



Under Section 8 of the NVRA, before removing a voter on the ground of a change in residence, a state must first confirm that the voter has indeed changed residence by: (1) mailing a written notice to the voter stating that the voter's registration is at risk based on an apparent move; and (2) even then, removing the voter *only* if the voter provides written confirmation of the move or fails to vote in any election within the next two federal general election cycles. 52 U.S.C. § 20507(d). Because Indiana Code § 3-7-38.2-5(d)-(e) requires immediate cancellation without either of these safeguards, it violates Section 8 of the NVRA.

Indiana Code § 3-7-38.2-5(d)-(e) also violates the NVRA because the statute is not uniformly implemented throughout the state, and Defendants allow non-uniform implementation even within individual counties. The NVRA requires uniformity in voter list maintenance programs, 52 U.S.C. § 20507(b)(1), but Indiana's statute directs individual county voter registration clerks to determine (as they see fit) whether an Indiana voter has moved out of state and registered to vote elsewhere and then decide whether to remove the voter from the rolls on that ground. Defendants have given no guidance to the counties on how to make these determinations, what standards to apply, or when there is sufficient proof of changed residence to cancel a registration. Instead, Defendants leave it entirely to the individual county clerks to come up with their own decision-making processes. To make matters worse, when county clerks seek *ad hoc* guidance on voter list maintenance from either of the Indiana Election Divisions co-directors, Defendant Nussmeyer or Defendant King, they may receive differing opinions on what Indiana law and the NVRA require, depending on which co-director they speak to.

Plaintiff Common Cause Indiana requests that the Court enjoin Defendants from implementing or enforcing Indiana Code § 3-7-38.2-5(d)-(e)—which will disenfranchise Indiana voters during this important election year—until the Court can finally resolve this case on its

merits, and that the Court further order Defendants to instruct Indiana’s county election boards and boards of registration not to implement Indiana Code § 3-7-38.2-5(d)-(e). Common Cause, which faces irreparable harm to its mission, organizational resources, and its members absent this relief, has met all the requirements for the grant of a preliminary injunction, and such a remedy is particularly critical here, where it is necessary to prevent Defendants from violating the NVRA and compromising Indiana citizens’ fundamental right to vote in the upcoming general election.

## **BACKGROUND**

### **I. Congress Passed the NVRA to Increase and Protect Voter Registration.**

#### **A. The NVRA’s General Background and Requirements.**

The abysmal voter turnout in the 1988 general election—the lowest in 40 years—led Congress to pass a national voter registration law that would increase voter participation. *See Crocker, R. (2013)*<sup>1</sup>. In passing this legislation, Congress recognized that “[r]estrictive registration laws and administrative procedures were introduced in the United States in the late nineteenth and early twentieth centuries to keep certain groups of citizens from voting.” NVRA of 1993 Report of Committee on House Administration Feb. 2, 1993, H.R. Rep. No. 103-9, at 2. As examples, Congress cited poll taxes, literacy tests, residency requirements, “elaborate administrative procedures,” and “selective purges” of voter registration rolls as devices implemented by states to suppress votes. *Id.*

Congress therefore passed the NVRA to “increase the number of eligible citizens who register to vote,” “enhance[] the participation of eligible citizens as voters in elections for Federal office,” and “ensure that accurate and current voter registration rolls are maintained.”

---

<sup>1</sup> The National Voter Registration Act of 1993: History, Implementation, and Effects (CRS Rep. No. R40609), retrieved from Congressional Research Service website: <https://fas.org/sgp/crs/misc/R40609.pdf>.

52 U.S.C. § 20501(b)(1), (2), (4). The NVRA realizes these purposes by establishing a comprehensive national framework for voter registration in federal elections. Among other things, the NVRA sets forth requirements concerning the “administration of voter registration” lists. *Id.* § 20507. “[O]ne of the guiding principles of this legislation [is] to ensure that once registered, a voter remains on the rolls so long as he or she is eligible to vote in that jurisdiction.” S. Rep. No. 103-6, at 19. In furtherance of this principle, Section 8 of the NVRA (i) requires that “each State shall . . . ensure that any eligible applicant” who submits a voter registration application in accordance with the statute “is registered to vote” and (ii) limits *how, when, and why* states may remove voters from their rolls. 52 U.S.C. § 20507.

Specifically, Section 8(a) mandates that registrants may be removed from the rolls for only five reasons: a voter’s (1) request; (2) criminal conviction; (3) mental incapacity; (4) death; or (5) change in residence. *Id.* § 20507(a)(3)-(4). Section 8 also requires that any voter list maintenance program in which voters are removed from the rolls be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965.” *Id.* § 20507(b)(1).

Section 8 also imposes strict safeguards that must be complied with *before* a state can remove a registrant’s name from the voting rolls. 52 U.S.C. § 20507(d)(1). Of relevance here, Section 8 mandates that a state “shall not remove” a registrant from the voter roll on the ground of change in residence “unless the registrant”:

(A) **confirms in writing** that the registrant has changed residence to a place outside the registrar’s jurisdiction in which the registrant is registered; or

(B) (i) **has failed to respond to a [statutorily prescribed] notice . . . ; and**  
(ii) **has not voted or appeared to vote . . .** in an election during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice.

*Id.* § 20507(d)(1)(A)-(b) (emphasis added).

The “notice” referenced in Section 8(d)(1)(B)(i) that a State is required to mail to a voter when it believes the voter has changed residence must include a postage prepaid and pre-addressed return card, sent by forwardable mail, on which the voter can confirm their address. *Id.* § 20507(d)(2). Among other things, the notice must also inform the voter that if the card is not returned, confirmation of the voter’s address may be required before he or she can vote in the next two Federal elections, and that the voter’s registration will be cancelled if he or she does not vote during this period. *Id.* The NVRA requires these notice-and-waiting safeguards even where a state has objective and reliable evidence of a registrant’s potential ineligibility to remain on the voter roll due to a change in residence, such as change-of-address information supplied by the registrant herself to the Postal Service. *Id.* § 20507(c)(1)(A).

Finally, the NVRA requires states to complete all systematic voter list maintenance programs, including those aimed at removing voters based on change in residence, no later than 90 days before a federal election. *Id.* § 20507(c)(2)(A). States may only cancel registrations during this period if the cancellation is based on the voter’s request or individualized documentation of a voter’s criminal conviction, mental incapacity, or death. *Id.* § 20507(c)(2)(B).

## **II. Indiana’s Election Division Governs Implementation of the State’s Voter List Maintenance System.**

### **A. Indiana Counties Perform Voter List Maintenance under Defendants’ Guidance.**

Defendant Connie Lawson, the Indiana Secretary of State, is the chief election official in the State of Indiana and is charged with performing all ministerial duties related to the state’s administration of elections. Ind. Code §§ 3-6-3.7-1, 3-6-4.2-2(a). Defendants J. Bradley King (“King”) and Angela M. Nussmeyer (“Nussmeyer”) are the co-directors of the Indiana Election Division and in that capacity are jointly the “NVRA official” designated under Indiana law as

responsible for the coordination of Indiana's responsibilities under the NVRA. *Id.* § 3-7-11-1. These co-directors are individually appointed by the Governor based on recommendations from Indiana's Democratic and Republican parties, respectively. *Id.* Each co-director has a four-year term that coincides with the term of the Indiana Secretary of State. *Id.* § 3-6-4.2-3.2.

There are 92 counties in Indiana. Depending upon its size, a county will have a County Election Board or a County Board of Registration. Ind. Code § 3-6-5-1; *see also id.* § 3-6-5.2 (hereinafter "county board"). Pursuant to the official policies, guidance, and standard operating procedures issued by the co-directors, these individual county boards conduct elections and administer election laws within their jurisdictions. *Id.* § 3-6-5-14; *id.* § 3-6-5.2-6; Deposition of Angela Nussmeyer ("Nussmeyer Dep.") at 12:5-13.<sup>2</sup> Counties are also responsible for adding, updating, or removing Indiana voters' registration records. Ind. Code § 3-6-5-14; Ind. Code § 3-6-5.2-6; Nussmeyer Dep. at 13:3-15. While the county boards control voter registration records within their jurisdictions, this list maintenance is governed by the policies, procedures, and guidance established by the Election Division co-directors and constrained by the Division's business rules governing the electronic State Voter Registration System ("SVRS"). Nussmeyer Dep. at 12:14-14:11.

Co-directors King and Nussmeyer's duties include creating the protocols within SVRS and issuing Indiana's official policies, guidance, and standard operating procedures instructing county boards on their duties under state and federal law, including the NVRA, and providing training regarding the same. Ind. Code § 3-6-4.2-14; Nussmeyer Dep. at 11:5-20. Official guidance as reflected in these protocols, documents, and trainings are mandatory. Nussmeyer

---

<sup>2</sup> Excerpts from the Nussmeyer Dep. are attached as Ex. A.

Dep. at 81:2-25; Deposition of LaDonna Freeman (“Freeman Dep”) at 15:14-18, 16:13-25.<sup>3</sup> In advising the counties, co-directors King and Nussmeyer often receive and respond to counties’ inquiries independently and without consulting one another. *Id.* at 19:23-20:24; *see also* Ex. G; Ex. H.<sup>4</sup> Co-directors King and Nussmeyer do not always agree on the required policies and procedures when they respond to inquiries from the counties. *See, e.g.*, Nussmeyer Dep. at 11:14-12:13, 21:7-22:3; Deposition of Cindy Mowery (“Mowery Dep.”) at 61:4-62:6. As a result, Nussmeyer and King may provide conflicting instructions to counties in response to similar inquiries. Moreover, Nussmeyer and King ultimately relegate responsibility for NVRA compliance to the counties by directing counties to use their discretion in implementing whatever instructions the co-directors provide. Nussmeyer Dep. at 11:14-12:13; 23:17-23; Mowery Dep. at 61:4-62:6.<sup>5</sup>

**B. Indiana’s Statewide Voter Registration System.**

Indiana keeps “a single, uniform, official, centralized, and interactive statewide voter registration list,” the Statewide Voter Registration System (“SVRS”) that is maintained by the co-directors. Ind. Code §§ 3-7-26.3-3, 4. The SVRS is the sole system for storing and managing the official list of voters in Indiana and is the official voter registration list for all elections in Indiana. *Id.* § 3-7-26.3-5.

Although Indiana counties execute the actual voter list maintenance actions within the SVRS through the SVRS Voter List Maintenance Hopper system (the “hopper”), Defendants maintain and operate the SVRS and promulgate the standard operating procedures that counties

---

<sup>3</sup> LaDonna Freeman is co-director of the Marion County Board of Registration. She was deposed as a Rule 30(b)(6) witness for the Marion county board. Relevant excerpts of the Freeman Dep. are attached as Ex. B.

<sup>4</sup> All exhibits are attached to this motion.

<sup>5</sup> Cindy Mowery is co-director of the Marion County Board of Registration. She was deposed as a Rule 30(b)(6) witness for the Marion county board. Relevant excerpts of the Mowery Dep. are attached as Ex. C.

are required to follow when using the system, including formal step-by-step guides on how to perform the various list maintenance activities. Nussmeyer Dep. at 11:5-13, 15:1-17; *see also* Ex. I. Additionally, Defendants set the business rules that dictate how the SVRS operates, including what information is provided to the counties in the hoppers and what actions counties are able to take within the SVRS user platform, known as the “portal.” Nussmeyer Dep. at 110:18-111:11; Deposition of J. Bradley King (“King Dep.”) at 16:8-16.<sup>6</sup> Counties rely on Defendants to ensure that these rules comport with the framework of federal and state law, including the NVRA, and that the SVRS operates in compliance with these laws. King Dep. at 16:8-16; Nussmeyer Dep. at 110:21-23 (“The county does not participate in designing logic for the statewide voter registration system.”); *see also* Mowery Dep. at 30:6-9. Co-directors Nussmeyer and King also train counties each year on voter list maintenance and periodically answer county clerks’ *ad hoc* questions on how to operate SVRS within the confines of state and federal law. Ind. Code § 3-7-26.3-10, 11, 17; Nussmeyer Dep. at 19:11-20:24; Deposition of Bethany Sheller (“Sheller Dep.”) at 13:1-15:4, 16:9-17:1 (IED conducts annual trainings and responds to individual questions).<sup>7</sup>

Additionally, co-directors Nussmeyer and King contract with vendors involved with SVRS, primarily Quest Information Systems (“Quest”), which developed and constructed the SVRS, and Baker Tilly Virchow Krause, which operates as Program Manager. King Dep. at 15:2-21. Baker Tilly monitors Quest’s performance and works with Quest in designing the crosscheck interface. Nussmeyer Dep. at 86:15-22; 104:14-105:1.

---

<sup>6</sup> Relevant excerpts of the King Dep. are attached as Ex. D.

<sup>7</sup> Bethany Sheller is the voter registration deputy for the Hamilton County Voter Registration Board. She was deposed as a Rule 30(b)(6) witness for the Hamilton county board. Relevant excerpts of the Sheller Dep. are attached as Ex. E.

**III. Indiana’s Amended Voter List Maintenance Laws Permit Removal of Voters without Notice.**

**A. Indiana’s General Voter List Maintenance Programs.**

Pursuant to Indiana Code article 3-7, the state has a number of voter list maintenance programs aimed at removing voters from the rolls when they have become ineligible to vote. For example, chapter 45 provides for removing registrants who are deceased, and chapter 46 relates to removing registrants who are incarcerated. *See* Ind. Code §§ 3-7-45, 3-7-46. In chapter 38.2, Indiana sets forth processes for removing “ineligible voters from [county] lists of eligible voters due to a change of residence.” *Id.* § 3-7-38.2-1.

**B. Indiana’s Voter List Maintenance Procedures Based on Change of Residence.**

As delineated in Indiana Code § 3-7-38.2, Indiana has several means through which it identifies voters who may have moved out of the relevant jurisdiction, *i.e.*, the county, including:

- Checking for jury duty notices returned due to unknown or insufficient address;
- Checking with the Indiana Bureau of Motor Vehicles for Indiana licenses surrendered to another jurisdiction;
- Sending mailers to voters of a precinct, advising them of a change of precinct boundary or the precinct polling place, and checking for mailers returned due to an unknown or insufficient address; and
- Using the United States Postal Service National Change of Address Service, as provided in section 8(c) of the NVRA.

*Id.* §§ 3-7-38.2-2, 3-7-38.2-5(a). When Indiana identifies voters as possibly having moved out of the relevant jurisdiction through these programs, it follows the notice-and-waiting procedures mandated by the NVRA and contained in Indiana Code § 3-7-38.2-2.

**C. Indiana Also Uses Crosscheck, a Second-hand Source of Data, to Identify Voters Who May Have Moved Out of State.**

Another process codified in Section 38.2 that Indiana uses to identify voters who may have become ineligible due to a change in residence involves the Interstate Voter Registration Crosscheck Program (“Crosscheck”). *Id.* § 3-7-38.2-5(d). Crosscheck is a program conceived and administered by the Kansas Secretary of State that purports to identify voters who have moved to and registered to vote in another state. Ex. J. It does this by comparing certain voter registration information provided by participating states to identify “matches”—voters who, according to Crosscheck, appear on the registration rolls in more than one state. *Id.*; *see also* Nussmeyer Dep. at 66:16-20; Expert Report of Dr. Michael P. McDonald (“McDonald Report”) at 2. Crosscheck bases these matches on just three pieces of information: first name, last name, and birthdate, and it presumes that where there are voter registration records from two or more states for which these three data points match, those records represent the same individual. Ex. J.

**1. Defendants Push Crosscheck Matches to Counties for Processing.**

Under Indiana Code § 3-7-38.2-5(d)–(e), Indiana annually provides its statewide voter registration list to the Kansas Secretary of State to compare to data from other participating states through the Crosscheck program. *Id.* § 3-7-38.2-5(d). Crosscheck then sends a list of purported matches back to Indiana, and, within 30 days of receiving that list, Indiana’s statute requires that the “NVRA official,” *i.e.*, Defendants Nussmeyer and King, “shall provide [to] the appropriate county voter registration office” the name and any other information obtained on any Indiana voters who share “identical . . . first name, last name and date of birth of [a] voter registered in [another] state.” *Id.*

Although on its face the Indiana statute *requires* Defendants to provide all voter registration records meeting this minimal matching criteria to the counties for processing and

removal, Defendants said they only transmitted records if they meet a certain “confidence factor,” which Defendants calculate based on additional matching data points.<sup>8</sup> King Dep. at 22:7-11. Defendants distributed purported matches that met the confidence factor to the appropriate county for review and possible action in the SVRA “hopper.” *Id.* at 23:15-20; *see also* Nussmeyer Dep. at 67:7-23.

## 2. Counties Review Crosscheck Matches and Cancel Registrations.

After receiving this information in the hopper, each individual county voter registration office “shall determine” whether each person identified as an out-of-state-voter: (1) “is the same individual who is a registered voter of the county; and (2) registered to vote in another state on a date following the date that voter registered in Indiana.” Ind. Code § 3-7-38.2-5.

A county official has three selection choices within the SVRS hopper for each purportedly matched voter registration: “match approve” (voter is removed without notice); “match reject” (voter is not removed); or “research needed.” Ex. K at 5; *see also* Nussmeyer Dep. at 70:15-19. The county official must make this selection based on the information about the voter that is available in the hopper. Sheller Dep. at 30:7-13. Because the data collected by Crosscheck is limited, that information does not include sufficient data to determine with any degree of confidence that the information indeed represents the same voter, such as a prior registration address, copies of any original voter registration forms from the other state, or other documents signed or submitted by the voter through which the counties could confirm the accuracy of the match and compare additional data points, such as the voter’s signature. Freeman Dep. at 23:21-24:4. As a result, there is a high probability of a false match of Indiana

---

<sup>8</sup> This confidence factor has evolved in recent years. King Dep. at 22:12-23:14. In 2017 and prior years, Defendants applied an *ultra vires* 70 point confidence factor. *Id.* Pending legislation would require a confidence factor of 75 points. HB 1253.

registrants sharing the same first name, last name and date of birth with a registrant in another state. McDonald Report at 2-3.

In addition to determining whether the Indiana and out-of-state registration records belong to the same voter, under Indiana Code § 3-7-38.2-5, counties are required to cancel a voter's Indiana registration only if they determine the voter's Indiana registration predates their registration in another state. As currently set up, dates of registration are not provided in the hoppers nor are matches "sifted" for date of registration before being placed in the county hoppers. Ex. K at 5; *see also* King Dep. at 73:13-74:7, 77:10-78:8; Nussmeyer Dep. at 73:5-12, 101:9-20; Mowery Dep. 56:19-24. Thus, it is impossible for counties to determine whether the Indiana registration or the out-of-state registration should be canceled based on the data in the hopper. Nevertheless, when processing Crosscheck matches in the hopper, counties routinely presume that the voter's Indiana registration predates the voter's other registration. Mowery Dep. at 75:5-11; *see also* Freeman Dep. at 36:13-24; Deposition of Pat Toschlog ("Toschlog Dep.") at 32:18-25 ("Yes. That's what we're told that ours is the oldest.");<sup>9</sup> Sheller Dep. at 33:12-23; 36:19-37:13; Mowery Dep. at 56:19-24, 75:5-76:1.

Even if the counties did have access to date of registration information provided by Crosscheck, that information is not complete or consistent, as states participating in Crosscheck do not always populate the registration date field, and they use divergent practices in how they determine which date to use. King Dep. at 24:16-28:21; Nussmeyer Dep. at 98:15-99:14; Ex. L. For example, if an individual (a) registered to vote in State A, (b) moved to State B for college and registered and voted there, and (c) upon graduation, reregistered in State A, State A might

---

<sup>9</sup> Pat Toschlog is the voter registration deputy for the Hamilton County Voter Registration Board and was deposed as a Rule 30(b)(6) witness for the Hamilton county board. Relevant excerpts of the Toschlog Dep. are attached as Ex. F.

(i) reactivate the old registration record and preserve the date of initial registration, (ii) reactive the old registration record and update the date of registration with the date of re-registration; or (iii) create a new registration record with a new registration date. Different states have different policies for handling such situations; there is no uniform practice among states. King Dep. at 28:9-14.

Defendants do not provide Indiana counties with a standardized procedure for how to “determine” whether the records in the hopper actually represent a voter who has registered in another state or whether the out-of-state registration record is more recent. King Dep. at 43:20-44:20. Unsurprisingly, the practice varies widely—in some counties, officials approve all matches populated in the hopper. *See, e.g.,* Ex. M; McDonald Report at 3 (“Eleven counties accepted all Crosscheck matches provided to them”). Each of the 92 counties has discretion to cancel or not cancel a voter’s registration based on their analysis of the data received from other states and Crosscheck—not on first-hand information from the subject voters themselves. King Dep. at 43:9-13. Moreover, the decision whether to cancel a voter’s registration based only on second-hand data is made at the discretion of each individual county without any official, binding guidance from the Election Division co-directors. Nussmeyer Dep. at 13:16-16:16; Mowery Dep. at 14:24-15:22; Sheller Dep. at 30:7-31:25 (analysis of a “match” is based on data in the crosscheck hopper).

The co-directors have different opinions on what sort of review the counties should conduct during this process. *Compare* Nussmeyer Dep. at 130:22-24, 133:13-15 (defining a “careful review” as “consultation with the other state to either view or receive an out-of-state registration featuring a registration address in Indiana” and “consulting with the other state to determine which registration is more current.”) and King Dep. at 31:13-32:13; 32:25-33:9

(starting that it was within the county official’s discretion to conduct *any* additional review if a match met a minimum confidence factor and declared that the Election Division does not “have the authority” to require additional inquiry).

**D. Indiana Removes Voters Identified by Crosscheck with No Confirmation Notice.**

Prior to the amendment of Indiana Code § 3-7-38.2-5(d) by Senate Bill 442, adopted July 1, 2017, as Senate Enrolled Act (“SEA”) 442, in the event that a county reviewed the third-party data in the hopper system and selected “match approve”—*i.e.*, where the county determined that the Crosscheck match in the hopper was a true match—SVRS would, pursuant to business rules set by the co-directors, generate a confirmation mailing to the voter. King Dep. at 46:2-10; Ex. N at 32. This mailing allowed a person to confirm their registration at the current address, update their registration, or cancel it. King Dep. at 46:2-7. In effect, this confirmation allowed the voter to confirm or rebut the “match” and which state had the most current registration. If the voter did not respond to the mailer, he or she would get put on “inactive” status. At that point, only if the voter did not vote over the course of the next two federal general election cycles could Indiana cancel the voter’s registration. *Id.* at 46:11-24. SEA 442 eliminated the procedural safeguards afforded to voters by this NVRA-compliant confirmation mailing and waiting period. *Id.* at 37:14-38:23.

Indiana also used to require county election officials to confirm that voters who apparently had registered out of state had *also* “authorized the cancellation of any previous registration by the voter when the voter registered in another state.” Ind. Code § 3-7-38.2-5(d) (2016). If the county official could not determine that the voter had “authorized the cancellation of any previous registration,” the law required the county voter registration to “send an address confirmation notice to the Indiana address of the voter.” Ind. Code § 3-7-38.2-5 (2015). In other

words, absent an authorization from the voter to cancel their Indiana registration, the pre-amendment statute required compliance with the written confirmation notice and waiting procedures mandated by the NVRA and prescribed in Indiana Code § 3-7-38.2-2. SEA 442 deleted this requirement, too. In its current form, the relevant subsections of the statute now state:

(d) . . . on January 15 of each year, the NVRA official shall provide data from the statewide voter registration list without cost to the Kansas Secretary of State to permit the comparison of voter registration data in the statewide voter registration list with registration data from all other states participating in [Crosscheck] . . . . Not later than thirty (30) days following the receipt of information under this subsection indicating that a voter of Indiana may also be registered to vote in another state, the NVRA official shall provide the appropriate county voter registration office with the name of and any other information obtained under this subsection concerning that voter, if the first name, last name, and date of birth of the Indiana voter is identical to the first name, last name, and date of birth of the voter registered in the other state. The county voter registration office shall determine whether the individual:

(1) identified in the report provided by the NVRA official under this subsection is the same individual who is a registered voter of the county; and

(2) registered to vote in another state on a date following the date that voter registered in Indiana.

(e) If the county voter registration office determines that the voter is described by subsection (d), the county voter registration office shall cancel the voter registration of that voter.

Ind. Code § 3-7-38.2-5. As a result of the 2017 amendment, if a county election official now “determines” that a listing in the Crosscheck hopper reflects a match between an Indiana voter and someone registered later in another state, the county official “shall cancel the voter registration of the Indiana voter” immediately without determining whether the voter authorized cancelation and without providing the voter notice and an opportunity to confirm their registration at their Indiana address. *Id.* § 3-7-38.2-5(e); *see also* King Dep. at 37:14-38:3;

Sheller Dep. at 35:4-25; Ex. O at 5; Ex. P at 10. These voters no longer receive any election-related notices or voting information leading up to the election.

Defendants have stated that they will begin using Indiana Code § 3-7-38.2-5(d)-(e) to cancel voter registrations beginning July 1, 2018. King Dep. at 37:14-38:3; Ex. Q.

**E. Common Cause Has Expended Resources to Counteract the Effects of Amended Indiana Code § 3-7-38.2-5(d)-(e).**

Common Cause Indiana is the Indiana affiliate of Common Cause, a national non-profit, nonpartisan grassroots organization that works in multiple ways through its employees and thousands of members to advance ethics, good government, constitutional law, and to eliminate barriers to voting and ensure access to the polls. Affidavit of Julia Vaughn (“Vaughn Aff.”) ¶ 3. Common Cause Indiana has approximately 12,000 members who live and vote in Indiana. *Id.* ¶ 4. It has long worked to fulfill its mission of expanding and protecting equal access to voting in the state. *Id.* ¶ 5. It has done so on multiple fronts, including by partnering with other community organizations to provide education and training to on-the-ground voting rights activists around the state, providing election protection monitoring and assisting while voting is ongoing, as well as by lobbying for non-partisan redistricting and increasing the number of satellite voting locations. *Id.* Common Cause Indiana has one full-time employee (named Julia Vaughn) and a limited budget, and it relies on its member volunteers for much of its activities. *Id.* ¶ 8. It has to make hard choices about how to deploy these limited resources.

On January 30, 2017, Common Cause Indiana’s policy director, Julia Vaughn, testified on behalf of organization before the legislature, and prior to that she spoke with Defendant Lawson’s General Counsel, explaining why SEA 442, by removing the notice and waiting period requirements, would harm Indiana voters by putting them at risk of being erroneously removed from the voter rolls. *Id.* ¶ 10. These lobbying efforts necessarily took time away from other

important issues for which Common Cause Indiana was lobbying and advocating at the time, including increasing early voting and non-partisan redistricting. *Id.* ¶ 11. Nonetheless, Common Cause Indiana believed that the issues posed by SEA 442 threaten an individual's right to vote. *Id.* ¶ 12.

Since the July 1, 2017, amendment of Indiana Code § 3-7-38.2-5(d)-(e), Common Cause Indiana has also had to devote significant staff and time and resources to ameliorating the effects of this law, including conducting activities such as training sessions aimed at educating voters and community activists about the increased risk of erroneous voter registration cancelations. *Id.* ¶ 19. In the past, for example, Common Cause Indiana has conducted training sessions for member volunteers to serve as poll monitors, and it anticipates doing so again for the 2018 general election. *Id.* ¶ 21. Topics for these trainings have focused on polling place procedures, voter rights, and what to do when a poll monitors thinks a voter's rights are being violated. (*Id.*) Common Cause Indiana's staff spends considerable time developing a curriculum and presentation materials for these sessions. *Id.* ¶ 22. Over the past year, however, because of SEA 442, the organization has had to change its curriculum and presentation materials to address the increased risk of voters being erroneously removed from the voter rolls. *Id.* ¶ 23.

Common Cause Indiana will also have to spend a greater portion of the fixed amount of time it has for these sessions discussing SEA 442's effects, which necessarily diverts from time that it could spend talking about other issues. *Id.* ¶ 24. Discussing the impact of SEA 442 on voters also generates questions both during and after the sessions to which Common Cause Indiana has to respond. *Id.* ¶ 25. As Common Cause has only one full-time employee in Indiana, fielding these calls takes away from Common Cause's ability to work on its other priorities in the state. *Id.*

In the past, Common Cause Indiana volunteers and voters have also called Common Cause Indiana on Election Day because their names had been erroneously removed from the voter roll. *Id.* ¶ 26. Common Cause Indiana believes that the number of these calls will increase significantly once SEA 442 is implemented. *Id.* In previous elections, the organization has had 50-80 volunteers serving as poll monitors in the field. *Id.* ¶ 27. Because Ms. Vaughn is usually the only person fielding calls from them, she will be less able to address other poll access issues that inevitably come up on what is a very busy day for our organization. *Id.* Common Cause Indiana volunteers at polling sites on Election Day will also have to spend more time assisting the increase in voters who have been erroneously removed from the rolls and will be less able to assist voters with other poll access issues. *Id.* ¶ 28. The time that Common Cause Indiana has expended and will continue to expend addressing the effects of SEA 442 necessarily diverts time that the organization spends on its other advocacy, education, voter assistance, and lobbying efforts, including but not limited to its efforts to expand early voting and implement non-partisan redistricting, as well as its education and assistance related to other issues by poll monitors and Common Cause Indiana volunteers on Election Day. *Id.* ¶ 29.

**F. Common Cause Notifies Defendants Indiana Code § 3-7-38.2-5(d)-(e) Violates the NVRA and Brings this Lawsuit.**

During the legislative process prior to enactment of SEA 442, Common Cause Indiana raised its concerns that the proposed modifications to Indiana Code § 3-7-38.2-5(d)-(e) would result in an NVRA violation. *Id.* ¶ 10. Ms. Vaughn testified to this effect before the Indiana House Committee on Elections and Apportionment on January 30, 2016. *Id.* On behalf of Common Cause Indiana, Ms. Vaughn expressed the specific concern that enactment of SEA 442 would cause Indiana Code §§ 3-7-38.2-5(d)-(e) to violate the NVRA by allowing county voter

registration offices to immediately cancel an allegedly Crosscheck-matched voter's registration without notice-and-waiting. *Id.*

On June 9, 2017 (after the passage of SEA 442), Common Cause Indiana, through its counsel, sent a letter by certified mail and email to Defendant Lawson, notifying her that the State of Indiana was failing to meet its obligations under Section 8 of the NVRA for the reasons stated above. Ex. R. On July 13, 2017, Common Cause Indiana's counsel sent an identical letter by certified mail to Defendants King and Nussmeyer. Ex. S. These letters provided Defendants with notice of Common Cause Indiana's intent to sue for the violations of Section 8 of the NVRA described therein, unless Indiana corrected the violations within the 90-day notice period prescribed by the NVRA. *Id.*; Ex. R

Defendant Lawson, through her office's General Counsel, sent a response to Common Cause Indiana's letter on July 13, 2017, cc'ing the other Defendants. Ex. T. In that letter, Defendants confirmed their understanding that Indiana Code § 3-7-38.2-5(d)-(e) no longer required counties to send a confirmation notice or wait two general federal election cycles before removing registrants based on information from Crosscheck purportedly indicating that the voters have moved. *Id.* The letter stated the Secretary's belief that this procedure does not violate the NVRA, and it did not indicate that any steps would be taken to address Common Cause Indiana's concerns. *Id.*

Common Cause Indiana filed this lawsuit on October 27, 2017. Dkt. No. 1. Its complaint seeks declaratory and injunctive relief, specifically that the Court declare Indiana Code § 3-7-38.2-5(d)-(e) violates the NVRA and enjoin Indiana from using the list maintenance procedure set forth therein.

### **PRELIMINARY INJUNCTION STANDARD**

In order to obtain a preliminary injunction, Common Cause Indiana must demonstrate that it has “some likelihood of succeeding on the merits” and will suffer irreparable harm for which there is no adequate remedy at law. *Girls Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). Common Cause Indiana must also demonstrate that the balance of harms favors granting a preliminary injunction. In analyzing this showing, “the court employs a sliding scale approach: ‘[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor.’” *Id.* (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984)). Conversely, the more heavily the harms favor granting an injunction, the less likely it needs to be the plaintiff will ultimately prevail on the merits. *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992). Finally, the Court must consider whether a preliminary injunction is in the public interest. *Girl Scouts*, 549 F.3d at 1086.

### **ARGUMENT**

The Court should grant this preliminary injunction—and preserve the status quo pending resolution of this matter—because Common Cause Indiana ultimately will prevail on the merits due to Indiana Code § 3-7-38.2-5(d)-(e)’s facial violation of the NVRA’s notice-and-waiting requirement, and because Indiana’s list maintenance program lacks uniformity. Absent an injunction, Common Cause Indiana, its members, and thousands of other lawfully registered Indiana voters, will suffer irreparable harm when counties begin purging voters without notice through Indiana Code § 3-7-38.2-5(d)-(e) in July 2018—mere months before the 2018 general election.

As Indiana’s chief election officials charged with ensuring that statewide registration procedures comply with the NVRA, Defendants must ensure that, at a minimum, counties send out confirmation notices and wait two full election cycles before removing a voter registration record based on a Crosscheck “match approved.” Furthermore, because Common Cause Indiana’s proposed injunction would “eliminate[] a risk of individual disenfranchisement without creating any new substantial threats to the integrity of the election process,” the balance of harms and public interest unquestionably support granting this motion. *U.S. Student Ass’n Found. v. Land*, 546 F.3d 373, 388-89 (6th Cir. 2008); *see also League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12-13 (D.C. Cir. 2016).

**I. Common Cause Indiana Will Prevail on the Merits of its Claim That Indiana Code § 3-7-38.2-5(d)-(e) Violates the NVRA.**

Indiana Code § 3-7-38.2-5(d)-(e) (the “Crosscheck Procedure”) violates the NVRA for two reasons. First, it requires Indiana counties to immediately cancel voter registrations based on an apparent change in residence, without first providing the voter notice and an opportunity to correct the change-of-address information as required by the NVRA. Indeed, the new law on its face requires counties to *immediately cancel* Indiana voter registrations if the county voter election officials believe—based on no more than a matching name and date of birth, inconsistent and undefined registration dates, and on information received not from the voter himself but from a third-party entity—that the voter has moved and registered to vote in another state. Ind. Code § 3-7-38.2-5(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.”); *see also* King Dep. at 37:14-38:3. This practice violates the plain text of the NVRA as well as its guiding principle of keeping voters on the rolls so long as they remain eligible in the jurisdiction.

Second, the Crosscheck Procedure establishes a list maintenance program that is not uniform on its face or in practice, as counties have no guidance—or worse, *ad hoc* and inconsistent guidance depending solely on which member of the Election Division provides it—on how to “determine” whether to cancel a voter’s registration. As a result, they utilize varying procedures and tests for doing so—leading to inconsistent treatment of similarly situated voters based solely on their county of residence or on who responds to a query to the Election Division. As such, Indiana Code § 3-7-38.2-5(d)-(e) violates the NVRA’s requirement that all list maintenance programs be uniform. Defendants are the chief election officials of Indiana under the NVRA and are responsible for ensuring Indiana’s list maintenance programs comply with federal law.

**A. Indiana Code § 3-7-38.2-5(d)-(e) Violates the NVRA Because It Lacks the Mandatory Notice-and-Waiting Safeguards.**

Section 8 of the NVRA establishes the requirements that states *must* satisfy in maintaining their voter registration rolls. 52 U.S.C. § 20507. This section lists the reasons for which a state may remove a duly registered voter from the voter rolls and sets forth the procedures states must follow when doing so. *Id.* § 20507(a), (d); *ACLU v. Phila. City Comm’rs*, 872 F.3d 175, 182 (3d Cir. 2017) (Section 8 “is designed to protect voters from improper removal and only provides very limited circumstances in which states may remove them.”).

While Section 8(a)(4)(B) requires that states adopt a reasonable list-maintenance program to identify and remove voters from rolls when the voter has become ineligible due to a change in residence, 52 U.S.C. § 20507(a)(4)(B), it also imposes explicit duties on states in the establishment and operation of those programs. As relevant here, the statute provides that such programs must be conducted “in accordance with subsection[] . . . (d),” which, in turn, mandates—in plain, prohibitive language—that a state “shall not remove” a voter from its list of

eligible voters due to change in residence *unless*: (a) the voter confirms such a residence change in writing; or (b) the voter fails to respond to a confirmation notice with specific content prescribed by the statute *and* the voter does not vote in the jurisdiction during the next two federal election cycles. *Id.* § 20507(d)(1). These restrictions reflect Congress’s intent that “once a citizen is registered to vote, he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction.” S. Rep. No. 103-6, at 17 (1993). Congress affirmed this notion by prohibiting states from conducting systematic voter-list maintenance based on change in residence in the 90 days preceding a federal election. 52 U.S.C. §20507(c)(2). Likewise, Congress included safeguards that protect voters from erroneous cancelation by requiring notice and waiting (consisting of a specifically defined written notice to the voter *and* a stay on any cancelation for two federal election cycles) prior to the removal of a voter from the rolls even where there is a presumably reliable indication that the voter has changed residence, such as a change of address notification from the U.S. Postal Service. *Id.* § 20507(b)(2). These safeguards are a critical component of the NVRA’s protections against disenfranchisement.

Contrary to these requirements, the express terms of Indiana Code. § 3-7-38.2-5(d) require Defendants Nussmeyer and King to provide to county voter registration offices information concerning every voter who Crosscheck identifies as having registered in another state based solely on a matching first name, last name, and date of birth. Once the county receives the voter name, identified by Crosscheck, the county “shall cancel the voter registration of that voter” immediately, without any notice and without waiting the two federal election cycles, if it believes that the two (or more) records in Crosscheck belong the same voter and that the voter’s out-of-state registration post-dates the Indiana registration. Ind. Code § 3-7-38.2-5(d), (e); King Dep. at 37:13-38:3; Sheller Dep. at 35:6-36:2.

Defendants fail to provide the counties with the requisite policies and guidance to make these determinations in compliance with the NVRA. *See Harkless v. Brunner*, 545 F.3d 445, 453 (6th Cir. 2008). Under Defendants' current regime, counties are free to make determinations solely on what is provided in the hopper. Sheller Dep. at 30:7-13. But given the hopper's limited data and functionality—including that (i) it provides only screen shot of third-party voter registration data that may be insufficient to identify a match, and (ii) it does not include the underlying documentation that would evidence a request or confirmation by the voter to cancel its registration—there is no way for a county to be certain that the two records represent the same voter.

The face of the Indiana statute, moreover, permits cancellation based on no more than the apparent match of a name and birthdate and some undefined date of registration determination. County officials confirmed that they do in fact identify crosscheck matches and cancel registrations on this data alone. Sheller Dep. at 30:7-32:13 (a match may be made on name and birthdate, or name, birthdate and last four digits of the social security number); Toschlog Dep. at 23:19-24:17. Such a match is highly unreliable as it will generate a high rate of false positives. In fact, many voters share first names, last names, and dates of birth.<sup>10</sup> A recent statistical study by researchers at Stanford, Harvard, University of Pennsylvania, and Microsoft found that Crosscheck's standard procedure would eliminate the registrations of about 200 unique, legitimate voters for every registration belonging to a voter who was actually registered in more than one state.<sup>11</sup> Even the Crosscheck Participation Guide admits that "a significant number of

---

<sup>11</sup> Sharad Goel et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections* (Harv. U., Working Paper, Jan. 13, 2017), <http://scholar.harvard.edu/morse/publications/one-person-one-vote-estimating-prevalence-double-voting-us-presidential-elections>.

apparent double votes are false positives and not double votes.”<sup>12</sup> Several states already have ceased using Crosscheck, with at least one publicly attributing the move to Crosscheck’s unreliability.<sup>13</sup> Crosscheck thus regularly produces a large number of false positive registration matches<sup>14</sup> that, under Indiana’s current law, may result in summary cancellation of a voter’s registration without notice, in violation of the NVRA. To illustrate, when Indiana voter registration officials investigate Crosscheck matches that Indiana indicates have the highest 100% factor, they reject more than half of these matches as being a false positive registration match.<sup>15</sup>

Even assuming that Defendants do not follow the express terms of the Indiana statute and apply a confidence factor based on additional matching data points, that still does not relieve them of their obligation to ensure that the NVRA-procedures—and specifically, the NVRA’s notice requirement—are followed. The NVRA is clear: for removals based on evidence of a change in residence, a voter must be provided with notice and an opportunity to confirm his or her Indiana registration.

Even if the county could determine to a certainty that the Indiana and out-of-state registration records belong to the same voter, the county must still determine which of the voter’s registrations should be cancelled. As currently set up, dates of registration are not provided in

---

<sup>12</sup> 2014 Participation Guide 5, Interstate Voter Registration Data Crosscheck (Dec. 201), [https://wei.sos.wa.gov/agency/osos/en/press\\_and\\_research/weekly/Documents/Participation%20Guide%20with%20Comments.pdf](https://wei.sos.wa.gov/agency/osos/en/press_and_research/weekly/Documents/Participation%20Guide%20with%20Comments.pdf).

<sup>13</sup> Greg Palast, *The GOP’s Stealth War Against Voters*, Rolling Stone, Aug. 24, 2016, <http://www.rollingstone.com/politics/features/the-gops-stealth-war-against-voters-w435890>; Jon Greenberg & Amy Sherman, *Florida No Longer Part of Controversial National Voter Data Project*, Miami Herald, Apr. 11, 2014, <http://miamiherald.typepad.com/nakedpolitics/2014/04/florida-no-longer-part-of-controversial-national-voter-data-project.html>.

<sup>14</sup> Michael P. McDonald & Justin Levitt, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 Election L.J. 111 (2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=997888](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=997888). While New Jersey does not participate in Crosscheck, all the “double voters” were found by matching first name, last name, and birthdate in a process similar to that of Crosscheck.

<sup>15</sup> McDonald Report at 8.

the hopper nor are matches “sifted” so that only Crosscheck matches with a more recent out-of-state date of registration are placed in the county hoppers. King Dep. at 73:13-74:7; 77:10-78:8. And even if it the hopper system did provide registration dates or attempt to pre-determine which Crosscheck matches involved more recent out-of-state registrations, Defendants fail to provide sufficient information and guidance to make this determination correctly. As a result, some counties assume that if there is a match in the hopper, then the out-of-state registration is the more recent one, and they therefore perform no analysis of the date of registration in determining whether cancellation of the Indiana registration is warranted. Sheller Dep. at 33:12-22.

Moreover, analysis of the data provided through the Crosscheck system demonstrates that even where there is a reliable match of two records, the date of registration provided by Crosscheck may still be unreliable. For thousands of Crosscheck matches analyzed in the Goel, *et al.* study, the active record turned out to be the file with the “older” registration date.<sup>16</sup> Additionally, as conceded by the Indiana Election Division, different states use different methods to identify the “date of registration,” making a uniform and reliable assessment of which record should be cancelled all but impossible. Nussmeyer Dep. at 99:2-8.

Indiana Code § 3-7-38.2-5 thus violates the NVRA by requiring county voter registration officials to use second-hand information provided via Crosscheck and other unspecified sources to identify voters they believe have moved out of state, and immediately cancel their registrations without notice to the voter, opportunity for the voter to confirm his or her Indiana registration, or waiting two general election cycles prior to removing the voter. Ind. Code § 3-7-38.2-5(d), (e); King Dep. at 37:14-38:3. Indeed, one of the defendants warned the legislative

---

<sup>16</sup> Goel, *supra* note 11, at 27 & App’x 22.

aides working on its passage that “federal law does not permit the cancellation” of voters from the registration rolls as mandated by SEA 442. Ex. U.

Congress saw fit to require notice and waiting procedures even when a state has apparently objective and reliable change-of-address information from the U.S. Postal Service, and it could not have intended that same voter would get a lower level of protection where the information is less reliable. Given uncertain and error-prone methodology outlined by Indiana Code § 3-7-38.2-5(d) to identify possible out-of-state registrations the NVRA’s notice-and-waiting procedural safeguards are even more critical to protect against disenfranchising voters. Indiana’s Crosscheck Procedure wholly disregards the NVRA’s procedures. In failing to ensure that counties comply with the NVRA’s notice and waiting period requirements when utilizing Crosscheck data, Defendants violate the NVRA.<sup>17</sup>

**B. Indiana Code § 3-7-38.2-5(d)-(e) Violates the NVRA Because It Is a Non-Uniform List Maintenance Procedure.**

Defendants’ failure to provide adequate list-maintenance guidance or procedures, as well as the wide differences in state voter-registration and record-keeping procedures, guarantees that the implementation of Indiana Code § 3-7-38.2-5 will not be uniform within or among Indiana’s counties, as required by the NVRA. 52 U.S.C. § 20507(b)(1). Indeed, there is nothing uniform about how voters are identified for removal under Indiana Code § 3-7-38.2-5. Specifically, there

---

<sup>17</sup> Although Ind. Code § 3-7-38.2-5(d) requires no more than a name and date of birth match, Defendants have indicated that as a matter of policy, they require more data to match before a Crosscheck match is provided to the counties. Nussmeyer Dep. at 66:16-67:1. The Crosscheck match is still dangerously unreliable because there is no uniform procedure among Crosscheck participants in other states, or even among the counties in Indiana, for determining the date of registration. Without certainty as to this date, election officials risk canceling a voter’s most recent registration record. But even if the match were reliable, due to the fact that it is based on second-hand data, and the underlying risk of disenfranchisement of the voter at stake, the NVRA requires that reliable data indicating an address change be confirmed by sending a confirmation notice and waiting two election cycles where the voter does not vote. Defendants cannot simply ignore the requirements of the NVRA, no matter how confident they are in their own procedures.

are at least two ways in which Indiana law and the Defendants' practices lead to non-uniform treatment of Indiana voters under § 3-7-38.2-5.

First, the statute instructs county voter registration offices to "determine" whether voters have moved and registered to vote elsewhere, but neither the statute nor the Defendants provide official guidance or standardized procedures for counties to use in making these determinations, King Dep. at 43:14-19.

The result is that each county adopts its own practices and procedures for evaluating and processing the information provided by Crosscheck or other sources of information on voters who have purportedly registered in another state.<sup>18</sup> In fact, two clerks indicated that they approve matches on the basis of unusual names, a transparently non-uniform and likely discriminatory practice. Sheller Dep. at 31:10-32:13 (stating she would not cancel the registration of an Indiana voter who had a name "too common to assume that that [sic] the same person," but would cancel the registration "if she had a super odd name"); Toschlog Dep. at 32:9-13 ("[I]f they have an unusual name . . . but [you] don't have , maybe, the Social Security number, you might go ahead and accept it if you have the same date of birth and an extremely unusual name."). For example, when Marion county officials receive notification from another state under Ind. Code § 3-7-38.2-5, they send the voter a notice and wait two election cycles prior to canceling the Indiana registration. Mowery Dep. at 82:2-23. Conversely, if Hamilton

---

<sup>18</sup> Defendants' current practice under Indiana Code § 3-7-28.2-5(b), (c) illustrates how derelict Defendants are in enforcing the requirements of the NVRA. Under this provision, the Defendants also receive second-hand data from other states outside of the Crosscheck system concerning potential voter registration matches. Defendants simply pass the information on to county election officials without conducting their own analysis and without any follow-up to determine whether a voter registration record was canceled and if NVRA requirements were followed. In fact, Defendants' Rule 30(b)(6) designee could not remember any NVRA enforcement action ever taken by Defendants with regard to county voter list-maintenance practices. Nussmeyer Dep. 83:11-19. The Defendants have similarly indicated that they do not intend to take any further action to ensure NVRA compliance once a Crosscheck match is provided to a county.

county officials received the same notification, they would immediately cancel the registration without sending a mailing or waiting the two election cycles. Sheller Dep. at 35:6-37:2

The second way in which voters are purged under non-uniform procedures is that the co-directors often do not consult with one another when responding to requests for guidance from individual counties and may provide different guidance to county election officials. *See* Nussmeyer Dep. at 19:16-20:24. For example, when confirming the purported date of registration in another state, co-director King would accept an email from an official in the other state containing a bare assertion of the purported date of registration. King Dep. at 40:9-25. Conversely, co-director Nussmeyer's position is that in order to cancel an Indiana registration, the Indiana county official must see original documentation of the voter's registration in the other state in order to confirm the date of that registration and that cancelation of the Indiana registration is appropriate. Nussmeyer Dep. at 56:2-13. This lack of uniformity is compounded by the fact that the county board members—the individuals who have the authority to cancel registrations—may request guidance from whichever of the co-directors they prefer or whoever happens to respond first. *See* Toshlog Dep. at 13:14-14:13. This results in a system where different county board members in the same county could receive conflicting guidance on list maintenance procedures and on the requirements of Indiana and Federal law when determining whether to purge similarly situated voters. The differing processes and data sources and varying levels of rigor, applied both within and across counties, defy the NVRA's uniformity requirement. 52 U.S.C. § 20507(b)(1). For this additional reason, Indiana Code § 3-7-38.2-5(d)-(e) violates the NVRA.

**II. Common Cause Indiana Meets the Other Requirements for the Grant of a Preliminary Injunction.**

**A. Absent an Injunction, Common Cause Indiana Will Suffer Irreparable Harm for Which There Is No Adequate Remedy At Law.**

Common Cause Indiana will be irreparably harmed absent a preliminary injunction barring enforcement of Indiana Code § 3-7-38.2-5(d) and (e). Irreparable harm is that which “cannot be prevented or fully rectified by the final judgment after trial.” *Girls Scouts*, 549 F.3d at 1089. In the context of an organization such as plaintiff, harm exists where the defendant’s conduct has made it more burdensome for the organization to carry out its activities. *See Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264–65 (1991). Additionally, an organization can establish that it has been harmed when the organization devotes its resources to correcting the defendant’s actions. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (harm to an organization established where actions taken by the defendant “perceptibly impaired . . . the organization’s activities”). If there can be “no do over and no redress” to correct this harm, such as would be the case after the registration deadline for elections, the harm to the organization is deemed irreparable. *See Newby*, 838 F.3d at 9.

Here, Common Cause Indiana will suffer irreparable harm in two ways absent an injunction: (1) through the diversion of its limited resources from programs serving Indiana voters towards training and advocacy efforts aimed at addressing the increased risk of erroneous voter registration cancelations; and (2) through the purging and potential disenfranchisement of Indiana voters who are members of Common Cause Indiana and of the communities it serves. Although Indiana has not yet begun to cancel voter registrations under the amended Indiana Code § 3-7-38.2-5(d)-(e), a preliminary injunction is necessary to preserve the status quo and prevent the state from inflicting those harms once it implements the new law in July 2018.

*Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 783 (7th Cir. 2011); *see also Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 580 (7th Cir. 2001) (awarding injunctive relief prior to implementation of city ordinance).

First, Common Cause Indiana will suffer irreparable harm as an organization. As a result of SEA 442, Indiana Code § 3-7-38.2-5(d)-(e) will force Common Cause Indiana to divert significant resources (primarily its limited amount of staff and volunteer time) to address the effects of the law. Vaughn Aff. ¶ 29. Many—if not all—of the voters whose registrations will be unlawfully cancelled under Indiana Code § 3-7-38.2-5(d)-(e) will be unaware they are no longer registered to vote (because the cancellation occurs without any notice to them). Common Cause Indiana has been forced, and will continue to be forced, to divert resources to conduct additional education and training sessions so voters are informed of the risk of being erroneously removed from the voter rolls, and so that its poll monitors know how to handle the increased number of voters who will find themselves erroneously removed on election day. *Id.* ¶¶ 19-25; *see also Havens Realty*, 455 U.S. at 379 (actions that impair an organization's ability to fulfill its mission and causes a drain on its resources constitute concrete injury to that organization). This diversion of resources will impair Common Cause's ability to carry out its other work, including its advocacy and lobbying efforts on behalf of redistricting reform, early voting, and other electoral issues that affect the state. *Id.* 18. This will necessarily harm its mission of reducing barriers to voters. *Id.*

Second, Defendants' implementation of Indiana Code § 3-7-38.2-5(d)-(e) will unlawfully disenfranchise Indiana citizens that Common Cause serves, including its own members, precluding them from exercising those most basic of rights—the right to vote and to engage in the critical exercise of free speech that occurs at the ballot box. Voting is a fundamental right,

and the freedom to exercise this right is the essence of our democracy. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1440-41 (2014); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”). Deprivation of First Amendment rights, such as the right to vote, is well-recognized as presumptively constituting irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (“for some kinds of constitutional violations, irreparable harm *is presumed*”) (emphasis added); *see also Christian Legal Soc’y v. Walker*, 453 F.3d 853, 867 (7th Cir. 2006) (“violations of First Amendment rights are presumed to constitute irreparable injuries”); *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) (“The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest.”).

Within the spectrum of constitutional violations, preservation of the right to vote is given extreme weight. *See Elrod*, 427 U.S. at 373-74 & n.29 (“[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury[,]” and “[t]he timeliness of political speech is particularly important”); *see also Frank v. Walker*, 196 F. Supp. 3d 893, 917 (E.D. Wis. 2016) (disenfranchisement constitutes “irreparable harm”), *appeal filed*, No. 16-3003 (7th Cir. July 22, 2016). The denial of the right to vote is without redress; there is simply no way to recompense violations of this fundamental right after the fact. *See League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *accord Obama for Am. v. Husted.*, 697 F.3d 423, 436 (6th Cir. 2012). Given the importance of preserving and protecting constitutional rights, such as the right to vote, the demonstration of a

violation thereof is generally found to be sufficient evidence on its own to establish irreparable harm. *Christian Legal Soc’y*, 453 F.3d at 867 (7th Cir. 2006); *see also Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”).

Consistent with this long-accepted principle, violations of the NVRA have specifically been found to constitute irreparable harm in the preliminary injunction context. *See Newby*, 838 F.3d at 12; *see also Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 324 F. Supp. 2d 1358, 1368 (N.D. Ga. 2004), *aff’d*, 408 F.3d 1349 (11th Cir. 2005); *Browning*, 863 F. Supp. 2d at 1167 (state law conflicting with NVRA constituted irreparable harm “because the denial of a right of this magnitude under circumstances like these almost always inflicts irreparable harm”).

Common Cause Indiana has demonstrated such a violation and, consequently, established irreparable harm by showing that Indiana Code § 3-7-38.2-5(d)-(e) violates the plain mandates of the NVRA, and that, absent an injunction, Indiana will use the law to cancel the registrations of thousands of voter registrations without notice before this year’s primary and general elections. King Dep. at 37:13-38:3. Indiana then will have to re-register these eligible voters whom it wrongfully removed from the rolls under Indiana Code § 3-7-38.2-5(d)-(e)—a harm that affects both the voters and Defendants.

#### **B. The Balance of Harms Favors Granting the Injunction.**

While the harm flowing from the *denial* of an injunction is concrete, substantial, and irreparable, the harm caused to Defendants by *granting* an injunction is none of these. Cancelling the registrations of Indiana voters who are no longer eligible to vote is both important and prescribed by the NVRA, and Indiana has many methods for ensuring up-to-date voter rolls that are not challenged by this lawsuit (*e.g.*, using its annual statewide mailer, using the NCOA

process, cancelling registrations based on the voter's death/incarceration/incapacity/written request, etc., *see supra* Section III.B). Indiana is free to continue using these and other lawful voter list-maintenance activities to keep its voter list current. Indiana has not yet implemented the new procedures in Indiana Code § 3-7-38.2-5(d)-(e), and has agreed not to start using them until July 1, 2018. *See Ex. Q*. There is no evidence that delaying implementation of this particular list maintenance program for a few more months pending resolution of this case will result in harm to the state.

**C. The Public Interest Is Served by Issuance of an Injunction.**

Finally, the public is best served by maintaining the status quo, and not cancelling any voter registrations pursuant to Indiana Code § 3-7-38.2-5(d)-(e) until the Court can decide this case on a full record. Voting is a fundamental constitutional right and is also the most basic expression of free speech, protected by the First Amendment. *John Doe No. 1 v. Reed*, 561 U.S. 186, 224 (2010). The Seventh Circuit has held that “injunctions protecting First Amendment freedoms are always in the public interest.” *Christian Legal Soc’y*, 453 F.3d at 859; *see also Déjà vu of Nashville, Inc. v. Metro. Gov’t of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001) (holding it is “always in the public interest to prevent violation of a party’s constitutional rights”) (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). The United States Supreme Court likewise has held that the public has a “strong interest in exercising the fundamental political right to vote.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

Moreover, allowing the state to remove voters prior to resolution of the case threatens not only those individual voters, but also the integrity of the voter rolls as whole. Should Plaintiff ultimately prevail in this matter, the state would be required to reinstate to the rolls voters purged improperly. Once voters are purged, however, accurately identifying and restoring to the rolls those who were purged improperly is a difficult if not impossible task. On the other hand, if

Defendants prevail, it will be a simple matter for them to begin implementing their procedures at that time. Pending the resolution of this case, the public interest would be better served by preserving the status quo.

Because Common Cause Indiana's proposed injunction would "eliminate[] a risk of individual disenfranchisement without creating any new substantial threats to the integrity of the election process," it is in the public interest and the Court should grant it. *U.S. Student Ass'n* 546 F.3d at 388-89.

#### **IV. The Injunction Should Issue Without Bond.**

The issuance of a preliminary injunction will not impose any monetary injuries on the Defendants. In the absence of such injuries, no bond should be required. *E.g., Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996).

#### **CONCLUSION**

The challenged statute, Indiana Code § 3-7-38.2-5(d)-(e), violates the NVRA and will cause the unlawful disenfranchisement of thousands of Indiana voters. Because Common Cause has met all the requirements for a preliminary injunction, the Court should enjoin the cancellation of any voter registrations pursuant to the procedures in Indiana Code §§ 3-7-38.2-5(d)-(e), without requiring a bond.

Dated: March 8, 2018

s/ Matthew R. Jedreski  
Matthew R. Jedreski  
Kate Kennedy  
Admitted *Pro Hac Vice*  
Davis Wright Tremaine LLP  
1200 Third Avenue, 22nd Floor  
Seattle, WA 98101  
206/622-3150  
mjedreski@dwt.com

Sophia Lin Lakin  
Dale Ho  
Admitted *Pro Hac Vice*  
American Civil Liberties Union  
125 Broad Street, 18th Floor  
New York, NY 10004  
212/519-7836  
slakin@aclu.org  
dho@aclu.org

Jan P. Mensz  
No. 33798-49  
Gavin M. Rose  
No. 26565-53  
ACLU of Indiana  
1031 E. Washington Street  
Indianapolis, IN 46202  
317/635-4059  
fax: 317/635-4105  
jmensz@aclu-in.org  
grose@aclu-in.org

Stuart C. Naifeh  
Admitted *Pro Hac Vice*  
Demos  
80 Broad Street, 4th Floor  
New York, NY 10004  
212/485-6055  
snaifeh@demos.org

William R. Groth  
No. 7325-49  
Fillenwarth Dennerline Groth & Trowe LLP  
429 E. Vermont Street, Suite 200  
Indianapolis, IN 46202  
317/353/9363  
fax: 317/351-7232  
wgroth@fdgtlaborlaw.com

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 8th day of March 2018, a true and accurate copy of the foregoing was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the Court's filing system. Parties may access this filing through the Court's system.

*/s/ Matthew Jedreski* \_\_\_\_\_