UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

COMMON CAUSE INDIANA, Plaintiff, v. CONNIE LAWSON, in her official capacity as Secretary of State of Indiana; J. BRADLEY KING, in his official capacity as Co-Director of the Indiana Election Division; and ANGELA M. NUSSMEYER, in her official capacity as Co-Director of the Indiana Election Division, Defendants.	Case No. 1:17-cv-3936

PLAINTIFF COMMON CAUSE INDIANA'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Congress enacted the National Voter Registration Act ("NVRA") to remedy a long history of selective disenfranchisement that was often subtle, indirect, difficult to detect, and sometimes unintentional. To achieve this goal, Congress started with a broad mandate—that no state shall cancel a voter's lawful registration, except in specific circumstances and following specific procedures that the NVRA details in plain language.

The list-maintenance program codified in Indiana Code ("IC") § 3-7-38.2-5(d)-(e) does not fit any of these circumstances and procedures. Although the NVRA permits states to cancel voters' registrations if the voters themselves request cancellation or confirm in writing that they have moved to another jurisdiction, IC § 3-7-38.2-5(d)-(e) does ***not*** involve requests or confirmations (or any other actions) from voters themselves. Rather, it calls for removal of voters based entirely on secondhand (or even third-hand) information. Indiana county elections officials testified that they have, under this program, cancelled voter registrations based ***solely*** on a summary of data from a third party—Kansas' Crosscheck program—which itself gets the data from yet other third parties (election offices in other member states). The specific content and significance of the voter registration data Crosscheck collects varies widely from state to state, but Crosscheck provides no information to Indiana on how to interpret other states' data. Defendants equating Crosscheck data to actual requests or confirmations directly from voters defies the ordinary meaning of the NVRA's plain language, and flouts its stated intent.

To make matters worse, county officials receive little guidance from defendants on how to handle the Crosscheck data, which results in counties cancelling voter registrations based on different standards (such as how "unusual" or "odd" the official finds the voters' names). The fact defendants have not provided any further guidance to counties on how to implement the

amended IC § 3-7-38.2-5(d)-(e)—a law that has existed in much the same form for five years—does not help them. Rather than reconceptualizing the program, the amendments to IC § 3-7-38.2-5(d)-(e) simply permit counties to dispense with necessary safeguards before cancelling registrations with no more information about the voters than before. Defendants testified under oath that counties can now cancel registrations based solely on the "matches" Crosscheck provides, and counties testified that this is what they have done and intend to do.

Plaintiff Common Cause Indiana ("Common Cause") is not speculating about the effects of IC § 3-7-38.2-5(d)-(e); it bases its arguments on the plain language of the amended statute, defendants' formal guidance on the implementation of this program, and defendants' and county election officials' testimony. It is defendants who seek to avoid liability by speculating that counties ***might*** take undefined future actions—actions that would be inconsistent with the statute as written—that ***might*** render the statute NVRA-compliant in some unexplained way.

Plaintiff Common Cause asks this Court to enjoin IC § 3-7-38.2-5(d)-(e) pending a final resolution on the merits. Absent a preliminary injunction, Indiana will cancel upwards of 10,000 voter registrations before the 2018 general election without notice or any waiting period in violation of the NVRA. Common Cause, moreover, has suffered and will continue to suffer irreparable harm, while defendants provide no evidence that further delaying implementation of this program will harm anyone.

ARGUMENT

I. COMMON CAUSE WILL SUCCEED ON THE MERITS.

A. Common Cause Has Standing to Challenge IC § 3-7-38.2-5(d)-(e).

1. Common Cause has standing in its own right.

Defendants throw up artificial barriers to standing that are not supported by case law: that "resources Common Cause has expended or will expend in the future . . . does not qualify as an

injury in fact," that Common Cause's injury is self-inflicted, and that harm would result only if Common Cause had uncovered individuals unable to vote or who suffered racial discrimination because of IC § 3-7-38.2-5(d)-(e). Defs.' Br. 11.

In *Havens Realty Corp. v. Coleman*, the Supreme Court established that where an organization diverts institutional resources to counter the challenged conduct, "there can be no question that the organization has suffered injury in fact." 455 U.S. 363, 379 (1982) ("Such concrete and demonstrable injury to the organization's activities—with the consequent drain on [an] organization's resources—constitutes far more than simply a setback to [its] abstract social interests[.]"). The Seventh Circuit explicitly recognized this diversion-of-resources theory in *Crawford v. Marion County Election Board*, which held that the Democratic Party had standing in its own right to challenge Indiana's photo ID law because it was "compell[ed]" to divert organizational resources to combat the law's negative effects in order to achieve the organization's goals.[1] 472 F.3d 949, 951 (7th Cir. 2007). Further, "[a]n independent basis for organizational standing exists when a defendant's conduct makes it difficult or impossible for the organization to fulfill one of its essential purposes or goals." *Common Cause of Colorado v. Buescher*, 750 F. Supp. 2d 1259, 1269 (D. Colo. 2010).

Courts consistently apply this basis for standing in the NVRA context, finding standing for organizational plaintiffs that have to divert resources to counteract a state's failure to comply with the NVRA. *See, e.g.*, *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008) (organization had standing where it would have to divert personnel and time to educating volunteers and potential voters on NVRA compliance and assisting voters who might be left off the rolls on Election Day); *N.C. State Conference of NAACP v. N.C. State Bd. of*

[1] Defendants ignore the Seventh Circuit's application of *Havens Realty* and recognition of this diversion-of-resources organization injury in citing *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006).

Elections, 283 F. Supp. 3d 393, 402 (M.D.N.C. 2017) (organization "established a cognizable injury" where it was "forced to divert its valuable and limited resources away" from core activities "in order to investigate, respond to, mitigate, and address the concerns of its members resulting from defendants' unlawful *en masse* voter challenge and purging practices" (internal quotation marks and citation omitted)); *Buescher*, 750 F. Supp. 2d at 1269-70 (organizational plaintiffs had standing where they asserted "*Havens*-style standing on grounds they diverted substantial resources in 2008 [election], and will likely do so again in this election, dealing with phone calls related to pre-election voter list 'purges'/cancellations").[2] In none of these cases is the identification of individuals unable to vote because of the defendant's NVRA violations a prerequisite to finding a cognizable harm to the *organization* itself.

Diversion of resources and frustration of mission injuries are the precise harms that Common Cause has suffered—and will increasingly suffer—as a result of defendants' NVRA violations. As discussed in detail in its opening brief, *see* Pl.'s Br. 16-18, IC § 3-7-38.2-5(d)-(e) as amended directly frustrates Common Cause's core mission of expanding and protecting equal access to voting by permitting the unlawful removal of Indiana voters from the voter rolls. Vaughn Aff., ECF No. 74-24, ¶¶ 5, 18. To ameliorate the effects of the law on its mission and activities, Common Cause has already diverted (and will continue to divert) its limited resources from other advocacy, training, education, voter assistance, and lobbying efforts in anticipation of defendants' planned July 1, 2018 implementation of the new law. *Id*. ¶¶ 8, 11, 19-25, 29. Common Cause will also have to divert resources on Election Day to assist an increase in voters

[2] *See also, e.g.*, *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040-41 (9th Cir. 2015); *Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341-42 (11th Cir. 2014); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1353-54 (11th Cir. 2005); *Ga. State Conf. of NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1336-37 (N.D. Ga. 2012); *Nat'l Coalition for Students with Disabilities Educ. & Legal Defense Fund v. Scales*, 150 F. Supp. 2d 845, 849-50 (D. Md. 2001).

erroneously removed from the rolls due to IC § 3-7-38.2-5(d)-(e), and away from addressing and assisting voters with other poll access issues. *Id*. ¶¶ 26-28.

Common Cause need not provide a detailed accounting of the resources it has diverted and will need to divert in the future. The Seventh Circuit in *Crawford* explicitly noted that "[t]he fact that the added cost" of the harmed organization's anticipated diverted resources "has not been estimated and may be slight ***does not affect standing, which requires only a minimal showing of injury***." 472 F.3d at 951 (emphasis added).[3] Other courts have also found standing where, as here, an organization's prospective harm is reasonably anticipated. *See, e.g.*, *Browning*, 522 F.3d at 1165-66 (finding standing for organization that "reasonably anticipate[d]" having to "expend many more hours than it otherwise would have conducting follow-up work with registration applicants because voters will have their applications denied due to matching failures," and "compensating for the new obstacles created by [the new law] [that] would divert substantial resources away from helping voters who may need language-translation assistance on election day").

Defendants also mischaracterize relevant case law in claiming Common Cause lacks standing because its diversion of resources is "initiated at its sole and voluntary discretion." Defs.' Br. 12. The Seventh Circuit in *Crawford* clearly held that an organization's diversion of resources to overcome the challenged conduct's negative effect on the organization's goals—whether initiated voluntarily or not—is a cognizable injury. 472 F.3d at 951; *see also Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990). That is exactly the harm Common

[3] Defendants cite *Rokita*, 458 F. Supp. 2d at 816, where this Court rejected standing for certain organizational plaintiffs, for the proposition that anticipated diversion of resources that has not yet occurred "is not enough to confer standing." Defs.' Br. 11. Although in reviewing *Rokita*, the Seventh Circuit did not review standing for these organizational plaintiffs, as stated above, it did affirm standing for another organizational plaintiff, the Democratic Party, based on the same diversion-of-resources harm suffered by Common Cause here.

Cause suffers here. Far from "eviscerat[ing] the standing doctrine," Defs.' Br. 12, this harm falls squarely within the ambit of Seventh Circuit and Supreme Court precedent. *See Crawford*, 472 F.3d at 951; *Havens Realty*, 455 U.S. at 379. As for defendants' reliance on *Fair Employment Council of Greater Washington, Inc. v. BMC*, the D.C. Circuit in that case did ***not*** conclude that an organization's resource reallocations were categorically self-inflicted injuries as defendants suggest. 28 F.3d 1268 (D.C. Cir. 1994). The *BMC* court's concern about self-inflicted harms related to resources expended ***in anticipation of litigation***—which has no bearing here as Common Cause's injuries do not relate to litigation. *Id*. at 1276 (citing *Havens* and holding "there can be no question that the organization has suffered injury in fact" where a defendant's actions has "perceptibly impaired" the organization's programs).

2. Common Cause Has Associational Standing.

Common Cause has established that it is injured by defendants' violation in its own right, and thus need not identify any members that have been adversely impacted in order to establish associational standing at this stage.[4] However, the fact that no Common Cause member has yet been purged pursuant to amended IC § 3-7-38.2-5(d)-(e) does not deprive Common Cause of associational standing. Defendants' unlawful list-maintenance program under IC § 3-7-38.2-5(d)-(e), could, once enforced, easily impact Common Cause's members: without any notice or waiting period, the real risk that a voter may be misidentified and erroneously removed applies equally to all Indiana voters, including members of Common Cause. Absent notice, Common Cause members must vigilantly monitor their registration status in case they are erroneously purged because a voter with a similar name and birth date is registered in another state.

[4] Defendants' argument that Common Cause cannot establish representation on behalf of the general public is irrelevant as it is not claiming any such expanded representational standing.

3. Defendants Are Causing Common Cause's Injury.

Defendants' final challenge to Common Cause's standing—that its harm is not traceable to defendants—also fails. Defs.' Br. 13. As discussed in Section I.D.4 below, defendants are the elections officials charged with ensuring NVRA compliance in Indiana and are thus responsible for the harms arising from any non-compliance within the State.

B. Defendants' Speculation about Future Guidance Is Irrelevant.

Defendants repeatedly suggest it is possible they will provide further or different guidance on how counties should go about cancelling registrations under IC § 3-7-38.2-5(d)-(e). But defendants propose no such guidance or suggest how it could render the law NVRA-compliant. Common Cause pointed out its concerns about the implementation of amended IC § 3-7-38.2-5(d)-(e) in its pre-litigation notice letter and asked defendants in depositions and written discovery what the implementation guidance would be (if any). Op Br. 18-19; King Dep. 43:14-19[5]; Nussmeyer Dep. 142:17-143:10 (Ex. W). Defendants have never provided evidence that the process will be any different than it has been in the five years since Indiana enacted the prior version of IC § 3-7-38.2-5(d)-(e), other than to acknowledge that the statute now requires ***no notice*** to voters before cancellation. Pl.'s Br. 14-15; King Dep. 37:14-38:16. Defendants did not explain how the procedures might be any different, or offer any assurance that new guidance would be issued to counties. The Court can and should evaluate the law as it exists today, informed by how counties and defendants have implemented it over the past five years.

C. The Use of Misleading "Confidence Factors" Does Not Render the Statute Lawful.

After Common Cause moved for a preliminary injunction, Indiana amended IC § 3-7-38.2-5(d)-(e) to require use of "confidence factors" to filter the Crosscheck matches that are sent

[5] All deposition cites were also in Common Cause's opening brief and attached thereto, unless otherwise noted.

to counties. This statutory amendment codifies with little change a process for filtering Crosscheck matches defendants had formerly established as internal policy (in violation of the language of the original statute). King Dep. 22:7-23. Defendants' discussion of the confidence factors is misleading. Defs.' Br. 6-7. Defendants provide no evidence that the confidence factors improve the reliability of the raw Crosscheck matches, or that they are anything but arbitrary. Defendants have submitted no study or expert testimony validating the methodology underlying the confidence factors. Indeed, they have provided no information at all showing how they or the Indiana legislature arrived at these confidence factors.

Further, this process adds more false "confidence" than real confidence to the Crosscheck matches. First, it makes no sense why the statute suggests defendants could match full social security numbers, Indiana driver's license or ID number, or prior Indiana address, none of which are provided by Crosscheck; indeed, defendants do not even ***try*** to match these factors, according to the source code their vendor uses to process confidence factors. *See* Reply Declaration of Dr. Michael P. McDonald (Ex. X), ¶ 5; Ex. V. Second, Crosscheck "masks" (i.e., hides) the last four digits of voters' social security numbers ("SSN4"), providing only a code indicating whether Crosscheck supposedly found a match on this data point. *See* McDonald Rep. (ECF No. 74-22) at 7-8. Neither defendants nor county officials can verify the match for themselves; they must assume Crosscheck has done the match correctly (adding ten points based solely on Crosscheck's say-so). Third, defendants call it a match (and apply confidence points) where there are ***no*** data, e.g., if neither record has a suffix Indiana treats it as a match and adds five points; if neither record has a middle name, Indiana treats it as a match and adds five points. Ex. X at ¶ 3. Fourth, and perhaps most concerning, defendants call it match when the data ***do not actually match***. If middle names have the same first letter, like "Sophia" and "Stanislaus,"

Indiana treats it as a match and adds five points. *Id*. Finally, defendants appear to be inflating the confidence levels—giving ten or fifteen points for a matched middle name when the statute says a matched middle name should only be awarded five points. *Id*. at ¶¶ 3-4.[6]

To make matters worse, county officials testified that they do not make any determination as to whether the out-of-state registration is more recent than a matched voter's Indiana registration, and assume that defendants have provided them only with matches where the Indiana registration predates the other registration. *See* Freeman Dep. 36:13-24; Toschlog Dep. 32:18-25 ("Yes. That's what we're told that ours is the oldest."); Sheller Dep. 33:12-23; 36:19-37:13; Mowery Dep. 56:19-24, 75:5-76:1.[7] Defendants, for their part, also rely on an assumption about this date, because Crosscheck does not explain what the out-of-state registration dates mean (i.e., whether it is the date the voter first registered in the other state, the date of the most recent activity by the voter, or the date the other state most recently took an action, like making the voter inactive). King Dep. 30:9-25.

In sum, defendants and Indiana counties are at most matching names and birth dates, and assuming Crosscheck is doing the rest of the matching correctly and correctly identifying which registration was more recent. But even setting aside these serious problems, the use of these "confidence" factors does not render IC § 3-7-38.2-5(d)-(e) lawful under any scenario.

D. The NVRA Prohibits the Procedure in IC § 3-7-38.2-5(d)-(e).

Defendants do not deny that under IC § 3-7-38.2-5(d)-(e) as amended, Indiana provides

[6] Indiana may also double-count a fully matched middle name ("Jane" and "Jane"), giving ten points for a full match plus five points for having matched the first letter of the name. *Id*. at ¶ 4. Despite repeated requests, defendants have not provided the full source code that would reveal whether this is the case.

[7] Indeed, counties do not have the tools or data to make this determination for a number of reasons: (1) registration dates are not populated in the Crosscheck hopper, (2) even if the data were available or sought by counties, states do not identify a voter's registration date in a uniform manner, so comparing "registration dates" without knowledge of how the registration date is calculated would be an apples and oranges analysis, King Dep. 24:16-28:21; Nussmeyer Dep. 98:15-99:14, and could result in a properly matched voter's registration being cancelled in both states.

no notice to voters that their registrations may be cancelled, gives voters no chance to confirm they still live in Indiana, and does not wait two general election cycles before cancelling their registrations. The statute therefore violates the NVRA to the extent defendants are using Crosscheck as evidence that voters may have moved out-of-state. *See* Pl.'s Br. 22-27.

Recognizing this, defendants creatively claim their procedures falls under one of two narrow bases the NVRA provides for immediate cancellation of a voter's registration: (1) if the voter requests cancellation, or (2) if the voter confirms in writing that they have moved out of the jurisdiction. These arguments fail for a variety of reasons but most obviously because the information on which defendants rely to purge voters under IC § 3-7-38.2-5(d)-(e) does not come from the voter, but from Crosscheck, a third party. Defendants do not (because they cannot) provide any authority for their argument that the NVRA allows Indiana to use third-hand evidence as a substitute for a direct voter request or confirmation. The fact that the information provided by Crosscheck may have originated with a voter does not change the analysis. Under the NVRA, where a state relies on third-party information, such as change of address information provided by the U.S. Postal Service (which also originates with a voter), to determine that a voter has changed residence, it must use the notice and waiting period procedure outlined in 52 U.S.C. § 20507(d).

1. A Crosscheck List Is Not a "Request of the Registrant."

The NVRA permits states to cancel a voter's registration "at the request of the registrant." 52 U.S.C. § 20507(a)(3)(a). Defendants spill much ink arguing that a voter's signed voter registration form submitted to another state is equivalent to a "request" from that voter to cancel their prior registrations, Defs.' Br. 18-21, but they ignore that, under IC § 3-7-38.2-5(d)-(e), ***Indiana counties do not receive or review voter registration forms submitted by voters to another state***. Instead, IC § 3-7-38.2-5(d)-(e) permits counties to cancel registrations based

solely on data provided by Crosscheck, which is not even complete and is itself based on limited voter registration data received from other states culled from their voter registration databases;[8] whether there is in fact a voter registration form, signed, intentionally, by the voter, is merely assumed.

Indeed, counties cancel registrations based solely on this Crosscheck data, without reviewing actual out-of-state registration applications, and without checking whether the supposed out-of-state registration actually post-dates the Indiana registration, let alone whether the out-of-state registration is in fact the active registration. *See* Sheller Dep. 31:10-32:13 (testifying she would cancel a Crosscheck-matched voter's registration "if she had a super odd name"); Toschlog Dep. 32:9-25 (testifying he would "go ahead and accept [Crosscheck's alleged match] if you have the same date of birth and an extremely unusual name," and "we're told that [Indiana's registration date] is the oldest."); McDonald Rep. at 3 ("Eleven counties accepted all Crosscheck matches provided to them"). Defendants themselves testified that ***any*** form of written communication indicating a supposed out-of-state registration would suffice for a county to immediately cancel a voter's registration, and that counties need not actually see an out-of-state registration. King Dep. 40:9-41:6. Defendants' attempt to shoe-horn IC § 3-7-38.2-5(d)-(e) into a narrow exception under which Congress permitted states to cancel registrations "at the request of the registrant" conflicts with both the statute's ordinary meaning and what Congress intended to accomplish with the NVRA.

The starting point for statutory interpretation is the ordinary meaning of the words Congress employed. *Cler v. Ill. Educ. Ass'n*, 423 F.3d 726, 730 (7th Cir. 2005). Here, Congress

[8] Defendants misleadingly assert that original out-of-state registrations are "available for review" by counties, suggesting such original documents are provided by Crosscheck or made available by defendants. Defs.' Br. 26. This is not true, nor is it supported by defendants' citations. County officials ***cannot*** see actual out-of-state registrations in SVRS, as defendants are well aware. *See* Mowery Dep. 50:8-57:9; Freeman Dep. 34:7-36:25.

used plain language to define this narrow circumstance when a voter's registration could be cancelled immediately: "the name of a registrant may not be removed from the official list of eligible voters except . . . at the request of the registrant." 52 U.S.C. § 20507(a)(3)(a). A "request" is "the act or an instance of asking for something,"[9] or an action by which someone "seeks permission for the exercise of a privilege, or asks a question."[10] By the words' ordinary meaning, the NVRA only allows this type of cancellation when it is clear that the ***voter*** has initiated the request.

Further, the NVRA is a remedial statute, intended to rectify a long history of selective disenfranchisement by "ensur[ing] 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 (1993); *Condon v. Reno*, 913 F. Supp. 946, 962 (D.S.C. 1995). As such, it "should be construed broadly to extend coverage and [its] exclusions or exceptions should be construed narrowly." *In re Carter*, 553 F.3d 979, 985 (6th Cir. 2009). This is consistent with the structure of Section 8 of the NVRA, which starts with the proclamation that states are prohibited from removing registrants—period— "except" under specifically enumerated instances. *See* 52 U.S.C. § 20507(a). Construing these exceptions narrowly best promotes Congress' intent to eliminate disenfranchisement efforts that often have been subtle, imperceptible, or even unintentional. While maintaining accurate rolls is also a goal of the NVRA, keeping accurate rolls necessarily means not removing individuals who remain eligible and should not be removed. It therefore is improper and dangerous to interpret "at the request of the registrant" to mean any data from a third party that might indicate the registrant has engaged in conduct that might serve as a proxy

[9] "Request," *www.Merriam-Webster.com*, Merriam-Webster, last visited Apr. 19, 2018.
[10] "Request," Black's Law Dictionary (10th ed. 2014).

for requesting cancellation of their registration, with no direct communication with or direct evidence of a request from the voter.

Ultimately, the Court need not decide whether an Indiana county can immediately and without notice cancel a voter's registration if it is presented with an out-of-state registration form, because that is simply not at issue here.[11]

2. A Crosscheck List Is Not Confirmation from the Registrant.

Defendants' second attempt to back IC § 3-7-38.2-5(d)-(e) into a permissible NVRA program is to call Crosscheck data a voter's "written confirmation of [the] voter's residency change." Defs.' Br. 23-25. This similarly tortured interpretation of the NVRA's plain language cannot stand.

The NVRA prohibits states from cancelling registrations "on the ground the registrant has changed residence unless ***the registrant*** . . . ***confirms in writing*** that the registrant has changed residence" or the state goes through the notice-and-waiting procedures. 52 U.S.C. § 20507(d)(1) (emphasis added). This written confirmation exception cannot be met as a matter of law or logic unless the voter: (1) is aware of the thing to be confirmed, and (2) takes knowing action to approve or affirm it. This is consistent with the rest of the subsection, which operates as an either/or—either the voter takes action and confirms the move, or—absent a response from the voter—the state must go through the notice-and-waiting procedures. There is no third option to the effect that states can immediately cancel a registration if they are extra sure a voter has moved based on "reliable" information, confidence factors, *etc*.

[11] Defendants' argument about the Full Faith and Credit Clause is a red herring. Defs.' Br. 27-29. The purpose of the Full Faith and Credit Clause is to ensure that an issue adjudicated in one state is *res judicata* in another. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 438 (1943). In this context, Indiana would have to abide by Kansas' decision to cancel a Kansas registration, but Indiana is not obligated to cancel an Indiana voter's registration because Kansas tells it that there might be a voter with a similar name registered in Ohio. Defendants offer no authority that would support this proposition.

The NVRA's treatment of the U.S. Postal Service's change-of-address list highlights the unreasonableness of defendants' claim. The Postal Service list is information that originates from voters themselves (even more directly so than Crosscheck information), and is an even more direct proxy for change in residence (after all, that is its entire reason for existence). Yet the NVRA specifically requires states to use the notice-and-waiting procedures before cancelling the registrations of voters on the Postal Service change-of-address list. If Congress did not consider a voter to have "confirm[ed] in writing" they have moved out-of-state by submitting information to the Postal Service that they have moved, there is no logical way Congress could have intended a more removed proxy for change in residence (Crosscheck's aggregation of information collected by other states) to count as confirmation from the voter.

Defendants misleadingly focus on Congress's recognition of electronic means for satisfying written requirements in claiming Congress "has left it open" what constitutes a "writing" in this circumstance. Defs.' Br. 24. This is not a debate, for example, about whether an email from a voter or an electronic signature would count as a "writing." *Id*. This is about defendants using a list of data sent by a third party, which itself has obtained the data from other parties, indicating a voter may have moved. Common Cause does not here challenge defendants' ability to use such third-party data as a proxy for a possible change of residence—same as the Postal Service data—but it cannot use it to cancel registrations immediately without the notice-and-waiting procedures, which the NVRA requires when states use other proxies for a possible change in residence.

3. IC § 3-7-38.2-5(d)-(e) Is Not a Uniform List Maintenance Procedure.

The NVRA requires states' list maintenance programs to be "uniform, nondiscriminatory, and in compliance with the Voting Rights Act." 52 U.S.C. § 20507(b)(1). IC § 3-7-38.2-5(d)-(e) instructs county officials to "determine" if Crosscheck data shows a true match, "determine" that

the Indiana registration is more recent, and then cancel the registration. It does not address *how* to make these determinations (and defendants provide no guidance), which is precisely the point at which uniformity in list maintenance is most critical and where uniformity is lacking in Indiana.

To give one stark example, county officials testified they apply differing levels of rigor to "determine" a match based on how "unusual" or "common" they find the voter's name. Sheller Dep. 31:10-32:13; Toschlog Dep. 32:9-13. Needless to say, what makes a name "unusual" or "common" (a dangerous distinction that could lead to a discriminatory as well as a non-uniform program) is in the eye of the particular county official performing the review. Similarly, some county officials testified they would abide by the notice-and-waiting procedures before removing an individual they deemed to be a match, while others stated they would immediately remove the voter without following those procedures. *Compare* Mowery Dep. 82:2-23 *with* Sheller Dep. 35:6-37:2 (two officials from the same county); *see also* Defs.' Br. 25 (admitting some counties might continue to send voters' notices if they wish). The testimony of county officials, unchallenged by defendants, demonstrates that IC § 3-7-38.2-5(d)-(e) is not applied uniformly even within the same county—a result that is inherent in the statute.

Defendants' contention that a state program only violates the NVRA's uniformity requirement if it "applies only to a certain class of voters," Defs.' Br. 31, should be rejected because it renders the term "uniform" completely duplicative of "non-discriminatory." *See United States v. Berkos*, 543 F.3d 392, 396-97 (7th Cir. 2008) ("We avoid interpreting a statute in a way that renders a word or phrase redundant or meaningless."). The plain meaning of "uniform" in this context means that a state's list maintenance program must be consistently applied, such that similarly situated voters are treated similarly. *See Project Vote v. Blackwell*,

455 F. Supp. 2d 694, 707 (N.D. Ohio 2006) (law not uniform where "it does not apply to everyone involved in the process"). IC § 3-7-38.2-5(d)-(e) violates this requirement.

Defendants also make the circular argument that because they delegate all decision-making to county officials, and instruct county officials to "follow the law," IC § 3-7-38.2-5(d)-(e) is uniform. This argument ignores the evidence of inconsistent practices among and within counties, and defendants' awareness of these inconsistent practices and failure to take steps to unify them. Further, the implementation of the new confidence factors and the mere possibility that defendants could issue new guidance does not eliminate the problem with IC § 3-7-38.2-5(d)-(e). Counties were using non-uniform procedures before SEA 442, which only lowers the bar before counties can immediately cancel voter registrations. Defendants have had every opportunity to explain what guidance they might issue (Indiana passed the amendment over a year ago) and continue to remain silent, so the only reasonable assumption is that counties will continue to operate non-uniformly.

4. Defendants Cannot Avoid Responsibility for Indiana's NVRA Violations.

The NVRA requires states to designate an official "responsible for coordination of State responsibilities under [the NVRA]." 52 U.S.C. § 20509. Indiana has designated defendants Nussmeyer and King in this role. IC § 3-7-11-1 (designating Election Division co-directors as "responsible for the coordination of state responsibilities under NVRA").

Defendants nonetheless argue they are not responsible for any NVRA violations in Indiana, and that Common Cause must sue individual counties because they are the entities that physically cancel voter registrations. Defs.' Br. 15. This is incorrect, as made clear by the plain text of the NVRA, its legislative history, and guidance issued by the Election Assistance Commission. *See* 52 U.S.C. § 20509; S. Rep. No. 103–6, at 39 (noting this designated official is "responsible for implementing the state's function under the bill"); *Voluntary Guidance on*

Implementation of Statewide Voter Registration Lists, Election Assistance Comm'n, 70 Fed. Reg. 44593, 44594 at II(G) (Aug. 3, 2005) ("The chief State election official is the highest ranking State official who has, as a primary duty, the responsibility to ensure the lawful administration of voter registration in Federal elections.").

Federal courts likewise have consistently held that states' NVRA officials are the proper defendants where the actual voter registration has been delegated to—and actual NVRA violations committed by—local officials. *See Harkless v. Brunner*, 545 F.3d 445, 451 (6th Cir. 2008) (holding that Ohio Secretary of State, as Ohio's NVRA official, was proper defendant even though counties were allegedly committing NVRA violations); *United States v. New York*, 255 F. Supp. 2d 73, 79 (E.D.N.Y. 2003) ("It would be plainly unreasonable to permit a mandatorily designated State agency to shed its NVRA responsibilities because it has chosen to delegate the rendering of its services to local municipal agencies."); *Az. Democratic Party v. Reagan*, 2016 WL 6523427, at *6 (D. Az. Nov. 3, 2016) (the duty to ensure compliance with the NVRA extends to "the Secretary's oversight of voter registration as carried out by the counties"); *cf. Robertson v. Jackson*, 972 F.2d 529, 533-35 (4th Cir.1992) ("A state that chooses to operate its program through local ... agencies cannot thereby diminish the obligation to which the state, as a state, has committed itself, namely, compliance with federal requirements . . . ."); *cf. Woods v. United States*, 724 F.2d 1444, 1447 (9th Cir.1984) ("While the state may choose to delegate some administrative responsibilities, the ultimate responsibility for operation of the [food stamp program] remains with the state." (citation & internal quotation marks omitted)).

II. Common Cause Has Established the Remaining Elements for a Preliminary Injunction.

A. Common Cause Will Suffer Irreparable Harm.

Absent an injunction, Indiana counties will begin cancelling voter registrations pursuant to IC § 3-7-38.2-5(d)-(e) on July 1, 2018. As detailed extensively above and in its opening brief,

Common Cause has already suffered irreparable harm in anticipation of the law's enforcement, harm that will only persist and increase once Indiana enforces the law and Common Cause must divert resources to assist voters erroneously removed from the rolls with all the attendant harms that such removals entails, not least of which is potential disenfranchisement. *See* Section I.A.1, *supra*; Vaughn Aff. ¶¶ 19-25; Pl.'s Br. 30-33.

Defendants, moreover, do not dispute that they will begin using the procedures in IC § 3-7-38.2-5(d)-(e) to cancel voter registrations on July 1, 2018. The law is in effect, and defendants stipulated to begin implementing it on July 1, 2018. *See* ECF No. 57 at 2. There is no question Common Cause and Indiana voters, including Common Cause members, will be further harmed by unlawful cancellations pursuant to IC § 3-7-38.2-5(d)-(e) before this year's general election in November. Absent an injunction, defendants will send over 10,000 Crosscheck-matched voters to Indiana counties, which historically have approved over 78% of these matches. McDonald Rep. at 7-9. These voters will have their registrations cancelled without notice, and—unbeknownst to them—will stop receiving election-related mail, will not receive information should their polling location change, and will not be able to find voting information online. Nussmeyer Dep. 79:10-24 (Ex. W). These voters—should they overcome all these barriers and actually turn out and make it to the correct polling location—face additional hurdles to casting a meaningful ballot.[12] An NVRA violation is not excused because—after some effort—an improperly cancelled voter might be able to cast a provisional ballot. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). And certainly the fact that Indiana has the

[12] Such voters are told they are not registered to vote, and they must wait while a polling official contacts a voter registration official. Nussmeyer Dep. 145:4-19 (Ex. W). They then must fill out an extensive form called a VRG 4/12 before they can cast a ballot. *Id*. at 145:25-146:6. At that point, their vote can be challenged, and they have to vote a sealed ballot. Defs.' Br. 32.

NVRA's fail-safe procedures does not excuse its violations of the NVRA's other provisions. 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); (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").

B. Defendants Offer No Evidence an Injunction Will Cause Them Harm.

On the other hand, defendants do not describe—let alone offer evidence of—any harm that will befall them should the Court issue an injunction aside from a vague desire to be free from "federal judicial micromanagement." Defs.' Br. 34. A preliminary injunction, moreover, would require nothing of defendants beyond merely continuing the stay of enforcement defendants themselves agreed to put in place.

C. Public Interest Favors an Injunction.

The only public interest identified by defendants is the general policy of "ensuring and administering fair and honest elections, particularly in ensuring the integrity of the voter registration rolls." *Id*. But defendants cite no evidence that the 2018 election will not be fair, honest, or have integrity if they are not permitted to implement the amended IC § 3-7-38.2-5(d)-(e). Defendants allude to the specter of voter fraud without saying it directly, but there is no basis to suspect an increase in voter fraud if IC § 3-7-38.2-5(d)-(e) is not implemented this year (and plenty of evidence that this is a minute, if not non-existent, concern). *See, e.g.*, *Newby*, 838 F.3d at 13 (recounting scant evidence of actual voter fraud). In any event, 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, etc.). Indiana may continue using such lawful voter list-maintenance activities to keep its voter list current.

To the contrary, "electoral integrity is enhanced, not diminished, when all citizens who are eligible to vote are allowed to exercise that right free from interference and burden unnecessarily imposed by others." *N.C. State Conference of the NAACP v. N.C. State Bd. of Elections*, 2016 WL 6581284, at *11 (M.D.N.C. Nov. 4, 2016); *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012) ("The public interest therefore favors permitting as many qualified voters to vote as possible.").

As the Seventh Circuit has held, "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006); *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" (citation & internal quotation marks omitted)). Because Common Cause'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 Found. v. Land*, 546 F.3d 373, 388-89 (6th Cir. 2008).

CONCLUSION

For the foregoing reasons, and as set forth fully in Common Cause's opening papers, the Court should grant Common Cause's motion for preliminary injunction.

Dated: April 19, 2018

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of April 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