

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

PATRICK HARLAN, et al.,)	
)	
Plaintiffs,)	Case No. 1:16-cv-7832
)	
v.)	Hon. Samuel Der-Yeghiayan
)	
CHARLES W. SCHOLZ, Chairman, Illinois)	
State Board of Elections, et al.,)	
)	
Defendants.)	
)	

**PLAINTIFFS’ MEMORANDUM IN SUPPORT
OF THEIR MOTION FOR PRELIMINARY INJUNCTION**

I. Introduction

“[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

Illinois, however, has adopted a system for Election Day voter registration (“EDR”) that does not allow all of its citizens to participate in elections on an equal basis. Instead, it guarantees residents in high-population counties the right to register to vote at any precinct polling location on Election Day but does not give that right to residents in low-population counties. This not only violates the rights of residents in those low-population counties in violation of the Equal Protection Clause of the Fourteenth Amendment; it also appears to be designed to tilt the political playing field to benefit candidates who draw more of their support from high-population counties at the expense of candidates who draw more of their support from low-population counties.

To prevent constitutional injury to voters in Illinois’ low-population counties, and the candidates and political parties for which they would like to vote, this Court should enjoin

Defendants – members of the Illinois State Board of Elections, who are collectively responsible for supervising and directing the activities of county election authorities – to direct election authorities in Illinois’ 102 counties not to implement EDR at precinct polling places in the 2016 general election.

II. Statement of Facts

A. Illinois’ Election Day Registration Scheme

Before the 2014 general election, Illinois, like most states then and now, did not allow citizens to register to vote on Election Day. After the close of its normal voter registration period, Illinois would allow citizens to make use of “grace period” registration, which began at the close of the normal registration deadline and continued through the third day before the election. *See* Ill. Public Act 98-961 (attached as Exhibit 1) §§ 4-50, 5-50, 6-100. During the grace period, a voter could register to vote at a county clerk’s office or at a specially designated voter registration site. *Id.*

In 2014, the Illinois General Assembly passed, and Governor Pat Quinn signed, a pilot program for Election Day registration (“EDR”), which by its terms applied only to the 2014 general election. *See id.* Under the pilot program, the state extended the “grace period” for late registration up to and including Election Day, allowing a qualified person to both register and vote at the office of his or her county’s election authority or at a “permanent polling place” for early voting established by the county’s election authority. *See id.*

Less than one month after the 2014 general election, the Illinois General Assembly rapidly considered and passed new legislation, SB 172, which created a permanent system of EDR in Illinois. *See* Ill. Public Act 98-1171. SB 172 passed completely on party-line votes in both houses of the General Assembly, with all affirmative votes coming from Democratic

legislators and all “nay” votes coming from Republican legislators.¹ Outgoing Governor Pat Quinn signed the bill on Saturday, January 10, 2015, and it was approved on January 12, 2015, the same day his successor, Governor Bruce Rauner, was inaugurated.²

The permanent EDR system of SB 172, which is currently in effect, is substantially different from the 2014 pilot program. The permanent EDR system allows a qualified person to register to vote, and then vote, in person at any of several locations: the office of the election authority, a permanent polling place for early voting; any early voting site beginning 15 days prior to the election; or *any polling place* on Election Day. 10 ILCS 5/4-50, 5-50, 6-100.

That last option – registering at any polling place on Election Day – is not available to all citizens, however. Rather, the statute only mandates that Illinois counties with a population of 100,000 or more offer EDR at all polling places. Illinois counties with a population of less than 100,000 that do not use electronic poll books are not required to provide EDR at all polling places, so long as they allow Election Day registration and voting at “(i) the [county] election authority’s main office and (ii) a polling place in each municipality where 20% or more of the county’s residents reside if the election authority’s main office is not located in that municipality.” 10 ILCS 5/4-50, 5-50, 6-100.

Thus, Illinois law now guarantees a right to EDR at every polling place to citizens who live in the 20 Illinois counties with a population of 100,000 or more (“high-population counties”)

¹ Illinois General Assembly, S.B. 172 House Roll Call, Dec. 3, 2014, http://www.ilga.gov/legislation/votehistory/98/house/09800SB0172_12032014_008000T.pdf; S.B. 172 Senate Vote on House Floor Amendment No. 2 (adding relevant provisions), http://www.ilga.gov/legislation/votehistory/98/senate/09800SB0172_12032014_007001C.pdf.

² Illinois General Assembly, Bill Status of SB 172, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=172&GAID=12&DocTypeID=SB&LegId=69471&SessionID=85&GA=98#actions>.

but not to citizens who live in the 82 Illinois counties with a population of less than 100,000 (“low-population counties”).

This discrimination against voters in low-population counties is extraordinary. No other state with EDR discriminates against citizens of certain counties in this way. Six of the ten states offering EDR – Idaho, Iowa, Minnesota, New Hampshire, Wisconsin, and Wyoming – allow electors statewide right to register and vote at their respective precinct locations on Election Day. *See* Idaho Code § 34-408A; Iowa Code § 48A.7A; Minn. Stat. §201.061 Subd. 3; RSA 654:7-a; Wis. Stat. § 6.55; Wyo. Stat. § 22-3-104(f)(ii)(a). (*See also* Declaration of M.V. Hood III (“Hood Decl.”), attached as Exhibit 2, 5-6.) Similarly, North Dakota allows electors to vote at their respective precinct polling locations on Election Day without registering (the functional equivalent of EDR). *See* N.D. Cent. Code §16.1-05-07(2)(c). (*See also* Hood Decl. 5 n.7.)

The other four states offering EDR do not provide EDR at every polling place, but each has a uniform system and does not make distinctions between counties based on population. In Colorado, any citizen may register to vote on Election Day at a center within his or her respective county of residence. *See* C.R.S. 1-2-217.7(4). (*See also* Hood Decl. 5.) In Connecticut, each town contains one designated EDR site. *See* Conn. Gen. Stat. § 9-19j. (*See also* Hood Decl. 5.) Similarly, in Maine, each city or town has a designated EDR site, typically located at city hall or the town office. *See* 21-A M.R.S. § 122(4). (*See also* Hood Decl. 5.) And in Montana, EDR is available at the elections office in each county. 13-2-304, MCA(1)(a). (*See also* Hood Decl. 5.) Although these four states do not have EDR at every polling place, they have a uniform system and do not make distinctions between counties based on population. (Hood Decl. 5.)

B. Tilting the Political Playing Field

Illinois' EDR system is discriminatory on its face because it guarantees some voters, but not others, the right to register and vote at their respective precinct polling places on Election Day. The predictable result of this discriminatory scheme will be to benefit some candidates for office – and their supporters – at the expense of others.

As explained by Plaintiffs' expert witness, Professor M.V. Hood III, an overwhelming consensus exists in the academic literature that EDR increases voter turnout where it is implemented. (Hood Decl. 7-9, 14.) This is true when EDR is available at a centralized location, but EDR's effects on voter turnout have been found to be more encompassing and consistent when EDR is offered at precinct polling places. (*Id.* at 8.)

Accordingly, Illinois' EDR scheme is likely to increase voter turnout in counties that offer EDR at every polling place more than it increases voter turnout in counties that do not offer EDR at every polling place. (*See id.* at 9.) Thus, Illinois' EDR scheme will tend to give an advantage to candidates who draw support from high-population counties when they compete against candidates who draw support from low-population counties.

In general, Illinois' EDR scheme is likely to have partisan effects, benefiting Democratic Party candidates at the expense of Republican Party candidates. In statewide elections, Democratic candidates tend to perform better in high-population counties; Republican candidates tend to perform better in low-population counties. (*See id.* at 11-13.) In statewide elections from 2004 through 2014, Democratic candidates received more than three fifths (62.1%) of the two party vote in high-population counties; Republican candidates received more than 54.1% of the vote in low-population counties. (*Id.* at 11.) The difference between the average Democratic (or Republican) vote by county size is 16.2%, which is statistically significant. (*Id.*) Thus, it is quite

possible that Illinois' EDR scheme will have the effect of diminishing Republican votes relative to Democratic votes. (*Id.* at 14.)

C. Harm to Plaintiffs

1. Harm to Plaintiff Patrick Harlan

Plaintiff Patrick Harlan is a candidate for the U.S. House of Representatives in the 17th Illinois Congressional District,³ which encompasses a high-population county (Rock Island), portions of three other high-population counties (Peoria, Tazewell, and Winnebago), and the entirety of ten low-population counties (Carroll, Fulton, Henderson, Henry, Jo Daviess, Knox, Mercer, Stephenson, Warren, and Whiteside).⁴

The high-population counties in the 17th District are, of course, required to offer Election Day registration at all polling places. *See* 10 ILCS 5/4-50. The low-population counties are not required to offer EDR at precinct polling places and do not intend to do so in the 2016 general election. (*See* Exhibit 3, Declaration of Joseph Tabor.)⁵ Instead, they will provide the minimum EDR that Illinois law requires. (*See id.*)

³ Illinois State Board of Election, Candidate List, <https://www.elections.il.gov/ElectionInformation/CandList.aspx?SearchType=OfficeID&ElectionID=51&OfficeID=7789&OrderBy=ORDER%20BY%20OfficeBallotGroup,%20OfficeSequence,%20PartySequence,%20FileDateTime,%20vwCandidates.Sequence,%20vwCandidates.ID,%20LotteryLastName,%20LotteryFirstName>.

⁴ Illinois State Board of Elections, Illinois Congressional District 17, <http://elections.il.gov/Downloads/VotingInformation/PDF/2011Districts/2011CongDist17.pdf>. The complaint omitted Jo Daviess County and Winnebago County from the list of counties in the district. (Compl. ¶ 38.)

⁵ Plaintiffs have confirmed that Carroll County, Fulton County, Henderson County, Jo Daviess County, Stephenson County, and Warren County will not provide Election Day registration at polling places. They expect to receive confirmation soon that the other 17th District low-population counties also will not provide Election Day registration at polling places.

As a result, electors in low-population counties in the 17th District will not have the same opportunity to vote as electors in high-population counties within the 17th District. And it is a virtual certainty that some residents of those low-population counties who would register and vote for Mr. Harlan at their polling places on Election Day if they could do so will end up not voting at all. Mr. Harlan has brought this lawsuit to protect the right of citizens in those low-population counties to have the opportunity to vote on the same basis as voters in high-population counties. (Doc. 1, Complaint ¶¶ 36-51.)

2. Harm to Plaintiff Crawford County Republican Central Committee

Plaintiff Crawford County Republican Central Committee is an Illinois political party committee based in Crawford County, Illinois, the purpose of which is to elect Republican Party candidates to office.⁶

As a low-population county without electronic polling books, Crawford County's election authority is not required to provide EDR at precinct polling places and does not intend to do so. (*See* Exhibit 3.) Instead, it will provide the minimum EDR that Illinois law requires. (*Id.*)

As a result, Crawford County electors – including some who would vote for Republican candidates in statewide elections – will not have the same opportunity to vote as electors in high-population counties. And it is virtual certainty that some Crawford County residents who would register and vote for a Republican candidate in a statewide race in the 2016 general election if they could do so will not vote at all.

The Crawford County Republican Central Committee has brought this lawsuit to protect the right of would-be Republican voters in Crawford County to have the opportunity to vote on the same basis as citizens in high-population counties. (Compl. ¶¶ 42-46.)

⁶ Illinois State Board of Elections, Committee Details, Crawford County Republican Central Comm., <https://www.elections.il.gov/CampaignDisclosure/CommitteeDetail.aspx?id=389>.

III. Standard of Review

To prevail on a motion for preliminary injunction, Plaintiffs must demonstrate: (1) a likelihood of success on the merits; (2) the lack of an adequate remedy at law; and (3) irreparable harm if the Court does not grant the injunction. *Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). If these conditions are met, the Court must then balance the hardship the moving party will suffer in the absence of relief to any hardship the nonmoving parties will suffer if the injunction is granted. *Id.* Finally, the Court considers the interests of nonparties in deciding whether to grant injunctive relief. *Id.* The Court weighs all these factors using a “sliding scale” approach: the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards his side; the less likely it is the plaintiff will succeed, the more the balance need weigh toward his side.” *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992).

IV. Argument

A. **Plaintiffs are likely to succeed on the merits of their Equal Protection claim because Illinois’ Election Day registration scheme arbitrarily discriminates against citizens in low-population counties.**

The right to vote is a fundamental right. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). And the Equal Protection Clause protects that right “in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.” *Bush v. Gore*, 538 U.S. 98, 104-05 (2000). In particular, “a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

1. Illinois' Election Day voter registration system arbitrarily discriminates against citizens in low-population counties based on geographic location.

Illinois has adopted a system of Election Day Registration that is fundamentally unfair and unequal. Illinois' EDR system makes classifications of voters based on geographic location, guaranteeing EDR at polling places to citizens who live in high-population counties, but not to citizens who live in low-population counties. In this way, Illinois' EDR system denies electors in low-population counties equal access to the fundamental right to vote. *See Dunn*, 405 U.S. at 336.

When a state restricts voting rights, courts employ a balancing test to determine whether it is permissible under the Equal Protection Clause. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Under the test the Supreme Court set forth in *Anderson*:

A court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789.

The character of the injury in this case is a restriction on citizens' access to EDR at polling places based on where they live – i.e., a loss of the right to participate in an election on an equal basis with others in the same jurisdiction based on a “geographic classification.” This injury is a serious one; the United States Supreme Court has long held that the Equal Protection Clause prohibits the arbitrary classification of voters based on where they live. *See Moore v. Ogilvie*, 394 U.S. 814 (1969); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gray v. Sanders*, 372 U.S.

368 (1963). The Supreme Court has stated that “uniform rules” for practical implementation of statewide laws are necessary to ensure equal protection of voters in different counties and that the Equal Protection clause is violated when states “accord[] arbitrary and disparate treatment to voters in its different counties.”. *Bush*, 538 U.S. at 106-07. When the state treats the voting rights of some of its citizens arbitrarily, based on geographic location, as it has done here, strict scrutiny applies. *Reynolds*, 377 U.S. at 581; *see also Communist Party of Illinois v. State Board of Elections*, 518 F.2d 517, 521 (7th Cir. 1975).

Further, the magnitude of the injury the citizens whose rights Plaintiffs seek to protect is severe. A qualified citizen in a low-population without polling-place EDR who attempts to register at his or her polling place on Election Day will not be able to do so and, as a result, could be totally deprived of his or her ability to cast a vote, while a qualified citizen in a high-population county, however, would simply be able to register at a polling place on Election Day and vote. Plaintiffs, Patrick Harlan and the Crawford County Republican Central Committee, are injured as well because, as described above, the statute’s discrimination puts Mr. Harlan and the candidates that the Crawford County Republican Central Committee supports at a competitive disadvantage because it will tend to boost Democratic voter turnout relative to Republican voter turnout. Where citizens’ voting rights are severely affected, as here, strict scrutiny is warranted, and the challenged provision must be narrowly drawn to advance a state interest of compelling importance. *See Burdick*, 504 U.S. at 434. Indeed, rigorous scrutiny is especially appropriate for laws that tend to give an advantage to one side or the other in elections because, as the Supreme Court has recently emphasized, “those who govern should be the *last* people to help decide who *should* govern.” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1448 (2014). Therefore, Defendants must

provide a compelling government interest for the EDR system's geographic discrimination that is narrowly tailored to serve that interest. As explained below, Defendants are unable to do so.

2. Illinois' discrimination against citizens in low-population counties does not serve any legitimate governmental interest, much less a compelling one.

Illinois' discrimination against citizens in low-population counties is not justified by any compelling governmental interest. The state has no legitimate interest in denying polling-place EDR to residents of low-population counties while guaranteeing it to residents of high-population counties.

The only apparent purpose served by the scheme's discrimination is one the Supreme Court has consistently recognized as illegitimate: to give candidates who draw relatively strong support from voters in high-population counties a competitive advantage over candidates who draw relatively strong support over voters in low-population counties. *See McCutcheon*, 134 S. Ct. at 1441 (government "may not . . . restrict the political participation of some in order to enhance the relative influence of others"); *Knox v. SEIU Local 1000*, 132 S. Ct. 2277, 2295 (2012) ("The First Amendment creates a forum in which all may seek, without hindrance or aid from the State, to . . . achieve their political goals."). Again, studies have consistently found that – as common sense would suggest – EDR increases voter turnout, and this effect is stronger where EDR is available at the precinct level, not just at a central location. (Hood Decl. 9.) As a result, in Illinois, it is likely that EDR will increase voter turnout more in high-population counties, where Democratic candidates tend to perform better, than in low-population counties, where Republican candidates tend to perform better. (*Id.* at 11.) It would strain credulity to suggest that the Democratic legislators who voted for SB 172 were not aware of this likely

consequence when they rushed to pass the bill between the November 2014 election and the inauguration of a Republican governor.

Even if the burden Illinois' EDR system imposed on citizens' rights were slight – which it is not – Defendants would still have to put forth relevant (*Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966)), and legitimate state interests (*Anderson*, 460 U.S. at 789) “sufficiently weighty to justify the limitation” *Norman v. Reed*, 502 U.S. 279, 288-89 (1992). In other words, even if strict scrutiny did not apply, Defendants would still be required to provide something more than a rational basis for their discrimination under *Anderson*. Defendants cannot do this.

In any event, if the state wants to serve its interest in facilitating greater participation in elections by allowing citizens to register at polling places on Election Day, it may do so in a manner that is less restrictive of constitutional rights than the current system by giving that right to all citizens statewide, not just to residents of favored counties, as seven other states have. (*See Hood Decl.* 5-6.)

Because the discrimination inherent in Illinois' EDR scheme does not serve any legitimate governmental interest – and because, in any event, the statute is not narrowly tailored to serve the government's interest in facilitating participation in elections without unnecessary infringements of constitutional rights – it fails not only strict scrutiny but also any level of constitutional scrutiny.

B. Plaintiffs lack an adequate remedy at law and will suffer irreparable harm unless the Court grants a preliminary or permanent injunction stopping implementation of Illinois' Election Day registration scheme.

Unless this Court enters a preliminary injunction, the individuals discriminated against by Illinois' EDR system, whose interests Plaintiffs represent, will forever lose their right to participate in the 2016 general election on an equal basis – an irreparable injury for which

damages could not compensate them. Specifically, to avoid irreparable constitutional harm, the Court must enjoin Defendants to direct election authorities in all Illinois counties not to implement EDR at polling places in the 2016 general election.⁷ This order would preserve the status quo ante: just as Illinois counties have never offered EDR at polling places in any past election, they would not do so in this election.

C. The public interest and balance of hardships favor granting an injunction.

Enjoining Defendants to ensure that all eligible Illinoisans may participate in the 2016 general election on an equal basis will not cause any substantial harm. Again, a preliminary injunction would simply preserve the status quo ante by allowing voting to proceed in the 2016 general election as it always has in Illinois: without Election Day voter registration at precinct polling places. And citizens in all counties would still have an equal right to register on Election Day at sites other than precinct polling places, as SB 172 provides.

Moreover, it is always in the public interest to prevent violations of constitutional rights, and the public therefore has an interest in ensuring that elections are conducted so that each Illinois elector participates in election on a fair, equal basis.

V. Conclusion

To avoid irreparable constitutional harm to people Illinois has discriminated against with its EDR system, Plaintiffs respectfully ask this Court enter a preliminary injunction ordering Defendants to direct election authorities in all 102 Illinois counties not to implement Election Day voter registration at precinct polling locations.

Dated: August 9, 2016

⁷ As members of the Illinois State Board of Elections, Defendants collectively have the authority to direct and supervise the administration of election laws throughout Illinois. *See* 10 ILCS 5/1A-8.

Respectfully submitted,

/s/ Jeffrey M. Schwab

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CERTIFICATE OF SERVICE

I, Jacob H. Huebert, an attorney, certify that on August 10, 2016, I served Plaintiffs' Memorandum in Support of Their Motion for Preliminary Injunction [CORRECTED] on Defendants' counsel by filing it through the Court's electronic case filing system.

/s/ Jacob H. Huebert