**Nos. 16-3547 & 16-3597**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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PATRICK HARLAN and the CRAWFORD COUNTY REPUBLICAN CENTRAL COMMITTEE,

Plaintiffs-Appellees,

v.

CHARLES W. SCHOLZ, Chairman of the Illinois State Board of Elections, *et al.*,

Defendants-Appellants,

and

DAVID ORR, Cook County Clerk,

Intervening Defendant-Appellant.

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Appeal from the United States District Court for the Northern District of Illinois
Case No. 16-cv-07832
The Honorable Samuel Der-Yeghiayan, Judge Presiding

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# BRIEF OF PLAINTIFFS-APPELLEES

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# CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3547 & 16-3597

Short Caption: Harlan, et al. v. Scholz, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Patrick Harlan

Crawford County Republican Central Committee

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ Jacob H. Huebert Date: December 22, 2016

Attorney's Printed Name: Jacob H. Huebert

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

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None

Attorney's Signature: /s/ Jeffrey M. Schwab Date: December 22, 2016

Attorney's Printed Name: Jeffrey M. Schwab

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes _____ No X

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## Jurisdictional Statement

The Appellants' briefs' jurisdictional statement is not complete and correct because this Court no longer has jurisdiction over this appeal because it is moot.

Plaintiffs-Appellees Patrick Harlan, a candidate for the U.S. House of Representatives for the 17th Illinois Congressional District in the November 2016 election, and Crawford County Republican Central Committee filed this action against the Defendants-Appellants, the chairman and members of the Illinois State Board of Elections (the "State Defendants"). R. 1-12. Plaintiffs brought their complaint under 42 U.S.C. § 1983, challenging Illinois' statutes governing Election Day voter registration under the Fourteenth Amendment. R. 1-12. Because Plaintiffs' complaint raises a federal question, the district court had jurisdiction under 28 U.S.C. § 1331.

On September 27, 2016, the district court issued an order granting Plaintiffs' motion for a preliminary injunction. R. 496, 500-12. The State Defendants and Intervening Defendant-Appellant David Orr filed their notices of appeal from that order on September 27, 2016 and October 4, 2016, respectively. R. 497-99, 569-70. Both notices were filed within 30 days after the order was entered and therefore timely under Fed. R. App. P. 4(a)(1)(A). This Court initially had jurisdiction over the interlocutory appeals (which it has consolidated) under 28 U.S.C. § 1292(a)(1). Now, however, the Court no longer has jurisdiction over this appeal because it is moot, as set forth in Section I of Plaintiffs' Argument below. In the alternative, if the case is not moot, the Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

## Statement of the Issues

Is this appeal moot because it seeks review of a preliminary injunction that applied to the November 2016 election, which has now occurred?

In the alternative, did the district court abuse its discretion in issuing a preliminary injunction against implementation of Illinois' scheme for Election Day voter registration, which guarantees citizens in some Illinois counties – but not others – the right to register and vote at their local precinct polling places on Election Day?

## Statement of the Case

This case concerns the constitutionality of Illinois statutes that guarantee citizens of some Illinois counties – but not others – the right to register to vote, and then vote, at their local precinct polling places on Election Day.

### 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. Illinois did, however, allow citizens to make use of "grace period" registration, which began at the close of the normal registration period and continued through the third day before the election. *See* Ill. Public Act 98-961 §§ 4-50, 5-50, 6-100. R. 164-67. During the grace period, a voter could register to vote at a county clerk's office or at a specially designated voter registration site. *Id.*

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

Less than one month after the 2014 general election, the Illinois General Assembly rapidly considered and passed new legislation, SB 172, which created a permanent system of EDR in Illinois. *See* Ill. Public Act 98-1171. SB 172 passed

completely on party-line votes in both houses of the General Assembly, with all affirmative votes coming from Democratic legislators and all "nay" votes coming from Republican legislators.[1] Outgoing governor Pat Quinn signed the bill on Saturday, January 10, 2015, and it was approved on January 12, 2015, the same day Quinn's successor, Governor Bruce Rauner, was inaugurated.[2]

The permanent EDR system of SB 172, which is currently in effect, is substantially different from the 2014 pilot program. The permanent EDR system allows a qualified person to register to vote, and then vote, in person at any of several locations during the grace period: the office of the election authority; a permanent polling place for early voting; any early voting site beginning 15 days before the election; or *any precinct 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 polling 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

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

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

main office and (ii) a polling place in each municipality where 20% or more of the county's residents reside if the election authority's main office is not located in that municipality." 10 ILCS 5/4-50, 5-50, 6-100.

Thus, Illinois law now guarantees a right to EDR at every polling place to citizens who live in the 20 Illinois counties with a population of 100,000 or more ("high-population counties") but not to citizens who live in the 82 Illinois counties with a population of less than 100,000 ("low-population counties"). And, given a choice, only four low-population counties chose to offer in-precinct EDR in the November 2016 election; the other 78 opted out. SA 14.

**Tilting the Political Playing Field**

The predictable result of this discrimination favoring of citizens in high-population counties will be to benefit some candidates for office – and their supporters – at the expense of others.

As explained by Plaintiffs' expert witness, M.V. Hood III, an overwhelming consensus exists in the academic literature that EDR increases voter turnout where it is implemented. R. 194-96. This is true when EDR is available at a centralized location, but EDR's effects on voter turnout have been found to be more encompassing and consistent when EDR is offered at precinct polling places. R. 195.

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. R. 196.

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. R. 198-200. 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. R. 198. The difference between the average Democratic (or Republican) vote by county size is 16.2%, which is statistically significant. R. 198. Thus it is quite possible that Illinois' EDR scheme will have the effect of diminishing Republican votes relative to Democratic votes. R. 198.

**Harm to Plaintiffs**

In the November 2016 election, Plaintiff Patrick Harlan was the Republican candidate for the U.S. House of Representatives in the 17th Illinois Congressional District,[3] which encompasses a high-population county, parts of three other high-population counties, and ten low-population counties. R. 501 (SA2).

The high-population counties in the 17th District are, of course, required to offer EDR at all polling places. *See* 10 ILCS 5/4-50. The low-population counties are not required to offer EDR at precinct polling places and did not do so in the 2016

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

general election. SA 14. Instead, they provided the minimum EDR that Illinois law requires. R. 220-30, 233-34.

As a result, citizens in the low-population counties in the 17th District did not have the same opportunities to register and vote in the November 2016 election as citizens in the high-population counties in the 17th District. And it is a virtual certainty that some residents of those low-population counties who would have registered and voted for Mr. Harlan at their polling places on Election Day if they could have done so ended up not voting at all. R. 8. Mr. Harlan brought this lawsuit to protect the rights of citizens in those low-population counties to have the opportunity to vote on the same basis as voters in high-population counties. R. 9.

Plaintiff Crawford County Republican Central Committee is an Illinois political party committee based in Crawford County, Illinois, the purpose of which is to elect Republican candidates to office. R. 3.

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 did not do so in the November 2016 election. SA 14. Instead, it has provided the minimum EDR that Illinois law requires. R. 231-32.

As a result, citizens in Crawford County – including some who would vote for Republicans in statewide elections – did not have the same opportunities to register and vote as citizens in high-population counties in the November 2016 election. R. 9. As a result, it is a virtual certainty that some Crawford County residents who

would have voted for a Republican candidate in a statewide race ended up not voting at all. R. 9.

The Crawford County Republican Central Committee 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. R. 9.

**Procedural History**

On August 4, 2016, Mr. Harlan and the Crawford County Republican Central Committee filed their complaint in this case, which seeks to have Illinois' scheme for EDR at precinct polling places declared unconstitutional and enjoined for violating the Equal Protection Clause of the Fourteenth Amendment. R. 1-12. On August 9, Plaintiffs filed a motion for preliminary injunction asking the Court to enjoin the chair and members of the Illinois State Board of Elections (collectively, the "State Defendants") to direct Illinois election authorities not to implement EDR at precinct polling places in the November 2016 election. R. 65-66, 146-234. On August 15, the State Defendants filed a motion to dismiss Plaintiffs' complaint for failure to state a claim (and memorandum in support). R. 236-57. The State Defendants' memorandum in opposition to Plaintiffs' motion for preliminary injunction, filed August 30 (R. 357-64), incorporated by reference the arguments on the merits in the State Defendants' memorandum in support of their motion to dismiss. R. 359. The district court denied the motion to dismiss and granted the preliminary injunction in an order issued September 27, 2016. R. 496. The State Defendants filed a notice of appeal to seek this Court's review of the preliminary

injunction on that same day. R. 497-99. On the following day, the State Defendants filed a motion to stay the preliminary injunction, which the district court denied in an order issued on the next day, September 29. R. 546-61. Then, on September 30, the State Defendants filed a motion for stay pending appeal in this Court, which the Court summarily granted on October 4. R. 603-04.

While Plaintiffs' motion for preliminary injunction was pending in the district court, Cook County Clerk David Orr ("Clerk Orr") filed a motion to intervene in the case, which the district court granted. R. 261-70, 282. Clerk Orr then filed his own motion to dismiss (relying on the State Defendants' memorandum in support of their motion to dismiss) and his own memorandum in opposition to Plaintiffs' motion for preliminary injunction. R. 430-31. After the district court denied the motions to dismiss and granted the preliminary injunction, Clerk Orr filed his own motion to stay in the district court, which the court denied along with the State Defendants' motion to stay. R. 564-65, 567-68. Clerk Orr filed a notice of appeal seeking review of the preliminary injunction on October 4, 2016. R. 572-601. Like the State Defendants, Clerk Orr sought a stay of the preliminary injunction pending appeal, which this Court granted. R. 605-06. This Court then consolidated the State Defendants' appeal and Clerk Orr's appeal.

## Summary of the Argument

The Court should dismiss this appeal because it is moot. The appellants seek review of a preliminary injunction that barred Defendants from implementing Election Day voter registration at precinct polling places in the November 2016

general election. Because that election has now occurred, an opinion on whether the injunction was proper could only be advisory. This Court therefore lacks jurisdiction over this appeal and should dismiss it.

In the alternative, if the Court concludes that this appeal is not moot, it should affirm because the district court did not abuse its discretion in concluding that Plaintiffs are likely to prevail on the merits of their constitutional claim, that Plaintiffs would suffer irreparable harm without a preliminary injunction, and that the balance of hardships and the public interest favor an injunction.

The right to vote is a fundamental right, and it is a right to participate in elections on an *equal basis* with other citizens in one's jurisdiction. Accordingly, the courts have considered state laws that arbitrarily give some citizens better voting rights than others – including, in particular, state laws that give some citizens better voting rights based on where they live – to impose severe burdens on voting rights, and they have subjected such laws to strict scrutiny.

The district court did not abuse its discretion in concluding that Illinois' EDR statutes impose a severe burden on voting rights because they treat some citizens better than others based on where they live: citizens in high-population counties are guaranteed a right to register to vote at their local precinct polling places, while citizens in low-population counties without electronic polling books are not guaranteed that right. As a result, citizens of high-population counties have significantly better opportunities to register and vote than citizens of most low-population counties, and some citizens of low-population counties who would vote if

in-precinct EDR were available will not vote at all. In this way, the district court concluded, Illinois' scheme suppresses voter turnout in low-population counties where in-precinct EDR is not available relative to voter turnout in counties where in-precinct EDR is available. That conclusion was supported not only by common sense but also by Plaintiffs' expert's undisputed conclusion that voter turnout tends to be relatively suppressed where EDR is available only at a centralized location, rather than in every precinct.

The district court rightly rejected Defendants' arguments that Illinois' EDR scheme imposes little or no burden on voting rights. The scheme does not merely "enhance," rather than burden, voting rights, as Defendants argue. Because it gives some voters better rights than others, the scheme places a relative burden on citizens whom the law treats less favorably, who are denied their right to vote on an equal basis with others in their jurisdiction. The burden the law imposes also cannot be dismissed as a mere "inconvenience" because it is an "inconvenience" that the state has specifically chosen to eliminate for some voters but not others. Plaintiffs' expert's analysis further shows that the burden goes beyond inconvenience because it prevents some people from voting who otherwise would do so.

And there is no merit in Defendants' argument that any burden the statues impose is the type of "unavoidable" inequality in treatment that will arise in any election system. In fact, every other state with EDR has managed to avoid this type of discrimination. And in-precinct EDR is not like absentee voting, where the state

will necessarily treat some voters unequally unless it adopts the relatively radical reform of allowing anyone to vote absentee for any reason. The Illinois scheme also is not comparable to a situation in which local entities within a state have developed different voting mechanisms based on their local expertise, which the Supreme Court has arguably implicitly condoned; rather, it is a situation in which the state government has guaranteed some voters better rights than others based on where they live, which the Supreme Court has repeatedly explicitly condemned.

Because Illinois' EDR statutes impose a severe burden on the voting rights of citizens in low-population counties, they are subject to strict scrutiny, under which the state must show that the burden is narrowly tailored to serve a compelling governmental interest.

The district court correctly concluded that Defendants have failed to show that state interests justify Illinois' EDR scheme, whether under strict scrutiny or lesser scrutiny under the framework established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992), under which a court must determine whether the interests the state has asserted to justify a burden on voting rights outweigh the burden on citizens' voting rights.

As the district court recognized, Defendants cannot justify Illinois' EDR scheme simply by citing the state's (undisputed) interest in allowing as many qualified citizens as possible to vote. That interest justifies the provision of EDR *in general*, but it cannot justify the provision of EDR *on a discriminatory basis*, favoring some citizens over others.

Defendants also cannot justify the statutes' discrimination by citing the existence of long lines in Cook County, but not low-population counties, when the state offered EDR at a centralized location within each county under its 2014 pilot program. The Court should not even consider that justification because Defendants did not present it to the district court before it entered a preliminary injunction. Besides, the argument fails on its merits for several reasons. *First*, Defendants presented no evidence for the factual premise that only Cook County experienced long lines. *Second*, even if that factual premise is correct, it does not demonstrate that in-precinct EDR was more urgently needed in high-population counties: if low-population counties did not have long lines for EDR in 2014, it might have been because traveling to a centralized location was too burdensome for citizens in those counties. *Third*, long lines in Cook County do not explain why the state mandated in-precinct EDR in the state's 19 other high-population counties. *Fourth*, in any event, the state cannot give some voters better rights than others based on its estimation as to who will take the most advantage of them.

The district court rightly rejected Defendants' argument that the statutes' discrimination is justified because of the financial and administrative burdens that in-precinct EDR might impose on low-population counties. That argument fails for multiple reasons as well. *First*, courts have rejected avoidance of costs and administrative convenience as justifications for violating constitutional rights, including voting rights. *Second*, Defendants have not actually shown that in-precinct EDR is financially or administratively easier to implement in high-

population counties than in low population counties. *Third* – and most important – it is patently improper to guarantee citizens in wealthy counties better rights than citizens in less wealthy counties specifically because of their counties' relative wealth. The district court rightly recognized that a citizen's voting rights should not depend on whether he or she lives in a relatively affluent county. R. 508.

The district court did not abuse its discretion in concluding that an injunction would prevent irreparable harm to the Plaintiffs and the voters whose interests they represent because the injury to their voting rights cannot be undone by rerunning the election or by compensating them with monetary damages. Defendants' argument that Plaintiffs' face no threat of irreparable harm now that the November 2016 election is over is improper because the question before this Court is whether the district court abused its discretion at the time it entered its order, before the November 2016 election, not whether it would be an abuse of discretion for the district court to enter a preliminary injunction now.

Besides, even if Defendants' argument were proper (and assuming for the sake of argument that the district court's order applied to elections after November 2016), it would still fail because Plaintiff Republican County Republican Central Committee and the voters whose interests it represents will face the same threat of irreparable injury in any future election, as long as the current EDR scheme remains in place and Crawford County does not provide in-precinct EDR.

Defendants' argument that the EDR scheme does not threaten irreparable harm because residents of low-population counties have other opportunities to vote fails

as well. That argument wrongly assumes that Defendants are correct on the merits, and it contradicts arguments Defendants and their supporting amici made below that enjoining in-precinct EDR statewide would harm voters in high-population counties who would no longer be able to take advantage of it. Defendants also argue that, if Plainitffs really faced a threat of irreparable harm, they would have filed their motion sooner, not some 18 months after the EDR statutes became effective; but that argument fails because Defendants have presented no reason why Plaintiffs should have been ready and able to bring their lawsuit sooner than they did.

The district court also did not abuse its discretion in concluding that the balance of hardships favored an injunction. Again, Plaintiffs and the voters whose interests they represent faced a threat of severe, irreparable harm. The Defendants, in contrast, failed to show that an injunction would cause them more than negligible harm. Their interest in implementing the public policy supposedly underlying the statutes does not suffice.

Finally, the district court did not abuse its discretion in concluding that the public interest favored a preliminary injunction. The public's interest in having in-precinct EDR at precinct polling places – something Illinois never previously offered to anyone in a general election, and which only six other states permanently provide to their voters – is relatively minor compared to the public's extremely strong interest in having fair, democratic elections in which all qualified citizens have an opportunity to participate on an equal basis. After all, there is no constitutional

right to have in-precinct EDR at all, but there is a constitutional right to vote on an equal basis with others in one's jurisdiction. Although providing in-precinct EDR at polling places might be good public policy in general, it is not in the public interest if it is implemented in an unfair manner that favors some voters over others based on an arbitrary factor.

## Argument

### I. The Court should dismiss this appeal as moot.

Although Plaintiffs maintain that the district court's preliminary injunction was proper, the Court need not and should not reach that question because this appeal is moot.

Mootness is a "threshold jurisdictional question" about whether an appeal presents a case or controversy that the Court may hear under Article III of the U.S. Constitution. *Worldwide St. Preachers' Fellowship v. Peterson*, 388 F.3d 555, 558 (7th Cir. 2004). Federal courts "may not give opinions upon moot questions or abstract propositions, and . . . an appeal should therefore be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant any effectual relief whatever in favor of the appellant." *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (internal marks and citations omitted). An appeal of a preliminary injunction pertaining to a particular election becomes moot once that election has occurred, and this Court therefore no jurisdiction to review it. *See Stone v. Bd. of Election Comm'rs*, 643 F.3d 543, 544-45 (7th Cir. 2011).

Because the preliminary injunction at issue in this appeal applied to the November 2016 election, which has now occurred, an opinion from this Court on whether the injunction was proper would be merely advisory. This appeal is therefore moot, and the Court should therefore dismiss it.

Defendants argue that this appeal is not moot because, they say, Plaintiffs' motion for preliminary injunction and the district court's order granting it were not limited to the November 2016 election. (State Defs.' Br. 13.) To the contrary, however, Plaintiffs' memorandum in support of their motion for preliminary injunction asked the district court to "enjoin Defendants to direct election authorities in all Illinois counties not to implement EDR at polling places *in the 2016 general election*." R. 158 (emphasis added). Further, it is obvious that Patrick Harlan was seeking relief only for the November 2016 election because that is the only election in which he was running for Congress, for which he needed a preliminary injunction to avoid irreparable injury. R. 151-52. True, in granting Plaintiffs' motion, the district court did not specify whether the preliminary injunction it entered would apply beyond the November 2016 election. R. 512. But the court did state that the injunction was necessary to prevent harm "in the upcoming election," R. 503, and the most reasonable inference is that the district court granted no greater relief than Plaintiffs requested – i.e., that its order was limited to the November 2016 election.

Moreover, Defendants' arguments below reflect their own assumption that the preliminary injunction Plaintiffs sought concerned the November 2016 election in

particular, not just any future election. Defendants and their supporting amici all relied heavily on the argument that the balance of harms and public interest disfavored an injunction because it would come too soon before the November 2016 election, (supposedly) confusing voters and forcing election authorities to make costly changes to their plans at the eleventh hour. R. 300-02, 363, 377-79, 410.

Those arguments have no relevance to whether the statutory provisions Plaintiffs are challenging should remain in effect now that the November 2016 election is over, and Defendants and their amici accordingly have not repeated those arguments on appeal. Instead, Defendants now argue that Plaintiffs no longer face a threat of irreparable harm warranting a preliminary injunction because the November 2016 election is over. (State Defs.' Br. 12.) That might seem to be an argument based on mootness, but Defendants nonetheless maintain that this appeal is not moot based on the premise that Plaintiffs' requested injunction and the district court's order were not limited to the November 2016 election. (State Defs.' Br. 13.) Again, that premise is incorrect.

Further, it only makes sense that the district court's preliminary injunction would be limited to the November 2016 election. As Defendants recognize, the next election in which Plaintiffs might suffer the harm their preliminary injunction sought to prevent will not occur until March 2018 at the earliest. (State Defs.' Br. 12.) If the district court has not resolved Plaintiffs' claims by then, and Plaintiffs seek another preliminary injunction to protect their rights, presumably the arguments on both sides will be somewhat different than they were before the

November 2016 election because circumstances will be different: for example, the timing relative to the election will be different; presumably Plaintiffs' arguments will be informed by facts revealed during discovery; and both sides' arguments will be informed by the state's experience with EDR in the November 2016 election.

Thus, in sum, it makes no sense for this Court to decide now whether an injunction was appropriate for the November 2016 election because that election has already occurred. And it makes no sense for this Court to decide now whether a preliminary injunction will be proper for the March 2018 election because that question should be addressed in the first instance by the district court, based on arguments that the parties did not make below and on facts that are not before this Court and not currently available to the parties.

For these reasons, the Court should dismiss this appeal as moot.

## II. In the alternative, the Court should affirm because the district court did not abuse its discretion in granting a preliminary injunction.

In the alternative, if the Court concludes that this appeal is not moot, it should affirm because the district court did not abuse its discretion in concluding that Plaintiffs are likely to prevail on the merits of their constitutional claim, that Plaintiffs would suffer irreparable harm without an injunction, and that the balance of hardships and the public interest favor an injunction preserving the status quo ante.

In reviewing a district court order granting a preliminary injunction, this Court applies "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 an 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 conditions are met, the court must then balance the hardship the moving party will suffer in the absence of relief against any hardship the nonmoving parties will suffer if the injunction is granted. *Id.* Finally, the court also considers the interests of nonparties. *Id.* The court weighs all these factors using a "'sliding scale' approach: the more likely it is plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh toward 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).

### A. The district court did not abuse its discretion in concluding that Plaintiffs are likely to succeed on the merits of their claim that Illinois' discriminatory EDR statutes violate the Equal Protection Clause.

The right to vote is a fundamental right. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966). And it is a "right to participate in elections on an *equal basis* with other citizens in [one's] jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330,

336 (1972). The Equal Protection Clause therefore protects the right to vote not only in "the initial allocation of the franchise" but also to "the manner of its exercise." *Bush v. Gore*, 531 U.S. 98, 104 (2000). "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." *Id.* at 104-05.

The statutes at issue in this case deny certain Illinois citizens their right to participate in elections on an equal basis with others: they guarantee citizens in high-population counties the right to register and vote at their local precinct polling places on Election Day, but do not guarantee that right to citizens in low-population counties without electronic polling books. The district court therefore did not abuse its discretion in concluding that Plaintiffs are likely to succeed on their claim challenging those statutes under the Equal Protection Clause.

**1. The district court did not abuse its discretion in concluding that Illinois' EDR scheme imposes on a severe burden on the voting rights of citizens in low-population counties.**

The district court correctly concluded that Illinois' system for in-precinct EDR denies electors in low-population counties equal access to the fundamental right to vote by making classifications of citizens based on their geographic location, guaranteeing in-precinct EDR to citizens who live in high-population counties but not to citizens who live in low-population counties that lack electronic polling books.

**a. The statutes' discrimination against certain voters based on where they live severely burdens voting rights.**

To determine whether Illinois' discriminatory statues governing in-precinct EDR violate the Equal Protection Clause, the district court correctly applied the test the

U.S. Supreme Court established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). Under that test, a court considering a challenge to a statute affecting voting rights must "weigh the character and magnitude of the asserted injury" to voters' rights "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 (internal marks omitted)). When the injury to voting rights is "severe," the restriction is subject to strict scrutiny – i.e., it must be narrowly tailored to advance a compelling state it interest. *Id.*

The injury in this case arises from a restriction on citizens' access to EDR at precinct 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. Again, the Supreme Court has held that the right to vote is inherently a right to vote on an equal basis with other's in one's jurisdiction. *Dunn*, 405 U.S. at 336. And the Court has held specifically 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 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. By subjecting state laws that arbitrarily discriminate against the voting rights of some citizens based on their geographic location to strict scrutiny, the Supreme Court has shown that it considers such laws to inflict a severe injury on voters' rights. *See Reynolds*, 377 U.S. at 581; *see also Communist Party of Ill. v. State Board of Elections*, 518 F.2d 517, 521 (7th Cir. 1975) (rules for forming political party that discriminated against citizens in Cook County and in favor of citizens in rural counties subject to strict scrutiny); *Mullins v. Cole*, No. 3:16-9918, 2016 U.S. Dist. LEXIS 160928, *8-11 (S.D.W.V. Nov. 21, 2016) (requiring voters in one county, but not others, to mail registration application after submitting an application online imposed severe burden subject to strict scrutiny under *Burdick*).

In light of these principles, the district court did not abuse its discretion in concluding that the magnitude of the injury the challenged statutes' inflict on the citizens in low-population Illinois counties whose rights Plaintiffs seek to protect is "severe." R. 506. Under the statutes that Plaintiffs challenge, a qualified citizen in a low-population county without in-precinct 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. On the other hand, a qualified citizen in a high-population county may simply register at a polling place on Election Day and vote.

Further, the district court correctly found that Plaintiffs had presented evidence showing that the state's discriminatory EDR statutes would tend to suppress voter

turnout in low-population counties. Specifically, Plaintiffs showed "that the availability of polling place registration as part of the EDR results in a significant increase in voter turnout" relative to the voter turnout that would occur if EDR were only available at a centralized location, which "in turn shows that in a low-population county without electronic polling books there will be a significant decrease in voter turnout." R. 506. Plaintiffs' evidence on this point was presented in the declaration of their expert, political scientist M. V. Hood III, who cited academic literature showing that EDR has a greater effect on voter turnout when it is available at precinct polling places and not just at a centralized location. R. 195. Based on this literature, Dr. Hood concluded that the unavailability of in-precinct EDR in low-population Illinois counties would "likely dampen any positive turnout effect relative to larger counties where EDR will be implemented at all voting precincts." R. 201.

Defendants argue as though the district court concluded (without evidence) that the EDR scheme would lead to an *absolute* decrease in turnout relative to the status quo (*see* State Defs.' Br. 15), but that is not a reasonable interpretation in light of the context and Plaintiffs' arguments to the district court. The district court stated that Plaintiffs had shown that "Illinois citizens in low-population counties without electronic polling books [would] have their right to vote significantly curtailed *in comparison to* citizens in high-population counties and counties with electronic polling books." R. 503 (emphasis added). Thus, the district court obviously accepted Dr. Hood's analysis and accordingly concluded that low-population counties' voter

turnout would be "decreased" *relative* to what it would be if those counties had in-precinct EDR and *relative* to the increase in turnout that high-population counties with in-precinct EDR would experience.

There is no merit in Defendants' suggestion that Dr. Hood's report was insufficient because he opined that it was "quite possible" or "likely" that voter turnout would increase more in high-population counties with in-precinct EDR than in low-population counties that lack in-precinct EDR but did not specify the degree or magnitude of this effect. (*See* State Defs.' Br 21.) But Defendants did not dispute Dr. Hood's conclusion on this point below; nor did they present any evidence to show that Dr. Hood's conclusion was incorrect or to show that he or the sources he relied on applied an inappropriate methodology. (Clerk Orr questioned whether Dr. Hood considered sufficient data to reach a conclusion about the law's partisan effects, R. 736; but Clerk Orr presented no evidence of his own to show that Dr. Hood's analysis was insufficient, and the law would burden the rights of voters in low-population counties even if it did not result in net partisan effects.) And of course no expert can be expected to predict with certainty or precision what citizens will do, especially with limited data; one can only make predictions about what is likely based on studies of voters' behavior in the past, as Dr. Hood did.

The cases Defendants cite to argue that Dr. Hood's analysis was too speculative to demonstrate a severe burden on voters are inapposite in two ways: (1) they did not involve constitutional claims regarding burdens on voting rights but rather addressed whether plaintiffs had presented sufficient evidence of irreparable harm

to support a preliminary injunction; and (2) they involved alleged harm for which there was *no* evidentiary support. *See E. St. Louis Laborers Local 100 v. Bellon Wrecking & Salvage Co.*, 414 F.3d 700, 704 (7th Cir. 2003) (district court abused discretion in issuing preliminary injunction based on union's unsupported assertion that its members would otherwise "lose confidence" in the union); *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1204 (7th Cir. 1996) (district court abused discretion in issuing preliminary injunction where key factual issue turned on contents of an agreement court never reviewed, about which it never received any details); *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 6 (1st Cir. 1991) (district court did not abuse discretion in denying preliminary injunction where the only evidence *contradicted* plaintiffs' key factual assertion, which plaintiffs admitted they could not yet prove).

Thus, the district court did not abuse its discretion in concluding – in accordance with both Dr. Hood's declaration and common sense – that low-population counties' lesser opportunities to register and vote would result in less registration and less voting than would otherwise occur and would thus severely burden the voting rights of the affected citizens in those counties.

**b. There is no merit in Defendants' arguments that the statutes impose little or no burden on voting rights.**

The district court rightly rejected Defendants' arguments that the state's EDR scheme imposes little or no burden on voting rights.

There is no merit in Defendants' argument that the challenged EDR statutes warrant minimal scrutiny because they supposedly enhance, rather than burden,

voting rights. (State Defs.' Br 15-17.) As the cases discussed above make clear, the right to vote is, by its nature, a right to vote on an *equal basis* with others in the same jurisdiction. Therefore, when the law gives some voters better rights than others – whether through a restriction of one group's rights or an enhancement of another group's rights – the government burdens the voting rights of the citizens who are treated less favorably. Of course the government may enhance voting rights; but it may not play favorites when it does so.

There is also no merit in Defendants' argument that Illinois' EDR scheme imposes no burden on citizens in low-population counties because the "inconvenience" of having to drive further to register and vote is not a severe burden on constitutional rights. (State Defs.' Br. 20.) The court opinions Defendants cite for this proposition are inapposite because they addressed inconveniences that some citizens might face as a result of facially neutral, "nondiscriminatory" election laws, not laws that, on their face, guaranteed some voters better rights than others as the statutes at issue here do. *See Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008) (opinion of Stevens, J.) (considering facially neutral voter ID law); *id.* at 205 (opinion of Scalia, J.) (same); *Frank v. Walker*, 768 F.3d 744, 749 (7th Cir. 2014) (same). This case, unlike those, involves a statute that is discriminatory on its face because it guarantees the best, easiest opportunity for EDR to some citizens but not others. If Illinois required that *all* citizens who want to register on Election Day go to a centralized location – as it did under its 2014 pilot program – that might not burden citizens' voting rights much, if at all; but its current requirement that

some citizens, but not others, go to a centralized location imposes a *relative* burden on citizens whom the law treats less favorably. Allowing the government to escape meaningful scrutiny when it places "inconveniences" in the way of some citizens' access to voting, but not in the way of others' access – as Defendants urge – would create obvious, intolerable opportunities for abuse of disfavored groups and governmental manipulation of elections.

Further, Defendants have not refuted Plaintiffs' expert's conclusion that the state's discriminatory statute will tend to suppress voter turnout (relatively) in counties where in-precinct EDR is not available – i.e., it will impose such a severe burden that some people who would register and vote if in-precinct EDR were available will not register or vote at all.

Also, there is no merit in Defendants' argument that the burden that Illinois' EDR scheme imposes on citizens in low-population counties is insignificant because it (supposedly) is the type of "unavoidable inequalit[y] in treatment" of voters referenced in *Griffin v. Roupas*, 385 F.3d 1128, 1132 (7th Cir. 2004). (State Defs.' Br. 23.)

Defendants' argument fails because the type of discrimination at issue in this case certainly is not "unavoidable": in fact, *every other state* that offers EDR has managed to avoid it. All six of the other U.S. states with permanent in-precinct EDR systems require it to be provided at all precinct polling places statewide, not just in some counties. *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).

Also, North Dakota provides the functional equivalent of in-precinct EDR at every polling place statewide because it does not require voters to register. *See* N.D. Cent. Code § 16.1.05-07-(2)(c). And a Utah pilot program for in-precinct EDR, which will expire on January 1, 2017, allowed all county and municipal election authorities to choose whether to offer it; it did not mandate in-precinct EDR in some counties but not others as Illinois alone has. *See* Utah Code Ann. § 20A-4-108. Further, each of the four other states that offer EDR has a uniform system: none makes distinctions between counties based on population. *See* C.R.S. 1-2-217.74(4) (Colorado statute allowing any citizen to register on Election Day at a center within his or her county of residence); Conn. Gen. Stat. § 9-19j (Connecticut statute providing for one EDR site in each town); 21-A M.R.S. § 122(4) (Maine statute providing for a designated EDR site in each city or town, typically a city hall or town office); 13-2-304, MCA(1)(a) (Montana statute providing for EDR in the elections office of each county).

Moreover, *Griffin* is unlike this case because it concerned Illinois' restrictions on absentee voting – an area where unequal treatment of voters is indeed unavoidable unless a state chooses to allow any citizen eligible to vote to cast an absentee ballot for any reason. In *Griffin*, the Court concluded that the Constitution did not require it to impose that "radical . . . reform" on Illinois 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 strong 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"), for voters casting invalid ballots, and for voters casting ballots early without the benefit of information that surfaces later in the election season. *Id.* at 1130-31.[4] Here, in contrast, Defendants have not alleged that it is necessary to mandate EDR only in certain counties to limit a serious evil such as voting fraud. (As discussed below, the putative government interests Defendants cite to justify Illinois' scheme do not suffice.)

There is also no merit in Defendants' argument that the burdens the EDR scheme imposes are trivial because they are supposedly no different from the "variations among States and local entities with respect to voting mechanisms [that] are ubiquitous and do not present federal constitutional concerns." (State Defs.' Br. 23.)

As an initial matter, "variations among States" are irrelevant because this case concerns a citizen's right to vote on an equal basis with others in the *same jurisdiction*. For this purpose, there is no "jurisdiction" that extends beyond the boundaries of a state. In a presidential election – the only election in which voters in multiple states participate – voters actually select their state's presidential electors, so even there the state is the jurisdiction in which voters must be treated

[4] The other absentee-voting case the Board relies on, in which the plaintiffs challenged Illinois' absentee-voting law for not allowing pretrial detainees in the Cook County Jail to vote absentee, is not instructive because (1) it involves the same sort of truly unavoidable discrimination among voters and (2) 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. If it did not control there, it could not control here.

equally. *Cf. Bush*, 531 U.S. at 104-05 (discussing lack of federal constitutional right to vote for presidential electors, states' plenary authority to select the manner for appointing presidential electors, and the Equal Protection Clause's requirement that a state value its citizens' votes equally once it has given them the right to vote for presidential electors).

And, contrary to Defendants' suggestion, this case is not about whether the Constitution requires "strict geographic uniformity" of voting mechanisms within a state or "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections," a question the Supreme Court referenced (but did not address) in *Bush*, 531 U.S. at 109. (*See* State Defs.' Br. 23.) Rather, this case is about whether a state may *guarantee* better rights to citizens in some counties than it guarantees to citizens in other counties. And *Bush* itself states that, even if *local* entities may develop different systems for implementing elections based on their local expertise, a *state* government violates Equal Protection Clause when it "accord[s] arbitrary and disparate treatment to voters in different counties." *Bush*, 531 U.S. at 107.

Finally, Defendants receive no support from the other case they cite on this point, *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003). (State Defs.' Br 23.) Defendants describe that case as "affirming denial of [a] preliminary injunction challenging use in some counties of punch cards, which had a higher voter-rejection rate than alternative means used in other counties." (State Defs.' Br. 23.) Defendants then argue that "[i]f the use of different voting

mechanisms, without more, does not deny equal protection, it is difficult to see how differences as to registration . . . could constitute a violation." (State Defs.' Br 23-24.) That case, however, apparently involved variations in the practices of local election authorities in California, not a state law mandating that some counties, but not others, use a particular method that affects citizens' ability to register and vote. *See id.* at 917. And Defendants omit an important detail about the case: the court did not conclude that the plaintiffs were unlikely to succeed on the merits of their equal protection claim – it simply described the issue as "one over which reasonable jurists may differ" – and it affirmed the district court primarily because it was not an abuse of discretion to deny the plaintiffs the "extraordinary," "unprecedented" relief they were seeking: an order enjoining an election in which hundreds of thousands of citizens had already cast ballots. *Id.* at 918-19. Thus, the California case has no relevance to the severity of the burden on voting rights at issue in this case.

**2. Because the EDR scheme severely burdens voting rights, it is subject to strict scrutiny.**

Where, as here, a state law severely burdens citizens' voting rights, it is subject to strict scrutiny, under which the government must show that the challenged provision is narrowly drawn to advance a state interest of compelling importance. *Burdick*, 504 U.S. at 434.

Rigorous scrutiny is especially appropriate for laws, such as those at issue here, 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). Basic notions of democratic fairness demand that courts give more-than-minimal scrutiny to laws that would "restrict the political participation of some in order to enhance the relative influence of others." *Id.* at 1441. *See* R. 507.

Even where a law imposes a burden on voting rights that is less than severe, the Court must balance the injury against the government's interest to determine whether the burden is justified. *See Burdick*, 504 U.S. at 434. It does not simply apply rational-basis review, as Defendants would urge. *See Public Integrity Alliance, Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016) ("*Burdick* calls for neither rational basis review nor burden shifting.").

The cases Defendants cite to argue that laws treating citizens in different parts of a state differently are subject to mere rational-basis review (State Defs.' Br. at 23) are inapposite because those cases did not involve voting rights. 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 (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).

Defendants' suggestion that Plaintiffs must show intentional discrimination to receive any scrutiny at all (State Defs.' Br. 27) is incorrect. A plaintiff challenging a statute under the Equal Protection Clause must show an intent to discriminate if the statue he or she is challenging is nondiscriminatory on its face – i.e., if the plaintiff claims that a facially neutral law, inoffensive by its terms alone, has a disparate impact on a particular individual or group. *See Crawford*, 553 U.S. at 207 (opinion of Scalia, J.); *Frock v. U.S. R.R. Retirement Bd.*, 685 F.2d 1041, 1048 (7th Cir. 1982). Here, the statutes Plaintiffs challenge are facially discriminatory, so Plaintiffs need not prove intentional discrimination. (The statutes' likely disparate impact on the two major political parties, discussed above, is an effect of the statutes' discrimination; it is not, in itself, the basis of Plaintiffs' equal protection claim, and the district court did not rely on it in granting a preliminary injunction.)

The Supreme Court has explained why discriminatory 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*, 377 U.S. at 562. 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 affects 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.").

**3. The district court did not abuse its discretion in concluding that no state interest justifies the burden on citizens' voting rights.**

The district court correctly concluded that Defendants failed to show that state interests justify Illinois' discriminatory EDR scheme, whether under strict scrutiny or lesser scrutiny.

**a. The state's interest in helping citizens in high-population counties vote cannot justify its discrimination against citizens in low-population counties.**

The district court rightly rejected Defendants' argument that the challenged provisions governing in-precinct EDR are justified by the state's interest in ensuring that citizens can exercise the right to vote. (*See* State Defs.' Br. 28; R. 506-07, 511.) The state's burden in this case is not to show that EDR *in general* serves an important state interest, which no one disputes. Rather, the state's burden requires it to show that its EDR scheme's *discrimination* against citizens in low-population counties serves a compelling governmental interest (under strict scrutiny), or, in the alternative, an interest so important that it outweighs the burden on those citizens' rights (under lesser *Anderson/Burdick* scrutiny).

Regardless of the level of scrutiny, Defendants cannot justify the statutes' discrimination by simply citing, as they do, cases stating that the public interest "favors permitting as many qualified voters to vote as possible." *League of Women Voters of N.C. v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012)). (State Defs.' Br. 28.) Of course

those cases implicitly refer to a voting in the context of a fair election, conducted in a lawful, constitutional manner; they cannot reasonably be interpreted as endorsing discriminatory rules that enhance the voting rights of some citizens but not others. Indeed, neither of those cases cited the government's interest in increased voting to uphold a discriminatory burden on voting rights, as Defendants would have this Court do here; rather, they cited the public's interest in increased voting as a reason to *enjoin* an alleged discriminatory burden on voting rights. *See League of Women Voters of N.C.*, 769 F.3d at 247; *Obama for Am.*, 697 F.3d at 437.

Defendants also attempt to justify the statutes' discrimination by arguing that they address a problem (allegedly) observed in high-population counties (specifically Cook County), but not low-population counties, under the state's 2014 EDR pilot program: long lines at centralized EDR locations. (State Defs.' Br. at 29.) This is a new argument, which Defendants did not present in opposing Plaintiffs' motion for preliminary injunction in the district court, and it is therefore improper. *See Hicks v. Midwest Transit, Inc.*, 500 F.3d 647, 652 (7th Cir. 2007). The district court could not have abused its discretion by not accepting a justification Defendants did not present.[5]

[5] State Defendants did not preserve the argument by including it in a footnote in their motion to stay the preliminary injunction, which they filed after their notice of appeal. R. 558 n.2. *See Cent. States, Se. & Sw. Areas Pension Fund v. Waste Mgmt. of Mich.*, 674 F.3d 630, 636 n.2 (7th Cir. 2012) (footnote insufficient to preserve an argument); *Russian Media Group, LLC v. Cable Am., Inc.*, 598 F.3d 302, 308 (7th Cir. 2010) (district court rightly did not modify, and this Court could not reverse, preliminary injunction based on defense raised after injunction was entered and appealed). An amicus brief did make a similar argument about long lines in and near Chicago. R. 293-98. But the district court was not required to consider that brief at all, let alone credit its justification for a state law that the state itself did not raise, and amici cannot preserve arguments on a party's behalf.

Besides, Defendants' argument fails to justify the statutes' discrimination against citizens in low-population counties for several reasons.

*First,* Defendants lack evidentiary support for their premise that long lines were a problem only in high-population counties under the 2014 pilot program. To support this idea, Defendants cite media reports of long lines in Chicago and suburban Cook County and state that Plaintiffs have presented no evidence of comparable lines in low-population counties. (State Defs.' Br. 29-30.) But neither Plaintiffs *nor Defendants* introduced evidence on this factual issue below. Further, Defendants' argument relies on media reports of long lines in high-population counties. If there were no similar media reports of long lines in low-population counties in 2014, as Defendants and their supporting amici suggest, that would not suffice by itself to prove that there were, in fact, no long lines in those counties. That is one possible explanation; but it is also possible that there were some long lines in low-population counties, but they did not receive media attention because they were in areas with few media outlets and few activists monitoring the polls. Defendants did not present the district court with any evidence that would favor one conclusion over the other, so the district court could not have abused its discretion in declining to credit Defendants' explanation for the statutes' discrimination (if Defendants had presented this argument at all, which they did not).

*Second*, even if one accepts Defendants' unsupported factual premise that there were no lines for EDR at centralized locations in low-population counties in 2014,

that does not show that in-precinct EDR was more urgently needed in high-population counties than in low-population counties. To the contrary, it could be that traveling to a centralized location is so inconvenient for many citizens in low-population counties that they simply did not attempt to take advantage of EDR in 2014 – which would suggest that in-precinct EDR would benefit voters in low-population counties *more* than it benefits voters in high-population counties.[6] Again, Defendants presented the district court with no evidence that would support one conclusion over the other (or, again, any argument at all on this point), so the district court could not have abused its discretion in declining to accept Defendants' justification.

*Third*, Defendants point to reports of long lines in Chicago and Cook County in particular – not in the other 19 counties where Illinois has mandated in-precinct EDR. (State Defs.' Br. at 29.) Defendants have not explained why the state mandated in-precinct EDR in all 20 high-population counties to remedy a problem

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[6] Data from the 2014 election show that this hypothesis is plausible. An amicus brief opposing Plaintiffs' motion for preliminary injunction observed that 72 percent of voters who took advantage of centralized EDR under the 2014 pilot program lived in Cook County, even though Cook County accounted for just 41% of the voting age population. R. 409-10.

Casting further doubt on Defendants' idea that in-precinct EDR is most urgently needed in high-population areas, all of the other states that have adopted in-precinct EDR or its substantial equivalent have been relatively sparsely populated states with no cities approaching Chicago's size: Idaho (ranked #44 in population density); Iowa (#36); Minnesota (#30); New Hampshire (#21); North Dakota (#47); Utah (#40); Wisconsin (#25); and Wyoming (#49). *See* List of U.S. states by population density, Wikipedia, https://en.wikipedia.org/wiki/List_of_U.S._states_by_population_density (last visited Dec. 20, 2016).

Also, Plaintiffs' expert noted that the academic literature shows that people with moderate income and education benefit disproportionately from EDR – and, he noted, lower-population Illinois counties have a higher proportion of residents with moderate levels of income and education compared to larger counties. R. 477-78.

that, according to their allegations, was specific to Cook County – which discredits their argument that the scheme was tailored to address the differing needs of high-population counties and low-population counties.

*Fourth* – and most important – Defendants' argument fails because the state's determination that members of one group are more likely to benefit from or take advantage of a voting right than members of another group cannot justify the denial of that right to members of the second group. The state is obligated to protect equal voting rights regardless of any government officials' beliefs – well-founded or not – about who will take the most advantage of them, and regardless of whose rights activist groups such as the amici have focused on. 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." R. 511.

**b. Concerns about cost and administrative convenience cannot justify the state's discrimination against citizens in low-population counties.**

The district court also rightly rejected Defendants' argument that the statutes' discrimination is justified because of the financial and administrative burdens that in-precinct EDR might impose on low-population counties. R. 507-08. Defendants' argument is fatally flawed in several respects.

*First*, a desire to avoid costs or administrative inconvenience is not a compelling or important governmental interest – let alone an interest so important that it can justify guaranteeing citizens of certain counties better access to voting than citizens

of other counties. To the contrary, courts have rejected reduction of costs and administrative inconvenience – i.e., expedience – as a justification for violating constitutional rights, including voting rights. *See, e.g., Bush*, 531 U.S. at 108 ("A desire for speed is not a general excuse for ignoring [voters'] equal protection guarantees."); *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975) ("administrative convenience" could not justify constitutional violation in jury selection); *Shapiro v. Thompson,* 394 U.S. 618, 633 (1969) (desire to limit costs could not justify "an otherwise invidious classification" of citizens); *Stein v. Thomas*, No. 16-14233, 2016 U.S. Dist. LEXIS 167055, *6 (E.D. Mich. Dec. 5, 2016) (under *Anderson*/*Burdick* analysis, "with the perceived integrity of the presidential election . . . at stake, concerns about cost pale in comparison"); *Fla. Democratic Party v. Detzner*, No. 4:16cv607-MW/CAS, 2016 U.S. Dist. LEXIS 143620, *22 (N.D. Fla. Oct. 16, 2016) (desire to avoid "administrative inconvenience" could not justify Florida law allowing voters to cure lack of signature, but not a mismatched signature, on mail-in ballots); *Fla. Democratic Party v. Scott*, No. 4:16cv626-MW/CAS, 2016 U.S. Dist. LEXIS 142064, *12 (N.D. Fla. Oct. 10, 2016) ("administrative convenience" could not justify state's refusal to extend voter registration deadline to accommodate citizens who fled hurricane). Defendants have cited no cases, and Plaintiffs have found none, in which expedience has been held sufficient to justify a burden on voting rights comparable to the one at issue in this case.

*Second*, Defendants have presented no evidence to support the factual premise underlying their argument: the idea that in-precinct EDR is financially or

administratively easier to implement in high-population counties than it is in low-population counties. It is not obvious that this is true.[7]

In fact, SB 172's legislative history shows that election authorities in both high-population counties and low-population counties opposed the bill because of the burdens it would impose on them. *See* 98th Ill. Gen. Assembly, House Proceedings, Dec. 3, 2014,[8] at 28-29 (Statements of Rep. Brady) (addressing the bill's primary sponsor, Rep. Barbara Flynn Currie: "[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-

[7] One reason why it is not obvious is because, again, all the other states to adopt in-precinct EDR have done so statewide, even though they are significantly less densely populated than Illinois, lack any cities approaching the size of Chicago, and have many low-population counties.

[8] Available at http://www.ilga.gov/house/transcripts/htrans98/09800151.pdf.

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).

The legislative history also shows that the legislators who sponsored and voted for SB 172 in the House deliberately declined to seek information about the costs the bill would impose on high-population counties and 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.[9] It is implausible that SB 172 was tailored to address the differing burdens in-precinct EDR would impose high-population and low-population counties, respectively, when legislators affirmatively chose not to inform themselves about a mandate's likely fiscal impact on those counties.

The portions of the legislative history that Defendants have cited do not demonstrate that the statutes were designed to spare low-population counties financial and administrative burdens they could not afford to bear. Defendants observe that the Illinois Association of County Clerks and Records ("IACCR") initially filed a "no position" slip on SB 172 but then filed a "proponent" slip after the opt-out provisions were added. (State Defs.' Br. 28-29 & n.7.) But that proves nothing: countless factors could have influenced IACCR's decision to support the bill – which encompassed many more election-related subjects than in-precinct EDR – after initially taking no position. Defendants also cite a statement by the bill's

[9] *See* 98th Ill. Gen. Assembly, House Proceedings, Dec. 3, 2014, at 23; 98th Ill. 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.

sponsor that the idea for the opt-out provision "came from a clerk . . . from the clerk themselves (*sic*) who were concerned about being required to offer in-precinct registration and vote (*sic*) opportunities on Election Day itself," but that is similarly unenlightening because it is not clear whether it refers to a single clerk or multiple clerks, let alone which clerks in particular, the specific nature of those clerks' concerns, or the magnitude of the burdens that in-precinct EDR would impose on election authorities in low-population counties and high-population counties, respectively. Therefore, even if administrative convenience could theoretically justify *some* burdens on voting rights, the district court did not abuse its discretion in concluding that the Defendants' minimal evidence regarding the low-population counties' relative ability to implement in-precinct EDR did not suffice to justify the burden that the state's EDR scheme imposes on the voting rights of citizens in those counties. R. 507.

*Third* – and most important – even if Defendants could show that high-population counties can better afford to implement EDR than low-population counties, that would only demonstrate the *wrongfulness* of the statute's discrimination against citizens in low-population counties. Defendants essentially argue that the state can treat voters in less affluent areas worse than voters in more affluent areas, specifically *because* they live in less affluent areas. [10] As the

[10] Below, State Defendants justified the statutes' opt-out provisions for election authorities in low-population counties by citing the "duties and financial mandates" that in-precinct EDR would impose on election authorities in low-population counties. R. 249. Clerk Orr similarly cited "the more limited resources of smaller-population counties." R. 371. On appeal, Defendants have modified their wording to argue that legislators might have concluded that in-precinct EDR would be "administratively unmanageable" in low-

district court recognized, a citizen's voting rights should not depend on whether he or she lives in a relatively affluent county. R. 508.

### B. The district court did not abuse its discretion in concluding that a preliminary injunction would prevent irreparable harm to Plaintiffs and the citizens whose interests they represent.

The district court did not abuse its discretion in concluding that a preliminary injunction was necessary to prevent irreparable harm to Plaintiffs and the voters whose interests they represent. As the district court stated, the harm to voting rights that Plaintiffs sought to prevent was irreparable because an election, once over, cannot be rerun, and "the impairment of the fundamental and intangible right to vote [cannot] be quantified in money damages." R. 503. *See Obama for Am.*, 697 F.3d at 436 (statute limiting early voting period for some citizens but not others would cause irreparable harm); *Hutchinson v. Miller*, 797 F.2d 1279, 1287 (4th Cir. 1986) ("federal courts do not . . . award post-election damages to defeated candidates" and "such compensation is fundamentally inappropriate"); *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 [his] party, if any, who support the candidate" and "citizens who would have voted for him").

On appeal, Defendants argue that a preliminary injunction could not be necessary to prevent irreparable harm to Plaintiffs because the November 2016 election is now over, and the district court might resolve Plaintiffs' claims before the

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population counties. (State Defs.' Br. 28.) But if in-precinct EDR would be "administratively unmanageable" in low-population counties, that must be due to a *lack of resources* resulting from *less money*. And in any event Defendants may not change the substance of their argument on appeal.

next statewide election. And, Defendants argue, if the district court does not resolve Plaintiffs' claims before the next election, Plaintiffs can file a new motion for preliminary injunction in the district court. (State Defs.' Br. 12-13.)

Defendants' argument fails because it is irrelevant to the issue on appeal: whether the district court abused its discretion when it concluded, *before* the November 2016 election, that Plaintiffs would suffer irreparable harm without a preliminary injunction. The question of whether it would be an abuse of discretion for the district court to conclude that a preliminary injunction is necessary to prevent irreparable harm to Plaintiffs *now*, after the November 2016 election, is not before the Court. *Cf. Ashcroft v. ACLU*, 542 U.S. 656, 672 (2004) (affirming preliminary injunction and stating that changes in factual and legal circumstances that occurred while the appeal was pending should be addressed in the first instance by the district court).

Putting that fatal flaw aside, Defendants' argument still fails because Plaintiff Crawford County Republican Central Committee and the voters whose interests it represents still stand to suffer the same irreparable harm in every election as long as the challenged provisions remain in effect and the Crawford County election authority chooses not to provide in-precinct EDR. In every election, Crawford County voters will not be able to vote on an equal basis with voters in high-population counties who are guaranteed the right to register at their precinct polling places on Election Day. Therefore – assuming for the sake of argument that

the district court's order applied to any future election – the court did not abuse its discretion in finding that an injunction was necessary to prevent irreparable harm.

Defendants also argue that the state's EDR scheme does not threaten to cause any irreparable harm because residents of low-population counties have other opportunities to register and vote besides in-precinct EDR. (State Defs.' Br. 31.) But that assumes that the state's discrimination against citizens in low-population counties imposes no burden on voting rights – which, to the contrary, it does, as discussed above. Moreover, Defendants' argument contradicts the arguments they and their supporting amici made below that enjoining in-precinct EDR statewide would harm voters in high-population counties who would no longer be able to take advantage of it. R. 301-03, 362, 277, 409-11.

Defendants also argue that Plaintiffs undercut their claim of irreparable harm by filing their motion for preliminary "more than *18 months* after the provisions they are challenging became law," which Defendants call a "lengthy delay" – essentially arguing that, if Plaintiffs *really* faced a threat of irreparable harm, they would have sought an injunction much sooner after the statutes took effect.[11] (State Defs.' Br. 32.) That kind of "delay" argument might have some merit against a plaintiff who could be presumed to be fully aware of his or her rights and to have ready means of defending them in court. *Cf. Nader v. Keith*, 385 F.3d 729, 736 (7th Cir 2004) (affirming denial of preliminary injunction to put Ralph Nader on ballot because, among other reasons, Nader's past experience seeking ballot access in

[11] This seems to be inconsistent with Defendants' argument that Plaintiffs currently face no threat of irreparable harm because the next statewide election will not be held until March 2018, more than 13 months from now. (State Defs.' Br. 12-13.)

Illinois should have put him on notice of his cause of action and prompted him to sue as soon as he declared his candidacy). But it would not be reasonable to expect Plaintiffs – a truck driver who never ran 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.

### C. The district court did not abuse its discretion in concluding that the balance of hardships favored a preliminary injunction.

The district court did not abuse its discretion in concluding that the balance of hardships favored an injunction.

As discussed above, Plaintiffs stood to suffer irreparable harm without an injunction because, once the November 2016 election was over, they and the citizens whose interests they represent would forever lose their right to participate in that election on an equal basis with citizens in high-population counties. The election could not be redone, and monetary damages could not make them whole.

As for hardship to Defendants, the State Defendants did not show below that a preliminary injunction would harm them *at all*. They did not argue that an injunction ordering them to direct election authorities not to implement in-precinct EDR would impose significant costs or other burdens on them. Nor did they argue that an injunction would somehow interfere with their ability to supervise the November 2016 election or give rise to a greater risk of other election-related evils such as voter fraud.

Clerk Orr argued below 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 did not show that any changes that an injunction would require would be especially difficult to implement. R. 377-78. The only change of plans he specifically identified was the "transfer [of] election judges from the polling places to off-site registration sites," which presumably would not have been especially costly or difficult with nearly two months' notice. R. 379. Clerk Orr stated that his office spent "roughly $250,000 to add equipment to the polling places that will expedite registration and insure voter identity," but he did not argue that this investment would be wasted if it could not be used for polling-place EDR in the November 2016 election. R. 378. (And even it would have been wasted, that sunk cost would not outweigh the irreparable harm to Plaintiffs' constitutional interest.)

The Board argued below that an injunction would require county clerks in high-population counties to "scramble" because the law required 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 would not be available. R. 363. In fact, however, the September 19 deadline would not have prevented county clerks from expanding early voting opportunities even after that deadline passed. The law explicitly authorizes clerks to create additional temporary voting locations after September 19, 10 ILCS 5/19A-25(e), and would not have prohibited them from expanding polling-place hours after initially posting a schedule on

September 19. Defendants have not argued, let alone established, that this would be infeasible or unduly burdensome.

Because Defendants failed to establish that an injunction would cause them significant harm – let alone a harm so significant that it outweighs the constitutional harm Plaintiffs would suffer without an injunction – the district court did not abuse its discretion in concluding that the balance of harms favored an injunction.

On appeal, Defendants do not even make the (minimal) arguments about harm that they made to the district court, and those arguments should therefore be deemed waived. *See Zuppardi v. Wal-Mart Stores, Inc.*, 770 F.3d 644, 648 (7th Cir. 2014) (perfunctory, undeveloped argument on appeal could not establish abuse of discretion); *Montgomery v. Am. Airlines, Inc.*, 626 F.3d 382, 392 (7th Cir. 2010) (appellant waived argument he failed to develop on appeal). Instead, Defendants simply argue that an injunction would harm their interest in implementing the state's policy favoring increased opportunities to register and vote. (State Defs.' Br. 32-33.) But that argument cannot suffice because it assumes that the state has chosen a lawful means of serving that policy – which, as discussed above, it has not. Because the statues advance the state's putative interest by unconstitutional means, Defendants can suffer no harm from being prevented from implementing them. *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").

### D. The district court did not abuse its discretion in concluding that the public interest favored a preliminary injunction.

Finally, the district court did not abuse its discretion in concluding that the public interest favored a preliminary injunction.

Before the district court, Defendants relied heavily on the "public interest" factor of the preliminary injunction analysis. R. 361-63, 377-79. On appeal, however, they have abandoned (and therefore waived) almost all of the arguments they made below on this point, and they instead simply cite the Fourth Circuit's statement that "[t]he public interest . . . favors allowing as many qualified voters to vote as possible." *League of Women Voters of N.C.*, 769 F.3d at 247. (State Defs.' Br. 33.) As discussed above, that statement cannot reasonably be interpreted as condoning just *anything* a state might do that expands voting opportunities for some group of voters. Again, that case did not consider, let alone uphold, a discriminatory provision that guaranteed some voters better rights than others.

In the district court, Defendants and their supporting amici relied heavily on the harm that an injunction allegedly would cause to citizens in high-population counties who would seek to take advantage of in-precinct EDR if it were available. R. 301-02, 362, 377, 409-11. But citizens suffer no cognizable harm if EDR is equally unavailable to everyone, as the injunction provided. The public's interest in having in-precinct EDR – something Illinois never previously offered to anyone in a general election, and which only six other states permanently provide to their voters – is relatively minor compared to the public's extremely strong interest in having fair, democratic elections in which all qualified citizens have an opportunity to

participate on an equal basis. *See, e.g., Dunn*, 405 U.S. at 336. After all, there is no constitutional right to have in-precinct EDR at all, but there is a constitutional right to vote on an equal basis with others in one's jurisdiction. As the district court put it:

> [T]he unavailability of such [in-precinct EDR] for citizens in certain counties [resulting from the injunction] is not actually a harm. It is in reality the removal of an unfair advantage from some United States citizens in Illinois that levels the election playing field, and is consistent with the Equal Protection Clause. The [right to] equal protection under the United States Constitution does not disappear or evaporate just because a legislation might be a benefit to certain United States citizen voters in a certain geographic area.

R. 510.

So even if providing in-precinct 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 the Equal Protection Clause because it favors some voters over others based on an arbitrary factor.

For these reasons, the district court did not abuse its discretion in concluding that the public interest favored a preliminary injunction.

## Conclusion

The Court should dismiss this appeal as moot because it seeks review of a preliminary injunction that applied to an election that has already occurred. In the alternative, the district court's order granting a preliminary injunction should be affirmed.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Circuit Rule 32(c) because it contains 13,749 words, excluding the parts of the document exempted by Fed R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced font, Century Schoolbook, with 12-point type in the body of the document and 11-point type in the footnotes.

/s/ Jacob H. Huebert
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**CERTIFICATE OF SERVICE**

I certify that on December 22, 2016, I served Plaintiffs-Appellees' brief on all counsel of record by filing it with the appellate CM/ECF system.

/s/ Jacob H. Huebert
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