Nos. 16-3547 & 16-3597

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

REPLY BRIEF OF DEFENDANTS-APPELLANTS CHARLES W. SCHOLZ, ERNEST L. GOWAN, BETTY J. COFFRIN, CASSANDRA B. WATSON, WILLIAM M. McGUFFAGE, JOHN R. KEITH, ANDREW K. CARRUTHERS AND WILLIAM J. CADIGAN

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SUMMARY OF ARGUMENT

Plaintiffs assert that the district court's injunction expired after the November 2016 general election, and on that basis they ask the Court to dismiss this appeal as moot. Pl. Br. 16-19. Although the plain language of the injunction order suggests that it was meant to remain in effect beyond the election, defendants have no objection to a dismissal on mootness grounds in accordance with plaintiffs' concession.

As for the merits, plaintiffs' brief is as notable for what it omits as for what it includes. Plaintiffs do not dispute that 10 ILCS 5/4-50 makes voting more convenient than ever before throughout Illinois, including in smaller counties, by expanding the times and places at which election authorities must make voter registration available. Plaintiffs make no real effort to demonstrate that driving to a county clerk's office or another designated site for election-day registration (EDR) to register and vote represents a serious inconvenience — let alone a severe burden — for residents of low-population counties. They all but admit, as they must, that Section 4-50 does not intentionally discriminate against members of a suspect class or, indeed, against anyone. Pl. Br. 34. They acknowledge that the statute's hypothesized partisan turnout effect is "not, in itself, the basis of Plaintiffs' equal protection claim" and that "the district court did not rely on it in granting a preliminary injunction." *Id*. And they barely even attempt to defend the district court's drastically regressive remedy, which would eliminate EDR in all polling places and all elections throughout the State.

Instead, plaintiffs are left to argue that any departure from strict geographic uniformity in the mandated availability of a registration or voting procedure that may correlate statistically with turnout ought to be treated as a *per se* "severe burden" under the *Anderson/Burdick* test. But that is not the law, and for good reason. The Supreme Court has consistently required a showing of actual severity as a prerequisite to strict scrutiny of electoral regulations, in deference to the States' broad authority over elections and because "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Even when reviewing regulations that restrict, rather than expand, voting rights, the Court has held that a minor inconvenience, such as traveling to a centralized government office to obtain a photo ID, "surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198 (2008) (plurality opinion); *id*. at 209 (Scalia, J., concurring) (same). If the plaintiffs' *per se* severe burden argument were accepted, then a host of common-sense state-law electoral regulations, right down to the choice of where to locate polling places, would become the subject of intensive federal judicial scrutiny, to the detriment of orderly election administration.

Because Section 4-50 does not prevent anyone from registering or voting, and because there is plenty of time for the district court to resolve their claims on the

merits, plaintiffs do not face irreparable harm in the absence of a preliminary injunction. Moreover, the balance of hardships and the public interest strongly favor denial of their request for interim relief.

As decisions of the Supreme Court and this Court have recognized, the Constitution does not prohibit States from expanding voting rights one step at a time, or prevent them from reasonably balancing practical considerations as they determine how best to do so. That is what Illinois has done here. The district court's grant of a preliminary injunction, insofar as it remains in effect, should be reversed.

ARGUMENT

I. Defendants Have No Objection To Dismissal On Mootness Grounds.

Plaintiffs argue that the Court should dismiss this appeal as moot because the preliminary injunction entered by the district court applied solely to the November 2016 election, which has already taken place. Pl. Br. 16-19. Plaintiffs thereby concede that the injunction they asked for and got is no longer operative. Their confined reading of the injunction's scope draws support from this Court's repeated admonition in cases applying Federal Rule of Civil Procedure 65(d) that "injunctions are construed narrowly, with close questions of interpretation being resolved in the defendant's favor." *3M v. Pribyl*, 259 F.3d 587, 598 (7th Cir. 2001); *see also*, *e.g.*, *United States v. Apex Oil Co., Inc.*, 579 F.3d 734, 739-40 (7th Cir. 2009). If this Court accepts the concession, defendants have no objection to dismissal on mootness grounds. Alternatively, this Court could remand to the district court with an order to

dissolve the preliminary injunction, as plaintiffs in effect request. Either of these options would be more economical than a remand for a clarification by the district court of the scope of the injunction or for a motion by the plaintiffs to dissolve it.[1]

If plaintiffs' concession does not dispose of the issue, however, the injunction can be read to extend past the November 2016 election — in which case this appeal would remain live — for two reasons. First, a preliminary injunction normally lasts until the relevant claim has been resolved on the merits, *see*, *e.g.*, *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *Michigan v. U.S. Army Corps of Engineers*, 667 F.3d 765, 783 (7th Cir. 2011); 11A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 2941 (3d ed. 2008), although there is some precedent for preliminary injunctions of more limited duration, *see Com. of Va. v. Tenneco, Inc.*, 538 F.2d 1026, 1030 (4th Cir. 1976); *United States v. M/V Sanctuary*, 540 F.3d 295, 303 (4th Cir. 2008). Second, as noted in defendants' opening brief, Def. Br. 13, the injunction granted by the district court was not expressly limited to the 2016 election. In particular, Rule 65(d)'s requirement that an injunctive order "state its terms specifically" and describe the acts enjoined "in reasonable detail — and not by referring to the complaint or other document" casts doubt on plaintiffs' attempt (Pl.

[1] If the appeal is dismissed, this Court's usual practice is not to vacate the underlying preliminary injunction, assuming the plaintiffs intend to pursue their claims to final judgment. *Gjertsen v. Bd. of Election Comm'rs*, 751 F.2d 199, 202 (7th Cir. 1984). The issue of vacatur is of no legal significance, however, since the preliminary injunction (vacated or not) will have lapsed, and a "preliminary injunction has no preclusive effect — no formal effect at all — on the judge's decision whether to issue a permanent injunction." *Id.*

Br. 17) to define the scope of the injunction by reference to their supporting memorandum in the district court.

II. Plaintiffs Are Not Entitled To A Preliminary Injunction.

A. Plaintiffs face no risk of irreparable harm.

As defendants pointed out in their opening brief, there is no risk that plaintiffs will suffer any harm, irreparable or otherwise, in the absence of interim relief, because there is ample time for the district court to resolve their claims on the merits before the next statewide election in 2018. Def. Br. 12-13. Plaintiffs' primary response is to argue that the relevant question on appeal is the backward-looking one of whether they faced irreparable harm with respect to the November 2016 general election at the time the district court ruled, i.e., *before* that election. Pl. Br. 45. That response misunderstands the nature of injunctive relief, which is designed to remedy *ongoing* violations of law. Indeed, regardless of whether this appeal as a whole is moot, *see supra* Part I, surely no live question remains as to whether plaintiffs faced a threat of irreparable injury sufficient to justify prospective relief in advance of an election that has since taken place.[2] The only live question concerns whether plaintiffs will be irreparably harmed in the *2018* election and beyond unless they get preliminary relief now. They have not met their burden of showing that.

[2] *Ashcroft v. ACLU*, 542 U.S. 656 (2004), cited at Pl. Br. 45, is not to the contrary. In that case, there was a "likely possibility" that the plaintiffs would be prosecuted under the challenged statute, creating the "potential for extraordinary harm and a serious chill upon protected speech." *Id*. at 670-71. Accordingly, the Supreme Court left the preliminary injunction in place, remanding for trial to allow the district court to take account of intervening technological and legal changes. *Id*. at 672. Here, there is no need for interim relief, as Section 4-50 will not be applied again before the 2018 election.

Plaintiffs maintain that they need a preliminary injunction because otherwise they will face the same threat of irreparable harm in future elections. Pl. Br. 45-46. But they face no harm at all from Section 4-50 because it does not prevent them, or anyone else, from registering or voting. Residents of smaller counties have ample opportunity to register and vote on election day at the office of the local election authority, at a required satellite EDR site in a municipality that contains more than 20% of the county's residents, or at a permanent or temporary early voting site. 10 ILCS 5-4/50. And even if having to travel to such a location constituted an irreparable harm, plaintiffs can always renew their request for a preliminary injunction before the next election if the district court has not resolved their claims by then.

B. Plaintiffs do not have a likelihood of success on the merits.

1. Plaintiffs have not established that Section 4-50 severely burdens their right to vote.

Plaintiffs do not dispute that Section 4-50 makes it possible for more Illinoisans, in more places, to register on election day than ever before. Nor do they deny that the statute makes polling-place EDR available for the first time in jurisdictions containing more than 84.9% of the State's population. Def. Br. 5. Nonetheless, they argue that the statute imposes a "severe burden," within the meaning of the *Anderson*/*Burdick* test, on residents of low-population counties without electronic poll books that choose not to implement polling-place EDR as compared to residents of other counties. *See*, *e.g.*, Pl. Br. 23. The district court agreed, finding that "in the upcoming election Illinois citizens in low-population

counties without electronic polling books will have their right to vote significantly curtailed in comparison to citizens in high-population counties and counties with electronic polling books." R. 503 (SA 4). *See also*, *e.g.*, R. 507 (SA 8) ("[t]he magnitude of the impact of the EDR upon voters in low-population counties without electronic voting books will be enormous"). Those findings are not supported by the record.

As defendants noted in their opening brief, Def. Br. 20-22, the opinion of plaintiffs' expert, M.V. Hood III, was the only evidence in the record on this issue.[3] Relying on his review of academic literature, Hood concluded that EDR is generally agreed to have a "positive effect on voter turnout." R. 101. But since Section 4-50 mandates that EDR be made available in all Illinois counties, the key empirical question is whether EDR *at polling places* has a positive turnout effect as compared to EDR *at centralized locations* such as county clerk's offices. On this question, the literature Hood reviewed was quite thin indeed. Hood summarized a single study that examined the turnout effects of different forms of EDR in other States. R. 102-03. That study classified voters into groups by age, residential mobility, and election cycle, concluding that centralized EDR was associated with a statistically significant increase in turnout for most of these groups (56%), while polling-place EDR was associated with an increase in turnout for almost all groups (94%), with the most notable increase occurring among groups that were "young and residentially mobile."

[3] Plaintiffs assert that defendants failed to question Hood's conclusions, but they note that Defendant Orr did just that. Pl. Br. 25. In any event, defendants cannot be held to have engaged in forfeiture by failing to anticipate the district court's overreading of plaintiffs' evidence.

R. 103. *See also* R. 102 ("[E]lection-day registration may be particularly helpful to younger citizens and recent movers."). Notably, Hood makes no effort to determine what proportion of the population of smaller Illinois counties is "young and residentially mobile" and therefore potentially more likely to take advantage of the polling-place version of EDR that is required in larger counties as opposed to the centralized EDR that is required in smaller counties without electronic poll books. It seems quite plausible, and the legislature could reasonably have concluded, that residents of predominantly rural counties tend to be older and more residentially stable and, therefore, less likely to use EDR in general — and less likely to benefit from polling-place as opposed to centralized EDR in particular — than are residents of more urban counties. Certainly plaintiffs' evidence does nothing to undermine such a conclusion.

Based on his review of the single study addressing different forms of EDR, Hood concluded that "[i]f one were to apply these findings to Illinois, it is *quite possible* voters in larger counties with precinct EDR would benefit to a larger extent from this reform option than would voters in smaller counties using centralized EDR." R. 102 (emphasis added). *But see* R. 108 (summarizing findings by concluding, without explanation for discrepancy in wording, that State's EDR system "will *likely* dampen any positive turnout effect relative to larger counties") (emphasis added). Of course, the mere *possibility* of *some* disparities in voter registration and votes cast, as opposed to a *probability* of *severe* disparities, is insufficient to sustain plaintiffs' burden of establishing a likelihood of success on their claim. To prevent

orders and judgments from being based on speculation or conjecture, a party's burden of proof must be sustained by evidence that a particular fact is probable, not just possible. *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993); *Olson v. United States*, 292 U.S. 246, 257 (1934); see also *Kirschner v. Broadhead*, 671 F.2d 1034, 1040 (7th Cir. 1982) ("a mere possibility is not an affirmative basis for a finding of fact"); *Jastremski v. United States*, 737 F.2d 666, 671 (7th Cir. 1984) (applying New York law). Plaintiffs did not satisfy that requirement here.

Even assuming that Hood's opinion constitutes admissible evidence that polling-place EDR will likely result in some increase in voter turnout compared to places where EDR is available at centralized locations, his opinion offers no support on the separate, and critical, issue regarding the *magnitude* or *degree* of that difference. Yet the district court leapt to the unsupported finding that the "magnitude" of this difference would be "enormous." R. 507. That finding, which is critical to the district court's conclusion that voters in low-population counties will be "severely burden[ed]" by not having polling-place EDR (R. 506), has no evidentiary basis and therefore cannot support the preliminary injunction.

The evidence presented by the plaintiffs was equally unpersuasive on the issue of whether Section 4-50 is discriminatory in any constitutionally meaningful sense. Plaintiffs cannot and do not assert that the statute classifies people along suspect lines, or indeed that it classifies people (as opposed to counties) at all. As defendants noted in their opening brief, this Court and the Supreme Court have long recognized

that geographic distinctions in legislation pose no special equal protection problems. *See* Def. Br. at 22-23 (quoting *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), and *Hearne v. Board of Educ. of City of Chicago*, 185 F.3d 770, 774 (7th Cir. 1999)). Nor have plaintiffs come close to showing that Section 4-50 discriminates on the basis of party affiliation. Indeed, they concede that any allegation of partisan discrimination "is not, in itself, the basis of Plaintiffs' equal protection claim," Pl. Br. 34, and that "the district court did not rely on it in granting a preliminary injunction," *id*.

The concession is well-taken, as plaintiffs made no effort to substantiate the required showing that Section 4-50 has a discriminatory *purpose*. To the extent disparate partisan *effects* are relevant, their expert's opinion on that issue said only that a partisan effect was "quite possible." R. 108. And, as with the general turnout effect of different kinds of EDR, he made no attempt to quantify the magnitude or degree of such an effect, if it exists. Hood's opinion, which attempts to draw a comparison between voters in Illinois's large and small counties, measures voters' party preferences by the candidates they selected in races for national or statewide office during general elections from 2004 through 2014. R. 105-06. But the data in his study show wide variations in these preferences in both groups of counties, demonstrating the limited effect of party loyalty compared to individual candidate appeal. R. 106. (For Democratic candidates, the voting percentages in different elections range from 77.4% to 46.2% in large counties and from 64.7% to 30.9% in small counties; the same percentages for Republican candidates vary from 53.8% to

22.6% in large counties and from 69.1% to 35.3% in small counties.) In addition, despite Hood's earlier comment that differences in the effect on voter turnout between polling-place and centralized EDR depend on a voter's age and residential mobility, he makes no attempt to consider how those differences might correlate with partisan preferences (*e.g.*, because younger or more transient voters may tend to vote more frequently for Democratic candidates than older or more residentially stable voters). In sum, Hood's opinion fails to provide sufficient factual support for the conclusion that polling-place EDR in larger counties will impermissibly discriminate against, or irreparably injure, Republican voters or candidates.

2. Plaintiffs' suggestion that Section 4-50 imposes a *per se* severe burden has no basis in law and should be rejected.

Unable to make the factual showing that Section 4-50 imposes a severe burden or discriminates in any constitutionally cognizable sense, plaintiffs try to define their way out of the problem by in effect arguing that any departure from geographical comprehensiveness with respect to the mandatory scope of an electoral reform that could increase turnout must be considered a "severe burden" as a matter of law. *See*, *e.g.*, Pl. Br. 21-23; *see also id.* at 34 (asserting, without record support or authority, that "the statutes Plaintiffs challenge are facially discriminatory"). But that proposition has no support in case law or common sense.

For starters, the cases plaintiffs cite for the proposition do not support it. *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Gray v. Sanders*, 372 U.S. 368 (1963), are, of course, landmark "one person, one vote" cases, grounded in the recognition that stranding citizens in overpopulated districts dilutes their representation in the

political process regardless of how or whether they vote. *See*, *e.g.*, *Gray*, 372 U.S. at 380 ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions."). The present case, which involves, at most, differences in the ease or convenience of registration, is a far cry from *Reynolds* and *Gray*—and perhaps that is why plaintiffs agree that this case, unlike those watershed precedents and their progeny, is properly analyzed within the *Anderson*/*Burdick* framework. (Pl. Br. 21-22.) *Moore v. Ogilvie*, 394 U.S. 814 (1969), in which the Court struck down an Illinois statute that diluted the political power of voters in populous counties by requiring nominating petitions for general election candidates to be signed by 200 voters in at least 50 counties, was a straightforward application of *Reynolds* and *Gray* and is likewise inapposite. *See Moore*, 394 U.S. at 817-18 (relying on *Reynolds* and *Gray*). *Communist Party of Ill. v. State Board of Elections*, 518 F.2d 517 (7th Cir. 1975), in turn, simply applied *Moore* in striking down a requirement that no more than 13,000 of a party's 25,000 nominating signatures may come from any one county. *Id.* at 520-22 (relying on *Moore*). And *Dunn v. Blumstein*, 405 U.S. 330 (1972) (cited at Pl. Br. 20, 22, 51), in which the Court struck down Tennessee's one-year durational residency requirement because it denied the vote outright to those who had recently exercised their constitutional right to travel, is completely beside the point.

As noted in defendants' opening brief (Def. Br. 25-26), *Bush v. Gore*, 531 U.S. 98 (2000), also fails to support plaintiffs' position, for several reasons. There, the

Court concluded that the lack of a statewide standard for determining the intent of the voter meant that otherwise identical ballots that had already been cast would almost surely be interpreted to mean one thing in one county and something else in another, in violation of the "rudimentary requirements of equal treatment and fundamental fairness." *Id*. at 109 (*per curiam*). Here, there is no dispute that all votes are counted equally; the issue relates solely to the locations at which EDR must be made available. Moreover, the Court in *Bush v. Gore* acknowledged that "local entities, in the exercise of their expertise, may develop different systems for implementing elections," *id.*, which is exactly what Section 4-50 leaves low-population counties free to do with respect to EDR. And besides, *Bush v. Gore* noted that "[o]ur consideration is limited to the present circumstances," and neither the Supreme Court nor this Court has seen fit to cite that case for any proposition since.[4]

But plaintiffs' *per se* severe burden argument suffers from a more fundamental problem than its lack of support in the case law: it is simply unworkable. Elections are administered locally in Illinois as in all other States, and local variations in the procedures for registration and voting are therefore ubiquitous. If all such variations were automatically subject to strict scrutiny regardless of their actual effect on the right to vote, courts would find themselves micromanaging the regulation of elections, in defiance of this Court's admonition that the balancing inherent in such

[4] As for *Mullins v. Cole*, No. 3:16-9918, 2016 WL 6871263 (S.D.W.Va. Nov. 21, 2016), cited at Pl. Br. 23, that district court case is easily distinguished on its facts, as the plaintiffs there identified more than 2,200 residents of a particular county who were not registered when they thought they were — and therefore would have been unable to vote without a preliminary injunction — due to a misleading letter sent by the county clerk. *Id.* at *5.

regulation is "quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004).

Localities differ from one another in population density, proportion of voters whose primary language is not English, number of disabled voters, availability of public transportation, and countless other relevant respects — and legislatures and election authorities often take these differences into account in crafting electoral regulations. Statutes regulating the location of early in-person voting sites, for example, properly take account of population density.[5] Jurisdictions aiming to make polling places more accessible to the disabled by subsidizing wider doors or wheelchair ramps are not required to fund all such projects at once or none at all. Voluntary initiatives aimed at making non-English-language ballots or interpreters available to voters who need them must consider where language minorities live. Even the siting of a single new polling place is, by necessity, not a geographically neutral act. Yet no one could seriously maintain that all of these measures should automatically be subjected to strict scrutiny.

Nor is it unusual for there to be county-by-county discrepancies in methods of registration and voting. Indeed, the study relied upon by plaintiffs' own expert collects several examples, noting that early in-person voting was implemented in only

[5] *See*, *e.g.*, 10 ILCS 5/19A-10 (requiring jurisdictions to establish one, two, or three permanent in-person early voting sites depending on their population, and providing that "[n]o permanent polling place required by this Section shall be located within 1.5 miles from another permanent polling place required by this Section, unless such permanent polling place is within a municipality with a population of 500,000 or more").

a few counties in North Dakota in 2004 and 2008; that Pierce County, the second most populous county in the State of Washington, allowed polling-place voting in 2008 while all other counties in the state conducted voting exclusively through the mail; and that in the 2008 election in Wyoming, only Laramie County, the state's largest, provided a polling place for early voting.[6] And as defendants noted in their opening brief (Def. Br. 24), eight of Utah's 29 counties have offered EDR at polling places under that State's pilot program, while 21 of 29 Utah counties allow voting by mail.[7]

Yet, under plaintiffs' approach, all such efforts to expand voting rights one step at a time while remaining sensitive to local conditions would be met with strict judicial scrutiny, with no need even for a threshold showing that anyone's right to vote had been severely burdened. The Supreme Court's and this Court's cases reject that approach. *See*, *e.g.*, *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802, 810-11 (1969) (refusing the plaintiffs' "ironic[]" invitation to punish Illinois for its "willingness to go further than many States in extending the absentee voting privileges"); *Citizens For John W. Moore Party v. Bd. of Election Comm'rs of City of Chicago*, 794 F.2d 1254, 1259 (7th Cir. 1986) (observing, in applying *Anderson*

[6] Roger Larocca & John S. Klemanski, *U.S. State Election Reform and Turnout in Presidential Elections*, STATE POLITICS & POLICY QUARTERLY 11(1) 76-101 (2011) (cited at R. 102-03), at 89.

[7] Plaintiffs observe that the Utah pilot EDR program "allowed all county and municipal election authorities to choose whether to offer it" (Pl. Br. 29), but Section 4-50 does not prevent any county that wishes to do so from offering EDR at polling places and, as described in defendants' opening brief, several low-population jurisdictions have chosen to do so. *See* SA 14 (describing decision by Brown, Bureau, Grundy and Stark Counties and the City of Danville to offer polling-place EDR in the November 2016 election).

v. Celebrezze to regulation of ballot petition circulators, that "[t]he constitution does not require a state to adopt comprehensive plans or none at all," and that the Supreme Court has "applied the step-at-a-time doctrine to legislation affecting elections").

Plaintiffs attempt to cabin their newly minted principle of strict geographic uniformity by contending that "this case is about whether a state may *guarantee* better rights to citizens in some counties than it guarantees to citizens in other counties." Pl. Br. 31 (emphasis in original). The idea, apparently, is that by *mandating* polling-place EDR in large counties and those with electronic poll books while merely *allowing* it in other counties (while still requiring EDR to be offered at the election authority headquarters of those counties, as well as at permanent or temporary early voting sites and in any municipality that contains at least 20% of the county's population but is not the location of the election authority), Illinois has imposed a *per se* severe or discriminatory burden on plaintiffs' voting rights.

But plaintiffs' conclusion does not follow from their premise. To the contrary, this Court has made clear that "unavoidable inequalities in treatment, *even if intended in the sense of being known to follow ineluctably from a deliberate policy*, do not violate equal protection." *Griffin*, 385 F.3d at 1132 (emphasis added). Presumably, under plaintiffs' theory, if the Illinois legislature had "guaranteed" EDR in every polling place throughout the State — even knowing that some counties would be unable to make good on that guarantee immediately because they did not have electronic poll books — there would be no constitutional violation. *See*

Gustafson v. Illinois State Board of Elections, No. 06 C 1159, 2007 WL 2892667 (N.D. Ill. Sept. 30, 2007) (rejecting constitutional challenge based on disparities between counties in implementation of in-person early voting). Yet plaintiffs never explain why an explicit provision requiring polling-place EDR in certain counties while permitting it in others violates equal protection when a "deliberate policy" that would foreseeably produce the same result would not. Their principle, which elevates facial geographical uniformity over all other factors the legislature is entitled to take into account in crafting regulations of the electoral process, regardless of whether the regulation actually imposes a severe burden on anyone, is inconsistent with settled law and should not be adopted.

Plaintiffs try to distinguish *Griffin* by arguing that "absentee voting [is] an area in which 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." Pl. Br. 29. But there is nothing special about absentee voting in this regard, and so plaintiffs' argument boils down to the tautology that a State will always end up treating people differently unless it treats them the same. The question, for equal protection purposes, is whether the differences in treatment contemplated by the law (here, between counties) are adequately justified. As explained in defendants' opening brief and the next section of this brief, they are.

3. Section 4-50 is justified by important state interests.

The *Anderson*/*Burdick* test asks courts to balance the "'character and magnitude of the asserted injury to the rights protected by the First and Fourteenth

Amendments…' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. 789 (1983)). If the State has imposed "reasonable, nondiscriminatory restrictions on these rights… the [S]tate's important regulatory interests will generally be sufficient to justify the regulations." *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 773 (7th Cir. 1997) (citing *Burdick*, 504 U.S. at 434).

As explained in defendants' opening brief, Section 4-50 easily satisfies the *Anderson*/*Burdick* balancing test. Def. Br. 28-31. Plaintiffs acknowledge that the State has a compelling interest in expanding voting rights. Pl. Br. 35-36. They contend, however, that the State has not adequately justified the geographic scope of the statute's polling-place EDR requirement. *Id*. at 35. Plaintiffs are incorrect: the State's interest in devising an administratively manageable EDR system while responding to the long lines and delays that were evident in high-population counties during the 2014 pilot program more than adequately justifies Section 4-50's design.

As a threshold matter, plaintiffs are mistaken insofar as they argue that the State is required to introduce evidence in support of the existence or strength of the justifications that underlie its electoral regulations. As this Court has held in the related area of ballot access, "[t]he sorts of interests states assert to justify regulation of elections often cannot be reduced to proof…. A requirement of proof, like a requirement that the state's interests quantitatively outweigh associational interests (how much does an interest weigh?), would either condemn almost all regulation or

give courts far too much discretion to substitute their opinions for those of the political branches." *Citizens For John W. Moore Party*, 794 F.2d at 1257–58 (7th Cir. 1986); *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986); *Stone v. Bd. of Election Comm'rs for City of Chicago*, 750 F.3d 678, 685 (7th Cir. 2014). Thus, for example, plaintiffs' arguments that defendants introduced no evidence of long lines at special EDR sites during the 2014 pilot program (Pl. Br. 37) or of delays outside of Cook County (*id.* at 38-39) are unavailing, because defendants had no obligation to do so.

Plaintiffs, on the other hand, had the burden to prove that they were likely to prevail on the merits, *see*, *e.g.*, *AM General Co. v. DaimlerChrysler Corp.*, 311 F.3d 796, 803 (7th Cir. 2002), and they cannot carry that burden through "speculation and conjecture," *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1204 (7th Cir. 1996). For instance, plaintiffs' supposition that traveling to a centralized EDR site is so inconvenient that many residents of low-population counties might not have tried (Pl. Br. 38) is not entitled to any weight. Besides, common sense suggests that residents of rural counties typically have to drive to their regular polling place in any event, so that for many of them an automobile trip to a centralized EDR location to register (*and* vote) would not represent a significant incremental inconvenience. *Cf. Crawford*, 553 U.S. at 198 (opinion of Stevens, J.) (trip to DMV does not qualify as a substantial burden); *Frank v. Walker*, 768 F.3d 744, 745-46 (7th Cir. 2014) (same). Meanwhile, residents of high-population counties might often have to make a long journey by public transportation to get to a centralized EDR site, not to mention the

long lines they might encounter once they get there. The legislature was entitled to recognize, and respond to, such concerns when crafting its statewide EDR program. Tellingly, plaintiffs offer no authority for their contention that the Constitution requires a State to ignore local issues of transportation, delay, and relative demand when designing its registration procedures. Pl. Br. 39.[8]

The design of Illinois's EDR statute is also justified by administrability concerns. As described in defendants' opening brief, the legislative history of Section 4-50 indicates that the Illinois Association of County Clerks & Recorders supported the statute's opt-out provision because it eliminated the unmanageable burden of providing polling-place EDR for smaller counties that do not yet have electronic poll books. Def. Br. 28-29. As with issues of delay and relative demand, the Constitution does not preclude a State from taking such concerns into account in crafting electoral regulations. "Administrative convenience readily falls under the rubric of a state's 'regulatory interests,' the importance of which the Supreme Court has repeatedly recognized." *Wood v. Meadows*, 207 F.3d 708, 715 (4th Cir. 2000) (citing *Anderson* and *Burdick*); *cf. Culp v. Madigan*, 840 F.3d 400 (7th Cir. 2016) (affirming denial of preliminary injunction and finding that Illinois's practical need for reliable information adequately justified state law allowing concealed-carry license applications from residents of some States but not others). Meanwhile, none of the

[8] Plaintiffs claim that defendants forfeited their ability to adduce this justification for Section 4-50, Pl. Br. 36, but as they acknowledge, *id.* at 36 n.5, the issue was briefed at length by amicus below and was therefore available for consideration by the district court.

Supreme Court cases cited by plaintiffs in support of the contrary proposition (Pl. Br. 40) even applied the *Anderson-Burdick* balancing test.

Plaintiffs assert that defendants failed to show that polling-place EDR is cheaper or easier to implement in larger counties than in smaller ones, Pl. Br. 40-43, but as noted above, the *Anderson*/*Burdick* test places no such evidentiary burden on the State. *See Citizens for John W. Moore Party*, 794 F.2d at 1258 ("We require of Illinois a logical justification for [the challenged statute], the real justification and not a front for more sinister objectives, even though we do not insist on evidence establishing how the statute achieves its objectives."). It was logical for Illinois to limit the polling-place EDR requirement to those counties that currently have the technology necessary to implement it. Plaintiffs' attempt to paint this commonsense limitation in a sinister light by implying that Section 4-50 discriminates against "voters in less affluent areas" (Pl. Br. 43-44) is misplaced, as the opt-out provision is based on population and the availability of electronic poll books, not affluence.

C. The remaining injunction factors favor reversal.

Defendants' opening brief explained why the balance of the harms and the public interest support reversal of the preliminary injunction. Def. Br. 31-33. Two issues, however, merit further discussion.

First, plaintiffs effectively concede that they undermined their own claim of irreparable harm by waiting for more than a year and a half after Section 4-50 became law to seek a preliminary injunction. In response, they argue only that they could not reasonably have been expected to become aware of the alleged violation of

their rights in time to act sooner — apparently due to their supposed lack of legal sophistication. Pl. Br. 47 (noting that plaintiffs are a "truck driver who never ran for office before and a political party committee for a rural county"). But plaintiffs never explain why a federal congressional candidate and a local committee of a major political party should be deemed too unsophisticated to avoid sleeping on their rights, nor do they cite any authority for the proposition that certain kinds of parties may be excused for doing so.

Second, and notably, plaintiffs scarcely offer any defense of the district court's extraordinarily retrograde remedy, which would shut down polling-place EDR in *all* counties for *all* elections. They argue only that "citizens suffer no cognizable harm if EDR is equally unavailable to everyone, as the injunction provided." Pl. Br. 50. But that is manifestly untrue. Section 4-50 is the latest in a series of measures expanding the times and locations of voter registration in Illinois. An injunction that eliminates polling-place EDR throughout the State would make it harder for some 85% of the State's citizens to vote. Such an injunction cannot be defended in the name of vindicating voting rights.

* * *

In enacting Section 4-50, Illinois made a quintessentially legislative judgment to advance the goal of facilitating voter participation in elections while taking into account local differences in the benefits and costs of election-day registration. Plaintiffs failed to show that the statute imposes a severe burden on anyone or discriminates in any constitutionally meaningful sense. As a matter of law,

therefore, there was no basis to find that plaintiffs were likely to succeed on the merits of their claim, and the district court's preliminary injunction, predicated on its finding that the law imposed a severe burden on residents of low-population counties, should be reversed.

CONCLUSION

For these reasons, defendants request that this Court reverse and vacate the district court's order granting a preliminary injunction, or, in the alternative, accept plaintiffs' invitation to dismiss this appeal as moot.

Respectfully submitted,

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I hereby certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word, in 12-point CentSchbook BT font, and 11.5-point CentSchbook BT font in the footnotes, and complies with Federal Rule of Appellate Procedure Rule 32(a)(7)(B) in that the brief contains 6,316 words.

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CERTIFICATE OF SERVICE

I certify that on February 16, 2017, I electronically filed the foregoing Reply Brief of Defendants-Appellants with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system.

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