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Gryzbowski, Beth Rose Breslaw,	:	COURT OF APPEALS
Edward James Vasconcellos III,	:	
Bon-Jin Kun, Annalee Switek,	:	DOCKET NO.: A-004318-14
Latino Leadership Alliance of	:	
New Jersey (LLANJ), New Jersey	:	
Citizen Action (NJCA), and the	:	
American Civil Liberties Union	:	
of New Jersey (ACLU-NJ)	:	
	:	
Plaintiffs	:	
	:	
vs.	:	APPELLANTS' BRIEF
	:	
Middlesex County Board of	:	
Elections and Daniel Frankel,	:	
Commissioner of Registrations	:	
of Middlesex County	:	
	:	
Defendants.	:	

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PRELIMINARY STATEMENT

The central issue in this case is whether the statutory requirement that a voter register twenty-one days in advance of an election in order to cast a valid ballot is an unnecessary and unjustifiable burden on citizens, in violation of the New Jersey Constitution's guarantee of the right to vote. To wit, does the State have a compelling and overriding interest in advance registration that justifies the burden on that fundamental right? As the evidence below made clear, the State - after being given numerous opportunities - failed to prove any legitimate, much less compelling, interest to justify a burden.

The New Jersey Constitution reads:

Every citizen of the United States, of the age of 18 years, who shall have been a resident of this state and of the county in which he claims his vote 30 days next before the election, shall be entitled to vote for all officers that now or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people.

[N.J. Const. art. II, § 1, ¶ 3.]

Appellants (hereinafter "Plaintiffs") assert that changes in New Jersey's election machinery have rendered advance registration unconstitutional under this Article; the government Respondents (hereinafter "Defendants") and trial court disagree.

This case is here for a second time. Initially, an appellate panel reversed the trial court's dismissal of the case on

summary judgment and faulted it for failing to "explain why defendants' interest in advance registration outweighed the burden imposed on plaintiffs' right to vote." RUSA, et al. v. Middlesex County Board of Elections, et al., 438 N.J. Super. 93, 106 (App. Div. 2014). The trial court's first opinion rejected, without factual support, Plaintiffs' unchallenged factual showings that advance registration is no longer necessary due to modern technology and New Jersey's electoral procedures. On remand, the trial court mostly reiterated its earlier opinion but invented "facts" concerning the cost of implementing Election Day Registration (hereinafter "EDR"). In so doing, the trial court assumed that administrative costs, never introduced or proven in the record, established a valid state interest justifying the denial of New Jersey citizens' right to vote. This decision is, once again, reversible because it is rife with factual errors and misapplies the law. Specifically, the trial court repeated its critical error of law that dismissed strict scrutiny as the applicable standard of review for the fundamental right to vote under the N.J. Constitution. Relying solely on federal cases, the trial court applied the Burdick balancing test to the case at hand. The court ignored the fact that the N.J. Supreme Court has ruled that under the State Constitution "there can be no interference with an individual's

right to vote, 'unless a compelling state interest to justify the restriction is shown,'" Worden v. Mercer County Board of Elections, 61 N.J. 325, 346 (1972).

Nonetheless, even under the Burdick standard that weighs a state's interest against the burden it imposes on a citizen's right to vote, the trial court's analysis fails. A valid state interest has never been proffered or proven by Defendants. Instead, throughout this litigation, Defendants have chosen, abandoned and adopted state interests in a fickle attempt to get one to stick. The trial court dismissed Defendants' prevention of voter fraud claim. (663a.) It did, however, find that advance registration was necessary "in ensuring public confidence in the integrity of the electoral process" without any explanation of what that meant in the absence of a threat of fraud. (Ibid.) Defendants never produced any evidence connecting advance registration with public confidence in election integrity. More troubling, the trial court created facts to find that administrative costs were a valid state interest justifying advance registration. (664a.) The record negates such concern.

In short, rather than taking its obligation on remand to "determine the constitutionality of N.J.S.A. 19:31-6.3b" seriously, the trial court merely found a way to rubber-stamp its earlier opinion.

PROCEDURAL HISTORY

Plaintiffs are a group of individuals and organizations burdened and disenfranchised by New Jersey's current twenty-one-day advance voter registration deadline. (4a-8a, ¶¶ 8-17.) They filed a Complaint for Injunctive and Declaratory Relief in Middlesex County Superior Court on April 19, 2011. (1a-35a.); and filed a Motion to File an Amended and Supplemental Complaint for Declaratory and Injunctive Relief on December 12, 2012. Such motion to amend was granted on January 11, 2013. (36a-72a.) Defendants' Answer was filed on May 27, 2011. (73a-89a.)

Defendants answered Plaintiffs' Interrogatories on September 29, 2011. (407a-416a.) Defendants also submitted Answers and Objections to Plaintiffs' First Request for Admissions on January 25, 2013. (417a-427a.)

Plaintiffs took the following depositions:

- Carmen M. DiSimoni, Manager of the New Jersey Statewide Voter Registration System, January 23, 2012 (283a);
- Malcolm Boyd, Elections Portfolio Practice Leader for U.S. State and Local Government of Hewlett Packard, May 18, 2012 (327a);
- Linda Ann Pino, Chief Clerk of the Middlesex County Board of Elections, June 21, 2012 (356a); and
- James Vokral, Administrator of the Middlesex County Board of Elections, June 21 2012 (387a).

Plaintiffs submitted the following Expert Certifications:

- Lorraine C. Minnite, Associate Professor, Dept. of Public Policy and Administration, Rutgers University, Camden, dated January 18, 2012. (243a-264a);
- Mark Ritchie, Secretary of State, Minnesota, dated February 2, 2012 (226a-236a);
- Matt Dunlap, former Secretary of State and Chief Election Officer, Maine, dated October 16, 2012 (237a-242a); and
- Ronald K. Chen, former Director, Office of Public Advocate, New Jersey, dated May 4, 2012 (222a-225a).

Defendants did not serve any discovery requests on Plaintiffs nor take any depositions.

Plaintiffs filed a Motion for Summary Judgment with an extensive statement of undisputed material facts on March 5, 2013. In response, Defendants filed an Opposition to Summary Judgment and a Cross Motion to Dismiss that did not include a statement of undisputed material facts. Instead, Defendants attached the Certification of Robert Giles, Director of the Division of Elections, dated August 14, 2013. (523a-531a.) Plaintiffs filed a Reply to Defendants' Opposition and Cross Motion to Dismiss on September 18, 2013 and contested the fact that the Respondents did not include a statement of undisputed material facts in accordance with R. 4:46-1, 4:46-2(a)-(b). Defendants finally provided such statement, entitled Responding Statement of Material Facts on Behalf of Defendants. (120a-139a.) Plaintiffs requested time in order to reply to facts newly introduced that were not produced during discovery, and,

on October 15, 2013, filed Plaintiffs' Reply to Defendants' Statement of Undisputed Material Facts in Further Support of Their Motion for Summary Judgment. (140a-149a.)

The case was argued before the Honorable Heidi Willis Currier, J.S.C. of the Superior Court of New Jersey, Law Division in Middlesex County on November 4, 2013. (567a-631a.) The trial court rendered its decision on December 11, 2013, denying Plaintiffs' Motion for Summary Judgment. (153a-160a.) The court held that the twenty-one day registration requirement did not impose an unjustifiable burden on a citizen's right to vote and, consequently granted Defendants' Cross-Motion to Dismiss, but converted it to a Motion for Summary Judgment. (150a-152a.)

Plaintiffs filed a Notice of Appeal on January 28, 2014. (161a.) The New Jersey Appellate Division published an Opinion on November 19, 2014 reversing and remanding the trial court's December 2013 decision. For remand, the Appellate Division instructed the trial court to "make detailed findings of fact supported by the record, and conclusions of law drawn from those facts in accordance with Rule 1:7-4(a)." RUSA, supra, 438 N.J. Super. at 107. On April 14, 2015 Judge Currier issued a new opinion, again granting Defendants' Motion for Summary Judgment. (654a-667a.)

Plaintiffs filed a Notice of Appeal on May 27, 2015.
(668a.)

STATEMENT OF FACTS

The material facts of this case are broader than is ordinarily the case, because they include legislative facts¹ in addition to adjudicative facts. Such legislative facts include details of the way New Jersey's Statewide Voter Registration System ("SVRS") functions and current election practices regarding provisional ballots; the severe burden advance registration imposes on New Jersey voters; and the manner in which EDR operates in the several other jurisdictions that have adopted it.

THE PLAINTIFFS

The individual Plaintiffs in this case are current and former undergraduate Rutgers University students who lived at or near the New Brunswick campus in Middlesex County, New Jersey, at all relevant times to this Complaint. (91a-96a, ¶¶ 1-7; 121a, ¶¶ 1-7.) Five of the Plaintiffs were negatively impacted, indeed disenfranchised, by the current twenty-one-day

¹ See Notes of the Advisory Committee on Proposed Federal Rules of Evidence, Rule 201, Judicial Notice of Adjudicative Facts, eff. December 1, 2011. (Noting legislative facts are "those which have relevance to legal reasoning and the lawmaking process, whether in the formulation or ruling by a judge or court or in the enactment of a legislative body.").

advance registration deadline in New Jersey. Two of the Plaintiffs, Matthew Cordeiro and John Connelly, are respectively, the former Presidents of the organizational plaintiff, Rutgers University Student Assembly ("RUSA"). (T:5:20-25; 91a, ¶¶ 1-2; 121a, ¶¶ 1-2.)

RUSA is the elected student government body for undergraduate students of Rutgers University on the New Brunswick/Piscataway campus. (T5:15-19; 91a, ¶ 1; 121a, ¶ 1.) All undergraduate students in New Brunswick and Piscataway are entitled to vote for, are represented by, and are the constituents of, RUSA and its members. (91a, ¶ 1; 121a, ¶ 1.)

Plaintiffs Gabriela Agata Grzybowski, Annalee Switek, Edward James Vasconcellos III and Bon Jin Ku were students at Rutgers University who registered to vote at least twenty-one days before an election. (T6:5-9, T7:3-6, T18-22, T8:5-8; 91a-96a, ¶¶ 3, 5-7; 121a, ¶¶ 3, 5-7.) However, when they went to vote on Election Day, they were told that they were not on the rolls. (T6:9-10, T7:7-9, T7:22-25, T8:8-10; 91a-96a, ¶¶ 3, 5-7; 121a, ¶¶ 3, 5-7.) Poll workers directed the above plaintiffs to vote by provisional ballot, but their votes were later held invalid, even though their provisional ballots were accepted as registrations for future elections. (T7:9-12, T7:24-25, T8:1-4, T8:11-14; 91a-96a, ¶¶ 3, 5-7; 121a, ¶¶ 5-7.) Grzybowski was not

even given the option of a provisional ballot. Plaintiff Beth Rose Breslaw was also a student at Rutgers University during the 2010 General Election, and had first registered to vote in 2007 at her mother's address in Princeton. (T6:16-19; 92a-94a, ¶ 4; 121a, ¶ 4.) Because she was on crutches and could not return to Princeton to vote, she went to a local polling place in New Brunswick, and election officials accepted her provisional ballot. (T6:21-24; 92a-94a, ¶ 4; 121a, ¶ 4.) The ballot was later ruled invalid, although it was accepted as a registration for future elections. (T6:24-25, T7:1-2; 92a-94a, ¶ 4; 121a, ¶ 4.)

The stories of disenfranchisement of the above Plaintiffs are representative of a great number of otherwise eligible New Jersey voters who are deemed ineligible to vote simply because of New Jersey's anachronistic 21-day advance voter registration requirement. (37a; 45a, ¶¶ 3, 18.) The three other organizational plaintiffs expend resources either on voter registration or assisting would-be voters in County courthouses on election days. (7a-9a, ¶¶ 15-17.)

NEW JERSEY'S VOTER REGISTRATION SYSTEM

In New Jersey, a person is entitled to vote if, on Election Day, he or she is over eighteen years of age, a citizen of the United States, not on parole or probation, and a

resident of one of New Jersey's twenty-one counties for at least thirty days. N.J. Const. art. II, § 1, ¶ 3(a). (T17:21-25, T18:1; 37a; 46a-47a, ¶¶ 1, 21.) In order to ensure that only eligible voters cast a ballot for any given election, the State requires persons to register to vote in the county in which they reside. The registration process requires the voter to submit an application on which he or she provides information as to age, citizenship status, current residence and social security or driver's license number. (428a.) This information is then verified by local election officials, and if found accurate, the applicant is placed on the county's voter registration rolls. (49a-50a, ¶¶ 26-27.)

The exact nature of the registration process has changed over the years due to evolving technology and the means by which officials can verify a voter's information. Paper election records, once stored only at the seat of a county, have given way to a state-wide electronic data base. Indeed, since the full-implementation of the New Jersey State-wide Voter Registration System (the "SVRS"), as required by the Help America Vote Act, Public Law 107-252, 42 U.S.C. 15301 et seq. (2003), local election officials are able to easily upload and verify a person's identifying information by cross-referencing that information against other data bases, such as that of the

Department of Motor Vehicles and the federal Social Security Administration. (T9:7-13, T9:21-25, T10:1-2; 98a, ¶ 11; 122a, ¶ 11.) Consequently, election officials are able to determine whether a voter is registered anywhere in the State, and have access to that person's voting history. (T10:8-14; 100a, ¶ 25; 123a, ¶ 25.)

The relative ease of the adoption and use of SVRS indicates that New Jersey's current election system permits the addition of new registrants into the SVRS on or immediately following Election Day. (T11:3-6.) The quick verification of voters' identifying information and eligibility would allow all legal voters to be verified within, at minimum, twenty-four hours of registration. (100a-101a, ¶ 27; 123a, ¶ 27.)

New Jersey's SVRS specifically protects against ineligible ballots being cast in the following ways: The SVRS (1) automatically detects and corrects user identification information that cannot be verified for accuracy (T12:22-25; 102a, ¶ 34; 124a, ¶ 34); (2) detects registration applications by persons registered elsewhere in the State thus enabling officials to delete the prior registration to avoid duplication (T13:1-4; 102a-103a, ¶35; 124a, ¶35); (3) provides for the means of sorting the eligible from ineligible ballots, and for detecting whether a person voted elsewhere (102a, ¶¶ 33-34;

124a, ¶¶ 33-34) and, (4) provides probative evidence for criminal prosecution of ineligible voters who cast ballots (T12:7-11; 97a ¶ 10; 122a ¶ 10).

As noted above, the SVRS is linked to federal and state Database Interface Agencies ("DIA") to facilitate voter verification. (T9:21-25, T10:1-2; 98a; 100a-101a ¶¶ 27-29; 124a, ¶¶ 27-29.) There is an "overnight duplication check" with the Department of Corrections criminal history database and the Department of Health and Human Services' vital statistics file. See generally N.J.S.A. § 19:31-32(e)(2)-(5). If a potential match appears in the overnight check, the voter registration is flagged for further study, and can be rejected. (98a-99a, ¶ 17; 102a, ¶ 32, ¶ 4.) Moreover, the Social Security Administration check includes the federal Death Master File, which flags individuals who have died in other states or abroad who are not otherwise in the statewide health vital statistics file. Finally, an acknowledgment card is sent to the new voter. (99a, ¶ 22; 123a, ¶ 22.) If the card is returned undeliverable, a new notice is sent to the person at the same address. If it is again undeliverable, then the person is recorded as "inactive" in the SVRS. (99a, ¶ 22; 123a, ¶ 22.) That, in turn, triggers a requirement for the voter to show identification when he or she next appears at the polls to

vote or submits a mail-in ballot. (99a-100a, ¶ 23; 123a, ¶ 23.) In some cases, it can trigger a criminal investigation. (232a, ¶ 16.) The SVRS provides New Jersey with an effective, efficient and almost instantaneous method to verify a voter's identity and eligibility.

THE SUBSTANTIAL BURDEN ON THE RIGHT TO VOTE

The twenty-one-day advance voter registration deadline burdens not just a small subset of the eligible voting population, but a panoply of otherwise eligible New Jersey voters. The individual Plaintiffs in this case reflect the thousands of eligible voters who are disenfranchised because they are mobile and/or youth voters. As detailed below, residential mobility increases the likelihood that eligible voters will miss the current registration deadline or be unable to travel to the county of former residence where their registration is still valid. (37a, ¶ 3.)

Two other categories of voters are disenfranchised for purely temporal reasons: citizens who are newly naturalized and citizens who are released from parole after the twenty-one-day deadline. (T13:13-18; 107a-108a, ¶¶ 54, 56; 126a, ¶¶ 54, 56.) If, within the twenty-one-day advance registration period, an individual in either category becomes legally eligible to vote, he or she will miss the registration deadline and not be

able to vote. (T13:13-18; 107a-108a, ¶¶ 54, 56; 126a, ¶¶ 54, 56.) There are also eligible New Jersey voters whose interest peaks too late for them to meet the advance registration deadline. (108a, ¶ 58.) And the final group, individuals who believe that they are properly registered, suffer the indignity of going to vote only to find that their names are not on the rolls. (109a, ¶ 63; 127a, ¶ 63.) Several of the individual plaintiffs herein fall into this category.

Of course, under New Jersey (and HAVA), individuals in each of these groups of otherwise eligible voters are permitted to fill out a provisional ballot; but as detailed below, those provisional ballots are often not counted and, under New Jersey law, may only serve as a voter registration form for future elections. (T13:19-25, T14:1-4; 37a, ¶ 4.) Despite a voter's desire to exercise his or her fundamental right to vote, each is potentially disenfranchised by nothing more than the 21-day advance deadline. For example, in 2008, 16,308 provisional ballots cast by eligible voters were discarded. (110a, ¶ 67; 128a, ¶ 67.) When such ballots are not counted, it effects outcomes and undermines not only the New Jersey Constitution's guarantee of voting rights, but the integrity of each election in the state.

MOBILE VOTERS

Requiring people to register to vote prior to an election creates a substantial burden on people who are highly mobile. A person moving into a new county must re-register at his or her new home address in order to be included on the rolls.² (105a, ¶ 57; 126a, ¶ 57.) The numbers of mobile potential voters in New Jersey is significant. Each mobile voter is potentially disenfranchised if he or she fails to re-register at his or her new residence twenty-one days before an election. (105a, ¶ 45; 125a, ¶ 45; 142a, ¶ 45.) State-wide, in 2009, it is estimated that 159,875 voting age people moved from one county to another within the State and 37,031 of them were between the ages of eighteen and twenty-four years old.³ (104a-105a, ¶ 43; 125a, ¶ 43.) And, 108,077 voting age people moved into New Jersey from a different state.⁴ In short, nearly a quarter of a million people in New Jersey could have been disenfranchised in 2009 if

² A registered voter who moves within a county may vote by provisional ballot at his or her new address. N.J.S.A. 19:31-11(c). When a voter moves to a new county, or moves from out of state, he or she must re-register within twenty-one days of the election. N.J.S.A. 19:31-6.

³ 515a. Geographical Mobility in the Past Year By Age for Current Residence in the United States: 2009 American Community Survey 1-Year Estimates - New Jersey.

⁴ Ibid.

they failed to register twenty-one days before the next election.

Re-registering to vote is the "primary barrier" that deters mobile people from voting.⁵ (105a, ¶ 46.) Not meeting registration requirements ranked as the second reason that eligible people did not vote in 2006, behind a lack of interest in politics as the primary reason.⁶ The more frequently a person moves, the greater the likelihood he or she will have registration problems.⁷ (105a, ¶ 47.)

YOUTH VOTERS

Advance registration also disproportionately impacts youth voting because, as a whole, youth are a very mobile group.⁸ In 2009, 134,027 New Jerseyans between the ages of eighteen and twenty-four years old (5.65 of the population of

⁵ Michael P. McDonald, *Portable Voter Registration*, 30 *Pol. Behav.* 491, 492 (2008); Peverill Squire, et al., *supra*, at 45.

⁶ U.S. Census Bureau, *Voting and Registration' in the Election of November 2006*, 14 (2008) available at <http://www.census.gov/prod/2008pubs/p20-557.pdf> (last visited March 4, 2013).

⁷ *Id.* at 15.

⁸ Peverill Squire, et al., "Residential Mobility and Voter Turnout," 81 *Am. Pol. Sci. R.* 45, 48 (1987). In addition to housing tenure, age is one of the strongest factors that determine mobility; Jason P. Schachter, *Geographical Mobility: 2002 to 2003*, U.S. Census 1, 9 (2004).

the age group) moved either from one residence to another within the state or into the state from another.⁹ (106a, ¶ 48; 126a, ¶ 48.)

Generally, older Americans are less likely to move because they are more likely to be married, have a family, and own a home. These variables provide them with more stability in the place they reside and give them less incentive to want to leave. Data shows that the shorter a person's duration of residence, the less likely he or she will be to vote.¹⁰

Although voter turnout among young Americans has been steadily increasing,¹¹ those numbers are still lagging behind

⁹ (514a-515a.) The numbers were derived by subtracting the total population of New Jersey residents aged 18 to 24 years old from the total population who lived in the same home after one year in the same age range.

¹⁰ U.S. Census Bureau. Voting and Registration in the Election of November 2006, Census Bureau 1, 5 (2008) available at <http://www.census.gov/prod/2008pubs/p20-557.pdf> (last visited March 4, 2013).

¹¹ Census statistics indicate that in the 2008 presidential election, turnout among 18 to 29 year olds reached 51.1% (the third highest turnout rate since voting was extended to those over 18 in 1972). Kei Kawashima-Ginsberg, et al., *State Election Law Reform and Youth Voter Turnout*. Similar to the national trend, the percentage of 18 to 29-year-olds voting in New Jersey has risen: 41.4% voted in 2000, 51.2% voted in 2004, and 53% voted in 2008. Center for Information & Research on Civic Learning & Engagement, Youth Turnout in New Jersey, About the Same in Virginia, Compared to Past Gubernatorial Elections, available at <http://www.civicyouth.org/youth-turnout-down-in-new-jersey-about-the-same-in-virginia-compared-to-past->

those of other age groups.¹² Advocates of state election law reforms argue that easing the burdens of accessing the right to vote will lead to the biggest increase in youth voter turnout.¹³

EDR advocates are right. After EDR reform took place in Idaho, New Hampshire and Wyoming, the turnout gap decreased dramatically. In 1990, young voter turnout in Idaho was ranked 41st, New Hampshire 43rd, and Wyoming 39th.¹⁴ In 1994, turnout rates improved to 14th, 24th and 7th, respectively.¹⁵ Also, after adopting EDR in 2005, Montana saw an increase in youth voter participation in counties with large numbers of college students.¹⁶

gubernatorial-elections/ (Nov. 4, 2009). For off-year elections, voter turnout has decreased by 7% from 1997 to 2009. Off years are notorious for lower voter turnouts than presidential elections. Ibid.

¹² U.S. Census Bureau. Voting and Registration in the Election of November 2008, 4 (July 2012), <http://www.census.gov/prod/2010pubs/p20-562.pdf> (last visited March 4, 2013).

¹³ Kei Kawashima-Ginsberg, et al., supra, "State Election Law Reform and Youth Voter Turnout," (July 2009) at 1.

¹⁴ Stephen Knack & James White, Election Day Registration and Turnout Inequality, 22 Political Behavior 29, 34 (2000).

¹⁵ Ibid.

¹⁶ Steven Carbo & Brenda Wright, Chapter 5: The Promise and Practice of Election Day Registration in Voting Rights 66, 70

Youth voter turnout for the 2008 election in EDR states supports the proposition that EDR improves youth voting in particular. Youths who resided in states that offered EDR "were 41% more likely to vote in the November 2008 elections than those who did not have a residence in EDR states."¹⁷ In EDR states, the voter turnout among eighteen to twenty-four year olds was higher than the national and New Jersey percentages: 54.7% in Maine, 62.9% in Minnesota, 57.7% in New Hampshire, and 57.5% in Wisconsin.¹⁸ (106a, ¶ 51.)

In New Jersey, only 52.5% of voters aged 18-24 voted in the same election.¹⁹ (107a, ¶ 52.) On average, 59% of eligible

(Benjamin E. Griffith ed. 2008). Available at <http://www.demos.org/sites/default/files/publications/The-Promise-and%20Practice-of-Election-Day-Registration-copy.pdf> (last visited March 4, 2013) ("The three counties where registrations spiked most - Missoula, Gallatin, and Yellowstone counties - are home to the University of Montana or Montana State University campuses. Montanans between the ages of 18 and 25 comprised more than a third of the approximately 9,200 individuals who registered to vote under Montana's new statute between October 7, 2006 and November 7, 2006.")

¹⁷ Ibid. ("This is based on the odds ratio of 1.41 associated with EDR in logistic regression analysis controlling for demographics.")

¹⁸ See U.S. Census Bureau, "Reported Voting and Registration of the Citizen Voting-Age Population, by Age, for States: November 2008" (2009) available at <http://www.census.gov/hhes/www/socdem/voting/publications/p20/2008/tables.html>.

¹⁹ Ibid.

young Americans living in EDR states voted in 2008, nine percentage points higher than in non-EDR states.²⁰ (107a, ¶ 53.) Clearly, EDR lessens the burden on youth voters and, not only encourages, but allows, their participation in states whose election regime does not include an advance registration requirement.

NEWLY NATURALIZED CITIZENS

The twenty-one-day advance registration requirement may also disenfranchise the most enthusiastic group of eligible voters: newly naturalized citizens who are sworn in between the registration cutoff and Election Day. (T13:13-18; 107a, ¶ 54; 126a, ¶ 54.) Unlike persons who will become eighteen years old between those two dates, new citizens are not allowed to register in time to vote.²¹ (107a, ¶ 54; 126a, ¶ 54.) According to the Department of Homeland Security's *Yearbook of Immigration Statistics* from 2010, the number of individuals naturalized in New Jersey in 2010 was 33,864.²² That number

²⁰ See Kawashima-Ginsberg, *supra*, note 13.

²¹ A person under the age of 18 may register to vote if he or she will be eighteen years old at the next ensuing election and meets, or will meet, the residency requirements at the time of the election. N.J.S.A. 19:31-5.

²² United States Dep't of Homeland Security. *Yearbook of Immigration Statistics: 2010*. Washington, D.C.: U.S.

averages to about 2,822 people naturalized per month in 2010. (107a, ¶ 55; 126a, ¶ 55.) It can be assumed that two-thirds of those new citizens are naturalized during the twenty-one days prior to Election Day.

CITIZENS WHO ARE RELEASED FROM PAROLE

Like newly naturalized citizens, citizens coming off of parole after the deadline are not allowed to register in time to vote. (108a, ¶ 56; 126a, ¶ 56.) In 2011, 372 persons were released from parole between October 15 and November 8, Election Day. (108a, ¶ 57.) That accounts for 372 eligible New Jersey voters who were denied the franchise due to nothing more than a calendar conflict.

INDIVIDUALS WHO BELIEVE THEY ARE PROPERLY REGISTERED

Unlike individuals in the groups above, who might move and not register in advance of an election, or who might miss the registration deadline, there are also thousands of eligible voters who *registered on time* but are disenfranchised at each election. Although a voter fills out a voter registration application before the twenty-one-day advance registration deadline, the application sometimes does not reach the proper

Department of Homeland Security, Office of Immigration Statistics (2011), 57. This number varies from year to year. In the past ten years, this number has varied from 22,968 to 59,950 individuals naturalized in New Jersey per year.

election officials in time for processing before Election Day due to human error - registration forms are sometimes lost or not properly processed. When these registrants show up at the polls, they are told that they must vote by provisional ballot. (T14:10-12; 109a, ¶ 60; 127a, ¶ 60.) If for some reason election officials do not later find the original voter registration form, the provisional ballots are discarded. (T13:22-24; 109a, ¶ 61.) The voter is, thus, disenfranchised despite two attempts to have his or her vote counted.

The vast discrepancy in the number of provisional ballots ultimately counted with the number cast highlights the haphazard operation of provisional ballots in New Jersey's twenty-one counties. In Hudson County, election officials counted 98.87 percent of cast provisional ballots, yet in Warren County for the same election, election officials counted 52.43 percent of cast provisional ballots.²³ All others were discarded. Overall, 25.3% of the 73,874 provisional ballots cast in New Jersey in the 2008 election were deemed invalid.²⁴ (T14:5-9; 109a, ¶ 62; 127a, ¶ 62.)

If a voter goes to the polls and finds their name missing despite having registered, they must take the time to

²³ Ibid.

²⁴ Ibid.

travel to the county courthouse on Election Day and go before a judge to get a court order to vote if they do not want to cast a provisional ballot. (T14:10-13; 109a, ¶ 63; 127a, ¶ 63.) In the 2008 election, the Department of the Public Advocate appeared on behalf of 497 prospective voters who believed that they had registered but whose registration had not been recorded. (T14:14-18; 109a-110a, ¶ 64.) Eighty-eight percent of the voters represented by the Public Advocate prevailed and were allowed to vote pursuant to court order. (T14:20-22; 110a, ¶ 65; 127a, ¶ 65.) The number of disenfranchised voters aided by the Public Advocate's attorneys was obviously just "the tip of the iceberg." (225a, ¶ 5.) Far more eligible voters choose not to take the time and trouble to go to the County Court House.

According to former New Jersey Public Advocate, Ronald K. Chen:

Prospective voters assisted that day fell into one of five categories: (1) Individuals who had registered to vote by the October 14 deadline, but whose names did not appear in the poll books at their precincts; (2) Individuals denied the mandatory registration opportunity at a motor vehicle agency; (3) Individuals whose voting address of record was not changed after a successful change of their motor vehicle address of record; (4) Inappropriate purges of voters; [and,] (5) Voters denied the right to vote due to perceived mental capacity.

[(110a, ¶ 66; 224a, ¶ 3.)]

**THE 21-DAY ADVANCE REGISTRATION REQUIREMENT
EFFECTS THE ENTIRE NEW JERSEY ELECTORATE**

Every eligible New Jersey voter detailed above who must cast a provisional ballot on Election Day because his or her name does not appear on the rolls bears the risk of casting an uncounted vote. Worse, fellow eligible voters bear the burden of what could very likely be an election outcome not based on New Jersey's constitutional requirement that every vote be counted. N.J. Const. art. II, § 1, ¶ 3. The accounting of provisional ballots submitted versus those actually counted provides a clear demonstration of the disenfranchisement. In 2008, there were 74,002 provisional ballots submitted statewide. Of those, 18,773 were rejected and *not counted* as votes. (T14:22-25, 15:1-3; 45a-46a, ¶ 18.) Pursuant to New Jersey law, however, 16,308 of those 18,773 ballots served as registration applications for future elections.²⁵ (T14:22-25, T15:1-3; 45a-46a, ¶ 18; 110a-111a, ¶ 67; 128a, ¶ 67.) This means 16,308 eligible voters showed up on Election Day to cast their ballots, but for some reason were not on the rolls. (45a-46a, ¶ 18;

²⁵ Since Plaintiffs submitted their Amended and Supplemental Complaint, they have filed several OPRA requests with the state to gather a more up-to-date set of numbers reflecting provisional ballot submission, rejection and subsequent registration numbers.

110a-111a, ¶ 67; 128a, ¶ 67.) 2,178 of those disenfranchised voters were residents of Middlesex County. (45a-46a, ¶ 18; 110a-111a, ¶ 67; 128a, ¶ 67.)

In 2009, a non-federal election year, 16,932 voters in New Jersey cast provisional ballots. Of those, 2,649 were not counted, even though 2,033 were submitted by eligible voters and 278 of those disenfranchised voters resided in Middlesex County. (T15:4-14; 53a, ¶ 34; 111a, ¶ 68; 128a, ¶ 68.) In this way, over 2,000 New Jersey voters were disenfranchised by advance voter registration in 2009.

In 2010, 2,725 provisional ballots were not counted statewide. (111a, ¶ 69; 128a, ¶ 69.) Election officials verified the eligibility of 1,819 of those voters, 249 of whom resided in Middlesex County. (T15:14-20; 46a, ¶ 20; 54a, ¶ 35; 111a, ¶ 69; 128a, ¶ 69.) Thus, despite the development and existence of voter registration-related technology that can effectively and efficiently verify the eligibility and identity of voters within twenty-four hours of input of such data, thousands of New Jersey voters are disenfranchised in each election. Election results, therefore, do not reflect the voice of New Jersey's eligible voters, who actually go to the polls intending to exercise their right to vote.

Local elections in New Jersey are frequently decided by

very small margins of victory. Two reports published by the former New Jersey Public Advocate found that from 2006 to 2009, the margin of victory in 117 New Jersey elections was less than one percent. (111a-112a, ¶ 70.) In twenty-three elections, the margin of victory was just a single vote. (112a, ¶ 71; 128a, ¶ 71.) There were twenty-nine elections in New Jersey where the vote margin between win and loss was less than 10 votes. (112a, ¶ 72; 128a, ¶ 72.) In fact, the November 2008 South Bound Brook Borough Council election resulted in a tie between three candidates. (200a-203a.) Not until litigation and a special election were held was the winner decided. (200a-209a.) It is clear that in such close elections, an increase in the number of provisional ballots counted rather than discarded could change the outcome.

The evidence demonstrates that there were elections in Middlesex County and elsewhere where the number of provisional ballots accepted as voter registrations under N.J.S.A. 19:31- 6(h), but rejected as valid ballots under N.J.S.A. 19:53C-13, in 2008 and 2010 equaled or exceeded the margin of victory for that election. There were at least five elections in New Jersey Counties where the margin of victory was surpassed by the number of provisional ballots cast that were later rejected. (112a ¶ 73; 128a ¶ 73.)

COUNTY	MUNICIPALITY/ OFFICE SOUGHT	ELECTION	MARGIN OF VICTORY	PROVISIONAL BALLOTS REJECTED AS BALLOTS BUT ACCEPTED AS REGISTRATION
Middlesex	So. Amboy Borough Council	November 2010	2	2 (113a, ¶ 78)
Middlesex	Metuchen Borough Council	November 2008	16	19 (112a, ¶ 74)
Camden	Merchantville Borough Council	November 2008	1	19 (113a, ¶ 75)
Salem	County Freeholder	November 2008	7	39 (113a, ¶ 76)
Sussex	Ogdensburg Borough Common Council	November 2008	3	3 (113a, ¶ 77)

In all the above ways, New Jersey's advance registration requirement substantially burdens New Jersey voters, and disenfranchises thousands of eligible voters.

EDR: THE LEAST RESTRICTIVE MEANS

Election Day registration (EDR) is steadily advancing across the nation's states. EDR allows an eligible voter to register and cast a ballot on the day of an election.²⁶ (T15:23-25; 113a, ¶ 79; 129a, ¶ 79.) At the time of Summary Judgment, eight states had some form of same day voter registration. That number has now nearly doubled to fourteen.²⁷ The states that have statutes that currently allow EDR are: Maine (Me. Rev. State. tit. 21-A. § 122(4) (2015)), Minnesota (Minn. Stat. § 201.06 (Subd. 3) (2015)), Wisconsin (Wis. Stat. § 6.55 (2014)), Idaho (Idaho Code Ann. § 34-408A (2015)), New Hampshire (N.H. Rev. Stat. Ann. 654:7-a (2014)), Wyoming (Wyo. Stat. Ann § 22-3-104 (2015)), Montana²⁸ (Mont. Code Ann. § 13-2-304 (1)(a) (2014)), Iowa (Iowa Code §48A.7A (2015)), Connecticut (Conn. Gen. Stat. § 9-19j (2015)), Colorado (Colo. Rev. Stat. § 1-2-217.7

²⁶ See Steven Carbo & Brenda Wright, supra at 65-6.

²⁷ On this appeal, plaintiffs have added data regarding the following states: Colorado, Vermont, California, Maryland, Illinois, Hawaii and Utah.

²⁸ In Montana registration on Election Day takes place at an elections office, not at the polling place.

(2015)), Vermont (Vt. Stat. Ann. tit. 17 § 2144 (2014), and the District of Columbia (D.C. Code § 1-1001.07(g)(1)(5) (2015)).²⁹ (T16:1-4; 114a, ¶80; 129a, ¶ 90.) California, in particular, has an EDR regime wherein eligible voters can submit a provisional ballot on election day if they are not already registered. The voter's eligibility is cross-referenced against the California SVRS and if the voter is eligible, the voter is counted. (Cal. Elec. Code § 2170(b), § 2170(c)(1), § 2170(d)(2) (2015)) (T16:4-8; 114a, ¶ 81; 129a, ¶ 81.)³⁰

On January 1, 2016, Maryland will allow for same day registration during an early voting period (Md. Code Ann. Elec. Law § 3-305 (2014)). Illinois allows for "grace period" voter registration between the close of registration period to the election where any qualified elector may register to vote (10 Ill. Comp. Stat. Ann. 5/4-50, 5/5-50, 5/6-50 (2014)). Hawaii will have Election Day registration in 2018 (H.B. 2590 (Hawaii 2014)). Recently, Utah conducted a pilot EDR program that allowed eligible voters in select counties to vote by provisional ballots on

²⁹ Connecticut enjoyed its first EDR election on November 5, 2013.

³⁰ Note at the time of submission of the Plaintiffs' first appellate brief, California's EDR law was conditioned on the functioning of the California's SVRS. EDR is now a reality in California.

election day. (Utah Code Ann. § 20A-4-108 (2014)). North Dakota is the only state that does not require voter registration.³¹

In most current EDR states, Election Day registration is implemented the same way. Any prospective voter who is eligible to vote may register in his or her precinct on Election Day if he or she completes a registration application, makes an oath and provides proof of residence.³² In EDR states, there is minimal, if any, in person voter fraud and voter turnout rates have been substantially higher than the national average.³³ (T16:9-25, T17:1-14; 114a-115a, ¶ 84; 117a, ¶ 93; 129a, ¶ 84; 131a, ¶ 93; 233a-234a, ¶¶20-21; 239a-240a, ¶ 10.) EDR states commonly report higher voter turnout rates than New Jersey.

³¹ "Same Day Voter Registration," National Conference of State Legislatures, <http://www.ncsl.org/legislatures-elections/elections/same-day-registration.aspx> (last visited September 20, 2015); N.D. Code § 16.1-01-04(1) (2014).

³² Idaho Code Ann. §34-408A (2015); ME Rev. State Ann. tit. 21A, § 121 (1-A) (2015); Minn. Stat. Ann. § 201.061(3)(a) (2015); Wyo. Stat. Ann. § 22-3-103 and 104 (g) (2015); Wis. State. § 6.55 (2014); N.H. Rev. Stat. Ann. § 654:7-a (2014); Conn. Gen Stat. §9-19j (2015); N.H. Rev. Stat. Ann. § 654:7-a (2014); D.C. Code § 1-1001.07(2015); Montana allows voters to register on Election day, but voters must do so in the County Election Administrator's office. Mont. Code Ann. § 13-2-304(a) (2014).

³³ Demos, Voters Win with Same Day Registration, 1 (2010) http://www.demos.org/sites/default/files/publications/Voter_sWinSDR_2010_Demos.pdf.

(38a, ¶ 4; 115a, ¶ 86.) As such, EDR imposes a less significant burden on citizens' right to vote than advance registration,³⁴ and is a less restrictive method than advance registration in achieving honest elections. (T15:23-25.)

EDR'S IMPACT ON VOTER TURNOUT

Requiring citizens to register in advance of Election Day clearly reduces voter turnout.³⁵ Election data overwhelmingly demonstrates that states allowing EDR consistently achieve higher voter participation.³⁶ Nowhere was this been more apparent than the 2008 General Elections, where the EDR average turnout of eligible voters was 69%; but in non-EDR states, the eligible voter turnout average

³⁴ See Stephen Knack & James White, *Election-Day Registration and Turnout Inequality*, 22 Pol. Behavior 29, 29 (2000).

³⁵ See Carbo & Wright, *supra* at 71, n.32 (citing to 1980 study by Rosenstone and Wolfinger, which used 1972 Current Population Survey's Voter Supplement to demonstrate how voter registration practices, like the length of pre-election closing period, effected voter turnout by making voter participation more difficult).

³⁶ Burden, Canon, Mayer and Moynihan, "The Effects and Costs of early Voting, Election Day Registration and Same Day Registration in the 2008 Elections," FN 19, at 3, 22, available at https://apw.polisci.wisc.edu/archives/Burden_et_al.pdf (noting that "[c]areful analyses of the causal effects of EDR produce estimates that range from three to seven percentage points.").

was only 62%.³⁷ To further exemplify the superiority of turnout in EDR states, the top four states with the highest voter turnout were all EDR states.³⁸

EDR played a substantial role in the success of these states; in the 2008 General Election, the percentage of votes cast through EDR made up between 10-18% of the total ballots cast in EDR states. (114a, ¶ 83; 129a, ¶ 83.) New Jersey is poised to reap similar rewards. With over 5.5 million eligible voters in New Jersey, even an increase as small as two percent would translate into an increase of over 110,000 additional votes.

The 2008 Election had an impressive voter turnout, but 2012 showed the same basic fact: EDR states experience higher voter turnout than non-EDR states. (129a, ¶ 84.) For the 2012 General Election an EDR state experienced an average voter turnout of 67 percent; New Jersey had a mere 61.8 percent. (114a-115a, ¶¶ 84-85; 129a, ¶ 8.) In fact, if you compare the two EDR states with urban populations similar to New Jersey, Wisconsin and Minnesota, the impact is obvious. For the 2012 general election, Wisconsin and

³⁷ Calculated from data in the United States Elections Projects, <http://www.electproject.org/2008g> (last updated Mar. 31, 2012).

³⁸ Ibid.

Minnesota had an eligible voter turnout rates of 70.5% and 71.9%, respectively. For the same election, New Jersey only enjoyed 54.5% eligible voter turn-out.³⁹ In 2012, five of six states with the highest voter turnouts were EDR states. (115a, ¶ 86.)

LEGAL ARGUMENT

SUMMARY OF ARGUMENT

Pursuant to the R. 4:46-2, summary judgment is appropriate, "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 529 (1995). After extensive discovery culminating in a robust showing of material facts not in dispute, Plaintiffs demonstrated that the State of New Jersey has no compelling or even legitimate state interest in maintaining advance voter registration. Indeed, during the summary judgment motion hearing, neither the Defendants nor the trial court voiced

³⁹ Table A-5a "Reporting Voting and Registration for Total and Citizen Voting-Age Population, by State for Presidential Elections: 1972-2012." <http://www.census.gov/hhes/www/socdemo/voting/publications/historical/index.html> (last seen September 28, 2015.)

any state interest that would necessitate the 21-day advance deadline. (See T42:24-T:43-4, T:47:20-22; T55:12-17; T56:1-2.)

It is Plaintiffs' position that advance registration has been rendered arbitrary given the implementation of the SVRS. With the SVRS, the state can verify the information provided by the voter on the provisional ballot affirmation statement within 24 hours of receipt. The record before the trial court established that there is no compelling state interest justifying advance registration. (T13:1-12; T16:11-13.) The only state interest proffered by Defendants and not dismissed by the trial court was "ensuring public confidence in the integrity of the election." (663a.) However, the record is devoid of any testimony or other evidence that advance registration promotes such an interest. In fact, Plaintiffs demonstrated with substantial evidence that a voter who registered on Election Day in New Jersey could be verified within 24 hours. (100a-102a, ¶¶ 27-31.) Defendants admitted to these facts. (123a-124a, ¶¶ 27-31.) The trial court, oddly, decided to deny these facts that were undisputed by the parties. (663a-664a.) Further, the trial court created facts about "time-consuming manual labor" that were never suggested by Defendants and, indeed, were preemptively

discredited by Plaintiffs. (664a-666a; 118a-119a, ¶¶ 100-105.) Plaintiffs emphasized Defendants' own admission to the trial court that any speculative administrative barriers would be met by the State. (118a, ¶ 101.) The trial court erroneously chose to ignore the facts in the record and craft its own unfounded state interest for advance registration based on its own speculations.

I. THE TRIAL COURT ERRED IN NOT APPLYING STRICT SCRUTINY AS THE LEGAL STANDARD OF REVIEW

As the trial court correctly observed, "[i]t is undisputed that New Jersey attaches paramount importance to an individual's right to vote." (659a.) Indeed, unlike the United States Constitution, the New Jersey Constitution affirmatively grants its citizens the rights and duties associated with voting and elections in a dedicated article entitled "Elections and Suffrage." It states:

Every citizen of the United States, of the age of 18 years, who shall have been a resident of this State and of the county in which he claims his vote 30 days, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people

[N.J. Const. art. II, § 1, ¶ 3(a); See In re Att'y Gen.'s Directive on Exit Polling: Media & Non-Partisan Pub.

Interest Grps.," 200 N.J. 283, 302 (2009) (observing that the New Jersey Constitution devotes an entire article to enumerating the rights and duties associated with voting and elections.)]

In fact, as recently as 2009, the New Jersey Supreme Court declared that "[t]he right to vote is among the most prized of all rights in a democracy." Ibid; See also, Worden v. Mercer Cnty. Bd. of Elections, supra, 61 N.J. at 334 ("[T]he right to vote is a very fundamental one."); Gangemi v. Rosengard, 44 N.J. 166, 170 (1965) ("The right to vote] is the citizen's sword and shield. . . [i]t is the keystone of a truly democratic society."); Asbury Park Press, Inc. v. Woodley, 33 N.J. 1, 11 (1960) ("No man can boast of a higher privilege than the right granted to citizens of our State and Nation of equal suffrage and thereby to equal representation in making of the laws of the land."); In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp., 331 N.J. Super. 31, 36 (App. Div. 2000) ("Voting is a fundamental right."). As the late presiding judge of the Appellate Division, Sylvia Pressler, wrote: "the right to vote is the bedrock upon which the entire structure of our system of government rests." Afran v. City of Somerset, 244 N.J. Super. 229, 232 (App. Div. 1990).

Despite this unassailable recognition of the "paramount importance" of the franchise in New Jersey, the trial court erroneously applied the balancing test from Burdick v. Takushi, 504 U.S. 428, 112 S. Ct. 2059, 119 L.Ed.2d 245 (1992), rather than the well-established precedent of Worden, supra, 61 N.J. at 334 to the challenged infringement on the fundamental right to vote. (660a.) Notably, the New Jersey Supreme Court has never cited the Burdick balancing test to assess infringements on the right to vote, nor has it relied on Burdick in any other context. Instead, it has consistently required a more stringent form of review.

Since it is so patently sound and so just in its consequences, we adopt the compelling state interest test in its broadest aspects, not only for compliance with the Federal Constitution but also for purposes of our own State Constitution and legislation; under the test a restriction against college students registering and voting in their college residence communities and not elsewhere during the extended time they actually reside there, must be stricken unless a compelling state interest to justify the restriction is shown."

[(Emphasis added) Worden, supra, 61 N.J. at 346. (citing Dunn v. Blumstein, 405 U.S. 330, 342, 92 S.Ct. 995, 1003, 31 L.Ed. 2d 274, 284 (1972)).]

In adopting the strict scrutiny standard articulated in Dunn v. Blumstein, the Worden Court acknowledged that infringements on the right to vote are unconstitutional unless the State can demonstrate that such laws are

"necessary to promote a 'compelling state interest.'" Worden, supra, 61 N.J. at 344 (citing, Dunn, supra, 405 U.S. at 342, 92 S. Ct. at 999, 31 L. Ed. 2d at 281). The Dunn Court further elucidated the strict scrutiny analysis as follows:

. . . [a] heavy burden of justification is on the State, and . . . the statute [infringing on voting rights] will be closely scrutinized in light of its asserted purposes.

It is not sufficient for the State to show that [the infringement] further[s] a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with "precision," and must be "tailored" to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose "less drastic means."

[Dunn, supra, 405 U.S. at 342-43, 92 S.Ct. at 1003, 31 L.Ed. 2d at 285 (internal citations omitted).]

Although Worden and Dunn both involved challenges to durational residency requirements and not challenges to an advance registration requirement, the strict scrutiny standard has been affirmed in other cases involving statutory infringements on personal voting rights. See, e.g. In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp., supra, 331 N.J. Super. at 34,

38-39 (finding that unilaterally denying individuals receiving treatment in psychiatric hospitals the right to vote "absent a particularized showing of incompetence" to be unconstitutional); Id. at 37-38 (quoting Worden, supra, 61 N.J. at 346) (internal citations omitted) (noting that "Voting is a fundamental right. As with all fundamental rights, there can be no interference with an individual's right to vote, 'unless a compelling state interest to justify the restriction is shown.'")

The trial court erroneously distinguished Worden from the instant matter. The trial court claimed that because the "registration requirement . . . does not treat similarly situated voters differently . . . therefore [it] is not subject to a strict scrutiny test." (661a.) Respectfully, that interpretation is incorrect. Worden clearly states "since the right to vote is a very fundamental one, restrictions thereon may be imposed only to the extent necessary to promote 'a compelling state interest.'" (Internal citations removed) Worden, supra, 61 N.J. at 334. The Worden court adopted strict scrutiny because the right to vote is fundamental, not because the class of voters was suspect or discriminated against under an equal protection analysis. In the instant matter, our plaintiffs are also *bona fide* residents and eligible voters

who want to exercise their fundamental right to vote. Worden demands a strict scrutiny standard of review when the fundamental right to vote is infringed under "our own State Constitution and legislation." Worden, supra, 61 N.J. at 336. Worden's strict scrutiny standard is the proper analysis for this case.

II. THE TRIAL COURT MISIDENTIFIED THE BURDEN
IMPOSED ON NEW JERSEY VOTERS BY ADVANCE
REGISTRATION

Regardless of whether the court adopts the Worden or Burdick standard, this entire case revolves around understanding the nature of the burden imposed by the twenty-one day advance registration requirement. The trial court failed to recognize the true burden imposed by N.J.S.A. 19:31-6 and, thus, failed to recognize the severity of that burden. The result was an improper application of case law, and ultimately, an unjust outcome.

In its opinion, the trial court states that: "Plaintiffs assert that they are being disenfranchised by having to comply with the twenty-one day registration requirement of the Statute and that the current registration requirement is excessively burdensome." (659a.) Throughout its opinion, the trial court suggests the burden Plaintiffs allege is the actual act of filling

out the registration form. This is clear error. All voters fill out a registration form - whether they do so on an affirmation statement attached to a provisional ballot or on a routine voter registration form. The effort and time expended by voters to fill out registration materials is the same whether performed twenty-one days in advance of the election or on Election Day. The trial court's definition of the burden is mistaken and ignores the record.

New Jersey's registration requirement, which prohibits registration less than twenty-one days before an election, directly interferes with the right to vote because it denies the franchise to numerous otherwise eligible citizens. This disenfranchisement occurs when (1) mobile voters miss the twenty-one day deadline because they relocate to a different county right before an election (105a, ¶¶ 45-47); (2) young voters move to another county for work or to attend school and fail to register before the deadline (206a, ¶ 50); (3) newly naturalized citizens miss the voter registration deadline because they are naturalized within 21 days of an election (107a, ¶ 54); (4) citizens are released from parole within the twenty-one days before an election (107a, ¶ 56); (5) eligible voters who are not registered do not get interested in the election until the registration deadline has passed (108a,

¶ 58); and, (6) many voters make a good faith effort to register and believe they are properly registered only to find they are not on the rolls when they go to the poll due to some form of clerical error (109a, ¶¶ 61-63). These otherwise eligible voters are then permitted to vote by provisional ballot, but their votes are not counted because there is no indication in the SVRS that they are registered in the county in which they cast their ballots. (109a-111a, ¶¶ 61-67.) The burden incurred is disenfranchisement.

The parties in this case agreed that provisional ballots of eligible voters may be discarded for reasons other than the voter missing the registration deadline. (127a-128a, ¶¶ 68-76.) The parties also agreed that a voter's eligibility to vote must be confirmed regardless of when the voter registers. (102a, ¶ 31; 124a, ¶ 31.) All eligible voters complete the voter registration form or the affirmation statement that is part of the provisional ballot (which collects all information requested on a registration form). In fact, several of the named Plaintiffs, including Beth Rose Breslaw, Edward James Vasconcellos, III, Bon Jin Ku and Annalee Switek fully complied with the registration requirement *per se*, but their votes were not counted because their registration applications were not considered timely. (92a-96a.)

Disenfranchisement occurs when the provisional ballots of these otherwise eligible voters are not counted (109a, ¶ 61.) In this way, the burden sustained by Plaintiffs is not limited to the time needed to fill out a registration form, as the trial court erroneously concluded.

III. THE TRIAL COURT FAILED TO RECOGNIZE THE SEVERITY OF THE BURDEN OF DISENFRANCHISEMENT CAUSED BY ADVANCE REGISTRATON

In misdiagnosing the burden, the trial court misidentified the severity of the burden. The trial court claimed, "[T]here is some inconsistency among plaintiffs' pleadings and brief as to whether they make their claims of disenfranchisement on behalf of college students or all people affected by the statute." (T6-9; 666a.) However, at the summary judgment hearing, the trial court fully detailed the effected voters: citizens recently paroled, mobile voters, youth voters, newly naturalized citizens, and individuals who believe they are properly registered but find their names left off the voting rolls.⁴⁰ (T6-9.) The above classes and their respective votes are not counted despite expending the effort to fill out a voter registration document. Indeed, all of these eligible voters

⁴⁰A person under the age of eighteen may register to vote if he or she will be eighteen years of age at the next ensuing election and meets, or will meet, the residency requirements at the time of the election. N.J.S.A. 19:31-5.

have absolutely no recourse to remedy their disenfranchisement.

The trial court continued to opine that people "move for college matriculation and employment opportunities. . . and have myriad other life occurrences which necessitate changing personal forms." (662a.) This assertion entirely misses the point. By way of example, the Department of Homeland Security's Office of Immigration Statistics reported that the number of naturalized citizens in New Jersey in 2012 was 42,622.⁴¹ That number averages to approximately 3,552 people naturalized per month in 2012. Thus, if two-thirds of that number were naturalized in the twenty-one days leading up to the election, roughly 2,400 of them would be prevented from casting a ballot on Election Day. The same is true for citizens who are recently released from parole. In 2011, 372 people were released from parole between October 15, and the November 8th Election Day. (171a, ¶ 33.)

In addressing the breadth of the burden, the trial court suggested, "recent election results do not demonstrate a widely-based problem." But, this perspective

⁴¹ U.S. Dep't of Homeland Security, Office of Immigration Statistics, U.S. Naturalizations: 2012 at 3, available at https://www.dhs.gov/sites/default/files/publications/ois_natiz_fr_2012.pdf.

completely ignores the 16,308 provisional ballot votes that would have been counted but for the advance registration deadline in the 2008 election, the 2,033 votes from 2009, and the 1,819 votes in 2010. (666a; 110a-111a, ¶¶ 67-69.)⁴² The trial court simply ignored the voters unconstitutionally disenfranchised by advance registration and, instead, focused on voter turn-out rates, which are irrelevant to measuring the actual burden.

Nonetheless, in support of its voter turnout argument, the trial court cited incorrect statistics to compare voter turnout rates. (666a.) Most sources use the voting eligible population to determine voter turnout numbers. The court's opinion cites New Jersey turn-out in the 2012 general election as 67% voter participation, in comparison to the national turnout of 52.5%, to allegedly show New Jersey's higher rates of participation than the country overall. (666a.) The statistics employed come from Robert Giles' certification dated August 14, 2013, which appears to use data from the New Jersey Division of Elections ("NJDOE") website for the New Jersey voter participation statistics and an unknown source for the national statistics, as the certification provides no citations. (563a.) The NJDOE website lists 67% as the percentage of registered voters

who participated in the election, not the turnout percentage of eligible voters. (565a.) Voter turnout in New Jersey in 2012 was actually 61.8%. (115a, ¶ 85.) Trying to determine eligible voter turnout by employing statistics reflecting registered voter turnout is just wrong, as the numbers represent two different groups of people. (145a, ¶¶ 85-86.) Accordingly, the judge's finding with respect to voter turnout percentage is not only irrelevant but erroneous.

Given the above, advance registration unquestionably imposes a severe burden on individual voters, by stripping them of their guaranteed right to vote, and it substantially burdens the entire democratic process. (103a-113, ¶¶ 38-78.) Plaintiffs demonstrated that even one or two votes can swing local elections in the state of New Jersey. (111a-113a, ¶¶ 70-78.) Such a burden is simply inexcusable when there is no longer a substantial or even legitimate state interest justifying an advance registration requirement.

IV. THE TRIAL COURT ERRED IN FINDING THAT ENSURING PUBLIC CONFIDENCE IN THE INTEGRITY OF THE ELECTORAL PROCESS WAS A STATE INTEREST JUSTIFYING ADVANCE REGISTRATION

The only state interest which emerged after the Appellate Court remanded this matter was the trial court's finding

that the "State does . . . raise its legitimate interest in ensuring public confidence in the integrity of the election." (663a.) Specifically, the Appellate Court remanded this case because "the judge [in her first opinion] made no findings as to whether this stated purpose was advanced by the twenty-one-day advance registration requirement." RUSA v. Middlesex Cnty Bd. of Elec., 438 N.J. Super. 93, 105 (App. Div. 2014). But in its second opinion, the trial court's analysis and factual findings from the record again failed to demonstrate that advance registration advances public confidence in the integrity of the election.

A state interest in preserving the integrity of the electoral process "has independent significance . . . because it encourages citizen participation in the democratic process." Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 197, 128 S.Ct. 1610, 1620, 170 L.Ed. 2d 574, 587 (2008). Some courts have found that voter identification laws further this state interest because "[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." Purcell v. Gonzalez, 549 U.S. 1, 4, 127 S.Ct. 5, 7, 166 L.Ed. 2d 1, 4 (2006). However, in the instant matter nothing in the record suggests that EDR will dissuade

voters from casting a ballot, nor did the state demonstrate how EDR discourages participation.

In re-addressing this asserted interest on remand the trial court relied on three specious findings: 1) that all voters cannot be verified within 24 hours of being put into the SVRS (663a-664a); 2) that the experience of the 2008 election in New Jersey demonstrates that EDR would be administratively and fiscally prohibitive (664a); and, 3) that long lines of people have turned out in states like Wisconsin to cast ballots under an EDR regime, thus increasing administrative burden (664a-665a). The trial court manipulated the record to come up with these supporting "facts." When the record is understood, no one can maintain a position that an advance registration deadline protects public confidence in the integrity of the electoral process.

A. Undisputed Facts Proved That Provisional Ballot
Voter Verification Can Be Conducted Within 24
Hours

To support the state interest of "preserving public confidence in the integrity of the election," the trial court wrote, "there is not a scintilla of evidence to support plaintiffs' statement" that "all legal voters [can] be verified within, at minimum, 24 hours of registration." (663a-664a.) This finding completely belies the substantial

record in this case and the undisputed material facts. The trial court ignored extensive testimony from State election officials about the capabilities of New Jersey's SVRS and the fact that there are no facts in dispute regarding the State's ability to process provisional ballots. (97a, ¶ 9.)

The parties are in agreement that New Jersey's current election system permits the verification of provisional ballots with the SVRS on or immediately following Election Day. (T11:3-6; 98a, ¶ 12; 122a, ¶ 12.) Linda Ann Pino, Chief Clerk of the Middlesex County Board of Elections, testified that the verification of a voter's identification against records with the Department of Human Services, the State Parole Board, the Administrative Office of the Courts, and the Motor Vehicle Commission is "instantaneous" (100a-101a, ¶ 27; 360a, 16:6-12.) The state admitted to this fact and testimony. (123a-124a, ¶ 27.) Defendants also admitted that through the link to Data Interface Agencies (DIA), the SVRS runs an overnight duplication check with the Department of Corrections criminal history database and the Department of Health and Human Services' vital statistics file. (See generally N.J.S.A. § 19:31-32(e)(2)-(5); see also 98a-99a, ¶ 17; 102a, ¶ 32, ¶ 34; 122a, ¶ 17; 124a, ¶ 32, ¶ 34). Further, the Social Security Administration check allows the SVRS to flag individuals

who have died in other states or abroad who are not otherwise in the statewide health vital statistics file. (101a, ¶¶ 28-29; 124a, ¶¶ 28-29.) The parties agree provisional ballot voters are verified in the same way new voter registrations are verified with the N.J. SVRS. (102a, ¶ 31; 124a, ¶ 31.) Thus, within twenty-four hours of a voter's data input - "instantaneous" for identity verification and an "overnight" check for eligibility verification - a provisional ballot may be verified.

Without advance registration, this verification process is the only barrier to counting these otherwise eligible votes. Twice in her deposition, Middlesex County Chief Clerk, Linda Ann Pino, agreed that once an election employee clears the provisional ballot search and verifies the voter, the provisional ballot is counted. She stated, "[A]s we're doing the research, we're looking them up and then recording that they voted a provisional, if it was accepted." (376a, 78:14-18; 383a, 108:6-8.) A rejected provisional ballot (including those of voters who did not meet the registration deadline) is set aside and not counted. (383a, 108:8-12.) Counting the provisional ballots cast by eligible New Jersey voters who missed the deadline would only require inputting the voter's information into the SVRS, letting the automatic

verifications run and counting the eligible ballots instead of setting them aside as rejected. The government Defendants agreed with the Plaintiffs that the verification capacity of the SVRS makes EDR feasible (376a, 78:14-18; 383a, 108:6-8), even though they disagreed with Plaintiffs' position that EDR is constitutionally required. The trial court seems to have overlooked this critical point of agreement between the parties.

B. The Trial Court's Speculative Dicta About
Administrative and Financial Burdens on the State Are
Contrafactual and Legally Indefensible

Despite the undisputed evidence that provisional ballots can be verified and counted without advance registration, the trial judge attempted to suggest that the sheer number of voters who may turn up on Election Day would be administratively and fiscally onerous. (664a.) This legal conclusion was not based on any evidence produced by the government Defendants and directly contradicted evidence produced by Plaintiffs to the contrary.

The trial court suggested that Plaintiffs have argued that 250,000 voters would show up on Election Day to vote under an EDR regime. That was not Plaintiffs' argument. Plaintiffs clearly stated that advance registration potentially disenfranchises 250,000 eligible New Jersey

voters at each election. While Plaintiffs certainly hope EDR increases voter turnout, the important numbers are the eligible New Jersey voters who did show up on Election Day to vote and whose provisional ballots were processed, verified and input by the State and, yet, not counted because of the advance registration requirement. Further, the trial court's analysis completely ignored the facts in the record that EDR does not necessarily increase administrative and financial costs.

The trial court's allusion to Wisconsin's "long lines" is a perfect example of the trial court fictionalizing facts. The trial court stated, "The certification from Wisconsin describes long lines of people at the unregistered voter table on election day." (665a.) The Declaration of Kevin J. Kennedy clearly reads:

34. Wisconsin has not experienced any significant administrative problems or difficulties as a result of EDR. The biggest challenge has been getting poll workers to ensure that forms are filled out correctly, which can be done with training. While some polling places have long lines, the lines are not nearly as bad as they were in Ohio in 2004 or in states that do signature matching, nor can they be attributable solely to EDR, which accounts for only 15% of voters. In any event, the lines can be addressed with proper planning and the assignment of additional poll workers.

[(274a-275a, ¶ 34.)]

The trial court decided to ignore not only the import of Mr.

Kennedy's statement, but also the fact that New Jersey currently conducts signature matching. N.J.S.A. § 19:31A-7.

The trial court also used testimony regarding the experience of the Middlesex Board of Elections during the 2008 elections to suggest EDR would be administratively and fiscally difficult. (664a.) Despite the fact that the trial court "scrutinized" Ms. Pino's deposition testimony, (Ibid.) it stated, "[t]he undisputed evidence from the 2008 election is that it took one county seven full days, paying employees overtime, before the county board of elections reviewed and verified 2,178 ballots and thus certified the election results." (665a.) That is just not true, and distorts all the different processes that must occur before an election is certified.

Ms. Pino testified that Middlesex County processed 5,617 provisional ballots for the 2008 election. (377a, 83:14-16.) Plaintiffs pointed out that 2,178 provisional ballots were rejected by Middlesex County and served as registrations for future elections. (110a-111a, ¶ 67.) This means that county election officials verified the identity and eligibility of 5,617 provisional voters, but determined that the 2,178 voters missed the advance registration deadline. If EDR was in place, those 2,178 ballots would have been counted. Advance registration

disenfranchised those voters. Advance registration does not save the state the time, expense and effort of processing provisional ballots. Certification of elections is governed by statute, and the record in this matter is empty of any evidence that an increase in provisional ballots voters on Election Day would pose an undue burden on Middlesex County or any other county that would prevent it from satisfying its obligations to certify the election by a given date.

The trial court also speculated that, "each county would incur attendant costs that were not calculated or even considered by plaintiffs." (664a.) This statement was not only baseless, as Defendants offered no evidence that EDR would increase costs, but it also disregarded assertions by three states with EDR that identified minimal or no attendant costs. (234a, ¶ 22; 241a, ¶ 14; 275a, ¶ 35.) Minnesota's Executive Director of the State Elections Board certified that "[t]here is little incidental expense to Election Day Registration. Increased expenses of additional election judges (also known as poll workers) to handle Election Day Registrants are primarily offset by the reduced costs of pre-deadline processing." (234a, ¶22.) The trial court also chose to ignore the certifications of Robert Giles, Director of the New Jersey Division of Elections, submitted in Grillo v. Christie, 214 N.J. 113

(2013), a case revolving around whether the state could manage to successfully hold back-to-back elections. On June 18, 2013, after this case was commenced, Mr. Giles certified: [T]he state will ensure that each County has sufficient resources These resources include additional trained staff as needed, so that all polling places will be prepared for the November 5 election." (533a, ¶ 28.) Though the concern in Grillo was getting the voting machines up and running, the dedication to supplying additional resources should be the same. If the state is willing to apply "[a]dditional transportation resources and staff" to a special senate election, surely resources can be found to ensure that every vote is constitutionally counted in a regular election. (534a, ¶ 33.)

Even if proofs of increased administrative costs were in the record, justifying advanced voter registration by claiming there may be attendant costs does not withstand constitutional muster. The New Jersey Supreme Court has ruled that cost is no justification for denying a fundamental constitutional right such as voting. Abbott v. Burke, 206 N.J. 332, 343 (2011). The court explicitly stated that there is "no bar to judicial enforcement when, as here, the shortfall in appropriations purports to operate to suspend not a statutory right but rather a

constitutional obligation." Abbott, supra, 206 N.J. at 363. As recently explicated by Justice Albin, "[t]he point made in Abbott XXI, and in other cases, is that the Appropriations Clause must bow to certain constitutional rights, and particularly to federal rights that have a privileged status under the Supremacy Clause." Burgos v. State, 22 N.J. 175, 236 (2015) (dissenting opinion). Therefore, the trial court's assertion that attendant costs to voter registration should be calculated and considered by the Plaintiffs is invalid. (664a.) New Jersey law does not countenance costs as a justifiable barrier to the enforcement of constitutional rights.

V. ALL OF THE ABOVE DEMONSTRATE THAT THE BURDICK BALANCING TEST FAILS BECAUSE THE RECORD DOES NOT CONTAIN FACTS WHICH SUPPORT A STATE INTEREST JUSTIFYING THE DISENFRANCHISEMENT OF ELIGIBLE NEW JERSEY VOTERS

Though the New Jersey Supreme Court has never referred to, or cited, Burdick v. Takushi, 504 U.S. 428, 112 S Ct. 2059, 119 L.Ed. 2d. 245 (1992) in any of its voting rights jurisprudence, the trial court once again erroneously chose to apply the Burdick balancing test. Plaintiffs argue that Worden provides the correct standard of scrutiny. However, assuming *arguendo* that the Burdick test applies, the Defendants' arguments fail and the trial court's ruling is erroneous.

In Burdick, the United States Supreme Court laid out a balancing test, indicating that courts "must weigh 'the character and magnitude of the asserted injury to the rights . . . 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, supra, 504 U.S. at 434, 112 S. Ct. at 2063, 119 L. Ed. 2d at 253 (quoting Anderson v. Celebrezze, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570, 75 L. Ed. 2d 547, 558 (1983)) (emphasis added). Courts must also evaluate "the extent to which those interests make it necessary to burden the plaintiff's rights." Anderson, supra, 460 U.S. at 789, 103 S. Ct. at 1570, 75 L. Ed. 2d at 558. The Burdick court found the regulation on write-in voting in Hawaii to be a reasonable infringement on the individual right to vote because it "channel[ed] expressive activity at the polls." Burdick, supra, 504 U.S. at 438, 112 S. Ct. at 2066, 119 L. Ed. 2d at 256 (citations omitted). However, the advance registration requirement in New Jersey does not channel any voting rights; rather, it hinders them.

Under Burdick, the State must articulate its interest and produce some evidence to provide a justification for imposing a burden. Burdick, supra, 504 U.S. at 434, 112 S. Ct. at 2064, 119 L. Ed. 2d at 253 (citing Tashjian v.

Republican Party, 479 U.S. 208, 214, 107 S.Ct. 544, 548, 93 L. Ed. 2d 514, 523 (1986) ("precise interest put forward by the State as justification"); Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 593 (6th Cir. 2006) (finding that relying on suppositions, speculation was not sufficient to justify severe burden on First Amendment rights). As the previous Appellate Division panel stated: "it is not clear what evidence, if any, defendants presented in support of their contention that advance registration is still necessary." RUSA, et al. v. Middlesex County Board of Elections, et al., 408 N.J. Super. 93, 106 (App. Div. 2014). Furthermore, the trial court's statement that "the state has not provided any evidence to support its assertion of the necessity of the advance registration requirement to counteract fraud" also applies to a state interest in preserving confidence in the integrity of the election. (663a.) DAG Cohen stated at the summary judgment hearing that to determine whether EDR would work [or not] administratively would require expert testimony. (T52:13-23.) However, he never produced it despite the fact that "[o]n remand the court offered the parties the opportunity for additional discovery, briefing and/or argument." (658a.) In contrast, in the first instance, Plaintiffs produced the testimony of election officials in other

states that have successfully administered EDR. Accordingly, there is no valid, proven State interest to balance against the severe burden of disenfranchisement for thousands of eligible New Jersey citizens.

The State has clearly failed to meet its burden of proof as demanded by Burdick. Burdick, supra, 504 U.S. at 434, 112 S. Ct. at 2063, 119 L. Ed. 2d at 253 (citing Anderson, supra, 460 U.S. at 789, 103 S. Ct. at 1570, 75 L. Ed. 2d at 558) (explaining that the State must provide "precise interests" that justify "the burden imposed by its rule.") (emphasis added). The State's interest in "electoral integrity" in the absence of fraud is vague and speculative at best, and the trial court's assertion of increased administrative costs is not supported by the record and is not constitutionally valid.

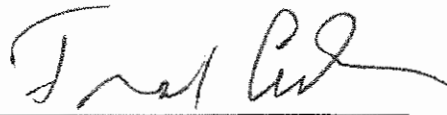
CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court set aside the opinion below and find New Jersey's advance registration requirement unconstitutional.

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Respectfully submitted,



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