APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-2605

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 all others similarly situated,
Plaintiffs-Appellants,

v.

PAUL OKESON, S. ANTHONY LONG, SUZANNAH WILSON OVERHOLT, ZACHARY E. KLUTZ, and CONNIE LAWSON, in their official capacities,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.

No. 20-cv-01271 – James Patrick Hanlon, *Judge*.

Argued: September 30, 2020
Decided: October 6, 2020

Before RIPPLE, KANNE, and SCUDDER, *Circuit Judges*.

KANNE, *Circuit Judge*:

Relying on the unprecedented challenges posed by the COVID-19 pandemic, Plaintiffs seek a preliminary injunction requiring Indiana to permit unlimited absentee voting in the upcoming general election. To attain this goal, they challenge Indiana's absentee-voting regime on two grounds. First, Plaintiffs assert that Indiana's extension of absentee ballots to elderly Hoosiers violates the Twenty-Sixth Amendment by abridging younger Hoosiers' right to vote. Second, Plaintiffs contend that requiring some voters, such as themselves, to cast ballots in person during the ongoing COVID-19 pandemic infringes on their fundamental right to vote and thus violates the Fourteenth Amendment's Equal Protection Clause.

These claims hinge on one question: what is "the right to vote"? In *McDonald v. Board of Election Commissioners of Chicago*, the Supreme Court told us that the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail. 394 U.S. 802, 807 (1969). And unless a state's actions make it harder to cast a ballot at all, the right to vote is not at stake. *Id.*

Considering that definition, Indiana's absentee-voting regime does not affect Plaintiffs' right to vote and does not violate the Constitution. In the upcoming election, all Hoosiers, including Plaintiffs, can vote on election day, or during the early-voting period, at polling places all over Indiana. The court recognizes the difficulties that might accompany in-person voting during this time. But Indiana's absentee-voting laws

are not to blame. It's the pandemic, not the State, that might affect Plaintiffs' determination to cast a ballot.

Two other principles guide our decision in this case. First, the Constitution explicitly grants states the authority to prescribe the manner of holding federal elections. U.S. Const. art. I, § 4. Recognizing that authority, our court has acknowledged that balancing the interests of discouraging fraud and mitigating elections-related issues with encouraging voter turnout is a judgment reserved to the legislature. *See Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004). Second, the Supreme Court's *Purcell* principle counsels federal courts to exercise caution and restraint before upending state election regulations on the eve of an election. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Given that voting is already underway in Indiana, we have crossed *Purcell*'s warning threshold and are wary of turning the State in a new direction at this late stage.

We therefore affirm the district court's decision denying Plaintiffs' request for a preliminary injunction.

I. Background

Indiana voters who fall into any of thirteen statutorily enumerated categories can vote by mail. Ind. Code § 3-11-10-24 (2020). One of those categories encompasses voters aged sixty-five and older. *Id.* § 3-11-10-24(a)(5). Others encompass, for example, disabled or homebound voters, voters who lack transportation, and voters who expect to be absent from the county on election day. *Id.* § 3-11-10-24(a).

For purposes of the primary election held in June of this year, the Indiana Election Commission responded to the difficulties of voting during the

COVID-19 pandemic by extending these absentee-voting privileges to all registered and qualified Indiana voters. For the general election coming up this November, however, the IEC did not renew its order. Instead, Indiana has by now taken steps to alleviate COVID-19's burden on voters by, for example, allowing Hoosiers in all counties to vote during a twenty-eight-day period before the election (*see id.* § 3-11-10-26(f)) and by implementing safety guidelines and procuring protective equipment for election day. This preparation also came as Indiana progressed to "Stage 5" of its public health and reopening plan late last month.[1]

Plaintiffs include nine Indiana voters who do not expect to qualify for an absentee ballot in the fast-approaching general election.[2] Asserting claims under the Twenty-Sixth Amendment and the Equal Protection Clause, they moved for a preliminary injunction requiring Indiana to implement "no-excuse absentee voting" in the general election. The district court denied Plaintiffs' motion. Plaintiffs now appeal that decision.

II. Analysis

"A preliminary injunction is an extraordinary remedy." *Whitaker v. Kenosha Unified Sch. Dist. No. 1*

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[1] *See* Shari Rudavsky, *Indiana to Move to Stage 5 of Coronavirus Reopening Saturday While Staying Masked*, Indianapolis Star (Sept. 23, 2020), https://www.indystar.com/story/news/health/2020/09/23/indiana-movestage-5-coronavirus-reopening/3506866001/.

[2] Although there is a corporate plaintiff—Indiana Vote by Mail, Inc.—for simplicity, we refer only to the individual plaintiffs throughout the opinion.

Bd. of Educ., 858 F.3d 1034, 1044 (7th Cir. 2017) (citing *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1085 (7th Cir. 2008)). "We review the grant of a preliminary injunction for the abuse of discretion, reviewing legal issues *de novo*, while factual findings are reviewed for clear error." *Id.* (internal citations omitted) (citing *Jones v. Markiewicz-Qualkinbush*, 842 F.3d 1053, 1057 (7th Cir. 2016); *Fed. Trade Comm'n v. Advoc. Health Care Network*, 841 F.3d 460, 467 (7th Cir. 2016)).

To merit such relief, a movant "must make a threshold showing that: (1) absent preliminary injunctive relief, he will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) he has a reasonable likelihood of success on the merits." *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015). Then, if the movant makes this threshold showing, the court proceeds to consider the balance of harms between the parties and the effect of granting or denying a preliminary injunction on the "public interest." *Id.* This case turns on the threshold inquiry and, more particularly, whether Plaintiffs have shown that they have a reasonable likelihood of success on the merits.

A movant's showing of likelihood of success on the merits must be "strong." *Ill. Republican Party v. Pritzker*, No. 20-2175, 2020 WL 5246656, at *2 (7th Cir. Sept. 3, 2020). "A 'strong' showing ... does not mean proof by a preponderance ... . But it normally includes a demonstration of how the applicant proposes to prove the key elements of its case." *Id.* Plaintiffs have not made this "strong" showing as to either of their claims because "the right to vote" does not include Plaintiffs' "claimed right to receive absentee ballots."

McDonald v. Bd. of Election Comm'rs of Chi. 394 U.S. 802, 807 (1969).

A. Plaintiffs' Twenty-Sixth Amendment Claim

The Twenty-Sixth Amendment provides, "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." Plaintiffs argue that Indiana's law permitting Hoosiers who are sixty-five and older to vote absentee violates the Twenty-Sixth Amendment because it does not provide the same privilege to younger voters. The success of this claim depends on whether Indiana's age-based absentee-voting law abridges "the right ... to vote" protected by the Twenty Sixth Amendment or merely affects a privilege to vote by mail.

The Supreme Court answered this question in *McDonald*. 394 U.S. at 807; *see also Tex. Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917, at *10 (5th Cir. Sept. 10, 2020) ("Understanding what the right to vote meant at the time the Twenty-Sixth Amendment was ratified in 1971 is certainly assisted by the 1969 *McDonald* decision."). There, pretrial detainees in Illinois argued that a state law granting absentee ballots to some individuals, but not to pretrial detainees, violated the Equal Protection Clause. *McDonald*, 394 U.S. at 803. The Court rejected this argument because the detainees did not put forth evidence showing that the challenged law "impact[ed their] ability to exercise the fundamental right to vote" or that it "absolutely prohibited" them from voting. *Id.* at 807, 808 n.7. Instead, the law "ma[de] voting more available to some groups." *Id.* at 807. Therefore, it was "not the right to vote that [was] at stake ... but a claimed right to receive absentee ballots." *Id.* In short, the Court held that the fundamental right to

vote means the ability to cast a ballot, but not the right to do so in a voter's preferred manner, such as by mail.[3]

In this case, we too are reviewing an absentee-voting statute that "make[s] voting more available to some groups"— namely, voters over sixty-five. *Id.*; *see also Luft v. Evers*, 963 F.3d 665, 672 (7th Cir. 2020) (noting that Wisconsin's absentee-voting laws "make voting easier"). And even as applied right now, during a pandemic, the *statute* does not "impact[Plaintiffs'] ability to exercise the fundamental right to vote" or "absolutely prohibit[Plaintiffs] from voting"; only the

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[3] The Court has reiterated this holding several times. *See Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969) ("In *McDonald* ... we were reviewing a statute which made casting a ballot easier for some ... . [A]t issue was not a claimed right to vote but a claimed right to an absentee ballot."); *see also Hill v. Stone*, 421 U.S. 289, 300 n.9 (1975) (summarizing *McDonald* as addressing "whether pretrial detainees in Illinois jails were unconstitutionally denied absentee ballots" when "there was nothing in the record to indicate that the challenged Illinois statute had any impact on the appellants' exercise of their right to vote"); *Goosby v. Osser*, 409 U.S. 512, 521 (1973) (holding that, unlike the claim in *McDonald*, the plaintiffs' claim implicated the right to vote because it alleged that a "Pennsylvania statutory scheme absolutely prohibit[ed] the[plaintiffs] from voting"); *Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." (citing *McDonald*, 394 U.S. at 802)). And other federal courts of appeals have continued to acknowledge *McDonald*'s authority. *See, e.g.*, *Abbott*, 2020 WL 5422917, at *12 (relying on *McDonald* to hold that "the right to vote in 1971 did not include a right to vote by mail" and that "[i]n-person voting was the rule, absentee voting the exception"); *Mays v. LaRose*, 951 F.3d 775, 792 (6th Cir. 2020) ("[T]here is no constitutional right to an absentee ballot." (citing *McDonald*, 394 U.S. at 807–09)).

pandemic is potentially guilty of those charges. *McDonald*, 394 U.S. at 807, 808 n.7.

If Indiana's law granting absentee ballots to elderly voters changed or even disappeared tomorrow, all Hoosiers could vote in person this November, or during Indiana's twenty-eight-day early voting window, just the same. Consequently, "at issue [i]s not a claimed right to vote" but a "claimed right to an absentee ballot." *Id.* at 807. And for that reason, Plaintiffs' claim under the Twenty-Sixth Amendment, which only protects the right to vote, is unlikely to succeed. *Abbott*, 2020 WL 5422917, at *15 ("[A]n election law abridges a person's right to vote for the purposes of the Twenty-Sixth Amendment only if it makes voting more difficult.").

Plaintiffs retort that this conclusion is wrong because hypothetical laws similarly restricting the ability of African Americans or women or the poor to vote by mail would violate the Fifteenth, Nineteenth, and Twenty-Fourth Amendments, respectively.[4] Plaintiffs are correct that such laws could be subject to heightened scrutiny for "operat[ing] to the peculiar disadvantage of a suspect class." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 (1976). But this scrutiny would come from the Fourteenth Amendment's Equal Protection Clause. *Am. Party of Tex. v. White*, 415 U.S. 767, 795 (1974) ("[P]ermitting absentee voting by some classes of voters and denying the privilege to

[4] U.S. Const. amend. XV ("The right of citizens of the United States to vote shall not be denied or abridged ... on account of race ... ."); *id.* amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged ... on account of sex."); *id.* amend. XXIV ("The right of citizens of the United States to vote ... shall not be denied or abridged ... by reason of failure to pay any poll tax or other tax.").

other classes ... is an arbitrary discrimination violative of the *Equal Protection Clause*." (emphasis added)); *McDonald*, 394 U.S. at 807 ("[A] careful examination on our part is especially warranted [under the Equal Protection Clause] where lines are drawn on the basis of wealth or race ... ."). It would *not* come from the Fifteenth, Nineteenth, or Twenty-Fourth Amendments because Plaintiffs' hypothetical laws do not implicate the right to vote.[5] Plaintiffs' rebuttal thus bears no weight.

B. Plaintiffs' Equal Protection Claim

The Fourteenth Amendment's Equal Protection Clause prohibits states from impermissibly interfering with individuals' fundamental rights such as the right to vote. *Murgia*, 427 U.S. at 312 & n.3. Plaintiffs argue that Indiana's absentee-voting regime requiring some Indiana voters, themselves included, to cast ballots in person during the COVID-19 pandemic hinders their ability to vote and therefore violates the Equal Protection Clause. We disagree. Because Indiana's absentee-voting scheme does not impact Plaintiffs' fundamental right to vote, *McDonald* commands that rational-basis review applies. And under that lenient test, Plaintiffs' equal protection claim is not likely to succeed. Further, whether we employ *McDonald*'s rational-basis test or the *Anderson*/*Burdick* balancing-of-interests test, we land on the same conclusion.

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[5] Plaintiffs have not argued that Indiana's age-based absentee-voting law violates the Equal Protection Clause by "operat[ing] to the peculiar disadvantage of a suspect class." *Murgia*, 427 U.S. at 312. So we do not reach that issue.

1. Rational-basis review applies.

The parties disagree on the appropriate test to use in scrutinizing Indiana's absentee-voting regime under the Equal Protection Clause. Plaintiffs argue that we should apply the balancing test set forth by the Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), under which we weigh the burden that a state regulation imposes on the right to vote against the state's interest in enacting the regulation. But Indiana argues that we should apply the rational-basis test used by the Supreme Court in *McDonald*, 394 U.S. at 807–08.

The Supreme Court has never overturned or disparaged any of these cases. In fact, *Burdick* itself cites *McDonald* favorably. *Burdick*, 504 U.S. at 434. So, bearing in mind that the Supreme Court shies from overturning its precedents *sub silentio*, *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000), we must harmonize the *McDonald* and *Anderson*/*Burdick* frameworks.

As explained above, *McDonald* dealt with Illinois pretrial detainees who brought an equal protection challenge against a law that did not affect their fundamental "right to vote" but only affected "a claimed right to receive absentee ballots." 394 U.S. at 807. The law was thus subject to mere rational-basis review. *Id.* *Anderson* and *Burdick*, however, involved very different situations in which the right to vote protected by the Fourteenth Amendment *was* at stake. *Anderson*, 460 U.S. at 786; *Burdick*, 504 U.S. at 439. The Court therefore employed a balancing test in which it weighed "'the character and magnitude of the asserted injury to the rights protected by the First and Four-

teenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

We have stated that the *Anderson*/*Burdick* "test applies to *all* First and Fourteenth Amendment challenges to state election laws." *Acevedo v. Cook Cnty. Officers Electoral Bd.*, 925 F.3d 944, 948 (7th Cir. 2019). But that assertion, which comes from a case that had nothing to do with absentee voting, did not, and cannot, override the Supreme Court's holding in *McDonald* that rational-basis scrutiny applies to election laws that do not impact the right to vote—that is, the right to cast a ballot in person. *See Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." (citing *McDonald*, 394 U.S. at 802 (1969)). Accordingly, all election laws affecting the right to vote are subject to the *Anderson*/*Burdick* test, but election laws that do not curtail the right to vote need only pass rational-basis scrutiny.[6]

[6] We also note that *Anderson* and *Burdick* themselves compel this conclusion. The balancing test set forth by those cases requires courts to consider "the character and magnitude of the asserted injury to *the rights protected by the First and Fourteenth Amendments* that the plaintiff seeks to vindicate." *Burdick*, 504 U.S. at 434 (emphasis added) (quoting *Anderson*, 460 U.S. at 789). As has been exhaustively explained, the ability to vote by mail is not a "right[] protected by the First and Fourteenth Amendments." *Id.* So, in cases like *McDonald*, where only the claimed right to vote by mail is at issue, the *Anderson*/*Burdick* test, by its own terms, cannot apply.

Given this harmonization, *McDonald*'s rational-basis test applies in this case to determine the validity of Indiana's absentee-voting scheme under the Equal Protection Clause. Just as Indiana's law providing absentee ballots to elderly Hoosiers does not affect Plaintiffs' right to vote, Indiana's *whole* absentee-voting scheme does not affect Plaintiffs' right to vote. Indiana's absentee-voting laws "ma[ke] casting a ballot easier for" voters who fall into any of thirteen qualifying categories. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 n.6 (1969) (citing *McDonald*, 394 U.S. at 807). And they do not make it harder for anyone to cast a ballot—it's COVID-19 that might affect election-day plans. For those reasons, rational-basis review controls.

2. Indiana's absentee-voting laws pass rational-basis review.

Under rational-basis review, a law must "bear some rational relationship to a legitimate state end." *McDonald*, 394 U.S. at 809. This poses a low hurdle because 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)). For example, in *McDonald*, the Court held that the Illinois law failing to provide absentee ballots to pretrial detainees passed rational-basis review because, although Illinois could make voting easier "by extending absentee voting privileges to [the detainees, i]ts failure to do so ... 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." 394 U.S. at 809–10.

Indiana's absentee-voting scheme likewise survives rational-basis scrutiny. In wielding its "broad authority to regulate the conduct of elections, including federal ones," Indiana has an undeniably legitimate interest in preventing voter fraud and "other abuses" that are "facilitated by absentee voting." *Griffin v. Roupas*, 385 F.3d 1128, 1130–31 (7th Cir. 2004). And the Indiana General Assembly's decision to open up absentee voting only to those Hoosiers who are most likely to benefit from it bears a clearly rational relationship to that interest in curbing the dangers of unfettered absentee voting. *Id.* So although Indiana could make voting even easier "by extending absentee-voting privileges to" all, "[i]ts failure to do so ... hardly seems arbitrary." *McDonald*, 394 U.S. at 810.

3. Indiana's voting scheme is equally sound even under the Anderson/Burdick test.

Even if we were to analyze Plaintiffs' equal protection challenge using the *Anderson*/*Burdick* balancing approach, we would arrive at the same result. The Supreme Court in *Burdick* acknowledged the fundamental nature of the right to vote but recognized that it does not follow "that the right to vote in any manner ... [is] absolute." *Burdick*, 504 U.S. at 433. State laws regulating the mechanics of elections will "invariably impose some burden upon individual voters," so courts should employ a balancing analysis for constitutional challenges to such laws. *Id.* at 433–34. Specifically, courts "weigh 'the character and magnitude of the asserted injury'" to voting rights "against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Id.* at 434 (quoting *Anderson*, 460 U.S. at 789). *Anderson* further instructs that, in undertaking this balancing inquiry,

we "must not only determine the legitimacy and strength of each of those interests" but also "consider the extent to which those interests make it necessary to burden the plaintiff's rights." 460 U.S. at 789.

Plaintiffs assert that their inability to vote by mail under Indiana's absentee-voting laws force each voter to make a choice between personal health and safety and exercising the right to vote. There is no question that Indiana's eligibility requirements for absentee voting inconvenience some voters who would prefer, but do not qualify, to vote by mail. But we cannot assess Indiana's absentee voting provisions in isolation and instead must consider Indiana's electoral scheme as a whole. *See Burdick*, 504 U.S. at 434–37; *Luft*, 963 F.3d at 671–72, 675.

Indiana allows absentee voting by mail for all Hoosiers that qualify in one of thirteen categories, which include voters who are disabled, will be confined due to illness or injury, will be confined caring for another person, lack transportation to the polls, are age sixty-five or older, expect to be absent from the county on election day, and more. Ind. Code § 3-11-10-24. Indiana also allows for early in-person voting for twenty-eight days leading up to the election, one of the longer early-voting periods across all states. *Id.* § 3-11-10-26(f).

What is more, the Indiana Governor's Stay-At-Home Executive Order has expired and Indiana has progressed to "Stage 5" of its reopening plan, alleviating some of Plaintiffs' proposed justifications for universal voting by mail. Taken together, the State's voting scheme has a modest impact on Hoosiers in selecting their preferred manner of voting, but we cannot say it severely restricts the right to vote altogether.

Turning to the state-interest side of the balancing scale, Indiana has identified several factors that guided its decision to allow some, but not all, Hoosiers to vote absentee: discouraging fraud, ensuring that the maximum number of ballots are deemed valid, managing administrative capacity to process ballots, and permitting voters to receive timely information about candidates up to election day.

On balance, Indiana's legitimate interests in ensuring safe and accurate voting procedures are sufficient to outweigh any limited burden on Hoosiers' right to vote as they choose caused by the State's restricted absentee voting scheme. We are mindful that Indiana's decision to accommodate some voters by permitting absentee voting "is an indulgence—not a constitutional imperative that falls short of what is required." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring). And we reiterate that "[o]ne less-convenient feature does not an unconstitutional system make." *Luft*, 963 F.3d at 675.

Finally, we are well aware that the most severe public-health crisis of the past century currently ravages our nation and the world. But that reality does not undermine our conclusion—it reinforces it. "[T]he balance between discouraging fraud and other abuses," on the one hand, and "encouraging turnout" and voter safety, on the other, "is quintessentially a legislative judgment." *Griffin*, 385 F.3d at 1131. This court is ill equipped to second guess, let alone override, the rational policy judgments of Indiana's elected officials "on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020). Indeed, "[g]iven the imminence of the

election," our intervention now would only risk exacerbating "voter confusion," and we should therefore "allow the election to proceed without an injunction." *Purcell v. Gonzalez*, 549 U.S. 1, 4–6 (2006). This holds true even—and especially—in midst of a pandemic when "[l]ocal officials are working tirelessly to 'shap[e] their response to changing facts on the ground,' knowing that the appropriate response is 'subject to reasonable disagreement.'" *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 393–94 (5th Cir. 2020) (alteration in original) (quoting *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Roberts, C.J., concurring)).

Indiana has exercised its judgment and taken steps to lighten COVID-19's burden on voters by, for example, allowing Hoosiers to vote early and implementing safety guidelines and procuring protective equipment for election day. *Tully v. Okeson*, No. 1:20-cv-01271-JPH-DLP, 2020 WL 4926439, at *6 (S.D. Ind. Aug. 21, 2020). We cannot upend this legislative work even if we thought we could do better. *Griffin*, 385 F.3d at 1132.

III. Conclusion

We are mindful of the difficulties that so many Hoosiers, and other Americans, face as a result of COVID-19. We also fully grasp the gravity of our national elections and the sincere desires of Plaintiffs and other Hoosiers to participate in one of the most central aspects of our republic—choosing our representatives. But it is precisely because of the gravity of this situation that we should not, and will not, "judicially legislat[e] so radical a reform [as unlimited absentee voting] in the name of the Constitution" where

the State has infringed on no one's right to vote. *Griffin*, 385 F.3d at 1130. We therefore AFFIRM the decision of the district court.

RIPPLE, *Circuit Judge*, concurring. I join the judgment of the court affirming the district court's denial of a preliminary injunction.

The Indiana statutory scheme for voting by absentee ballot is a generous one. It sets forth thirteen categories of individuals who can vote absentee. Ind. Code § 3-11-10-24 (2020). It also gives the Indiana Election Commission the authority to let any "person who is otherwise qualified to vote in person to vote by absentee ballot" in an emergency. *Id.* § 3-11-4-1(c). One of the categories listed in the statute is the elderly, *id.* § 3-11-10-24(a)(5), defined in another section of the Code as those over sixty-five years old. *Id.* § 3-5-2-16.5. The remaining sections deal with other categories of individuals who may be impeded in getting to the polls. Unlike in this year's primary elections, the Commission has refrained from extending permission, under its emergency powers, to all otherwise qualified voters to vote by absentee ballot in the general election. Notably, it still has the authority to consider individual cases. *Id.* § 3-11-4-1(c).

In my view, the plaintiffs have made a weak case that the Commission's action constitutes an abridgement of the right to vote on the basis of age and therefore violates the Twenty-Sixth Amendment. The statute granting the mail ballot privilege employs age only in a tangential way. It simply defines the term "elderly" as a person who has lived sixty-five years. This definitional shorthand is a common-sense tool; it relieves the Commission of the insurmountable task of adjudicating, on an individual basis, which of its older citizens would be deterred in coming to the polls on a November day because of the physical and social conditions that invariably afflict senior citizens. A No-

vember day in Indiana, at least in the northern regions of the State, can pose a significant obstacle to leaving one's home.

By granting a general absentee voting privilege to its senior citizens, the State removed for its senior citizens impediments not experienced by most other Hoosiers who desire to vote. By defining the elderly by age, the State may well have created a category that is both over- and under-inclusive. No party in this case suggests, however, that this line drawing constitutes an invidious irrebuttable presumption. To the extent that the category is over-inclusive, it simply implements the legislature's solicitude that everyone who experiences the barriers associated with old age can vote. Any under inclusion is the unhappy byproduct of the need to make a reasonable judgment based on the Country's general experience in dealing with the problems of the aged. The legislature simply employed a reasonable methodology to identify those who, in its judgment, needed a special accommodation to get to the polls. This is hardly an invidious classification based on age.

My colleagues do not concern themselves with the nature of the State's exemption for the aged because, in their view, *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969), establishes a rigid rule that the fundamental right to vote does not include a right to cast an absentee ballot. Any age distinction with respect to absentee ballot privileges therefore does not impact the right to vote and therefore does not implicate the Twenty-Sixth Amendment. *McDonald* antedates the ratification of this Amendment, however, and it may well be that the day will come when the general rule articulated in *McDonald* will have to yield to the Twenty-Sixth Amendment

when the values protected by that Amendment are clearly at stake. As I already have explained, I do not believe that those values are directly implicated here. We live, however, in an age when many consider manipulation of the electoral process to be acceptable public conduct. We well may see someday a more direct attempt to manipulate the electoral process by altering the absentee ballot program to disfavor a specific age group. On that issue, we ought to keep our powder dry.[7]

The plaintiffs' Fourteenth Amendment argument, while somewhat stronger than their Twenty-Sixth Amendment submission, hardly constitutes a significant chance of success on the merits. Here, the intermediate scrutiny of the *Anderson-Burdick* rule seems appropriate to ensure that manipulation of the absentee ballot privilege does not result in disenfranchisement. Yet, invocation of this intermediate scrutiny test does not appreciably assist the plaintiffs here. On this record, they simply cannot show any realistic

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[7] The same may very well be said for my colleagues' discussion of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments. My colleagues write that only the Fourteenth Amendment offers a vehicle to scrutinize line drawing on the basis of race or sex or wealth, with respect to absentee voting—the Fifteenth, Nineteenth, and Twenty-Fourth Amendments, according to my colleagues, have no role to play on the issue. This case, of course, does not present us with an opportunity to consider how the Fifteenth, Nineteenth, or Twenty-Fourth Amendments might apply to laws regarding absentee voting, or how the historical context underlying those Amendments might differentiate each Amendment's scope. Though my colleagues' discussion of the Fifteenth, Nineteenth, and Twenty-Fourth Amendments is surely dicta, I believe it is prudent to keep our powder dry on those issues as well.

jeopardy of losing the right to vote because of the Commission's decision not to extend the absentee ballot privilege. The record shows that the Commission assessed the State's capacity to conduct a "no excuses" absentee ballot election and compared it to its ability to conduct an in-person election with enhanced safeguards for the health of the voters. The Commission considered the significant difficulty that it had experienced in conducting the primary election under a "no excuses" absentee ballot system. Although the primaries required the State to handle a significantly smaller number of ballots than the number anticipated in the general election, the State's capacity to tally the votes was significantly wanting.[8] There is no indication in the record that, in the short period since the primary election, the State has had the opportunity to build the infrastructure necessary to handle a significantly greater number of ballots in the general election. On the other hand, the record does demonstrate that the State has taken significant alternate steps to assuage the danger still attendant on waiting in an enclosed area to vote.[9] Whether the State made a wise decision we cannot say. That it made its decision only after a careful weighing of the competing considerations is evident. *See Burdick v. Takushi*, 504 U.S. 428, 438–39 (1992). Further judicial scrutiny of that decision is not appropriate. Accordingly, I join the judgment of the court.

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[8] R.53, Exs. 1–4.

[9] R.53, Ex. 4.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 20-2605

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, ZACHARY E. KLUTZ, and CONNIE LAWSON, in their official capacities,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:20-cv-01271-JPH-DLP – James Patrick Hanlon, *Judge*.

October 6, 2020

BEFORE RIPPLE, KANNE, and SCUDDER, *Circuit Judges*.

FINAL JUDGMENT

The judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered on this date.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

v.

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

DISABILITY RIGHTS EDUCATION and DEFENSE FUND, INC.,
Amicus.

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

Signed: August 21, 2020

ORDER DENYING PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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

I. Facts and Background

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

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

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

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

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

(5) The voter is an elderly voter.[1]

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

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

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

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

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

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

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

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

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

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

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

II. Applicable Law

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

III. Discussion

"A preliminary injunction is an extraordinary remedy.... never to be indulged in except in a case clearly demanding it." *Id.* (quoting *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of United States of Am., Inc.*, 549 F.3d 1079, 1085 (7th Cir. 2008)). To be entitled to a preliminary injunction, Plaintiffs must

first meet their threshold burden to show a reasonable likelihood of success on the merits, irreparable harm, and that traditional legal remedies would be inadequate. *Id.*

A. Likelihood of success on the merits

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

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

The right to vote is a fundamental right central to our democracy. *Harper v. Va. State Bd. of Educ.*, 383 U.S. 663, 667 (1966). Less clear is whether that right is at stake here, so that's where the Court's analysis begins. Plaintiffs correctly "acknowledge that [Indiana] could likely eliminate all absentee voting if it wished." Dkt. 14 at 9. That's because unless a restriction on absentee voting "absolutely prohibit[s]" someone from voting, the right to vote is not at stake. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969).

In *McDonald*, pretrial detainees in Illinois sought the ability to vote absentee. *Id.* at 803. Illinois allowed absentee voting for four classes of people, but the detainee plaintiffs did not fall into any of them. *Id.* at 803–04. The Supreme Court rejected the detainees'

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

argument that Illinois' absentee voting privileges violated the Fourteenth Amendment's Equal Protection Clause. *Id.* at 806. The Court explained that "because of the overriding importance of voting rights, classifications 'which might invade or restrain them must be closely scrutinized and carefully confined.' " *Id.* at 807, 89 (quoting *Harper*, 383 U.S. at 670). But Illinois' absentee voting provisions did not require that "exacting approach" because the detainees had not shown that they were absolutely prohibited from voting on election day. *Id.* at 808, 808 n.6. So it was "not the right to vote that [was] at stake ... but a claimed right to receive absentee ballots." *Id.* at 807.

Plaintiffs argue that the Supreme Court has "limited *McDonald*'s holding to its facts." Dkt. 14 at 12–13. In *Goosby v. Osser*, however, the Court confronted a different factual situation because the plaintiffs had alleged that "the Pennsylvania statutory scheme absolutely prohibit[ed] them from voting." 409 U.S. 512, 521 (1973). The Court's limited holding at the preliminary stage of that case was only that—because of that allegation—the plaintiffs' claim was not "wholly insubstantial" or "obviously frivolous" under *McDonald*. *Id.* at 518, 521–22. Similarly, in *Hill v. Stone*, the Court did not cabin *McDonald*, but summarized it as addressing "whether pretrial detainees in Illinois jails were unconstitutionally denied absentee ballots" when "there was nothing in the record to indicate that the challenged Illinois statute had any impact on the appellants' exercise of their right to vote." 421 U.S. 289, 300 n.9 (1975). Those cases therefore did not overrule *McDonald* or limit it to its facts.

Moreover, in *Griffin v. Roupas*, working mothers sought expanded voting options "that would allow people [to vote] who find it hard for whatever reason

to get to the polling place on election day." 385 F.3d 1128, 1129–30 (7th Cir. 2004). The Seventh Circuit found no equal protection violation because, among other reasons, "unavoidable inequalities in treatment, even if intended in the sense of being known to follow ineluctably from a deliberate policy, do not violate equal protection." *Id.* at 1132.

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

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

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

It is not necessary for the Court to decide whether the *Anderson–Burdick* framework applies here because Plaintiffs have not shown a reasonable likelihood of success on the merits under either *Anderson–Burdick* or *McDonald*.[3] While election laws "invariably impose some burden on individual voters," those burdens do not necessarily "compel close scrutiny." *Burdick*, 504 U.S. at 433. Instead, the rigor of the inquiry "depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* at 434. Here, Plaintiffs have not alleged or shown that the State—through either Defendants' actions or Indiana's laws—has absolutely prohibited them from voting. *See McDonald*, 394 U.S. at 809 (because nothing showed that plaintiffs were "absolutely prohibited" from voting, Illinois' absentee voting decisions appeared "quite reasonable"). And as explained

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

above, the privilege of voting by mail does not implicate the fundamental right to vote. *See id.* at 807. Plaintiffs therefore have not shown a substantial burden on the fundamental right to vote, leaving them with only their equal protection argument that Indiana does not evenhandedly grant a statutory entitlement to vote by mail. Dkt. 14 at 11–12.

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

For these reasons, "unavoidable inequalities in treatment, even if intended in the sense of being known to follow ineluctably from a deliberate policy, do not violate equal protection." *Griffin*, 385 F.3d at 1132. That is the case here. Indiana drew distinctions about who may vote by mail, knowing that some would not be able to enjoy that privilege. *See* Ind. Code § 3-11-10-24. That legislative judgment is one that Indiana is generally entitled to make, *see Griffin*, 385 F.3d at 1131, and Plaintiffs have not shown a likelihood that it was merely an "arbitrary scheme," *McDonald*, 394 U.S. at 811. Moreover, "electoral provisions cannot be assessed in isolation," looking only at voting restrictions while ignoring voting privileges. *Luft*, 963 F.3d at 675.

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

The cases that Plaintiffs cite do not counsel otherwise. *Dunn v. Blumstein* was about whether citizens were entirely foreclosed from exercising their fundamental right to vote. 405 U.S. 330, 336 (1972). The same is true of *Harper*, because it involved a poll tax which denied voters the right to vote altogether if they did not pay the tax. 383 U.S. at 666–68. Nor are any of the cited district court opinions on point, so Plaintiffs have not established a likelihood of success on the merits in light of *McDonald* and *Griffin*. *See, e.g. League of Women Voters of Va. v. Va. State Bd. of Elections*, --- F.Supp.3d ----, No. 6:20-cv-24 (W.D. Va. May 5, 2020) (addressing—in the consent decree context—an as-applied constitutional challenge to a witness-signature requirement for absentee ballots); *Doe v. Walker*, 746 F. Supp. 2d 667 (D. Md. 2010) (addressing

a deadline for the receipt of absentee ballots from uniformed services and overseas voters).[4]

Plaintiffs also attempt to distinguish *McDonald* and *Griffin* by arguing that nothing in those opinions suggests "that the Constitution would have no application to claims seeking to expand absentee voting in the face of a historic pandemic." Dkt. 62 at 15–16. While COVID-19 undisputedly presents new and serious challenges, Plaintiffs have not explained why those challenges trigger constitutional protections when the challenges of working mothers, medical personnel, and those working two jobs do not. *See Griffin*, 385 F.3d at 1130. In short, there have long been classes of people "for whom voting may be extremely difficult, if not practically impossible." *McDonald*, 394 U.S. at 809–10. Yet Plaintiffs do not identify any case in which that has been enough to show "unconstitutional incompleteness" of absentee voting privileges. *Id.* at 810.

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

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

whether a rule is beneficial, on balance—to be treated as a constitutional question and resolved by the courts rather than by legislators." *Luft*, 963 F.3d at 671. "*Burdick* forecloses that sort of substitution of judicial judgment for legislative judgment." *Id.*

Indeed, Indiana enjoys double deference in this case. First, the Constitution "confers on the states broad authority to regulate the conduct of elections, including federal ones." *Griffin*, 385 F.3d at 1130 (citing U.S. Const. Art. I § 4); *accord Burdick*, 504 U.S. at 433; *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 208, 128 (2008) (Scalia, J., concurring). So courts do "not interfere unless strongly convinced that the legislative judgment is grossly awry." *Griffin*, 385 F.3d at 1131. Second, in a pandemic "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in the denial of injunctive relief) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). Indiana receives this deference because of its responsibility to protect Plaintiffs and other voters on election day. And indeed, for the general election Indiana is "procuring and distributing over 1 million face masks, over 1.5 million gloves, 20,000 half-gallon bottles of hand sanitizer, 5,000 gallons of surface and equipment disinfectant, and other PPE supplies for voters and poll workers." Dkt. 53-4 at 3 ¶ 8. Indiana also plans to distribute a manual on best safety practices, as well as posters and "social distancing markers." *Id.* at 4 ¶ 9.

While balancing the harms and public interest is not required because Plaintiffs have not shown a reasonable likelihood of success, it is worth noting several

factors that weigh in Defendants' favor. It is in the interest of Defendants and the public that the manner of voting in the general election promote the accurate and timely counting and reporting of results. *See Griffin*, 385 F.3d at 1131 (explaining some "problems created by absentee voting" and acknowledging that balancing those problems against the benefits "is quintessentially a legislative judgment"). Expanding voting by mail again for the general election may jeopardize that interest. Dkt. 53 at 21–22.

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

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

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

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

Plaintiffs argue that, because voters who are at least sixty-five years old are entitled to vote by mail for that reason, Indiana's voting by mail statute abridges younger voters' right to vote on account of age in violation of the Twenty-Sixth Amendment. That amendment provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." Dkt. 14 at 16 (quoting U.S. Const. amend. XXVI § 1). Defendants respond that Indiana's provisions do not abridge the right to vote, which does not include a right to vote absentee. Dkt. 52 at 18–19.

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

Plaintiffs argue that *McDonald* "cannot possibly control the Twenty-Sixth Amendment analysis because the Twenty-Sixth Amendment had not been

adopted when *McDonald* was decided." Dkt. 62 at 18. But the Twenty-Sixth Amendment and *McDonald* are contemporaries, and both address the constitutional right to vote. *See Tex. Democratic Party*, 961 F.3d at 409. So, as the Fifth Circuit recognized, "*McDonald*'s logic applies neatly to the Twenty-Sixth Amendment's text." *Id.* There is also "plenty" of historical evidence "that the Amendment's most immediate purpose was to lower the voting age from twenty-one to eighteen." *Id.* at 408 (citing Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L.J. 1168, 1170 (2012)).

Moreover, because there are very few cases involving the Twenty-Sixth Amendment, Plaintiffs are unable to show that it "clearly demand[s]" the "far-reaching power" of a preliminary injunction. *Orr v. Schicker*, 953 F.3d 490, 501 (7th Cir. 2020). At the least—focusing on the preliminary stage of this case—Plaintiffs have not shown a reasonable likelihood of success on the merits of this claim, so they are not entitled to a preliminary injunction.[6]

* * *

For these reasons, Plaintiffs have not met their threshold burden to show a reasonable likelihood of success on the merits for either their equal protection or Twenty-Sixth Amendment claim. *See Whitaker*, 858

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

F.3d at 1044. They therefore are not entitled to a preliminary injunction and the Court does not proceed to balance each parties' interests. *See id.*

IV. Conclusion

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

Plaintiffs' motion for a preliminary injunction is therefore **DENIED**. Dkt. [13]. *Amicus* Disability Rights Education and Defense Fund's motion for leave to file *amici curiae* brief is **GRANTED**. Dkt. [64].[7] The motion to certify class remains pending. Dkt. 17. The parties shall file a status update **by August 28, 2020**.

SO ORDERED.

Date: 8/21/2020

/s/ *James Patrick Hanlon*
JAMES PATRICK HANLON
United States District Judge
Southern District of Indiana

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

APPENDIX D

ORDER NO. 2020-37

INDIANA ELECTION COMMISSION

CONCERNING EMERGENCY PROVISIONS AFFECTING THE 2020 INDIANA PRIMARY ELECTION

WHEREAS, per Executive Order 20-02, the Governor of the State of Indiana has declared a public health disaster emergency effective March 6, 2020, in response to the COVID-19 pandemic;

WHEREAS, on March 11, 2020, the World Health Organization declared COVID-19 to be a global pandemic, and, several days later, on March 13, 2020, the President of the United States declared a national emergency under Proclamation 9994 in response to the COVID-19 pandemic;

WHEREAS, Indiana Code 3-6-4.1-14 provides that the Indiana Election Commission ("the Commission") shall, in addition to other duties prescribed by law, administer Indiana election laws, and advise and exercise supervision over local election and registration officers;

WHEREAS, Indiana Code 3-6-4.1-17 permits the Commission to issue an order extending the time to perform an election related duty or file a document as the result of an emergency;

WHEREAS, Indiana Code 3-6-4.1-25 permits the Commission to issue advisory opinions to administer Indiana election law;

WHEREAS, Indiana Code 3-11-4-1(c) permits the Commission, in an emergency, to allow a person who

is otherwise qualified to vote in person the ability to vote by absentee ballot;

WHEREAS, Indiana Code 3-11-4-1(d) permits the commission to determine whether absentee ballots subject to 3-11-4-1(c) may be transmitted to and from the voter by mail or personally delivered; and

WHEREAS, Indiana Code 3-11-10-1(a)(6) currently allows only the voter, the voter's attorney in fact, a member of a voter's household, the U.S. Mail, or a bonded courier to return the absentee ballot to the county election board.

NOW, THEREFORE, BE IT ORDERED BY THE INDIANA ELECTION COMMISSION:

SECTION 1

The Indiana primary election of May 5, 2020, is postponed to Tuesday, June 2, 2020. This order applies to all Indiana counties and election boards.

SECTION 2

A. Pursuant to IC 3-6-4.1-17(b) this order applies to the entire State of Indiana and to all county election boards, boards of registration, boards elections and registration, circuit court clerks, and all other persons (as defined in IC 3-5-2-36) who are required to perform a duty or permitted to file a document under Indiana Code 3.

B. This order applies to any statute set forth in IC 3, IC 6-1.1-20, and IC 20-46-1 which specifies a date by which a duty must be performed or documents filed on or before May 5, 2020.

C. This order applies to any statute set forth in, IC 3, IC 6-1.1-20, and IC 20-46-1 which spec-

ifies a date by which a duty must be performed or documents filed after May 5, 2020, to the extent that the deadline is calculated to occur on a number of days after the election that was to occur on May 5, 2020.

SECTION 3

A. All dates corresponding to and calculated from the date of the May 5, 2020, primary election, including deadlines for performing a duty or filing a document are extended by twenty-eight (28) days.

B. The Commission advises any person affected by this SECTION of the following deadlines for performing a duty or filing a document provided in Appendix 1 of this Order.

SECTION 4

A. Any ballot, notice, form, or filing made before the date of this order is valid for purposes of the June 2, 2020 primary election, notwithstanding any May 5, 2020 reference.

B. Any ballot, notice, or form prescribed for use on the May 5, 2020 primary is valid for use during the primary election on June 2, 2020.

SECTION 5

A. All registered and qualified Indiana voters are afforded the opportunity to vote no-excuse absentee by mail. Specifically, the qualifications set forth in IC 3-11-10-24(a) are expanded to include all otherwise registered and qualified Indiana voters.

B. The Indiana Election Division is ordered to prescribe an application to request an absentee ballot by mail under IC 3-5-4-8 in compliance with this

SECTION. The order prescribing the application shall expire on June 3, 2020.

C. The Commission advises each county election board that it may assign its responsibility to mail an absentee ballot to a voter under IC 3-11-4-18 to one (1) or more of the following persons the circuit court clerk, or an employee of the county election boards appointed under IC 3-6-5, IC 3-6-5.2;IC 3-6-5.4; or IC 3-6-5.6.

SECTION 6

A. An absentee by mail application that was submitted on or after December 2, 2019, and not later than the date of this order on which the voter did not indicate a qualification under IC 3-11-10-24(a) shall be accepted by a county election board if otherwise in accordance with the requirements of Indiana law. If the application was rejected prior to this date due to the lack of stated qualification to vote by mail, it shall be accepted if otherwise in compliance with Indiana law.

B. If possible, the Indiana Election Division shall, create a system preferably through the statewide voter registration system and Indianavoters.com, the state's online voter portal, for a voter to submit an absentee ballot application online to a county election board. An electronic copy of the voter's signature from the voter's registration record will be affixed to only those applications submitted through the online portal. The Indiana Election Division shall work with the Secretary of State under IC 3-7-26.3-3 to incorporate this feature into the statewide voter registration system.

SECTION 7

A. The Commission advises each county election board, consistent with Executive Order 20-04 and 20-09, that county election boards may suspend the requirement of explicitly adopting a policy for electronic participation and suspend the requirement to have any members be physically present for meetings deemed to be essential. All meetings of the county election board where the Open Door Law (IC 5-14-1.5) applies may be conducted by videoconference or by telephone conferencing so long as a quorum of members is met, and any meeting is made available to members of the public and media.

B. The Commission advises each county election board that under IC 3-11-4-17.5, a county election board may review and determine if an absentee ballot application is to be approved or rejected in the place of an absentee voting board appointed under IC 3-11.5-4-23 and 3-11.5-4-23.5.

C. The Commission advises each county election board and circuit court clerk that under IC 3-11-4-17 the circuit court clerk, or an employee of the county election board that is assigned an election duty of the circuit court clerk under IC 3-6-5-14.5, but only one (1) person is required to enter information contained on an applicant's absentee ballot application into the statewide voter registration system ("SVRS").

D. The Commission advises each county election board that under IC 3-11-4-19 and 3-11-10-27, each appointed member of the county election board or their designated representative may initial absentee ballots that are issued to a voter and that each appointed member of the county election board

is not required to be present when the other appointed member initials a ballot.

SECTION 8

A. Each county election board is directed to notify the county chairmen of the two major political parties of the county to nominate additional members of absentee voter boards under IC 3-11.5-4-23 and 3-11.5-4-23.5 and encourage the nomination of employees of residential and in-patient healthcare facilities to jointly perform the duties of absentee travel board members to assist those confined in medical facilities, including hospitals and nursing homes, and other locations in casting their ballot.

B. The Commission advises each county election board and circuit court clerk to work with staff and administrators of residential and in-patient healthcare facilities to develop a plan for the delivery of absentee ballots and other envelopes and forms required by IC 3-11-10 that are to be taken into said facilities and for the return of any completed absentee ballot to the county election board. This plan should include designating an absentee voter board, circuit court clerk, or employee of the county election board with delivering absentee ballot materials to a designated place at each facility and taking possession of absentee ballots completed by a voter in the facility.

C. Each absentee voter board appointed under this SECTION that assists a voter in completing their ballot shall complete Affidavits of Voter Assistance (PRE-3) (State Form 28192; R10/5-19).

SECTION 9

A. For the purposes of this SECTION, "voter with disabilities" includes a voter who is unable

to complete their ballot because they are temporarily unable to physically touch or be in safe proximity to another person.

B. Each county election board is directed to notify the county chairmen of the two major political parties of the county to nominate additional members of absentee voter boards under IC 3-11.5-4-23 and 3-11.5-4-23.5 and encourage the nomination of two (2) members of a household to perform the duties of absentee travel board members to assist a voter confined in the same private residence as the absentee travel board members.

C. Each absentee travel board is not required to be in the same room as a voter with disabilities to assist them in completing their ballot. A travel board may communicate with the voter from a different room, by telephone, visually, or by some other telephonic or video device to help the voter complete their ballot and allow the voter to verify the votes on their ballot were accurately captured.

D. Each absentee voter board appointed under this SECTION that assists a voter in completing their ballot shall complete an Affidavit of Voter Assistance (PRE-3) (State Form 28192; R10/5-19).

SECTION 10

A. For purposes of this SECTION, "family member" is defined as an individual listed in IC 3-6-6-7(4): as the spouse, parent, father-in-law, mother-in-law, child, son-in-law, daughter-in-law, grandparent, grandchild, brother, sister, brother-in-law, sister-in-law, uncle, aunt, nephew, or niece of the voter.

B. For purposes of this SECTION, "care giver" is defined as a person who provides care or assistance to a voter in the person's place of residence.

C. Notwithstanding IC 3-11-10-1(a)(6), a family member or care giver may personally deliver a voted ballot in the required security envelope to a county election board, and upon executing an affidavit setting forth their status as a family member of the voter on a form prescribed under IC 3-5-4-8.

SECTION 11

A. The Commission advises to each circuit court clerk that they may designate one location in their county to be a location of the office of the circuit court clerk for the purpose of absentee voting under IC 3-11-10-26.

B. A county election board may establish satellite locations for conducting absentee voting according to IC 3-11-10-26.3 and may establish as many locations as necessary to conduct absentee voting and observe any CDC or state department of health guidelines regarding the COVID-19 virus. Any satellite locations established for the primary election that is postponed under SECTION 1 of this Order are not required to be used during the general election held after the primary election.

SECTION 12

A. The Commission advises each county election board that they have the ability to reduce and consolidate the number of polling locations and poll workers needed to conduct an election on election day. This includes:

i. A resolution under IC 3-6-6-38 to not use the position of Sheriff or Poll clerk.

ii. A resolution under IC 3-6-6-38.5 to have one person serve as inspector for each precinct whose polling location is located in the same shared location.

iii. An order under IC 3-11-8-3.2 to move a precinct polling location established by the county executive that the county election board determines would be dangerous or impossible to use on election day.

iv. An order under IC 3-11-8-4.3 to locate the polls of a precinct to the same location as the polls of another adjoining precinct.

B. The Commission advises each county election board that a challenger station referred to IC 3-11-8-19 may be used to assist in following any public health guidelines to prevent the spread of the COVID-19 virus by keeping as many people as is practical and efficient from congregating in the area where a voter signs the poll list or casts a ballot.

SECTION 13

A. Notwithstanding IC 3-11-18.1-6, a vote center plan of a county where the total number of active voters in the county equals at least twenty-five thousand (25,000), may be amended, by unanimous vote of the entire membership of the board, to provide for the following only for the election postponed by SECTION 1 of this Order:

(1) At least one (1) vote center for each twenty five thousand (25,000) active voters.

(2) In addition to the vote centers designated in subdivision (1), the plan must provide

for a vote center for any fraction of twenty five thousand (25,000) active voters.

B. This SECTION may not be construed to require a county election board to establish more vote center locations in the county vote center plan that is required by IC 3-11-18.1-6.

C. The Commission advises each county election board that a county vote center plan under IC 3-11-18.1-4 only requires a minimum of one (1) precinct election board for each vote center established in the plan.

SECTION 14

A. Notwithstanding IC 3-6-6-39, an individual who is not a voter and eligible to serve as a precinct election officer under IC 3-6-6-39 does not need to provide written approval of the principal of the school the individual is attending at the time of being appointed as a precinct election officer, if the school the individual attends is not in session, or, if the student is educated in the home, the approval of the individual responsible for the education of the student.

B. Notwithstanding IC 3-11.5-4-23, an individual who is eligible to be appointed as an absentee ballot counter or courier under IC 3-11.5-4-23(d) does not need to provide written approval of the principal of the school the individual attends at the time of being appointed as a precinct election office or, if the student is educated in the home, the approval of the individual responsible for the education of the student, if the school the individual attends is not in session. An individual who is eligible to be appointed as an absentee ballot counter or courier under IC 3-11.5-4-23

is also eligible to be appointed as a member of an absentee voter board except for an absentee traveling board under IC 3-11-10-25.

SECTION 15

A. The Commission advises each county election board that it may adopt a resolution under IC 3-11.5-4-11 to provide for the processing and counting of absentee ballots at 6:00 a.m. on election day.

B. Each county election board in a county where IC 3-11.5-4-11(c) or (d) does not apply may adopt a resolution, by the unanimous vote of the entire membership of the board, to allow for the processing and counting of absentee ballot according to IC 3-11.5 to begin at 6:00 a.m. on election day.

The Commission advises each county election board that it may adopt a resolution under IC 3-11.5-4-12 to waive the requirements to make the findings under IC 3-11.5-4-12(b)(2) and (b)(3) for an absentee ballot cast under IC 3-11-10-25, 3-11-10-26, and 3-11-10-26.3.

C. Notwithstanding IC 3-11.5-4-12.5(a), the provisions of IC 3-11.5-4-12.5 apply to each county.

D. Notwithstanding IC 3-11.5-6-4, the requirement that each of the absentee ballots for each precinct be counted without interruption does not apply to the primary election postponed under SECTION 1 of this Order. The county election board shall direct the pace in which absentee ballots in each precinct shall be counted provided that the counting of absentee ballots must be completed not later than noon, June 12, 2020.

SECTION 16

A. The Commission advises each county election board that there is no deadline to complete the canvass of the vote under IC 3-12-4-6 except that the final, certified results of the election must be determined not later than 3:00 p.m. local prevailing time June 12, 2020.

B. The Commission advises each county election board, consistent with Executive Order 20-04 and 20-09, to make efforts to allow the public to participate in the public meeting when the canvass is held electronically. The county election board may take into consideration matters of public health and safety when determining which parts of the room where election materials are handled or transported may be restricted.

SECTION 17

A. The Commission shall hold a public hearing on April 22, 2020 at 10:00 a.m. Eastern Time, to consider the methods and procedures necessary to implement a vote by mail election for the primary election that has been postponed by SECTION 1 of this Order should the public health disaster emergency necessitate such a change in election procedures.

B. At this meeting, the Commission shall also address the timely certification of elected state convention delegates and the presidential primary preference vote to each of the major political parties so that both parties may hold their state conventions. The Commission shall also consider any other statutes that would need to be addressed to allow the major political parties to hold their state convention with the postponed primary.

SECTION 18

This Order is effective immediately.

ADOPTED THIS 25TH DAY OF MARCH, 2020 BY THE INDIANA ELECTION COMMISSION:

/s/ *Paul Okeson*	/s/ *S. Anthony Long*
Paul Okeson, Chair	**S. Anthony Long, Vice Chair**
/s/ *Suzannah Wilson Overholt*	/s/ *Zachary E. Klutz*
Suzannah Wilson Overholt, Member	**Zachary E. Klutz, Member**

APPENDIX E

Indiana Code
3-11-10-24

Effective: July 1, 2019

3-11-10-24 Voter entitled to vote by mail; voter with disabilities; deposit or delivery of sealed envelope; recasting ballot

Sec. 24. (a) Except as provided in subsection (b), a voter who satisfies any of the following is entitled to vote by mail:

(1) The voter has a specific, reasonable expectation of being absent from the county on election day during the entire twelve (12) hours that the polls are open.

(2) The voter will be absent from the precinct of the voter's residence on election day because of service as:

(A) a precinct election officer under IC 3-6-6;

(B) a watcher under IC 3-6-8, IC 3-6-9, or IC 3-6-10;

(C) a challenger or pollbook holder under IC 3-6-7; or

(D) a person employed by an election board to administer the election for which the absentee ballot is requested.

(3) The voter will be confined on election day to the voter's residence, to a health care facility, or to a hospital because of an illness or injury during

the entire twelve (12) hours that the polls are open.

(4) The voter is a voter with disabilities.

(5) The voter is an elderly voter.

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

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

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

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

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

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

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

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

(b) A voter with disabilities who:

(1) is unable to make a voting mark on the ballot or sign the absentee ballot secrecy envelope; and

(2) requests that the absentee ballot be delivered to an address within Indiana;

must vote before an absentee voter board under section 25(b) of this chapter.

(c) If a voter receives an absentee ballot by mail, the voter shall personally mark the ballot in secret and seal the marked ballot inside the envelope provided by the county election board for that purpose. The voter shall:

(1) deposit the sealed envelope in the United States mail for delivery to the county election board; or

(2) authorize a member of the voter's household or the individual designated as the voter's attorney in fact to:

(A) deposit the sealed envelope in the United States mail; or

(B) deliver the sealed envelope in person to the county election board.

(d) If a member of the voter's household or the voter's attorney in fact delivers the sealed envelope containing a voter's absentee ballot to the county election board, the individual delivering the ballot shall complete an affidavit in a form prescribed by the election division. The affidavit must contain the following information:

(1) The name and residence address of the voter whose absentee ballot is being delivered.

(2) A statement of the full name, residence and mailing address, and daytime and evening telephone numbers (if any) of the individual delivering the absentee ballot.

(3) A statement indicating whether the individual delivering the absentee ballot is a member of the

voter's household or is the attorney in fact for the voter. If the individual is the attorney in fact for the voter, the individual must attach a copy of the power of attorney for the voter, unless a copy of this document has already been filed with the county election board.

(4) The date and location at which the absentee ballot was delivered by the voter to the individual delivering the ballot to the county election board.

(5) A statement that the individual delivering the absentee ballot has complied with Indiana laws governing absentee ballots.

(6) A statement that the individual delivering the absentee ballot is executing the affidavit under the penalties of perjury.

(7) A statement setting forth the penalties for perjury.

(e) The county election board shall record the date and time that the affidavit under subsection (d) was filed with the board.

(f) After a voter has mailed or delivered an absentee ballot to the office of the circuit court clerk, the voter may not recast a ballot, except as provided in IC 3-11.5-4-2.

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