Nos. 20-2815 & 20-2816

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

v.

CONNIE LAWSON, et al.,
Defendants-Appellants.

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

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SUMMARY OF THE ARGUMENT

The Organizations agree that when Indiana receives a voter's out-of-state registration form authorizing the removal of her prior Indiana registration, it is a "request of the registrant" sufficient to satisfy the National Voter Rights Act's requirements for voter-list maintenance. 52 U.S.C. § 20507(a)(3)(A). And the State has made clear that it interprets its revised law to require *Indiana* officials to have exactly that—a signed voter registration form authorizing cancellation—before it may cancel a former Indiana voter's registration under Section 5.5(f)(2) of codified Act 334.

Despite the State's NVRA-compliant interpretation of its own law and no evidence that any voter has or will be removed from Indiana's voter rolls in the manner the Organizations fear, the Organizations read Section 5.5(f)(2)'s text to permit the State to remove voters from Indiana's rolls with merely an unsigned document—and thereby violate the NVRA.

But the statutory text is not as clear-cut as the Organizations claim. The law references "written information" and "written notice" interchangeably without defining either and is silent on the key issue: whether the Election Division must have a signed out-of-state voter registration form authorizing removal before it passes information to the county for cancellation of the voter's registration. And the Organizations' reading, which places emphasis on the word "forward" and the definite article "the" before "notice," only raises more questions about the meaning of the law

because it requires an understanding of the phrase "actual voter signature" in the context of Indiana's election laws.

Given these ambiguities, Indiana's interpretive rules required the district court to embrace the State's reasonable saving construction instead of striking down a law that the State has never had a chance to implement—and a law no Indiana court has had a chance to interpret. Properly construed, Section 5.5(f)(2) provides that if another State sends the Election Division a signed authorization for removal by the voter, the county may rely on the information forwarded to it by the Election Division even if the county itself does not have the "actual voter signature." This indisputably complies with the NVRA's command that the State have a "request of the registrant" before removal from the voter rolls.

The district court compounded its interpretive error by facially invalidating Act 334. The Organizations apparently agree that they made an insufficient showing to mount a facial attack, because they now assert that they brought only as-applied challenges. But given the fact that the Organizations sought and received invalidation of a state law, their challenges are undoubtedly facial. In any event, the Organizations failed to meet their burden for an as-applied challenge because the record is devoid of any evidence that a single voter or group of voters will be removed from Indiana's rolls in violation of the NVRA.

And even if the district court were correct when it found that Section 5.5(f)(2) violated the NVRA on its face, the court's injunctions are fatally overbroad because they enjoined indisputably lawful provisions of Act 334. The injunctions are also too

vague to be understood because the district court mistook the extra-statutory term "directly" from this Court's decision in *Common Cause I* as appropriate for its injunctions, without appreciating the unresolved scope of the term. The upshot is that the injunctions are unlawful because they go further than the NVRA requires.

ARGUMENT

I. Section 5.5(f)(2) Is Ambiguous and Amenable to a Reasonable Saving Construction

Act 334 brings Indiana's law into compliance with the NVRA. There are at least two plausible interpretations of the statute's text, particularly Section 5.5(f)(2). Under the State's interpretation of Section 5.5(f), an election official within the State must receive a written authorization of removal from the voter (or follow the notice-and-waiting procedure) before removing a voter from the voter rolls. That interpretation, offered by the very state officials charged with enforcing Act 334, squarely complies with this Court's holding in *Common Cause I* and harmonizes all parts of the statute. The Organizations offer a competing interpretation under which an unsigned document *may* suffice for removal depending on which election official—state or county—first receives the document. They divine this interpretation from the "plain language," insisting that Section 5.5(f) is unambiguous. Yet to get there, the Organizations ignore several words of the statute, presume the meaning of several undefined terms, ignore the context in which the statutory language is used, and disregard long-established principles of interpretation applied by Indiana courts.

A. Section 5.5(f) is inherently ambiguous

The plain language of Section 5.5(f)(2) does not say what the Organizations claim: that the Election Division needs to have only an unsigned voter form before passing it along to the county. Critically, the statute says nothing about what material the Election Division must receive from another State, and it interchangeably uses "written information" and "written notice." When read as a whole and placed in context, Section 5.5(f)(2) says only that when a county receives information from the Election Division, the county need not have the materials it usually needs to cancel a voter's registration.

Indeed, the Organizations' plain-language argument fails for three reasons: First, Section 5.5(f) uses "written information" and "written notice" interchangeably without defining either term. Second, the Organizations ignore several words in Section 5.5(f)(2), and those words plainly indicate that the Election Division receives information above and beyond what the counties receive when they learn of a cancellation from the Election Division. And third, the Organizations' reading of the statute requires the Court to indulge the unwarranted assumption that the General Assembly and the Governor intended to ignore this Court's decision in *Common Cause I* when they enacted Act 334, which contravenes long-established norms and presumptions.

1. Section 5.5(f) is ambiguous because it interchangeably uses "information" and "notice" to identify the documents the State must receive before cancelling a voter's registration. In the introductory clause, Section 5.5(f) provides that the

county may rely on "written information" provided either directly from another State or forwarded from the Election Division to determine whether a voter has "authorized the cancellation" of her registration. Ind. Code § 3-7-38.2-5.5(f) (2020). And consistent with the introduction, Section 5.5(f)(1) provides that a voter has authorized cancellation if the "information" provided from the other State includes a copy of the voter's signed registration application indicating cancellation is authorized. Section 5.5(f)(2), in contrast, uses the phrase "written notice" and provides that if the Election Division forwards "written notice" from another State to the county, the county may rely on state officials and consider the "notice" to be confirmation that the individual is registered in another jurisdiction and has requested cancellation of the Indiana registration. The law further provides that if the county receives the "notice" indirectly from the other State through the Election Division, the county does not need "a copy of the actual voter signature." *Id.* § 3-7-38.2-5.5(f)(2).

The differing terms create an inherent ambiguity in the statute. It is possible that "written information" and "written notice" have different meanings, especially if those terms are viewed in a vacuum. Yet it is also plausible that "written information" and "written notice" are synonyms with no legally significant difference. This is actually the more likely reading when considering Section 5.5(f) as a whole, which sets out the mechanics of carrying out the tasks in Section 5.5(d) and (e). The opening clause provides that a county office "may rely on written information provided *either* directly by a voter registration office in another State *or* forwarded from

the election division from the office in the other state." *Id.* § 3-7-38.2-5.5(f) (emphases added). Section 5.5(f)(1) and (2) then address those alternative situations, respectively.[1] The interchangeable use of "written information" and "written notice" renders Section 5.5(f) ambiguous.

Nor does the statute define "written information" or "written notice" or otherwise specify the information the Election Division must possess before forwarding it to the county voter registration office. *Cf.* Ind. Code § 3-7-33-5 (2020) (specifying what must be included in a "notice" sent by the county when an office receives a voter registration application). Section 5.5(f)(2) expressly relieves the *county* of having "a copy of the actual voter signature," but it says nothing about the information in the hands of the *Election Division* when it serves as an intermediary with another State. *Id.* § 3-7-38.2-5.5(f)(2); *cf. ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1195–96 (Ind. 2016) ("As we interpret the statute, we are mindful of both what it does say and what it does not say." (cleaned up)). Because "written notice" is undefined, the word "forwarded" simply cannot do the heavy lifting required to accept the Organizations' interpretation as the *only* reasonable interpretation. The statute talks about the Election Division "forward[ing]" written notice, but it does not define "written notice." And the rest of Section 5.5(f) supports

[1] Indeed, accepting the Organizations' position that "written information" and "written notice" mean different things results in an irrational statute given the statute's structure. Suppose the statute were about eating apples. Under the State's reading, the statute would say, "A person can eat an apple inside or outside as follows: (1) If a person eats an apple outside, she must do X. (2) If a person eats an apple inside, she must do Y." Yet under the Organizations' interpretation, the statute would say, "A person can eat an apple inside or outside as follows: (1) If a person eats an apple outside, she must do X. (2) If a person eats an orange inside, she must do Y."

the State's view that the written notice from another State is a communication from the voter herself authorizing cancellation of her prior registration.

The interchangeable use of "written information" and "written notice" coupled with the lack of any definitions dooms the Organizations' contention that the statute's plain language unambiguously allows the State to remove a voter even if neither the Election Division nor the county office has a signed form authorizing cancellation of the voter's registration.

2. The statutory text that the Organizations underscore to support their plain reading does not have the straightforward meaning they propose and requires the Court to disregard language in the second sentence of Section 5.5(f)(2). That sentence provides that "[a] copy of the *actual* voter signature is not required *to be provided to the county* for the voter's status to be canceled if the written notice is forwarded by the election division." Ind. Code § 3-7-38.2-5.5(f)(2) (2020) (emphases added). The Organizations suggest that the plain meaning of the word "forwarded" combined with the use of the definite article "the" before "notice" in the second sentence of Section 5.5(f)(2) implies that the Election Division must have the same information as the county: a document without the "actual voter signature." Appellees' Br. 19–21. In other words, the Organizations believe the statute plainly and unambiguously requires the Election Division to pass along *exactly* what it receives from the other State and that there is no other reasonable interpretation of that sentence. But the Organizations' reading requires the Court to ignore seven of the

sentence's 33 words—the adjective "actual" and the phrase "to be provided to the county"—and to ignore the broader context of Indiana's election laws.

When read as a whole, the second sentence of Section 5.5(f)(2) reasonably contemplates that the Election Division receives something that the county does not receive. The phrase "to be provided to the county" signals that the Election Division has additional information—the voter's signature—that is not in the hands of county officials. The phrase relieves the Election Division, the subject of the sentence, from taking the action of providing the county with the "actual voter signature." The phrase implies that when the Election Division receives written notice from another State, the Election Division receives the actual voter signature as part of that notice, and need not include that when passing the cancellation information to the county through the statewide voter registration system or other means. The Organizations' plain reading erases "to be provided to the county" from the statutory text entirely. But the key phrase must be considered and given effect as part of the language in the statute. When it is, Section 5.5(f)(2) does not plainly and unambiguously mean that the Election Division and the county must have the same information.

The Organizations' reading also completely ignores the modifier "actual" in the phrase "actual voter signature." Yet that modifier is critical and not mere surplusage. *See Pabey v. Pastrick*, 816 N.E.2d 1138, 1148 (Ind. 2004) ("We do not presume that statutory language is meaningless and without a definite purpose but rather seek to give effect to every word and clause" (cleaned up)). The phrase "actual

voter signature" clarifies that—unlike other in-state forms and affidavits—when the county receives a voter's cancellation request on an out-of-state form from the Election Division, the county is not required to have and maintain the voter signature. Ordinarily, when a voter seeks to cancel her prior registration after moving from one Indiana county to another, Indiana law requires the voter to execute an affidavit or form. Ind. Code §§ 3-7-43-2, -4 (2020); *see also id.* § 3-7-43-5 (authorizing cancellation if a voter moves out of State and executes an affidavit). The law also requires the county voter registration office to maintain the "original affidavits of registration," *id.* § 3-7-27-22, including the "original cancelled affidavit or form," *id.* § 3-7-27-19, for specified time periods.

By providing that the Election Division need not provide a copy of the "actual voter signature" to the county, the second sentence of Section 5.5(f)(2) merely clarifies that the *county* is relieved of its usual obligations to receive and maintain signed voter forms. In that way, the second sentence operates similarly to Indiana Code section 3-7-43-6, which relieves a voter's new county from "forward[ing] a paper copy of the request for cancellation of registration" to the voter's old county "if the authorization of cancellation has been transmitted to the other county voter registration office using the computerized list." Section 5.5(f)(2)'s reference to the "actual voter signature" thus reasonably means only that the *county* is relieved of its usual obligation to act on and retain documents bearing the voter's actual signature. That reading is bolstered by the fact that the second sentence of Section 5.5(f)(2) says only that "[a] copy of the actual voter signature" need not "be provided

to the county." At bottom, the Organizations' hyper focus on the word "forward" does not reveal the plain meaning of the law because "forward" must be considered alongside the unclear phrase "actual voter signature" and in the context of the whole statutory scheme.

3. Further, the Organizations' purported "plain reading" of Section 5.5(f)(2)—as permitting Indiana to cancel a voter's registration with an unsigned out-of-state voter registration form—disregards the legislature's entire purpose in adopting Act 334 and creates more internal conflict in the law. *See Estabrook v. Mazak Corp.*, 140 N.E.3d 830, 836 (Ind. 2020) (explaining that Indiana's "absurdity doctrine" defeats even the plain meaning of statutes to give a law its obvious intended effect).

For one thing, the Organizations' reading of the revised law is irreconcilable with the well-established presumption applied by Indiana courts that the General Assembly enacts statutes with the judicial decisions on the subject matter in mind. *See, e.g.*, *Harter v. Boone Cty. Bd. of Comm'rs*, 116 N.E. 304, 305 (Ind. 1917) (explaining that Indiana courts presume that legislation passed in the wake of a judicial decision is responsive to that decision); *Reynolds v. Dewees*, 797 N.E.2d 798, 800 (Ind. Ct. App. 2003) ("The legislature is presumed to have in mind the history of the act and the decisions of the courts upon the subject matter of the legislation being construed." (citations omitted)); *accord Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."). This Court held in *Common Cause I* that Indiana's prior law (Act 442) violated the NVRA because it allowed the State to cancel a

voter's registration without a request from the voter herself. *See Common Cause Indiana v. Lawson* (*Common Cause I*), 937 F.3d 944 (7th Cir. 2019). The Court should thus presume the General Assembly had *Common Cause I* in mind when it passed Act 334 and sought to rectify the NVRA issues identified in that opinion.

Moreover, accepting the Organizations' reading means that the legislature established an anomaly in Indiana's voter-list maintenance laws that turns solely on the decisions made by election officials *in other States*. In the Organizations' view, if another State decides to send a voter's registration authorizing removal of prior registrations to an Indiana *county* official, then the form from the other State must contain the voter's signature to cancel the registration. Yet the other State can send something completely different if it decides to direct its communication to Indiana's Election Division instead. That makes little sense because it permits other States to dictate Indiana's protocols in performing its own voter-list maintenance. And the Organizations have not articulated any sound reason why Indiana's legislature would have intended another State's choice of communication with Indiana officials to be treated differently.[2]

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[2] The Organizations spend several pages discussing the Indiana data enhancement association (IDEA) and suggesting that Section 5.5(f)(2) is intended to allow the State to use IDEA in the same way the State used Crosscheck under Act 442. Appellees' Br. 23–25. Yet *Common Cause I* made clear that Crosscheck was not the problem—it was what the State did with the Crosscheck information. And here, the State's adoption of IDEA is irrelevant to its compliance with the NVRA. The program merely provides the Election Division with potential duplicate registrants, but to remove those voters the State must take additional steps to determine that the voters authorized cancellation of their Indiana registrations.

Lastly, the Organizations' reading suggests that the legislature redefined "authorization" in a way that is at odds with its common meaning. If the Organizations' view were accepted, then the law would permit Indiana to decide that a voter has "authorized the cancellation" of her voter registration in Section 5.5(d)(3) without any indication that the voter authorized that action, which not only contravenes the plain meaning of "authorization" but is also inconsistent with how that term is understood in other election laws. *See* Ind. Code § 3-7-43-4(b) (2020) ("Execution by a person of the affidavit constitutes authorization by the person to cancel the person's registration in the county of the person's former residence."). Absent some indication of permission from the voter, it would be illogical for Indiana to determine that the voter "authorized" removal within the common meaning of the term. In short, the Organizations' plain reading of Section 5.5(f)(2) is at odds with the legislative purpose of Act 334 and its remaining laws, which were intended to comply with the NVRA's requirement that Indiana rely upon a request from the voter herself.

B. The district court should have accepted the State's reasonable saving construction of Section 5.5(f)(2)

Given the ambiguities in the statute, the district court was obligated to accept the State's reasonable saving construction in lieu of facial invalidation. Rather than offer a response to the State's arguments, the Organizations double-down on their flawed "plain language" argument and their unfounded skepticism of the State's proffered statutory interpretation.

The State's resolution of the ambiguity is consistent with the language of the statute. Indeed, it effectuates the legislature's intent of bringing Indiana's law into compliance with the NVRA, harmonizes Section 5.5(e) through (f), and is the interpretation put forth by the Indiana Attorney General on behalf of the officials charged with implementing the law. *See Siwinski v. Town of Ogden Dunes*, 949 N.E.2d 825, 828 (Ind. 2011) (citation omitted) (requiring the court to "consider the statute in its entirety, and … construe the ambiguity to be consistent with the entirety of the enactment"); *West v. Office of Indiana Sec'y of State*, 54 N.E.3d 349, 353 (Ind. 2016) (requiring the court to construe statutes in a manner that avoids conflicts with other applicable laws); *Moriarty v. Indiana Dep't of Nat. Res.*, 113 N.E.3d 614, 619 (Ind. 2019) (providing that a state agency's reasonable interpretation of a statute it is charged with implementing controls unless that interpretation is inconsistent with the statute itself).

Section 5.5(f)(2) can be reasonably read to require the Election Division to have a signed voter registration form authorizing cancellation by attributing the same meaning to "written information" referenced in the introductory clause of subsection (f) and in subsection (f)(1) and "written notice" in Section 5.5(f)(2). Stated differently, Section 5.5(f)(2) can be construed to require the Election Division to have received "written notice"—in the form of a copy of the voter's signed voter registration form authorizing cancellation—in the same way it is required when the county receives information directly from another State. The second sentence of Section 5.5(f)(2) merely relieves the *county* from having and maintaining the voter's

original signature like it must in other circumstances before a voter's registration may be canceled.

The Organizations' contention that the State's reasonable statutory interpretation should not be trusted because it is merely a "litigation position" ignores the circumstances under which Act 334 was enacted and exploits the State's inability to offer anything else given the Organizations' own pre-enforcement challenges. Appellees' Br. 28–32. First, the State, through its Election Division or its courts, has not had any occasion to implement or interpret Act 334. Indeed, the State's only opportunity to advance its reasonable and NVRA-compliant interpretation of this new law has been in this litigation. Second, the Organizations' demand for an affidavit from the Election Division signifying its agreement wrongly shifts their burden onto the State, but more puzzlingly, disregards the fact that the Election Division has already spoken through the Attorney General, who of course is the State's chief legal officer. *See* Ind. Code § 4-6-2-1 (2020) (providing that the Attorney General of Indiana has the authority to speak on behalf of the State in "defend[ing] all suits initiated by or against the state of Indiana"). And third, the Election Division's decision not to issue guidance to the counties in their 2020 Indiana Voter Registration Guidebook as to how they should implement the enjoined law does not undermine the State's reasonable statutory interpretation either. There is nothing nefarious in declining to issue administrative guidance on a law that is currently being challenged in federal court.

Further, the Organizations improperly rely upon a lone legislator's views and Defendant King's comments during a legislative hearing as evidence of the legislature's intent when it enacted Act 334. Appellees' Br. 28–29. This information is irrelevant to the judiciary's interpretation of a statute enacted by Indiana's General Assembly. Indiana has long recognized that "the motives of individual sponsors of legislation cannot be imputed to the legislature, absent statutory expression." *O'Laughlin v. Barton*, 582 N.E.2d 817, 821 (Ind. 1991); *accord United States v. O'Brien,* 391 U.S. 367, 384 (1968) ("what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork"). The Organizations' use of Defendant King's remarks during a legislative committee hearing is doubly inappropriate because Indiana law also forbids the use of audio or video coverage of the hearing from being used as legislative history or an expression of legislative intent, purpose, or meaning of a resolution adopted by the General Assembly absent certain circumstances not present here. *See* Ind. Code § 2-5-1.1-15 (2020); *Hr'g on SEA 334 Ind. H. Comm. on Elections and Apportionment*, 121st G.A. (Feb. 20, 2020), http://iga.in.gov/information/archives/2020/video/committee_elections_and_apportionment (last visited Feb. 25, 2021).

Beyond that, the Organizations misrepresent Defendant King's statements before the legislative committee. Appellees' Br. 28, 32. Defendant King correctly explained the procedural posture of *Common Cause I*, and noted that while Act 442 had been *preliminarily* enjoined by the district court and affirmed on appeal, final

judgment had not been entered and this Court had not yet spoken on the legislative fix—Act 334—that was pending before the committee at the time. Hr'g 1:03:00 – 1:12:00. Defendant King's accurate recount of the status of the litigation was far afield from the Organizations' unfounded view that he sought to rebuff this Court's decision with Section 5.5(f)(2) by permitting the State to cancel voters' registrations without a voter signature.

In fact, Defendant King's explanation of the Election Division's implementation of Act 334 aligns with the State's reasonable interpretation of the statutory language, and certainly does not conflict with it. He offered an example to illustrate his view of the Election Division's implementation of the Act: If the Election Division received information from Illinois that a former Indiana voter had registered in Illinois, Defendant King indicated that Act 334 would require the Election Division to "confirm from Illinois whether or not on the registration form [the voter] authorized cancellation of his previous registration." Hr'g 1:04:20–1:05:00. And he later explained that he believed that this Court in *Common Cause I* was troubled that Indiana's prior law "was not specific enough to determine that the voter had actively requested cancellation of their previous registration." Hr'g 1:08:20–1:08:40. But he did not believe that this Court's decision held that the NVRA's notice-and-waiting requirements would apply "if a voter explicitly says cancel my voter registration *and the state or county receives a copy of that*." Hr'g 1:08:40–1:09:10. Defendant King's

remarks, properly understood, parallel the State's reasonable interpretation of Section 5.5(f)(2), which requires the Election Division (or the county) to obtain a signed copy of the voter's out of state registration form authorizing cancellation.

C. The Organizations brought a facial challenge and cannot show that Section 5.5(f)(2) is invalid in all circumstances

Instead of advocating that they met their high burden for facial invalidity, the Organizations now disavow their facial challenges to Act 334, and accuse the State of mislabeling their statutory attacks. Appellees' Br. 38. Yet the Organizations misapprehend the facial and as-applied dichotomy, and ignore that they, too, labelled their challenge as a facial one. *See, e.g., NAACP* R.1 at 18–19 ("On its *face*, Indiana Code 3-7-38.2-5(d), effective July 1, 2017 as amended by SB 442, violates the NVRA by requiring the removal of voters without the requisite notice, response opportunity, and waiting period required by federal law." (emphasis added)).

The line between the facial and as-applied challenges is not always bright, but there is a difference, and the Organizations' challenge falls firmly on the side of a facial attack. A facial challenge seeks to invalidate a statute in all of its applications, *Ezell v. City of Chicago*, 651 F.3d 684, 698–99 (7th Cir. 2011), whereas an as-applied challenge seeks to invalidate a statute only as applied to the plaintiffs' "specific activities even though it may be capable of valid application to others," *Surita v. Hyde*, 665 F.3d 860, 875 (7th Cir. 2011). *See also Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 803 (7th Cir. 2016) ("a facial challenge usually invites prospective relief, such as an injunction, whereas an as-applied challenge invites

narrower, retrospective relief, such as damages" (citing *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010))). The important inquiry is whether the "claim and the relief that would follow … reach beyond the particular circumstances of these plaintiffs," and when the relief reaches beyond the circumstances of the particular plaintiffs to invalidate a law, they must satisfy the "standards for a facial challenge to the extent of that reach." *Doe v. Reed*, 561 U.S. 186, 194 (2010).

The Organizations' challenge is a facial one because they claim that Section 5.5(f)(2) is wholly invalid under the NVRA—a claim the district court accepted in enjoining the State from enforcing the law entirely. *Common Cause* R.1 at 8–16; *NAACP* R.1 at 8, 18–20; *NAACP* R.137 at 32; Short App. 28, 57. The Organizations have never limited their challenge to Act 334 to a particular voter or group of voters or requested a narrow form of relief. Rather, they have consistently claimed that Section 5.5(f)(2) violates the NVRA as applied to *every* voter that may fall within its scope. Appellees' Br. 38; *NAACP* R.137 at 32-35. And the breadth of relief requested by the Organizations and granted by the district court—an injunction prohibiting implementation of the law—reaches beyond the circumstances of the Organizations, for the injunctions struck down the law in its entirety, in all circumstances. Because the Organizations' demand and the remedy clearly fall in the category of a facial challenge, the Organizations had to satisfy the rigorous standard for facially invalidating a law.

The Organizations' decision to morph their claim from a facial to an as-applied challenge on appeal appears to be driven by their recognition that they failed

to meet their difficult burden to mount a successful facial challenge to Act 334. The Organizations do not—and cannot—dispute that the State's narrow interpretation of Section 5.5(f)(2), which requires a signed voter registration form authorizing removal to be in the hands of Indiana officials before a voter's registration may be canceled, is encompassed by their broader interpretation of the statute. *See* Appellees' Br. 39–40. Certainly it does not violate Section 5.5(f)(2) for the Election Division to pass along a signed voter authorization from another State to a county and for the county to honor it. Because the Organizations acknowledge that the State's narrow reading complies with the NVRA, the Organizations cannot establish "that no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745 (1987). Their facial challenge thus fails.

To the extent the Organizations brought an as-applied pre-enforcement challenge, they failed to meet that burden too. They have not identified any voter who will suffer harm from a particular application of the Act 334. And given the mere hypothetical circumstances involved, it would be impossible for the Court to fashion a concrete remedy tailored to a particular set of circumstances concerning the unimplemented law. *NAACP* R.137 at 35; *see Center for Individual Freedom v. Madigan*, 697 F.3d 464, 475–76 (7th Cir. 2012) (holding that the plaintiff brought a facial and not an as-applied challenge when the plaintiff did not seek to challenge the applicability of the law to itself).

II. The Injunctions Should Be Reversed Because They Enjoin Valid Laws and Use the Vague Term "Directly"

Even if the district court were correct that Section 5.5(f)(2) on its face violates the NVRA, its injunctions would still be unlawful. Those injunctions violate general, well-established rules prohibiting overbroad injunctions by invalidating more than Section 5.5(f)(2), the only provision the district court deemed unlawful. The injunctions also conflict with the well-established specificity requirement by not defining what it means to receive a request or written confirmation "directly" from the voter. For each of these reasons, the injunctions should be reversed.

A. The State did not waive its overbreadth and vagueness challenges to the district court's injunctions

As a threshold matter, the State did not waive its challenge to the scope and specificity of the district court's injunctions. The Organizations' contrary argument suffers from four fatal flaws.

First, nothing in Rule 65 or any other procedural rule required the State to first challenge the scope of the district court's fashioned relief in its eventual final judgment before pursuing an appeal. *See* Fed. R. Civ. P. 59, 60, 62, 65. While the State could have sought modification of the preliminary injunction, it was under no obligation to do so. *Wirtz v. City of S. Bend*, 669 F.3d 860, 861 (7th Cir. 2012) ("[Defendant] could of course have appealed from the grant of the injunction, 28 U.S.C. § 1292(a)(1), but did not. Instead it filed a motion to modify the injunction ....").

Second, the State consistently challenged the merits of the Organizations' claims and objected to the imposition of *any* injunctive relief. *Common Cause* R.180;

R.197; *NAACP* R.134; R.143. This was sufficient to preserve its challenge to the district court's overbroad and vague injunctions under Rule 65(d), which is a question of law that this Court reviews de novo. *Eli Lilly & Co. v. Arla Foods, Inc.*, 893 F.3d 375, 381 (7th Cir. 2018). Moreover, the State had no reason to believe that the district court would enjoin provisions of the law that all seemed to agree were lawful. Short App. 10, 40; *NAACP* R.1 at 8; R.137 at 1, 12–13; R.138 at 9; *see also Common Cause* R.1 at 7–8; *Common Cause I*, 937 F.3d at 957–59.

Third, the full scope of the injunctions was known to the State only when the district court issued its orders. As a result, this appeal represents the State's first opportunity to object to the breadth of the injunction, so the State cannot be faulted for failing to object in the district court. *See, e.g., Paris v. U.S. Dep't. of Hous. and Urban Dev.*, 713 F.2d 1341, 1347 (7th Cir. 1983) (rejecting the argument that an objection not made to the trial court was waived because "the appeal [was], in effect, the [party's] first opportunity to object").

The general waiver cases on which the Organizations rely all involve misspent opportunities, such as a party's failure to present an argument on the merits of the case in response to summary judgment, *Arendt v. Vetta Sports, Inc.*, 99 F.3d 231, 237 (7th Cir. 1996); *Wheeler v. Hronopoulos*, 891 F.3d 1072, 1073 (7th Cir. 2018), and a party's failure to oppose counsel's statement of costs in the district court, *TKK USA, Inc. v. Safety Na'l Cas. Corp.*, 727 F.3d 782, 792 (7th Cir. 2013), before raising these arguments on appeal. Even *In re Aimster Copyright Litiga-*

tion—the only waiver case cited by the Organizations concerning the scope of an injunction—deemed the appellant's challenge waived because of its failure to present an argument and a suggested alternative either in the district court *or* this Court. 334 F.3d 643, 656 (7th Cir. 2003). Unlike *In re Aimster Copyright Litigation*, the State has raised narrow and specific objections in this Court to the district court's ailing injunctions for which there is an easy fix: removal of the valid statutes within the injunctions' scope and elimination of the word "directly."

Fourth, this Court has held that general waiver principles give way when the lawfulness of injunctive relief is at issue, especially when the injunction is against a State. *See, e.g.*, *Ass'n of Community Org. for Reform Now (ACORN) v. Edgar*, 56 F.3d 791, 797 (7th Cir. 1995). In fact, this Court has insisted on reviewing the lawfulness of injunctions even where the defendant did "not question [the injunction's] scope or application" because it has consistently recognized courts' "independent duty" to ensure that any injunction they issue is lawful. *Chicago Bd. Of Educ. v. Substance, Inc.*, 354 F.3d 624, 632 (7th Cir. 2003). In *Marseilles Hydro Power, LLC v. Marseilles Land and Water Company,* for example, the Court observed that it could remand for the permanent injunction to be redrafted to comply with Rule 65 even though "neither party has cited the rule," explaining that "because injunctions impose continuing responsibilities on courts and frequently have effects on third parties, courts have an independent responsibility for assuring the ready administrability of injunctions." 299 F.3d 643, 647 (7th Cir. 2002); *see also Wisconsin*

Right to Life, Inc. v. Barland, 751 F.3d 804, 830 (7th Cir. 2014) (remanding preliminary injunction to comply with Rule 65(d) in spite of the parties' failure to raise any objection); *Allard Enterprises, Inc. v. Advanced Programming Resource, Inc.*, 146 F.3d 350, 360 (6th Cir. 1998) (rejecting the application of the waiver doctrine to a party's failure to challenge the breath of an injunction ordered in the district court).

Even in cases of *default*, courts are hesitant to subject litigants to forfeiture of the "right to challenge the lawfulness of ... injunctions." *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 143 (2d Cir. 2011). In *e360 Insight v. The Spamhaus Project*, for example, this Court reversed a permanent injunction following a default judgment because it "fail[ed] to comply with the rule requiring courts to tailor injunctive relief to the scope of the violation found." 500 F.3d 594, 603–04 (7th Cir. 2007) (internal quotation marks and citation omitted). The Court explained that "although a default judgment establishes liability, it does not answer whether any particular remedy is appropriate," and "[t]his principle applies with equal if not greater force in the context of equitable relief, for which the law imposes a requirement that the party seeking the injunction demonstrate the inadequacy of legal relief." *Id.* at 604.

The Organizations' waiver argument thus completely misses the mark. The State did not waive its challenge to the district court's overbroad and vague injunctions.

B. The injunctions are overbroad because they bar the State from implementing unquestionably lawful provisions of Act 334

The district court's injunctions prohibiting the State from implementing its unquestionably valid laws are not narrowly tailored to remedy a violation of the NVRA. The Organizations conceded at the outset of this litigation that Indiana's restored statutory scheme in Act 334 complied with the NVRA. *NAACP* R.1 at 8; R.137 at 1, 12–13; R.138 at 9; *see also Common Cause* R.1 at 7–8. The only perceived problem with the resurrected Act, they said, was the addition of Section 5.5(f)(2), which the Organizations deemed a "yawning loophole" because they feared it would permit voters to be removed from the rolls with only an unsigned form. And to close that gap, the district court needed to only enjoin Section 5.5(f)(2), leaving the remaining longstanding NVRA-compliant scheme intact.

The Organizations now shift their position and claim that all of Act 334 is flawed without Section 5.5(f)(2). Appellees' Br. 42–44. Their repeated admissions to the contrary aside, the remainder of Act 334 is not founded on Section 5.5(f)(2) and can operate within NVRA guidelines in its absence. Section 5.5(d)(3) requires the county to determine that a voter "authorized the cancellation" before removal, and if not, to follow the notice-and-waiting procedures in Section 5.5(e). Ind. Code § 3-7-38.2-5.5. And under Section 5.5(f)(1), counties must have the signed voter registration form authorizing removal before cancelling the voter's registration. *Id.* § 3-7-38.2-5.5 (f)(1). These valid provisions can be implemented without conflicting with the NVRA. The Organizations offer nothing more than their speculation untethered

to the statutory text that the State *could* use the remaining facially valid laws to violate the NVRA in unknown future circumstances. But the Organizations' imaginary circumstances are not a valid justification for the district court's decision to sweep unchallenged and lawful provisions within the scope of its broad injunctions. *Cf. Trustees of Indiana Univ. v. Curry*, 918 F.3d 537, 541 (7th Cir. 2019) (explaining that "ask[ing] a federal court to blot [a] law from the books … [is] not how uncertainty should be addressed").

C. The injunctions are unlawfully vague because they require the State to guess what it means to receive a request or written confirmation "directly" from the voter

Finally, the district court was wrong to inject the word "directly" into its injunctions because it is too vague to be understood in the context of this litigation. The Organizations counter that "directly" is not vague because the State can look to the district court's orders and this Court's opinion in *Common Cause I* to discern the meaning. Appellees' Br. 44–45. But the Organizations miss the point: Neither court provided clarity before the district court injected "directly" into its injunctions. Indeed, this Court explicitly left the scope of its meaning open for another day in *Common Cause I*, and the district court declined to weigh in on the term. *Common Cause Indiana v. Lawson* (*Common Cause I*), 937 F.3d 944, 961 (7th Cir. 2019); Short App. 28, 57.

Instead of relying on the specificity provisions of Rule 65(d) to defend the injunctions, the Organizations suggest that "requiring the State to comply with a

statement of law previously announced by this Court" is the proper standard for injunctive relief. Appellees' Br. 45. It is not. Rule 65 requires the State to know precisely what conduct is prohibited. *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). The district court's decision to convert an excerpt from this Court's opinion using the term "directly" into injunctions—a concept this Court explicitly deemed unsettled—fails that standard. The language of this Court's decision in *Common Cause I* was not written for an injunction, and the district court erred when it used it for that distinctly different purpose. Because the injunctions are overbroad and vague, they should be reversed.

***

To affirm the district court's judgment, this Court has to make three determinations: First, the Court has to conclude that the Organizations' interpretation of Section 5.5(f) is the *only* reasonable interpretation of that statute. Second, the Court has to conclude that the statute violates the NVRA is every single application. And third, the Court must conclude that the district court's injunctions are lawful even though they use vague terms and enjoin provisions that do not violate the NVRA. For the reasons explained in the State's opening brief and above, the Court cannot make any one of those determinations, let alone all three.

CONCLUSION

The Court should reverse the district court's permanent injunctions.

Respectfully submitted,

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Dated: February 26, 2021

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

1. Pursuant to Fed. R. App. P. 32(g), the undersigned counsel for the appellant certifies that this reply brief complies with the type-volume limitations of Circuit Rule 32(c) because the brief contains 6,896 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

/s/ Aaron T. Craft
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