IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PATRICK HARLAN, et al., Plaintiffs, v. CHARLES W. SCHOLTZ, Chairman, Illinois State Board of Elections, et al., Defendants.	)	Case No. 1:16-cv-7832 Hon. Samuel Der-Yeghiayan

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS AND OTHER VOTING RIGHTS ORGANIZATIONS IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs correctly note that Election Day registration (EDR) consistently increases voter turnout. (Pls.' Mem. Supp. Prelim. Inj. 5.) Moreover, the beneficial effects of EDR are greater when it is offered in local precincts, rather than only at a centralized location. *Id.* Incredibly, however, the plaintiffs ask this Court to *prohibit* EDR at local polling places in Illinois counties where it is mandated by law – counties that account for 83.9 of the state's population. (Pls.' Mem. Supp. Prelim. Inj. Ex 2 at 4, hereinafter, "Hood Decl.") In other words, plaintiffs ask this Court to prevent thousands of people from voting in this November's election.

The *amici* – nonprofit, nonpartisan organizations that advocate for full and equal access to the franchise – take no position on the merits of plaintiffs' claim that the current EDR system violates the Equal Protection Clause, but *amici* do object to plaintiffs' proposed remedy. If this Court determines that preliminary relief is warranted to equalize access to EDR, *amici* urge the Court to do so by extending EDR to polling places where it is not currently available, rather than removing it from polling places where it is.

INTERESTS OF *AMICI CURIAE*

The American Civil Liberties Union of Illinois is the state affiliate of the American Civil Liberties Union ("ACLU"), a nationwide, non-profit, non-partisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. For decades, the ACLU has been at the forefront of litigation and advocacy protecting the right to vote and ensuring equal access to the ballot for all Americans.

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. ("Chicago Lawyers' Committee") is a non-profit, non-partisan organization and is the public interest law consortium of Chicago's leading law firms. Chicago Lawyers' Committee was established in 1969 with the mission to promote and protect civil rights, particularly the civil rights of low-income, minority, and disadvantaged people. The Voting Rights Project of Chicago Lawyers' Committee prevents, reduces, and eliminates barriers to voting for African Americans, Latinos, and other minority residents within Illinois.

The League of Women Voters of Illinois is a non-partisan political organization that encourages informed and active participation in government and elections, works to increase understanding of public policy issues, and seeks to influence public policy through education and advocacy.

The Better Government Association is a 93-year-old non-partisan, non-profit organization that works for integrity, transparency, and accountability in government by exposing corruption and inefficiency; identifying and advocating effective public policy; promoting public participation in government; and engaging and mobilizing the electorate to achieve authentic and responsible reform.

The Illinois Campaign for Political Reform (ICPR) is a non-profit and non-partisan public interest organization that conducts research and advocates reforms to promote public participation and to encourage integrity, accountability, and transparency in both Illinois government and election processes. ICPR facilitates bipartisan dialogue around a range of reform issues in order to advance honest, open, and accountable government and reinvigorate public confidence and civic involvement. ICPR has been supportive of many efforts to increase voting access in Illinois.

ARGUMENT

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 24 (internal quotation marks and citations omitted).

Here, the plaintiffs ask this Court to employ "the extraordinary remedy of injunction" to change the rules less than three months in advance of an election in a way that will likely make it impossible for thousands of qualified voters to vote. The great majority of voters affected by the plaintiffs' proposed injunction live in Cook County and the surrounding collar counties – not in Crawford County or any of the counties in plaintiff Harlan's congressional district. The public interest weighs heavily against this last-minute constriction of the franchise, and plaintiffs have

not come close to showing an irreparable harm that outweighs the public interest in ensuring access to the vote for the broadest possible range of eligible voters.

If the Court determines that preliminary injunctive relief is required, it should extend Election Day registration at polling places in low-population counties, rather than deprive voters in high-population counties of that opportunity. Such a remedy would support, rather than undermine, the public interest in allowing qualified voters to vote, would appropriately respect legislative intent, and would more directly remedy the plaintiffs' alleged injuries.

I. THE BALANCE OF EQUITIES DISFAVORS THE ELIMINATION OF ELECTION DAY REGISTRATION AT POLLING PLACES IN HIGH-POPULATION COUNTIES.

A. The Public Interest Favors Preservation of Election Day Registration at Polling Places.

"The public interest . . . favors permitting as many qualified voters to vote as possible." *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012). As plaintiffs' expert explains, EDR is a crucial method for expanding the franchise to qualified voters who, often by no fault of their own, would otherwise be unable to participate.[1] Plaintiffs' proposed remedy would deny the vote to those individuals.

Data from prior elections suggest that the EDR option is particularly important in higher population areas generally, and Cook County in particular. During the pilot program in the 2014 general election, 8,958 voters used EDR. Of these, 6,501, or 72% lived in Cook County,[2] even

[1] In interviews with several hundred EDR voters during the 2014 pilot program, advocates found that "many [EDR voters] had tried to update their information prior to the registration deadline but, due to administrative errors by government agencies or confusion over the procedure to update their voter registration, were unable to do so." Chicago Lawyers' Committee for Civil Rights Under Law, Illinois Embraces EDR: A Review of the Illinois Election Day Registration Pilot Program for the 2014 General Election at 1 (December 2016), available at www.votingrightsillinois.org/publications (last visited August 29, 2016) (hereinafter "Illinois Embraces EDR").

[2] Illinois Embraces EDR at 1, 3.

though Cook County accounts for only 41% of the voting age population of Illinois.[3] In the March 2016 primary, more than *58,000 voters* in Cook County (nearly three times the *entire population* of Crawford County) used EDR to register to vote or update their registration.[4] Given that the upcoming November election is a general election for President of the United States, turnout is likely to be much higher. If the Court issues the injunction requested by the plaintiffs, the predictable result is thousands of qualified voters turned away from the polls.

Exacerbating this result, the requested injunction will overturn voters' reasonable expectations. In preparation for November's election, voter education and get-out-the-vote organizations have undertaken massive voter education campaigns, getting the message out to thousands of voters that they can vote on Election Day even if they have not registered or their registration is out of date.[5] Those voters have every right to rely on a state statute guaranteeing their right to vote at their local polling place on Election Day. Turning those voters away at the polls would betray those expectations. Voters in high-population counties – including both Republican and Democratic leaning counties – would be confused at precinct polling places and face long lines at EDR sites, assuming that they make it to an EDR site at all. Meanwhile, short-staffed election personnel would have to spend significant additional resources in assisting voters at both types of locations, all thanks to plaintiffs' decision to file suit more than a year after the statute's effective date and less than three months before the election.

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[3] *See* U.S. Census Bureau, Voting Age Population by Citizenship and Race, 2010-2014 American Community Survey, available at http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html (last visited Aug. 25, 2016).

[4] David Orr, Cook County Clerk, Post-Election Report: March 15, 2016 Presidential Primary Election at 19 (2016) (23,123 EDR voters in suburban Cook County); data provided from Chicago Bd. of Elections Commissioners) (35,234 EDR voters in Chicago), on file with *amici*.

[5] *See* Br. of Amici Curiae Asian Americans Advancing Justice, et al., filed Aug. 30, 2016, at 14.

Moreover, the burden of an injunction limiting EDR is likely to fall disproportionately on identifiable sub-groups. For example, the research surveyed by plaintiffs' expert suggests that those most likely to be disenfranchised by such an injunction include "the young, the residentially mobile, and those with moderate level of income and education." (Hood Decl. at 10.) Additionally, although plaintiffs do not mention it, the Fourth Circuit recently found that the elimination of same-day registration unlawfully discriminated against African Americans. The Court noted that "African American voters disproportionately used same-day registration when it was available," and that African Americans "are more likely to move between counties and thus are more likely to need to re-register." *N.C. State Conference of NAACP v. McCrory*, No. 16-1468, 2016 WL 4053033, at *3 (4th Cir. July 29, 2016) (internal quotation marks, alteration, and citations omitted). The possibility of a disproportionate racial impact is another reason the public interest weighs heavily against the proposed injunction.

Finally, the plaintiffs incorrectly assert that "a preliminary injunction would simply preserve the status quo ante." Pls.' Mem. Supp. Prelim. Inj. 13. The current EDR system went into effect in June 2015 and was in place for the March 2016 primary election. Plaintiffs' proposed remedy would *disrupt* the status quo.

B. The Plaintiffs Have not Shown a Likelihood of Irreparable Harm that Outweighs the Public Interest in Preserving Existing EDR at Polling Places.

Shutting down EDR at precinct polling places in high-population counties will deny many qualified voters the right to vote, in derogation of the public interest. The plaintiffs have the burden of proving that (1) allowing those citizens to vote will cause the plaintiffs irreparable harm; and (2) the alleged harm to plaintiffs outweighs the harm to those citizens. *Curtis v. Thompson*, 840 F.2d 1291, 1296 (7th Cir. 1988). They have made no such showing.

The plaintiffs' claim to irreparable harm is based on a tenuous chain of inferences: EDR in local polling places boosts registration; EDR is not mandatory in polling places in low-population counties; low-population counties lean Republican; therefore the plaintiffs are harmed by the unavailability of EDR in polling places in low-population counties; and therefore the plaintiffs' harms will be remedied by prohibiting EDR in polling places in high-population counties. But the plaintiffs have not provided the evidence to connect these dubious dots.

First, it is certainly true, as a general matter, that turnout is increased when EDR is available, but the plaintiffs have provided no evidence from which the Court can infer that this is equally true in low-density areas and high-density areas. As noted above, in previous elections, voters in Cook County made much greater use of EDR. This could be because more Cook County residents have moved recently, requiring a change in registration.[6] It could be because there are more new voters in Cook County. *Amici* do not purport to know whether these hypotheses are accurate, but this is the type of information the Court would need in order to determine whether EDR has the same impact in low-population counties as it does in high-population areas, and the plaintiffs, who have the burden of proof, have not provided it.

More specifically, the plaintiffs have failed to show that the availability of *in-precinct* EDR is similarly important for voters in low-population counties compared to high-population counties. EDR is already available in at least one site in each county, at the headquarters of the local election authority. Counties must also provide EDR in any other municipality containing at least 20% of the county's residents. A cursory review of population figures shows that three of the nine low-population counties in the 17th Congressional District must provide a secondary

[6] *See* Matt Foulkes & K. Bruce Newbold, *Geographic Mobility and Residential Instability in Impoverished Rural Illinois Places*, 37 ENV'T & PLANNING A 845, 849 (2005) ("In Illinois . . . rural places exhibit a lower within-county mobility rate . . . than do urban places").

site.[7] In order to determine whether these EDR sites are sufficient, it would be helpful for the Court to know, for example, how many people live within ten miles of an EDR site, and how readily available transportation is. It might take less time and money to drive 20 miles from Landes, in the farthest corner of Crawford County, to Robinson, where the County Clerk is located, than it would to take public transportation or drive (and find and pay for parking) from the farther reaches of Chicago to downtown. It may also be true that, absent in-precinct EDR, the lines at EDR sites in high-population counties would be unmanageable, and that this might not be true in low-population areas. Again, plaintiffs simply have not submitted any evidence to show that the existing EDR sites in low-population counties are inadequate.

Indeed, as *amici* Asian Americans Advancing Justice, *et al*., explain, election officials in low-population counties themselves lobbied for the exemption from in-precinct EDR, and legislators agreed to it because those counties did not experience the long lines and delays during the 2014 pilot that were seen in high population counties.[8] Notably, the statute doesn't *forbid* those counties from offering EDR at all precincts, it simply gives them the flexibility to determine how many EDR sites they need. If voters decide that a county needs more EDR sites, they can pressure their local county clerks and other elected officials to provide them. In the meantime, plaintiffs have not provided any evidence that the absence of EDR in every precinct in the lower population counties imposes a significant hardship on the voters who live there.

Finally, even if the plaintiffs could somehow show an irreparable harm, they still have not shown that the harm is redressed by prohibiting EDR in polling places in high-population

[7] The City of Canton contains approximately 39% of the population of Fulton County; the City of Kewanee contains approximately 25% of the population of Henry County, and the City of Sterling contains about 26% of the population of Whiteside County. Additionally, in Knox County, Stephenson County, and Monmouth County, more than half of the population lives in the municipality where the County Clerk (and, thus, an EDR site) is located.

counties. As explained above, by far the greatest effect of the plaintiffs' proposed injunction would be to constrict voter participation in Cook County, no part of which is in the 17th Congressional District, or anywhere near Crawford County. Turning those voters away at the polls does not redress plaintiffs' alleged injuries. *Cf. Summers v. Smart*, 65 F. Supp. 3d 556, 565 (N.D. Ill. 2014) (If the preliminary relief sought by plaintiffs "would do little, if anything, to remedy the allegedly unconstitutional burdens imposed by the state, then the balance of equities tilts decisively toward the defendants, at least at this juncture.")

In sum, the plaintiffs' proposed remedy virtually ensures that thousands of voters will be unable to vote on Election Day. Plaintiffs have provided no evidence to justify this result.

II. IF A PRELIMINARY INJUNCTION IS WARRANTED, THE PROPER REMEDY IS EDR IN ALL POLLING PLACES IN ALL COUNTIES.

A. The Balance of Equities More Plausibly Supports a Remedy that Expands Election Day Registration at Polling Places.

In contrast to plaintiffs' proposed remedy, an order *expanding* EDR to all polling places in all counties would not damage the essential public interest in ensuring that qualified voters are able to vote. On the contrary, it would reinforce that interest. Moreover, unlike plaintiffs' proposed remedy, the expansion of EDR would directly redress plaintiffs' alleged injuries. If, as plaintiffs claim, some of their voters will be unable to vote because EDR is not available at their local precincts, then the expansive remedy will fix the problem by simply allowing those individuals to vote.

Such a remedy is feasible. As plaintiffs' note (Pls.' Mem. Supp. Prelim. Inj. at 5), six states – Idaho, Iowa, Minnesota, New Hampshire, Wisconsin, and Wyoming – provide EDR at

[8] Br. of *Amici Curiae* Asian Americans Advancing Justice, *et al*., filed Aug. 30, 2016, at 9-11.

all local polling places.[9] Some of these states instituted EDR decades ago – long before electronic poll books were in use.[10] Wisconsin and New Hampshire still do not use electronic poll books,[11] and the others allow but do not require them.[12] These examples demonstrate that EDR can be accomplished in all local precincts statewide, even without electronic poll books.

Amici believe that such a system could be put in place in Illinois before Election Day. If this Court determines otherwise, however, the blame rests squarely on the plaintiffs. The current EDR system was enacted in January 2015 and was effective in June 2015. If the plaintiffs had filed their challenge then, there would have been plenty of time to extend early voting to local precincts statewide. Should the Court find that plaintiffs' delay precludes this remedy – which fully addresses plaintiffs' grievances and serves the public interest – plaintiffs may not instead demand an injunction that fails to address their alleged injuries and also disenfranchises innocent third parties statewide, in derogation of the public interest.

Judge Tharp reached a similar conclusion in *Summers v. Smart*, 65 F. Supp. 3d 556 (N.D. Ill. 2014). There, the Illinois Green Party challenged several burdensome requirements for third party ballot access – including a requirement that they run a full slate of candidates for statewide office, and that petition signatures be notarized. These requirements impeded the party's ability

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[9] Idaho Code Ann. § 34-408A; Iowa Code Ann. § 48A.7A; Minn. Stat. Ann. § 201.061; N.H. Rev. Stat. Ann. § 654:7-a; Wis. Stat. Ann. § 6.55; Wyo. Stat. Ann. § 22-3-104.

[10] EDR has been offered since 1994 in Idaho (1994 Idaho Laws Ch. 67 (H.B. 603)); since 1973 in Minnesota (Minn. Laws 1973, c. 676, § 4); since 1976 in Wisconsin (Section 1, Chapter 85, Laws of 1975).

[11] Wis. Gov't Accountability Bd., Report on Electronic Poll Book Research, March 19, 2014, http://www.gab.wi.gov/sites/default/files/memo/20/electronic_poll_book_research_recommendations__17865.pdf (last visited August 26, 2016); Garry Rayno, *Electronic poll books won't be anytime soon*, NEW HAMPSHIRE UNION LEADER (May 21. 2016 8:57PM), http://www.unionleader.com/apps/pbcs.dll/article?AID=/20160522/NEWS0604/160529845/-1/news0604 (noting that bill approving electronic poll books had been killed for the year).

[12] Idaho Code Ann. § 34-1106A; Iowa Code Ann. § 49.77(1)(c); Minn. Stat. Ann. § 201.225; Wyo. Stat. Ann. § 22-3-113.

to collect signatures, so that its total number of valid, approved signatures fell short of the required 25,000. Although the court found a likelihood of success on the merits, it declined to issue a preliminary injunction. At that stage, enjoining the challenged provisions would do the party no good, as it was too late to collect more signatures. 65 F.Supp.3d at 566. Thus, "the only preliminary injunctive relief that the Court can award at this late date that would redress their claimed injuries is to compel the defendants to place the Green Party candidates on the ballot notwithstanding the failure to garner 25,000 valid signatures in the 90–day period." *Id.* Such relief, however, would have undermined the State's interest in ensuring that candidates on the ballot have a "modicum of support" among the electorate. As the court explained, "[t]he plaintiffs' delay created their current predicament: it is only because they brought this lawsuit so late that the Court can fashion no relief other than ordering their candidates' names to be printed on the ballots notwithstanding their failure to comply with a legitimate requirement of state law." *Id.* at 568. *See also id* at 567 ("A cure that removes healthy tissue rather than the cancer has little to recommend it.")

The same is true here. The plaintiffs claim they are injured because EDR is offered in local precincts in some counties but not others. The obvious remedy is to provide EDR in all local polling places. If the Court believes the timing of this lawsuit has foreclosed that option, the onus of the delay must fall on the plaintiffs, not on the qualified voters who rely on EDR to cast their ballots this Election Day.

B. A Remedy that Expands EDR is Preferable Because it Effectuates Legislative Intent, While Plaintiffs' Proposed Remedy Undermines It.

When devising remedies for unconstitutional statutes, courts should strive to give effect to legislative intent as much as possible. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328 (2006). In *Ayotte*, the Court described "[t]hree interrelated principles": "First, we

try not to nullify more of a legislature's work than is necessary, for we know that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people. . . . Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it. . . . Third, the touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial powers to circumvent the intent of the legislature." *Ayotte*, 546 U.S. at 329-30 (internal quotation marks and citations omitted).

These principles apply with special force when a court is asked to interfere in a state's procedures for running its elections. For example, in *Perry v. Perez*, 132 S. Ct. 934 (2012), a district court redrew an electoral map that allegedly violated the Fourteenth Amendment and the Voting Rights Act. The Supreme Court held that district court failed to give the state's proposed plan adequate deference. Although the court must "take care not to incorporate into the interim plan any legal defects in the state plan," *Perry*, 132 S. Ct. at 941, "that does not mean that the plan is of no account or that the policy judgments it reflects can be disregarded by a district court drawing an interim plan." *Id.* Instead, the state plan "provides important guidance that helps ensure that the district court appropriately confines itself to drawing interim maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate state policy judgments with the court's own preferences." *Id.*

Similarly, in *Veasey v. Abbott*, No. 14-41127, 2016 WL 3923868 (5th Cir. July 20, 2016), which struck down a state voter identification statute, the Fifth Circuit instructed the district court that "any remedy should be sufficiently tailored to the circumstances giving rise to the [Voting Rights Act] violation, and to the extent possible, courts should respect a legislature's policy objectives when crafting a remedy." *Id.* at *36 (internal quotation marks, citation, and

alterations omitted). The court observed that the law's disparate impact did not arise from its application to the majority of voters who possessed the mandated identification. Therefore, "[t]he remedy must be tailored to rectify only the discriminatory effect on those voters who do not have [mandated identification] or are unable to reasonably obtain such identification," by, for example, creating exemptions from the requirement. *Id.* at *39. Such a remedy would relieve the discriminatory impact of the law, while giving effect to the legislature's policy judgment that most people should be required to provide identification in order to vote.

In this case, an injunction requiring low-population counties to provide EDR at all polling places would be far more respectful of state legislative policy judgments than an injunction prohibiting high-population counties from doing so. The plaintiffs would have this Court order a direct violation of state statute: Counties that are required by Illinois law to provide EDR at polling places may not do so. By contrast, an injunction extending EDR to all counties would be wholly within the bounds of existing state law, which already allows the low-population counties to offer EDR at polling places. The choice is between ordering some counties to do something that state law prohibits, or ordering other counties to do something that state law allows. *See Salazar v. Buono*, 559 U.S. 700, 721 (2010) ("Respect for a coordinate branch of Government . . . requires that a congressional command be given effect unless no legal alternative exists.")

More broadly, an injunction extending EDR to low-population counties effectuates the underlying purpose of the statute, to assure the greatest possible access to the franchise. The plaintiffs' proposed remedy thwarts that purpose by imposing new barriers to voting.

C. In Cases Alleging Discrimination in Voting Procedures the Appropriate Remedy is to Remove Burdens on the Plaintiff's Rights, not to Add Burdens for Third Parties.

When a law or practice is unlawful because it imposes heavier burdens on one group's right to vote, the preferred remedy is to lift the burdens imposed on the plaintiffs, rather than

impose new burdens on others.

For example, in *Obama for Am. v. Husted*, 697 F.3d 423 (6th Cir. 2012), the Sixth Circuit found that the plaintiffs were likely to succeed on the merits of their claim that an Ohio law allowing only members of the military to vote early in the three days immediately preceding the election was unconstitutional. But the remedy for that violation was not to *deny* early voting on those days to service members. Instead, the Sixth Circuit affirmed the district court order *extending* early voting to non-military voters, noting that "[t]he public interest . . . favors permitting as many qualified voters to vote as possible." 697 F.3d at 437. *See also Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187 (1979) (Where statute unconstitutionally requires candidates for local office to obtain 35,000 petition signatures and candidates for state office must only obtain 25,000, the remedy is to reduce the number of signatures required for local candidates, not increase the number for state candidates.)

Amici are aware of no case in which a federal court has remedied an allegedly discriminatory voting law by restricting any individual's or group's access to the ballot box. Nor do *amici* know of any case in which a federal injunction has resulted in thousands of qualified voters being turned away from the polls on Election Day, as plaintiffs' proposed injunction surely would.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to deny the motion for preliminary injunction, or, alternatively, to grant an injunction that extends Election Day registration to local polling places statewide.

Dated: August 30, 2016

Respectfully submitted,

/s/ Rebecca K. Glenberg
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CERTIFICATE OF SERVICE

I, Rebecca K. Glenberg, certify that I caused a copy of the BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS AND OTHER VOTING RIGHTS ORGANIZATIONS IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION to be served to counsel of record via the ECF system of the U.S. District Court, Northern District of Illinois, Eastern Division, on this 30th day of August, 2016.

/s/ Rebecca K. Glenberg