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' RESPONSE
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs Patrick Harlan and the Crawford County Republican Central Committee challenge Illinois' scheme for Election Day voter registration, which guarantees some voters, but not others, the right to register to vote at their local polling places on Election Day.

Defendants' argument that the Court should analyze Plaintiffs' claim under the rational basis test – giving the state's discriminatory election law no greater scrutiny than it would give an ordinary economic regulation – flies in the face of the Supreme Court and Seventh Circuit case law on voting rights. Under the framework the Supreme Court established in the *Anderson* and *Burdick* cases, when a plaintiff challenges a law that burdens the voting rights of some of a state's citizens more than it burdens the voting rights of others, a court must determine whether the interest the state asserts to justify the law outweighs the burden it imposes. A court cannot simply approve the law based on any "hypothesized" justification that state puts forward, as Defendants ask the Court to do here. Accordingly, Defendants' motion to dismiss, which is premised on Defendants' incorrect assertion that the rational basis test applies, must be denied.

I. Background

Plaintiffs incorporate by reference the Statement of Facts set forth on pages 2 through 7 of their memorandum in support of their motion for preliminary injunction (Doc. 11), which the parties are briefing concurrently with Defendants' motion to dismiss.

II. Argument

A. Because Plaintiffs' claim concerns a burden on voting rights, the Court must apply the analysis the Supreme Court prescribed in *Anderson* and *Burdick*, not the rational basis test.

When plaintiffs bring a constitutional challenge to a law that burdens citizens' voting rights – or that burdens the voting rights of some citizens more than it burdens the voting rights of others – the federal courts apply the balancing test the Supreme Court prescribed in *Anderson v. Celebrezze*, 460 U.S. 708 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), not the extremely deferential rational basis test Defendants urge this Court to apply. Plaintiffs have alleged that Illinois' statutes governing Election Day voter registration ("EDR") burden the voting rights of citizens in counties with a population of less than 100,000 ("low-population counties") relative to the rights of voters in counties with a population of 100,000 or more ("high population counties") by guaranteeing only citizens in the high-population counties the right to register to vote at their precinct polling places on Election Day. *See* 10 ILCS 5/4-50, 5-50, 6-100. (Doc. 1, Complaint ¶¶ 22-23, 48-57.) The Court should therefore apply the *Anderson*/*Burdick* test to Plaintiffs' claims.

1. The *Anderson*/*Burdick* test requires more rigorous scrutiny than rational basis review.

As an initial matter, it is important to understand what the *Anderson*/*Burdick* test is, how it differs from rational basis review, and why courts use it instead of rational basis review in challenges to state election laws.

Under the *Anderson*/*Burdick* test, "[a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

This test is not as simple or automatically deferential as the rational basis test, under which laws affecting rights the courts have not deemed to be fundamental, such as ordinary economic regulations, are given minimal review, so long as a court can identify a possible rational purpose for the law. *See, e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488-89 (1955) (applying rational basis test to due process and equal protection challenges to economic regulation). As the Supreme Court stated in *Anderson*, "[t]he results of this [*Anderson/Burdick*] evaluation will not be automatic"; rather, the test requires the court to weigh the relevant considerations and make "hard judgments." 360 U.S. at 789-90.

The Supreme Court has explained why laws affecting the right to vote warrant careful scrutiny: because voting is "a fundamental political right" and is "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1963). In general, courts "are reluctant to overturn governmental action on the ground that it denies equal protection of the laws" because they presume that "improvident decisions will eventually be rectified by the democratic process." *Vance v. Bradley*, 440 U.S. 93, 97 (1979). When a law restricts affected citizens' *access* to the democratic process, however, that presumption is not warranted. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (recognizing greater scrutiny

may be warranted for laws affecting "those political processes [such as voting] which can ordinarily be expected to bring about repeal of undesirable legislation.").

Moreover, common sense and basic democratic fairness demand that election laws imposing different burdens on different groups receive more-than-minimal scrutiny. After all, voters, like candidates for office, are essentially in competition with each other at the ballot box. Accordingly, if an election law gives preferential treatment to a particular group of voters, that unequal treatment inherently harms the voters who do not receive that preferential treatment. Rules that treat voters equally are therefore essential to a fair, democratic election. In particular, as discussed in more detail below, the Supreme Court has recognized the importance of treating people in different parts of a state equally – i.e., of not discriminating against certain voters based on their geographic location. *See, e.g., Bush v. Gore*, 531 U.S. 98, 106-07 (2000) (Equal Protection Clause violated when states "accord[] arbitrary and disparate treatment to voters in different counties").[1]

Outside of the voting context – where concerns about fair elections do not apply – courts have understandably been far more deferential to state laws treating people in different parts of a state differently. Where voting rights are not involved, the law's more favorable treatment of people in one part of a state does not, in itself, harm citizens in other parts of the state who receives less favorable treatment. This is illustrated by a Seventh Circuit case the defendants rely on, in which the court applied the rational basis test in reviewing an Illinois statute that gave downstate Illinois teachers better employment terms than Chicago teachers, *Hearne v. Bd. Educ. of City of Chicago*, 185 F.3d 770 (7th Cir. 1999). In that case, the treatment of teachers

[1] To be clear, this case, like *Bush v. Gore*, is not about "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." 531 U.S. at 109. Nor is it about whether different counties may use "a variety of voting mechanisms" based on "concerns about cost, the potential value of innovation, and so on." *Id.* at 134 (Souter, J., dissenting). Rather, this case is about a different question: whether a State can guarantee the opportunity to register to vote at precinct polling places to citizens in some counties but not to others.

elsewhere in the state did not, in itself, cause the plaintiff Chicago teachers any injury. In the election context, however, members of a legally disfavored group are harmed by the law's preferential treatment of others because the law tilts the political playing field against them (and the candidates they would support) and in favor of similarly situated other voters.

2. Courts apply the *Anderson*/*Burdick* test in considering any constitutional claim that an election law burdens citizens' voting rights.

In the modern case law, federal courts apply the *Anderson*/*Burdick* test to all claims that a state election law burdens certain citizens' voting rights.

For example, in one of the primary cases on which the Defendants rely, *Griffin v. Roupas*, the Seventh Circuit applied the *Anderson*/*Burdick* balancing test, not the ordinary rational-basis analysis that the Defendants want the court to apply here. 385 F.3d 1128, 1130 (7th Cir. 2004) (citing *Burdick*, 504 U.S. at 438-42, among other cases). In that case, the plaintiffs challenged Illinois' absentee voter law, which allowed a citizen to vote by absentee ballot only under limited circumstances, primarily if the citizen expected to be absent from his or her county of residence on Election Day. *See id.* at 1129. The plaintiffs argued that this rule unconstitutionally burdened the voting rights of people, particularly working mothers, who would not be outside their counties of residence on Election Day but whose long working hours would nonetheless prevent them from making it to the polls. *See id.* at 1130. In analyzing this claim, the court noted that plaintiffs' argument would require invalidation of *any* rules restricting who can cast an absentee ballot and would thus require the court to order the state to allow "unlimited absentee voting," "judicially legislating [a] radical . . . reform." *Id.* The court concluded that the Constitution did not require this "radical" step because any burden created by reasonable rules limiting absentee voting to certain categories of citizens who face particular

hardships was justified by the government's interest in limiting the "serious" problems associated with absentee voting, particularly the increased potential for voter fraud ("a serious problem . . . with a particularly gamey history in Illinois"), voters casting invalid ballots, and voters casting ballots early without the benefit of information that surfaces later in the election season. *Id.* at 1130-31. Thus, the court did *not* simply engage in the extremely deferential rational basis review the Defendants ask this Court to apply here but rather weighed the government's interest in the law against the burden on citizens' voting rights.[2]

The district court also applied the *Anderson*/*Burdick* test in another case on which Defendants rely, *Gustafson v. Ill. State Bd. of Elections*, No. 06 C 1159, 2007 U.S. Dist. LEXIS 75209 (N.D. Ill. Sept. 30, 2007). In that case, the plaintiffs challenged an earlier version of Illinois' early voting law, and its application by the Illinois State Board of Elections, because, in the absence of contrary instructions from the Board, some counties disregarded the statute's requirement to provide early voting on Saturdays and Sundays, some disregarded the statute's mandate to hold early voting during certain hours of the day, and some varied in the number and types of early voting sites they operated (which the law permitted). *See id.* at *3-5, 9-10, 15-19. In discussing *Gustafson*, Defendants fail to note that, to analyze the plaintiffs' equal protection claim, the court did not automatically apply the rational basis test but instead looked to *Burdick*'s requirement that a court consider the burden an election law imposes on the right to vote. *See id.* at 29-30 (citing *Burdick*, 504 U.S. at 433-34). The Court determined that "the equivalent of rational basis test" was appropriate *only because* it concluded that the challenged statute imposed

[2] The other absentee-voting case Defendants rely on, in which the plaintiffs challenged Illinois' absentee voter law for not allowing pretrial detainees in the Cook County Jail to vote, is not instructive because it long predates the Supreme Court's establishment of the *Anderson*/*Burdick* framework for analyzing challenges to election laws. *See McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802 (1968). Tellingly, the Seventh Circuit did not even cite *McDonald*, let alone find it controlling, in *Griffin*, even though both cases involved challenges to exclusion of certain groups from absentee voting.

a "minimal" burden on the right to vote – that is, it concluded the burden that particular law imposed was so light that any rational government interest would outweigh it. *Id.* Thus, although the Court ultimately concluded that a rational basis would suffice to uphold the law, the court did *not* reflexively apply the rational basis test in disregard of *Anderson* and *Burdick* as Defendants urge the Court to do here. And, as discussed below, the burden on voters' rights at issue in this case is *not* low, and greater scrutiny is therefore warranted.

Defendants also fail to note that the recent voting rights decisions from federal district courts in Wisconsin and Ohio that they cite in support of their motion (Defs.' Mem. 10-11) likewise applied the *Anderson*/*Burdick* analysis in considering claims that certain provisions of those states' election law burden the voting rights of some voters more than they burden the voting rights of others. *See One Wisconsin Institute v. Thomsen*, 2016 U.S. Dist. LEXIS 100178 (W.D. Wis. July 29, 2016) (applying balancing analysis to claims alleging that Wisconsin election law imposes different burdens on different groups of voters) (appeal pending); *Ohio Organizing Collaborative v. Husted*, No. 2:15-cv-1802, 2016 LEXIS 85699 (S.D. Ohio May 24, 2016) (applying balancing analysis to claims alleging that Ohio election law imposes different burdens on different groups of voters), *rev'd on other grounds sub nom. Ohio Democratic Party v. Husted*, __ F.3d __, 2016 U.S. App. LEXIS 15433 (6th Cir. Aug. 23, 2016).

In attempting to distinguish the *One Wisconsin* case, Defendants fail to fully and accurately describe the issues in the case and the analysis the court applied. According to Defendants, the situation presented by the *One Wisconsin* case "is a world apart" from the situation presented by the present case because the *One Wisconsin* plaintiffs challenged a law that "*restricted* in-person absentee voting in larger cities," and the goal behind that law was "not just to achieve a partisan advantage, but [to do so by] suppress[ing] African American votes in

Milwaukee, with no other legitimate purpose." (Defs.' Mem. 11.) But that only describes one part of the *One Wisconsin* case. In fact, the *One Wisconsin* plaintiffs alleged that numerous provisions of Wisconsin's election laws unduly burdened some citizens' right to vote, and the court's analysis of many of those provisions involved no consideration of race or legislators' intention to discriminate. For example, the plaintiffs challenged:

- A requirement that, when colleges and universities provide "dorm lists" to municipal clerks to allow students to register and vote with their student IDs, they state whether each student is a U.S. citizen, which plaintiffs alleged burdened students' right to vote, *One Wisconsin*, 2016 U.S. Dist. LEXIS 100178 at *103-07;
- Elimination of voter registration by "special registration deputies" authorized to register voters statewide and by high schools (for their students and staff), which allegedly burdened citizens' right to register to vote, *id.* at *107-112;
- Preemption of a Madison, Wisconsin, ordinance that required landlords to distribute voter registration forms to new tenants, which allegedly made it harder for people to register to vote, *id.* at *112-14;
- Establishment of a zone in which election observers must stand at polls, which plaintiffs alleged facilitated harassment and intimidation of voters, *id.* at *123-27;
- Elimination of straight-ticket voting, which plaintiffs alleged burdened the right to vote, particularly for voters with low levels of education, *id.* at *127-130;
- A prohibition on municipal clerks faxing or emailing absentee ballots, except to military or overseas electors, which plaintiffs alleged burdened voters who are traveling but do not qualify, *id.* at *130-35.

For each of these claims, the court conducted a separate *Anderson*/*Burdick* analysis, weighing the burden imposed by the provision in question – as shown by *evidence* presented at a trial – against the government interest asserted. Although it concluded that some of the provisions imposed only a slight burden, requiring only a rational justification, it concluded that some – such as discrimination with respect to what type of out-of-state travel entitled a voter to receive a faxed or emailed absentee ballot – imposed greater a burden, requiring a greater justification. *See id.* at *130-35. Thus, the court did not engage in ordinary rational basis review.

3. Election laws that discriminate against certain voters based on their geographic location do not receive rational basis review.

Defendants are incorrect when they argue that laws that treat citizens in different parts of a state differently – i.e., that discriminate based on a citizen's geographic location – receive rational basis review when a plaintiff challenges an election law. (*See* Defs.' Mem. 11.) The Supreme Court has consistently recognized the need for rigorous scrutiny of laws that result in unequal treatment of voters in different parts of a state. *See, e.g., Bush*, 531 U.S. at 106-07 (2000) (Equal Protection Clause violated when states "accord[] arbitrary and disparate treatment to voters in different counties"); *Moore v. Ogilvie*, 394 U.S. 814, 818-19 (1969) (law that "discriminates against the residents of the populous counties of the State and in favor of rural sections . . . lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment"); *Reynolds*, 377 U.S. at 581 ("careful judicial scrutiny" necessary to ensure apportionment scheme does not impair voting rights of some voters in a state relative to others); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("homesite" cannot "afford[] a permissible basis for distinguishing between qualified voters within the State"); *see also Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (to justify law making it more difficult for Chicago voters than other Illinois voters to put an independent candidate on the

ballot, the state was required to "establish that its [geographic] classification [of voters] [was] necessary to serve a compelling interest").

Indeed, in the primary case Defendants rely on for this point, the Court applied rational-basis review only after it concluded that the law at issue did not affect the plaintiffs' voting rights. *See Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 70 ("Thus *stripped of its voting rights attire*, the equal protection issue . . . becomes whether the [state statutes at issue] . . . bear some rational relationship to a legitimate state purpose.") (emphasis added). Other cases Defendants cite on this point did not concern voting rights at all. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1988) (rejecting claim that school bussing fee violated equal protection by discriminating on the basis of wealth, distinguishing it from interference with "equality of the franchise, which should trigger strict scrutiny"); *Hearne*, 185 F.3d at 774 (rejecting equal protection challenge to statute giving downstate Illinois teachers more favorable employment terms than Chicago teachers).

As discussed above, cases involving voting rights are different from the typical case in which a law treats citizens in different parts of the state differently because fair and democratic elections inherently require that all voters within have equal rights, and the right to vote is therefore, by definition, a right to vote *on an equal basis* with others in one's jurisdiction. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.").

4. The *Anderson*/*Burdick* test is not limited to First Amendment claims.

Finally, Defendants are simply incorrect in suggesting that *Anderson*/*Burdick* analysis only applies to First Amendment claims, primarily those related to ballot access. (*See* Defs.' Mem. 11 n.3.) To the contrary, both the Supreme Court and lower courts have applied

Anderson/*Burdick* analysis to claims involving burdens on voting rights that were not based on the First Amendment or related to ballot access. *See, e.g., Crawford v. Marion County Election Bd.*, 553 U.S. 181, 190 (opinion of Stevens, J.) (applying *Anderson*/*Burdick* analysis to claim that voter ID law unconstitutionally burdened voting rights); *id.* at 204 (opinion of Scalia, J.) ("To evaluate a law respecting the right to vote – whether it governs voter qualifications, candidate selection, or the voting process – we use the approach set out in *Burdick* . . . ."); *Ohio Democratic Party*, 2016 U.S. App. LEXIS 15433 at *13 (applying *Anderson*/*Burdick* test to equal protection challenge to various provisions of Ohio election law); *Gustafson*, 2007 U.S. Dist. LEXIS 75209 at *15-33 (applying *Anderson*/*Burdick* analysis to equal protection challenge to Illinois election laws). And it would make no sense for courts to consider a claim that an election law burdens voting rights under different standards depending on whether a plaintiff styled their claim as one brought under the Equal Protection Clause, the First Amendment, or the implicit constitutional right to vote. Thus, because Plaintiffs challenge a state election law's burden on citizens' right to vote (*see* Complaint ¶ 53), *Anderson*/*Burdick* scrutiny is appropriate for Plaintiffs' equal protection claim.

B. The *Anderson*/*Burdick* test requires more than minimal scrutiny of Illinois' discriminatory Election Day voter registration statute.

1. Defendants' motion must fail because it is premised entirely on the rational basis test, not *Anderson*/*Burdick* analysis.

The fact that Plaintiffs' claim calls for *Anderson*/*Burdick* analysis is sufficient reason to deny Defendants' motion to dismiss, which rests on the incorrect premise that ordinary rational basis review applies. Defendants have not argued that Plaintiffs' claim fails on its face under the *Anderson*/*Burdick* test – their conclusory statement to that effect in a footnote hardly counts as an argument (*see* Defs.' Mem. 11 n.3) – and it is too late for them to do so now.

2. Defendants have not established that the burden the law Plaintiffs challenge imposes on voting rights is so "slight" as to warrant the equivalent of rational basis review under the *Anderson/Burdick* test.

Further, in any event, it would not suffice for Defendants to argue in a Rule 12(b)(6) motion that the law Plaintiffs challenge imposes only a slight burden that could be justified by any rational basis, like the law challenged in *Gustafson*. The burden that a law places on citizens' voting rights is a mixed question of fact and law on which the court may hear evidence, not typically something that can be determined as a matter of law from the face of a complaint. *See, e.g., Ohio Democratic Party*, 2016 U.S. App. LEXIS 15433 at *16 (district court's conclusions on burden imposed by election laws, reached after a trial, presented mixed questions of fact and law); *One Wisconsin Institute*, 2016 U.S. Dist. LEXIS 100178 at *81-140 (considering statutory provisions' burden on voting rights based on evidence presented at trial).

Moreover, it is obvious that the burden imposed by the law Plaintiffs challenge is *not* slight. Under this law, a resident of a high-population county who seeks to register and vote at a polling place on Election Day will be able to do so, while a resident of a typical low-population county who seeks to do the same thing will be turned away. (*See* Complaint ¶¶ 22-24.) As Plaintiffs' expert's report shows, this matters: where registration is not available at polling places, it is a virtual certainty that fewer people will vote than otherwise would. (*See* Complaint Exh. A, Declaration of M.V. Hood III, 8-9.). In other words, the unavailability of EDR at polling places makes it sufficiently more burdensome for some people to vote that, without it, they will not vote at all. Further, as discussed above, the Supreme Court has consistently considered election laws that give different voters different rights based upon where they live to impose a severe burden on voting rights that warrants careful scrutiny.

There is no merit in Defendants' argument that this case warrants minimal scrutiny because the challenged provisions of Illinois' EDR law enhance, rather than burden, voting rights. (*See* Defs.' Mem. 7, 10.) Again, the right to vote is, by its nature, a right to vote on an equal basis with others. Therefore, when the law accords some voters better rights than others – whether that comes through a restriction of one group's rights or the enhancement of another group's rights – the government burdens the rights of the voters who are treated less favorably.

Again, this case is not like *Gustafson*, where the court stated that the law at issue did "not remove the right to vote from any individual" and had the unintended effect of "expand[ing] the right for some more than others." 2007 U.S. Dist. LEXIS 75209 at *30. The law at issue there, unlike the statutes at issue in this case, was neutral on its face and did not actually confer greater voting rights on some voters than others. Instead, it set statewide "minimum standards" for early voting that left individual districts with flexibility to offer better opportunities to vote early. *See id.* at *19. Moreover, much of the variation in counties' voting procedures that the *Gustafson* plaintiffs complained of was the result of counties *disregarding* the law, not the result of the law itself. *See id.* at *18. And the court specifically noted that the law, by its terms, "manifest[ed] no intent to invidiously discriminate based on . . . geographic location." *Id.* In contrast, the law at issue in this case discriminates based on geographic location by its terms: instead of setting statewide baseline standards that some counties might choose to exceed, it sets one baseline for high-population counties (where polling-place EDR is mandatory) and another baseline for low-population counties (where polling-place EDR is not mandatory), thus guaranteeing a right to residents of high-population counties that it does not guarantee to residents of low population counties. (*See* Compl. ¶¶ 22-23.) Besides, it is not apparent that counties' variations in their early voting procedures at issue in *Gustafson* affected citizens' relative ability to vote nearly as much

as the availability of Election Day registration at polling places affects citizens' relative ability to vote.

3. Defendants have not established that the government interest served by the law Plaintiffs challenge outweighs the burden it imposes on the voting rights of residents of low-population counties.

Although the Court need not and should not perform the *Anderson*/*Burdick* analysis in evaluating Defendants' motion to dismiss, it is worth noting that the putative state interest that Defendants have put forth to justify the statute's discrimination against citizens in low-population counties is not well supported and, in any event, minimal.

Defendants claim that EDR at polling places in smaller counties that lack electronic poll books would "take longer" and might burden county clerks in downstate Illinois "with more duties and financial mandates than they could reasonably handle." (Defs.' Mem. 12.) But Defendants have provided no details or evidence to show that implementing polling-place EDR would be significantly more burdensome for low-population counties' election authorities than for high-population counties' election authorities. And it is not obvious that implementing polling-place EDR is easier to do on a large scale than on a small scale. Indeed, it appears that at least some high-population counties have found implementation of EDR at polling places quite burdensome. *See* Lauren Leone Cross, *Will, Grundy County Clerks Lay Out Election Day Registration Costs*, Herald-News, May 7, 2016, http://www.theherald-news.com/2016/05/06/will-grundy-county-clerks-lay-out-election-day-registration-costs/avhn95h/ (noting high costs and logistical problems in Will County).

In any event, Defendants' justification comes down to cost and expediency, which, standing alone, are not sufficiently important interests to justify the burden the law places on the voting rights of residents of low-population Illinois counties. Defendants have cited no cases,

and Plaintiffs have found none, in which the interests they cite have been held sufficient to justify a comparable burden on voting rights. *Cf. Bush*, 531 U.S. at 108 ("A desire for speed is not a general excuse for ignoring [voters'] equal protection guarantees.").

C. Plaintiffs are not required to show intentional discrimination to prevail on their claim.

Contrary to Defendants' argument (Defs.' Mem. 3-4), Plaintiffs need not show intentional discrimination, apart from the discrimination evident on the face of the statues they challenge, to prevail on their claim or avoid rational basis review. Plaintiffs bringing an equal protection claim only need to show evidence of intentional discrimination where intentional discrimination is not evident from the face of a statute – i.e., where they challenge a law that is neutral on its face but allegedly has a disparate impact on a particular group. *See Gustafson*, 2007 U.S. Dist. LEXIS 75209 at *19 (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Frock v. U.S. R.R. Retirement Bd.*, 685 F.2d 1041, 1048 (7th Cir. 1982)). Here, the law Plaintiffs challenge is *not* neutral because, on its face, it guarantees voting rights to residents of high-population counties that it does not guarantee to residents of low-population counties.

Besides, Plaintiffs' complaint, liberally construed, *does* allege that the state has engaged in intentional discrimination for partisan advantage. (*See* Compl. ¶ 36).) And on a Rule 12(b)(6) motion, a plaintiff is of course only required to allege, not prove, sufficient facts to support a claim. *See Savory v. Lyons*, 469 F.3d 667, 670 (7th Cir. 2006). Thus, even if Defendants were correct that Plaintiffs must prove intentional discrimination with evidence beyond the text of the statute itself, this would not warrant granting Defendants' motion.

III. Conclusion

For all of the foregoing reasons, Plaintiffs respectfully ask the Court to deny Defendants' motion to dismiss.

Dated: August 30, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jacob H. Huebert, an attorney, certify that on August 30, 2016, I served Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss on all counsel of record by filing it through the Court's electronic case filing system.

/s/ Jacob H. Huebert