

No. 20-2605

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

BARBARA TULLY, KATHARINE BLACK, MARC BLACK, DAVID CARTER, REBECCA GAINES, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, DAVID SLIVKA, DOMINIC TUMMINELLO, and INDIANA VOTE BY MAIL, INC., individually, and on behalf of those similarly situated,

Plaintiffs-Appellants,

v.

PAUL OKESON, S. ANTHONY LONG, SUZANNAH WILSON OVERHOLT, and ZACHARY E. KLUTZ, in their official capacity as members of the Indiana Election Commission, and CONNIE LAWSON, in her official capacity as the Indiana Secretary of State,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Indiana
No. 1:20-cv-01271-JPH-DLP

BRIEF AND SHORT APPENDIX FOR PLAINTIFFS-APPELLANTS

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**CORPORATE DISCLOSURE STATEMENT FOR
INDIANA VOTE BY MAIL, INC.**

Pursuant to Fed. R. App. P. 26.1, Plaintiff Indiana Vote By Mail, Inc. states that it has no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-2605Short Caption: INDIANA VOTE BY MAIL, INC., et al., Plaintiffs-Appellants v. PAUL OKESON, et al., Defendants-Appellees

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N/A
- (5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:
N/A

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Attorney's Signature: /s/ Brett E. Legner Date: August 25, 2020

Attorney's Printed Name: Brett E. Legner

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INTRODUCTION

This case concerns the fundamental constitutional rights of voters in Indiana to vote safely and securely in the upcoming general election in the middle of a global pandemic. Plaintiffs are not asking this Court to hold that all voters in all states at all times have a constitutional right to vote by mail. Rather, Plaintiffs contend that during the ongoing and unprecedented national health emergency, Indiana voters under age 65 must be afforded the same choice for the November election that voters 65 and older already have—to vote by mail, rather than in person, to reduce their and their loved ones’ risk of contracting COVID-19.

To conclude that Plaintiffs are entitled to a preliminary injunction, the Court need not adopt a novel interpretation of the Indiana Election Code or make any extraordinary factual findings. To the contrary, the Defendant members of the Indiana Election Commission (“IEC”) have *already* found that “Indiana Code 3-11-4-1(c) permits the Commission, in an emergency, to allow a person who is otherwise qualified to vote in person the ability to vote by absentee ballot.” *See* Dkt. 53-8, Ind. Elec. Comm’n Order 2020-37 (Mar. 25, 2020) at 1.¹ Those same Defendants, citing among other things Indiana Governor Holcomb’s declaration of “a public health disaster emergency” and President Trump’s declaration of a “national

¹ “Dkt.” citations refer to docket entries in the district court, No. 20-cv-01271 (S.D. Ind.). “S.A.” citations refer to the Short Appendix.

emergency” due to the COVID-19 pandemic, recognized that Indiana was in the midst of just such an emergency. *Id.*

Today, despite public health efforts, nearly 90,000 Indiana residents and over 5.7 million Americans have contracted COVID-19; more than 3,000 people in Indiana and more than 175,000 nationwide have died. *See Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. Times, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html> (last visited Aug. 25, 2020). As of August 24, Indiana was detecting almost 900 new positive cases daily and the 7-day positivity rate was 6.8%. Indiana COVID-19 Dashboard, <https://www.coronavirus.in.gov/2393.htm> (last visited Aug. 25, 2020). Last month, the Indiana State Health Commissioner warned that the State should prepare for a surge in cases this fall. Dkt. 61-9, *State Prepares for Fall Surge of COVID cases*, Indianapolis Star (July 16, 2020), <http://indianapolisstar.in.newsmemory.com/?publink=29f30879f>.

On July 24, 2020, Indiana Governor Holcomb issued a new Executive Order, reiterating that “a public health emergency exists throughout the State of Indiana as a result of the coronavirus disease 2019 (COVID-19) outbreak” and, citing worsening conditions in the State, ordering that “every individual within the State of Indiana shall wear a face covering over the nose and mouth” when “inside a business, public building, or other indoor space open to the public.” Dkt. 61-5, State of Indiana Executive Order 20-37 (July 24, 2020), at 1-2. However, it likely will not be possible

for election officials to enforce social distancing and mask requirements at polling places in November. *See* Dkt. 61-10, Decl. of Maya Eldridge ¶ 7 (declaration from Marion County Clerk explaining that “[n]either my staff nor our volunteer poll workers have any means of enforcing the face covering or social distancing requirements” of Executive Order 20-37); Dkt. 61-11, Decl. of Michelle Fajman ¶¶ 4, 10 (same from Director of Lake County Election and Voter Registration, stating that “[m]any voters will refuse to wear facial covering because of the strong philosophical and in some instances political objections to doing so, and the lack of penalties severe enough to deter non-compliance”).

In adopting no-excuse absentee balloting by mail for the June 2 primary, Defendants construed the governing statute, Indiana Code § 3-11-10-24, so that “voter with disabilities” includes “a voter who is unable to complete their ballot because they are temporarily unable to physically touch or be in safe proximity to another person.” Dkt. 53-8 § 9(A). They thus declared that “[a]ll registered and qualified Indiana voters are afforded the opportunity to vote no-excuse absentee by mail,” and that “the qualifications set forth in IC 3-11-10-24(a) are expanded to include all otherwise registered and qualified Indiana voters.” *Id.* § 5(A).

Having already decided that pandemic conditions warranted allowing no-excuse absentee voting by mail for the Indiana primary, there is no legitimate basis for Defendants to change course now. The public health emergency that existed on

March 25 when the IEC adopted no-excuse absentee balloting for the primary, and that existed on June 2 when the State of Indiana held that primary, continues today. If anything, it is getting worse.

Limiting no-excuse absentee voting by mail to those 65 and older during a global pandemic violates the Fourteenth and Twenty-Sixth Amendments to the United States Constitution. Accordingly, Plaintiffs ask the Court to order the district court to issue an injunction requiring Defendants to immediately (a) instruct all county election boards that all Indiana voters must be allowed to apply for and receive an absentee ballot without regard for their age and without excuse, and be permitted to vote by mail in the November 3, 2020 general election just as in the June 2, 2020 Indiana primary, and (b) take whatever additional administrative actions are necessary and appropriate to implement no-excuse absentee voting by mail for the November 3, 2020 general election. Alternatively, as explained in Plaintiffs' motion to expedite, filed contemporaneously, Plaintiffs ask this Court to issue the injunction pending appeal pursuant to Fed. R. App. 8.

JURISDICTIONAL STATEMENT

The district court has jurisdiction over this action under 28 U.S.C. §§ 1331, 1343, 2201 and 2202 because Plaintiffs allege violations of the Fourteenth and Twenty-Sixth Amendments to the U.S. Constitution and seek declaratory and injunctive relief. Dkt. 6, Am. Compl. ¶¶ 8, 65-94.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1292(a)(1) because Plaintiffs appeal from the district court's August 21, 2020 denial of their motion for a preliminary injunction. S.A. 1 (Dkt. 72). Plaintiffs filed a timely notice of appeal on August 24, 2020. Dkt. 73; *see* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES PRESENTED

Indiana draws a facial distinction between voters 65 years and older, who are categorically permitted to vote absentee by mail in Indiana elections, and voters younger than 65, who must provide one of several enumerated excuses to vote absentee by mail. *See* Ind. Code. §§ 3-5-2-16.5, 3-11-10-24(a)(5). Notwithstanding this scheme, Defendants previously permitted all otherwise eligible voters to vote by mail without an excuse in the June 2, 2020 primary election. *See* Dkt. 53-8, Ind. Elec. Comm'n Order 2020-37 (Mar. 25, 2020).

The question presented is whether Plaintiffs are entitled to a preliminary injunction under the Fourteenth or Twenty-Sixth Amendments to the U.S. Constitution ordering Defendants to likewise allow no-excuse absentee voting by mail for all otherwise eligible Indiana voters, regardless of age, in the November 3, 2020 general election.

STATEMENT OF THE CASE

On March 25, 2020, the Indiana Election Commission issued an Order, IEC No. 2020-37, providing for no-excuse absentee voting by mail for all Indiana

voters, regardless of age, for the then-upcoming Indiana primary election. The Order explained that “the Governor of the State of Indiana has declared a public health disaster emergency effective March 6, 2020, in response to the COVID-19 pandemic.” Dkt. 53-8 at 1. It also explained that the Indiana Code empowered the Commission “to issue advisory opinions to administer Indiana election law” and “allow a person who is otherwise qualified to vote the ability to vote by absentee ballot.” *Id.* Finally, the Order provided that any voter “who is unable to complete their ballot because they are temporarily unable to physically touch or be in safe proximity to another person” would be considered a “voter with disabilities” and thus that all Indiana voters would be allowed “to vote no-excuse absentee by mail” under Ind. Code. § 3-11-10-24(a). Dkt. 53-8 §§ 5(A), 9(A).

On April 29, 2020, Plaintiffs filed the instant lawsuit, seeking to require Defendants to afford all Indiana voters the same choice to vote absentee by mail in the upcoming general election that Defendants agreed was appropriate in the primary. Plaintiffs bring two federal claims.²

First, Plaintiffs allege that Indiana draws a facial distinction between classes of voters on the basis of age in violation of the Twenty-Sixth Amendment. Dkt. 6 ¶¶ 83-94. Specifically, Indiana provides that all “elderly” voters, defined to

² Plaintiffs also allege that Defendants have violated the Equal Privileges and Immunities Clause of the Indiana Constitution. Dkt. 6 ¶¶ 95-98. That claim was not at issue in the preliminary injunction motion in the district court and is not relevant to this appeal.

mean voters 65 years of age or older, are entitled to vote by mail. Ind. Code. §§ 3-5-2-16.5, 3-11-10-24(a)(5). But just as Indiana could not provide that only “white” voters or “female” voters are entitled to no-excuse absentee voting by mail under the Fifteenth and Nineteenth Amendments—which provide that “[t]he right of citizens of the United States to vote shall not be denied or abridged . . . on account of race” or “on account of sex,” U.S. Const. amend. XV, XIX—so too is Indiana prohibited from providing that only “elderly” voters are entitled to vote by mail without further excuse under the Twenty-Sixth Amendment, which states that “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged . . . on account of age.” U.S. Const. amend. XXVI.

Second, Plaintiffs allege that Indiana’s voting classifications, as applied during the COVID-19 pandemic, place an unconstitutional burden on the right to vote in violation of the Fourteenth Amendment to the U.S. Constitution. Dkt. 6 ¶¶ 65-82. Indeed, Defendants themselves recognized that burden when they determined that all Indiana voters, regardless of age, should be permitted to vote absentee by mail in the primary election.

On June 8, 2020, Plaintiffs filed a motion for a preliminary injunction based on their federal constitutional claims, Dkt. 13, and a motion for class certification, Dkt. 17. Pursuant to the briefing schedule set by the court, Defendants filed their

Response in opposition to the preliminary injunction motion on July 24, Dkt. 53, and Plaintiffs filed their reply on July 31, Dkt. 62.

On August 21, the district court denied Plaintiffs' preliminary injunction motion on the grounds that Plaintiffs had not shown a reasonable likelihood of success. S.A. 1 (Dkt. 72). As to the Twenty-Sixth Amendment claim, the Court held that (i) mail-in voting restrictions do not "absolutely prohibit" voters under age 65 from casting a ballot, and therefore that (ii) the Amendment's prohibition on the denial or abridgment of the right to vote on account of age was not implicated. S.A. 15-17. As to the Fourteenth Amendment claim, the court similarly held that (i) Defendants' refusal to permit all Indiana voters to vote by mail during the pandemic does not "absolutely prohibit" Plaintiffs from voting, and accordingly that (ii) Indiana only needed to satisfy rational-basis review. S.A. 10-15.

SUMMARY OF ARGUMENT

The district court held that Plaintiffs could not show a likelihood of success on either of their constitutional claims and therefore that a preliminary injunction safeguarding Indiana voters' right to vote during the pandemic was unwarranted. That determination was wrong as a matter of law.

First, the district court erred in construing the Twenty-Sixth Amendment. The plain text of that Amendment establishes that states may not deny *or* abridge the right to vote "on account of age." U.S. Const., amend. XXVI, § 1. The district court

rejected the Twenty-Sixth Amendment claim on the grounds that Indiana does not “absolutely prohibit” voting based on age. That conclusion is contrary to the Supreme Court’s interpretation of identical prohibitions in the Constitution’s other voting amendments, and would make the specific protections against discrimination based on age in the Twenty-Sixth Amendment a nullity.

Similarly, the district court erred in concluding that to obtain more than the most deferential review for their Fourteenth Amendment challenge, Plaintiffs had to show that they were “absolutely prohibited” from voting. That conclusion too is contrary to Supreme Court precedent. Under *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), state regulations that burden voting rights are assessed under a sliding scale that requires balancing the injury to voting rights against the particular state interests cited to support the rule. Defendants here already concluded that those interests warranted a relaxation of absentee mail-in voting rules for the primary, and they point to no new considerations that would warrant a different outcome for the general election.

Finally, Plaintiffs and all Indiana voters stand to suffer irreparable injury if their right to vote in the upcoming election is curtailed in violation of the Constitution, and the balance of harms cuts strongly in Plaintiffs’ favor. The district court accordingly abused its discretion in denying Plaintiffs’ motion for a preliminary injunction.

STANDARD OF REVIEW

To obtain a preliminary injunction, a plaintiff must show that it would suffer irreparable harm without an injunction; that traditional legal remedies are inadequate; and that it has some likelihood of success on the merits. *Courthouse News Service v. Brown*, 908 F.3d 1063, 1068 (7th Cir. 2018). Next, the court must weigh the harm to the plaintiff without an injunction against the harm to the defendant with one, and consider whether the preliminary injunction is in the public interest. However, where, as here, the government is the opposing party, then the harm to the opposing party and public interest factors “merge.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). The greater the likelihood of success on the merits, the less decisively the balance of harms needs to tilt in the moving party’s favor. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of Am., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008).

When reviewing a denial of a motion for a preliminary injunction, this Court reviews findings of fact for clear error, legal conclusions *de novo*, and balancing of harms for abuse of discretion. *Courthouse News Service*, 908 F.3d at 1068.

ARGUMENT

I. PLAINTIFFS FACE IRREPARABLE HARM IF A PRELIMINARY INJUNCTION IS NOT GRANTED.

The district court did not discuss the irreparable-harm factor in its analysis, but Defendants do not dispute that Plaintiffs and Indiana voters face an irreparable

harm if they are unconstitutionally precluded from voting in the general election because of a well-founded fear of contracting or spreading a deadly disease. It is well-established that a “restriction on the fundamental right to vote constitutes irreparable injury.” *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016); *see also, e.g., League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“Courts routinely deem restrictions on fundamental voting rights irreparable injury.”); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (same). It is therefore clear that this factor is satisfied.

II. PLAINTIFFS HAVE A STRONG LIKELIHOOD OF SUCCESS ON BOTH OF THEIR CONSTITUTIONAL CLAIMS.

Plaintiffs are very likely to succeed on both of their constitutional claims, either one of which is sufficient to grant a preliminary injunction.

A. Indiana’s Classification Of Voters By Age In Its Mail-In Voting Scheme Violates The Twenty-Sixth Amendment.

The Twenty-Sixth Amendment unambiguously provides that “[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.” U.S. Const. amend. XXVI, § 1. In violation of this prohibition, Indiana allows only those 65 and older to vote by mail with no excuse, while withholding that right from those 64 and younger. *See* Ind. Code. § 3-11-10-24(a)(5) (“elderly voters” are “entitled to vote by mail”; *id.* § 3-5-2-16.5 (defining “elderly” to mean “a voter who is at least

sixty-five (65) years of age”). That constitutes an “abridg[ment]” of Plaintiffs’ right to vote “on account of age” within the plain meaning of the Twenty-Sixth Amendment.

1. The Twenty-Sixth Amendment prohibits both “denial” and “abridgment” of the right to vote based on age.

The Twenty-Sixth Amendment’s prohibition of the denial *or* abridgment of the right to vote on its face extends beyond restrictions that *completely* prohibit voters from casting a ballot based on age. To “deny” means to “refuse to grant” or “refuse to admit.” *Deny*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/deny>. By contrast, to “abridge” means to “shorten” or “reduce in scope.” *Abridge*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/abridge>. Unlike denial, abridgment “necessarily entails a comparison.” *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000); *id.* at 359 (Souter, J., concurring in part and dissenting in part) (“[A]bridgment necessarily means something more subtle and less drastic than the complete denial of the right to cast a ballot, denial being separately forbidden.”). Indeed, to construe the words “abridge” and “deny” in the Twenty-Sixth Amendment to mean the same thing would violate the fundamental principle that a court should not interpret a legal text in a way that renders part of the text mere surplusage. *Cf. Loughrin v. United States*, 573 U.S. 351, 357 (2014) (“To read the next clause, following the word ‘or,’ as

somehow repeating that requirement, even while using different words, is to disregard what ‘or’ customarily means.”).

Compared to the right to vote that Indiana provides its citizens 65 and older, the right it provides to younger voters is less robust. Voters under 65 need a specific excuse to vote by mail, while older voters do not. In other words, the right of younger voters is “abridged” solely on account of the voters’ age—a criterion that is expressly forbidden by the Twenty-Sixth Amendment. If Indiana permitted men to vote by mail, but required women to meet certain requirements before they could vote by mail, no one would doubt that that scheme would constitute an unconstitutional abridgment under the Nineteenth Amendment. Likewise if the distinction were based on race, it would constitute an unconstitutional abridgment under the Fifteenth Amendment. Because Indiana’s mail-in ballot restrictions are expressly based on age—like race and sex, a forbidden criterion that cannot be used as a basis for differential treatment under the voting amendments—Indiana’s age-based voting restrictions for mail-in ballots on their face violate the Twenty-Sixth Amendment.

The Indiana restrictions also violate the Twenty-Sixth Amendment as applied. Even if the Court were to find no abridgment of the right to vote on the face of the Indiana restrictions themselves, there is surely an abridgment when the restrictions are applied in a pandemic. There can be no serious question that requiring voters under age 65 to risk life-threatening infection by appearing at crowded polling places

during a pandemic “reduces in scope”—and thus abridges—their right to vote. It is undisputed that many voters under 65 are particularly at risk from COVID-19. The Centers for Disease Control, whose guidance Defendants invoked in the district court (*see* Dkt. 53 at 7), has stated that “[i]t’s not just those over the age of 65 who are at increased risk for severe illness”; that an estimated 60 percent of American adults “have at least one chronic medical condition”—including common health conditions like asthma, high blood pressure, and pregnancy—that may put them at an increased risk of “severe COVID-19 illness”; and that the “best way to protect yourself and to help reduce the spread of the virus that causes COVID-19” is to “[l]imit your interactions with other people as much as possible.” Dkt. 61-8. Thus, under the Twenty-Sixth Amendment, the Indiana mail-in voting scheme is unconstitutional both on its face, and as applied here.

2. The Twenty-Sixth Amendment must be read in conjunction with the other voting amendments.

The conclusion that Indiana’s classification of voters by age violates the Twenty-Sixth Amendment is confirmed by the other voting amendments—the Fifteenth, Nineteenth, and Twenty-Fourth—which prohibit denial or abridgment of the right to vote based on race, sex, or failure to pay a poll tax, respectively. *See* U.S. Const. amend. XV, § 1 (“The right . . . to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude”); *id.* amend. XIX, § 1 (“The right . . . to vote shall not be denied or abridged . . . on account of sex”);

id. amend. XXIV, § 1 (“The right . . . to vote . . . shall not be denied or abridged . . . by reason of failure to pay any poll tax or other tax”). The Twenty-Sixth Amendment tracks this language directly.

Commentators have observed that the “strongly parallel language” of the voting amendments “is a strong (presumptive) argument for parallel interpretation.” Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 789 (1999). And this Court recently approved of the decision to “treat[] arguments under the Twenty-Sixth Amendment (for age) the same as those under the Fifteenth Amendment (for race).” *Luft v. Evers*, 963 F.3d 665, 673 (7th Cir. 2020).

The Supreme Court has held that the Twenty-Fourth Amendment “does not merely insure that the franchise shall not be ‘denied’ by reason of failure to pay the poll tax; it expressly guarantees that the right to vote shall not be ‘denied or abridged’ for that reason.” *Harman v. Forssenius*, 380 U.S. 528, 540 (1965). Thus, “like the Fifteenth Amendment, the Twenty-[F]ourth ‘nullifies sophisticated as well as simple-minded modes’ of impairing the right guaranteed.” *Id.* at 540-41 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). Applying this logic, the California Supreme Court has held that under the Twenty-Sixth Amendment an “abridgment” of the right to vote occurs when a state imposes “procedural requirements, which effectively handicap exercise of the franchise,” even if “the abstract right to vote” remains “unrestricted.” *Jolicoeur v. Mihaly*, 488 P.2d 1, 2, 4 (Cal. 1971) (noting that

the Twenty-Sixth Amendment mirrors the language of the “Twenty-Fourth, Nineteenth, and Fifteenth before it”); *see also Harman*, 380 U.S. at 542 (“[a]ny material requirement” based “solely” on one of the enumerated voting criteria “subverts the effectiveness” of the amendment and “must fall under its ban”); *Lane*, 307 U.S. at 275 (the Fifteenth Amendment bars “onerous procedural requirements which effectively handicap exercise of the franchise”—in that case, by black voters—“although the abstract right to vote may remain unrestricted as to race”).

The district court observed that there are “very few cases” involving the Twenty-Sixth Amendment. Dk. 72 at 16. But that is immaterial given that case law addressing identical questions under the other voting amendments overwhelmingly supports Plaintiffs. In addition, because this case arises at the preliminary injunction stage, Plaintiffs need only show a *likelihood* of success on the merits. In light of the plain text of the Twenty-Sixth Amendment, the Supreme Court case law interpreting identical text in other voting amendments, and Defendants’ inability to marshal any persuasive authority to support their contrary reading, Plaintiffs have more than satisfied this burden.

3. The pre-Twenty-Sixth Amendment decision in *McDonald* is not to the contrary.

The district court reasoned that Plaintiffs could not show a likelihood of success on their Twenty-Sixth Amendment claim because *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), supposedly holds that “a

restriction on absentee voting does not endanger the right to vote unless it ‘absolutely prohibit[s]’ someone from voting.” S.A. 16. The problem with that reasoning is two-fold. First, *McDonald* was a Fourteenth Amendment case and was decided two years before the Twenty-Sixth Amendment was adopted. Second, *McDonald* does not address, much less override, the meaning of the “deny or abridge” language in the voting amendments.

a. Relying on the Fifth Circuit’s decision in *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), the district court stated that the Twenty-Sixth Amendment and *McDonald* are “contemporaries” and both address “the constitutional right to vote.” S.A. 16. But even if so, that would not authorize a court to overlook the plain language of the Twenty-Sixth Amendment.

In any event, the Fifth Circuit’s contention that *McDonald*’s “logic” applies to the Twenty-Sixth Amendment, 961 F.3d at 409, is based on pure speculation. Neither the district court nor the Fifth Circuit in *Abbott* cited any evidence that the Congress that proposed the Twenty-Sixth Amendment or the state legislatures that ratified it believed the scope of the Amendment’s protections to be co-extensive with the Fourteenth Amendment as interpreted in *McDonald*. Nor does such a conjecture make sense. There would have been no need for a constitutional amendment forbidding discrimination in voting rights “on account of age” if that amendment simply duplicated the Equal Protection Clause’s existing protections for those 18 or

older. See *Walgren v. Bd. of Selectmen of Town of Amherst*, 519 F.2d 1364, 1367 (1st Cir. 1975) (it is “difficult to believe” that the Twenty-Sixth Amendment “contributes no added protection to that already offered by the Fourteenth Amendment” with respect to voting).

To the extent the Twenty-Sixth Amendment has a relevant judicial “contemporary” here, it is *Harman*—not *McDonald*. *Harman* was also decided shortly before the Twenty-Sixth Amendment’s adoption and, unlike *McDonald*, involved directly analogous constitutional language. Cf. *Morissette v. United States*, 342 U.S. 246, 263 (1952) (“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed”). As *Harman* explained in 1965, an amendment that “expressly guarantees that the right to vote shall not be ‘denied or abridged’ . . . nullifies sophisticated as well as simple-minded modes of impairing the right guaranteed.” 380 U.S. at 540-41. As a result, those voting in 1971 to enact a similar constitutional amendment guaranteeing that the right to vote shall not be “denied or abridged” based on age would hardly have concluded that an age-based restriction “does not endanger the right to vote unless it ‘absolutely prohibit[s]’ someone from voting.” S.A. 16 (quoting *McDonald*, 394 U.S. at 807).

b. The district court's observation that there is historical evidence that the Twenty-Sixth Amendment's "most immediate purpose was to lower the voting age from twenty-one to eighteen," S.A. 16 (quoting *Abbott*, 961 F.3d at 408), similarly does not hold water. Recently, the Supreme Court made clear that courts should not ask whether the legislators that enacted a law expected it to be applied to any given case. What matters is what "the text and our precedent indicate," not whether the statute's application "reaches 'beyond the principal evil' legislators may have intended or expected to address." *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1749 (2020). The same is true in this context. Further, if the authors of the Twenty-Sixth Amendment had intended it exclusively to lower the voting age to 18, they would have written and enacted a different amendment.³

c. The *McDonald* opinion itself shows that its reasoning does not apply in this context. As discussed in more detail in the following section, *McDonald* addressed a claim that it violated equal protection to deny incarcerated individuals the right to vote by mail while providing for mail-in voting by the "medically incapacitated." Under the Fourteenth Amendment, the Court observed, laws "drawn on the basis of wealth or race" are "highly suspect and thereby demand a more

³ Notably, the source that both the district court and the Fifth Circuit cited as evidence of the Twenty-Sixth Amendment's primary purpose concludes that the Amendment's text "does not merely set a minimum voting age," but "also establishes a general prohibition against age discrimination in voting rights." Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1174-75 (2012) (cited at S.A. 16).

exacting judicial scrutiny.” 394 U.S. at 807. However, Illinois’s absentee ballot rules were not “drawn on the basis of wealth or race,” and there was no evidence that challenged statutes themselves “den[ied] appellants the exercise of the franchise.” *Id.* at 807-08.

McDonald is thus triply inapposite here. First, it expressly addressed the Fourteenth Amendment, not the voting amendments, and certainly not the specific language of the Twenty-Sixth Amendment, which was not adopted until several years after the decision. Second, the decision rested on the proposition that Illinois’s scheme did not “deny” a right to vote, whereas the voting amendments prohibit both denial *and* abridgment of that right. Third, the *McDonald* Court itself distinguished the case before it *from* cases involving “highly suspect” classifications of race or wealth. But just as the Fifteenth Amendment confirms that race is a highly suspect classification for voting purposes, the Twenty-Sixth Amendment does the same for classifications “on account of age.”

Simply put, by virtue of the Twenty-Sixth Amendment, for purposes of voting, “age” is now a classification like race or sex: a state can no more adopt classifications that discriminate against a voter over the age of 18 on the basis of “age” than it can discriminate against her on the basis of “race, color, or previous condition of servitude” (amend. XV), “sex” (amend. XIX), or failure to pay a poll tax (amend. XXIV). The Fourteenth Amendment’s rational-basis test is not

applicable to determine if the “right to vote” has been “denied or abridged” under the Twenty-Sixth Amendment by Indiana’s decision that only voters 65 or older may avail themselves of no-excuse voting by mail. Thus, *McDonald* does not apply, *Abbott* is wrong, and the district court’s reliance on those cases was misplaced.

B. Indiana’s Mail-In Voting Classifications Violate The Fourteenth Amendment As Applied During The COVID-19 Pandemic.

Plaintiffs are also likely to succeed on the merits of their second challenge, based on the burden placed on voting rights by Indiana’s refusal to permit no-excuse absentee voting for all voters in the upcoming general election. Plaintiffs’ Fourteenth Amendment challenge is assessed under the *Anderson-Burdick* balancing test, which this Court has held “applies to *all* First and Fourteenth Amendment challenges to state election laws.” *Acevedo v. Cook Cnty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019) (emphasis in original); *see also Common Cause Ind. v. Individ. Members of the Ind. Elec. Comm’n*, 800 F.3d 913, 922 n.12 (7th Cir. 2015). The *Anderson-Burdick* test balances the “character and magnitude of the asserted injury” to voting rights against the strength of the state’s particular interests in the restriction. *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992).

1. Forcing Indiana voters to vote in person during the COVID-19 pandemic places significant burdens on their right to vote.

The first step of the *Anderson-Burdick* test is to assess the burden that Indiana’s restrictions on absentee voting-by-mail place on voters in the context of

the COVID-19 pandemic. *Burdick*, 504 U.S. at 434. As the IEC recognized when it issued its emergency orders permitting no-excuse absentee voting for the June 2 primary, requiring voters who are concerned with exposing themselves, their families, or others to COVID-19 to go to the polls for the general election places a burden on voting that is undeniable and severe. As one of Plaintiffs' declarants states, the "vast majority of Hoosiers are vulnerable" to COVID-19, which is "readily spread from person to person" and is "highly likely" to be present in November 2020. Dkt. 13-13, Decl. of Jeffrey G. Jones, M.D., M.P.H. ¶ 18. To minimize the risk of the transmission, people need to "spend the shortest amount of time in the best ventilated, least contaminated environment, where the fewest number of people are generating the fewest virus particles." *Id.* ¶ 8. The very CDC guidance Defendants submitted in opposition to Plaintiffs' motion expressly advises "elections officials in advance of election day" to "[e]ncourage voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations" and "[e]ncourage mail-in methods of voting if allowed in the jurisdiction." Dkt. 53-4 at 28 (emphasis added).

a. Case law, and common sense, overwhelmingly support the conclusion that requiring in-person voting during a pandemic represents a substantial burden for many voters. *See, e.g., Thomas v. Andino*, 2020 WL 2617329, at *17 n.20 (D.S.C. May 25, 2020) (recognizing the "undu[e]" burdens "during this pandemic"); *League*

of *Women Voters of Va. v. Va. State Bd. of Elections*, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) (similar). As the First Circuit recently held, the burden posed by restrictions on mail-in voting are “significant” in “the midst of a pandemic,” when “many more voters are likely to want to vote without going to the polls and will thus only vote if they can vote by mail.” *Common Cause R.I. v. Gorbea*, — F.3d —, 2020 WL 4579367, at *2 (1st Cir. Aug. 7, 2020). Even though “a determined and resourceful voter intent on voting” could “manage to work around these impediments,” taking an “unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote.” *Id.*⁴

b. Defendants have no real answer to the burden posed by in-person voting because they already decided for Indiana’s June 2 primary that the COVID-19 public health emergency justified construing state law to allow all Indiana voters to vote absentee by mail. Defendants do claim that “Indiana election officials are taking extraordinary precautions to protect voters from the COVID-19 pandemic.” Dkt. 53 at 6; *see also* S.A. 14. But while it is good that Defendants plan to make personal

⁴ The district court stated that *League of Women Voters* and other “district court opinions” were not “on point,” without explaining why that was so. S.A. 12. Yet the distinction between those cases and this one cuts in Plaintiffs’ favor. *Thomas*, *League of Women Voters*, and *Common Cause Rhode Island* addressed far more modest burdens on the ability of voters to vote by mail—namely, requirements that voters obtain a signature from a witness or notary for their mail-in ballot to be counted. Ballot signature rules necessarily impose far lighter burdens on voters than a blanket *prohibition* on absentee mail-in voting that applies to all except those groups expressly mentioned in Indiana Code § 3-11-10-24.

protective equipment (“PPE”) and hand sanitizer available and to try to enforce social distancing in polling stations in November, the best protection would be to allow all Indiana voters to choose to vote by mail and to avoid public gatherings, including polling stations, to the maximum extent possible. In fact, prior to the June primary, Indiana Secretary of State Connie Lawson—a Defendant in this case—stated that “the safest way to vote is by absentee mail-in ballot” and “encouraged everyone to do so.” Dkt. 61-6, Niki Kelly, *Secretary of State Buys, Distributes PPE to Make Primary Election Safer*, Journal Gazette (May 15, 2020), <https://www.journalgazette.net/article/20200515/WEB/200519907>.

2. The State cannot justify the significant burdens its voting scheme imposes.

The second step of the *Anderson-Burdick* test is to consider “the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Burdick*, 504 U.S. at 434. If, as here, the burdens on voters are significant, the Court should apply something approaching strict scrutiny to assess whether the State’s interests justify the restriction. *Common Cause Ind.*, 800 F.3d at 917. Yet even an election requirement that imposes only a “slight” burden on the right to vote must “be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation.’” *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

Defendants failed to identify—and offer no real evidence to establish—any sufficiently “weighty” interests to justify their refusal to adopt no-excuse absentee voting by mail for the upcoming general election.

a. Defendants alluded to an interest in combating voter fraud, stating that “[v]oting by mail introduces the potential of fraudulent voting.” Dkt. 53 at 3. However, the district court did not even mention that supposed interest in its opinion. Plaintiffs have submitted an uncontroverted declaration from a voting expert who explains that fraud is “as uncommon” during vote-by-mail elections as “during in-person voting,” with Americans “more likely” to be “struck by lightning.” Dkt. 13-14, Decl. of Gregory Shufeldt, Ph.D ¶¶ 27-32. That is consistent with the experience of the Marion County Clerk and the Lake County Director of Election and Voter Registration, both of whom submitted declarations in this case stating that they have not observed evidence of fraud in the mail-in balloting process. *See* Dkt. 61-10, Decl. of Maya Eldridge ¶ 8; Dkt. 61-11, Decl. of Michelle Fajman ¶ 11.

For their part, Defendants do not cite any evidence that their adoption of no-excuse absentee voting by mail for the primary led to any fraud or explain why this speculative risk outweighs the inevitable burden on Indiana voters fearful of contracting or spreading COVID-19 by going into a crowded polling place to vote if a similar rule is not adopted for the general election. Indeed, shortly after Plaintiffs filed their reply in the district court in support of their motion for a preliminary

injunction, Governor Eric Holcomb reportedly stated that he was unaware “of any voter fraud with Indiana mail-in ballots.” Dkt. 65-2, Niki Kelly, *Rental Aid Program Given Boost*, Journal Gazette (Aug. 6, 2020), <https://www.journalgazette.net/news/local/20200806/rental-aidprogram-given-boost>. A purported interest in protecting against voter fraud “in the abstract” is not enough if there is no “evidence that such an interest made it necessary to burden voters’ rights here.” *Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020); *see also League of Women Voters*, 2020 WL 2158249, at *9 (there is “no evidence in the record” to suggest that accommodating voters’ need to vote by mail during the pandemic “would increase voter fraud in a meaningful way”).

b. Defendants also contended that absentee voters are “more prone to cast invalid ballots” than those who visit the polls in person. Dkt. 53 at 4. There are steps Indiana can take to ameliorate these problems. Dkt. 61-10, Decl. of Maya Eldridge ¶ 5; Dkt. 61-11, Decl. of Michelle Fajman ¶ 7. Regardless, the concern that some voters might cast an invalid ballot does not justify refusing to permit all voters to vote by mail during the pandemic *if they choose*. After all, the voters most burdened by Indiana’s restrictions on mail-in voting likely will not go to a polling place because of fears about COVID-19. For those voters, the choice is not between voting by mail and voting in person. It is between voting by mail and not voting at all.

c. In discussing the balance of harms if an injunction should issue, Defendants argued that “no-excuse absentee-by-mail voting” will shift “vast numbers” of voters from in-person to by-mail voting. Dkt. 53 at 22. The fact that large numbers of voters want to vote by mail in November, however, cuts squarely against Defendants, not in their favor.

The reason so many Indiana voters sought to vote by mail during the primary is that those voters did not feel safe going to polling places and exposing themselves, their families, and their communities to risks from the coronavirus. Defendants’ expectation that many more voters will want to vote by mail in the general election shows that the public’s demand for expanded mail-in voting is now even greater. Thus, the fact that many Indiana voters of all ages would want to vote by mail is precisely the point. Voters are understandably concerned for their health, and their lives, if they are forced to vote in person during this pandemic. That is why the State can expect a large number of requests for absentee ballots. And that is why Defendants must be ordered forthwith to allow no-excuse absentee voting by mail again during the general election and to prepare now to accommodate requests for absentee ballots.

The district court also mentioned a public interest in “the accurate and timely counting and reporting of results.” S.A. 14. But there has been no evidence in this case that mail-in voting results in less accurate tabulations, and the State’s supposed

interest in timeliness is wildly speculative, based on assertions that the IEC “must consider whether a delay in county reporting” might “result in escalated civil unrest akin to what the Nation has experienced in recent months.” Dkt. 53 at 22-23. In any case, the supposed need for the IEC to consider these factors is conclusively disproved by the IEC’s only post-primary meeting to date, as explained below.

d. It is no answer that “[i]t is within Indiana’s discretion to consider and weigh the benefits of expanded voting by mail with the harm that could result.” S.A. 15; *see also* S.A. 13 (urging judicial deference to legislative judgment). Even if there were actual evidence of such harms beyond the State’s mere assertion, which Plaintiffs dispute, deference to Defendants’ “discretion” is particularly unwarranted here because Defendants have declared that they are unwilling to exercise it.

Defendants said in their opposition brief that state officials must be free to “recalibrat[e]” their approach to mail-in voting based on their “experience” and an “evolving” insight into how COVID-19 “impacts life in the public forum.” Dkt. 53 at 21. But the IEC did not meet once between May 12, 2020 and August 14, 2020, when they convened virtually (presumably because of COVID-19) to discuss whether to allow no-excuse absentee voting by mail for the November 3 general election. At that meeting, the IEC declined to take action, opting instead to defer to the courts. According to published news reports, Commissioners Long and Overholt supported expanded mail-in voting, but Chairman Okeson and Commissioner Klutz

stated that they “want to see the results of a federal lawsuit filed to compel the state to expand absentee voting before making any decisions to do so on their own.” Chairman Okeson reportedly said that it would be “premature to take any action by voting today until the courts have a chance to hand down a ruling.” It was also reported that Chairman Okeson “would not consider holding a public hearing” on the issue.⁵

All of the relevant considerations that led the Commission to allow all Indiana voters to cast mail-in ballots in the State’s primary if they wished to avoid voting in person still exist and have, if anything, grown more urgent. Having refused to bring their “experience” to bear upon these matters, and with the number of days between now and the November election rapidly dwindling, Defendants cannot credibly claim that there is some injustice in ordering them to act to ensure that all Indiana voters who want to safely cast their ballot in November are able to do so.

⁵ The reports referenced in this paragraph are Dkt. 66-1, Chris Sikich, *Indiana Election Commission Won’t Expand Absentee Voting in November for COVID-19 Concerns*, Indianapolis Star (Aug. 14, 2020), <https://www.indystar.com/story/news/politics/2020/08/14/indiana-electionscommission-wont-expand-absentee-voting/5581806002/>; Dkt. 66-2, Lauren Cross, *State Election Commission Rejects Vote-By-Mail Expansion Amid COVID-19 Pandemic*, NWI Times (Aug. 14, 2020), https://www.nwitimes.com/news/local/lake/state-election-commission-rejects-vote-by-mailexpansion-amid-covid-19-pandemic/article_cf73d5d0-5510-59fe-882a-b124ccdd31c0.html; and Dkt. 66-3, Bob Segall, *Indiana Election Commission Kills Proposal for Expanded Mail-In Voting for November Election*, WTHR (Aug. 14, 2020), <https://www.wthr.com/article/news/investigations/13-investigates/indiana-electioncommission-kills-proposal-for-expanded-mail-in-voting-for-november-election/531-37092a67-e36f-46c5-a091-7864cd5704ab>.

3. *McDonald* does not require a contrary result.

The district court also reasoned that Plaintiffs could not show a likelihood of success on the Fourteenth Amendment claim. It saw no need to resolve whether *Anderson-Burdick* or the Supreme Court's earlier *McDonald* decision governed Plaintiffs' challenge because "under *Anderson-Burdick*, any burden on the right to vote would be analyzed under *McDonald*." S.A. 9 n.3. That is incorrect. The *Anderson-Burdick* test is "not automatic" and "requires courts to conduct fact-intensive analyses when evaluating state electoral regulations." *Gill v. Scholz*, 962 F.3d 360, 365 (7th Cir. 2020). Courts cannot "apply a 'litmus test' that would neatly separate valid from invalid restrictions." *Id.* (quoting *Crawford*, 553 U.S. at 190). But that is just what the district court's substitution of *McDonald* for the *Anderson-Burdick* framework did.

In any event, *McDonald* is not controlling here. It held—at summary judgment, not on a motion for a preliminary injunction—that it was not a denial of equal protection for Illinois to allow "medically incapacitated" persons to vote by mail without allowing incarcerated persons to do the same. But the Court stressed that there was "nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote" because the inmates had not adduced evidence that the State refused to provide other means, short of mail-in ballots, to alleviate their burden. 394 U.S. at 807. The Court

therefore applied “traditional standards for evaluating appellants’ equal protection claims” and concluded that it was reasonable for the Illinois Legislature to treat unsentenced inmates differently from other classes of voters. *Id.* at 808-09.

This case is fundamentally different from *McDonald*. Here, the State’s refusal to permit no-excuse mail-in voting in the general election forces voters to choose between risking their health, and potentially their lives or the lives of their loved ones, or giving up their right to cast a ballot. For these voters, there are no alternatives that will adequately address their legitimate safety concerns. Thus, in the context of the COVID-19 pandemic, Indiana’s statutory scheme *does* have an “impact” on the “fundamental right to vote.” *Id.* at 807. Refusing to apply the same mail-in voting rules the State applied during the June primary forces voters to trade off their health against their right to vote—a trade-off no prisoner in *McDonald* had to make. The Constitution does not permit States to impose such a burden absent a compelling justification, which is wholly lacking here.

Moreover, subsequent authority makes clear that the district court was wrong to hold that *McDonald* means that rational basis review applies to the Fourteenth Amendment analysis so long as Plaintiffs cannot show that they are “absolutely prohibited from voting.” S.A. 8. The Sixth Circuit has held that “Plaintiffs [do] not need to show that they were legally prohibited from voting, but only that ‘burdened voters have few alternate means of access to the ballot.’” *Obama for Am. v. Husted*,

697 F.3d 423, 430-31 (6th Cir. 2012). The Second Circuit has found it sufficient that “there is at least some burden on the voter-plaintiffs’ rights” that made it “difficult to vote in person.” *Price v. N.Y. State Bd. of Elec.*, 540 F.3d 101, 109 & n.9 (2d Cir. 2008). And in *Thomas v. Andino*, *supra*, the district court directly rejected Defendants’ reading of *McDonald* in the COVID-19 context, explaining that “the standard does not require this court to find that the state has ‘absolutely prohibited voting’” and that it is enough that “[i]n-person voting, while still technically an available option, forces voters to make the untenable and illusory choice between exercising their right to vote and placing themselves at risk of contracting a potentially terminal disease.” 2020 WL 2617329, at *17 n.20.

Without addressing this authority, the district court observed that the Supreme Court has not “overruled” *McDonald* or “limit[ed] it to its facts.” S.A. 8. But even the Supreme Court’s cases have read *McDonald* exceedingly narrowly. Thus, in *Hill v. Stone*, the Supreme Court distinguished *McDonald* because “there was nothing in the record to indicate that the challenged Illinois statute had any impact on the appellants’ exercise of their right to vote.” 421 U.S. 289, 300 n.9 (1975). And in *Goosby v. Osser*, 409 U.S. 512, 520-22 (1973), the Court observed that the *McDonald* Court itself had suggested that the result would be different if plaintiffs

had shown that the lack of absentee voting had effectively precluded them from voting.⁶

The district court also relied on the Fifth Circuit's decision in *Abbott*, which read *McDonald* to foreclose a similar Fourteenth Amendment claim. S.A. 9 n.3. But as with *Abbott*'s Twenty-Sixth Amendment analysis, the Fifth Circuit simply got it wrong when it held that *McDonald* requires rational basis review for restrictions on mail-in voting unless a plaintiff can show that he or she has been "absolutely prohibited" from voting. That reading is incompatible with *Anderson-Burdick*'s sliding-scale rule and with the Second Circuit's *Price* decision and Sixth Circuit's *Husted* decision (which the Fifth Circuit did not discuss). Also, in a footnote, the Fifth Circuit conceded that the Supreme Court qualified its "absolutely prohibited" language in *McDonald* by referring to whether the "statutory scheme has an impact" on the plaintiffs' ability to vote. *Abbott*, 961 F.3d at 405 n.30. While the Fifth Circuit said there was no difference between the two formulations—because "Texas's decision to allow those aged sixty-five and older to vote by mail does not 'impact' the plaintiffs' ability to vote," *id.*—that blinks reality. For purposes of the Fourteenth Amendment, what "impacts" Plaintiffs' and other Indiana voters' ability to vote is

⁶ The district court noted that the *Goosby* Court's holding was at "the preliminary stage of that case" (S.A. 7)—another distinction that supports Plaintiffs, for this case likewise is only being decided on a motion for preliminary injunction.

not Indiana's decision to allow 65 year-olds to vote by mail, but Indiana's decision to withhold that choice from others during a global pandemic.⁷

4. *Luft and Griffin do not require a contrary result.*

In addition to misreading *McDonald*, the district court misread two of this Court's decisions, which it thought required denial of a preliminary injunction. Neither decision forecloses Plaintiffs from obtaining their requested relief.

a. First, citing *Luft v. Evers*, the district court emphasized that electoral provisions "cannot be assessed in isolation." S.A. 10-11 (citing 963 F.3d at 672, 675). *Luft* does not support Defendants' position. It holds only that *Anderson-Burdick* directs courts to "weigh" the burden on voters "against the state's interests by looking at the whole electoral system." *Id.* at 671-72. Defendants themselves, however, have already concluded that the "whole electoral system" warranted an extension of mail-in voting when they allowed all Indiana voters to choose to vote by mail during the Indiana primary. Nothing has changed since then to make the burdens for Indiana voters any less severe.

⁷ *Abbott* also arose in a very different state law context. The Texas State Attorney General had issued an opinion construing Texas's statute allowing voters with a "disability" to vote by mail as *not* authorizing all voters who lack immunity to COVID-19—*i.e.*, voters generally—to do the same. *Id.* at 394-95. Subsequently, the Texas Supreme Court affirmed the Attorney General's interpretation of the Texas statute. *In re State*, 602 S.W.3d 549, 550 (Tex. 2020). Here, the Indiana Election Commission has already interpreted the term "voter with disabilities" in Indiana's statute providing for absentee voting by mail to encompass voters who are unable to vote safely due to the pandemic. Dkt. 53-8 at 4.

In addition, the features of Indiana's voting system that the district court identified do nothing to address the burden here. The court identified three ways in which Indiana "make[s] it easy to vote": early in-person voting, mail-in voting for those who are eligible, and at-home voting for those who are eligible. S.A. 11. The first of these is clearly not an adequate alternative for voters who fear in-person voting due to the risk of catching or spreading COVID-19. Meanwhile, the criteria for voters who wish to vote at home are even narrower than the criteria for voting absentee by mail; only those who are expected to be confined due to illness or injury or caring for a confined person, who are disabled and cannot access their polling place, or who are physically unable to complete and sign the ballot, qualify. *See* Ind. Code § 3-11-10-25(a), (b). At-home visits also create the same or greater burden as in-person signature requirements, which courts have found inappropriate to enforce during the pandemic. *See supra* pp. 22-23.

Finally, that those who are otherwise eligible can vote by mail is indeed a good thing. But it simply does not follow that because *some* can vote by mail, the state can burden the rights of others by forcing them to vote in-person at great personal risk. *Common Cause R.I.* 2020 WL 4579367, at *2 ("Taking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote").

b. The district court also cited *Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004), in which this Court held that there is no constitutional right to vote by mail generally. Plaintiffs agree. But *Griffin* hardly suggested that the Constitution would have no application to claims seeking to expand absentee voting during a historic pandemic. To the contrary, *Griffin* cited *Burdick* approvingly, explaining that “the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves.” 385 F.3d at 1130. As shown in Parts II.B.1 and II.B.2 *supra*, in the extraordinary context of the COVID-19 pandemic, the restrictions here far outweigh any arguable state interest. *Cf. Price*, 540 F.3d at 112 (although there is no “general constitutional right to obtain absentee ballots,” the record showed that the State’s “extraordinarily weak” arguments “cannot justify the burden imposed” by the challenged law).

The district court acknowledged that “COVID-19 undisputedly presents new and serious challenges,” but thought that restrictions on mail-in voting during the pandemic are not meaningfully different from the burdens imposed on “working mothers” (at issue in *Griffin*), those working two jobs, or others. S.A. 12. Respectfully, the distinction is plain. The hardship in-person voting poses for groups like working mothers can be addressed through alternatives short of adopting no-excuse absentee vote by mail for all voters. The same is not true for individuals fearful of contracting a deadly disease through in-person contact during a declared

public health emergency. Again, Defendants recognized this reality when they declared for the June Indiana 2020 primary that any voter “who is unable to complete their ballot because they are temporarily unable to physically touch or be in safe proximity to another person”—in other words, all Indiana voters—would be considered a “voter with disabilities” and would be allowed to vote absentee by mail Dkt. 53-8 §§ 5(A), 9(A).

III. THE BALANCE OF HARMS TIPS STRONGLY IN PLAINTIFFS’ FAVOR.

The last prong of the preliminary injunction test requires the Court to balance the harm to Plaintiffs if an injunction is not granted against the harm to the State if the injunction is granted. The district court did not formally address the balance of harms as to either constitutional claim, *see* S.A. 17 & n.6, although it mentioned balancing-of-interest considerations in its discussion of the Fourteenth Amendment. *See* S.A. 14-15. Plaintiffs’ response to that discussion appears in Part II.B.2 *supra*.

Defendants also contend that it will be administratively difficult to process the expected surge of mail-in ballots. But again, that merely underscores the powerful desire of Indiana voters to cast their ballots without putting themselves and their families in danger. There is no reason to think that Indiana will face greater logistical challenges than the other thirty-plus states that allow no-excuse mail-in voting in general elections, *see* Dkt. 61-12, *Applying for a Mailed-out Ballot: A State-by State Guide*, National Vote at Home Institute (Mar. 2020 update), <https://perma.cc/L9X8->

SVC8, or the other states that have extended no-excuse mail-in voting due to the COVID-19 pandemic.

It is axiomatic that no state may deprive citizens of their constitutional right to vote “because of some remote administrative benefit,” *Carrington v. Rash*, 380 U.S. 89, 96 (1965), particularly where the challenged rule is not “in any sense necessary to the proper administration of its election laws.” *Harman*, 380 U.S. at 542-43. Further, in cases involving significant public interest, courts may consider the balance of the equities and the public interest together, as courts of equity may go to greater lengths to give relief “in furtherance of the public interest than they are accustomed to go when only private interests are involved.” *FTC v. Credit Bureau, LLC*, 937 F.3d 764, 784 (7th Cir. 2019).

This Court has affirmed federal courts’ broad equitable authority to order a state “to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution, even if the order requires the state to disregard provisions of state law that otherwise might ordinarily apply to cause delay or prevent action entirely.” *Judge v. Quinn*, 624 F.3d 352, 355-56 (7th Cir. 2010). The exercise of that authority is particularly appropriate here, because we are not living in normal times, and the public interest in this matter must be assessed through the prism of what has been called the “worst pandemic” the “planet has seen in over

a century.” *League of Women Voters*, 2020 WL 2158249, at *10. Accordingly, the balance of harms weighs in favor of granting the request for a preliminary injunction.

CONCLUSION

In light of the strength of Plaintiffs’ case, Defendants’ own interpretation of the Indiana Election Code as allowing no-excuse absentee voting by mail for the recently-conducted Indiana primary, and the worsening pandemic, Plaintiffs have made a more than sufficient showing to warrant a preliminary injunction. Forcing Indiana voters in the upcoming general election to choose between exercising the most precious right in a democracy and exposure to a highly transmissible virus that poses a real and immediate threat of serious health consequences or even death is not something the Constitution permits.

The Court should order the district court to enter an injunction requiring Defendants to immediately (a) instruct all county election boards that all Indiana voters must be allowed to apply for and receive an absentee ballot without regard to their age and without excuse, and be permitted to vote by mail in the November 3, 2020 general election just as in the June 2, 2020 Indiana primary, and (b) take whatever additional administrative actions are necessary and appropriate to implement no-excuse absentee voting by mail for the November 3, 2020 general election. Alternatively, as explained in Plaintiffs’ motion to expedite, filed

contemporaneously, Plaintiffs ask this Court to issue the injunction pending appeal pursuant to Fed. R. App. 8.

Dated: August 25, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2020, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send electronic notification of such filing to all counsel of record. I also caused copies of this filing to be sent by email to counsel for Defendants at the following addresses:

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This brief complies with: (1) the type-volume limitation of Circuit Rule 32(c) because it contains 9,625 words, excluding the parts exempted by rule; and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the body of the brief has been prepared in 14-point Times New Roman font and the footnotes have been prepared in 13-point Times New Roman font using Microsoft Word 2016.

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REQUIRED SHORT APPENDIX

Order Denying Plaintiffs’ Motion For A Preliminary Injunction,
Aug. 21, 2020S.A. 1

District Court Docket Sheet,
Aug. 24, 2020S.A. 20

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BARBARA TULLY,)
KATHARINE BLACK,)
MARC BLACK,)
DAVID CARTER,)
REBECCA GAINES,)
ELIZABETH KMIECIAK,)
CHAQUITTA MCCLEARY,)
DAVID SLIVKA,)
DOMINIC TUMMINELLO,)
INDIANA VOTE BY MAIL, INC.)
individually, and on behalf of those)
similarly situated,)

Plaintiffs,)

v.)

No. 1:20-cv-01271-JPH-DLP

PAUL OKESON,)
S. ANTHONY LONG,)
SUZANNAH WILSON OVERHOLT,)
ZACHARY E. KLUTZ in their official)
capacity as members of the Indiana)
Election Commission,)
CONNIE LAWSON in her official capacity)
as the Indiana Secretary of State,)

Defendants.)

DISABILITY RIGHTS EDUCATION AND)
DEFENSE FUND, INC,)

Amicus.)

**ORDER DENYING PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION**

Plaintiffs ask the Court to enter a preliminary injunction that would
require the State of Indiana to allow all Indiana voters to vote by mail in the

November 3, 2020 general election. They argue that Indiana's absentee voting law—which allows only some Hoosiers to vote by mail—unconstitutionally burdens their right to vote. Defendants—the Indiana Secretary of State and members of the Indiana Election Commission—respond that because Plaintiffs may vote in person, they are not likely to be able to show that the absentee voting law is unconstitutional and are not entitled to a preliminary injunction. The question before the Court is not whether it would be wise for Indiana to allow everyone to vote by mail; that's a policy choice. Rather, the legal issue is whether Plaintiffs are likely to be able to show that the Constitution requires Indiana to give all voters the right to vote by mail in the upcoming general election. Plaintiffs have not made this showing so their motion for preliminary injunction is **DENIED**. Dkt. [13].

I.
Facts and Background

The Court recites the undisputed facts for purposes of this preliminary injunction motion. See *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (procedures are "less formal" and the evidence is "less complete" than at trial because the "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held").

COVID-19 needs little introduction—it is a respiratory disease that "readily spread[s] from person to person," dkt. 13-13 at 9 ¶ 18, and has caused a pandemic. While COVID-19 has infected many Hoosiers, many more remain vulnerable. *Id.* at 6 ¶ 11. One way they can minimize the risk of infection is by

spending time "in the best ventilated, least contaminated environment where the fewest number of people are generating the fewest virus particles." *Id.* at 4 ¶ 8.

In response to COVID-19, the Election Commission—which is charged with administering Indiana's election laws—endorsed a broad reading of Indiana's vote by mail statute for Indiana's primary election. See [Indiana Code § 3-11-10-24\(a\)](#). That statute provides that "a voter who satisfies any of the following [13 categories] is entitled to vote by mail":

- (1) The voter has a specific, reasonable expectation of being absent from the county on election day during the entire twelve (12) hours that the polls are open.
- (2) The voter will be absent from the precinct of the voter's residence on election day because of service as:
 - (A) a precinct election officer under IC 3-6-6;
 - (B) a watcher under IC 3-6-8, IC 3-6-9, or IC 3-6-10;
 - (C) a challenger or pollbook holder under IC 3-6-7; or
 - (D) a person employed by an election board to administer the election for which the absentee ballot is requested.
- (3) The voter will be confined on election day to the voter's residence, to a health care facility, or to a hospital because of an illness or injury during the entire twelve (12) hours that the polls are open.
- (4) The voter is a voter with disabilities.

(5) The voter is an elderly voter.¹

(6) The voter is prevented from voting due to the voter's care of an individual confined to a private residence because of illness or injury during the entire twelve (12) hours that the polls are open.

(7) The voter is scheduled to work at the person's regular place of employment during the entire twelve (12) hours that the polls are open.

(8) The voter is eligible to vote under IC 3-10-11 or IC 3-10-12.

(9) The voter is prevented from voting due to observance of a religious discipline or religious holiday during the entire twelve (12) hours that the polls are open.

(10) The voter is an address confidentiality program participant (as defined in IC 5-26.5-1-6).

(11) The voter is a member of the military or public safety officer.

(12) The voter is a serious sex offender (as defined in IC 35-42-4-14(a)).

(13) The voter is prevented from voting due to the unavailability of transportation to the polls.

For Indiana's June 2020 primary election, the IEC ordered that any voter "unable to physically touch or be in safe proximity to another person" could vote by mail under subsection (4) as a voter with disabilities. Dkt. 6 at 10 (citing IEC Order 2020-37 § 9A). For the upcoming general election in November, the Election Commission has not renewed that order. See dkt. 66.

¹ An elderly voter is "a voter who is at least sixty-five years of age." [Ind. Code § 3-5-2-16.5](#).

Plaintiffs are nine Indiana voters who do not expect to qualify to vote by mail in the general election under [Indiana Code § 3-11-10-24](#). Dkt. 14 at 2 (citing declarations). They have filed a motion for preliminary injunction. Dkt. 13. Specifically, they ask the Court to enter an order requiring Indiana to implement "no-excuse absentee voting" that would allow any voter to vote by mail with an absentee ballot in the November 3, 2020 general election. Dkt. 62 at 5-6.

II. Applicable Law

Parties may move under [Federal Rule of Civil Procedure 65](#) for the issuance of a preliminary injunction. Determining whether a preliminary injunction is required involves a two-step inquiry, with a threshold phase and a balancing phase. [Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.](#), 858 F.3d 1034, 1044 (7th Cir. 2017). At the threshold phase, the moving party must show that: (1) without the requested relief, it will suffer irreparable harm during the pendency of its action; (2) traditional legal remedies would be inadequate; and (3) it has "a reasonable likelihood of success on the merits." *Id.* If the movant satisfies these requirements, the court proceeds to the balancing phase "to determine whether the balance of harms favors the moving party or whether the harm to other parties or the public sufficiently outweighs the movant's interests." *Id.*

III. Discussion

"A preliminary injunction is an extraordinary remedy. . . . never to be indulged in except in a case clearly demanding it." *Id.* (quoting *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of United States of Am., Inc.*, 549 F.3d 1079, 1085 (7th Cir. 2008)). To be entitled to a preliminary injunction, Plaintiffs must first meet their threshold burden to show a reasonable likelihood of success on the merits, irreparable harm, and that traditional legal remedies would be inadequate. *Id.*

A. Likelihood of success on the merits

Plaintiffs argue that they are likely to succeed on the merits of their Fourteenth Amendment and Twenty-Sixth Amendment challenges because Indiana has not consistently allowed voting by mail.² Dkt. 14 at 7–20. Defendants respond that Indiana has made reasonable distinctions in its vote-by-mail accommodations. Dkt. 53 at 9–19.

1. The right to vote does not include the right to vote by mail

The right to vote is a fundamental right central to our democracy. *Harper v. Va. State Bd. of Educ.*, 383 U.S. 663, 667 (1966). Less clear is whether that right is at stake here, so that's where the Court's analysis begins. Plaintiffs correctly "acknowledge that [Indiana] could likely eliminate all absentee voting if it wished." Dkt. 14 at 9. That's because unless a restriction

² Plaintiffs also allege a violation of Article 1 § 23 of the Indiana Constitution, dkt. 6 at 20, but they do not seek a preliminary injunction on that basis, see dkt. 13; dkt. 14.

on absentee voting "absolutely prohibit[s]" someone from voting, the right to vote is not at stake. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969).

In *McDonald*, pretrial detainees in Illinois sought the ability to vote absentee. *Id.* at 803. Illinois allowed absentee voting for four classes of people, but the detainee plaintiffs did not fall into any of them. *Id.* at 803–04. The Supreme Court rejected the detainees' argument that Illinois' absentee voting privileges violated the Fourteenth Amendment's Equal Protection Clause. *Id.* at 806. The Court explained that "because of the overriding importance of voting rights, classifications 'which might invade or restrain them must be closely scrutinized and carefully confined.'" *Id.* at 807 (quoting *Harper*, 383 U.S. at 670). But Illinois' absentee voting provisions did not require that "exacting approach" because the detainees had not shown that they were absolutely prohibited from voting on election day. *Id.* at 808, 808 n.6. So it was "not the right to vote that [was] at stake . . . but a claimed right to receive absentee ballots." *Id.* at 807.

Plaintiffs argue that the Supreme Court has "limited *McDonald*'s holding to its facts." Dkt. 14 at 12–13. In *Goosby v. Osser*, however, the Court confronted a different factual situation because the plaintiffs had alleged that "the Pennsylvania statutory scheme absolutely prohibit[ed] them from voting." 409 U.S. 512, 521 (1973). The Court's limited holding at the preliminary stage of that case was only that—because of that allegation—the plaintiffs' claim was not "wholly insubstantial" or "obviously frivolous" under *McDonald*. *Id.* at 518,

521–22. Similarly, in *Hill v. Stone*, the Court did not cabin *McDonald*, but summarized it as addressing "whether pretrial detainees in Illinois jails were unconstitutionally denied absentee ballots" when "there was nothing in the record to indicate that the challenged Illinois statute had any impact on the appellants' exercise of their right to vote." 421 U.S. 289, 300 n.9 (1975). Those cases therefore did not overrule *McDonald* or limit it to its facts.

Moreover, in *Griffin v. Roupas*, working mothers sought expanded voting options "that would allow people [to vote] who find it hard for whatever reason to get to the polling place on election day." 385 F.3d 1128, 1129–30 (7th Cir. 2004). The Seventh Circuit found no equal protection violation because, among other reasons, "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." *Id.* at 1132.

The same is true here. Plaintiffs do not contend that they are absolutely prohibited from voting. Rather, they contend that the constitution requires the state to allow all voters to vote by mail. Dkt. 14 at 11. Since Plaintiffs really seek an expansion of absentee voting privileges, dkt. 6 at 21; dkt. 13, it is "not the right to vote that is at stake here but a claimed right to receive absentee ballots." *McDonald*, 394 U.S. at 807. When, as here, the fundamental right to vote is not at stake, Indiana has "wide leeway . . . to enact legislation that appears to affect similarly situated people differently." *Id.*

2. Plaintiffs are not likely to succeed on their equal protection claim

Plaintiffs contend that, under the Constitution, all voters must be allowed to vote by mail in the general election because of COVID-19. Dkt. 6 at 21; dkt. 13. They argue that their equal protection claim should be evaluated under the *Anderson–Burdick* framework, which balances the burdens on the right to vote against the state's interests that may justify those burdens. Dkt. 14 at 7; see *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Defendants respond that the decision not to expand voting by mail does not implicate the right to vote, so the *Anderson–Burdick* framework does not apply. Dkt. 53 at 16.

It is not necessary for the Court to decide whether the *Anderson–Burdick* framework applies here because Plaintiffs have not shown a reasonable likelihood of success on the merits under either *Anderson–Burdick* or *McDonald*.³ While election laws "invariably impose some burden on individual voters," those burdens do not necessarily "compel close scrutiny." *Burdick*, 504

³ The Supreme Court has applied *Anderson–Burdick* when "a challenged regulation burdens First and Fourteenth Amendment rights," *Burdick*, 504 U.S. at 434, and the Seventh Circuit has explained that it applies "to all First and Fourteenth Amendment challenges to state election laws," *Acevedo v. Cook Cty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019). Defendants argue that under *McDonald*, *Anderson–Burdick* does not apply to this equal protection challenge, dkt. 53 at 16–18, and as explained, the Court need not resolve this question at this stage of this case. Cf. *Mays v. LaRose*, 951 F.3d 775, 783 n.4 (6th Cir. 2020) ("It's unclear whether the Supreme Court ever intended *Anderson–Burdick* to apply to Equal Protection claims. That Court has only applied the framework in the context of generally applicable laws."). Under *Anderson–Burdick*, any burden on the right to vote would be analyzed under *McDonald*—which, as explained above, the Supreme Court has not limited to its facts or overruled—and *Griffin*. See *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 393–94 (5th Cir. 2020) ("[*McDonald*] squarely governs the equal-protection issue.").

U.S. at 433. Instead, the rigor of the inquiry "depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* at 434. Here, Plaintiffs have not alleged or shown that the State—through either Defendants' actions or Indiana's laws—has absolutely prohibited them from voting. See *McDonald*, 394 U.S. at 809 (because nothing showed that plaintiffs were "absolutely prohibited" from voting, Illinois' absentee voting decisions appeared "quite reasonable"). And as explained above, the privilege of voting by mail does not implicate the fundamental right to vote. See *id.* at 807. Plaintiffs therefore have not shown a substantial burden on the fundamental right to vote, leaving them with only their equal protection argument that Indiana does not evenhandedly grant a statutory entitlement to vote by mail. Dkt. 14 at 11–12.

But Plaintiffs have not shown a reasonable likelihood of success on that argument. To start, voting by mail is not a right but a privilege that "make[s] voting easier." *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020). Nonetheless, under an equal protection analysis, the statutory distinctions must at least "bear some rational relationship to a legitimate state end." *McDonald*, 394 U.S. at 809. In this context, the legitimate state end is the "consistent and laudable state policy of adding . . . groups to the [vote by mail] coverage." *Id.* at 811. And Indiana is not required to all at once add every conceivable group who could benefit. *Id.*

For these reasons, "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. That is the case here. Indiana drew distinctions about who may vote by mail, knowing that some would not be able to enjoy that privilege. See *Ind. Code § 3-11-10-24*. That legislative judgment is one that Indiana is generally entitled to make, see *Griffin*, 385 F.3d at 1131, and Plaintiffs have not shown a likelihood that it was merely an "arbitrary scheme," *McDonald*, 394 U.S. at 811. Moreover, "electoral provisions cannot be assessed in isolation," looking only at voting restrictions while ignoring voting privileges. *Luft*, 963 F.3d at 675.

Indiana provides several alternatives to voting in-person on November 3, 2020: (1) early in-person voting is available between October 6, 2020 and November 2, 2020; (2) voters who meet the requirements may vote by mail with an absentee ballot; and (3) eligible voters may have poll workers bring them a ballot so they may vote at home. See *How to Vote Early in Indiana*, <https://www.in.gov/idr/voteearly.htm> (last visited Aug. 20, 2020). These provisions of Indiana's voting laws make it easy to vote. The vote by mail absentee ballot provision, *Indiana Code § 3-11-10-24(a)*, grants vote by mail privileges to any voter who falls into any one of thirteen categories, many of which are sweepingly broad. This "cut[s] in [Indiana's] favor." *Luft*, 963 F.3d at 675. A few less-convenient effects "does not an unconstitutional system make." *Id.*; see *McDonald*, 394 U.S. at 810.

The cases that Plaintiffs cite do not counsel otherwise. *Dunn v. Blumstein* was about whether citizens were entirely foreclosed from exercising their fundamental right to vote. 405 U.S. 330, 336 (1972). The same is true of

Harper, because it involved a poll tax which denied voters the right to vote altogether if they did not pay the tax. 383 U.S. at 666–68. Nor are any of the cited district court opinions on point, so Plaintiffs have not established a likelihood of success on the merits in light of *McDonald* and *Griffin*. See, e.g. *League of Women Voters of Va. v. Va. State Bd. of Elections*, --- F. Supp. 3d. ----, No. 6:20-cv-24 (W.D. Va. May 5, 2020) (addressing—in the consent decree context—an as-applied constitutional challenge to a witness-signature requirement for absentee ballots); *Doe v. Walker*, 746 F. Supp. 2d 667 (D. Md. 2010) (addressing a deadline for the receipt of absentee ballots from uniformed services and overseas voters).⁴

Plaintiffs also attempt to distinguish *McDonald* and *Griffin* by arguing that nothing in those opinions suggests “that the Constitution would have no application to claims seeking to expand absentee voting in the face of a historic pandemic.” Dkt. 62 at 15–16. While COVID-19 undisputedly presents new and serious challenges, Plaintiffs have not explained why those challenges trigger constitutional protections when the challenges of working mothers, medical personnel, and those working two jobs do not. See *Griffin*, 385 F.3d at 1130. In short, there have long been classes of people “for whom voting may be extremely difficult, if not practically impossible.” *McDonald*, 394 U.S. at 809–10. Yet Plaintiffs do not identify any case in which that has been enough to

⁴ Plaintiffs also cite *One Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wisc. 2016), which has since been reversed in part and vacated in part on appeal, *Luft*, 963 F.3d 665.

show "unconstitutional incompleteness" of absentee voting privileges. *Id.* at 810.

Plaintiffs are therefore unlikely to be able to show that COVID-19's challenges entitle them to constitutional relief. When it comes to this virus, "[l]ocal officials are working tirelessly to 'shap[e] their response to changing facts on the ground,' knowing that the appropriate response is 'subject to reasonable disagreement.'" *Tex. Democratic Party*, 961 F.3d at 393–94 (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring in the denial of injunctive relief)). For the federal courts to step in and decide what measures are necessary would "allow[] a political question—whether a rule is beneficial, on balance—to be treated as a constitutional question and resolved by the courts rather than by legislators." *Luft*, 963 F.3d at 671. "*Burdick* forecloses that sort of substitution of judicial judgment for legislative judgment." *Id.*

Indeed, Indiana enjoys double deference in this case. First, the Constitution "confers on the states broad authority to regulate the conduct of elections, including federal ones." *Griffin*, 385 F.3d at 1130 (citing U.S. Const. Art. I § 4); accord *Burdick*, 504 U.S. at 433; *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring). So courts do "not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin*, 385 F.3d at 1131. Second, in a pandemic "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'"

Pentecostal Church, 140 S. Ct. at 1613 (Roberts, C.J., concurring in the denial of injunctive relief) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). Indiana receives this deference because of its responsibility to protect Plaintiffs and other voters on election day. And indeed, for the general election Indiana is "procuring and distributing over 1 million face masks, over 1.5 million gloves, 20,000 half-gallon bottles of hand sanitizer, 5,000 gallons of surface and equipment disinfectant, and other PPE supplies for voters and poll workers." Dkt. 53-4 at 3 ¶ 8. Indiana also plans to distribute a manual on best safety practices, as well as posters and "social distancing markers." *Id.* at 4 ¶ 9.

While balancing the harms and public interest is not required because Plaintiffs have not shown a reasonable likelihood of success, it is worth noting several factors that weigh in Defendants' favor. It is in the interest of Defendants and the public that the manner of voting in the general election promote the accurate and timely counting and reporting of results. *See Griffin*, 385 F.3d at 1131 (explaining some "problems created by absentee voting" and acknowledging that balancing those problems against the benefits "is quintessentially a legislative judgment"). Expanding voting by mail again for the general election may jeopardize that interest. Dkt. 53 at 21–22.

Plaintiffs argue that Indiana should expand voting by mail for the general election as it did for the primary because it will enable more people to vote.⁵

⁵ Plaintiffs do not present an argument that Indiana's vote by mail expansion for the primary election itself constitutionally requires the same for the general election. *See* dkt. 14 at 15; dkt. 62 at 10.

But general elections already have substantially higher numbers of voters than primaries do. Combining that increase with increased votes from vote by mail privileges—even if that privilege is not expanded, and certainly if it is—could easily strain Indiana's voting systems because those systems are instead equipped for in-person voting. *Id.*; dkt. 53-1 at 2; dkt. 53-2 at 2; dkt. 53-4 at 4. There is therefore greater risk of delayed results and the disqualification of voters for late or defective ballots for the general election than for the primary. See dkt. 53-2 at 2; dkt. 53-3 at 4; dkt. 53-4 at 4–5. It is within Indiana's discretion to consider and weigh the benefits of expanded voting by mail with the harm that could result from the potential disqualification of a high number of absentee ballots and the inability of county election boards to certify election results in a timely manner.

In sum, Plaintiffs seek "unlimited absentee voting," for the November 3, 2020 general election, but have not shown a reasonable likelihood of overcoming "a host of serious objections to judicially legislating so radical a reform in the name of the Constitution." *Griffin*, 385 F.3d at 1130.

3. Plaintiffs are not likely to succeed on their Twenty-Sixth Amendment claim

Plaintiffs argue that, because voters who are at least sixty-five years old are entitled to vote by mail for that reason, Indiana's voting by mail statute abridges younger voters' right to vote on account of age in violation of the Twenty-Sixth Amendment. That amendment provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

Dkt. 14 at 16 (quoting U.S. Const. amend. XXVI § 1). Defendants respond that Indiana's provisions do not abridge the right to vote, which does not include a right to vote absentee. Dkt. 52 at 18–19.

Plaintiffs have not shown a likelihood of success on this claim for the same reasons they have not shown a likelihood of success on their equal protection claim. The text of the Twenty-Sixth Amendment shows that it protects "the right . . . to vote." And as explained above, under *McDonald*, a restriction on absentee voting does not endanger the right to vote unless it "absolutely prohibit[s]" someone from voting. *McDonald*, 394 U.S. at 807.

Plaintiffs argue that *McDonald* "cannot possibly control the Twenty-Sixth Amendment analysis because the Twenty-Sixth Amendment had not been adopted when *McDonald* was decided." Dkt. 62 at 18. But the Twenty-Sixth Amendment and *McDonald* are contemporaries, and both address the constitutional right to vote. See *Tex. Democratic Party*, 961 F.3d at 409. So, as the Fifth Circuit recognized, "*McDonald*'s logic applies neatly to the Twenty-Sixth Amendment's text." *Id.* There is also "plenty" of historical evidence "that the Amendment's most immediate purpose was to lower the voting age from twenty-one to eighteen." *Id.* at 408 (citing Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1170 (2012)).

Moreover, because there are very few cases involving the Twenty-Sixth Amendment, Plaintiffs are unable to show that it "clearly demand[s]" the "far-reaching power" of a preliminary injunction. *Orr v. Schicker*, 953 F.3d 490, 501 (7th Cir. 2020). At the least—focusing on the preliminary stage of this case—

Plaintiffs have not shown a reasonable likelihood of success on the merits of this claim, so they are not entitled to a preliminary injunction.⁶

* * *

For these reasons, Plaintiffs have not met their threshold burden to show a reasonable likelihood of success on the merits for either their equal protection or Twenty-Sixth Amendment claim. See *Whitaker*, 858 F.3d at 1044. They therefore are not entitled to a preliminary injunction and the Court does not proceed to balance each parties' interests. See *id.*

III. Conclusion

As the Supreme Court has noted, allowing broader voting by mail may be wise policy. See *McDonald*, 394 U.S. at 811 (noting Illinois' "consistent and laudable state policy of adding, over a 50-year period, groups to the absentee coverage"). Some states have chosen "no-excuse" voting by mail for all. See dkt. 62 at 14. Indiana has decided otherwise. The question here, however, is not whether the policy is wise, but whether it is constitutional. For the reasons explained above, Plaintiffs have not shown a reasonable likelihood of success in showing that the policy is unconstitutional.

Plaintiffs' motion for a preliminary injunction is therefore **DENIED**. Dkt. [13]. *Amicus* Disability Rights Education and Defense Fund's motion for leave

⁶ Because Plaintiffs have not met their threshold preliminary injunction burden to show a reasonable likelihood of success on the merits, so addressing the remaining threshold factors is unnecessary. See *Korte v. Sebelius*, 735 F.3d 654, 665 (7th Cir. 2013) ("Here, the analysis begins and ends with the likelihood of success on the merits.").

to file *amici curiae* brief is **GRANTED**. Dkt. [64].⁷ The motion to certify class remains pending. Dkt. 17. The parties shall file a status update **by August 28, 2020**.

SO ORDERED.

Date: 8/21/2020



James Patrick Hanlon
United States District Judge
Southern District of Indiana

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⁷ The Court is grateful for the *amicus* brief and its valuable insights into COVID-19's impact on Hoosier voters with disabilities. Dkt. 64-1.

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U.S. District Court
Southern District of Indiana (Indianapolis)
CIVIL DOCKET FOR CASE #: 1:20-cv-01271-JPH-DLP

TULLY et al v. OKESON et al
Assigned to: Judge James Patrick Hanlon
Referred to: Magistrate Judge Doris L. Pryor
Cause: 42:1983 Civil Rights Act

Date Filed: 04/29/2020
Jury Demand: None
Nature of Suit: 441 Civil Rights: Voting
Jurisdiction: Federal Question

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(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

William R. Groth
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

CHAQUITTA MCCLEARY

represented by **Brett E. Legner**
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PRO HAC VICE
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Gary A. Isaac
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Jed W. Glickstein
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William R. Groth
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Plaintiff

DAVID SLIVKA

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Plaintiff

DOMINIC TUMMINELLO

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Michael Anthony Scodro
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ATTORNEY TO BE NOTICED

William R. Groth
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Plaintiff

INDIANA VOTE BY MAIL, INC.
individually, and on behalf of those
similarly situated

represented by **Brett E. Legner**
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PRO HAC VICE
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Gary A. Isaac
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Mark W. Sniderman

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William R. Groth

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V.

Defendant

PAUL OKESON

represented by **Courtney Lyn Abshire**
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Defendant

S. ANTHONY LONG

represented by **Courtney Lyn Abshire**
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Jefferson S. Garn
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ATTORNEY TO BE NOTICED

Kian J. Hudson
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ATTORNEY TO BE NOTICED

Parvinder Kaur Nijjar
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Thomas M. Fisher
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ATTORNEY TO BE NOTICED

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Defendant

SUZANNAH WILSON OVERHOLT

represented by **Courtney Lyn Abshire**
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Jefferson S. Garn
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Kian J. Hudson
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Parvinder Kaur Nijjar
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Thomas M. Fisher

(See above for address)
ATTORNEY TO BE NOTICED

Defendant

ZACHARY E. KLUTZ

*in their official capacity as members of the
Indiana Election Commission*

represented by **Courtney Lyn Abshire**
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ATTORNEY TO BE NOTICED

Jefferson S. Garn
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ATTORNEY TO BE NOTICED

Kian J. Hudson
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ATTORNEY TO BE NOTICED

Parvinder Kaur Nijjar
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ATTORNEY TO BE NOTICED

Thomas M. Fisher
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ATTORNEY TO BE NOTICED

Defendant

CONNIE LAWSON

*in her official capacity as the Indiana
Secretary of State*

represented by **Courtney Lyn Abshire**
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ATTORNEY TO BE NOTICED

Jefferson S. Garn
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Parvinder Kaur Nijjar
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Thomas M. Fisher
(See above for address)
ATTORNEY TO BE NOTICED

Amicus

**DISABILITY RIGHTS EDUCATION
AND DEFENSE FUND, INC**

represented by **Bridget A. Clarke**
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ATTORNEY TO BE NOTICED

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Date Filed	#	Docket Text
04/29/2020	1	COMPLAINT <i>for Declaratory and Injunctive Relief</i> against All Defendants, filed by All Plaintiffs. (Filing fee \$400, receipt number 0756-5973629) (Attachments: # 1 Civil Cover Sheet, # 2 Proposed Summons)(Sniderman, Mark) (Entered: 04/29/2020)
04/29/2020	2	NOTICE of Appearance by Mark W. Sniderman on behalf of Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Sniderman, Mark) (Entered: 04/29/2020)
04/29/2020	3	NOTICE of Appearance by William R. Groth on behalf of Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Groth, William) (Entered: 04/29/2020)
04/30/2020	4	Summons Issued as to ZACHARY E. KLUTZ, CONNIE LAWSON, S. ANTHONY LONG, PAUL OKESON, SUZANNAH WILSON OVERHOLT. (REO) (Entered: 04/30/2020)
04/30/2020	5	MAGISTRATE JUDGE's NOTICE of Availability to Exercise Jurisdiction issued. (REO) (Entered: 04/30/2020)
05/04/2020	6	AMENDED COMPLAINT <i>for Declaratory and Injunctive Relief</i> , against All Defendants, filed by All Plaintiffs.(Sniderman, Mark) (Entered: 05/04/2020)
05/04/2020	7	NOTICE of Service of Amended Complaint, filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO, re 6 Amended Complaint. (Sniderman, Mark) (Entered: 05/04/2020)
05/06/2020	8	NOTICE of Appearance by Jefferson S. Garn on behalf of Defendants ZACHARY E. KLUTZ, CONNIE LAWSON, S. ANTHONY LONG, PAUL OKESON, SUZANNAH WILSON OVERHOLT. (Garn, Jefferson) (Entered: 05/06/2020)
05/06/2020	9	NOTICE of Appearance by Courtney Lyn Abshire on behalf of Defendants ZACHARY E. KLUTZ, CONNIE LAWSON, S. ANTHONY LONG, PAUL OKESON, SUZANNAH WILSON OVERHOLT. (Abshire, Courtney) (Entered: 05/06/2020)
05/11/2020	10	SCHEDULING ORDER: Initial Pretrial Conference set for 6/23/2020 02:00 PM (Eastern Time) in Telephonic before Magistrate Judge Doris L. Pryor. The information needed to participate in this telephonic conference will be provided by a separate notification. No fewer than seven (7) days before the IPTC, counsel must file a Proposed CMP. See Order for additional details. Signed by Magistrate Judge Doris L. Pryor on 5/11/2020.(SWM) (Entered: 05/13/2020)
05/13/2020	11	RETURN of Service by CMRRR, filed by All Plaintiffs. ZACHARY E. KLUTZ served on 5/4/2020; CONNIE LAWSON served on 5/4/2020; S. ANTHONY LONG served on 5/4/2020; PAUL OKESON served on 5/4/2020; SUZANNAH WILSON OVERHOLT served on 5/4/2020. (Groth, William) (Entered: 05/13/2020)
05/17/2020	12	NOTICE of Parties' First Extension of Time, filed by Defendants ZACHARY E. KLUTZ, CONNIE LAWSON, S. ANTHONY LONG, PAUL OKESON, SUZANNAH WILSON

		OVERHOLT. (Garn, Jefferson) (Entered: 06/17/2020)
06/08/2020	13	MOTION for Preliminary Injunction , filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Attachments: # 1 Exhibit Declaration of Barbara Tully, # 2 Exhibit Declaration of David Carter, # 3 Exhibit Declaration of Elizabeth Kmiecik, # 4 Exhibit Declaration of Janice Johnson, # 5 Exhibit Declaration of Marc Black, # 6 Exhibit Declaration of Katharine Black, # 7 Exhibit Declaration of Shelly Brown, # 8 Exhibit Declaration of Chaquitta McCreary, # 9 Exhibit Declaration of Dominic Tumminello, # 10 Exhibit Declaration of Rebecca Gaines, # 11 Exhibit Declaration of Katherine Paolacci, # 12 Exhibit Declaration of David Slivka, # 13 Exhibit Declaration of Jeffrey G. Jones, M.D., M.P.H., # 14 Exhibit Declaration of Gregory Shufeldt, Ph.D.)(Sniderman, Mark) (Entered: 06/08/2020)
06/08/2020	14	BRIEF/MEMORANDUM in Support re 13 MOTION for Preliminary Injunction , filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Sniderman, Mark) (Entered: 06/08/2020)
06/09/2020	15	SCHEDULING ORDER-TELEPHONIC Status Conference set for 6/18/2020 at 3:30 PM (Eastern) before Magistrate Judge Doris L. Pryor. The purpose of the conference is to discuss a briefing schedule regarding the Motion for Preliminary Injunction 13 . Signed by Magistrate Judge Doris L. Pryor on 6/9/2020.(CBU) (Entered: 06/10/2020)
06/12/2020	16	NOTICE of Appearance by Parvinder Kaur Nijjar on behalf of Defendants ZACHARY E. KLUTZ, CONNIE LAWSON, S. ANTHONY LONG, PAUL OKESON, SUZANNAH WILSON OVERHOLT. (Nijjar, Parvinder) (Entered: 06/12/2020)
06/16/2020	17	MOTION to Certify Class , filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Attachments: # 1 Exhibit Declaration of William R. Groth, # 2 Exhibit Declaration of Mark W. Sniderman)(Sniderman, Mark) (Entered: 06/16/2020)
06/16/2020	18	BRIEF/MEMORANDUM in Support re 17 MOTION to Certify Class , filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Sniderman, Mark) (Entered: 06/16/2020)
06/16/2020	20	<i>Joint</i> CASE MANAGEMENT PLAN TENDERED, filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO . (Sniderman, Mark) (Entered: 06/16/2020)
06/18/2020	21	ANSWER to 6 Amended Complaint , filed by All Defendants.(Garn, Jefferson) (Entered: 06/18/2020)
06/22/2020	23	PRELIMINARY INJUNCTION SCHEDULING ORDER - The parties appeared by counsel telephonically for a telephonic status conference on June 18, 2020 pursuant to

		Rule 16 of the Federal Rules of Civil Procedure regarding the Plaintiff's Motion for Preliminary Injunction, Dkt. [13]. The Court establishes the following schedule to prepare this matter for a hearing on that motion (see Order for established deadlines and addition details). Signed by Magistrate Judge Doris L. Pryor on 6/22/2020.(SWM) (Entered: 06/23/2020)
06/29/2020	24	MINUTE ORDER for proceedings held before Magistrate Judge Doris L. Pryor: The parties appeared by counsel for an Initial Pretrial Conference on June 23, 2020. The Court will approve the Case Management Plan, by separate order, with the changes to which the parties have agreed. This matter is scheduled for a telephonic status conference on June 29, 2020 at 11:30 a.m. (Eastern) to discuss case status. Counsel shall attend the statusconference by calling the designated telephone number, to be provided by the Court via email generated by the Court's ECF system. This matter is scheduled for a telephonic settlement conference on July 14, 2020 at 10:00 a.m. (Eastern) before Magistrate Judge Doris L. Pryor. The parties shall attend the conference by calling the designated telephone number, to be provided by the Court via email generated by the Court's ECF system. Signed by Magistrate Judge Doris L. Pryor. (CAG) (Entered: 06/29/2020)
06/29/2020	26	Unopposed MOTION for Extension of Time to File Response to 7/24/2020 re 17 MOTION to Certify Class , filed by Defendants ZACHARY E. KLUTZ, CONNIE LAWSON, S. ANTHONY LONG, PAUL OKESON, SUZANNAH WILSON OVERHOLT. (Attachments: # 1 Text of Proposed Order)(Garn, Jefferson) (Entered: 06/29/2020)
06/29/2020	27	ORDER: CASE MANAGEMENT PLAN APPROVED AS AMENDED. Dispositive Motions due by 4/29/2021. Discovery due by 2/26/2021. Signed by Magistrate Judge Doris L. Pryor on 6/29/2020.(SWM) (Entered: 06/30/2020)
06/29/2020	28	ORDER Regarding Discovery Disputes. See Order. Signed by Magistrate Judge Doris L. Pryor on 6/29/2020.(SWM) (Entered: 06/30/2020)
06/29/2020	29	ORDER REGARDING PROTECTIVE ORDERS. See Order. Signed by Magistrate Judge Doris L. Pryor on 6/29/2020.(SWM) (Entered: 06/30/2020)
06/30/2020	30	MINUTE ORDER for proceedings held before Magistrate Judge Doris L. Pryor: The parties appeared by telephone for a Status Conference on June 29, 2020. The parties discussed the status of and future plans for discovery. The parties also discussed the telephonic Settlement Conference scheduled for July 14, 2020. The call was held and concluded. Signed by Magistrate Judge Doris L. Pryor. (CAG) (Entered: 07/01/2020)
07/01/2020	31	ORDER granting Defendants' 26 Motion for Extension of Time to File Response to 7/24/2020 re 17 MOTION to Certify Class . Signed by Magistrate Judge Doris L. Pryor on 7/1/2020. (SWM) (Entered: 07/01/2020)
07/07/2020	32	MOTION to Excuse Individual Plaintiffs from Personal Attendance at July 14, 2020 Telephonic Settlement Conference, filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Attachments: # 1 Text of Proposed Order)(Sniderman, Mark) (Entered: 07/07/2020)
07/08/2020	33	ORDER granting Plaintiffs' 32 Motion to Excuse Individual Plaintiffs from Personal Attendance at July 14, 2020 Telephonic Settlement Conference. The individual Plaintiffs are excused from personal attendance of the July 14, 2020 settlement conference. Barbara Tully shall attend the settlement conference on behalf of all Plaintiffs and shall have full

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 and final settlement authority. Signed by Magistrate Judge Doris L. Pryor on 7/8/2020.
 (MAC) (Entered: 07/09/2020)

07/17/2020	36	STIPULATION of Dismissal <i>Only</i> , as to Plaintiffs JANICE JOHNSON, SHELLY BROWN, KATHERINE PAOLACCI, filed by All Plaintiffs. (Sniderman, Mark) (Entered: 07/17/2020)
07/17/2020	38	MINUTE ORDER for proceedings held before Magistrate Judge Doris L. Pryor: The parties appeared in person and by counsel for a settlement conference on July 14, 2020. This matter is CONTINUED to July 22, 2020 at 9:00 a.m. (Eastern) by telephone. Counsel shall attend the status conference by calling the designated telephone number, to be provided by the Court via email generated by the Court's ECF system. Signed by Magistrate Judge Doris L. Pryor. (CAG) (Entered: 07/20/2020)
07/20/2020	37	MOTION for Protective Order , filed by Defendants ZACHARY E. KLUTZ, CONNIE LAWSON, S. ANTHONY LONG, PAUL OKESON, SUZANNAH WILSON OVERHOLT. (Attachments: # 1 Exhibit Protective Order)(Garn, Jefferson) (Entered: 07/20/2020)
07/21/2020	39	Unopposed MOTION to Vacate <i>Settlement Conference</i> , filed by Defendants ZACHARY E. KLUTZ, CONNIE LAWSON, S. ANTHONY LONG, PAUL OKESON, SUZANNAH WILSON OVERHOLT. (Attachments: # 1 Text of Proposed Order)(Garn, Jefferson) (Entered: 07/21/2020)
07/21/2020	40	ORDER - This matter comes before the Court on the Unopposed Motion to Vacate Settlement Conference, Dkt. [39]. The Court, having considered the same and being duly advised, hereby GRANTS said motion. The telephonic settlement conference is CONVERTED to a telephonic status conference on July 22, 2020 at 9:00 a.m. (Eastern). Counsel shall attend the status conference by calling the designated telephone number, to be provided by the Court via email generated by the Court's ECF system. Signed by Magistrate Judge Doris L. Pryor on 7/21/2020.(SWM) (Entered: 07/21/2020)
07/21/2020	42	ORDER Acknowledges Parties' 36 Stipulation of Dismissal. The Clerk is DIRECTED to dismiss ONLY Shelly Brown, Janice Johnson, and Katherine Paolacci from the docket. (Marginal Notation). Signed by Judge James Patrick Hanlon on 7/21/2020. (MAC) (Entered: 07/22/2020)
07/22/2020	43	MINUTE ORDER for proceedings held before Magistrate Judge Doris L. Pryor: The parties appeared by telephone for a Status Conference on July 22, 2020. The parties discussed the status of the case. This matter is scheduled for a telephonic status conference on October 14, 2020 at 11:30 a.m. (Eastern) to discuss case status. Counsel shall attend the status conference by calling the designated telephone number, to be provided by the Court via email generated by the Court's ECF system. Signed by Magistrate Judge Doris L. Pryor. (CAG) (Entered: 07/23/2020)
07/22/2020	44	STIPULATED PROTECTIVE ORDER 37 So ordered. Signed by Magistrate Judge Doris L. Pryor on 7/22/2020.(SWM) (Entered: 07/23/2020)
07/24/2020	45	MOTION for Attorney(s) Jed W. Glickstein to Appear pro hac vice (Filing fee \$100, receipt number 0756-6096438), filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Attachments: # 1 Exhibit Certification for Jed W. Glickstein, # 2 Text of Proposed Order)(Sniderman, Mark) (Entered: 07/24/2020)
07/24/2020	46	MOTION for Attorney(s) Gary A. Isaac to Appear pro hac vice (Filing fee \$100, receipt number 0756-6096464), filed by Plaintiffs KATHARINE BLACK, MARC BLACK,

		SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Attachments: # 1 Exhibit Gary A. Isaac Certification, # 2 Text of Proposed Order)(Sniderman, Mark) (Entered: 07/24/2020)
07/24/2020	47	MOTION for Attorney(s) Brett E. Legner to Appear pro hac vice (Filing fee \$100, receipt number 0756-6096480), filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Attachments: # 1 Exhibit Brett E. Legner Certification, # 2 Text of Proposed Order)(Sniderman, Mark) (Entered: 07/24/2020)
07/24/2020	48	MOTION for Attorney(s) Michael A. Scodro to Appear pro hac vice (Filing fee \$100, receipt number 0756-6096501), filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Attachments: # 1 Exhibit Michael A. Scodro Certification, # 2 Text of Proposed Order)(Sniderman, Mark) (Entered: 07/24/2020)
07/24/2020	49	MOTION for Attorney(s) Jeffrey M. Strauss to Appear pro hac vice (Filing fee \$100, receipt number 0756-6096509), filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Attachments: # 1 Exhibit Jeffrey M. Strauss Certification, # 2 Text of Proposed Order)(Sniderman, Mark) (Entered: 07/24/2020)
07/24/2020	50	RESPONSE in Opposition re 17 MOTION to Certify Class , filed by Defendants ZACHARY E. KLUTZ, CONNIE LAWSON, S. ANTHONY LONG, PAUL OKESON, SUZANNAH WILSON OVERHOLT. (Garn, Jefferson) (Entered: 07/24/2020)
07/24/2020	51	NOTICE of Appearance by Thomas M. Fisher on behalf of Defendants ZACHARY E. KLUTZ, CONNIE LAWSON, S. ANTHONY LONG, PAUL OKESON, SUZANNAH WILSON OVERHOLT. (Fisher, Thomas) (Entered: 07/24/2020)
07/24/2020	52	NOTICE of Appearance by Kian J. Hudson on behalf of Defendants ZACHARY E. KLUTZ, CONNIE LAWSON, S. ANTHONY LONG, PAUL OKESON, SUZANNAH WILSON OVERHOLT. (Hudson, Kian) (Entered: 07/24/2020)
07/24/2020	53	RESPONSE in Opposition re 13 MOTION for Preliminary Injunction , filed by Defendants ZACHARY E. KLUTZ, CONNIE LAWSON, S. ANTHONY LONG, PAUL OKESON, SUZANNAH WILSON OVERHOLT. (Attachments: # 1 Exhibit 1 Angerman declaration, # 2 Exhibit 2 Hoskins declaration, # 3 Exhibit 3 Williams declaration, # 4 Exhibit 4 Clifton declaration, # 5 Exhibit 5 EO 20-02, # 6 Exhibit 6 EO 20-07, # 7 Exhibit 7 EO 20-08, # 8 Exhibit 8 IEC order 2020-37, # 9 Exhibit 9 Pl. interrogatory responses) (Garn, Jefferson) (Entered: 07/24/2020)
07/27/2020	54	MOTION for Attorney(s) Bridget A. Clarke to Appear pro hac vice for Interested/Amicus Party, Disability Rights Education and Defense Fund, Inc. (Filing fee \$100.00, receipt number IP070087). (Attachments: # 1 Text of Proposed Order, # 2 Copy of Receipt, # 3 Envelope)(DWH) (Entered: 07/27/2020)
07/28/2020	55	ORDER granting 45 Motion to Appear pro hac vice. Attorney Jed W. Glickstein for BARBARA TULLY, KATHARINE BLACK, MARC BLACK, DAVID CARTER,

		REBECCA GAINES, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, DAVID SLIVKA, DOMINIC TUMMINELLO and INDIANA VOTE BY MAIL, INC added. Applicant shall register for electronic filing, as required by Local Rule 5-3, within ten (10) days of the entry of this Order. Copy to Jed W. Glickstein via US Mail. Signed by Magistrate Judge Doris L. Pryor on 7/28/2020. (SWM) (Entered: 07/28/2020)
07/28/2020	56	ORDER granting 46 Motion to Appear pro hac vice. Attorney Gary A. Isaac for BARBARA TULLY, KATHARINE BLACK, MARC BLACK, DAVID CARTER, REBECCA GAINES, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, DAVID SLIVKA, DOMINIC TUMMINELLO and INDIANA VOTE BY MAIL, INC. added. Applicant shall register for electronic filing, as required by Local Rule 5-3, within ten (10) days of the entry of this Order. Copy to Gary A. Isaac via US Mail. Signed by Magistrate Judge Doris L. Pryor on 7/28/2020. (SWM) (Entered: 07/28/2020)
07/28/2020	57	ORDER granting 47 Motion to Appear pro hac vice. Attorney Brett E. Legner for BARBARA TULLY, KATHARINE BLACK, MARC BLACK, DAVID CARTER, REBECCA GAINES, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, DAVID SLIVKA, DOMINIC TUMMINELLO, and INDIANA VOTE BY MAIL, INC. added. Applicant shall register for electronic filing, as required by Local Rule 5-3, within ten (10) days of the entry of this Order. Copy to Brett E. Legner via US Mail. Signed by Magistrate Judge Doris L. Pryor on 7/28/2020. (SWM) (Entered: 07/28/2020)
07/28/2020	58	ORDER granting 48 Motion to Appear pro hac vice. Attorney Michael Scodro for BARBARA TULLY, KATHARINE BLACK, MARC BLACK, DAVID CARTER, REBECCA GAINES, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, DAVID SLIVKA, DOMINIC TUMMINELLO and INDIANA VOTE BY MAIL INC. added. Applicant shall register for electronic filing, as required by Local Rule 5-3, within ten (10) days of the entry of this Order. Copy to Michael A. Scodro via US Mail. Signed by Magistrate Judge Doris L. Pryor on 7/28/2020. (SWM) (Entered: 07/29/2020)
07/28/2020	59	ORDER granting 49 Motion to Appear pro hac vice. Attorney Jeffrey M. Strauss for BARBARA TULLY, KATHARINE BLACK, MARC BLACK, DAVID CARTER, REBECCA GAINES, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, DAVID SLIVKA, DOMINIC TUMMINELLO and INDIANA VOTE BY MAIL, INC. added. Signed by Magistrate Judge Doris L. Pryor on 7/28/2020. (SWM) (Entered: 07/29/2020)
07/31/2020	60	REPLY in Support of Motion re 17 MOTION to Certify Class , filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Sniderman, Mark) (Entered: 07/31/2020)
07/31/2020	61	Appendix of Exhibits in Support of Reply in Support of Motion re 13 MOTION for Preliminary Injunction , filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Attachments: # 1 Exhibit Exhibit 1: Tribune Star Op-Ed, July 28, 2020, # 2 Exhibit Exhibit 2: Journal Gazette Editorial, July 26, 2020, # 3 Exhibit Exhibit 3: Statement of Indiana Advisory Committee to U.S. Commission on Civil Rights, July 23, 2020, # 4 Exhibit Exhibit 4: N.Y. Times Coronavirus Tracker, last updated July 31, 2020 9:01 AM, # 5 Exhibit Exhibit 5: State of Indiana, Executive Order 20-37, July 24, 2020, # 6 Exhibit Exhibit 6: Journal Gazette Article, May 15, 2020, # 7 Exhibit Exhibit 7: Indiana COVID-19 Dashboard, results as of July 29, 2020, 11:59 PM, # 8 Exhibit Exhibit 8: Consolidated CDC guidance and press releases, # 9 Exhibit Exhibit 9: Indianapolis Star

		Article, July 16, 2020, # 10 Exhibit Exhibit 10: Declaration of Myla Eldridge, July 30, 2020, # 11 Exhibit Exhibit 11: Declaration of Michelle Fajman, July 31, 2020, # 12 Exhibit Exhibit 12: National Vote at Home Institute, Applying for a Mailed-out Ballot: A State-by- State Guide (updated March 2020), # 13 Exhibit Exhibit 13: Indiana 2016 General Election Turnout and Registration)(Sniderman, Mark) (Entered: 07/31/2020)
07/31/2020	62	REPLY in Support of Motion re 13 MOTION for Preliminary Injunction , filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Sniderman, Mark) (Entered: 07/31/2020)
08/06/2020	63	ORDER - granting 54 Motion to Appear pro hac vice. Attorney Bridget A. Clarke for DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC added. Applicant shall register for electronic filing, as required by Local Rule 5-3, within ten (10) days of the entry of this Order. Additionally, the Clerk is instructed to add to the docket Disability Rights Education and Defense Fund, Inc. as an Amicus Party. Signed by Magistrate Judge Doris L. Pryor on 8/6/2020. Copy Mailed. (CKM) (Entered: 08/06/2020)
08/11/2020	64	MOTION for Leave to File <i>Amici Curiae Brief</i> , filed by Amicus DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC. (Attachments: # 1 Exhibit Amici Curiae Brief)(Clarke, Bridget) (Entered: 08/11/2020)
08/14/2020	65	NOTICE of Supplemental Authority, filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO, re 13 MOTION for Preliminary Injunction . (Attachments: # 1 Exhibit Ex A - Common Cause Rhode Island v Gorbea - 1st Circuit, # 2 Exhibit Ex B - Journal Gazette Article, # 3 Exhibit Ex C - RNC v Common Cause - Sup Ct) (Sniderman, Mark) (Entered: 08/14/2020)
08/16/2020	66	NOTICE of Supplemental Filing, filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO, re 13 MOTION for Preliminary Injunction . (Attachments: # 1 Exhibit Ex A - Indianapolis Star Article, # 2 Exhibit Ex B - NWI Times Article, # 3 Exhibit Ex C - WTHR Article) (Sniderman, Mark) (Entered: 08/16/2020)
08/18/2020	67	MOTION to Consolidate Cases , filed by Defendants ZACHARY E. KLUTZ, CONNIE LAWSON, S. ANTHONY LONG, PAUL OKESON, SUZANNAH WILSON OVERHOLT. (Garn, Jefferson) (Entered: 08/18/2020)
08/18/2020	68	COURT NOTICE: Any response to Defendants' Motion to Consolidate, dkt. 67, must be filed by Friday, August 21, 2020. *** TEXT ONLY ENTRY *** (PKP) Modified on 8/18/2020 (PKP). (Entered: 08/18/2020)
08/19/2020	69	RESPONSE in Opposition re 67 MOTION to Consolidate Cases , filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Sniderman, Mark) (Entered: 08/19/2020)
08/19/2020	70	RESPONSE in Opposition re 67 MOTION to Consolidate Cases , filed by Miscellaneous

		COMMON CAUSE INDIANA, INDIANA STATE CONFERENCE OF THE NAACP. (Sniderman, Mark) (Entered: 08/19/2020)
08/20/2020	71	ORDER DENYING MOTION TO CONSOLIDATE - Defendants have filed a motion to consolidate Common Cause Indiana et al. v. Election Commission Members et al., No. 1:20-cv-2007-SEB-TAB, with this case. Dkt. 67. They argue that this Court should exercise its discretion to consolidate the cases to "ensure judicial efficiency and avoid potential confusion by separate rulings." The motion to consolidate is DENIED. Dkt. 67 (SEE ORDER FOR ADDITIONAL INFORMATION). Signed by Judge James Patrick Hanlon on 8/20/2020. Copies distributed pursuant to distribution list. (DWH) (Entered: 08/20/2020)
08/21/2020	72	ORDER DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION - As the Supreme Court has noted, allowing broader voting by mail may be wise policy. See McDonald, 394 U.S. at 811 (noting Illinois' "consistent and laudable state policy of adding, over a 50-year period, groups to the absentee coverage"). Some states have chosen "no-excuse" voting by mail for all. See dkt. 62 at 14. Indiana has decided otherwise. The question here, however, is not whether the policy is wise, but whether it is constitutional. For the reasons explained above, Plaintiffs have not shown a reasonable likelihood of success in showing that the policy is unconstitutional. Plaintiffs' motion for a preliminary injunction is therefore DENIED. Dkt. 13 . Amicus Disability Rights Education and Defense Fund's motion for leave to file amici curiae brief is GRANTED. Dkt. 64 . The motion to certify class remains pending. Dkt. 17. The parties shall file a status update by August 28, 2020 (SEE ORDER FOR ADDITIONAL INFORMATION). Signed by Judge James Patrick Hanlon on 8/21/2020. (DWH) (Entered: 08/21/2020)
08/24/2020	73	NOTICE OF APPEAL as to 72 Order on Motion for Leave to File Order on Motion for Preliminary Injunction, filed by Plaintiffs KATHARINE BLACK, MARC BLACK, SHELLY BROWN, DAVID CARTER, REBECCA GAINES, INDIANA VOTE BY MAIL, INC., JANICE JOHNSON, ELIZABETH KMIECIAK, CHAQUITTA MCCLEARY, KATHERINE PAOLACCI, DAVID SLIVKA, BARBARA TULLY, DOMINIC TUMMINELLO. (Filing fee \$505, receipt number 0756-6145085) (Sniderman, Mark) (Entered: 08/24/2020)
08/24/2020	74	PARTIES' SHORT RECORD re 73 Notice of Appeal - Instructions for Attorneys/Parties attached. (LBT) (Entered: 08/24/2020)
08/24/2020	75	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 73 Notice of Appeal. - for Court of Appeals Use Only. (LBT) (Entered: 08/24/2020)

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CERTIFICATE OF COMPLIANCE

Pursuant to Seventh Circuit Rule 30(d), I hereby certify that this Short Appendix includes all the materials required by Circuit Rules 30(a) and (b).

/s/ Mark W. Sniderman

Mark W. Sniderman

Counsel for Plaintiffs-Appellants

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