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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA PUBLIC INTEREST RESEARCH GROUP; MONTANA FEDERATION OF PUBLIC EMPLOYEES,

Plaintiffs,

v.

CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State; AUSTIN KNUDSEN, in his official capacity as Montana Attorney General; CHRIS GALLUS, in his official capacity as Montana Commissioner of Political Practices,

Defendants.

Case No. CV 23-70-H-BMM-KLD

BRIEF OF *AMICUS CURIAE* RESTORING INTEGRITY AND TRUST IN ELECTIONS IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Montana's HB 892 prohibits the State's registered voters from "purposefully remain[ing] registered to vote in more than one place in" Montana "or another state …." 2023 Montana Laws Ch. 742 (H.B. 892) §1 (amending Mont. Code. Ann. §13-35-210(5)). This prohibition would not surprise the typical American. More nearly the opposite is true; most would be surprised to learn that Montana did not ban duplicative registrations before enacting HB 892 in 2023. After all, duplicative registrations create opportunities for fraud and impair election administration, thus undermining the public's confidence in our elections. Moreover, when voters can register in multiple States, registration loses its civic significance. Allowing duplicative registrations transforms the act of registering to vote from the means by which citizens claim a share of the State's sovereign authority into a means for reserving the right to promote one's politics wherever doing so will have the greatest effect or be most convenient.

In this challenge to HB 892, plaintiffs gainsay the State's interest in preventing duplicative registrations. In doing so, they rely on *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019). But that case is neither relevant to any issue in this case nor persuasive on its own terms. This brief explains why, after addressing the sound reasons for barring duplicative registrations.

ARGUMENT

I. Duplicative registrations undermine important state interests.

No State should be compelled to allow its residents to register to vote while remaining registered in another State. This follows for three reasons. *First*, duplicative registrations create opportunities for fraud. *Second*, duplicative registrations hinder election officials in smoothly administering elections, making voting more difficult. *Finally*, duplicative registrations diminish the significance of state citizenship.

A. Duplicative registrations threaten election integrity.

1. A healthy democracy requires "public confidence in the integrity of the electoral process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (op. of Stevens, J.). Public confidence "encourages citizen participation." *Id.* It assures citizens that voting is worth their time—that they need not "fear their legitimate votes will be outweighed by fraudulent ones." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*per curiam*). Public confidence also breeds acceptance of adverse results. When a society resolves its disputes at the ballot box, it can guarantee "the winners … an honest victory, and the losers … the peace that comes from a fair defeat." *United States v. Windsor*, 570 U.S. 744, 802 (2013) (Scalia, J., dissenting).

But the peace that comes from fair defeats requires election results the public trusts. Our nation has persisted for two-and-a-half centuries because the losing sides

of political debates could continue "pressing their cases, secure in the knowledge that an electoral loss can be negated by a later electoral win." *Obergefell v. Hodges*, 576 U.S. 644, 714 (2015) (Scalia, J., dissenting). If the results cannot be trusted, those who come up short are not as likely to take their losses in stride.

Because every State has a compelling interest in protecting our republican form of government, and because that form of government requires public confidence in elections, every State has a compelling "interest in protecting the integrity and reliability of the electoral process." *Crawford*, 553 U.S. at 192 (op. of Stevens, J.). This, of course, requires rules that deter, root out, and punish fraud. But it also requires rules that promote trust by reducing *opportunities* for fraud. *See id.* at 193–94; *Brnovich v. DNC*, 141 S. Ct. 2321, 2348 (2021). After all, uncovering fraud *after* an election, while important, is less likely to promote public confidence than preventing the fraud from occurring in the first place. *See, e.g.*, *Gomes v. Clemons*, No. FBT-cv-26-6127336-S (Conn. Super. Ct. Nov. 1, 2023) (overturning election tainted by fraud), https://perma.cc/ PPXX. It is far better to "detect" and preempt "vulnerabilities" before Election Day, "bolster[ing] public confidence" that vote tallies accurately capture the people's will. Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections* ("*Building Confidence*") 28–29 (2005), https://perma.cc/VCH4-4P99; *accord Crawford*, 553 U.S. at 193–94 (op. of Stevens, J.).

2. The "maintenance of accurate and up-to-date voter registration lists" is a critical step in preventing fraud and maintaining public confidence. Federal Election Commission, *Implementing the National Voter Registration Act of 1993: Requirements, Issues, Approaches, and Examples* 18 (1994), https://perma.cc/22TY-CL2M. Duplicative registrations thwart the maintenance of accurate lists.

For one thing, duplicative registrations create opportunities for fraud even by people other than the individuals with multiple registrations. For proof, consider Chicago. In the early 1980s, the federal government successfully prosecuted Chicago politicians found to have cast *thousands* of illegal ballots in a single election. They carried out this scheme, in part, by casting votes in the names of voters who had died or moved. *See United States v. Howard*, 774 F.2d 838, 840 (7th Cir. 1985); *United States v. Olinger*, 759 F.2d 1293, 1297 (7th Cir. 1985). Duplicative registrations create opportunities for more of the same.

Beyond this, voters can and do use duplicative registrations to vote twice in single elections, allowing them to influence election results in at least one State where they do not reside. In 2023 alone, at least eight defendants have either pleaded guilty to doing so or admitted guilt as a condition for entering a diversion program. *See* Pre-Trial Intervention Contract, *Florida v. Rider*, No. 2021-CF-001506-A (Fla. 5th Cir. Ct. Jan. 19, 2023), https://perma.cc/2XVW-YCDY; Order and Judgment of

Conviction, *Ohio v. Gelman*, Geauga Cnty. No. 22 C 000281 (Ohio Ct. Comm. Pleas June 23, 2023), https://perma.cc/34B9-SY8D; John Karlovec, *Woman Charged with Voting in Ohio and Florida*, Geauga County Maple Leaf (Jan. 5, 2023), https://perma.cc/PFU8-PMM3; Agreement for Pretrial Diversion, *West Virginia v. Sink*, WVSOS File No. 20211104.01 (Mar. 27, 2023), https://perma.cc/A47J-93C8; West Virginia Secretary of State, *Warner Announces Conviction of Kanawha County Man for Illegal Voting in 2020 General Election* (Sept. 19, 2023), https://perma.cc/QX82-EYG7; West Virginia Secretary of State, *Mac Warner Announces Conviction of Randolph County Man for Voter Fraud* (Aug. 30, 2023), https://perma.cc/MM38-554U; West Virginia Secretary of State, *Fayette County Man Pleads Guilty to Illegal Voting in 2020 General Election* (May 25, 2023), https://perma.cc/RJS8-S4Q4; Kelli Arseneau and Chris Ramirez, *75-year-old Fond du Lac man convicted of election fraud in 2020 election*, The Post-Crescent (Aug. 18, 2023), https://perma.cc/9UA6-8VHC; Cory Shaffer, *Shaker Heights attorney who supported Trump jailed for felony voter fraud*, Cleveland.com (Aug. 22, 2023), https://perma.cc/7QAX-BFKV. That number, of course, should be zero.

Further, many instances of double voting are never detected, let alone prosecuted to a conviction or plea. One recent audit in Maryland found that, although the State Board of Elections "identified 134 voters who voted more than once and 1,371

voters who attempted to vote multiple times," it did not report them to the State's attorney general. Maryland Office of Legislative Audits, *Audit Report, State Board of Elections* 2 (2023), https://perma.cc/M2ZE-LRF6.

The current electoral landscape makes double voting more likely to occur. This follows for two reasons.

First, no-excuse mail-in voting, which is becoming more widespread, allows voters to cast ballots in more than one State—including States they long ago departed—without the burden of traveling to those States. As a law becomes easier to break, violations become more likely. *Cf.* Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. Pa. L. Rev. 1003, 1077 (2001) (precautions that make crime more expensive tend to deter crime). Additionally, the ability of officials to scrutinize mail-in ballots for potential fraud is inversely proportional to the volume of such ballots. As the volume grows, the chances of fraudulent votes evading detection grows as well, diminishing the law's deterrent effect.

Second, and perhaps more importantly, voters today have greater incentive to engage in election fraud. This is the direct result of political polarization. Americans are more polarized politically than at any time in recent memory. On "average, Democrats and Republicans are farther apart ideologically today than at any time in the past 50 years." Drew Desilver, *The polarization in today's Congress has roots that go*

back decades, Pew Research Center (Mar. 10, 2022), https://perma.cc/7KPP-3RVA. America is polarizing even faster than other Western countries. Levi Boxell, et al., National Bureau of Economic Research, *Cross-Country Trends in Affective Polarization* 2 (2021), https://perma.cc/5WUV-UYJM.

Polarization begets fraud. "When societies grow so deeply divided that parties become wedded to incompatible worldviews, and especially when their members are so socially segregated that they rarely interact, stable partisan rivalries eventually give way to perceptions of mutual threat." Carolyn Shapiro, *Democracy, Federalism, and the Guarantee Clause*, 62 Ariz. L. Rev. 183, 215–16 (2020) (quotation omitted, alteration accepted). "Such perceptions lead parties to view one another as mortal enemies, which means that the stakes of political competition heighten dramatically, undermining the normal operation of democratic give-and-take." *Id.* (quotation omitted, alteration accepted). "Losing ceases to be a routine and accepted part of the political process and instead becomes a full-blown catastrophe." *Id.* (quotation omitted).

The questions being decided in this era of heightened polarization are also increasingly fundamental. It is one thing to lose an election that might affect whether a State's revenue will be driven by property, sales, or income taxes. It is quite another when people perceive their physical freedoms and lives to be at stake. *See* John

Hanna, *States' push to define sex decried as erasing trans people*, Associated Press (Feb. 15, 2023), https://archive.is/HB2dj; Brendan Pierson, *Lockdown backlash curbs governors' emergency powers*, Reuters (June 22, 2021), https://perma.cc/9DFW-NKEM.

This raising of the stakes affects risk-reward calculus when it comes to fraud. The greater the threat, the more willing activists and others will be to defeat it through lawbreaking. Does anyone doubt that otherwise-law-abiding citizens would be more willing to break the law to stop a politician they saw as an existential threat to themselves, their families, and their communities? So as Americans polarize, the tendency, all else equal, will be for more citizens to seek opportunities to illegally increase their influence in elections.

B. Duplicative registrations hinder election administration.

In addition to protecting public confidence in elections, cutting down on duplicative registrations fosters the smooth administration of elections. Indeed, three separate blue-ribbon, election-reform commissions have concluded that inaccurate voting rolls generally, and duplicative registrations in particular, interfere with election officials' ability to properly administer elections. That, in turn, makes elections costlier and impairs the voting experience. Congress, apparently inspired by the report from one such commission, enacted legislation partially addressing the issue. In

sum, the need to assure that elections are efficiently run provides another reason to bar duplicative registrations.

In exploring this issue further, it makes sense to begin with the 2001 report from the National Commission on Federal Election Reform. *To Assure Pride and Confidence in the Electoral Process* (2001), https://perma.cc/ZZ4S-8JJ9. That commission—co-chaired by former Presidents Gerald Ford and Jimmy Carter, among others—issued its report in the aftermath of the controversial 2000 election. The commission reported that "inaccurate voter lists add millions of dollars in unnecessary costs to already underfunded election administrators," leading to mistakes and delays that "undermine public confidence in the integrity of the election system and quality of public administration." *Id.* at 27. The commission specifically recommended that Congress pass a law requiring States to ensure "elimination of duplicate voter registration records in the system." *Id.* at 102. Congress obliged in 2002, passing the Help America Vote Act, which contains provisions requiring that States remove "duplicate names" from their rolls. Pub. L. No. 107-252, §303(a)(2)(B)(iii), 116 Stat. 1666, 1709 (2002).

Another report from a bipartisan commission—this one co-chaired by Carter and former Secretary of State James Baker—soon followed. That report deemed inaccurate rolls the "root of most problems encountered in U.S. elections." *Building*

Confidence at 10. Duplicative, outdated registrations contributed to this problem. And while the Help America Vote Act partially helped prevent *intrastate* duplicative registrations, the commission lamented that the problem of *interstate* duplications remained unsolved. *See id.* at 12.

The problems remained in 2014, when President Obama's Presidential Commission on Election Administration released its own report. President Obama assembled this commission to address election-administration issues, including what many perceived to be unacceptably long lines at various polling locations. The commission concluded that "[i]mproving the accuracy of registration rolls … can expand access, reduce administrative costs, prevent fraud and irregularity, and reduce polling place congestion leading to long lines." Presidential Comm'n on Election Admin., *The American Voting Experience*, Cover Letter (2014), https://perma.cc/T653-MRNH. The commission zeroed in on "[b]loated and inaccurate voter registration lists" as "the source of many downstream election administration problems." *Id.* at 1. It explained that "incorrect records can slow down the processing of voters at polling places resulting in longer lines." *Id.* at 23. That makes sense; the more names officials must sift through before verifying someone's ability to vote, the longer the task is likely to take.

As all this shows, multiplicative registrations hinder the sound operation of American elections. Even setting aside any risk of fraud, bloated rolls create more work for election administrators, slowing the process and introducing more opportunities for mistakes. All of this creates the appearance that elections are poorly run, undermining the public's faith in the process.

C. Duplicative registrations are inconsistent with America's federalist structure.

Allowing duplicative registrations poses another problem as well: duplicative registrations undermine the significance of state residency.

In this country, "the people are sovereign." *Gamble v. United States*, 139 S. Ct. 1960, 1968 (2019). And "the people, by adopting the Constitution, 'split the atom of sovereignty.'" *Id.* (quoting *Alden v. Maine*, 527 U.S. 706, 751 (1999)). "'It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.'" *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

This division of sovereign authority requires "distinguish[ing] precisely between 'the people of *a State*' and 'the people of all the States'"—"between the 'sovereignty which the people of *a single state* possess' and the sovereign powers 'conferred by the people of the United States on the government of the Union." *Gamble*,

139 S. Ct. at 1968 (alteration accepted, emphases added) (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 428, 429–30,435 (1819)).

Americans, no matter where they live, are part of the "people of the United States." But their residence bears directly on their being part of the "'people of *a State*.'" *Id.* (emphasis added) (quoting *McCulloch*, 4 Wheat. at 428). "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of *the State* wherein they reside." U.S. Const., amend. XIV, §1 (emphasis added). Any American may, "'of his own volition, become a citizen of any State of the Union, … with the same rights as other citizens of that State.'" *Saenz*, 526 U.S. at 503 (quoting *Slaughter-House Cases*, 16 Wall. 36, 80 (1872)). But he may do so only by establishing "a *bonâ fide* residence therein." *Id.* (quoting *Slaughter-House Cases*, 16 Wall. at 80). Residency in one State is exclusive of residency in any other; Americans are citizens of the nation and of "the State," not the *States*, where they reside. U.S. Const., amend. XIV, §1.

A newly arrived citizen may exercise his share of his State's sovereignty by voting. Through elections, the people of a State choose who will wield sovereign power on their behalf. *See McPherson v. Blacker*, 146 U.S. 1, 25 (1892). And in States that make law by initiatives and referenda, the people wield sovereign power directly. *See Love v. King Cnty.*, 181 Wash. 462, 469 (1935). By these acts, everyone has a say

in the disposition of the property, liberty, and lives of his fellow residents—along with the property, liberty, and lives of other people subject to his State's coercive power. Registering to vote is thus a civically significant and consequential endeavor. It is how one claims a share in the "sovereignty which the people of a single state possess." *McCulloch*, 4 Wheat. at 429. No functioning sovereign would allow non-residents to exert such awesome, potentially life-altering powers over the sovereign and its citizens. The law should be applied to reinforce these precepts, which are too fundamental to give way to notions of convenience or preference, let alone electoral opportunism.

In sum, "registration of an elector is the first step in the process of voting which is a sovereign act, in fact the highest act of sovereignty that can be exercised by an American citizen." *State ex rel. Gandy v. Page*, 125 Fla. 348, 357 (1936). And the people of any State can reasonably demand that, before their citizens take this first step toward the "highest act of sovereignty," *id.*, they establish their commitment to the political community. *See Dunn v. Blumstein*, 405 U.S. 330, 334 (1972) (noting the undisputed nature of Tennessee's "power to restrict the vote to bona fide Tennessee residents.")

That commitment may very well entail canceling voter registrations in other States; it is reasonable to question an individual's commitment to a political

community if he insists upon retaining the power to undertake sovereign acts in another jurisdiction. Indeed, the United States, for years, *stripped the citizenship* of Americans who "vot[ed] in a political election in a foreign State." Nationality Act of 1940, Pub. L. 853, §401(e), 54 Stat. 1137, 1169 (1940). While the Supreme Court later determined that this stripping of citizenship violated the Fourteenth Amendment, *see Afroyim v. Rusk*, 387 U.S. 253, 267–68 (1967), it never questioned the legitimacy of forbidding citizens to vote in or retain other political ties with foreign sovereigns.

States, as sovereigns all their own, have the same interest in ensuring that only individuals committed to being part of their political communities exercise their sovereign power. States have an interest, in other words, in rejecting a cosmopolitan sort of state citizenship—a citizenship in which Americans can, without committing to a State, secure and retain the ability to exercise a share of that jurisdiction's sovereign authority. Laws prohibiting duplicative registrations promote that interest.

II. The challenged law furthers these interests—interests federal law promotes only imperfectly.

The discussion above highlights the importance of preventing duplicative registrations. This section discusses Montana's law addressing that problem.

A. HB 892 works in tandem with federal law to stop duplicative registrations.

Start with some background. "For many years, Congress left it up to the States to maintain accurate lists of those eligible to vote in federal elections." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). But "in 1993, with the enactment of the National Voter Registration Act (NVRA), Congress intervened." *Id.*; *accord* Pub. L. 103-31, 107 Stat. 77 (1993).

The NVRA adopts procedures that States must use to maintain the accuracy of their voting rolls. States must, for example, "'conduct a general program that makes a reasonable effort to remove the names' of voters who are ineligible 'by reason of' death or change in residence." *Husted*, 138 S. Ct. at 1838 (quoting 52 U.S.C. §20507(a)(4)). This includes clearing the rolls of voters who "request" that their names be removed, §20507(a)(3)(i), along with any voter who "confirms in writing" that he has moved, §20507(d)(1)(A). And States may also remove voters who fail to respond to a statutorily prescribed notice. To use this process, States must send "preaddressed, postage prepaid 'return card[s]'" to voters they suspect of having moved. *Husted*, 138 S. Ct. at 1839. States may remove the names of any voter who does not respond to the notice or fails to vote in any election held before the second post-notice general federal election. *Id.*; §20507(d)(1)(B).

The NVRA has its limits. For one thing, the Act governs removing the names of voters who move or die or who, for their own reasons, no longer wish to be registered. *Husted*, 138 S. Ct. at 1838–39. It does not, however, speak to whether newly registered voters can be required to cancel old registrations in States where they no longer live. The NVRA is silent on that issue, thus leaving it to the States.

HB 892 addresses the issue about which the NVRA is silent. It requires that individuals registered to vote in Montana maintain just a single registration. HB 892 thus attacks the problem of duplicative registrations from another angle; instead of requiring state agencies to disentangle conflicting information and restore the accuracy of their rolls, HB 892 requires citizens to take note of their own registrations and requires them not to claim sovereign authority in more than one State. Nothing in federal law precludes this exercise of state authority. (If anything, federal law *blesses* this approach, as the National Mail Voter Registration Form asks about the "address where" the voter was "registered before." *See Register To Vote In Your State By Using This Postcard Form and Guide* at 3, https://perma.cc/5ASU-2H5E.)

B. *Common Cause Indiana v. Lawson* does not support a contrary conclusion.

The plaintiffs' brief cites *Common Cause Indiana*, 937 F.3d 944, as though *Common Cause* stands for the proposition that States have no legitimate interest in stopping duplicative registrations. But that is not what the case says. Instead,

Common Cause addresses an issue not even presented here, making it wholly inapposite. Beyond that, *Common Cause* is a badly flawed opinion. This section considers those points in turn.

1. In *Common Cause*, the Seventh Circuit considered whether the NVRA preempted an Indiana law that required state officials to immediately remove from the rolls the names of voters determined, with a sufficient degree of confidence, to have moved to or registered in another State.

Common Cause challenged the law, arguing that the law violated the NVRA by allowing officials to remove voters without first sending the notice that Act requires. Indiana countered that its removal procedures did not trigger any notice requirement under the NVRA. States may remove a voter's name from the rolls without sending notice if the voter either "request[s]" to be removed or "confirms in writing" that he moved out of the State. 52 U.S.C. §20507(a)(3)(i), (d)(1)(A). Indiana argued that registering to vote in another State constitutes a constructive request for removal from the rolls in Indiana. *See Common Cause Indiana*, 937 F.3d at 959. Further, Indiana argued that, when a person registers to vote in another State, he thereby "confirms in writing" that he moved out of his previous State. *See id.*

The Seventh Circuit, without considering the immense civic and constitutional significance of registering to vote in a second sovereign, disagreed. First,

although it acknowledged that a new registration *implied* a desire for removal, it asserted that such an inference "might be rebuttable." *Id.* at 960. Accordingly, the second registration could not definitively be construed as a request for removal. Next, the Seventh Circuit declared that a registrant's registering in another State did not "'confirm[] in writing'" that the individual moved to another State. *Id.* at 961 (quoting §20507(d)(1)(A)). According to the Seventh Circuit, a voter can "confirm" in writing that he has moved *only* in response to a state-issued notice. That is, the confirms-in-writing provision applies only when the voter's writing constitutes "corroborating or verifying" information in response to an inquiry from a State. *Id.* at 961–62.

Common Cause does not address any issue relevant to this case. For one thing, the plaintiffs have not sought relief under the NVRA. Additionally, this case presents an issue that *Common Cause* had no occasion to consider: What may States do to ensure that individuals registered to vote in their States do not maintain registrations elsewhere? *Common Cause* did not present this question.

Further, *Common Cause* never doubted that States have a legitimate interest in preventing duplicative registrations. To the contrary, the court recognized the legitimacy of that interest by noting that States may cancel the registrations of voters who move, provided the cancelation does not violate the NVRA. *Id.* at 947–48. And the

Seventh Circuit again recognized the legitimacy of that interest in a follow-on case the plaintiffs never cite. *See League of Women Voters of Indiana, Inc. v. Sullivan*, 5 F.4th 714, 732 (7th Cir. 2021). There, the Seventh Circuit held that Indiana could lawfully remove from its rolls the names of voters who, when registering in another State, signed forms authorizing that new State to inform Indiana of their desire to be removed from Indiana's rolls. These forms, the court explained, constituted "request[s]" by "the registrant[s]" for removal. §20507(a)(3)(i); *League of Women Voters*, 5 F.4th at 731–32. Recognizing the importance of allowing the State to remove voters who sign authorization-of-removal forms, the Seventh Circuit confirmed that any earlier-issued injunction would not bar such removals. *League of Women Voters*, 5 F.4th at 731–32.

2. Regardless, courts outside the Seventh Circuit should not rely on *Common Cause* even in NVRA cases.

The flawed portion of *Common Cause* most relevant to this case consists of poorly reasoned *dicta* regarding the practice of protective registration—the practice of remaining registered in a State after moving away, *just in case* one's "personal circumstances change before election day." *Common Cause*, 937 F.3d at 960. The court suggested that those who move for work or school might want to keep a prior registration in case they are fired or drop out and move back before election day. *Id.* The

plaintiffs latch on to this language, which they read to *bless* protective registration. *See* Pls.' Br. in Supp. of Mot. for Prelim. Inj. 20–22, ECF No. 12. In fact, the Seventh Circuit did not bless the practice; it simply speculated that the practice existed. Regardless, the opinion entirely ignored the sound reasons that States have for barring duplicative registrations, including protective registrations. The court never mentioned the problems that duplicative registrations pose for election administration and fraud prevention. *See above* 2–11. Nor did it address the States' interest in ensuring that only voters entirely committed to their political communities secure the right to wield the people's sovereign authority. *See above* 11–14. Thus, insofar as the Seventh Circuit meant to bless the practice of protective registration, it did so without addressing at all the States' weighty interests in barring that practice.

Common Cause also misinterpreted the NVRA. Its interpretation of the Act's "confirms in writing" clause is especially flawed. The relevant provision empowers States to "remove the name of a registrant from the official list of eligible voters" if "the registrant … confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction …." 52 U.S.C. §20507(d)(1)(A). The word "confirms" means "establish[es] the truth, accuracy, validity, or genuineness of." *Random House Unabridged Dictionary* 428 (2d ed. 1993). For example, when a court says that "background evidence *confirms* that the Maoist group that threatened [a

party] is known for abducting and killing people," *Rayachhetry v. Holder*, 371 F. App'x 758, 760 (9th Cir. 2010) (emphasis added), it means the evidence proves this to be true. So, when the NVRA speaks of matters the voter confirms in writing, it speaks of matters established as true by the writing. This means a registrant "*confirms* in writing that the registrant has changed residence to a place outside the registrar's jurisdiction," §20507(d)(1)(A) (emphasis added), whenever he registers to vote at a new address in a new jurisdiction. A registration like that establishes the truth of the voter's move. Indeed, because residency in one State is mutually exclusive of residency in another State, it could not be otherwise. A person who registers in a new State resides in that State and therefore no longer resides in the State from which he departed.

The Seventh Circuit seemed to think that a voter can "confirm" his change of residence under the NVRA *only* in response to a valid NVRA notice sent by his prior State. *Common Cause*, 937 F.3d at 961–62. It erred. As just discussed, a writing can confirm a fact without being made in response to any inquiry. To take one well-known example, the Declaration of Independence confirmed our split from England even though England never requested the former colonies' position on the matter.

Two principles of statutory interpretation bolster the conclusion that "confirms," as it appears in the NVRA, should not be read to require confirmation *in response to* a state-issued notice.

First, when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 556 U.S. 568, 573 (2009) (quotation omitted). That principle applies with full force here. The confirms-in-writing provision never mentions any state-issued notice. §20507(d)(1)(A). Yet, other provisions of the very same statute—the very same *subsection*, in fact—provide exacting detail about the contents, timing, and relevance of responses (or non-responses) to the notice the NVRA requires. §20507(d)(1)(B) & (2). Thus, on the Seventh Circuit's reading, Congress provided exacting detail on the significance of notices and responses throughout §20507(d), yet mysteriously decided to leave the matter to subtle implication in the confirms-in-writing provision. That is implausible. "The statute says what it says—or perhaps better put here, does not say what it does not say." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1069 (2018). The confirms-in-writing provision does not say that the confirmation must come in response to any notice.

Second, this reading finds further support in the interpretive principle that "a 'textually permissible interpretation that furthers rather than obstructs the statute's purpose should be favored.'" *Rojas v. FAA*, 989 F.3d 666, 681 (9th Cir. 2021) (Collins, J., concurring) (alteration accepted) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law* §4, p.63 (2012)). The NVRA seeks a balance. On the one hand, it requires States to remove the names of voters who moved. On the other, it requires that States pursue this goal in ways that minimize the risk of removing names of voters who did not move. But nowhere does it establish a goal of preserving voter options or convenience. The confirms-in-writing provision serves the purpose of identifying one class of registrants for whom the balance tilts strongly in favor of removal: States can, without any serious risk of error, remove from the voting rolls the names of individuals who confirm in writing that they moved to another State. But that is true regardless of whether the confirmation comes in response to a state-issued notice or in the form of a written registration in another State. Thus, reading "confirms" to cover any kind of written confirmation furthers the statutory purpose. In contrast, reading "confirms" to cover only confirmations made in response to a state-issued notice obstructs the statutory purpose. The first reading is therefore superior.

CONCLUSION

The Court should deny the plaintiffs' motion for a preliminary injunction.

/s/ Benjamin M. Flowers
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief contains 5,123 words, excluding the contents listed in D. Mont. L.R. 7.1(d)(2)(E).

/s/ Benjamin M. Flowers
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/s/ Rob Cameron
Rob Cameron

CERTIFICATE OF SERVICE

All counsel of record who are deemed to have consented to electronic service are being served today, November 20, 2023, with a copy of this document via the Court's CM/ECF system.

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/s/ Rob Cameron
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