No. 16-3547

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PATRICK HARLAN and CRAWFORD COUNTY REPUBLICAN CENTRAL COMMITTEE, Plaintiffs-Appellees, v. CHARLES W. SCHOLZ, Chairman of the Illinois State Board of Elections; ERNEST L. GOWEN, Vice-Chairman of the Illinois State Board of Elections; BETTY J. COFFRIN, CASSANDRA B. WATSON, WILLIAM M. McGUFFAGE, JOHN R. KEITH, ANDREW K. CARRUTHERS, and WILLIAM J. CADIGAN, Members of the Illinois State Board of Elections, Defendants-Appellants.	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 16 C 7832 The Honorable Samuel Der-Yeghiayan, Judge Presiding

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR STAY PENDING APPEAL

"[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 that do not have electronic polling books. This not only violates the rights of residents in those low-population counties under 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, the district court correctly enjoined Defendants-Appellants – members of the Illinois State Board of Elections, who are collectively responsible for supervising and directing the activities of county election authorities (collectively, the "Board") – to direct election authorities in Illinois' 102 counties not to implement EDR at precinct polling places in the 2016 general election. This Court should deny the Board's motion to stay that order, which effectively seeks expedited review of the Board's appeal of the order.

I. Factual Background

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 98-691 §§ 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.*

For the 2014 general election, Illinois adopted a pilot program for EDR, under which 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 passed SB 172, a bill creating a permanent system of EDR for Illinois. The bill passed both houses of the legislature on strict party-line votes: all affirmative votes came from Democrats; all "nay" votes came from Republicans;[1] and the bill was signed by an outgoing Democratic governor two days before his Republican successor took office.[2] *See* Ill. Public Act 98-1171.

The permanent EDR system of SB 172 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

[1] Illinois General Assembly, S.B. 172 House Roll Call, Dec. 3, 2014,https://goo.gl/CzqZjT. ; S.B. 172 Senate Vote on House Floor Amendment No. 2 (adding relevant provisions), https://goo.gl/KmqLqt.
[2] Illinois General Assembly, Bill Status of SB 172, https://goo.gl/CIKaZm.

live in the 20 Illinois counties with a population of 100,000 or more ("high-population counties") but not to citizens who live in the 82 Illinois counties with a population of less than 100,000 ("low-population counties").

No other state with EDR discriminates against citizens of certain counties as Illinois does. Six of the ten states offering EDR – Idaho, Iowa, Minnesota, New Hampshire, Wisconsin, and Wyoming – allow electors statewide to register and vote at their respective precinct locations on Election Day[3] or provide the functional equivalent.[4] The other four states offering EDR do not provide it at every polling place, but each has a uniform system, and none makes distinctions between counties based on population.[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 at the expense of others.

As Plaintiffs' expert witness explained in a declaration in support of Plaintiffs' motion for preliminary injunction, an overwhelming consensus exists in the academic literature that EDR increases voter turnout where it is implemented. (Dkt. 11-3 at 7-9, 14.) However, EDR's effects on voter turnout are greater and more consistent when offered at precinct polling places than when available at a centralized location. (*Id.* at 8.)

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[3] *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).
[4] *See* N.D. Cent. Code §16.1-05-07(2)(c) (allowing electors to vote at their respective precinct polling locations on Election Day without registering).
[5] Each town or city has a designated EDR site in Connecticut and Maine. (Conn. Gen. Stat. § 9-19j; 21-A M.R.S. § 122(4); *see also* Hood Decl. 5). EDR is available at the elections office in each county in Montana. (13-2-304, MCA(1)(a); *see also* Hood Decl. 5).

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 would 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 two-party 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 would have the effect of diminishing Republican votes relative to Democratic votes. (*Id.* at 14.)

C. Harm to Plaintiffs

Plaintiff Patrick Harlan is a candidate for the U.S. House of Representatives in the 17th Illinois Congressional District, which encompasses a high-population county, portions of three other high-population counties, and the entirety of ten low-population counties.[6]

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

[6] Illinois State Board of Elections, Illinois Congressional District 17, https://goo.gl/OnnbR7.

counties are not required to offer EDR at precinct polling places and do not intend to do so in the 2016 general election. (*See* Dkt. 11-4 (attached as Exhibit B).)[7] Instead, they will provide the minimum EDR that Illinois law requires. (*Id.*)

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 virtually certain 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. (Dkt. 1 ¶¶ 37-42.)

Plaintiff Crawford County Republican Central Committee is an Illinois political party committee, the purpose of which is to elect Republican Party candidates to office.[8] 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* Dkt. 11-4.) 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 virtually certain 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

[7] 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.
[8] Illinois State Board of Elections, Committee Details, Crawford County Republican Central Comm., https://www.elections.il.gov/CampaignDisclosure/CommitteeDetail.aspx?id=389.

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. (Dkt. 1 ¶¶ 43-47.)

II. Procedural History

Plaintiffs filed their complaint challenging the discriminatory provisions of Illinois law governing EDR at precinct polling places for violating the Equal Protection Clause of the Fourteenth Amendment on August 4, 2016. (Dkt. 1.) On August 9, Plaintiffs filed a motion for preliminary injunction asking the district court to order the Board to direct all Illinois election authorities not to implement EDR at precinct polling places in the November 2016 election. (Dkt. 7.)

On September 27, the district court granted the preliminary injunction. (Dkt. 48.) The Board filed a notice of appeal later that day. (Dkt. 47.) On September 28, the Board filed a motion to stay the preliminary injunction in the district court (Dkt. 53), which the court denied the following day (Dkt. 58). On the evening of Friday, September 30, the Board filed its motion to stay in this Court.

III. This Court should deny the Board's motion to stay the district court's preliminary injunction.

The district court correctly concluded that Plaintiffs are likely to prevail on the merits of their equal protection claim and that failing to enjoin Illinois' discriminatory scheme for EDR at polling places would cause irreparable harm to both the Plaintiffs and the public interest that would far outweigh any harm that an injunction would cause to the Board. This Court should therefore decline to issue a stay of that order.

A. This Court should apply the standard of review applicable to a district court order granting a preliminary injunction.

Although the Board has styled its filing in this Court as a motion to stay the district court's order granting a preliminary injunction,[9] it effectively seeks expedited appellate review of that order. Because the district court's order enjoined EDR at precinct polling places in Illinois for the general election that will be held on November 8, 2016, the Board's appeal will become moot after November 8 – and therefore any decision on the Board's motion to stay before November 8 will be equivalent to expedited review of the Board's appeal.

Accordingly, the Court should apply the standard of review that applies to a district court order granting a preliminary injunction: "the deferential 'abuse of discretion' standard." *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1437 (7th Cir. 1986). Under that standard, a district court abuses its discretion only if it: (1) applies "incorrect substantive law or an incorrect preliminary injunction standard"; (2) "rest[s its] decision . . . on a clearly erroneous finding of fact that is material to the decision to grant or deny the injunction"; or (3) applies "an acceptable preliminary injunction standard in a manner that results in abuse of discretion." *Id.*

To grant a motion for preliminary injunction, a district court must conclude that the plaintiffs have demonstrated: (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

[9] Defendants also filed their motion to stay as an "emergency" motion but do not explain why the Court should consider it on an emergency basis rather than through the usual motion process. It is especially concerning when a party files a motion purporting to be an emergency at 6:45 pm on a Friday, effectively seeking expedited consideration of their appeal, which causes opposing counsel to rapidly respond with what effectively becomes a brief on the merits of the appeal.

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).

B. The district court correctly concluded that Plaintiffs are likely to succeed on the merits of their equal protection claim.

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*, 531 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*, 405 U.S. at 336.

1. Illinois' EDR system arbitrarily discriminates against citizens in low-population counties.

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 that lack electronic polling places. In this way, Illinois' EDR system denies electors in low-population counties equal access to the fundamental right to vote. *See id.*

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.

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 a state violates the Equal Protection Clause when it "accord[s] arbitrary and disparate treatment to voters in its different counties." *Bush*, 531 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 to the citizens whose rights Plaintiffs seek to protect is, as the district court recognized, "severe." (Dkt. 48 at 7.) A qualified citizen in a low-population county 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 may simply register at a polling place on Election Day and vote. In addition, the statute's discrimination puts Plaintiffs at a competitive disadvantage because it will tend to boost Democratic voter turnout relative to Republican voter turnout.

Where, as here, citizens' voting rights are severely burdened, 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, 1441-42 (2014).

Therefore, the state must provide a compelling government interest for the EDR system's geographic discrimination that is narrowly tailored to serve that interest. The Board has failed to do so here.

The cases the Board cites to argue that states may treat citizens in different parts of a state differently are inapposite because they do not involve voting rights. Indeed, in the primary case the Board relies on for this point (Mot. to Stay 9), 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 (1978) ("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); *see also Hearne v. Bd. Of Educ. Of City of Chicago*, 185 F.3d 770, 774 (7th Cir. 1999) (rejecting equal protection challenge to statute giving downstate Illinois teachers more favorable employment terms than Chicago teachers).

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 quite 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.[10]

2. Illinois' discrimination against citizens in low-population counties does not serve a compelling or important governmental interest.

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 Board attempts to justify the state's scheme on the ground that it serves the government's interest in increasing opportunities to register to vote, citing a Fourth Circuit case stating that the public interest "favors permitting as many qualified voters to vote as possible." (Mot. to Stay 11.) But of course that case does not condone just *anything* that would increase the total number of votes cast. Indeed, the court did not cite that principle 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).

The Board also argues that the legislature could have concluded that requiring EDR at all polling places statewide would be "administratively unmanageable for election officials in smaller counties that do not yet have electronic poll books." (Mot. to Stay 12.) The first and foremost problem with that argument is that the Board has not shown that

[10] 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.

a desire to avoid imposing costs or inconveniencing election officials in low-population counties is a compelling or important governmental interest – let alone that this interest is so important that it can justify giving citizens of certain counties better access to voting than citizens of other counties. Defendants have cited no cases, and Plaintiffs have found none, in which simple expedience has been held to be 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.").

Moreover, the Board has presented no evidence to support the factual premise underlying its argument: the idea that implementing EDR on a large scale is easier or less burdensome than implementing it on a small scale. In fact, the legislative history shows that election authorities in both high-population counties and low-population counties opposed the bill because of the costs it would impose on them.[11] The legislative history also 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

[11] *See* 98th Ill. Gen. Assembly, House Proceedings, Dec. 3, 2014, at 28-29 (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."); *Id.* at 48-49 (statements of Rep. Unes) (noting that Democratic election authorities in his district, which includes one high-population county and one low-population county, had only just found out about the bill and opposed it because of the costs it would impose).

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.[12]

The Board also fails to support its argument that the appearance (in media reports) of greater demand for polling-place EDR in Chicago and certain other locations in high-population counties justifies giving citizens in high-population counties better voting rights. (*See* Mot. to Stay 12-13.) The Board has cited no authority holding that a state can give some citizens better voting rights than others based on media reports or on how vocal a particular group of citizens is in demanding better rights. As the district court stated, "[t]he Constitution guarantees equal voting rights to all United States citizens in Illinois, not simply those in counties that have the highest populations and have organizations . . . to stand up for their enhanced voting rights." (Dkt. 48 at 12.)

The Board is also incorrect in arguing that the state's discrimination with respect to polling-place EDR is the type of "unavoidable inequalit[y] in treatment" the Court condoned in *Griffin v. Roupas*, 385 F.3d 1128, 1132 (7th Cir. 2004). First, this type of discrimination is plainly not "unavoidable" because, as discussed above, every other state that offers EDR at polling places does so at every polling place statewide, without giving better access to voters in some counties than voters in others. Second, *Griffin* concerned restrictions on absentee voting – where unequal treatment of voters is indeed unavoidable unless a state is simply going to allow anyone to cast an absentee ballot. The Court concluded that the Constitution did not require it to impose this "radical . . . reform" on Illinois because any burden created by reasonable rules limiting absentee voting to certain categories of citizens who face particular hardships was

[12] *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 https://goo.gl/Vrnuku.

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. Here, in contrast, it is not necessary to restrict EDR to certain counties to limit an evil such as voting fraud.[13]

C. The district court correctly concluded that the balance of hardships favors an injunction.

The district court correctly concluded that the balance of harms favors an injunction. (Dkt. 48 at 10-11.) The lack of an injunction would irreparably harm Plaintiffs and the citizens whose interests they represent because, without an injunction, they would forever lose their ability to participate in the November 2016 election on fair and equal terms, and the citizens whose interests they represent would lose their ability to participate in the election on an equal basis with citizens of high-population counties.

The Board downplays this harm by arguing that people in low-population counties can register to vote on Election Day at their county clerk's office or (where available) a satellite location. (Mot. to Stay 16.) But the Board has not refuted Plaintiffs' expert's conclusion that voter turnout tends to be greater where EDR is available in polling places, not just at a centralized location. (Dkt. 11-3 (attached as Exhibit A) at

[13] The other absentee-voting case the Board relies 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, this Court 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.

8.)[14] Further, the Board's argument ignores the harm that comes with the inability of Plaintiffs and voters in low-population counties to participate in the election on an equal basis with voters in high-population counties by being afforded the same opportunities. Finally, the Board's argument on this point contradicts the Board's own argument[15] – bolstered by amicus briefs submitted to the district court (Dkt. 22-1, 34) – that eliminating polling-place EDR statewide would harm voters in high-population counties who would no longer be able to take advantage of it. (*See* Mot. to Stay 18.)

To attempt to overcome this inconsistency in its argument, the Board argues that voters in high-population counties, unlike voters in low-population counties, have an expectation that they will be able to register at their local polling places on Election Day. (Mot. to Stay 16-17, 18-19.) But the Board has presented no evidence to show that any citizen is actually relying on EDR being available at polling places this far in advance of the election, or that election authorities and civic organizations would not be able to inform voters of when and where they can vote before Election Day. Indeed, since the district court issued its injunction, some election authorities have begun informing voters that EDR will not be available at polling places on Election Day. *See* Judge Rules Election Day Registration operates to provide unfair benefits to some United States citizens, Will County Clerk, https://goo.gl/k734Wb.

Also, there is no merit in the Board's argument that the preliminary injunction does not actually address Plaintiffs' injury. (*See* Mot. to Stay 17.) The constitutional problem

[14] When the district court stated that the law would cause a "significant decrease in voter turnout" in low-population counties (Dkt. 47 at 8), of course it meant that voter turnout would be, as Plaintiffs' expert showed, lower than it would be if there were EDR at polling places in those counties, and it accepted Plaintiffs' argument that the discriminatory law would boost voter turnout more in high-population counties than in low-population counties.

[15] "If the injunction remains in effect on Election Day, the large majority of Illinois citizens will be deprived of the option of registering at their polling places. . . . Conversely, if the stay is granted, no one will be deprived of the ability to register or vote." (Mot. to Stay 15).

with Illinois' EDR statutes is that they give voters in high-population counties and low-population counties unequal voting rights. As the district court stated, the scheme "favors the urban citizen and dilutes the vote of the rural citizen." (Dkt. 48 at 7-8.) Enjoining implementation of the provisions regarding polling-place EDR – restoring the status quo ante, under which Plaintiffs were treated equally in this respect and therefore suffered no injury – would undo this harm, eliminating an "unfair advantage" and "level[ing] the election playing field." (Dkt. 48 at 11.).

On the other hand, 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.

D. The district court correctly concluded that the public interest favors an injunction.

Finally, the district court was correct in concluding that its preliminary injunction will serve the public interest (Dkt. 48 at 11-13) 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*, 405 U.S. at 336. As the district court stated, "[t]he public interest is served by ensuring that all Illinois voters have an equal opportunity to vote." (Dkt. 48 at 12.) 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. Even if providing EDR at polling places is in general good public policy, 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.

To address the public-interest factor, the Board again cites citizens' alleged expectations. Again, that argument lacks factual support. The Board cites a page on the Cook County clerk's website that still states – as of this filing – that EDR will be available at polling places on Election Day. (Mot. to Stay 18.) But the clerk, an intervenor-defendant below, should not be allowed to bolster the government's case by refusing to provide voters with up-to-date information.

The Board also cites *Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004), where the Court affirmed denial of a preliminary injunction that Ralph Nader sought to place his name on the ballot for the 2004 presidential election because an injunction would have "throw[n] the state's [election] preparation into turmoil." (Mot. to Stay 19-20.) This case is not comparable to *Nader* because, 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.* Thus, an injunction would have required the state to print and mail new ballots, and voters who received the old ballots might nonetheless have submitted them. Here, in contrast, there will be no need to replace ballots or take any similar extraordinary action. Instead, county election authorities will simply refrain

from providing EDR at polling places – the same thing they have done in every previous general election in Illinois history, which most were already planning to do anyway.[16]

The Board also argues that an injunction would require county clerks in high-population counties to "scramble" because early voting is already underway and they might wish to add more locations if polling-place EDR will not be available. (Board Resp. 7.) But the Board does not argue that adding voting opportunities would be infeasible or unduly burdensome. Presumably county clerks who wish to make such arrangements are already doing so in response to the district court's order.

IV. Conclusion

For all the foregoing reasons, Plaintiffs-Appellees respectfully ask this Court to deny the Board's motion to stay the district court's order granting a preliminary injunction.

Respectfully submitted,

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[16] In ruling against Nader, this Court noted that his 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. *Nader*, 385 F.3d at 736. But 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. (Mot. to Stay 17.))

CERTIFICATE OF SERVICE

I certify that on October 3, 2016, I served Plaintiffs-Appellees' Response in Opposition to Defendants-Appellants' Motion for Stay Pending Appeal on Defendants-Appellants' counsel by filing it with the appellate CM/ECF system.

/s/ Jacob H. Huebert
Jacob H. Huebert