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,	)	
	)	
DAVID ORR, Cook County Clerk,	)	
	)	
Intervenor-Defendant.	)	

PLAINTIFFS' REPLY
IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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I. Defendants have failed to refute Plaintiffs' likelihood of success on the merits.

In arguing that Plaintiffs are unlikely to succeed on the merits of their equal protection claim, the Defendants, Charles W. Scholz and other members of the Illinois State Board of Elections (collectively, the "Board"), adopt by reference the fatally flawed argument of their memorandum in support of their motion to dismiss. (*See* Doc. 28, Defendants' Memo. of Law in Opp. To Plfs.' Mot. for Prelim. Injunction ("Board Resp.") 3.) As Plaintiffs explained in their response to that motion, the Board's argument fails because it rests on the false premise that the rational basis test applies to Plaintiffs' claim. (*See* Doc. 32, Plfs.' Resp. to Defs.' Mot. to Dismiss 2-11.) And since Plaintiffs filed their response to Defendants' motion, another U.S. Court of Appeals decision has recognized that *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), provide the appropriate framework for analyzing an equal protection challenge to an election law. *See Public Integrity Alliance v. City of Tucson*, No. 15-16142, __ F.3d __, 2016 U.S. App. LEXIS 16263, *9 (9th Cir. Sept. 2, 2016) (en banc) ("The Supreme Court delineated the appropriate standard of review for laws regulating the right to vote in *Burdick* . . . .").

Defendant-Intervenor, Cook County Clerk David Orr ("Clerk Orr"), mostly repeats the Board's argument based on the rational basis test and also states that, in the absence of a "severe" burden on voting rights, less exacting review is warranted, citing *Tripp v. Smart*, 2016 U.S. Dist. LEXIS 109216, *23 (S.D. Ill. Aug. 17, 2016). (Doc. 29, Cook County Clerk David Orr's Response to Plfs.' Mot. for Prelim. Injunction ("Orr Resp.") 10.) But *Tripp* itself acknowledged that "a less rigorous review may be warranted *only when* the burden is not severe *and* when the challenged restrictions are facially nondiscriminatory." *Tripp*, 2016 U.S. Dist. LEXIS 109216 at *29 (emphasis added). Here, the statute Plaintiffs challenge is facially

discriminatory – it guarantees the right to polling-place EDR to some citizens, but not others, depending on where they live – and therefore is not entitled to "less rigorous review" regardless of whether the Court considers the burden it imposes to be "severe." Besides, as Plaintiffs have explained in their response to Defendants' motion to dismiss, the burden the statute imposes *is* severe. (*See* Plfs.' Resp. to Mot. to Dismiss 12.)

Clerk Orr also briefly addresses the *Anderson*/*Burdick* test, arguing that the injury that Illinois' EDR statutes inflict on Plaintiffs and the voters whose interests they represent is "minimal, if it exists at all," because citizens in low-population counties can still register and vote on Election Day, just not at their precinct polling places. (Orr Resp. 11.) But that argument conflicts with the arguments of the Defendants and their supporting amici that the unavailability of EDR at polling places in high-population counties would harm voters in those counties. (*See* Board Resp. 6; Orr Resp. 13; Doc. 34, Brief of Amici Curiae American Civil Liberties Union of Ill., et al. ("ACLU Br.") 4-6; Doc. 25-1, Brief of Amicus Curiae Action Now Institute, et al. ("Action Now Br.") 12-13.) Indeed, neither the Defendants nor the amici dispute statements by Plaintiffs' expert witness, M.V. Hood III, that EDR increases voter turnout, particularly when it is available at polling places and not just at a centralized location. (*See* Doc. 1-1, Complaint Exh. A, Declaration of M.V. Hood III ("Hood Decl."), 8-9; ACLU Br. 7.) If a lack of polling-place EDR would burden the rights of voters in high-population counties, as Defendants and the amici argue, then of course the lack of polling-place EDR would likewise burden the rights of voters in low-population counties. Defendants cannot have it both ways.

The brief of amici curiae Action Now Institute, et al. (hereinafter referred to collectively as "Action Now") tries to justify the EDR statutes' discrimination by suggesting that the exemption for low-population counties exists because it was requested by the Illinois Association

of County Clerks and Records ("IACCR"), which Action Now claims "represents the interests of all the Illinois county clerks." (Action Now Br. 9.) But this argument, even if correct, does not show that the exemption serves an important government interest, let alone that whatever interest it serves outweighs the burden on voting rights of citizens in low-population counties.

Moreover, the argument is not factually correct: IACCR does not actually speak for all county clerks, as Action Now asserts; to the contrary, the statutes' legislative history shows that some election authorities in high-population counties and low-population counties were not consulted by the bill's sponsors and opposed it. After the bill's chief sponsor, Rep. Barbara Flynn Currie, stated that IACCR supported the bill and alleged that county clerks (or at least "a clerk") had requested the statute's different treatment of low-population counties (*see* Action Now Br. 10), a representative whose district includes one high-population county (Tazewell) and one low-population county (Fulton) stated:

> I just got off the phone with two of my county clerks who both happen to be Democrats . . . . [B]oth of them just found out about [the bill]. One of them found out about it yesterday and has not had a chance to reach out or to comment and the other one just found out about it two days ago. Both of them . . . could not be any more opposed to this Bill. They have said it is awful, "horrible." . . . Both . . . said that it will cripple them, because of the unfunded mandates . . . .

98th Ill. Gen. Assembly, House Proceedings, Dec. 3, 2014, at 48-49 (statements of Rep. Unes). Other legislators stated that they received similar comments from election authorities in their districts. *See id.* at 28 (Statements of Rep. Brady) ("[M]y election authority, the McLean County Clerk and the Bloomington Election Commission Authorities, they oppose this bill. . . . So, the facade that you're putting out there, that this is some type of unanimous support across the state, it's really not factual, Leader."); *Id.* at 30-31 (Statements of Rep. Sandack) ("I can assure [Rep. Currie] that DuPage County . . . electoral officials do not share in your approval . . . . [T]hey are

not in support of the Bill, as drafted, in its current form."); *Id.* at 43 (Statements of Rep. Ives) (noting that she received an objection to the bill from a DuPage County election commissioner because of the cost and burden it would impose); *Id.* at 45 (Statements of Rep. Reboletti) ("[T]he County Board Chairman of DuPage reached out to me. He's opposed to it because he has no idea how much it will cost, . . . how he could implement it as quickly as he could.").

Further, the IACCR's motivations for supporting the exemption are not necessarily the same as the motivations of the legislators who voted for it. In fact, the legislative history shows that the bill's sponsors were not interested in learning about the costs the bill would impose on either high-population counties or low-population counties. When a member requested a "state mandates note" – an analysis of a state mandate's fiscal impact on local governments ostensibly required by state law, 30 ILCS 805/8(b)(2) – the House rejected it on a party-line vote.[1]

In addition, neither Defendants nor the amici have shown that any interest clerks in low-population counties may have in avoiding the burdens of establishing EDR at polling places is a sufficiently important government interest to justify the statute's discrimination against voters in those counties. The state cannot deny voters equal protection simply because certain officials (allegedly) would find it more convenient not to provide it.

Thus, because Defendants and their supporting amici have not shown that any governmental interest outweighs the EDR statutes' burden on voting rights, they have failed to refute Plaintiffs' argument that they are likely to succeed on the merits of their equal protection claim.

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[1] *See* 98th Ill. Gen. Assembly, House Proceedings, Dec. 3, 2014, at 23; 98th General Assembly, House Roll Call, S.B. 172, Amendment No. 2, State Mandates Fiscal Note Inapplicable, Dec. 3, 2014, available at http://www.ilga.gov/legislation/votehistory/98/house/09800SB0172_12032014_007000M.pdf.

II. Without a preliminary injunction, Plaintiffs will suffer irreparable harm.

Defendants argue that denying Plaintiffs' motion would not cause Plaintiffs irreparable harm because citizens in low-population counties would still be able to register before Election Day or register their county clerk's office on Election Day. (Board Resp. 4; Orr Resp. 12.) But Plaintiffs' expert has refuted that argument. In his declaration, he explains how EDR, particularly at polling places, causes people to vote who otherwise would not vote. (*See* Hood Decl. 8-9.) The ACLU's amicus brief similarly argues that EDR is a "crucial method for expanding the franchise to qualified voters who, by no fault of their own, would otherwise be unable to participate" and concedes that it generally increases voter turnout where it is available. (ACLU Br. 4, 7.) Again, Defendants cannot coherently maintain that lack of polling-place EDR would harm voters in high-population counties but somehow would not harm voters in low-population counties.

And of course, if the Court were to deny Plaintiffs' motion, the resulting harm to Plaintiffs and the voters whose interests they represent would be irreparable. Plaintiff Patrick Harlan is running for Congress in the November 2016 election. If the state's discriminatory EDR rules were to remain in place for that election and he were to lose the election but ultimately prevail in this litigation, the Court could not provide any relief that would make him whole; the election could not be re-run with fair rules, and he could not be compensated with monetary damages. *See Hutchinson v. Miller*, 797 F.2d 1279, 1287 (4th Cir. 1986) (noting "federal courts do not . . . award post-election damages to defeated candidates" and "such compensation is fundamentally inappropriate"). For the same reasons, any injury the EDR rules cause to Plaintiff Crawford County Republican Party in the November 2016 election would likewise be irreparable. *See Jones v. McGuffage*, 921 F. Supp. 2d 888, 901 (N.D. Ill. 2013) (exclusion of candidate from ballot would irreparably harm "members or prospective members of the party, if

any, who support the candidate"). And the voters Plaintiffs represent would suffer irreparable harm as well: once the November 2016 election occurs, their opportunity to vote in it will be lost forever, and that harm will not be compensable by monetary damages. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (statute limiting early voting period for some citizens but not others would cause irreparable harm); *Jones*, 921 F. Supp. 2d. at 901 (exclusion of candidate from ballot would irreparably harm "citizens who would have voted for him"); *Foster v. Kusper*, 587 F. Supp. 1191, 1194 (N.D. Ill. 1984) (certification of wrong candidate as election winner would irreparably harm opponent's voters).

III. The balance of harms and the public interest favor granting Plaintiffs' motion.

Defendants have not shown that the balance of harms weighs against granting Plaintiffs' motion for preliminary injunction. To the contrary, it weighs in Plaintiffs' favor.

A. Because it is more likely than not that Plaintiffs will prevail on the merits, Plaintiffs do not need to show that the balance of harms weighs strongly in their favor.

As an initial matter, contrary to the Board's argument (Board Resp. 5-6), Plaintiffs need not show that the balance of harms tips "decidedly" in their favor. In the Seventh Circuit, courts considering motions for preliminary injunction, use 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). Under this sliding scale, a plaintiff must show that the balance of harms tips "decidedly" in his favor only if he has shown a merely "non-negligible" chance of success on the merits – i.e., where he has established the lowest likelihood of success that could justify a preliminary injunction. *See Boucher v. School Bd.*, 134 F.3d 821, 826 n.5 (7th Cir. 1998). Otherwise, a plaintiff's burden to

show that the balance of harms favors him decreases as the likelihood of success increases. *See Abbott Labs.*, 971 F.2d at 12 n.2. Where plaintiffs have a "substantial chance" of prevailing on the merits, "the balance need not weigh strongly in their favor." *Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd.*, 780 F.2d 589, 613 (7th Cir. 1986).

Here, Plaintiffs have shown that it is more likely than not that they will succeed on the merits. In the briefing on Plaintiffs' motion for preliminary injunction and Defendants' motion to dismiss, Plaintiffs have shown that the state's EDR statutes discriminate against voters in low-population counties, and Defendants have failed to identify, let alone substantiate, any state interest that the discriminatory provisions serve that is important enough to justify this geographic discrimination. (*See* Doc. 11, Plfs.' Memo. in Support of Mot. for Prelim. Injunction 8-12; Plfs.' Resp. to Mot. to Dismiss 11-15.) Accordingly, the balance of harms need not weigh strongly in Plaintiffs' favor for the Court to grant Plaintiffs' motion.

B. The balance of harms weighs in Plaintiffs' favor.

Although Plaintiffs need not show that the balance of harms weighs strongly in their favor, it does weigh strongly in their favor.

1. Without an injunction, Plaintiffs will suffer great irreparable harm.

As discussed above and in Plaintiffs' memorandum in support of their motion for preliminary injunction, the lack of an injunction will irreparably harm Plaintiffs and the citizens whose interests they represent. Without an injunction, Plaintiffs will forever lose their ability to participate in the November 2016 on fair and equal terms, and the citizens whose interests they represent will forever lose their ability to participate in the 2016 on an equal basis with citizens of high-population counties.

The ACLU attempts to downplay this harm by arguing that, if election authorities have not provided enough EDR sites in low-population counties, voters "can pressure their local county clerks and other election officials to provide them." (ACLU Br. 8.) But of course that is a heavy burden to place on voters just to achieve parity with the opportunities the state already automatically guarantees to residents of high-population counties. And it makes no sense to expect the same people who would rely on EDR – the same people who, in the ACLU's words, would be "unable to participate" in elections at all without EDR (ACLU Br. 4) – to undertake that burden. Presumably they are among the people *least* in a position to influence their local county clerks and other election officials.

2. An injunction will cause the Board negligible harm.

In contrast, an injunction will cause the Board negligible harm. Preventing a public body from implementing an unconstitutional law does not harm it. *See Joelner v. Village of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004) (stating that "there can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute"). And the Board has not argued that directing county election authorities not to implement EDR at precinct polling locations would impose significant costs or other burdens on it. Nor has the Board argued that an injunction would somehow interfere with its ability to supervise the November 2016 election or give rise to other election-related evils such as a greater risk of voter fraud. *Cf. Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (declining to strike down absentee voter law in part because restrictions served to protect against fraud).

3. An injunction will not cause Clerk Orr significant harm.

An injunction also would not significantly harm Clerk Orr. Like the Board, Clerk Orr can suffer no harm from being prevented from implementing an unconstitutional statute. And Clerk

Orr has no independent, protectable interest in defending the state's policy decisions on election law; his job is simply to do whatever state law and the Board direct him to do. *See* 10 ILCS 5/5-4; 10 ILCS 5/1A-8.

Clerk Orr argues that an injunction would require election authorities like him to make "significant changes" to "election day plans barely two months prior to the election," but he does not show that any changes an injunction would require would be especially difficult to implement. (Orr Resp. 13.) The only change he specifically identifies is the "transfer [of] election judges from the polling places to off-site registration sites" (*id.* at 15), which presumably would not be especially costly or difficult with nearly two months' notice. Clerk Orr states that his office has spent "roughly $250,000 to add equipment to the polling places that will expedite registration and insure voter identity" (*id.* at 14), but he does not argue that this investment would be wasted if it could not be used for polling-place EDR in the upcoming election. (And even itf it would, that certainly would not outweigh the irreparable harm to Plaintiffs' constitutional interest.)

The Board argues that an injunction would require county clerks in high-population counties to "scramble" because the law requires them to announce the locations and times for early voting by September 19, per 10 ILCS 5/19A-25(b), and they might wish to add more locations if polling-place EDR will not be available. (Board Resp. 7.) In fact, however, the September 19 deadline would not prevent county clerks from expanding early voting opportunities even after that deadline has passed. The law explicitly authorizes clerks to create additional temporary voting locations after September 19, 10 ILCS 5/19A-25(e), and does not prohibit them from expanding polling-place hours after initially posting a schedule on September

19. Neither the Board nor the amici have argued, let alone established, that this would be infeasible or unduly burdensome.

To support their balance-of-harms arguments, both Clerk Orr and the Board cite *Nader v. Keith*, 385 F.3d 729 (7th Cir. 2004), in which the Seventh Circuit affirmed the denial of a preliminary injunction that Ralph Nader sought to place his name on the ballot for the 2004 presidential election. (Board Resp. 7; Orr Resp. 14.) In that case, the Court concluded that preliminary relief was inappropriate because, by filing his lawsuit about four months before the election, "Nader created a situation in which any remedial order would throw the state's preparation into turmoil." *Id.* at 736. The Court concluded that Nader's delay was especially inexcusable given that "he had filed a similar suit the last time he ran for president." *Id.* This case is not comparable to *Nader*. In that case, ballots had already been mailed to some voters, and ballots were scheduled to be sent to additional voters on the day after the Court issued its decision. *Id.* Adding Nader at that date could have led to great confusion and "turmoil," as the state would have had to print and mail new ballots, and voters who received the old ballots might nonetheless have submitted them. Here, in contrast, there would be no need to replace ballots or take any similar extraordinary action. Instead, county election authorities would simply have to refrain from providing EDR at polling places – the same thing they have done in every previous general election in Illinois history.

And while Nader's past experience seeking ballot access in Illinois should have put him on notice of his cause of action and prompted him to sue when he declared his candidacy, there is no similar reason why Plaintiffs should have been prepared to challenge Illinois' EDR law as soon as it was passed or, in Plaintiff Harlan's case, as soon as he declared his candidacy. It would not be reasonable to expect Plaintiffs – a truck driver who has never run for office before

and a political party committee for a rural county with a population of about 19,000 – to have immediately recognized the constitutional defect in the law, recognized their standing to challenge it, and found counsel who were ready, willing, and able to immediately bring that constitutional challenge at a cost Plaintiffs could afford. (For the same reason, the timing of Plaintiffs' motion does not undermine their claim of irreparable harm as the Board argues. (Board Resp. 5.))

Other cases Clerk Orr cites involved situations where a preliminary injunction would have severely disrupted an election. (*See* Orr Resp. 14.) In *Fulani v. Hogsett*, a plaintiff seeking to be added to the ballot sought his injunction too late because ballots had already been printed. 917 F.2d 1028, 1031 (7th Cir. 1990). In *Rose v. Board of Election Commissioners*, the plaintiff sought a preliminary injunction too late where he moved to have his name added to the ballot – and have the election stayed until that could be accomplished – less than one month before the election. No. 15-cv-382, 2015 U.S. Dist. LEXIS 40030, *4-5, 28-29 (N.D. Ill. Mar. 30, 2015). Here, by contrast, a preliminary injunction would only require relatively minor changes to election authorities' plans (or, in most counties, no change at all).

4. The public interest favors an injunction.

Defendants and the amici all rely heavily on the "public interest" component of the balance-of-harms analysis. But that factor actually favors granting an injunction because the public has the strongest possible interest in having fair, democratic elections in which voters have an opportunity to participate on an equal basis. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). In comparison, the public's interest in having EDR available at precinct polling places – something no Illinois county has ever provided in a general election, and which only six other states provide to their voters – is relatively minor. After all, there is no constitutional right

to have polling-place EDR at all, but there is a constitutional right to vote on an equal basis with others in one's jurisdiction. *See id.* Even if providing EDR at polling places is in general good public policy, which Plaintiffs do not dispute, it is not in the public interest -- indeed, it is contrary to the public interest – if it is implemented in an unfair manner that does not comport with constitutional requirements because it favors some voters over others based on an arbitrary factor.

The Board and the ACLU cite cases stating that the public interest "favors permitting as many qualified voters to vote as possible," but of course those cases implicitly refer to voting in the context of a fair election, conducted in a constitutional manner -- they cannot reasonably interpreted as condoning just *anything* that might increase the total number of votes cast. Indeed, neither of the cases the Board and the ACLU have cited for this point cited maximum participation to justify upholding a scheme that a plaintiff claimed treated one group of voters more favorably than others as Illinois' EDR scheme does. See *League of Women Voters of N.C. v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *Obama for Am.*, 697 F.3d at 437.

Defendants and the amici also argue that residents of high-population counties, particularly Cook County, would be harmed by an injunction because they currently expect EDR to be available at polling places. But Defendants and the amici provide little to substantiate this claim. Clerk Orr asserts that voter registration numbers are "lower than before" and attributes this to "the availability of, and reliance upon, polling place EDR." (Orr Resp. 15.) But that appears to be pure speculation. It is difficult to respond further to Clerk Orr's claim because he does not even specify what he means by "before" – the 2014 election? the previous presidential election? – or how much lower they supposedly are or why he ruled out other possible causes. To support this allegation, Clerk Orr cites an affidavit from someone else in his office, but it

provides no additional details on this point. A conclusory, self-serving statement in an affidavit cannot suffice to substantiate this alleged harm.

Action Now also emphasizes the reliance point, arguing that an injunction would cause voter confusion, particularly because, before the March 2016 primary election, the amici called more than 3,000 voters by phone, sent 2,000 mailers, and "ran paid ads in local ethnic media newspapers informing the community about the availability of EDR." (Action Now Br. 13.) But Action Now has given no reason to believe that the information it gave to (relatively few) voters regarding the primary election will affect anyone's behavior in the general election. The only example Action Now has provided of one of its "paid ads in local ethnic media newspapers" bears the headline "Two ways to vote this week" and tells readers they can register and vote at an early voting location through March 14 or at their polling places on March 15; it does not say anything about citizens' ability to vote on Election Day in any future election. (Action Now Br. Appx. G.) Action Now claims an injunction would present an "extreme challenge" to its voter-education efforts, but it is not clear why: after all, Action Now says that the amici "will be heavily engaged in voter education, outreach, and mobilization efforts" before the November election but does not claim that they have distributed any information yet about voters' ability to vote on Election Day in November. (Action Now Br. 13-14.) So if the Court grants a preliminary injunction, presumably the amici (and many others like them) can and will inform voters accordingly as part of the voter education they were already planning to do.

Contrary to the amici's arguments, the number of Cook County voters who have used EDR does not demonstrate that an injunction would be against the public interest. (*See* ACLU Br. 5-6; Action Now Br. 12.) Action Now points out that, in the March 2016 primary election, 58,357 of approximately 110,000 Election Day voter registrations statewide occurred in Cook

County, and over half of EDR ballots cast came from Cook County. (Action Now Br. 12.) But that only bolsters Plaintiffs' argument that allowing the scheme to remain in force would be unfair because it shows that, as one would expect, EDR was used much more heavily in a county where it was required to be available at every polling place than it was in counties where it was not mandated and therefore not available.

The ACLU also cites data from the 2014 general election showing that 72 percent of voters who used EDR lived in Cook County even though Cook County only has 41 percent of the state's voting-age population. (ACLU Br. 4-5.) That argument has several flaws. First, it is not apparent that data from the 2014 general election, in which EDR was not available at any precinct polling places, is relevant to show who will take advantage of EDR when it is available at precinct polling places. Second, again, no one disputes the findings of the academic literature that Plaintiffs' expert has cited, which conclude that EDR tends to increase voting wherever it is implemented, especially where it is available at precinct polling places. Third, and perhaps most important, even if residents of high-population counties would tend to take advantage of polling-place EDR more than residents of low-population counties, that does not justify or offset the harm to voters in low-population counties who would take advantage of polling-place EDR if it were available. Nor does it offset the harm to candidates and political parties such as the Plaintiffs who will be placed at an unfair electoral disadvantage because of the differing treatment of different counties. Nor does it offset the harm to the public in general resulting from having an unfair election.

Indeed, the sheer numbers of voters in high-population counties versus low-population counties certainly cannot suffice to tip the balance of the harm in Defendants' favor. Otherwise, the balance-of-harms factor would always tend to weigh against plaintiffs in situations where a

law benefits a majority and oppresses a minority – an obviously unfair and inappropriate result that is incompatible with the protection of constitutional rights.

The ACLU argues that the burden of an injunction would "fall disproportionately on identifiable sub-groups," citing Plaintiffs' expert's statement that EDR is disproportionately used by people with moderate levels of income and education. (ACLU Br. 6.) But, as Plaintiffs' expert points out, individuals with moderate levels of income and education actually constitute a greater percentage of the population in low-population counties than in high-population counties. (*See* Exhibit 4, Supplemental Declaration of M.V. Hood III ("Hood Supp.") 4-5.) In high-population counties, the median household income is $59,718; in low-population counties it is $47,338 -- a statistically significant difference. (*Id.*) And in high-population counties, the percentage of residents age 25 and older who have only graduated from high school or completed only some college (short of a bachelor's degree) is 62.3%; in low-population counties, the percentage is 70.1% -- also a statistically significant difference. (*Id.*) Thus, if anything, voters in low-population counties would be disproportionately likely to take advantage of EDR at polling places, relative to voters in high-population counties, if it were available. (*Id.*)

The amici also argue that a preliminary injunction might disproportionately harm minority voters because they would be disproportionately likely to take advantage of polling-place EDR, but they support their arguments with little more than speculation. The ACLU cites a Fourth Circuit decision in which a court concluded that African-Americans were disparately affected by North Carolina's elimination of same-day voter registration ("SDR"), *N.C. State Conf. of NAACP v. McCrory*, No. 16-1468, 2016 WL 4053033, *3 (4th Cir. July 29, 2016). (ACLU Br. 6.) But, as Plaintiffs' expert observes, SDR, at issue in the North Carolina case, is not the same thing as EDR: SDR "refers to the ability of an elector to register and vote during an

early in-person voting period," while EDR "refers to the ability of a citizen to register and vote on election day itself." (Hood Supp. 2.) In surveying the academic literature, Dr. Hood has found no study that specifically tests the relationship between minority political participation and EDR. (*Id.*) That absence cannot be construed as implying that minority voters would be disproportionately likely to take advantage of EDR. (*Id.*) Moreover, a more recent Sixth Circuit decision concluded that elimination of SDR in that state did *not* disproportionately affect minority voters. *See Ohio Democratic Party v. Husted*, __ F.3d __, 2016 U.S. App. LEXIS 15433, *11-12 (6th Cir. Aug. 23, 2016). (*See* Hood Supp. 2.)

Action Now argues that "data suggest" that Plaintiffs' remedy would disproportionately affect minority voters because "65% of votes cast using EDR in Chicago came from majority-minority wards." But, as Plaintiffs' expert points out, if this "very crude" measurement of minority usage of EDR has any meaning, it actually refutes Action Now's point because 36 of 50 Chicago wards, or 72%, are majority-minority – so that, at least by this "crude" measurement, minorities do *not* disproportionately use EDR. (Hood Supp. 2.) Action Now also states that 13,015, or 36.9%, of EDR votes were cast in one of 19 majority-black wards. But majority-black wards constitute 38% of the 50 wards in Chicago – which indicates that, at least by this "extremely rudimentary" measurement, African-Americans' use of EDR comports "almost exactly" with the percentage of majority-black wards in Chicago. (Hood Supp. 2-3.)

To analyze the amici's claims about EDR's effect on minority voters in Chicago, Plaintiffs' expert estimated EDR use by race in Chicago at the ward level, using voting data and "ecological regression" to estimate EDR usage by race or ethnicity. (*Id.* at 3.) Applying this method, Professor Hood estimated that 4.3% of Hispanics were EDR voters, compared with 2.3% of African-Americans, 5.4% of other minorities, and 3.1% of whites. (*Id.*) Considered with

their respective confidence intervals and the model coefficients, however, the estimates actually overlap – that is, "the estimates for EDR use between these three minority groups are statistically indistinguishable from each other." (*Id.* at 3-4.) Thus, Dr. Hood concluded, "these results indicate that minority voters did not use EDR at higher rates than White voters in the City of Chicago during the 2016 March Primary election." (*Id.* at 4.)

In sum, the harms Defendants and the amici allege that an injunction would cause to themselves and the public are largely unfounded – and in any event outweighed by the public's interest in having fair elections in which all citizens may participate on an equal basis.

IV. The relief Plaintiffs seek is proper.

Finally, the remedy Plaintiffs seek in their motion for preliminary injunction is proper. Indeed, it is the only possible remedy for their constitutional injury.

Contrary to arguments made by the Board and the ACLU (Board Resp. 5; ACLU Br. 9), the remedy Plaintiffs seek – an injunction barring implementation of EDR at precinct polling places statewide in the November 2016 election – would address their injury. The constitutional problem with Illinois' EDR statutes is that they give voters in high-population counties and low-population counties unequal voting rights. Striking down the provisions regarding EDR at polling places – restoring the status quo ante, under which Plaintiffs were treated equally in this respect and therefore suffered no injury – would undo this harm.

The ACLU's argument that it would be more appropriate for the Court to issue an injunction expanding polling-place EDR statewide is incorrect. The ACLU's proposed injunction would have the Court rewrite state law to impose an unfunded mandate on low-population Illinois counties that the Illinois General Assembly has never authorized. "This the Court cannot do." *Nat'l Foreign Trade Council, Inc. v. Giannoulias*, 523 F. Supp. 2d 731, 750 (N.D. Ill. 2007)

(declining to rewrite Illinois pension code amendment to conform to the Foreign Commerce Clause). Federal courts "will not rewrite a state law to conform it to constitutional requirements." *Virginia v. Am. Booksellers' Ass'n*, 484 U.S. 383, 397 (1988). Although expanding polling-place EDR statewide might be desirable, "it is the role of [the legislature], and not the judiciary, to amend the statute . . . . 'Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.'" *Mills v. United States*, 713 F.2d 1249, 1257-58 (7th Cir. 1983) (quoting *United States v. Rutherford*, 442 U.S. 544, 555 (1979)).

To argue for its proposed injunction, the ACLU cites three factors the Supreme Court has identified that courts should apply in remedying an unconstitutional statute: (1) "try not to nullify more of the legislature's work than necessary"; (2) "restrain ourselves from rewriting state law to conform it to constitutional requirements even as we try to salvage it"; and (3) the "touchstone . . . is legislative intent, for the court cannot use its remedial powers to circumvent the intent of the legislature." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329-30 (2006). But all three of these factors favor Plaintiffs' proposed injunction.

First, Plaintiffs' remedy would not "nullify more of the legislature's work than necessary." Rather, it would simply strike the discriminatory provisions regarding polling-place EDR while leaving the other methods of EDR in place, along with SB 172's many other changes to Illinois election law.

Second, Plaintiffs' remedy would not require the court to "rewrit[e] state law" but would instead only require it to strike (and enjoin) the specific portion that creates a constitutional problem. In contrast, the ACLU's proposed remedy would require the Court to rewrite state law by imposing a new unfunded mandate on low-population Illinois counties.

Third, Plaintiffs' proposed remedy is at least as consistent with any legitimate intent behind the statute as the ACLU's proposed remedy. It is true that the General Assembly intended to expand opportunities to vote; but, according to Defendants and the bill's sponsors, the General Assembly also intended not to impose any unfunded mandate for polling-place EDR on low-population counties. Further, Plaintiffs' proposed remedy is consistent with the legislature's intent to expand EDR because EDR would remain available as the statute provides – just not at precinct polling places, where the legislature established an unfair, unconstitutional EDR scheme.

The ACLU cites the Sixth Circuit's *Obama for America* case as an example of a court expanding voting rights through an injunction. (ACLU Br. 14.) But the facts of that case support Plaintiffs' proposed remedy of restoring the status quo ante. Ohio established in-person early voting in 2005 allowing any registered voter to cast an absentee ballot at the appropriate board of elections office through the Monday before the election. *Obama for Am.*, 697 F.3d at 426. In 2011, however, Ohio amended the early voting law, which, through a series of legislative mistakes, resulted in a law that provided non-military voters with an in-person early voting deadline of 6:00 p.m. on the Friday before the election, while military and overseas voters had two contradictory deadlines: 6:00 p.m. on the Friday before election day and the close of the polls on election day. *Id*. at 427. In order to correct the confusion of the contradictory deadlines for military and overseas voters, the state construed the statute to apply the more generous deadline of the close of polls on election day, thus creating different standards for military and non-military voters that had not existed in the prior early voting law. *Id*. The district court entered an injunction striking down the new law and restoring the prior system of in-person early voting for all Ohio voters until the Monday before election day. *Id*. at 426. The Sixth Circuit held

that the district court's injunction was not an affirmative mandate rewriting the Ohio statute, but simply restored the status quo ante by striking out the unconstitutional portions. *Id.* at 437. Similarly, Plaintiffs are simply seeking to restore the EDR statute to the status quo ante. The ACLU's proposed remedy of requiring all counties to provide polling place EDR, in contrast, would not restore the status quo ante, but would impose an entirely new EDR scheme in Illinois creating an unfunded mandate on low-population counties. Unlike the remedy in *Obama for America*, which imposed only a minimal burden on election authorities, there is no reason to believe that forcing election authorities in low-population counties to provide polling place EDR would impose only a minimal burden. *Id.*.

In sum, if Plaintiffs are to receive any relief at all in this case – preliminarily or permanently – the Court will have to strike down and enjoin the provisions of the challenged statutes regarding EDR at precinct polling places. It is the only way the Court can undo the unfairness the statute creates without legislating from the bench.

V. Conclusion

For all the foregoing reasons, and all the reasons stated in Plaintiffs' memorandum in support of their motion for preliminary injunction, Plaintiffs respectfully ask this Court to grant a preliminary injunction ordering Defendants to direct all Illinois election authorities not to implement Election Day voter registration at precinct polling places in the November 2016 election.

Dated: September 13, 2016

Respectfully submitted,

/s/ Jacob H. Huebert

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CERTIFICATE OF SERVICE

I, Jacob H. Huebert, an attorney, certify that on September 13, 2016, I served Plaintiffs' Reply in Support of Their Motion for Preliminary Injunction on all counsel of record by filing it through the Court's electronic case filing system.

/s/ Jacob H. Huebert