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

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INTRODUCTION

In March, Defendants construed the Indiana Election Code to permit all Indiana voters to vote by mail in the State's June primary because of the health risks posed by the COVID-19 pandemic. Unfortunately, there are no signs that the pandemic is likely to abate before the November 3 general election. Indiana recently reported the highest number of new cases to date. NBC Chicago, *Indiana Reports 1,282 New Coronavirus Cases, Highest Single-Day Total to Date* (Sept. 11, 2020), https://www.nbcchicago.com/news/local/indiana-reports-1282-new-coronavirus-cases-highest-single-day-total-to-date/2337701. Even if daily cases or positivity rates trend down between now and November, epidemiologists expect rates to rise with colder weather, which may also coincide with the flu season. *See* Dkt. 61-9. Indiana remains under a public health emergency.

Despite this, Defendants have reversed course and chosen to force all Indiana voters younger than 65 who do not meet one of the statutory criteria for absentee voting to go to the polls in person on November 3 and put their health, and possibly their lives, at risk to exercise their right to vote. Adding insult to injury, Defendants suggest that, should it rule in Plaintiffs' favor, the Court should force Indiana voters 65 and older, who are now entitled to vote by mail without excuse, to vote in person.

Plaintiffs' opening brief ("Br.") demonstrated that in this historic pandemic, Indiana's refusal to give all qualified voters the choice to cast their ballot by mail in

November violates both the Fourteenth and Twenty-Sixth Amendments to the Constitution. Defendants' response brief ("Resp.") does not change this conclusion. To obtain a preliminary injunction, Plaintiffs must show irreparable injury, which Defendants do not dispute; make a "strong showing" of success, which does not mean that they "definitely will win the case" or even require "proof by a preponderance"; and prove that the balance of equities tips in their favor. *Ill. Republican Party v. Pritzker*, 2020 WL 5246656, at *2 (7th Cir. Sept. 3, 2020). As shown below, Plaintiffs have more than met their burden.

I. Plaintiffs Are Likely To Show A Twenty-Sixth Amendment Violation.

Plaintiffs showed that the Twenty-Sixth Amendment should be read in conjunction with the other voting amendments, and that making no-excuse absentee voting by mail available only to voters 65 and older when it was made available to all voters four months ago "abridges" younger voters' right to vote under the plain text of the Amendment—and especially during a pandemic. Br. 11-21. Defendants ignore most of these arguments, because they have no answer to them. Instead, Defendants stake their case on two propositions that are wrong as a matter of law.

First, Defendants contend that the Twenty-Sixth Amendment "was understood to simply lower the national voting age to 18." Resp. 12. But even if that were true, it is not an invitation to ignore plain text. *Infra* Part I.A. Second, Defendants argue that the "right to vote" "does not encompass 'a claimed right to

receive absentee ballots.'" Resp. 12. That overreads *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969); indeed, the Fifth Circuit recently abrogated the key authority Defendants cite to support their interpretation of *McDonald*. *Infra* Part I.B. In its latest decision, the Fifth Circuit rejected a Twenty-Sixth Amendment claim on different grounds, but the court's rationale is unpersuasive and, in any event, cuts against Defendants in this case. *Infra* Part I.C.

Finally, Defendants argue that if Indiana Code § 3-11-10-24(a)(5) violates the Twenty-Sixth Amendment, the Court should strip older voters of the right to vote absentee rather than extend a comparable right to all Indiana citizens. This argument is astonishing. Particularly during a pandemic, in which in-person voting poses serious risks to all voters, this Court not only can but should issue a preliminary injunction allowing all Indiana voters the choice to vote by mail—just as Defendants concluded the Indiana Election Code permitted for the June primary. *Infra* Part I.D.

A. The Amendment's Plain Text Controls.

Defendants urge the Court to limit the Twenty-Sixth Amendment to its "fundamental[] concern[]": lowering the voting age from 21 to 18. Resp. 14. It may be true that a principal purpose of the Twenty-Sixth Amendment was to lower the voting age to 18. But the Amendment's legal *effect* is not limited to the "mischiefs" (Resp. 17) that may have motivated its adoption.

The Supreme Court held over a century ago that "a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions." *Weems v. United States*, 217 U.S. 349, 373 (1910). Later, the Court explained that although the Fifteenth Amendment's "immediate concern" was "to guarantee to the emancipated slaves the right to vote," the Amendment plainly "goes beyond" that objective. *Rice v. Cayetano*, 528 U.S. 495, 512 (2000). Recently, the Supreme Court held that Title VII's explicit prohibition against employment discrimination "because of . . . race, color, religion, sex, or national origin," 42 U.S.C. § 2000e–2(a)(1), must be given effect even in cases that "reach[] 'beyond the principal evil' legislators may have intended or expected to address." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1749 (2020). Plaintiffs cited *Bostock* for this very point (at 19), but Defendants ignore it.

Under these cases, "the written word is the law, and all persons are entitled to its benefit." *Bostock*, 140 S. Ct. at 1737. It thus is irrelevant that some or even many legislators who voted for the Twenty-Sixth Amendment did so primarily to lower the voting age to 18. Whatever their concerns, those legislators proposed, and the States ratified, an Amendment that did not merely lower the voting age, but broadly declared—using language identical to the other voting amendments—that the right of citizens 18 years or older to vote could not be "denied or abridged" "on account of age." U.S. Const. amend. XXVI, § 1. That text, "cast in fundamental terms" and

"transcending the particular controversy which was the immediate impetus for [its] enactment," *Rice*, 528 U.S. at 512, governs here.

Even if expected-application evidence were relevant, moreover, Defendants offer no evidence that legislators *only* intended to lower the voting age to 18. In fact, many emphasized the parallels between the Twenty-Sixth Amendment and other voting amendments. *E.g.*, 117 Cong. Rec. 7533 (1971) (Rep. Emanuel Celler: "[The proposed amendment] is modeled after similar provisions in the 15th amendment, which outlawed racial discrimination at the polls, and the 19th amendment, which enfranchised women."); *id*. at 7534 (Rep. Richard Poff: "Just as the 15th amendment prohibits racial discrimination in voting and just as the 19th amendment prohibits sex discrimination in voting, the proposed amendment would prohibit age discrimination in voting, but only against those citizens who are 18 years of age or older. In this regard, the proposed amendment would protect not only an 18-year old, but also the 88-year old."); *id*. at 7539 (Rep. Claude Pepper: "What we propose to do . . . is exactly what we did in . . . the 15th amendment and . . . the 19th amendment."). In short, Defendants offer no basis for disregarding the Twenty-Sixth Amendment's plain text.[1]

[1] That the Twenty-Sixth Amendment may have implications for other state laws (Resp. 19) is no basis for disregarding plain text either. The Amendment only proscribes distinctions that "deny" or "abridge" the right to vote. Many of Defendants' examples—for instance, a law allowing elderly voters to move to the front of the line—are trivial distinctions that do not plausibly constitute an "abridgment" on any understanding of the term. *Cf*. *Medlock v.*

B. *McDonald* Is Inapposite.

Defendants next argue that under the "logic" of *McDonald*, the phrase "right to vote" in the Twenty-Sixth Amendment (and presumably the other voting amendments) does not include "the option of mail-in voting." Resp. 23-24. Plaintiffs have explained why that argument is meritless. Br. 17-20. *McDonald* pre-dated the Twenty-Sixth Amendment; did not purport to address the voting amendments; and recognized that "more exacting judicial scrutiny" should be applied to classifications like race or wealth under the Fourteenth Amendment. 394 U.S. at 807. Nor did *McDonald* hold that the "right to vote" could never be implicated by absentee voting provisions. The Court based its decision on a lack of *evidence* that the election rules actually had an "impact" on the particular plaintiffs' "fundamental right to vote." *Id*. "Essentially the Court's disposition of the claims in *McDonald* rested on failure of proof." *O'Brien v. Skinner*, 414 U.S. 524, 529 (1974). The Supreme Court has since interpreted *McDonald* narrowly for just this reason. Br. 32-33 (citing *Hill v. Stone*, 421 U.S. 289, 300 n.9 (1975), and *Goosby v. Osser*, 409 U.S. 512, 519-22 (1973)).

Trustees of Ind. Univ., 738 F.3d 867, 873 (7th Cir. 2013) ("*de minimis non curat lex* . . . has been held applicable to a variety of constitutional settings"). Regardless, a parade of supposed horribles, none of which are before the Court, cannot overcome the text of the law. "[U]nexpected applications of broad language reflect only Congress's 'presumed point [to] produce general coverage—not to leave room for courts to recognize ad hoc exceptions.'" *Bostock*, 140 S. Ct. at 1749 (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012)).

Discussing these decisions in the context of Plaintiffs' Fourteenth Amendment claim, Defendants say that *Hill* and *Goosby* "merely reiterate[] . . . that heightened scrutiny applies only when a citizen is in fact 'absolutely prohibited from voting by the State.'" Resp. 33. But the Supreme Court declared otherwise in *American Party of Texas v. White*. There, citing *McDonald*, *Goosby*, and *O'Brien*, the Court held that "it is plain that permitting absentee voting by some classes of voters and denying the privilege to other classes of otherwise qualified voters in similar circumstances, without affording a comparable alternative means to vote, is an arbitrary discrimination violative of the Equal Protection Clause." 415 U.S. 767, 795 (1974).

Defendants urge the Court to follow *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020) ("*Abbott I*"), in which a motions panel relied on *McDonald* in staying a district court injunction pending appeal. Resp. 23-24. One day after Defendants submitted their brief in this case, however, the Fifth Circuit abrogated that aspect of the motions panel's decision, declaring that it was "not precedent." *Texas Democratic Party v. Abbott*, 2020 WL 5422917, at *17 (5th Cir. Sept. 10, 2020) ("*Abbott II*"); *see also id*. at *22-23 (Stewart, J., dissenting in part) ("I am

unpersuaded that *McDonald* controls the outcome of this case."). This Court too should decline to stretch *McDonald*'s "logic" past the breaking point.[2]

C. Plaintiffs Have Shown An "Abridgment."

Indiana's election system, on its face and as applied during the pandemic, "abridges" the voting rights of younger citizens on account of age. Br. 12-14. *Abbott II* is not to the contrary.

In *Abbott II*, the majority concluded that a similar mail-in voting scheme in Texas did not "abridge" the right to vote because it was no more difficult for younger voters to cast ballots after the expansion of absentee voting for the elderly than it had been before. Defendants here have not claimed that "abridgment" means only retrogression with respect to the disadvantaged group. Rather, in both the district court and this Court, Defendants have argued that under *McDonald* mail-in voting "is not included in the 'right to vote' in the first place." Resp. 24; *see also* Dkt. 53 at 18-19. In any event, *Abbott II* does not show a lack of "abridgment" here.

1. Indiana has "abridged" the right to vote even under the *Abbott II* test. The Fifth Circuit concluded that "an election law abridges a person's right to vote for the purposes of the Twenty-Sixth Amendment only if it makes voting more

[2] The argument that the "right to vote" does not reach absentee voting is also inconsistent with Defendants' own invocation of legislative history. The Twenty-Sixth Amendment's sponsor, Rep. Emanuel Celler, explained that the proposed amendment "contemplates that the term 'vote' includes all action necessary to make a vote effective . . . including, but not limited to, registration or other action required by law prerequisite to voting [or] casting a ballot." 117 Cong. Rec. 7533.

difficult for that person than it was before the law was enacted *or enforced*." 2020 WL 5422917, at *15 (emphases altered). Texas refused to expand mail-in voting for the 2020 primary, Br. 34 n.7, so there was no retrogression on this view. By contrast, citing the ongoing public health emergency created by the pandemic, Defendants construed the Indiana Election Code *to allow* all voters to vote absentee by mail in Indiana's June 2020 primary. By changing their interpretation of the Indiana Election Code and choosing to enforce age-based rules in the general election, Defendants *have* made voting "more difficult" in November than it was previously. *Cf. Republican Nat'l Comm. v. Common Cause R.I.*, 2020 WL 4680151, at *1 (U.S. Aug. 13, 2020) ("The status quo is one in which the challenged requirement has not been in effect, given the rules used in Rhode Island's last election.").

2. Although the Fifth Circuit's interpretation of "abridgment" thus supports Plaintiffs, it is not the correct reading of the Twenty-Sixth Amendment. Plaintiffs agree that "abridgment" requires "some baseline with which to compare the practice." *Abbott II*, 2020 WL 5422917, at *13 (quoting *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000)); *accord* Br. 12. But that does not mean that the baseline is the disadvantaged group's ability to vote before the discriminatory enactment. As it pertains to the voting amendments, the Supreme Court has expressly held that retrogression is not the standard:

> In § 5 preclearance proceedings—which uniquely deal only and specifically with changes in voting procedures—the baseline is the

> status quo that is proposed to be changed: If the change "abridges the right to vote" relative to the status quo, preclearance is denied, and the status quo (however discriminatory it may be) remains in effect. ***In § 2 or Fifteenth Amendment proceedings, by contrast***, which involve not only changes but (much more commonly) the status quo itself, ***the comparison must be made with a hypothetical alternative***: If the *status quo* "results in [an] abridgement of the right to vote" or "abridge[s] [the right to vote]" relative to what the right to vote ought to be, the status quo itself must be changed. ***Our reading of "abridging" as referring*** only to retrogression in § 5, but ***to discrimination more generally in*** § 2 and ***the Fifteenth Amendment***, is faithful to the differing contexts in which the term is used.

Bossier Parish, 528 U.S. at 334 (bold emphasis added); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (the Fifteenth Amendment "invalidate[s] state voting qualifications or procedures *which are discriminatory* on their face or in practice") (emphasis added).

This Court too has held that § 2 of the Voting Rights Act embodies "an equal-treatment requirement" in which the relevant "baseline" is whether each group has an equal "opportunity to participate" in the electoral process. *Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020). It follows that the same is true of the voting amendments. *Cf. id*. at 673 (treating arguments under the Fifteenth Amendment "the same" as arguments under the Twenty-Sixth).

The Fifth Circuit's interpretation also is irreconcilable with earlier precedent. In *Lane v. Wilson*, 307 U.S. 268 (1939), the Supreme Court considered a registration system enacted after the Court invalidated an Oklahoma literacy test that effectively denied black citizens the right to vote. *See infra* n.4. Voters who cast ballots in the

1914 general election "automatically remained qualified voters" while new voters had to register during a two-week window. 307 U.S. at 271. This scheme did not make it "more difficult" for black citizens to vote than previously, when Oklahoma's literacy requirements prevented many from voting altogether. But the Court still struck down the rule because it abridged black voters' rights. *Id*. at 275.

Similarly, in *Harman v. Forssenius*, Virginia replaced a poll-tax requirement for federal elections with a requirement that voters pay the tax *or* file a certificate of residence six months before the election. 380 U.S. 528, 531-32 (1965). This change did not make it "more difficult" to cast ballots in federal elections; Virginia merely added another option by which voters could qualify. Here too, however, the Court held that Virginia's scheme was an unconstitutional abridgment under the Twenty-Fourth Amendment. *Id*. at 538-42.[3]

3. The Fifth Circuit acknowledged a "possible exception" to its retrogression rule in light of *Bossier Parish*, but simply proclaimed that "[e]ven if this concept applies to the Twenty-Sixth Amendment . . . we see no basis to hold that Texas's absentee voting rules as a whole are something that ought not to be."

[3] The *Abbott II* majority characterized *Lane* and *Harman* as cases where voting rules had "effectively handicap[ped]" the exercise of the franchise. 2020 WL 5422917, at *14-15. Of course, the same is true of an age-based classification in a pandemic where many voters reasonably fear going to the polls in person. Regardless, the majority made no meaningful attempt to reconcile these cases with its conclusion that "abridgment" occurs "only if [a law] makes voting more difficult for that person than it was before the law was enacted or enforced." *Id*.

2020 WL 5422917, at *14. That is *ipse dixit*, and is inconsistent with *Luft v. Evers*. In *Luft*, this Court explained that in deciding if there has been "abridgment" the question is whether voters within the protected class have an equal "opportunity to participate" in the election. 963 F.3d at 672. Thus, as the dissent in *Abbott II* recognized, a system that affords voters 65 and over the right to vote absentee by mail while denying that right to voters under 65 violates the Twenty-Sixth Amendment by "depriv[ing] individuals of the equal opportunity to vote based on a protected status." 2020 WL 5422917, at *21 (Stewart, J.) (citing *Luft*).

4. Finally, the Fifth Circuit erred in resolving the as-applied claim. It noted that some voters under 65 could still vote absentee by claiming a "disability," and that "Texas is taking the kinds of precautions for voting that are being used in other endeavors during the pandemic." 2020 WL 5422917, at *16-17. It then repeated its conclusion that "voters under age 65 did not have no-excuse absentee voting prior to the pandemic." *Id*. But whether or not it is an "abridgment" to allow only elderly voters to vote by mail as a general matter, during a pandemic, it is plain that a 64-year old who must expose herself to a potentially fatal illness to vote has less "opportunity to participate" (*Luft*, 963 F.3d at 672) than a 65-year-old who can stay home and vote by mail. *See Abbott II*, 2020 WL 5422917, at *23 (Stewart, J.) ("By giving younger voters fewer options, especially in the context of a dangerous

pandemic where in-person voting is risky to public health and safety, their voting rights are abridged in relation to older voters who do not face this burden.").

That is so even if some younger voters might be able to assert another excuse to vote absentee by mail or if election officials take precautions for in-person voting. Many voters under age 65 are at heightened risk from COVID-19, or live with others who are at great risk, but do not qualify for a mail-in ballot. Br. 12-14, 22-23. And it will be difficult to enforce social distancing and mask requirements at polling places in November. Br. 2-3.

D. The Court Should Reject Defendants' Request To "Level-Down."

Plaintiffs have consistently asked for an injunction allowing all voters the choice to vote absentee by mail in the general election. *E.g.*, Dkt. 14 at 20 n.6 ("the Court should order Defendants to extend the entitlement to vote by mail . . . rather than withdrawing the benefits of voting by mail from the already-entitled categories of voters"). For over four months, Defendants never hinted that they viewed stripping elderly Indiana voters of that choice as the more appropriate remedy. Yet now, Defendants assert that if Ind. Code § 3-11-10-24(a)(5) violates the Twenty-Sixth Amendment (as it does), the Court should force elderly voters to vote in-person. Resp. 30. This argument is not only meritless, but unconscionable in light of Defendants' obligation to ensure the safety of their citizens in a time of pandemic.

1. The Supreme Court has long recognized that in cases challenging discriminatory treatment, "extension, rather than nullification," is ordinarily "the proper course." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1699 (2017); *see also Barr v. Am. Assoc. of Political Consultants*, 140 S. Ct. 2335, 2354 (2020) ("*AAPC*") ("The Court's precedents reflect [a] preference for extension rather than nullification."). The preference here is strengthened because the voting amendments expressly prohibit "abridgment" of voting rights. It would be perverse to remedy an abridgment of the voting rights of *some* citizens by abridging the rights of *all*. A century ago the Supreme Court declared that because voting is "a right whose exercise lies at the very basis of government," courts should apply a "much more exacting standard" when addressing severability questions in the voting context. *Guinn v. United States*, 238 U.S. 347, 366 (1915).[4] As one commentator has noted, "particularly because the right to vote is so fundamental," a leveling-down remedy "would be absurd." Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 McGeorge L. Rev. 473, 491 (2002).

That is especially true here. Forcing elderly voters to vote in-person in November will increase crowding and confusion at polling places, discourage

[4] *Guinn* addressed an Oklahoma literacy test that exempted all persons entitled to vote prior to January 1, 1866 and their descendants. The Court held that the statute's grandfather clause violated the Fifteenth Amendment. 238 U.S. at 364-65. It then concluded that, rather than apply the literacy requirement to all voters—"leveling down" the right to vote—it was proper to strike down the literacy test as well. *Id*. at 366-67.

voting, and expose even *more* Indiana voters—including many of the most vulnerable—to unnecessary risks from COVID-19. Nor can Defendants claim that allowing all voters to vote by mail would violate some fundamental state policy. Defendants just allowed all Indiana voters to vote by mail in the June primary and, even in their brief, assert that Indiana has "an interest in encouraging elderly citizens" to "vote absentee." Resp. 35.

2. Defendants' arguments for departing from the general rule are groundless. They argue chiefly (Resp. 25, 27-28) that *Morales-Santana* and *AAPC* concluded that a "leveling down" remedy was appropriate. But in both cases the Court did so on the basis of unique considerations not present here.[5] Defendants also cite the remedial discussion in *Ill. Republican Party*, 2020 WL 5246656, at *8, which was *dictum* and did not purport to require leveling-down in any event.

Defendants next state (at 25-26) that Indiana's general severability statute requires a leveling-down remedy. But Ind. Code § 1-1-1-8 merely addresses whether

[5] In *AAPC*, the Court addressed a viewpoint-discriminatory exception to a ban on robocalls, deciding to strike the exception rather than allow robocalls generally. That made sense because the exception was "relatively narrow" and severing it "d[id] not raise any other constitutional problems." 140 S. Ct. at 2354-55. Here, the "exception" Defendants seek to strike applies to a huge proportion of voters (*i.e.*, all those 65 and older), and it is Defendants' proposed solution that raises constitutional issues. In *Morales-Santana*, which involved a challenge to the rules governing how a U.S. citizen could pass on citizenship rights to a child born abroad, leveling up would have disadvantaged "marital children" in comparison to "nonmarital children," "scarcely a purpose one can sensibly attribute to Congress." 137 S. Ct. at 1700. Here, it is eminently "sensible" to remedy the constitutional violation by allowing all voters to vote by mail—exactly what Defendants did for the June primary—rather than stripping elderly voters of the right to vote by mail.

an invalid provision "is severable from the remainder of the statute" or whether "the whole statute must be stricken." *City of Hammond v. Herman & Kittle Props., Inc.*, 119 N.E.3d 70, 87-88 (Ind. 2019). It says nothing about whether, between severance or an *expansion* to cure a constitutional defect, courts must always "level down."

Similarly, citing *AAPC*, Defendants argue that the Court should sever Ind. Code § 3-11-10-24(a)(5) rather than expand mail-in voting because that provision was passed as an amendment to the existing absentee-voting statute. Resp. 27-28. Neither *AAPC* (robocalling) nor any of the cases *AAPC* cites involved discrimination with respect to fundamental political rights like voting, however. *See* 140 S. Ct. at 2353 (discussing cases addressing wine-and-cider amendments under temperance laws, injunctions in labor disputes, and cotton-gin licensing).

3. Defendants' newfound position rings particularly hollow given their appeal (at 41) to *Purcell v. Gonzalez*, which instructs courts to consider, among other things, "voter confusion and consequent incentive to remain away from the polls" when crafting election-related injunctions. 549 U.S. 1, 4-5 (2006). It is *Defendants'* attempt to cut back on what they allowed during the recent primary—no-excuse absentee voting regardless of age—that is likely to cause "voter confusion and consequent incentive to remain away from the polls." *Id.*; *see also infra* Part III.A. One cannot imagine a more confusing and chaotic outcome than telling elderly voters they are no longer automatically entitled to vote by mail because Defendants

suddenly chose to deprive them of that right rather than continue to allow all Indiana voters the same choice.

Because this appeal concerns a preliminary rather than final injunction, the case for leveling down is flimsier still. *See Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) ("Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issues it presents."). If Defendants truly wish to level down in response to a Twenty-Sixth Amendment violation, there will be plenty of time to explore that question in post-injunction proceedings on remand. But the equities here overwhelmingly support expanding access to mail-in ballots *at least for the November 2020 election*. The Court should not entertain a late-breaking request to limit voters' rights during a pandemic.

II. Plaintiffs Are Likely To Show A Fourteenth Amendment Violation.

For Fourteenth Amendment challenges, the *Anderson-Burdick* test directs courts to evaluate the burden posed by election-related restrictions and then, using a sliding-scale approach, to weigh those burdens against the interests identified by the state. Given the pandemic, Indiana's refusal to permit voters under 65 to vote absentee by mail in November imposes a substantial burden on the right to vote, and the supposed interests Defendants identify to justify their refusal do not come close to justifying that burden. Br. 21-29. Defendants contend that *McDonald*, *Lane*, and

Griffin v. Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004), foreclose a Fourteenth Amendment claim, Resp. 30-39, but Plaintiffs have already explained why that is incorrect. Br. 30-37. As Defendants largely repeat their arguments below, only a few additional points are in order.

1. *McDonald* does not require courts to apply mere rational-basis scrutiny to Fourteenth Amendment challenges related to absentee ballots. *McDonald* pre-dated the development of the *Anderson-Burdick* framework that this Court has held applies to all election law challenges. In any case, as demonstrated above (at 6-8) and at Br. 30-32, *McDonald* was based on a failure of proof, not a failure of law. To say that only the Supreme Court can overrule its own decisions (Resp. 34) is therefore a red herring. Plaintiffs agree that *McDonald* has not been silently overruled. But neither have *O'Brien*, *Goosby*, *American Party of Texas*, *Anderson*, or *Burdick*.

Defendants' reliance on *Abbott I*'s equal-protection analysis is also misplaced. The Fifth Circuit abrogated that reasoning in *Abbott II*, stating that "[t]he right level of scrutiny to [apply to] an equal protection claim on remand is for the district court initially to analyze." *Abbott II*, 2020 WL 5422917, at *17-18. The motions panel's conclusion is also unpersuasive on its own terms. *See* Br. 33-34.

2. The Second and Sixth Circuits have rejected arguments that *McDonald* requires plaintiffs challenging absentee-voting procedures to show that they are

"absolutely prohibited" from voting. Br. 31-32 (citing *Obama for Am. v. Husted*, 697 F.3d 423, 430-31 (6th Cir. 2012); *Price v. New York State Bd. of Elecs.*, 540 F.3d 101, 108–09 (2d Cir. 2008)). Defendants do not mention those decisions. Defendants do cite *Mays v. LaRose*, 951 F.3d 775 (6th Cir. 2020), for the proposition that "[t]here is no constitutional right to an absentee ballot." But on this point, *Mays* supports Plaintiffs, because far from concluding that *McDonald* resolved the issue, the Sixth Circuit applied the *Anderson-Burdick* test. *Id*. at 783-84. Plaintiffs agree there is no right to an absentee ballot generally. But there *is* a constitutional right against imposing an unjustified burden on the right to vote, as Indiana has done here.

3. Similarly, Defendants repeat the canard that Plaintiffs want the Court to order absentee voting for "people who find it hard for whatever reason" to get to the polling place. Resp. 36 (citing *Griffin*). That is not true. The "reason" relief is necessary here is that this election will take place during an unprecedented public health emergency. Plaintiffs explicitly distinguished *Griffin* on this basis in their opening brief. Br. 36-37. Defendants ignore that discussion.

4. Defendants do not dispute that Indiana's election system imposes significant burdens on voters in a time of pandemic. *See* Br. 21-24. Their attempt to show that Indiana satisfies rational-basis scrutiny (Resp. 32-36) thus misses the mark. *Anderson-Burdick* demands something more than a rational basis. Under its "flexible standard," the Court "must actually 'weigh' the burdens imposed on the

plaintiff against 'the precise interests put forward by the State,'" taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Price*, 540 F.3d at 108–09; *accord Lee v. Keith*, 463 F.3d 763, 768 (7th Cir. 2006).

Defendants now claim that two interests justify their restrictions: an interest in combatting voter fraud; and an interest in ballot "secrecy." Resp. 37. But Defendants present no evidence of increased fraud or decreased "secrecy" in the just-conducted June primary, nor do they explain why these interests make it necessary to burden the rights of Indiana voters in November, Br. 25-26—particularly where Indiana has other means of combatting fraud. *See* Resp. 4; *cf. Abbott II*, 2020 WL 5422917, at *23-24 (Stewart, J.) (rejecting unsupported assertions that mail-in voting would cause "fraud and election chaos").

Defendants elsewhere argue that extending mail-in voting privileges for the upcoming election would cause "chaotic results." Resp. 29. That is a remedial argument, which Plaintiffs address in Part III *infra*. Insofar as it applies to the *Anderson-Burdick* framework, however, that "interest" does not justify the restriction either, for again Defendants have not presented any evidence that the problems they say they faced in the primary must be solved by burdening Plaintiffs' and others' rights. Defendants do not dispute that "[t]here are steps Indiana can take to ameliorate these problems" (Br. 26) short of denying voters the right to vote

absentee by mail. Assertions about these issues do not satisfy Defendants' burden. Br. 26 (citing *Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020)).

5. Finally, Defendants say that *Luft* forbids this Court from substituting judicial for legislative judgment, and requires a "system-wide analysis" that Plaintiffs supposedly "fail even to attempt." Resp. 38-39. But as Plaintiffs pointed out (Br. 34), Defendants themselves concluded that, in light of the pandemic, the "whole electoral system" warranted an extension of mail-in voting to all voters for the primary. Further, Plaintiffs specifically addressed the district court's reliance on Indiana's overall election system in their opening brief. The features of Indiana's election law that Defendants identify (at 39) will not help those worried about in-person voting to cast their ballot in November. Br. 34-35.[6]

While courts should often respect legislative judgments in election matters, legislatures also must abide by the Constitution's commands. In *Judge v. Quinn*, this Court held that "[i]n the face of a constitutional violation, it makes no difference"

[6] Defendants claim that "85%" of registered voters in Indiana cast a ballot in the 2016 general election, supposedly "well in line" with other States. Resp. 39. But data on Defendant Lawson's own website, https://www.in.gov/sos/elections/2983.htm, indicates that registered turnout was just 58%. *See* Dkt. 61-13, https://www.in.gov/sos/elections/files/2016_General_Election_Turnout.pdf. Other sources show that turnout in 2016 was much lower in Indiana than in other States. NonprofitVOTE & U.S. Elections Project, *America Goes to the Polls 2016: A Report on Voter Turnout and Election Policy in the 50 States*, at 9-10, https://www.nonprofitvote.org/documents/2017/03/america-goes-polls-2016.pdf. Regardless, Plaintiffs do not contend that Indiana's election rules violated the Fourteenth Amendment in 2016, and turnout in 2016 says nothing about what will happen in November 2020 if Indiana requires large numbers of citizens to vote in person during a pandemic.

that the Constitution "assign[s] primary responsibility to the states for controlling . . . procedural aspects" of elections. 624 F.3d 352, 360 (7th Cir. 2010). The case for deference is certainly at its weakest where, as here, election officials are unwilling to exercise that judgment while a court case is pending. *See* Br. 28-29. Defendants offer no response to these points.

III. The Balance of Equities Favors Plaintiffs.

Plaintiffs satisfy the balance of equities, because they are seeking to safeguard the fundamental right to vote and public health and safety. Br. 37-39. Defendants dispute this factor on two grounds, but neither is availing.

A. *Purcell* Does Not Apply.

The Supreme Court has explained that courts issuing injunctions near an election must take into account considerations "specific to election cases and [their] own institutional procedures." *Purcell*, 549 U.S. at 4. But *Purcell* does not "outline[] a categorically higher burden for Plaintiffs who move for relief soon before an election." *A. Philip Randolph Inst. v. Husted*, 907 F.3d 913, 918 (6th Cir. 2018).

The considerations in *Purcell* do not apply in this case. First, *Purcell* emphasized a lack of factual findings that had hindered appellate review, 549 U.S. at 3, 5-6, but that concern is absent here. Defendants identify no material facts in dispute. Second, Defendants assert but do not explain how an injunction expanding the availability of mail-in voting will cause voter "confusion." If the injunction

issues, voters under 65 will simply be permitted to request and receive a mail-in ballot as they did for the June 2 primary. Indeed, the fact that Indiana's primary election was conducted under the same rules that Plaintiffs seek for the general election makes this case very different from ones in which injunctions were found to be inappropriate. *See Common Cause*, 2020 WL 4680151, at *1.

This case also arises in a different procedural posture. In *Purcell*, the court of appeals set a briefing schedule terminating after the election; and then, without oral argument, a two-judge motions panel issued a "four-sentence order" enjoining Arizona from enforcing its election laws pending appeal. 549 U.S. at 3-4. By contrast, this Court expedited briefing and scheduled argument for September 30, more than a month before the general election. That is sufficient time to resolve the appeal after full consideration of the merits.

The Court need not take Plaintiffs' word for it. Just weeks ago, Defendants claimed that an accelerated schedule was "unnecessary and unjustified," because "the State's brief is presently due September 24, 2020, which gives the Court time to consider and decide this appeal in advance of the mail-in absentee-ballot-application deadline of October 22, 2020." 7th Cir. Dkt. 18 at 14. Under the Court-ordered schedule, Plaintiffs are submitting this reply—completing the briefing—eight days *before* the date Defendants proposed for filing their brief.

Republican National Committee v. Democratic National Committee, 140 S. Ct. 1205 (2020), is not to the contrary. There, just days before the primary, the district court ordered Wisconsin to count absentee ballots postmarked after the statutory deadline (relief that the plaintiffs had not asked for), and then issued a second order to deal with complications raised by the first injunction. *Id*. at 1206-07. The Supreme Court stayed the injunction but stated that its decision "should not be viewed as expressing an opinion on . . . whether other reforms or modifications in election procedures in light of COVID-19 are appropriate." *Id*. at 1208. *Libertarian Party of Illinois v. Cadigan*, 2020 WL 5104251 (7th Cir. Aug. 20, 2020), is also distinguishable. In that case, the defendant-appellant initially *consented* to the requested relief, then changed its mind and sought to undo the injunction while ignoring other parties' reliance interests. The Court also found that the appellant engaged in "meaningful delay, including in pursuing [the] appeal." *Id*. at *4.

Lastly, although Defendants protest that expanding the availability of mail-in voting for the election will "strain" the election system (Resp. 42-43), they cite no evidence that supports this assertion. Defendants cite their brief in the district court, which states that some counties experienced "challenges" in the form of "unintended costs." Dkt. 53 at 5. As Plaintiffs have noted, however, "unintended costs" are not a basis for burdening the right to vote. Br. 38. Defendants also state that some mail-in ballots were delayed or filled out incorrectly in June. Dkt. 53 at 5. But there is no

evidence that the proportion of mail-in ballots with errors was higher in the just-conducted primary than in an ordinary election. Dkt. 61-11, Decl. of Michelle Fajman ¶ 7. More importantly, if the requested preliminary injunction is issued, voters who wish to vote in-person would remain free to do so. That Defendants expect many voters to choose to vote by mail under the circumstances simply demonstrates why voters—as they did for the primary—should have that choice.

B. Plaintiffs Acted Diligently.

In a last-ditch effort, Defendants blame Plaintiffs for not bringing this litigation sooner. Resp. 44-46. As noted above, Defendants have acknowledged that there is sufficient time in advance of the election for this Court to rule, so this is beside the point. But in any event, the patent purpose of this lawsuit is to safeguard the rights of Indiana voters fearful of going to a polling place because of a pandemic that did not emerge in the United States until mid-March 2020. Plaintiffs filed their complaint on April 29, 2020 and amended it by right one week later. Dkt. 1, Dkt. 6. They moved promptly for a preliminary injunction and filed their opening appeal brief and motion to expedite in this Court just two business days after the district court's decision. At every turn, Plaintiffs have acted to resolve this case as expeditiously as possible so that all Indiana voters can vote safely in November.[7]

[7] The decisions Defendants cite (at 44-45) are completely dissimilar. In *Morgan v. White*, the plaintiff challenged ballot-access rules in light of social-distancing orders issued in March and April 2020, but the signature window had been open for over a year and the

Defendants, for their part, seem content to run out the clock. Not only did they oppose Plaintiffs' motion to expedite, but the Indiana Election Commission did not hold a public meeting from May 12 to August 14, 2020, even as the pandemic spread. Then, the IEC declined to decide whether to allow no-excuse absentee voting by mail in November while Plaintiffs' lawsuit was pending. Br. 28-29.[8] The IEC has not met since the district court denied Plaintiffs' motion on August 21.

CONCLUSION

Defendants do not dispute that there is still time for this Court to render a decision before the November 3 general election. The irreparable harm, likelihood-of-success, and balance-of-the-equities factors all overwhelmingly favor Plaintiffs. This Court should reverse the decision below and order the district court to enter the requested preliminary injunction.

principal plaintiff did "absolutely nothing" to gather signatures until after COVID struck. 964 F.3d 649, 651-52 (7th Cir. 2020). In *Jones v. Markiewicz-Qualkinbush*, the plaintiffs waited until two weeks before the start of early voting to move for an injunction. 842 F.3d 1053, 1057, 1060 (7th Cir. 2016). Finally, in *Fulani v. Hogsett*, the plaintiff did not sue until "three weeks before" the general election. 917 F.2d 1028, 1031 (7th Cir. 1990). The plaintiffs in those cases did not act diligently. Plaintiffs here unquestionably did.

[8] A recording of the IEC's August 14 meeting is available on the IEC's website, https://www.in.gov/sos/elections/2404.htm. Chairman Okeson's remarks about deferring to this lawsuit begin at approximately 35:00.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 16, 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.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Circuit Rule 32(c) because it contains 6,755 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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