

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

PATRICK HARLAN, <i>et al.</i>,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 16 C 7832
	)	
CHARLES W. SCHOLZ, <i>et al.</i>,	)	
	)	
Defendants,	)	Hon. Samuel Der-Yeghiayan
	)	
and	)	
	)	
DAVID ORR, Cook County Clerk,	)	
	)	
Intervenor-Defendant.	)	

**COOK COUNTY CLERK DAVID ORR'S
REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

Plaintiffs' primary response to the pending motions to dismiss is to repeat, on nearly every page of their brief, an unsupported conclusion that Illinois' EDR legislation places some considerable burden on citizens' voting rights. It is as if repeating it might make it true. But Plaintiffs provide nothing beyond conclusory allegations to establish the central element of their complaint: what this burden or restriction actually is. The terms of the challenged legislation make clear that the EDR amendments create neither a burden upon the voting rights of any Illinois citizen nor a deprivation of any previously-held right. 10 ILCS 5/4-50, 5-50, 6-100 (2016). To the contrary, with this law the Illinois General Assembly has taken an incremental step toward its goal of eliminating barriers to eligible citizens who wish to vote. As the relevant case law holds, this class of legislative action does not merit a heightened form of scrutiny. In the absence of any burden upon a protected right, this Court should find that the law is rationally

related to the legitimate State interest of providing greater access to the polling place and dismiss Plaintiffs' complaint.

A. THE CHALLENGED PROVISIONS BURDEN NO CONSTITUTIONAL RIGHT.

Throughout their brief in response to the motions to dismiss ("Response"), Plaintiffs chant their conclusion that Illinois' EDR law imposes some significant burden upon the voting rights of smaller-county citizens. For example Plaintiffs assert that the law "[r]estricts citizens' access to the democratic process" and that it places a "burden on citizens' right to vote." Response at 3, 11. Plaintiffs claim that the law places "different burdens on different groups." Response at 4. Plaintiffs assert that the "burden imposed by the law Plaintiffs challenge is *not* slight." Response at 12 (emphasis in original). Nowhere, however, do Plaintiffs get around to establishing how the law actually burdens any citizen's right to vote.

In order to survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009)(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). In its attempt to draw such an inference, the court will construe the complaint in a light favorable to the plaintiff and the court must accept all material facts alleged in the complaint as true. *Jackson v. E.J. Branch Corp.*, 176 F.3d 971, 978 (7th Cir. 1999). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal* 556 U.S. at 678. "Nor does a complaint suffice if it tenders 'naked assertion[s] devoid of further factual enhancement.'" *Id.*

The Supreme Court in *Iqbal* established a two prong inquiry when reviewing 12(b)(6) dismissals. First, pleadings consisting of conclusory allegations are not accepted as true when reviewing the complaint's sufficiency. This includes conclusory statements "couched" as factual allegations, and recitations of the elements. Second, after excising the conclusory allegations from the complaint, any well-pled factual allegations are accepted as true and then the Court must determine whether the remaining well-pled facts "plausibly give rise to an entitlement of relief." *Id.* at 679. In the present case, after excising all of the Plaintiffs' conclusions regarding a claimed burden upon voting rights stemming from the EDR law, there is virtually nothing left.

According to *Black's Law Dictionary*, the term "burden" means "A heavy load; A responsibility, onus; A cause of worry; To encumber with a burden (in any of the noun senses of the word)." *Black's Law Dictionary Free Online Legal Dictionary 2nd Ed.* In their complaint, however, Plaintiffs nowhere allege anything to establish that the EDR law imposes any such load, responsibility, worry or encumbrance upon any voter. That is because the statute places no additional duty or responsibility on any citizen in order to vote.

Unable to get beyond conclusory allegations to establish that the provision burdens voting rights, Plaintiffs engage in speculation about the comparative abilities of "large county" and "small county" citizens to register to vote at a polling place on election day. These statements also are purely conclusions, unsupported with any factual content, such as whether small county voters in Illinois historically have participated in any form of EDR, and if so, in what numbers. Plaintiffs also assert the unsupported conclusion that the law will deprive citizens of small counties of the right to vote as compared with citizens of larger counties. Complaint at pars. 41, 46.

Instead of providing the Court with Illinois-specific data, Plaintiffs resort to general statements of possible outcomes that could flow from this law, such as "it is quite possible that

Illinois EDR scheme will have the effect of diminishing Republican votes relative to Democratic votes,” and “Illinois EDR scheme will tend to give an advantage to candidates who draw support from high-population counties when they compete against candidates who draw support from low-population counties.” Complaint at pars. 35, 33 (emphasis supplied). Such speculative conclusions absent any factual content are not sufficient allegations upon which to base a legal claim under *Iqbal* and *Twombly*.

The language of the statute makes clear that it is an effort to provide for polling-place EDR state-wide, subject to the ability of smaller counties without electronic polling books to opt out. As will be shown below, this approach does not impose a constitutionally-cognizable burden. Nothing has been taken away from the rights of small county citizens and their election authorities are subject to the polling-place EDR unless they opt out of such requirements. A county election authority in an opt-out county could opt back in at any time and provide for polling place EDR. Similarly, voters in small counties dissatisfied with their election authority’s opt-out from providing polling place EDR could use the power of the ballot box to replace that official.

Recent case law on constitutional claims that, like here, allege that a regulation is underinclusive in its scope also defeat Plaintiffs’ claim of burden. For example *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015), involved a judicial candidate’s First Amendment challenge to a restriction that prohibited her from soliciting campaign contributions, although the judge’s campaign committee could do so. In upholding the restriction, the Supreme Court noted:

It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging too little speech. . . . A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests.

Id. at 1668. In *Williams-Yulee*, the Supreme Court rejected the plaintiff’s underinclusive argument, noting that the challenged rule “applied evenhandedly to all judges and judicial candidates, regardless of their viewpoint” *Id.*; see also *Illinois Liberty PAC v. Madigan*, 2016 U.S. Dist. LEXIS 120277, *41-42, *44 (N.D. Ill. Sept. 7, 2016)(ruling that campaign contribution limits applicable to legislative caucus committees do not violate the First Amendment or Equal Protection Clause, noting that “Illinois reasonably concluded that corruption (or the appearance thereof) by private individuals and non-legislative entities poses a far more serious risk to the democratic process than does a legislative leader contributing to another legislator or electoral candidate in that leader’s own caucus.”).

As in *Williams-Yulee*, the EDR statute applies across the board in all counties, regardless of their historical political leanings. Plaintiffs’ attempt to insert a political bias into the workings of the EDR provisions is nothing but speculation, with no foundation in fact or actual Illinois voter registration experience. Plaintiffs’ complaint therefore is deficient as a matter of law as it fails to allege facts supporting any real-life, constitutionally-protected burden upon the right to vote that has been imposed by the EDR legislation.

B. IN THE ABSENCE OF A LEGISLATIVE BURDEN UPON THE RIGHT TO VOTE, RATIONAL BASIS IS THE PROPER LEVEL OF JUDICIAL REVIEW.

Plaintiffs devote the majority of their Response to an argument that this Court should analyze the EDR law under the “*Anderson/Burdick*” test and not under the rational basis

standard.¹ See *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). In the present case, that is a distinction without a difference. Plaintiffs concede that the rational basis test would apply to the analysis of their claim absent some facts showing that the law “burdens citizens’ voting rights – or . . . burdens the voting rights of some citizens more than it burdens the voting rights of others” Response at 2. As discussed above, however, Plaintiffs have established no burden on voting rights.

In the absence of a burden or restriction upon voting rights, Plaintiffs also effectively concede that there is no practical difference between the rational basis and *Anderson/Burdick* tests. Response at 6-7. In this regard Plaintiffs noted that the court in *Gustafson* “‘applied the equivalent of rational basis test’ . . . only because it concluded that the challenged statute imposed a ‘minimal burden on the right to vote – that is, it concluded the burden that particular law imposed was so light that any rational government interest would outweigh it.’” *Id.*, quoting *Gustafson v. Ill. State Bd. of Elections*, 2007 U.S. Dist. LEXIS 75209, *29-30 (N.D. Ill. Sept. 30, 2007).

The three decisions that Plaintiffs highlight in their Response do not help them avoid application of the rational basis test. Plaintiffs first invoke *Bush v. Gore*, 531 U.S. 98, 106-07 (2000), as support for the position that the EDR law is unconstitutional because it allows certain counties to opt out of polling place EDR. But in *Bush*, the Supreme Court made certain to note that the question before it “is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.” *Id.* at 109. The *Bush* decision by its own terms provides no precedent for this Court’s review of this facially neutral law in which the state legislature allowed for local election authorities to develop different systems for implementing

¹ Plaintiffs do not argue in their Response that this Court should review the EDR statutes under a strict scrutiny standard.

elections, in this case voter registration. As a result, Plaintiffs seek to avoid the inapplicability of *Bush* by referring to the EDR law as the State's unequal "guarantee" of the opportunity for polling-place EDR. Response at 4, n.2. This is a myopic view of the law, however, as Plaintiffs appear blind to the bigger picture that the opportunities to register to vote across all counties are substantially the same, and they fail to recognize that under the EDR law all eligible citizens of all Illinois counties have the opportunity to register to vote on election day. Finally, Plaintiffs provide no Illinois-specific data or facts to support any conclusion that a county's decision to opt out of providing polling place EDR would impact a single vote. Under the law, "each election authority" must "establish procedures for the registration of voters . . . until and including the day of the election . . . [and] an unregistered, qualified elector may register to vote . . . at the polling place on election day" unless the county election authority opts to provide EDR elsewhere. 10 ILCS 5/4-50, 5-50, 6-100 (2016). With these provisions, the General Assembly has left it up to these local election authorities to decide, in their expertise, whether the elections in each county will include EDR at the polling place or elsewhere, but in every county the opportunity to register on election day exists. *Bush*, by its terms, is inapposite.

Plaintiffs also cite *Ohio Organizing Collaborative v. Husted*, 2016 U.S. Dist. LEXIS 85699 (S.D. Ohio May 24, 2016) ("OOC"), where the District Court concluded that the state's elimination of same-day registration at the beginning of the state's early voting period imposed a moderate burden upon African Americans' right to vote. *Id.* at *42, *53. Utilizing the *Anderson/Burdick* balancing test, the court concluded that the burden placed on African American voting was not outweighed by the state's articulated justifications of preventing voter fraud, reducing costs and administrative burden, and preventing voter confusion. *Id.* at *62-72.

The District Court's decision, however, was reversed by the Sixth Circuit, which concluded that the challenged law imposed only a minimal burden on voting rights because of the many opportunities Ohio voters have to engage in early voting. *Ohio Democratic Party v. Husted*, 2016 U.S. App. LEXIS 15433, *18 (6th Cir. Aug. 23, 2016). The Court of Appeals noted that the District Court's determination of the magnitude of the burden as moderate "is not a factual finding, but a legal determination subject to de novo review." *Id.* at *17. The court found it appropriate in weighing the burden upon voting to look at the bigger picture—the availability of early voting to all state voters. *Id.* at *22. By the same token, it is relevant to the present case that residents in smaller counties that have opted out of polling place EDR have multiple opportunities to register to vote at multiple locations up to and including election day. 10 ILCS 5/4-50, 5-50, 6-100 (2016). The General Assembly's empowerment of smaller counties to opt out of polling place EDR in no way disenfranchises their citizens or burdens in any way their ability to vote.

The Sixth Circuit also rejected out of hand the specific category of alleged burden that Plaintiffs claim in this case, finding that "the elimination of same-day registration and the resulting need for Ohioans to register and vote on separate occasions is, at most, minimally burdensome." *Id.* at *24. Upon a finding of at most a minimal burden, the court utilized "a deferential standard of review akin to rational basis" and required the state only to advance an important regulatory interest to sustain the law. *Id.* at *28-29, citing *Burdick*, 504 U.S. at 434. OOC therefore also fails to support Plaintiffs' theory of their case.²

Plaintiffs also argue that *One Wisconsin Institute, Inc. v. Thomsen*, 2016 U.S. Dist. LEXIS 100178 (W.D. Wis. July 29, 2016), supports their position that a standard of review

² On September 13, 2016, the United States Supreme Court denied the plaintiffs' request to stay the Sixth Circuit order. *Ohio Democratic Party v. Husted*, 579 U.S. ____ (Sept. 13, 2016).

greater than rational basis should apply in this case. In *One Wisconsin*, the court utilized the *Anderson/Burdick* test with respect to a number of claimed defects in the Wisconsin voting law, but only after finding that the law imposed some burden upon voting. For example, the court found that limitations on in-person absentee voting to one location per municipality, increased residency requirements, prohibitions on clerks faxing or emailing absentee ballots, and an overly cumbersome ID petition process all were unconstitutional under the First and Fourteenth Amendments because each restricted the ability of a citizen to vote.³ *Id.* at *96, *123, *134-35, *139-40. Plaintiffs miss the import of *One Wisconsin*: first, the court did not resort to the *Anderson/Burdick* test until after it first found that an aspect of the challenged law placed a burden on voting rights; and second, the provisions invalidated by the court all limited the ability of prospective voters to vote. As the district judge noted at a later stage of the case, “The enjoined provisions . . . have one thing in common: they impede Wisconsin citizens from voting.” *One Wisconsin Institute, Inc. v. Thomsen*, 2016 U.S. Dist. LEXIS 107177, *12 (W.D. Wis. Aug. 11, 2016). In contrast, the Illinois EDR amendment in no way impedes citizens from voting or burdens or restricts any right held by a voter prior to its effective date. It instead expands the right to vote to eligible persons who, for whatever reason, have not registered to vote prior to election day. *One Wisconsin* accordingly does not help Plaintiffs avoid application of the rational basis test.

Although Plaintiffs try to minimize the importance of *McDonald v. Bd. of Election Comm’rs of Chicago*, 394 U.S. 802, 808 (1969), it is still good law and is entirely consistent with the more recent cases involving challenges to election laws. Under *McDonald*, a law that does not make distinctions based upon a suspect classification and does not impact a citizen’s right to

³ The defendants’ expert in defending the restrictions to ballot access was the same Mr. Hood who has provided the statement in support of Plaintiffs’ claim in this case.

vote is analyzed under the rational basis test. *Id.* at 808. As discussed above, Illinois' EDR law on its face expands overall voter access and in no way burdens any voter's right to access the polls. Consequently, Plaintiffs do not assert that the statute creates a suspect classification. The rational basis test accordingly is the appropriate standard for this case.

C. THE LAW IS RATIONALLY RELATED TO THE LEGITIMATE STATE INTEREST OF INCREASING ACCESS TO THE POLLING PLACE.

As articulated in the State defendants' memorandum in support of their motion to dismiss, the challenged law is one of a series of incremental steps to extend "grace period" voter registration to permit easier registration. Memo in Support [Doc. #14] at 12. The law is rationally related to the legitimate State interest of removing barriers to voting and therefore does not violate the Equal Protection Clause.

Were this Court to determine determined that the Illinois EDR law imposed even a moderate burden upon voting rights, any such burden still would be outweighed by the legitimate State interest articulated within the statutory provisions themselves, as well as by members of the Illinois General Assembly during the House and Senate debates. The language of the challenged sections notes an intent to expand "grace period" voter registration to election day. 10 ILCS 5/4-50, 5-50, 6-100 (2016). And if that were not clear enough, the intent of the law was to eliminate barriers to voter registration, particularly in cities where electors previously have waited up to nine hours to register and vote.⁴ See Brief of Amicus Curiae Action Now Institute, Asian American Advancing Justice - Chicago, Change Illinois, Chicago Votes, Common Cause Illinois, The Illinois Coalition for Immigrant and Refugee Rights, and Illinois Public Interest Research Group [Doc. # 22] ("Action Now Amicus") at 2, 3. Representative Jack Franks explained that the bill was intended to address the "long line of voters who had never voted

⁴ A court may review a statute's legislative history in the context of deciding a Rule 12(b)(6) motion to dismiss. See, e.g., *Grzan v. Charter Hosp. of NW Indiana*, 104 F.3d 116, 122 (7th Cir. 1997).

before, but [who,] after waiting an hour and half” ultimately gave up. H. 98, 151st Leg. Sess. at 41 (Ill. 2014). The bill provided for the small county opt-out in order to gain the support of the Illinois Association of County Clerks and Recorders. Action Now Amicus at 9-10; *see also* discussion of legislative history in Cook County Clerk David Orr’s Response to Plaintiff’s Motion for Preliminary Injunction [Doc. # 29] at 2-3. In sum, the goal of the legislation was to “dramatically increase access to the ballot.” S. 98, 151st Leg. Sess. at 24 (Ill. 2014).

Plaintiffs raise no legitimate argument in opposition to the conclusion that the provisions of Illinois’ EDR law is rationally related to the legitimate State interest of removing barriers to voting.

D. PLAINTIFFS’ ANALYSIS FAILS TO ACCOUNT FOR THE BURDEN AN INJUNCTION WOULD PLACE UPON THE CITIZENS OF THE STATE AND ELECTION AUTHORITIES.

Plaintiffs address the weighing of the burdens supposedly imposed by the EDR law against what they claim to be the State’s interests in a brief discussion at the conclusion of their Response, arguing that the burdens imposed by the Illinois EDR law far outweigh any government interest. They are wrong, and for a reason wholly unrelated to the absence of a burden and the legitimacy of the legislative purpose for the law, as discussed above.

In articulating the State’s interests, Plaintiffs nowhere acknowledge the legitimate interest of the State and Clerk Orr in preserving the integrity of the election process and avoiding voter confusion that would result directly as a result of Plaintiffs’ nineteen month delay in filing suit following the passage of the subject law. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)(“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”) The Supreme Court in *Purcell* reversed an injunction issued by the Fifth Circuit, noting, among other things that “[c]ourt orders affecting elections, especially

conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.” *Id.* This principle has been recognized by the courts in the Seventh Circuit repeatedly. *See, e.g., Nader v. Keith*, 385 F.3d 729, 736-37 (7th Cir. 2004)(denying motion for preliminary injunction where the plaintiff’s delay in filing “created a situation in which any remedial order would throw the state’s preparations for the election into turmoil”); *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990)(barring plaintiff’s claim due to filing delay, citing the burden on the State and voter confusion where the State had proceeded to prepare for the election); *Rose v. Bd. of Election Commsrs. for the City of Chicago*, 2015 U.S. Dist. LEXIS 40030, *28-29 (N.D. Ill. March 30, 2015)(denying relief because “the Board’s election preparations have been in full swing while Plaintiff stood on the sidelines.”); *Summers v. Smart*, 65 F. Supp. 3d 556, 567 (N.D. Ill. 2014)(in a delayed filing case, “[a]t this point in time there is a substantially stronger public interest in enforcing the valid state law than there is in judicially ordering ballot access for a slate of candidates.”). Plaintiffs’ tardy filing sheds light not only on their motivation in filing suit but also on the legitimacy of their claim of burden, because a real impact upon voting most certainly would have been challenged in a more timely manner.

CONCLUSION

Plaintiffs have not alleged a colorable claim that the 2015 legislative amendments of which they complain places any burden upon the exercise of any protected right. The legislation satisfies the rational basis test and Plaintiffs' complaint accordingly should be dismissed.

Respectfully submitted,
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