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

PATRICK HARLAN,et al.,	)	
	)	
Plaintiffs,	)	No. 16 C 7832
	)	
v.	)	Judge Der-Yeghiayan
	)	
CHARLES SCHOLZ, et al.,	)	
	)	
Defendants.	)	

REPLY MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

The defendants, the members of the Illinois State Board of Elections in their official capacities, by their attorney, Lisa Madigan, Attorney General of Illinois, submit the following reply memorandum in support of their motion to dismiss.

ARGUMENT

I. Same-day registration does not "burden" voting rights.

Plaintiffs characterize the challenged law as a law that "*burdens* the voting rights of some of a state's citizens more than it *burdens* the voting rights of others." Doc. 32, Plaintiffs' Response at 1. If this were a law that imposed a fee for registering to vote, required a literacy test, actively impeded voting rights for persons based on race or political ideology, permitted absentee or early voting in some parts of the state but not others, or permitted same-day registration in some parts of the state and denied it outright in others, then plaintiffs' rhetoric about "burdening" voting rights would have some bite, and the Court's scrutiny of such laws would justifiably be far more exacting. But there is no fundamental right to register to vote on Election Day in one's home precinct. The statute at issue here is trying to ameliorate matters of

timing and administration for voting registration, but does not burden the right to vote itself. It is a means toward an end—to make it more convenient for people to vote.

But the plaintiffs' characterization of the law challenged here is neither fair nor accurate. No one seeking to register will be "turned away," as plaintiffs put it, on Election Day. As we recounted in our memorandum in support of the motion to dismiss, the challenged law represents the latest in a series of incremental steps designed to *ease* restrictions on registering to vote. These reform measures—and in fact, "reform" is a far more accurate characterization than "burden"—now permit same-day registration across the state. Earlier laws closed registration 28, or 14, seven, and then three days before Election Day. Doc.14, Def. Mem. at 12. With the passage of Public Act 98-1171, voters in all parts of the state can now register on Election Day itself. Voters in larger counties can do so at the same precinct where they vote. Illinois counties with populations of less than 100,000 that do not have electronic poll books[1] may opt out of offering registration in every precinct. If they do, they are required to offer same-day registration at the election authority's main office and at 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 in that municipality. 10 ILCS 5/4-50, 10 ILCS 5/5-50, and 10 ILCS 5/6-100. Election authorities in the smaller counties can also choose to go beyond this requirement by offering more registration locations. The State's efforts here are designed to enhance, not restrict, the right to vote. The Court's standard of review should accordingly be deferential. Plaintiffs' approach would have the perverse effect of striking down the law in its entirety, making it more difficult for everyone

[1] Counties that have electronic poll books must offer same-day registration at the polls regardless of population. 10 ILCS 5/4-50. For example, Grundy County, with a population of approximately 50,000 people (*see* Doc. 1-1 at 17), has electronic poll books and will offer registration at the polls on Election Day. *See* http://www.grundyco.org/county-clerkrecorder/clerk-home/elections-department/grace-period-voter-information/ (last visited August 30, 2016).

to register. This is hardly the result dictated by the Equal Protection Clause and the large body of law construing it. The Constitution does not prohibit states from experimenting with better technologies and procedures designed to eliminate barriers to voting.

II. Rational basis review is appropriate under equal protection principles or *Anderson* and *Burdick*.

Plaintiffs' characterization of the overall tenor of the law is not the only substantial error in their memorandum in opposition to the motion to dismiss. A great deal of the discussion in their brief is whether the rational basis test can properly be applied to any case that touches on aspects of election procedures. Plaintiffs make this categorical assertion, again using the totally inappropriate "burden" language which we strongly dispute: "When plaintiffs bring a constitutional challenge to a law that burdens citizens' voting rights—or that burdens the voting rights of some citizens more than it burdens the voting rights of others—the federal courts apply the balancing test prescribed in *Anderson v. Celebrezze*, 460 U.S. 708 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), not the extremely deferential rational basis test…." Doc. 32 at 2. Later, they repeat the assertion: "In the modern case law, federal courts apply the *Anderson/ Burdick* test to all claims that a state election law burdens certain citizens' voting rights." *Id.* at 5.

This is incorrect, demonstrably so. Courts apply the rational basis test all the time in matters touching elections. Moreover, even if the Court applied the *Anderson/Burdick* test here, the result would be the same. Neutral non-discriminatory laws relating to elections will generally be upheld under the *Anderson/Burdick* test, and the test is, like rational basis, very deferential to governmental interests.

Plaintiffs filed a one-count complaint under the Equal Protection Clause, and alleged there was no rational basis for the distinctions made between the large and small counties. Doc. 1, Complaint, ¶ 3, 54. There was no separate claim under the First Amendment asserting a denial

of voting rights themselves. Plaintiffs seemed to acknowledge in their own complaint the possible relevance of rational basis as a standard of review, having taken pains to plead the statute lacks such a rational basis. Now plaintiffs seem to be retreating from that stance altogether.

Rational basis is a test often used in cases regarding voting rights and elections. Most recently (August 23, 2016), it was used by Judge Gottschall in *Segovia v. Board of Elections Commissioners for City of Chicago*, --F.Supp.3d--, 2016 WL 4439947 (N.D. Ill. 2016). The question was whether a federal statute violated equal protection because residents of Guam, Puerto Rico, or the U.S. Virgin Islands could not cast absentee ballots in Illinois, while those in the Northern Marianas Islands could. The Court held rational basis was the correct standard, and rejected the constitutional challenge to a federal law regarding absentee voting. *Id.* at *1, *18 n.19. In *Johnson v. Bredesen,* 624 F.3d.742 (6th Cir. 2010), the constitutionality of a state's law on felon disfranchisement was analyzed, and upheld as constitutional, under the rational basis test. *Id.* at 746-48. *See also Mixon v. State of Ohio,* 193 F.3d 389, 402 (6th Cir. 1999) (rational basis test used, no fundamental right to elect an administrative body); *Tigrett v. Cooper,* 855 F.Supp.2d 733, 753 (W.D. Tenn. 2012) (race-based vote dilution claim analyzed under rational basis test); *Green v. City of Tucson,* 340 F.3d 891, 902 (9th Cir. 2003) (no right to vote on municipal incorporation, rational basis test applied); *Carlson v. Wiggins,* 675 F.3d 1134, 1141-42 (8th Cir. 2012) (no fundamental right to vote for members of commission appointing judges, rational basis test applied); *Harvey v. Brewer,* 605 F.3d 1067, 1079-80 (9th Cir. 2010) (conditions for restoring felons' right to vote, rational basis test); *American Assoc. of People with Disabilities v. Shelley,* 324 F.Supp.2d 1120, 1127-28 (C.D. Cal. 2004) (decertification of touch screen voting device arguably impacting disabled voters, citing *Burdick,* rational basis test); *One*

Wisconsin Institute v. Nichol, 155 F.Supp.3d 898, 903 (W.D. Wis. 2015) (voter registration, finding rational basis for distinction between voters moving in to the state and those moving within the state).

There is no basis to conclude that the rational basis test is off limits merely because the subject of the case is, broadly speaking, about elections and voting. To be sure, there are some cases which say that all ballot access cases (and our case is not a ballot access case) should be judged by the *Anderson/Burdick* test. *See Green Party of Tennessee v. Hargett*, 791 F.3d 684, 692 (6th Cir. 2015). In *Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 731-33 (9th Cir. 2015), the court applied a rational basis test to uphold a state election law that was found to impose only a *de minimis* burden on a party's First and Fourteenth Amendment rights. This prompted a dissent from Judge McKeown, who said the operative test should be *Anderson/Burdick. Id.* at 735. But she went to say that "the semantic distinction between the balancing test and the rational basis standard" would make "little difference in most cases." *Id.*

That is the relevant point here. Under *Anderson/Burdick*, if a law imposes a severe burden on a party's constitutional rights, it must be narrowly tailored and serve a compelling state interest. But laws that impose only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters will generally be upheld. *Burdick*, 504 U.S. at 434. It is in effect a sliding scale balancing test. For laws imposing no real burden on voting rights, the *Burdick/Anderson* test is the practical equivalent of a rational basis test. *See Gustafson v. Illinois State Board of Elections*, No. 06 C 1159, 2007 WL 2892667 at *9 (N.D. Ill. 2007). And with respect to the same-day registration statute challenged here, it is difficult to see how it can be characterized even as a *restriction* of anyone's right to vote or to register to vote—it makes

registration easier, not harder. That is a legitimate state interest which this Court should vindicate.

The nature of the challenged statute is what should be determinative, not a theoretical discussion of whether the predominant test should be rational basis originating in the Equal Protection Clause or its functional equivalent under *Anderson/Burdick.* Same-day registration is manifestly benign in the constitutional sense no matter which lens one uses.

Legislatures can act one step at a time. The State's most recent step is to permit registration on Election Day at a variety of locations around the state, giving smaller counties some alternatives other than registration in every precinct. The State's efforts to do so should not be invalidated.

CONCLUSION

The defendants request that their motion to dismiss for failure to state a claim be granted.

Respectfully submitted,

LISA MADIGAN
Attorney General of Illinois

By: */s/ Thomas A. Ioppolo*

Thomas A. Ioppolo
Sarah H. Newman
Assistant Attorneys General
100 W. Randolph Street, 13th Floor
Chicago, Illinois 60601
312- 814-7198 / 312-814-6131
tioppolo@atg.state.il.us
snewman@arg.state.il.us

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the aforementioned document was filed through the Court's CM/ECF system on September 13, 2016. Parties of record may obtain a copy through the Court's CM/ECF system. The undersigned certifies that no party of record requires service of documents through any means other than the CM/ECF system.

/s/ Thomas A. Ioppolo