations' summary judgment motion or the district court's injunction. Br. 11, 25. The motion came on the same day as the IED's deadline for issuing an implementing order, however, and the injunction came nearly two months later. Even if the deadline had not already passed, the existence of a pending summary judgment motion in no way constrained the State from issuing additional guidance, much less prevented the State from offering at least an affidavit in opposition explaining the State's view of the law or outlining regulations it would implement if given the opportunity.

Lawson and King drafted SEA 334 with a yawning loophole that allows county officials to remove voters based on third-party information, just as this Court forbade. They did not amend their bill, despite the repeated urging of the Voter Organizations, who warned that SEA 334 perpetuated the NVRA problems present in SEA 442. *See, e.g.*, *NAACP* R.137-12. Co-Director King then acknowledged that this Court would have "serious issues" with SEA 334, but effectively assured the legislature that this Court's ruling on the NVRA was not the last word and could be reversed by the U.S. Supreme Court. H.R. Hr'g. After its passage, the State issued guidance that did nothing to further clarify the meaning of the statute and failed to give even an inkling of the State's purported understanding of SEA 334 (even as it advanced that interpretation in its legal briefs). And the State has not demonstrated—through affidavit or otherwise—any intention to alter its existing guidance or to implement SEA 334 in the manner its attorneys now claim is called for by the statute. In other words, at every turn, the State has declined to bind itself to a voter list maintenance program that would be consistent with the NVRA.

E. The District Court Properly Reached the Merits of this Dispute.

The State faults the district court for construing SEA 334 at all, arguing that rather than reach the merits of what SEA 334 means, the court should have (1) dismissed the case on ripeness grounds while state officials "consider how the law will be implemented;" (2) abstained from deciding the case under the *Pullman* doctrine while state officials or courts "sort out the meaning of SEA 334," *see R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500–01 (1941), or (3) certified a

question to Indiana Supreme Court under Ind. App. R. 64(A). Br. 25–26.

The State requested none of these forms of relief from the district court. "It is axiomatic that arguments not raised below are waived on appeal." *Keene Corp. v. Int'l Fid. Ins. Co.*, 736 F.2d 388, 393 (7th Cir. 1984). In any event, none of these options were necessary or appropriate.

1. Ripeness

Because this case raises the primarily legal issue of federal preemption, it was ripe for resolution, and the district court properly proceeded to the merits. "To determine ripeness, courts examine (1) 'the fitness of the issues for judicial decision,' and (2) 'the hardship to the parties of withholding court consideration.'" *Cassell v. Snyders*, 458 F. Supp. 3d 981, 992–93 (N.D. Ill. 2020) (quoting *Metro. Milwaukee Ass'n of Com. v. Milwaukee Cnty.*, 325 F.3d 879, 882 (7th Cir. 2003)).

First, the issue here is fit for judicial decision now. "Claims that present purely legal issues are normally fit for judicial decision." *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 148 (7th Cir. 2011) (citing *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967)). Cases involving federal preemption of state statutes raise primarily legal issues that are ripe for resolution, even when the state statute has not yet been construed by the state courts. *See*, *e.g.*, *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) (finding preemption claim ripe for decision because "the question of pre-emption is predominantly legal, and although it would be useful to have the benefit of California's interpretation of [the relevant state law], resolution of the pre-emption

issue need not await that development"). Furthermore, the State's assertion that it has not had an opportunity to implement SEA 334, Br. 3, is belied by the fact that it issued the 2020 VR Guidebook, in which it failed to so much as suggest the interpretation of the law it now advances.

Second, withholding consideration would cause hardship. Hardship for ripeness purposes exists when the threat of future enforcement has a present "concrete" effect on the plaintiff's "day-to-day affairs" and when "adverse consequences [would] flow[] from requiring a later challenge," even where enforcement is not certain. *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 57–58 (1993) (citations and quotation marks omitted); *see Pac. Gas & Elec. Co.*, 461 U.S. at 201–02 (finding that spending and advance planning satisfied the hardship prong in preemption challenge); *Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1275 (7th Cir. 1992) ("When present harms will flow from the threat of future actions, those present harms may mean a controversy is ripe for review.") (citations and quotation marks omitted). Permitting SEA 334 to go into effect while the Indiana courts "sort[] out [its] meaning" could lead to many thousands of voters being removed from the rolls under procedures that plainly violate federal law, seriously complicating any possible remedy and imposing significant hardship on the Voter Organizations and their members.

Moreover, the Voter Organizations have already expended resources planning for this future application of SEA 334 and its impact on their members. *See*, *e.g.*, *NAACP* R.137-12. The fact that the statute has not yet been enforced does

not render the dispute unripe. *E.g.*, *Peick v. Pension Benefit Guar. Corp.*, 724 F.2d 1247, 1261 (7th Cir. 1983) ("There is no doubt that more issues involving the actual operation of the [challenged statute] would be before us if the parties had not initiated this suit until liability had been assessed, contested and arbitrated, but the potential existence of a different or more multifaceted case in the future cannot relieve us of the obligation to decide the case before us now."). Accordingly, the case is ripe for decision.

2. Pullman Abstention

Pullman abstention is "'an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it' and may be invoked only in those 'exceptional circumstances' in which surrendering jurisdiction 'would clearly serve an important countervailing interest.'" *Int'l Coll. of Surgeons v. City of Chicago*, 153 F.3d 356, 360 (7th Cir. 1998) (quoting *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188–89 (1959)." It is warranted only when "(1) there is a substantial uncertainty as to the meaning of the state law and (2) there exists a reasonable probability that the state court's clarification of state law might obviate the need for a federal constitutional ruling." *Id.* (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984); and *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 306 (1979)).

Here, *Pullman* abstention is inappropriate because, as the district court ruled and as explained above, there is no "substantial uncertainty" as to SEA 334's meaning. The statute plainly provides for the removal of voters in a manner that

violates the NVRA. "Where state law is unambiguous *Pullman* abstention is inapposite." *Ryan v. State Bd. of Elections of the State of Ill.*, 661 F.2d 1130, 1136 (7th Cir. 1981); *Int'l Coll. of Surgeons*, 153 F.3d at 365 (holding that *Pullman* abstention was inappropriate where the state statutory scheme was "not uncertain"). The mere possibility that a state court might, despite the clear statutory language, adopt a limiting construction of the statute does not provide a basis for *Pullman* abstention. "In the abstract, of course, such possibilities always exist. But the relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts might render adjudication of the federal question unnecessary." *Midkiff*, 467 U.S. at 237 (emphasis added). Rather, "[t]o justify abstention, there must be a *significant possibility* of a limiting construction." *Panhandle E. Pipe Line Co. v. Madison Cnty. Drainage Bd.*, 898 F. Supp. 1302, 1310 (S.D. Ind. 1995) (citing *Midkiff*, 467 U.S. at 236) (emphasis added). Such a "significant possibility" does not exist where the need for a limiting construction arises solely from the potential conflict with federal law. *See Zwickler v. Koota*, 389 U.S. 241, 251 (1967) ("[A]bstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim."); *Panhandle*, 898 F. Supp. at 1310 (rejecting abstention where "[e]ssentially the only argument in favor of a [narrowing construction of the state statute] is that such a construction would avoid the constitutional issue").

This case also fails *Pullman*'s second element, because preemption does not raise the kind of constitutional issue that abstention seeks to avoid. *See*, *e.g.*, *United*

Servs. Auto. Ass'n. v. Muir, 792 F.2d 356, 363 (3d Cir. 1986) ("[A] federal court should not abstain under *Pullman* from interpreting a state law that might be preempted by a federal law, because preemption problems are resolved through a non-constitutional process of statutory construction.").

Accordingly, the district court properly declined to apply *Pullman* abstention in this case.

3. Certified Question

Even had the State not waived the issue by failing to seek certification below as to SEA 334's meaning, the district court's decision not to, *sua sponte*, certify that question was appropriate. "The decision to grant or deny a motion to certify a question of state law is discretionary with the district court." *Brown v. Argosy Gaming Co., L.P.*, 384 F.3d 413, 417 (7th Cir. 2004). "[E]ven if there is no clear guidance from a state court, and a case technically meets the standards for certification, certification is neither mandated nor always necessary." *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 673 (7th Cir. 2001); *see also Mckesson v. Doe*, 141 S. Ct. 48, 51 (2020) ("Certification is by no means 'obligatory' merely because state law is unsettled; the choice instead rests 'in the sound discretion of the federal court.'"). "[T]he most important consideration guiding the exercise of this discretion is whether the reviewing court finds itself *genuinely uncertain* about a question of state law that is vital to a correct disposition of the case." *Pate*, 275 F.3d at 671 (emphasis added). Here, the district court had no difficulty ascertaining the meaning of SEA 334, which, as explained above, is unambiguous. Accordingly, the

district court did not abuse its discretion in declining to *sua sponte* certify a question to the Indiana supreme court.[12]

F. The Voter Organizations' Claim is a Proper Pre-Enforcement Preemption Challenge to SEA 334.

The State wrongly attempts to cast this litigation as a "facial challenge" to SEA 334, and incorrectly argues that the Voter Organizations had to "show that 'no set of circumstances exists under which [SEA 334] would be valid.'" Br. 26 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). The State contends that the district court must be reversed because "there *may* be situations" where Section 5.5(f)(2) *could* be applied without conflicting with the NVRA. Br. 26–27 (emphasis added).

Contrary to the State's argument, however, the Voter Organizations' challenge to SEA 334 is a proper pre-enforcement challenge to a voter list maintenance procedure that will harm them, their members, and the communities they serve. A pre-enforcement challenge may be maintained where it presents a "discrete and well-defined" application of the challenged law that is "likely to occur." *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007). Here, the Voter Organizations challenge SEA 334 on the ground that it is invalid when applied to remove voters for whom the State does not possess a later-signed out-of-state registration form and to whom it does not provide NVRA-mandated notice. The statute's application

[12] While it complains about the district court's failure to certify the question of SEA 334's construction, the State has not asked this Court to certify that question under Circuit Rule 52.

to those voters is well defined. In addition, given Section 5.5(f)(2)'s plain language and the 2020 VR Guidebook's explanation that Section 5.5(f)(2) creates an exception to the requirement that cancellation requests be in writing and signed by the voter, the unlawful application of SEA 334 is likely to occur. And as explained below, SEA 334's application to voters with whom the State and counties have had no direct contact is precisely the application that the district court enjoined. The Voter Organizations need not wait for voters to be removed to bring such a challenge. And their claim does not become a facial challenge simply because they sued prior to the statute's enforcement against them. *See Arizona v. United States*, 567 U.S. 387, 416, 425 (2012) (upholding in part a pre-enforcement, pre-implementation injunction against a state statute on preemption grounds); *see also Keller v. City of Fremont*, 719 F.3d 931, 958 (8th Cir. 2013) ("[W]here the effect of a law and the conflict with federal law is certain, pre-enforcement conflict preemption is entirely appropriate.").

The State does not dispute that if SEA 334 is read as the district court interpreted it, the statute conflicts with the NVRA. *See, e.g.*, Br. 20. Instead, it conceives of circumstances in which, almost by happenstance, SEA 334 might be applied in harmony with federal law. *See id.* at 26–27 ("there may be situations . . . where the Election Division receives a signed voter registration authorizing cancellation . . . .").[13] Statutes do not avoid preemption "whenever a defendant can conjure up just one hypothetical factual scenario in which implementation of the

[13] It is questionable whether the scenarios the State describes in fact constitute "applications" of SEA 334 rather than circumstances that fall outside its scope but are not prohibited by it.

state law would not directly interfere with federal law." *Lozano v. City of Hazleton*, 724 F.3d 297, 313 n.22 (3d Cir. 2013); *see also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 107 (1992) (A state law "is not saved from pre-emption simply because the State can demonstrate some additional effect outside" the federal statute's preemptive scope); *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000) (affirming pre-enforcement injunction against state law despite the law having some valid applications). Because there remain other applications—indeed obvious and likely applications—that SEA 334 permits but the NVRA forbids, the state statute is preempted.

Moreover, the State's argument that SEA 334 could be applied to avoid preemption—if only officials ignore its plain meaning and require a signed out-of-state voter registration form—falls flat. As described above, SEA 334 admits a single meaning. That meaning allows Indiana officials to cancel voter registrations absent direct voter contact.

II. The Injunction Is Not Overbroad or Vague, and the State Waived These Arguments.

The State claims that the injunction sought by the Voter Organizations and entered by the district court is "fatally overbroad" and "vague," Br. 29–31, but the State never raised these arguments to the district court and they are therefore waived. *See Wheeler v. Hronopoulos*, 891 F.3d 1072, 1073 (7th Cir. 2018) ("Failing to bring an argument to the district court means that you waive that argument on appeal."). Moreover, even if it had preserved these arguments, the injunction entered by the district court is not overbroad and spells out clearly—in the exact

terms used by this Court—the circumstances in which removal of voters is forbidden.

A. The State Waived Arguments Concerning the Scope or Terms of the Injunction.

A party that fails to raise an argument at the district court, including arguments concerning the scope or terms of an injunction, cannot raise it for the first time on appeal. *Wheeler*, 891 F.3d at 1073; *see also In re Aimster Copyright Litig.*, 334 F.3d 643, 656 (7th Cir. 2003) (appellant's failure to object to injunction's breadth or to suggest alternate language to the district court waived the argument on appeal that injunction was overly broad); *Laborers' Int'l Union of N. Am. v. Caruso*, 197 F.3d 1195, 1197 (7th Cir. 1999) (quoting *Arendt v. Vetta Sports, Inc.*, 99 F3d 231, 237 (7th Cir. 1996) ("We have long refused to consider arguments that were not presented to the district court in response to summary judgment motions.")); *TKK USA, Inc. v. Safety Nat'l Cas. Corp.*, 727 F.3d 782, 792 (7th Cir. 2013) (after failing to challenge opposing counsel's statement of costs in the trial court, party "cannot do so for first time on appeal").

Voter Organizations' motion for summary judgment requested that the district court:

> enter a permanent injunction prohibiting Defendants' implementation of SEA 334 §§ 5.5(d)–(f) and prohibiting Defendants from otherwise removing any Indiana registrant from the list of eligible voters because of a change in residence absent: (1) a "request" or "confirm[ation] in writing" directly from the voter that the voter is ineligible or does not wish to be registered; or (2) the National Voter Registration Act-prescribed process of (a) notifying the voter, (b) giving the voter an opportunity to respond, and (c) then waiting two inactive federal election cycles.

NAACP R.137 at 33–34. In opposing the motion, the State, as it does here, conceded that the NVRA prohibits removals without direct contact with the voter or notice and waiting, but it did not argue that the requested injunction was overly broad or vague. *NAACP* R.143. The district court granted summary judgment to the Voter Organizations and ordered the permanent injunction they sought. Short App. 55, 57. Even then, the State did not object to the scope or wording of the injunction or seek to modify it, through a motion for reconsideration or otherwise. The State thus cannot challenge the scope of the injunction now. *See Aimster*, 334 F.3d at 656; *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1216 (9th Cir. 2009) (concluding defendant "waived the objection to the scope of [injunctive] relief by failing to raise it before the district court" and therefore "declin[ing] to address it"). Accordingly, this Court should affirm the injunction issued by the district court.

B. The Injunction Issued by the District Court Is Clear and Appropriately Tailored to Prevent Unlawful Voter Removals.

Even had the State preserved its arguments concerning the scope and clarity of the injunction, the district court did not abuse its discretion by enjoining SEA 334 § 5.5(d)–(f). Sections 5.5(d)–(f) together comprise the latest incarnation of the unlawful list maintenance process that is and has been the subject of over three years of litigation. It is the list maintenance procedure as a whole—not the individual provisions that permit specific unlawful removals—that violates the NVRA. Because SEA 334 failed to remedy the previously enjoined NVRA violations in that procedure, its continuation via SEA 334 is thus likewise pre-empted and the district court's decision to permanently enjoin implementation of this flawed scheme

as a whole is eminently reasonable and well within the district court's discretion. *Cf. Gade*, 505 U.S. at 107 (a state law "is not saved from pre-emption simply because the State can demonstrate some additional effect outside" federal law's preemptive scope).[14] Moreover, if the State remains interested, as its lawyers claim, in implementing an NVRA-compliant list maintenance procedure—for example, one that requires, prior to removing a voter, either a signed out-of-state registration form authorizing removal or satisfaction of the NVRA's notice-and-waiting procedure—nothing in the NVRA or the district court's injunction prevents the State from doing so.

The State objects to the injunction as overly broad primarily because it includes Sections 5.5(d) and (e), in addition to Section 5.5(f)(2). But the district court was right to enjoin these provisions. It is not Section 5.5(f)(2) on its own that violates the NVRA. Rather, Section 5.5(f) merely prescribes some of the means by

[14] The State claims that the Court's review of an injunction issued against a state official "must be especially rigorous in requiring that 'the remedy must be tailored to the violation'" citing two cases: *People Who Care v. Rockford Board of Education, School District No. 205*, 111 F.3d 528 (7th Cir. 1997), and *In re Diet Drugs Products Liability Litigation*, 369 F.3d 293 (3d Cir. 2004). But those cases are worlds apart from this one. *People Who Care* addressed a sweeping desegregation remedial decree that ordered, among other things: bridging a gap in test scores between white and minority students; banning grouping of students by ability; establishing racial quotas for student groupings; and imposing minority teaching hiring goals. 111 F.3d 528. *In re Diet Drugs* is irrelevant: It relied on the Anti-Injunction Act, which bars injunctions against state court proceedings except in narrow circumstances. *In re Diet Drugs*, 369 F.3d at 297. This case does not involve an injunction against state court proceedings, and the district court's injunction is far more modest than the one at issue in *People Who Care*: It blocks the State from implementing a single list maintenance scheme that conflicts with federal law, leaving the State ample room to implement the scheme it claims it intends to implement, as well as Indiana's many other list maintenance programs not challenged here.

which the determinations spelled out in Section 5.5(d) may be made and by which a voter's registration may be cancelled without notice under Section 5.5(e). *See* Ind. Code § 3-7-38.2-5.5(d)–(f) (2020). That makes it necessary to enjoin Sections 5.5(d) and (e): All three sections together make up the unlawful voter removal scheme. Moreover, because Section 5.5(f) is permissive and provides a non-exclusive list of possible methods for determining that a voter has authorized removal, merely enjoining section 5.5(f)(2), as the State advocates, would be insufficient to prevent future violations of the NVRA.[15] The State's failure to remedy the prior NVRA violations—despite having the benefit of the guidance from this Court and the court below and even after the district court, through its five-month stay, gave it the opportunity to do so—justified the district court in issuing a broad injunction that leaves no room for alternative non-compliant programs. Thus, the district court enjoined any program that would permit removal without a communication made by the voter or notice and waiting, leaving the State free to construct a program that complies with these NVRA requirements.

Also unfounded is the State's argument that the injunction is "too vague" because it requires that confirmation "directly" come from a voter. As noted, the State did not ask the district court to clarify the use of the word "directly" in the injunction. And for good reason: Three federal court orders in this case have

[15] Indeed, the inclusion of Section 5.5(f)(2) as a way to determine that a voter has requested cancellation suggests that other methods of removing a voter without direct contact or notice are also permitted by the overall list maintenance scheme set forth in SEA 334.

analyzed the NVRA and explained what a communication "directly from the voter" means.[16] The district court's most recent order was clear that the State cannot cancel a voter's registration absent request or confirmation in writing from the voter or complying with the NVRA-prescribed notice-and-waiting process. Short App. 50 (quoting *Common Cause I*, 937 F.3d at 959). This Court considered the issue at length in its prior opinion. *See Common Cause I*, 937 F.3d at 958–62. By requiring the State to comply with a statement of law previously announced by this Court, "the district court's decision was guided by established principles of law," and therefore did not abuse its discretion. *See Money Store, Inc. v. Harriscorp Fin., Inc.*, 885 F.2d 369, 372 (7th Cir. 1989).

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment and permanent injunction should be affirmed.

[16] Even if this Court were to conclude that the scope of the injunction is too broad or the wording too imprecise, the appropriate course of action would be to remand to the district court to enter a narrower or more precisely worded injunction and not, as the State asks, to reverse the judgment and vacate the injunction. *See, e.g.*, *Am. Fam. Mut. Ins. Co. v. Roth*, 485 F.3d 930, 934 (7th Cir. 2007) (where injunction was warranted but there were problems with its wording, affirming the entitlement to the injunction and remanding to district court to "work out the details of a proper injunction"); *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541, 548–49 (7th Cir. 2020) (reversing and remanding where "the district court's injunction was too broad," and noting that "we should not be misunderstood as saying that a properly tailored injunction is not warranted"). Indeed, the State appears to concede that, if the district court's construction of SEA 334 is correct, a narrow injunction against the implementation of Section 5.5(f)(2) or any program that would allow removal of voters without the NVRA-mandated voter contact would be well within the district court's discretion. *See* Br. 29–30.

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Respectfully submitted,

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

Stuart C.Naifeh
DĒMOS
80 Broad Street, 4th Floor
New York, NY 10004
(212) 485-6055

Matthew R. Jedreski
DAVIS WRIGHT TREMAINE LLP
1200 Third Avenue, 22nd Floor
Seattle, WA 98101
(206) 622-3150

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

William R. Groth
VLINK LAW FIRM, LLC
445 N. Pennsylvania Street,
Suite 425
Indianapolis, IN 46204
(317) 353-9363

Counsel for Plaintiff-Appellee Common Cause Indiana

/s/ Myrna Pérez
Myrna Pérez
Eliza Sweren-Becker
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8373

Ellyde R. Thompson
Ellison Ward Merkel
Alexandre J. Tschumi
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor New York, NY 10010
(212) 849-7000

Trent A. McCain
MCCAIN LAW OFFICES, P.C.
363 South Lake Street, Suite 2
Gary, IN 46403
(219) 884-0696

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

CERTIFICATE OF COMPLIANCE

1. The undersigned counsel for the Appellees certifies that this brief complies with the word limit of Circuit Rule 32(c) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 12,635 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b), and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Professional Plus 2019 in Century Schoolbook typeface, font size 12 for the text and font size 11 for the footnotes.

/s/ Sophia Lin Lakin
Sophia Lin Lakin
Attorney for Plaintiffs-Appellees

January 19, 2021

CERTIFICATE OF SERVICE

I, Sophia Lin Lakin, a member of the Bar of this Court, hereby certify that on January 19, 2021, I electronically filed the foregoing "Consolidated Brief of Plaintiffs-Appellees" with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. Service will be made on all counsel or parties of record through the Court's CM/ECF system.

/s/ *Sophia Lin Lakin*
Sophia Lin Lakin
Attorney for Plaintiffs-Appellees