No. 20-2605

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BARBARA TULLY, *et al.*,

Plaintiffs/Appellants,

v.

PAUL OKESON, in his official capacity as
Member of the Indiana Election Commission, *et al.*,

Defendants/Appellees.

On Appeal from the United States District Court for the
Southern District of Indiana, No. 1:20-cv-01271-JPH-DLP
The Honorable James Patrick Hanlon, Judge

BRIEF OF APPELLEES

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INTRODUCTION

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). And doing so is a delicate task, for "balancing the competing interests involved in the regulation of elections is difficult." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). Indiana has chosen to balance these interests—"between discouraging fraud and other abuses and encouraging turnout," *id.*, at 1131—by making in-person voting, whether at the precinct polling place on Election Day or at various early-voting locations over the prior 28 days, the State's principal form of voting. *See* Ind. Code §§ 3-11-8-2, 3-11-4-1, 3-11-10-26. Beyond these in-person modes of voting, which are available to all voters, Indiana permits mail-in absentee voting in thirteen different circumstances, including when voters are disabled or elderly or expect to be away from their home counties on Election Day. *Id.* § 3-11-10-24.

Yet Plaintiffs "say this is not good enough; that the Constitution requires [the State] to go farther." *Griffin*, 385 F.3d at 1131. They seek a preliminary injunction requiring Indiana to "allow unlimited absentee voting" in the upcoming November general election—a notion that "ignores a host of serious objections to judicially legislating so radical a reform in the name of the Constitution." *Id.* at 1130. Plaintiffs initially premised their demand on the Supreme Court's Fourteenth Amendment decisions in *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), claiming these decisions authorize federal courts to decide that, in light of SARS-CoV-2 (the coronavirus COVID-19), the State's interest in enforcing its

voting laws "is outweighed by the burdens placed on Plaintiffs' right to vote during the pandemic." ECF 1 at 17; *see also* Appellants Br. 21. But they have since shifted their focus to an argument that has nothing to do with COVID-19: Because Indiana permits elderly Hoosiers to vote absentee-by-mail, they argue, the Twenty-Sixth Amendment obligates the State to extend mail-in voting to *everyone*. *Id.* at 11.

Yet Plaintiffs' Twenty-Sixth Amendment claim fails because legislative and judicial decisions surrounding the Amendment's adoption belie the notion that it prohibits all age distinctions in election laws. And even if Plaintiffs' interpretation were correct, any unlawful unequal treatment should be cured by invalidating the single exception, not by overhauling Indiana's voting laws to permit universal mail-in voting. Plaintiffs' Fourteenth Amendment claim is even weaker, for it is foreclosed both by *Griffin*—which rejected a virtually identical argument, 385 F.3d at 1131—and by *McDonald v. Board of Election Commissioners of Chicago*, which held that the "right to vote" does *not* encompass the "claimed right to receive absentee ballots." 394 U.S. 802, 807 (1969). And not only is universal mail-in voting not required by the Twenty-Sixth and Fourteenth Amendments, but such a drastic change to Indiana's voting laws is especially inappropriate now, just weeks before a major election: The Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (2020) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S. Ct 9 (2014)). Accordingly, this Court should affirm the district court's decision.

STATEMENT OF THE CASE

I. Legal Background

Elections in the United States have "always been a decentralized activity," with elections administered by local officials and their rules set by state legislators. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 486 (2003); *c.f.* U.S. Const. art. I, § 2, cl. 1. These voting rules must balance competing interests, such as "promoting voter access to ballots on the one hand and preventing voter impersonation fraud on the other." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008); *see also Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1051 (6th Cir. 2015) (noting that election laws "balance the tension between the two compelling interests of facilitating the franchise while preserving ballot-box integrity").

For most of American history, policymakers struck this balance by requiring the vast majority of voters to cast their ballots in person on Election Day: The first laws authorizing *absentee* voting were limited to soldiers fighting in the Civil War, and as late as 1913 only two States—Vermont and Kansas—generally permitted civilians to vote via absentee ballot. *See* Paul G. Steinbicker, *Absentee Voting in the United States*, 32 Am. Pol. Sci. Rev. 898, 898 (1938). Today, while all States permit some form of absentee voting, States continue to balance the interests in promoting voting and preventing fraud in a variety of ways, with different States adopting different rules governing when, how, and where voters may vote absentee.

In striking this balance, Indiana lawmakers have provided Hoosiers a variety of voting methods: All registered voters may vote in-person at their precinct polling

place on Election Day, *see* Ind. Code § 3-11-8-2, or—using a procedure sometimes called "absentee in-person voting"—may vote in-person at various locations for the 28 days prior to Election Day, *see id.* §§ 3-11-4-1, 3-11-10-26. Alternatively, Hoosiers suffering from an illness or injury, or caring for someone at a private residence, may vote via a travelling voter board, which will bring a ballot to the voter's house and then return it to election officials to be counted. *See id.* § 3-11-10-25.

In addition to these in-person voting opportunities, Indiana law provides thirteen separate circumstances under which eligible voters may instead vote via mail-in absentee ballot. *Id.* § 3-11-10-24. These circumstances include, for example, having "a specific, reasonable expectation of being absent from the county" while the polls are open on Election Day, being confined to a residence or health care facility "because of an illness or injury" while the polls are open, being scheduled to work while the polls are open, being prevented from voting due to the unavailability of transportation to the polls, being disabled, and being elderly. *Id.*

At the same time, in recognition of the ever-present threat of fraud and coercion attendant to mail-in voting, Indiana strictly regulates the mail-in voting process. Indiana law, for example, severely restricts who may handle printed or completed absentee ballots, deeming it a level 6 felony for anyone other than a select group of individuals to possess absentee ballots. *See* Ind. Code § 3-14-2-16(9)–(10). The Indiana legislature added this provision in 2005, *see* 2005 Ind. Legis. Serv. P.L. 103-2005, shortly after the highly publicized East Chicago mayoral election scandal involving absentee ballot fraud, *see Pabey v. Pastrick*, 816 N.E.2d 1138, 1145–47 (Ind. 2004).

Indiana law vests authority for administering these election rules with the Indiana Election Commission. *See* Ind. Code § 3-6-4.1-14. And in supervising Indiana's elections, the Commission has authority to adopt rules to "[g]overn the fair, legal, and orderly conduct of elections." *Id.* The Commission also has authority both to authorize an otherwise-qualified voter to vote absentee if the Commission "determines that an emergency prevents the person from voting in person at a polling place," as well as to decide whether such an absentee ballot should be transmitted "by mail or personally delivered." *Id.* § 3-11-4-1(c)–(d).

Notably, while the Commission is responsible for these sorts of high-level policy decisions, Indiana law makes local county election boards responsible for on-the-ground administration of elections. *See id.* § 3-6-5-14. County election boards, for example, are responsible for deciding whether particular absentee-ballot applications, *see id.* §§ 3-11-4-2, 3-11-4-17.5, and returned absentee ballots, *see id.* §§ 3-11.5-4-11, 3-11.5-4-12, meet the relevant legal requirements.

II. The State's Elections-Related Responses to COVID-19

On March 6, 2020, Indiana Governor Eric Holcomb declared a public health emergency for the COVID-19 outbreak. ECF 53-5 at 1. Shortly thereafter, on March 20, 2020, Governor Holcomb exercised his public health emergency authority under Indiana Code section 10-14-3 and ordered the primary election "postponed to June 2, 2020," requesting that the Secretary of State and Indiana Election Commission "take any and all necessary actions in connection with this Order." ECF 53-6. And on March 23, 2020, Governor Holcomb issued his directive for Hoosiers to Stay at Home, ordering Indiana residents to "stay at home or their place of residency,"

leaving "only for essential activities, essential governmental functions, or to participate in essential businesses"; the order also prohibited "all public or private gatherings . . . outside of a single household or living unit" as well as "any gathering of more than ten people." ECF 53-7.

Following these orders, on March 25, 2020, the Indiana Election Commission exercised its authority under Indiana Code section 3-11-4-1(c)–(d) to issue an emergency order that provided that "[a]ll registered and qualified Indiana voters are afforded the opportunity to vote no-excuse absentee by mail" for the 2020 primary election. ECF 53-8. As a result of the Commission's order, all 92 counties in Indiana permitted voters to vote by mail, in addition to in-person voting, for the primary election on June 2, 2020.

Permitting universal absentee-by-mail voting in the 2020 primary election caused many counties to experience challenges processing the much larger than usual—in some counties approximately ten times larger—volume of mail-in absentee ballots. For example, LeAnn Angerman, the Assistant Director of Lake County's Election and Voter Registration Board, observed that in the 2020 primary Lake County "sent voters 31,704 absentee-by-mail ballots, as compared to 3,298 during the 2016 primary election." ECF 53-1 at ¶¶ 4–10. Similarly, the Hendricks County Clerk of Court reported that the county "sent 10,152 absentee-by-mail ballots, as compared to 1,323 during the 2016 primary election," ECF 53-2 at ¶¶ 4–10, while the Hamilton County Clerk of Courts reported sending "approximately 40,000 absentee-by-mail

ballots, as compared to approximately 3,000 during the 2016 primary election." ECF 53-3 at ¶¶ 4–11.

This surge in mail-in absentee ballots caused many counties to incur additional, unintended costs, such as costs hiring personnel to process and count the mail-in votes, purchasing postage to mail out the ballots, and installing safety measures to securely store the absentee ballots. *See* ECF 53-1 at ¶ 5 (Lake County was "required [to hire] additional part-time staff and overtime for full-time staff," all of which costed "$38,046 in postage" and for staffing was "approximately $11,275"); ECF 53-2 at ¶¶ 4–5, 10 (Hendricks County had to hire "twenty additional staff members for the sole purpose of canvasing the vote," and spent "$12,444 in postage alone" for absentee-by-mail applications and "an additional $19,427" for absentee-by-mail ballots.); ECF 53-3 at ¶¶ 7–8 (in Hamilton County "approximately twice as many staff members were required to process absentee-by-mail ballots," and the 2020 primary "was the first time [the county] had to continue canvasing the vote on the following day.").

In addition, numerous absentee-by-mail ballots were not counted due to human error that could easily have been avoided in the in-person voting context: Sometimes election officials failed to initial the ballot before sending it to the voter, and many voters forgot to sign their ballots. *See* ECF 53-3 at ¶ 11. And, of course, the United State Postal Service's unpredictable processing caused many ballots to arrive late, both to the voter and, then, on return to the local election board—meaning that many mail-in ballots arrived after the deadline and could not be counted. *See* ECF 53-1 at ¶ 8; ECF 53-2 at ¶ 5; ECF 53-3 at ¶ 9.

III. Procedural History

Plaintiffs filed their complaint on April 1, 2020: They alleged that Indiana's mail-in-absentee-voting rules violate the Fourteenth Amendment, on the ground that these rules do not allow *all* eligible voters to vote via mail-in absentee ballot. ECF 1 at 16–17. More than a month later, on May 4, 2020, Plaintiffs amended their complaint to add a new claim—that for decades Indiana has been violating the Twenty-Sixth Amendment by allowing voters age 65 and over to vote by mail-in absentee ballot. ECF 6 at 18–20. About five weeks later, on June 8, 2020, Plaintiffs sought a preliminary injunction that would prohibit Indiana from enforcing its mail-in-absentee-voting rules and would require the State to allow voters 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." ECF 14 at 26. The State filed its opposition to the preliminary injunction motion on July 24, 2020, ECF 53, and Plaintiffs filed their reply on July 31, 2020, ECF 60. Neither party requested a hearing on the motion.

The district court denied Plaintiffs' preliminary injunction motion on August 21, 2020. ECF 72. In doing so, it observed that Supreme Court has already held that the Constitution does *not* provide all eligible voters the right to no-excuse mail-in absentee voting. *See* Short App. 6–7 ("[U]nless a restriction on absentee voting 'absolutely prohibit[s]' someone from voting, the right to vote is not at stake." (quoting *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969)). The district court thus rejected Plaintiffs' Fourteenth Amendment argument: Because the fundamental right to vote is not at stake here, the State has "'wide leeway . . . to

enact legislation that appears to affect similarly situated people differently.'" *Id.* at 8 (quoting *McDonald*, 394 U.S. at 807 (ellipsis in original)). And it concluded that Plaintiffs' Twenty-Sixth Amendment claim fails "for the same reasons" their Fourteenth Amendment claim fails: "The text of the Twenty-Sixth Amendment shows that it protects 'the right . . . to vote,'" and "under *McDonald*, a restriction on absentee voting does not endanger the right to vote unless it 'absolutely prohibit[s]' someone from voting." *Id.* at 16 (quoting *McDonald*, 394 U.S. at 807).

Finally, even apart from the merits of Plaintiffs' claims, the district court found "several factors that weigh in [the State's] favor." *Id.* at 14. It found that it is in the State's and the public's interest "that the manner of voting in the general election promote the accurate and timely counting and reporting of results," and found that "[e]xpanding voting by mail again for the general election may jeopardize that interest." *Id.* And because "general elections already have substantially higher numbers of voters than primaries," the district court found that greatly expanding Indiana's voting rules to permit universal mail-in voting "certainly" would "easily strain Indiana's voting systems because those systems are instead equipped for in-person voting," resulting in a "greater risk of delayed results and the disqualification of voters for late or defective ballots." *Id.* at 15.

Plaintiffs filed their notice of appeal on August 24, 2020, ECF 73, and filed their opening brief the following day. On September 1, 2020, this Court partially granted Plaintiffs' motion to expedite their appeal, ordering the State to file its response brief by September 9, 2020. The State now does so.

STANDARD OF REVIEW

As this Court recently confirmed, "an applicant for preliminary relief bears a significant burden." *Ill. Republican Party v. Pritzker*, No. 20-2175, 2020 WL 5246656, at *9 (7th Cir. Sept. 3, 2020). The applicant must make three threshold demonstrations—(1) that it will suffer irreparable harm absent preliminary injunctive relief; (2) that no adequate remedies at law exist; and (3) that it has a reasonable likelihood of success on the merits. *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1044 (7th Cir. 2017). Notably, a "reasonable likelihood of success" is not merely a "better than negligible" chance: To obtain a preliminary injunction, the party seeking such relief must make a "strong showing" of likely success on the merits. *Ill. Republican Party*, 2020 WL 5246656 at *2.

Plaintiffs' burden is especially heavy here, for the district court has denied their request for a preliminary injunction, and such decisions are "entitled to considerable weight." *Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 465 (7th Cir. 1998); *see also Lawson Prod., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1437 (7th Cir. 1986) ("[T]he ultimate evaluation and balancing of the equitable factors is a highly discretionary decision and one to which this court must give substantial deference."). In particular, the district court's "findings of historical or evidentiary fact" are reviewed for clear error, *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006), its balancing of the equities for abuse of discretion, *see Somerset House, Inc. v. Turnock*, 900 F.2d 1012, 1014 (7th Cir. 1990), and its legal conclusions *de novo*, *see id.*

What is more, because the requested preliminary injunction would alter voting rules on the eve of an election, Plaintiffs must address "considerations specific to election cases," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), including whether an injunction is appropriate notwithstanding the general rule "that lower federal courts should ordinarily not alter the election rules on the eve of an election," *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (2020) (citing *Purcell*, 549 U.S. 1; *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S.Ct 9 (2014)). Changing the rules shortly before an election begins can "result in voter confusion and consequent incentive to remain away from the polls," a risk that only increases "[a]s an election draws closer." *Purcell*, 549 U.S. at 4–5. Here, the district court concluded that an injunction was improper in view of such risks. *See* Short App. 14 (finding that "[e]xpanding voting by mail again for the general election may jeopardize" the State's and the public's interest in "promot[ing] the accurate and timely counting and reporting of results"). And on this question it is "necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court." *Purcell*, 549 U.S. at 5.

SUMMARY OF THE ARGUMENT

Plaintiffs seek a preliminary injunction on their claim that Indiana's rules governing when Hoosiers may vote by mail-in absentee ballot, Ind. Code § 3-11-10-24(a), are invalid under the Twenty-Sixth and Fourteenth Amendments. *See* Appellants Br. 7, 13. The Court should affirm the denial of their preliminary injunction motion. Plaintiffs failed to show that they are likely to succeed in establishing that

the Constitution requires Indiana to allow universal mail-in absentee voting, and the equities and public interest weigh conclusively against granting such emergency relief in any event.

Plaintiffs' Twenty-Sixth Amendment claim fails because that Amendment does not prohibit all age distinctions in election laws; if it did, many longstanding laws would need to be cleared from the statute books. Rather, it provides only that the "*right . . . to vote* shall not be *denied or abridged* . . . on account of age." U.S. Const. amend. XXVI (emphasis added). And at the time of its adoption it was understood to simply lower the national voting age to 18, and in *McDonald v. Board of Election Commissioners of Chicago*—less than two years before the Amendment was ratified—the Supreme Court held that "the right to vote" does *not* encompass "a claimed right to receive absentee ballots." 394 U.S. 802, 807 (1969). Accordingly, it neither abridges nor denies anyone's right to vote to allow elderly voters to vote by mail. Unlike racial distinctions—which the Constitution prohibits as virtually always invidious—the Constitution permits States to accommodate the difficulties elderly voters may encounter with in-person voting by giving such voters the option of voting by mail.

Furthermore, even if the Twenty-Sixth Amendment categorically prohibited age distinctions in voting laws as Plaintiffs suggest, it still would not entitle Plaintiffs to the injunction they seek. "[W]hen disparate treatment of two groups occurs, the state is free to erase that discrepancy in any way that it wishes," which means it "is free to 'equalize up' or to 'equalize down.'" *Ill. Republican Party v. Pritzker*, No. 20-2175, 2020 WL 5246656, at *9 (7th Cir. Sept. 3, 2020) (citing *Stanton v. Stanton*, 429

U.S. 501, 504 n.4 (1977)). Plaintiffs urge this Court to take this choice away from the State in a manner that contravenes Indiana' express severability provision and the history of Indiana's mail-in-voting law. The Court should not do so.

Plaintiffs' Fourteenth Amendment claim, meanwhile, is precluded by both this Court's and the Supreme Court's precedents. This Court recently confirmed that the Fourteenth Amendment does *not* "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 v. Evers*, 963 F.3d 665, 671 (7th Cir. 2020). Yet that is what Plaintiffs attempt to do: The Supreme Court has long held that the Constitution does *not* require States to "extend[] absentee voting privileges" to everyone, or even to those "for whom voting may be extremely difficult, if not practically impossible." *McDonald*, 394 U.S. at 809–10. And this Court has since reiterated this point, rejecting the argument "that the Constitution requires all states to allow unlimited absentee voting." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004).

Finally, beyond their failure to show likely success on the merits, the balance of equities and public interest foreclose the emergency relief Plaintiffs seek. *See Ill. Republican Party*, 2020 WL 5246656 at *2. While Plaintiffs could have brought their chief argument *decades* ago, they insist on upending Indiana's election laws *now*. They have not only sought to change state election procedures "just weeks before an election," *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam), but have "brought the emergency on [themselves]," and "[t]hat's a good reason to conclude that they are not entitled to emergency relief," *Morgan v. White*, 964 F.3d 649, 651–52 (7th Cir. 2020).

ARGUMENT

I. Plaintiffs Are Not Likely to Succeed on the Merits of Their Twenty-Sixth and Fourteenth Amendment Claims

A. Plaintiffs' Twenty-Sixth Amendment theory is contravened by the historical evidence and does not entitle them to the injunction they seek in any event

1. The Twenty-Sixth Amendment does not prohibit all age distinctions in all laws related to elections

The Twenty-Sixth Amendment 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. Plaintiffs contend that Indiana Code section 3-11-10-24(a)(5) violates the Twenty-Sixth Amendment's prohibition against the denial or abridgement of the right to vote on account of age because it authorizes all registered voters ages 65 and older to vote by mail, but allows voters under the age of 65 to vote by mail only if they meet one of the statute's twelve other vote-by-mail criteria. Appellants Br. 11–12. Plaintiffs' Twenty-Sixth Amendment claim fails, however, because this statute does not "deny or abridge" Plaintiffs' (or any other voters') right to vote. The Twenty-Sixth Amendment protects the right to vote, *not* the right to vote *absentee*. Because section 3-11-10-24(a)(5) merely grants elderly voters—among many others—the option of voting via mail-in absentee ballot, it does not run afoul of the Twenty-Sixth Amendment.

i. The Twenty-Sixth Amendment was widely understood at the time of its adoption to be fundamentally concerned with lowering the voting age from 21—set by the Fourteenth Amendment, *see* U.S. Const., amend. XIV, § 2—to 18. It served the

dual purpose of "eliminating the 'administrative nightmare' of separate voter lists for national and local elections and bringing 18, 19 and 20-year-old persons into the political process." *Walgren v. Bd. of Selectmen of Town of Amherst, Mass.*, 373 F. Supp. 624, 633 (D. Mass. 1974) (quoting *Walgren v. Howes*, 482 F.2d 95, 100-101 (1st Cir. 1973)), *aff'd sub nom. Walgren v. Bd. of Selectmen of Town of Amherst*, 519 F.2d 1364 (1st Cir. 1975). The Amendment was "less a recognition of basic human rights" than "a change in the condition of young Americans" who were not only being called to fight in Vietnam, but were also "generally were marrying earlier, travelling more widely and taking a greater interest in government than ever before." *Id.* at 634.

The history of the Twenty-Sixth Amendment's adoption illustrates that it was originally understood simply to secure the right to vote for all citizens age 18 and older. Congress attempted to lower the voting age to 18 for national, state, and local elections with the Voting Rights Act Amendments of 1970. The 1970 Act provided that "no citizen of the United States who is otherwise qualified to vote in any State or political subdivision . . . shall be denied the right to vote . . . on account of age if such citizen is eighteen years of age or older." Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 301, 84 Stat. 314, 318 (1970). Shortly after the 1970 Act's adoption, however, the Supreme Court issued a 4–1–4 decision holding that the Act, though valid for federal elections, was unconstitutional as applied to state and local elections. *Oregon v. Mitchell,* 400 U.S. 112 (1970). As a result, federal law provided one rule for federal elections while state and local laws provided a patchwork of age qualifications for other elections.

The congressional debate surrounding the Twenty-Sixth Amendment shows that the principal impetus for its adoption was to remedy this issue and provide for one uniform voting age, set at 18, for all state and federal elections.

Indiana Senator Birch Bayh, for example, observed that this "dual-age approach to voting would cause substantial nationwide confusion, delay, and danger of fraud." S. Rep. No. 92-26 at 12 (1971). Senator Mike Mansfield agreed, arguing in support of the Amendment that "such a dual age voting system can result only in added cost, confusion, delay, and waste, to say nothing of the unjust and unreasonable burden it imposes upon those citizens who are 18, 19, and 20 years of age." 117 Cong. Rec. 5815. Similarly, Representative Robert Michel noted that "my principal concern with this particular measure is one that has to do with permitting 18-year-olds to vote . . . in local and municipal elections." *Id.* at 7538. Senator Bob Dole discussed the dual-age issue as well, observing that because "[i]n view of the Congress' creation of [the age discrepancy] problem[,] . . . it is imperative for Congress to act expeditiously to remedy it." *Id.* at 5826. To do so, "[s]wift approval of Senate Joint Resolution 7 is the best and most appropriate means of providing an 18-year-old minimum voting age for all elections." *Id.*

The record of the congressional debate indicates that Members of Congress sought to lower the voting age to give the right to vote to young adults who were increasingly independent and educated. Representative James J. Howard said "this is something our country should do to in order to recognize that our 18-year-olds, our

19-year-olds, and 20-year-olds are adults in America." 117 Cong. Rec. 7537. Representative William Alexander, Jr. pointed out that 18-year-old citizens could be drafted into the military, get married, and be held responsible in court; it was "untenable that these same 18-year-olds should be held not sufficiently mature to make their wishes known at the ballot box . . . at all levels of government." *Id.* at 7553. Representative Jack Kemp explained that "as long as our society makes demands upon those within the 18- to 21-year-age group, it has some obligation to give them a role in choosing their government. Anything else sounds dangerously like taxation without representation." *Id.* at 7555.

This history demonstrates that the "mischiefs" at which the Twenty-Sixth Amendment was directed were the problems caused by *Mitchell*'s "dual-age" voting system, as well as the injustice of taxing and drafting 18-year-olds while denying them the vote—problems fully remedied when the Amendment set a nationwide minimum voting age of 18. *See generally* Samuel L. Bray, *The Mischief Rule*, 109 Geo. L. J. (Forthcoming) at 50, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452037 (last revised Apr. 6, 2020) (arguing that "the mischief rule still has something to offer to a wide array of interpreters," can be used with a good conscience even by a textualist," and "reflects a widespread intuition of interpreters, legal and otherwise"). As one noted scholar put it, "[a]ll [the Twenty-Sixth Amendment] did was change the voting age from twenty-one to eighteen. Nobody looked upon it as something more." Bruce A. Ackerman, *We the People: Foundations* 91 (1991).

ii. Plaintiffs, however, claim that the Twenty-Sixth Amendment was understood to go further and bar *all* aged-based distinctions in voting laws. But they cite no evidence that any federal legislator, or any participant in any one the 42 state ratifying proceedings, even *discussed* whether the Amendment imposed a categorical "age neutral[ity]" requirement. Eric S. Fish, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1235 & n.160 (2012). If the general public understood the Amendment to prohibit all age-based distinctions in state voting laws, concurrent commentary to that effect should be readily available.

What is more, any serious concern that the Twenty-Sixth Amendment carried such broad implications would surely have sparked *some* opposition. Yet the Twenty-Sixth Amendment's ratification generated less controversy than any other constitutional amendment in American history: It was endorsed by a 94-0 vote in the Senate and a 400-19 vote in the House, and "[t]he approval of three-fourths of the states was obtained in three months and seven days." Robert Roth, *Seven Polarizing Issues in America Today: A Rapid Change of Sentiment*, 397 Annals Am. Acad. Pol. & Soc. Sci. 83, 84 (Sep. 1971). "The nearest approach to that was achieved in 1804, when the Twelfth Amendment . . . was ratified in six months and six days." *Id.* And definitive histories of the proposal and ratification process make no mention of any opposition predicated on implications for laws benefitting the elderly. *See, e.g.,* Robert P. Saldin, *War, the American State, and Politics since 1898* 200–05 (2010) (noting opposition to reducing the voting age to 18); Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 225–28 (2000) (same).

Indeed, Plaintiffs' no-age-distinctions theory would require invalidation of state election laws in at least twenty-three different States. Alabama, for example, permits voters over the age of 70 to move to the front of the line at the polls, *see* Ala. Code § 17-9-13(c), and Georgia has a similar law, *see* Ga. Code § 21-2-409.1. In Florida, individuals "65 years of age or older" are exempt from personal-identification requirements for voter registration, Fla. Stat. § 97.0535, and first-time voters "65 years of age or older" are also not required to include a copy of their identification cards when returning mail-in ballots, Fla. Stat. § 101.6923; Alabama has a similar provision as well, *see* Ala. Code § 17-9-30(d). Michigan requires voters to present personal identification when voting, Mich. Comp. Laws § 168.523, but provides *free* identification cards for residents 65 and older, *id.* § 28.292(14)(a), and at least seven other States have similar laws.[1] At least three additional States give elderly voters access to specialized procedures and resources (such as North Carolina, which allows a voter, "but because of age . . . is unable to enter the voting enclosure to vote in person

[1] Other States include: Arizona (personal identification is required to obtain a ballot, *see* Ariz. Rev. Stat. § 16-579, but the Arizona department of Transportation does not charge those age 65 and over for an identification card, *see* Ariz. Dep't of Transp., https://azdot.gov/node/5115); Colorado (personal identification is required, *see* Colo. Rev. Stat. §1-7-110, but the State does not charge a fee for a state identification card for individuals 60 and older, *see* Colo. Rev. Stat. §42-2-306); Kansas (the State generally requires that the form of identification "has not expired," but provides that" [e]xpired documents shall be valid if the bearer of the document is 65 years of age or older," Kan. Stat. 25-2908(h)(1)); New Hampshire (voters over the age of 65 may use an expired form of identification no matter how long it has been expired, while other voters are subject to a 5-year limit on expiry, *see* N.H. Rev. Stat. 659:13); North Carolina (voters 65 and older may present "any expired form of identification . . . provided that the identification was unexpired on the registered voter's sixty-fifth birthday," N.C. Gen. Stat. § 163-166.16(a)(3); Texas (voters over the age of 70 may use a form of identification that has expired regardless of how long it has been expired, *see* Tex. Elec. Code § 63.0101); and Wisconsin (personal identification is required to vote, *see* Wis. Stat. § 6.79, but the State provides an identification card at no cost to individuals 65 and older, *see* Wis. Stat. § 343.50).

without physical assistance," to vote "in the vehicle conveying that voter or in the immediate proximity of the voting place," N.C. Gen. Stat. § 163-166.9).[2] And at least ten States have laws strikingly similar to the one challenged here, which either specifically permit elderly voters in particular to vote absentee or make it easier for them to do so.[3]

Congress, meanwhile, has long *required* States to assist older voters in obtaining mail-in ballots as part of a national policy "to promote the fundamental right to vote by improving access for handicapped and elderly individuals." 52 U.S.C. § 20101; *see also id.* § 20107 (defining "elderly" to mean "65 years of age or older"). For example, federal law requires States to "assure that all polling places for Federal elections are accessible to handicapped and elderly voters," and if a voter is not assigned to an accessible polling place States must provide the voter "with an alternative means for casting a ballot on the day of the election." *Id.* § 20102(b)(2)(B)(ii). States, including

[2] Other States include: Arizona (which provides alternative voting procedures for persons age 65-and-older who cannot access their polling place, *see* Ariz. Rev. Stat. § 16-581); and Rhode Island (which law provides that one voting booth shall be designated for priority use by voters over sixty-five years of age, *see* 17 R.I. Gen. Laws § 17-19-51).

[3] Ga. Code § 21-2-381 ("Any elector meeting criteria of advanced age . . . may request . . . a ballot"); Ky. Rev. Stat. § 117.085(1)(a)(8) (in-person absentee ballots available for persons "on account of age . . . not able to appear on election day."); La. Rev. Stat. § 18:1303(J) (allowing persons age 65 and older to vote absentee by mail); Miss. Code. § 23-15-715(b) (allowing persons age 65 and older to vote absentee by mail); Mo. Stat. § 115.277(6)(1) (allowing voters 65 and older to vote absentee); S.C. Code § 7-15-320 (allowing persons age 65 and older to vote absentee); Tenn. Code § 2-6-201 (allowing persons age 60 and older to vote absentee by mail); Tex. Elec. Code § 82.003 (allowing persons age 65 and older to vote absentee by mail); Va. Code § 24.2-416.1 (requirement to vote in-person if registering to vote in a county or city where the voter has never voted "shall not apply to . . any voter age 65 or older"); W. Va. Code § 3-3-1(b)(1)(B) (voters may vote absentee by mail on account of "[p]hysical disability or immobility due to extreme advanced age").

Indiana, take these requirements seriously. *See, e.g.,* Ind. Code § 3-7-33-4.5(b)(4) (exempting from certain documentation requirements voters to whom 52 U.S.C. § 20102(b)(2)(B)(ii) applies). Yet these requirements directly contradict Plaintiffs' theory, for Plaintiffs read the Twenty-Sixth Amendment to *prohibit* States and the federal government from granting any accommodations to elderly voters.

The actions of state legislatures shortly after the Twenty-Sixth Amendment's ratification further confirm that the Amendment was not understood to prohibit age distinctions in voting laws categorically. For example, in 1975 Texas adopted a provision virtually identical to the one at issue here—which "extended absentee voting to voters 65 years of age or older," *In re State of Tex.*, 602 S.W.3d 549, 558 (Tex. 2020) (citing Act of May 30, 1975, 64th Leg. R.S., ch. 682, § 5, 1975 Tex. Gen. Laws 2080, 2082)—as part of a significant revision of the State's election laws meant in part "to bring the Texas Election Code into conformity with" with the Twenty-Sixth Amendment, House Comm. On Elections, Bill Analysis, S.B. 1047, 64th Leg., R.S. (1975), https://lrl.texas.gov/LASDOCS/64R/SB1047/SB1047_64R.pdf#page=82. That Texas—which had ratified the Amendment just four years earlier, *see* Tex. S. Con. Res. 65, 62d Leg., R.S., 1971 Tex. Gen. Laws 3867—adopted a provision allowing all voters 65-and-older to vote by mail *in the very same bill* that lowered the State's voting age to 18 strongly indicates that the Twenty-Sixth Amendment was not understood to prohibit such commonsense age-related distinctions.

iii. Finally, as a matter of textual construction, the "right . . . to vote" that the Twenty-Sixth Amendment protects does *not* include the right Plaintiffs assert

here—that is, the right to vote by mail-in absentee ballot. The "right to vote," of course, is nowhere expressly defined by the Constitution, and is understood to be secured as much by implication as by text. *See, e.g., Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) ("The Constitution does not in so many words confer a right to vote, though it has been held to do so implicitly." (collecting cases)). Accordingly, the substantive parameters of the right have been defined in the course of judicial resolution of concrete cases. *See, e.g., id.* (explaining that courts consider right-to-vote claims on a case-by-case basis, asking "whether the restriction and resulting exclusion are reasonable given the interest the restriction serves"). Any invocation of "the right to vote" must grapple with the contours of the right as articulated by controlling precedents.

Here, the relevant contour is supplied by the Supreme Court's decision in *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802 (1969), which, on the eve of the Twenty-Sixth Amendment, confirmed that the "right to vote" does *not* include the right to vote by mail. *McDonald*, decided just two years before the Twenty-Sixth Amendment's ratification, addressed a claim, brought by inmates awaiting trial in jail, that Illinois violated their "basic, fundamental right" to vote by refusing to allow them to vote absentee while allowing others—poll watchers, those away from the county, those observing a religious holiday, and the physically incapacitated—to do so. *Id.* at 807. The Court rejected the inmates' claim, explaining that "the Illinois statutory scheme" did not have "an impact on [the inmates'] ability to exercise the

fundamental right to vote," because it was "not the right to vote that is at stake here but a claimed right to receive absentee ballots." *Id.*

Because *McDonald* holds that the "right to vote" does not include a purported right to vote via absentee ballot, it follows that state laws that give elderly voters the option of voting absentee neither "den[y]" nor "abridge[]" anyone's "right . . . to vote." U.S. Const. amend. XXVI. Indiana's "accommodate[ion of] some voters by permitting (not requiring) the casting of absentee . . . ballots, is an indulgence," and the criteria the State sets on this benefit therefore do not burden Plaintiffs or anyone else. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring in the judgment).

As the Fifth Circuit explained in rejecting a virtually identical Twenty-Sixth Amendment argument challenging a Texas law permitting elderly voters to vote by absentee ballot, "[t]he well-respected logic of *McDonald* applies equally to the Twenty-Sixth Amendment." *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 408 (5th Cir. 2020). The Fifth Circuit explained that "employing *McDonald*'s logic leads inescapably to the conclusion that rational-basis review applies" to *both* Fourteenth Amendment and Twenty-Sixth Amendment challenges to absentee-voting laws. *Id.* at 409. "If a state's decision to give mail-in ballots only to some voters does not normally implicate an equal-protection right to vote"—which, as explained above, is precisely what *McDonald* holds—"then neither does it implicate '[t]he right . . . to vote' of the Twenty-Sixth Amendment." *Id.* "*McDonald*'s logic applies neatly to the

Twenty-Sixth Amendment's text—which was ratified two years after *McDonald*—because the Amendment similarly focuses on whether the *state* has 'denied or abridged' the right to vote." *Id.* (emphasis in original).

Accordingly, while the Supreme Court in *Harman v. Forssenius*, 380 U.S. 528 (1965), and *Symm v. United States*, 439 U.S. 1105 (1979) (mem.), established that the right to vote is secured against indirect as well as direct denials and abridgements, *McDonald* establishes that the option of mail-in voting is not included in the "right to vote" in the first place. The Twenty-Sixth Amendment thus does not prohibit a State from using age as a criterion for mail-in voting because such a distinction does not deny or abridge the right to vote at all: It instead merely limits the "claimed right to receive absentee ballots." *McDonald*, 394 U.S. at 807. Indiana's mail-in voting law thus does not implicate the Twenty-Sixth Amendment at all.

2. Even under Plaintiffs' interpretation, the Twenty-Sixth Amendment would not entitle them to universal mail-in voting

In any case, the Twenty-sixth Amendment would not entitle Plaintiffs to the injunction they seek *even under Plaintiffs' own interpretation*. Plaintiffs contend that allowing a voter to vote via mail-in absentee ballot because "[t]he voter is an elderly voter," Ind. Code § 3-11-10-24(a)(5), violates a purported Twenty-Sixth Amendment ban on age distinctions in election laws, and they demand that, rather than merely declare this statutory provision invalid, the court must extend the option of mail-in absentee voting to all. Appellants Br. 39. The Court should decline to do so.

i. When, as here, an alleged constitutional violation involves unequal treatment, "a court theoretically can cure that unequal treatment either by extending

the benefits or burdens to the exempted class, or by nullifying the benefits or burdens for all." *Barr v. Am. Assoc. of Political Consultants*, 140 S.Ct. 2335, 2654 (2020); *see also Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1698 (2017) ("'[W]hen the right invoked is that to equal treatment, the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.'" (quoting *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (alteration in original)). And whether a court should remedy the violation by withdrawing the benefits from the favored class or by extending the benefits to the excluded class can be a complicated question that may raise "knotty questions about what is the exception and what is the rule." *Barr*, 140 S.Ct. at 2354.

Such a question is not, properly speaking, a constitutional one: "'How equality is accomplished . . . is a matter on which the Constitution is silent.'" *Morales-Santana*, 137 S.Ct. at 1698 (quoting *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 426–427 (2010)). Instead, "the manner in which a State eliminates discrimination '*is an issue of state law*.'" *Id.* at 1698 n.23 (quoting *Stanton v. Stanton*, 421 U.S. 7, 18 (1975)) (emphasis added). For this reason, "when disparate treatment of two groups occurs, the state is free to erase that discrepancy in any way that it wishes." *Ill. Republican Party v. Pritzker*, No. 20-2175, 2020 WL 5246656, at *9 (7th Cir. Sept. 3, 2020) (citing *Stanton*, 429 U.S. at 504 n.4).

ii. Here, however, Plaintiffs contend that there is only one way remedy the unequal treatment they claim the Twenty-Sixth Amendment prohibits—to require

the State to allow "all Indiana voters . . . to apply for and receive an absentee ballot without regard for their age and without excuse." Appellants Br. 4. Not so: The "commonsense severability principles" that determine the appropriate remedy to "an equal-treatment constitutional violation" conclusively preclude the relief Plaintiffs seek. *Barr*, 140 S.Ct. at 2354.

"If the statute contains a severability clause, the Court typically severs the discriminatory exception or classification." *Id.*; *see also Heckler*, 465 U.S. at 740 (noting that a federal statute's severability clause would have prohibited extending benefits to the excluded class). And here the Indiana General Assembly has adopted a general severability statute that provides that if the application of any provision of the Indiana Code is held invalid, the invalidity does not affect other provisions "that can be given effect without the invalid provision or application." Ind. Code § 1-1-1-8(a). Unless a statute contains a nonseverability clause—and the statute here does not—"*each* part and application of *every* statute is severable." *Id.* § 1-1-1-8(b) (emphasis added). The only exception to this rule is where an invalid provision "is so essentially and inseparably connected with" the rest of the statute that no presumption can be drawn that the statute would have been enacted without the invalid provision, or where the rest of the statute "*cannot be executed in accordance with legislative intent* without the invalid provision." *Id.* (emphasis added).

These rules would thus require severing the challenged provision from the dozen other provisions enumerating separate circumstances in which Hoosiers may vote via mail-in absentee ballot. Indiana's mail-in voting rules can operate perfectly

coherently without extending mail-in voting to elderly voters. They did so for years before the challenged provision was adopted. In 1988, for example, the Indiana legislature authorized mail-in voting only for voters who were out of the county on election day, expected to remain confined because of illness or injury, were handicapped in a precinct whose polls were inaccessible, were serving as election officials at a precinct different from their own, or were employed by the election board to administer the election. *See* 1988 Ind. Legis. Serv. P.L. 10-1988, § 104. In 1991, the Indiana legislature expanded who could vote by mail-in absentee ballot, but voters aged 65 and older still were not included in that list. *See* 1991 Ind. Legis. Serv. P.L. 4-1991, §§ 67, 96. It was not until 1993 that the Indiana General Assembly added "elderly voters" to the list of those eligible to vote via mail-in absentee ballot. 1993 Ind. Legis. Serv. P.L. 3-1993, § 124.

Accordingly, Indiana's express severability statute is by itself sufficient to foreclose Plaintiffs' universal-mail-in-voting injunction: "At least absent extraordinary circumstances, the Court should adhere to the text of the severability" clause, for a severability clause "leaves no doubt about what" the legislature would have "wanted if one provision of the law were later declared unconstitutional." *Barr*, 140 S.Ct. at 2349.

iii. Furthermore, even if there were doubt on this score, the surrounding context of Indiana's voting laws confirms that if extending the privilege of mail-in absentee voting to the elderly is unconstitutional, the only appropriate remedy is simply to invalidate the provision that extends that benefit. As noted, the elderly-

voter provision Plaintiffs claim is unconstitutional is an *amendment* to Indiana's mail-in voter law. And where the legislature has "added an unconstitutional amendment to a prior law," the Supreme Court "has treated the original, pre-amendment statute as the 'valid expression of the legislative intent'" and has accordingly severed the amendment. *Barr*, 140 S.Ct. at 2353 (quoting *Frost v. Corp. Comm'n of Okla.*, 278 U.S. 515, 526–27 (1929)). The "original, pre-amendment" version of Indiana's mail-in voting rules lacked the age distinction of which Plaintiffs complain, and any remedy should therefore be limited to "sever[ing] the exception introduced by amendment." *Id.* (internal quotation marks and citations omitted).

In addition, the Supreme Court has said that where, as here, an allegedly unlawful distinction consists of a benefit afforded as an exception to a rule—such that a discrete group receives more favorable treatment than others—the appropriate remedy is to invalidate the favorable treatment and extend the general rule to cover the previously favored group. In *Morales-Santana*, for example, the Court was forced to determine the appropriate remedy in a challenge to a federal immigration law that unconstitutionally imposed a longer physical-presence requirement for unwed fathers than for unwed mothers: The Court explained that because "the discriminatory exception consists of favorable treatment for a discrete group (a shorter physical-presence requirement for unwed U.S.-citizen mothers giving birth abroad)," the appropriate relief was to "strik[e] the discriminatory exception" and "extend[] the general rule of longer physical-presence requirements to cover the previously favored group." 137 S.Ct. at 1699.

Analogously, in Indiana, in-person voting has always been the rule and mail-in voting the exception. *Compare* Ind. Code §§ 3-11-8-2 ("A voter shall vote at the polls for the precinct where the voter resides except when authorized to vote in another precinct"), 3-11-4-1 ("Except as otherwise provided . . . a voter voting by absentee ballot *must* vote in the office of the circuit court clerk . . . or at a satellite office") (emphasis added), 3-11-10-26 ("As an alternative to voting by mail, a voter is entitled to cast an absentee ballot before an absentee voter board") *with id.* § 3-11-10-24 ("a voter who satisfies any of the following [13 exceptions] is entitled to vote by mail" including on account of religious observances, disability, and age). The provision Plaintiffs challenge authorizes an exception to the general rule of in-person voting for elderly voters. Expanding the exception to all—particularly doing so in a system designed for primarily in-person voting—would produce chaotic results, as the State has already seen in this year's primary election. *See* ECF 53-1 at 2–4; ECF 53-2 at 2–4; ECF 53-3 at 3–5. If the Twenty-Sixth Amendment forbids such an exception, the only appropriate course is to invalidate the exception and apply the general rule to such voters.

Indeed, Plaintiffs' position—that the only proper relief is to extend any benefit given to elderly voters to *all* voters—would create absurd results in other jurisdictions that also have age distinctions in their voting laws. As noted, Alabama allows voters who are over the age of 70 to request to move to the front of the line at the polling place. *See* Ala. Code § 17-9-13(c). Plaintiffs' reasoning would require Alabama to extend that privilege to all voters and allow *anyone* to request to move to the front of

the line—a recipe for chaos if there ever was one. Similarly, Nevada requires county clerks to provide voters 65 and older voting aids, such as large-type instructions, *see* Nev. Admin. Code § 293.190, and Plaintiffs would have Nevada provide these aids to all voters.

The Constitution neither demands nor permits such absurd results. The Supreme Court recently cautioned that "[c]onstitutional litigation is not a game of gotcha against Congress, where litigants can ride a discrete constitutional flaw in a statute to take down the whole, otherwise constitutional statute." *Barr*, 140 S.Ct. at 2351. Here, too, Plaintiffs are attempting to use the alleged invalidity of a single provision—first added in 1993—to overhaul Indiana's entire voting system, contravening the Indiana legislature's considered decision to allow only certain categories of voters to vote absentee by mail. The Court should reject this attempt at legislation-by-lawsuit. If it determines that Plaintiffs are likely to succeed in establishing that the Twenty-Sixth Amendment bars States from allowing elderly voters to request to vote absentee-by-mail, this Court should do nothing more than invalidate that provision.

B. Plaintiffs' Fourteenth Amendment claim is foreclosed by multiple binding precedents

Plaintiffs' Fourteenth Amendment claim is even weaker, for it is foreclosed by both the Supreme Court's decision in *McDonald* and this Court's decisions in *Griffin*, 385 F.3d at 1130 and *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020).

1. As noted, *McDonald* squarely rejected an analogous challenge to an Illinois law that similarly limited absentee voting. Like Plaintiffs, the inmates challenging Illinois's absentee-voting law argued that the Fourteenth Amendment prohibited

Illinois from permitting absentee voting for some groups but not others, particularly the inmates, would could not "readily appear at the polls either because they are charged with nonbailable offenses or because they have been unable to post the bail imposed by the courts of Illinois." 394 U.S. at 803. The Court observed that "underlying" the inmates' claim was "the assertion that since voting rights are involved, there is a narrower scope for the operation of the presumption of constitutionality than would ordinarily be the case with state legislation challenged in this Court." *Id.* at 806.

The Court flatly *rejected* that assertion: Strict scrutiny was "not necessary" because Illinois law did not draw distinctions "on the basis of wealth or race" and because "there is nothing in the record to indicate that the Illinois statutory scheme has an impact on [the inmates'] ability to exercise the fundamental right to vote," *id.* at 807, "[s]ince there is nothing in the record to show that [the plaintiffs were] in fact *absolutely prohibited from voting by the State*," *id.* at 808 n.7 (emphasis added). Because it was "thus not the right to vote that is at stake here but a claimed right to receive absentee ballots," *id.* at 807, the Illinois law's "distinctions" were merely required to "bear some rational relationship to a legitimate state end," *id.* at 809. And the Court concluded they did: While "Illinois could, of course, make voting easier for all concerned by extending absentee voting privileges to" the plaintiffs, "[i]ts failure to do so, however, hardly seems arbitrary, particularly in view of the many other classes of Illinois citizens not covered by the absentee provisions, for whom voting may be extremely difficult, if not practically impossible." *Id.* at 809–10.

McDonald thus stands for the proposition that the Constitution does not confer a right to vote by absentee ballot. *See, e.g., Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 n.6 (1969) ("In McDonald . . . we were reviewing a statute which made casting a ballot easier for some who were unable to come to the polls . . . at issue was not a claimed right to vote but a claimed right to an absentee ballot."); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020) ("There is no constitutional right to an absentee ballot."). Rational-basis scrutiny therefore applies to distinctions States draw in crafting their absentee-ballot rules so long as States do not "absolutely prohibit[]," *McDonald*, 394 U.S. at 809, voting by other means (such as in-person voting).

And it was for precisely this reason that the Fifth Circuit recently rejected a parallel Fourteenth Amendment challenge to Texas's absentee-voting law, which also specifically permits elderly citizens to vote absentee. *See Texas Democratic Party*, 961 F.3d at 406 ("Because the plaintiffs' fundamental right is not at issue, *McDonald* directs us to review only for a rational basis.").

Plaintiffs readily admit that the Constitution does not confer a right to vote absentee and that Indiana could thus eliminate *all* absentee voting if it wished. Appellants Br. 36. Yet they attempt to sidestep *McDonald* on the ground that, in light of COVID-19, "the State's refusal to permit no-excuse mail-in voting" leaves them with "no alternatives that will adequately address their legitimate safety concerns," and they contend that Indiana's absentee-voting law thereby "does have an 'impact' on the 'fundamental right to vote.'" *Id.* at 31 (quoting *McDonald*, 394 U.S. at 807).

The difficulties the inmates in *McDonald* had with in-person voting were doubtlessly considerable too, however, and the Court nevertheless rejected their claims because there was "nothing in the record to show that [the inmates were] in fact *absolutely prohibited* from voting *by the State*." 394 U.S. at 808 n. 7 (emphasis added); *see also Texas Democratic Party*, 961 F.3d at 404. Indiana has done nothing to prevent, much less absolutely prohibit, Plaintiffs from voting. Contrary to Plaintiffs' assertions, the Constitution does not obligate the State to extend absentee voting to all "for whom voting may be extremely difficult, if not practically impossible." *McDonald*, 394 U.S. at 810.

Confronting the trouble *McDonald* spells for their claims, Plaintiffs also contend that the Supreme Court has since "read *McDonald* exceedingly narrowly." Appellants Br. 32 (citing *Hill v. Stone*, 429 U.S. 289, 300 n. 9 (1975); *O'Brien v. Skinner*, 409 U.S. 1240, 1241 (1972) (Marshall, J., in chambers); *Goosby v. Osser*, 409 U.S. 512, 520–22 (1973)). Yet every case Plaintiffs cite on this score merely reiterates the uncontroversial point—which *McDonald* itself made—that heightened scrutiny applies *only* when a citizen is "in fact *absolutely prohibited* from voting *by the State*." *McDonald*, 394 U.S. at 808 n.7.

Hill, which involved a law that categorically denied the vote to citizens who failed to list property with the local tax assessor, explained that *McDonald* did not control because the Illinois absentee-voting law at issue did not have "any impact on the . . . *right to vote*"; it merely limited one form of voting and did not "actually restrain[ ] the *fundamental right to vote*." *Hill*, 429 U.S. at 300 n.9 (emphasis

added). *O'Brien* and *Goosby* make the same point: Heightened scrutiny is appropriate only where "the State has rejected alternative means by which applicants might exercise their right to vote" (such as in-person voting). *O'Brien*, 409 U.S. at 1241 (Marshall, J., in chambers); *see also Goosby*, 409 U.S. at 521–22 (explaining that *McDonald* did not bar the plaintiffs' claims because the plaintiffs had alleged that, unlike the inmates in *McDonald*, "the Pennsylvania statutory scheme *absolutely prohibits them from voting*" (emphasis added)).

And in any case, the Supreme Court has consistently reiterated that *it*—not lower courts—has the sole power to overturn its precedents, which is not something the Court normally does "*sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). Because the Court has not overturned *McDonald*, the decision remains good law. After all, *Burdick* itself "cites it favorably." *Tex. Democratic Party*, 961 F.3d at 406 (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

Accordingly, "*McDonald* lives," *id.*, and requires that the distinctions drawn by Indiana's absentee-voter law be subject to merely rational-basis review. And here Plaintiffs' principal objections seem to be to the Indiana legislature's decision to allow elderly Hoosiers to vote absentee while not allowing *all* Hoosiers to vote absentee for any reason. But "because an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the 'facts on which the classification is apparently based could not reasonably be conceived to be true by the governing decisionmaker.'" *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979); *see also Massachusetts*

Bd. Of Retirement v. Murgia, 427 U.S. 307, 314 ("Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict judicial scrutiny."). "[W]here rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its law are imperfect.'" *Id.* at 316. Rational-basis review "'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Johnson v. Daley*, 339 F.3d 582, 587 (7th Cir. 2003) (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

Despite the circumstances created by COVID-19 and the implications they have on life in the public square, elected and other politically accountable officials are better-equipped to assess the public health issues at play and appropriately address them. In particular, age-based considerations are commonplace in election laws, and Indiana's decision to allow all elderly voters to vote absentee fits squarely in the realm of "rationally related to a legitimate state interest," for the State has a clear and direct interest in encouraging elderly citizens—who are more likely to face obstacles getting to the polls—to vote. *See McDonald*, 394 U.S. at 809.

Again, Indiana and at least ten other States have identified an interest in encouraging elderly citizens to vote by allowing such citizens to vote absentee or by making it easier for them to do so. *See supra* n.3. And many such state laws have been place for decades. Kentucky, Tennessee, and Texas, for example, have allowed elderly citizens to vote by absentee ballot for nearly fifty years. *See* Act of June 19,

1976, ch. 247, 1976 Ky. Acts 527; Act of May 3, 1973, ch. 399, 1973 Tenn. Pub. Acts 1411–12; Act of June 20, 1975, ch. 682, 1975 Tex. Gen. Laws 2082.

Indiana's willingness to make accommodations for that vulnerable population does not constitutionally obligate the State to throw the door open to statewide absentee voting. *See McDonald*, 394 U.S. at 810–11 ("Ironically, it is Illinois' willingness to go further than many States in extending the absentee voter privileges . . . that has provided [the plaintiffs] with a basis for arguing that the provisions operate in an invidiously discriminatory fashion to deny them a more convenient method of exercising the franchise.").

In sum, *McDonald* itself is sufficient to foreclose Plaintiffs' Fourteenth Amendment claim.

2. Even if the Court were to accede to Plaintiffs' request to consider their Fourteenth Amendment claim with a fresh "*Anderson/Burdick*" analysis, moreover, Plaintiffs have still failed to show a likelihood of success on the merits. This Court has already rejected the claim Plaintiffs advance here—"to order in the name of the Constitution . . . an unlimited right to an absentee ballot . . . that would allow people who find it hard for whatever reason to get to the polling place on election day nevertheless to vote." *Griffin*, 385 F.3d at 1129–30. This Court rejected the notion that "the Constitution requires all states to allow unlimited absentee voting" because "the argument ignores a host of serious objections to judicially legislating so radical a reform in the name of the Constitution." *Id.* at 1130.

In particular, "[v]oting fraud is a serious problem in U.S. elections . . . , and it is facilitated by absentee voting." *Id.* at 1130–31 (collecting authorities). Making matters worse, "[a]bsentee voters also are more prone to cast invalid ballots," and by voting before Election Day "are deprived of any information pertinent to their vote that surfaces in the late stages of the election campaign." *Id.* at 1131. With an absentee ballot, there are also more opportunities for parties other than the voters to view the voter's ballot, minimizing the protections of the secret ballot considered to be a fundamental part of the American election process, or even cast a ballot on behalf of a "feeble or unaware" voter. *See* John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. Mich. J.L. Reform 483, 512–13 (2003). As the popularity of voting absentee-by-mail increases, so will the opportunity for such fraud. *Id.; see also Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 195 n.12 (2008) (observing that "much of the [recent examples of voter fraud were] actually absentee ballot fraud or voter registration fraud").

While in some circumstances "[t]hese and other problems . . . may be outweighed by the" interest in making voting convenient, "the striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin*, 385 F.3d at 1131 (internal citations omitted). Because the Constitution "confers on the states broad authority to regulate the conduct of elections," and "because balancing the com-

peting interests involved . . . is difficult . . . , state legislatures may without transgressing the Constitution impose extensive restrictions on voting." *Id.* at 1130 (collecting cases). And in light of the interests in preventing election fraud and voter confusion that are furthered by limitations on mail-in absentee voting, the Constitution does not confer "a blanket right of registered voters to vote by absentee ballot." *Id.*

More generally, as this Court recently explained, the *Anderson/Burdick* test is deferential to state legislative judgments: It does not "allow the judiciary to decide whether any given election law is necessary" on the ground that unnecessary laws are "by definition an excessive burden." *Luft*, 963 F.3d at 671. On the contrary, the Supreme Court's decisions "foreclose[ ] that sort of substitution of judicial judgment for legislative judgment." *Id.*

In addition, courts applying this test "must not evaluate each clause [of a State's election law] in isolation." *Id.* Instead, "[c]ourts weigh these burdens against the state's interests by looking at the whole electoral system. Only when voting rights have been severely restricted must states have compelling interests and narrowly tailored rules." *Id.* at 671–72 (internal citations omitted).

Plaintiffs fail even to attempt such a system-wide analysis. They instead direct their arguments specifically at the distinctions drawn by Indiana's absentee-voting law authorizing absentee voting by elderly Hoosiers—even worse, at the refusal of the Commission to intervene and authorize mail-in voting for every registered voter in the State. *Luft* makes absolutely clear that *Anderson/Burdick* does not license

such fine-grained second-guessing. "In isolation, any rule reducing" the number of opportunities to vote "seems like an unjustified burden. But electoral provisions cannot be assessed in isolation. . . . One less-convenient feature does not an unconstitutional system make." *Id.* at 675. Plaintiffs have only identified a single, "less-convenient feature" of Indiana's voting system, so their *Anderson/Burdick* theory fails from the get-go.

And even if the Court were to consider whether Indiana's voting system as a whole "severely restrict[s]" voting rights under *Anderson/Burdick*, *id.* at 672, plainly it does not. Like the Wisconsin voting system this Court upheld in *Luft*, Indiana "has lots of rules that make voting easier." *Id.* For example, Indiana permits everyone to cast an "in-person absentee ballot" within 28 days before Election Day, and requires county election offices to be open for such voting. Ind. Code §§ 3-11-4-1, 3-11-10-26, 3-11-10-26.3. Indiana also has empowered counties to create "vote centers" that provide voters additional places to cast a ballot regardless of their precinct. *Id.* § 3-11-18.1-13. Indiana even enables online voter registration and provides assistance to voters with disabilities and those unable to understand English. *Id.* §§ 3-11-9-2; 3-7-26.7-5.

The "net effect" of Indiana's voting rules has led to a turnout rate well in line with other States; for example, according to the Census Bureau, approximately 85% of Indiana's registered voters cast ballots in the November 2016 general election. *See* U.S. Census Bureau, *Voting and Registration in the Election of November 2016* (May 10, 2017), Table 4a, https://www.census.gov/data/tables/time-series/demo/

voting-and-registration/p20-580.html (reporting approximately 3.3 million registered voters and approximately 2.8 million votes cast in Indiana).

Finally, as noted, Plaintiffs concede that the Constitution allows Indiana to do away with mail-in voting entirely; their objection, at bottom, is that the State allows only some voters to vote by mail. But this argument sounds in rational-basis review, not *Anderson/Burdick*. Allowing certain groups to vote by mail cannot fairly be said to *burden* the voting rights of anyone, much less severely restrict them.

For these reasons, Indiana's absentee-voting law satisfies rational-basis review, and Plaintiffs are thus not likely to succeed on their Fourteenth Amendment challenge to the statute.

II. The Equities and Public Interest Weigh Against a Preliminary Injunction, Particularly in Light of the Upcoming Election

Beyond Plaintiffs' failure to establish the merits of their claims, equitable considerations weigh heavily against issuing the preliminary injunction they request here. Indiana's legislature has restricted absentee voting by mail for decades. Plaintiffs demand that the Court alter this longstanding rule now, weeks before a major election, principally on the basis of an argument they could have raised decades ago—and in any case on the basis of a preliminary injunction motion they could have filed at least weeks earlier. Both the specific considerations applicable to election-law cases and more general equitable principles demonstrate why the Court should not issue the preliminary injunction Plaintiffs seek.

A. The *Purcell* principle bars the Court from requiring Indiana to overhaul its election processes on the eve of an election

Courts considering whether to order last-minute changes to election laws are "required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). The Supreme Court "has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S.Ct. 1205, 1207 (2020) (citing *Purcell*, 549 U.S. 1; *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S.Ct (2014)).

This Court has frequently underscored this point as well, reiterating just days ago that "federal courts should refrain from changing state election rules as an election approaches." *Libertarian Party of Ill. v. Cadigan*, No. 20-1961, 2020 WL 5104251 , at *4 (7th Cir. Sept. 3, 2020); *see also FreeEats.com, Inc. v. Indiana*, 502 F.3d 590, 598 n.9 (7th Cir. 2007) (noting that this Court denied a motion to expedite an appeal challenging an Indiana law because "Indiana's statute was enacted 18 years ago, and emergency relief in a suit filed on the eve of an election is unwarranted" (citing *Purcell*, 549 U.S. 1)).

Courts exercise such restraint because "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Id.* at 4–5. Where an electoral rule is at issue—especially one that, as here, has long been enforced—courts "should carefully guard against judicially altering the

status quo on the eve of an election." *Veasey v. Perry*, 769 F.3d 890, 895 (5th Cir. 2014).

The relief Plaintiffs seek would require Indiana, on the eve an election, to dramatically alter its long-established election rules—to move from an election system where in-person voting is the default to a system where *everyone* can vote by mail for any reason (or no reason at all). Plaintiffs assert that Indiana did so for the primary election and should be able to do so again. Appellants Br. 3. But they ignore that (1) Governor Holcomb's Stay at Home order, the driving force behind the Commission's expansion of absentee voting for all Indiana voters, expired on May 1, 2020, *see* Exec. Order 20–22; (2) universal vote-by-mail in the primary election overwhelmed counties, decreased voter confidence, and resulted in some votes not getting counted, *see* ECF 53 at 5; and (3) turnout for the General Election, based on historical trends, is likely to increase over Primary Election turnout by at least twofold.[4] Indiana simply does not have the election infrastructure necessary to handle the greater vote-by-mail participation Plaintiffs demand.

Indiana does, on the other hand, have plans in place to handle large numbers of in-person voters, even amidst the COVID-19 pandemic. The Secretary of State has

[4] *See* 2016 Primary Election Turnout and Registration, https://www.in.gov/sos/elections/files/2016_May_3_Primary_Turnout_and_Absentee_Information.pdf (1,771,753 voters voting out of 4,715,292 registered voters); 2016 General Election Turnout and Registration, https://www.in.gov/sos/elections/files/2016_General_Election_Turnout.pdf (2,807,676 voters voting out of 4,829,243 registered voters; 2012 Primary Election Turnout and Registration, https://www.in.gov/sos/elections/files/2012_Primary_Election_Turnout_and_Absentee_Chart.pdf (957,510 voters voting out of 4,409,890 registered voters); 2012 General Election Turnout and Registration, https://www.in.gov/sos/elections/files/2012_General_Election_Turnout_Report.pdf (2,663,368 voters voting out of 4,555,257); ECF 53-4 at 4.

plans to procure, with the assistance of the Indiana National Guard, over 1 million face masks, 1.5 million pairs of gloves, 20,000 half-gallon bottles of hand sanitizer, 5,000 galls of surface and equipment disinfectant, and other PPE supplies for poll workers. ECF 53 at 6; Short App. at 14. The Secretary of State is also developing a safety-related best-practices manual for county election boards and will distribute safety awareness posters and social distancing makers to county election boards prior to the election. ECF 52 at 7; Short App. at 14.

Indeed, the district court found that adopting universal mail-in voting would cause serious problems—problems that are especially acute where, as here, the system has long been designed for primarily in-person voting. Short App. at 14. The district court found that this strain on the electoral system is likely to happen again if the State were forced to immediately expand mail-in voting to all eligible voters for the general election, and it concluded that this likely harm weighed against the preliminary injunction. *Id.* The district court also highlighted both the State's and the public's interest in promoting "the accurate and timely counting and reporting of results" as similarly weighing against the preliminary injunction. *Id.* These factual findings and balancing of the equities are entitled to significant deference. *See Purcell*, 549 U.S. at 5; *Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1437 (7th Cir. 1986).

Granting Plaintiffs the relief they seek would upend long-established election rules on the eve of an election, confusing voters and placing a significant strain on the system—strain that officials experienced during the primary election—in clear

violation of the *Purcell* principle. The Court should not invite the confusion that would certainly result from altering the status quo so soon before the election, and should refuse to overturn the district court's denial of the preliminary injunction.

B. Plaintiffs created the emergency for which they seek relief

Plaintiffs filed their preliminary injunction motion on June 8, 2020, nearly two and a half months after the Indiana Election Commission issued its emergency order expanding absentee voting by mail to all Indiana voters and well after the Governor's Stay at Home Directive had expired. In waiting to file, Plaintiffs apparently appreciated the authority of the Governor and the Commission to assess the rapidly evolving challenges presented by COVID-19 and respond accordingly. Yet they now claim urgency based on their dissatisfaction with these officials' decisions. Because Plaintiffs are responsible for the urgency they claim justifies this Court issuing a preliminary injunction, the Court should not overturn the district court's decision.

The "obligation to seek injunctive relief in a timely manner in the election context is hardly a new concept." *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1061 (7th Cir. 2016). A party seeking injunctive relief in such a context is thus obligated to act "'expeditiously,'" *id.* (quoting *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990)), to give courts "'sufficient time in advance of an election to rule without disruption of the electoral cycle,'" *id.* (quoting *Gjersten v. Bd. of Election Comm'rs for City of Chicago*, 791 F.2d 472, 479 n.12 (7th Cir. 1986)).

An important question when "weighing the considerations relevant to requests for preliminary relief" is "whether the plaintiff has brought the emergency on him-

self." *Morgan v. White*, 964 F.3d 649, 651 (7th Cir. 2020). In *Morgan*, a group of plaintiffs challenged an Illinois law requiring a minimum number of signatures to place an initiative or referendum on a ballot as unconstitutional as applied during the pandemic in light of the Illinois Governor's social distancing mandate. *Id.* The plaintiffs sought a preliminary injunction to extend the signature deadline and reduce the number of signatures required, and the district court denied the request for a preliminary injunction. *Id.* This Court affirmed the district court's denial, highlighting that the primary plaintiff "did not evince any interest in the subject until early April 2020, several weeks after the Governor began to issue orders requiring social distancing" and that was "a good reason to conclude that [he was] not entitled to emergency relief" *Id*. at 651–52.

Here, too, Plaintiffs waited nearly five weeks following the Indiana Election Commission's March 23, 2020 emergency order, which expressly applied only to the primary election, before filing their original complaint on April 29, 2020. Plaintiffs waited *eleven weeks* following the emergency order to file their motion for preliminary injunction, despite Plaintiffs' assertions that the order served as the triggering event for seeking preliminary injunctive relief. The law does not allow Plaintiffs to fail to act expeditiously and then demand emergency relief that would result in significant disruptions to Indiana's election process.

Worse, Plaintiffs' principal argument on appeal is that that "Indiana's age-based voting restrictions for mail-in ballots on their face violate the Twenty-Sixth Amendment." Appellants Br. 13. This argument, however, could have been raised as

long ago as 1993, when the Indiana General Assembly authorized elderly voters to vote absentee by mail. *See* 1993 Ind. Legis. Serv. P.L. 3-1993, § 124. Yet Plaintiffs did not even include this argument in their original complaint, only adding it to their complaint just a few months ago, on May 4, 2020. *See* ECF 6 at 18–20.

The Court has noted that a plaintiff's timeliness in seeking emergency relief "must be judged by the knowledge of the plaintiffs as well as the nature of the right involved." *Jones*, 842 F.3d at 1061. And in light of the repeated, explicit warnings—from this Court and the Supreme Court—against altering the status quo on the eve of an election, Plaintiffs' delay bars them from disrupting Indiana's elections now.

CONCLUSION

A preliminary injunction is an extraordinary and drastic remedy, and should only be granted in instances where Plaintiffs, by a *clear showing*, carry the burden of persuasion for all of the conditions. The district court concluded that Plaintiffs failed to carry that burden and accordingly denied their motion. The Court should affirm that decision.

Respectfully submitted,

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I verify that this brief contains 12,850 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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