

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ACORN, CONNECTICUT COMMON CAUSE,	:	CIVIL ACTION NO.
CONNECTICUT CITIZEN ACTION GROUP,	:	3:04-CV-1624 (MRK)
CONNECTICUT PUBLIC INTEREST	:	
RESEARCH GROUP, PEOPLE FOR THE	:	
AMERICAN WAY, CONNECTICUT	:	
WORKING FAMILIES PARTY,	:	
DEMOCRACYWORKS, SANDEEPAN	:	
MUKHERJEE, STEVEN CANADY, JOSE	:	
CAMPODONICO, GARVIN ROOS,	:	
CLEONICE RAMALH, JEZEL DUPIGNY,	:	
ROBIN GARRO, NAJLA SHAH, and SUSAN	:	
SORENSEN,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SUSAN BYSIEWICZ, in her official capacity as	:	
Secretary of State for the State of Connecticut,	:	
	:	
Defendant.	:	APRIL 15, 2005

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' REQUEST
FOR A DECLARATION OF UNCONSTITUTIONALITY**

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Plaintiffs submit this memorandum in support of their request for a declaration holding unconstitutional sections of Connecticut's elections law limiting the right to vote in a general election (except for President) to citizens who have registered more than 14 days before Election Day. This 14-day registration deadline for general elections violates the Equal Protection Clause, and is an unconstitutional restriction on the rights to vote and to free association under the First and the Fourteenth Amendments of the United States Constitution. This Court's declaration of unconstitutionality will give the State an opportunity to select among various less burdensome alternatives, including several endorsed by Defendant, that address fully the State's interest in orderly and fair elections.

PRELIMINARY STATEMENT

One provision of Connecticut law permits citizens to vote for President and Vice President without registering. But the provision that Plaintiffs challenge prohibits citizens from registering to vote after the 14th day before the general election. *Compare* Conn. Gen. Stat § 9-158c(a)(1), *with* § 9-17(a). The combination of the two provisions means that on Election Day unregistered voters can vote for President but are barred from voting for any other federal, state, or local office.

Standing alone, this stark irrationality is fatal to the constitutionality of Connecticut's 14-day registration deadline. The State cannot, consistent with the Equal Protection Clause, impose totally different rules for access to the franchise in elections that are not meaningfully different. *See Illinois State Bd. of Elections v. Socialist*

Workers Party, 440 U.S. 175 (1979). This Court thus should strike down the 14-day registration deadline as facially unconstitutional. *See infra*, at Law Sec. A.

The 14-day deadline also severely and unjustifiably burdens citizens' rights to vote and to free association, which are protected by the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Long-standing precedents from the Supreme Court, the Second Circuit, and this Court hold that a law placing a "severe" burden on the constitutionally protected rights to vote and to free association is unconstitutional unless the State¹ shows that the restriction is "necessary." *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983); *Lerman v. Bd. of Elections in the City of N.Y.*, 232 F.3d 135, 145 (2d Cir. 2000); *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164, 172 (D. Conn. 2003). This establishes, in effect, a strict scrutiny test that the State cannot pass. *See infra*, at Law Sec. B.

Unchallenged evidence demonstrates that the 14-day deadline causes massive disenfranchisement. In 2000 and 2004, more than 60,000 unregistered voters cast presidential ballots. All these voters would have been able to vote in every other race but for the 14-day registration deadline. Still more people, unable to register, simply stayed away on Election Day. Thus, 60,000 is only the minimum number of people barred from voting in most races in the last two general elections by the State's 14-day registration deadline. *See infra*, at Fact Sec. B & Law Sec. B.2.

The 14-day registration deadline, in effect, demands that citizens take the decision to participate in an election before they have the information or the incentive to do so. As

¹ The defendant in this action is Secretary of the State Susan Bysiewicz in her official capacity. *See Campbell v. Bysiewicz*, 242 F. Supp. 2d 164, 167 (D. Conn. 2003) (noting that the Secretary is "the administrator of the election process"). Plaintiffs will refer interchangeably to the "Secretary" and "the State" in recognition of that fact.

the Supreme Court has long recognized, and Plaintiffs' unchallenged expert and lay testimony confirms, it is in the last two weeks before the voting begins that campaigning and media attention to the election take off. This is true for all elections and exacerbated for local elections. And it is only then that many citizens' minds turn to the election, and many people make the decision whether or not to seek to participate. But at the very moment the election catches citizens' attention, the State blocks the path to the polls, except to vote for President. This especially burdens those who have not previously been active in the political process, like young voters, new citizens, and low-income populations. *See infra*, at Fact Sec. B.5 and Law Sec. B.2.

This Court must apply strict scrutiny to the 14-day registration deadline. In two 32-year-old challenges to registration deadlines, the Supreme Court examined closely the specific state interests said to justify registration bars. *See Burns v. Fortson*, 410 U.S. 686 (1973) (*per curiam*); *Marston v. Lewis*, 410 U.S. 679 (1973) (*per curiam*). In these cases, Arizona and Georgia identified specific components of their electoral machinery that made a registration deadline necessary. Not only does the State fail to make that showing here, but the Secretary of the State, the Attorney General, and other officials charged with enforcing the State's election laws have expressed support for eliminating the registration deadline. Although the State is not estopped from mounting a defense due to these repeated statements by appointed officials, these statements illustrate how far Connecticut falls short of meeting its substantial burden of justification. *See infra*, Law Sec. B.3.

In the three decades since *Burns* and *Marston*, six states adopted Election Day Registration ("EDR"): Wisconsin, Wyoming, Minnesota, Maine, New Hampshire, and

Iowa. These states have seen no evidence of increased potential for fraud or administrative difficulties. They did see surging voter turnouts, while turnouts elsewhere withered. *See infra*, at Fact Sec. D.2.

The State, moreover, has many ways of ensuring orderly and fair elections without a registration deadline. Several EDR bills proposed to Connecticut's legislature contain stringent identification requirements, affirmation rules, and fraud deterrence provisions. A different approach would be to hold the Election Day ballots uncounted until the State can verify them using the many means at its disposal. These EDR bills illustrate some of the many less burdensome means the State has to meet its interests. The State also has existing resources, such as a statewide registration database, to aid in detecting and deterring potential fraud. *See infra*, at Fact Secs. D & E, and Law Sec. B.4.

Registration deadlines are legacies of a bygone era, in which election officials were leery of enfranchising voters who were not sufficiently "informed" or were simply "undesirable." With adequate technology and electoral experience to hold orderly and fair elections without a registration deadline, Connecticut cannot justify its burdensome 14-day cut-off. *See infra*, at Fact Sec. B.7.

Hence, plaintiffs seek a declaration of unconstitutionality from this Court, finding the State's failure to permit EDR is unconstitutional; providing the legislature and governor with a window of opportunity to replace the registration deadline with an EDR system that is consistent with the Constitution and with this Court's findings; and, in the absence of such action by the legislature and governor, enjoining the State's use of a deadline for registration prior to Election Day unless it also provides for Election Day Registration.

STATEMENT OF FACTS

A. Connecticut's Voter Registration Deadlines

For general elections, Connecticut requires its citizens to register at least 14 days prior to the election. Plaintiffs' Proposed Findings of Fact ("PPF") ¶ 216 (Stipulated Facts ("Stip.") ¶ 1). Critically, however, Connecticut permits unregistered citizens to cast a ballot for President and Vice-President, only to bar them from voting in every other race. PPF ¶¶ 274-75 (Conn. Gen. Stat. § 9-158b). In addition, primary and general elections have a host of further exceptions to the 14-day deadline. *See infra* at 21-23.

B. Burdens Imposed By Connecticut's 14-Day Registration Deadline

1. Tens of Thousands of Connecticut Residents Are Disenfranchised by the 14-Day Registration Deadline

In 2000 and 2004, more than 30,000 unregistered Connecticut citizens voted for United States President and Vice-President by presidential ballot. PPF ¶¶ 9, 10 (Stip. ¶ 14; Ex.1, Bysiewicz Testimony ("Test.") at 4). Almost all of them applied to vote on Election Day. PPF ¶ 11 (Stip. ¶ 14). The November 2000 presidential election was the first election in which presidential ballots could be requested and submitted up until Election Day. PPF ¶ 12 (P.A. 97-154). In 1996, when a seven-day registration deadline applied to presidential ballots, only 1,000 citizens voted with such ballots. PPF ¶ 13 (Ex. 2, 11/20/00 OLR Rpt. at MNT 00002).

Tens of thousands of Connecticut residents wish to participate in elections, but are not registered in time to cast a full ballot. PPF ¶ 14 (Ex. 3, Bysiewicz Test. at 22-23).²

² Although the number of voters who cast presidential ballots shows the magnitude of the burden placed on Connecticut residents by the registration deadline, it vastly understates the number of citizens who are disenfranchised by the registration deadline because many citizens who miss the registration deadline, may not know about or understand the presidential ballot process, or may choose not to take advantage of it because they want to vote for a non-presidential candidate or in a referendum.

Many of the voters who cast presidential ballots in 2000 and 2004 took advantage of the opportunity offered by some towns to fill out a registration card on Election Day in order to prevent disenfranchisement in future elections. PPF ¶ 15 (Ex. 3, Beaudreau Test. at 59) (registrar of Vernon testifying that her staff registered 278 of the 289 voters who cast presidential ballots on Election Day in 2000).³

2. Testimonial Evidence of Disenfranchisement as a Result of Connecticut's Registration Deadline

Testimony from both Plaintiffs' and the State's witnesses reveals that many Connecticut residents attempt to register between the registration deadline and the election each year.⁴ Salvatore Bramante, the deputy registrar of Hartford, and Rae Tramontano, the registrar of New Haven, testified that their offices receive phone calls after the registration deadline from potential voters inquiring how to register for an upcoming election. PPF ¶¶ 17, 20 (Bramante Dep. at 214:10-25; Tramontano Dep. at 154:18-25). Richard Abbate, the President of the Registrar of Voters Association of Connecticut and Registrar of Cheshire ("ROVAC"), testified that registrars in large cities in Connecticut have informed him that there is a significant volume of people who contact their offices after the deadline because they would like to register to vote. PPF ¶ 19 (Abbate Dep. at 161:5-162:16). Politicians and organizers report the same experience.

³ The fact that some voters may have declined such an opportunity in no way indicates that they were not aggrieved by Connecticut's registration deadline or that they were not interested in registering to vote. They may have known, for example, that they were going to move before the next election, making it fruitless to register after the election in the place where they were currently residing. Abbate Dep. at 140:17-24.

⁴ Plaintiffs learned through discovery that their calculations in the Second Amended Complaint of the number of people who attempt to register during the 13 days before a general election are incorrect. *See* Second Amended Complaint ¶¶ 51-52. Plaintiffs mistakenly interpreted the "Date Accept" field in the State's voter registration database to mean the date on which a registration application was received by a registrar's office.

Americo Santiago, the Policy Director of Democracy Works, who has run for office in Connecticut nine times, testified that he frequently encounters people who want to register in the two-week period. Ex. 17, Santiago Decl. ¶ 10. David Lagstein, the head organizer for Connecticut ACORN, testified that four ACORN employees found through two hours of door-knocking in Hartford and Bridgeport approximately 15 people who were interested in voting on November 2, 2004, but had missed the registration deadline. PPF ¶ 21 (Lagstein Dep. at 93:3-11, 95:22-25, 96:16-19, 100:1-25); *see also* PPF ¶ 22 (Lagstein Dep. at 166:25-167:7).

3. Voter Participation In States Where EDR Has Been Adopted

Empirical studies show that, as a result of EDR, and controlling for other factors, voter participation increased by three to six percentage points in the six states in which it has been adopted. PPF ¶ 43 (Ex. 4, Nagler Rpt. at 3-4; Ex. 7, “Making Voting Easier” at 4). These studies identify two groups of voters likely to see an even greater increase in participation rates: young voters and those who have recently moved. PPF ¶ 58 (Ex. 4, Nagler Rpt. at 4; Ex. 7, “Making Voting Easier” at 1; Ex. 11, “Expanding the Vote” at 15-18). Young people have not yet learned how to register and are often extremely mobile. PPF ¶ 58 (Ex. 4, Nagler Rpt. at 4; *see also* Ex. 10, Bysiewicz Test. at 8) (testifying that Election Day Registration will “go a long way” toward encouraging young people, ages 18 to 24, to participate in the electoral process). People who have recently moved to a new town are often unaware that they must re-register or may not prioritize re-registering among the host of other relocation tasks. PPF ¶ 215 (Stip. ¶ 9).

On average, states with EDR also have voter participation rates over 13 percentage points higher than the national average. PPF ¶ 42 (Stip. ¶ 20). In 2000, for

example, EDR states had an average 65.4% voter turnout rate (as a percentage of Voting Age Population) compared to the national average of 53%.⁵ PPF ¶ 46 (Stip. ¶ 20; Ex. 4, Nagler Rpt. at 2). Minnesota's turnout rate in 2000 was as high as 68.8% of the voting age population. PPF ¶ 47 (Ex. 4, Nagler Rpt. at App. B1). In addition, the states with EDR show among the highest voter participation rates in the country. In 2000, for example, Maine, Wisconsin, and Minnesota were among the five states with the highest participation rates. Ex. 4, Nagler Rpt. at App. B1.

4. Projected Increase In Voter Participation if Connecticut Were to Adopt EDR

More than 25 years of empirical research consistently confirm that voter registration deadlines are a significant barrier to voting. Ex. 4, Nagler Rpt. at 3. Using differing methodologies, these studies all conclude that the length of a registration deadline influences voter turnout, with shorter deadlines producing increased voter participation. Ex. 4, Nagler Rpt. at 3.

According to Plaintiffs' expert Jonathan Nagler, a political science professor at New York University, who has published numerous studies on the impact of registration laws on voter participation, adopting EDR would increase voter turnout in Connecticut by 5.2% in years with a presidential election and 4% in years without a presidential election. PPF ¶ 55 (Ex. 4, Nagler Rpt. at 4-5). In 2000, a 5.2% increase in turnout would have meant an additional 130,000 voters in Connecticut. PPF ¶ 56 (Ex. 4, Nagler Rpt. at

⁵ Voting Age Population ("VAP") is considered by the Election Assistance Commission to be the most accurate base number for comparisons of participation in the political process and is therefore used in the Commission's reports to Congress on voter registration. See "A Few Words About Voting Age Population" at www.eac.gov/election_resources/vapwords.htm. It is also used by the Congressional Research Service of the Library of Congress and private publications, such as those from the Committee for the Study of the American Electorate and Congressional Quarterly. *Id.*

5). Consistent with earlier empirical studies, Professor Nagler's analysis found that allowing voter registration on Election Day would have an even greater impact on young voters and those who have recently moved. PPF ¶ 58 (Ex. 4, Nagler Rpt. at 4-5). Voter participation among 18-25 year olds in Connecticut would increase by 10.6% in presidential election years and 9% in off-year elections. PPF ¶ 59 (Ex. 4, Nagler Rpt. at 5). Turnout among people who had moved in the six months prior to an election would increase by 8.8% in years with presidential elections and 4.5% in off-year elections. PPF ¶ 61 (Ex. 4, Nagler Rpt. at 4-5).

5. Reasons Individuals Are Burdened by Registration Deadlines

a. The Crescendo of Voter Interest and Campaign and Media Activity During the Two Weeks Before Election Day

The 14-day deadline deprives citizens of the mobilizing effects of campaigns and media coverage, which intensify during the last two weeks before the election. The crescendo of campaign and media activity as an election nears, which is uncontested by the State, is clear from Plaintiffs' expert reports and lay practitioner testimony.

Analysis by Plaintiffs' expert Kenneth Goldstein, Professor of Political Science at University of Wisconsin-Madison, reveals that a disproportionate amount of television advertising and most local news coverage, which are the major information sources for the American electorate, air after Connecticut's registration deadline has expired. PPF ¶ 75 (Ex. 16, Goldstein Rpt. at 1).⁶ Professor Goldstein found the following in national and Connecticut races:

⁶ Before he was retained as an expert in this case, Professor Goldstein analyzed two unique data sets on the content, volume, targeting, and timing of election advertising and local news coverage of politics to determine precisely when that information is available to voters. Ex. 16, Goldstein Rpt. at 1. To determine the timing of election advertisements, Professor Goldstein used data provided by the Campaign Media Analysis Group, which uses a satellite tracking system. In 1998 and 2000, Professor Goldstein tracked

- In 1998, 35% of all ads aired in federal races since January 1 aired in the last two weeks of the election. PPF ¶ 77 (Ex. 16, Goldstein Rpt. at 2).
- In the last week alone, 19% of all the ads aired over the entire election cycle were aired. PPF ¶ 79 (Ex. 16, Goldstein Rpt. at 2).
- In Hartford, 81% of the ads aired in the race for the First Congressional District, 52% of the ads aired in the race for the Fifth Congressional District, and 43% of the ads in the Sixth Congressional District were aired in the last two weeks of the campaign. Ex. 16, Goldstein Rpt. at 3.
- Of the 969,138 election ads aired in the top 75 markets in 2000, 253,591 or 26% were aired in the last two weeks of the campaign. PPF ¶ 80 (Ex. 16, Goldstein Rpt. at 3).
- In Hartford, 3,236 or 41% of all ads aired in 2000 were aired in the last two weeks of the campaign. PPF ¶ 84 (Ex. 16, Goldstein Rpt. at 3).
- In individual Connecticut races, 53% of the ads aired in the race for the First Congressional District, 57% of the ads for the Second Congressional District, and 60% in the Sixth Congressional District were aired in the final two weeks of the campaign. Ex. 16, Goldstein Rpt. at 3.
- While few ads were run in the Presidential or Senate races in Connecticut in 2000, 66% of those run in the Presidential campaign and all of the Senate ads were aired in the last two weeks of the campaign. Ex. 16, Goldstein Rpt. at 3.
- Again, in 2002, the last two weeks of the campaign drew the heaviest advertising activity with 291,941 or 26% of all ads aired in federal races that year being aired in the last two weeks of the contest. PPF ¶ 89 (Ex. 16, Goldstein Rpt. at 4).
- In the Hartford media market, 3,418 or 28% of all ads aired over the course of the entire election year were aired in the last two weeks of the campaign. PPF ¶ 85 (Ex. 16, Goldstein Rpt. at 4).

Professor Goldstein found that the increased intensity of local *news* coverage of politics as Election Day approaches is even more pronounced than with advertising

television advertising in the 75 largest media markets in the United States (comprising 80% of the population), and in 2002, he increased data collection to the 100 largest media markets (comprising 86% of the population). *Id.* at 1. To determine the timing of local news coverage of politics and candidates, in 2002, Professor Goldstein's Wisconsin NewsLab project analyzed 10,066 news broadcasts, or 5,033 hours of local news programming, from a sample of 122 stations over a 48-day period. *Id.* at 4.

activity. PPF ¶ 86 (Ex. 16, Goldstein Rpt. at 5). Of the 10,066 news broadcasts that were analyzed from the 48 days leading up to the 2002 election, 4,462 broadcasts or 44% included at least one campaign story. That is a total of 7,460 stories. PPF ¶ 87 (Ex. 16, Goldstein Rpt. at 5). Over half of these political stories (54%) aired during the last two weeks of the campaign, with 36% aired in the last week alone. PPF ¶ 88 (Ex. 16, Goldstein Rpt. at 5). Similarly, as Jon Green, the Director of the Connecticut Working Families Party (“WFP”) explains, newspaper endorsements and feature stories tend to focus on candidates and election issues only during the last week or even weekend before the election. PPF ¶ 90 (Ex. 18, J. Green Decl. ¶ 11). During that time, statewide and local papers typically do one “profile of the election” story describing all of the candidates running for office. PPF ¶ 91 (Ex. 18, J. Green Decl. ¶ 11; Ex. 17, Santiago Decl. ¶ 9). Unless a race is highly competitive or there is a particularly interesting campaign event, this summary story may be the only newspaper coverage of state or a municipal race. Ex. 18, J. Green Decl. ¶ 11.

According to another of Plaintiffs’ experts, Donald Green, Professor of Political Science at Yale University, who has conducted numerous studies on campaigns and the impact of various voter mobilization techniques in Connecticut and elsewhere, state and local races are likely to engender voter interest very close to an election. PPF ¶ 70 (Ex. 14, D. Green Rpt. at 4). A pair of Quinnipiac University Polls in 2002 demonstrates this trend. On October 2nd, 51% of the public said that they did not have enough information to form an opinion about the Connecticut Democratic gubernatorial nominee Bill Curry. By October 29th, nine days before the election, this figure had dropped to only 16%. PPF ¶ 71 (Ex. 14, D. Green Rpt. at 4).

This is hardly surprising. Whereas high-profile races for President, Congress, and Governor involve significant funds, professional campaign staff, television advertising, and press attention, the typical state or local election is waged on a much smaller scale. Far fewer financial resources are deployed. PPF ¶ 92 (Ex. 14, D. Green Rpt. at 5). As typical mobilizing tactics, such campaigns use phone calls, door-to-door canvassing, direct mail and leafleting, all concentrated in the last two weeks before Election Day. Ex. 18, J. Green Decl. ¶¶ 9-10; Ex. 17, Santiago Decl. ¶¶ 5-9; Ex. 14, D. Green Rpt. at 5-6. Non-partisan organizations seeking to educate voters and improve civic participation use the same methods, also disproportionately focused in the last days before the election. PPF ¶ 100 (Ex. 14, D. Green Rpt. at 5; Ex. 18, J. Green Decl. ¶ 12; Lagstein Dep. at 13:23-15:7; 155:12-24). Indeed, generally accepted wisdom among campaign strategists posits that there is little return in allocating campaign resources earlier in the election cycle. PPF ¶ 93 (Ex. 18, J. Green Decl. ¶ 9; Ex. 17, Santiago Decl. ¶¶ 11-12; Ex. 14, D. Green Rpt. at 5-6). Studies confirm this belief, finding that phone calls are most effective during the last week before the campaign, and have no significant influence on voter turnout if made earlier in the election. PPF ¶ 95 (Ex. 14, D. Green Rpt. at 6). Door-to-door campaigning is also most effective in the last few weeks before the election because that is when people are curious and interested in the election. PPF ¶ 96 (Ex. 17, Santiago Decl. ¶ 10). Potential voters who did not register cannot take advantage of these contacts to become motivated to register or to vote. They thus become further marginalized from the political process. PPF ¶ 99 (Ex. 14, D. Green Rpt. at 10; Ex. 17, Santiago Decl. ¶ 9-10).

The campaign activity of the WFP is illustrative. PPF ¶ 97 (Ex. 18, J. Green Decl. ¶¶ 9-10). In the 2004 election campaign, all of WFP's phone bank and door-to-door campaigning took place within the two weeks before the election. PPF ¶ 98 (Ex. 18, J. Green Decl. ¶ 9). In any typical state campaign, WFP's candidates send one direct mailing to potential voters three to four weeks before the election, but may send three or four mailings the week before the election. *Id.*

National election polls confirm that voters become most interested in elections immediately before Election Day. A Gallup Poll tracking voter interest during the 2000 presidential election found that while 59% of registered voters were paying "quite a lot" of attention to the election during the first week of September, that figure steadily rose peaking at 77% on November 5-6, one to two days before the election. PPF ¶ 67 (Ex. 122, "Thought Given to Elections"). Another national poll of 41,838 individuals conducted by the National Annenberg Election Survey between April 4, 2000, and November 6, 2000, found that 37% of potential voters were "very much interested" in the election the day before Election Day, as compared to approximately 25% throughout September. PPF ¶ 68 (Ex. 15, "Interest and Attention to News" at 2).

b. Lack of Awareness of Registration Deadlines and Registration Procedures

Even individuals who intend for several weeks or months before an election to participate in the electoral process are often shut out of the political process by the registration deadline because they are unaware of the need to register or unfamiliar with the process for registering. Lagstein Dep. at 100:1-25 (testifying that most of the people ACORN registered in 2004 after the cutoff date said they were not informed of the registration deadline); Ex. 19, Beaudreau Test. at 106 (Vernon registrar testifying that, in

the 2003 municipal elections, she had to turn away 38 potential voters who came into the office to register after the deadline not knowing Connecticut had a 14-day cutoff); Ex. 19, Hotchkiss Test. at 179 (Wallingford registrar testifying that many people mistakenly think they are registered because they filled out a white card at the Department of Motor Vehicles (“DMV”) asking if their change of address form could be used for voting purposes, not realizing that the white card is not itself a voter registration form).

Unawareness of Connecticut’s registration deadline is particularly common among new citizens, who are not informed during the citizenship process about voter registration in this country, a process that is not only likely distinct from their native country’s, but one that varies tremendously from state to state.⁷ PPF ¶ 119 (Ex 1, George Test. at 90-91; Ex. 1, Burnett Test. at 83-84). Many do not learn that they need to register until it is too late and are consequently denied the opportunity to exercise the fundamental right they waited so long to attain. PPF ¶ 120 (Ex 1, George Test. at 90-91; Ex. 1, Burnett Test. at 83-84).

As acknowledged by Kyle Noonan, the Chair of the Student Board of ConnPIRG, another group of citizens who tend to be unfamiliar with the registration process are young voters, ages 18 to 25. PPF ¶ 110 (Ex. 20, Noonan Decl. ¶ 6). A 2004 study conducted by the Institute for the Advancement of Political Social Work Practice at the University of Connecticut School of Social Work found that the reason most students give for failing to register to vote is that they do not know how and where to register.

⁷ There is no statutory requirement in Connecticut that the office of the Secretary of the State conduct voter registration activities at naturalization ceremonies. Prior to 2003, the Secretary voluntarily sent a representative to naturalization ceremonies in order to register new citizens. In 2003, however, that program was terminated due to budget cuts. As a result, there is not always a representative from the Secretary’s office at the ceremonies to educate new citizens about the registration process. Bromley Dep. at 49:21-50:20.

PPF ¶ 111 (Ex. 21, Price Test.). Although registration applications are made available at most schools, students are not always given complete or accurate information about the process. PPF ¶ 112 (Ex. 20, Noonan Decl. ¶ 6). Confusion about the process is particularly acute among college students, who have the option to register in their parents' community or in their school community, depending upon which residence they consider to be primary. Plaintiff Garvin Roos, for example, was given conflicting information by his grandmother about where he should register and was hence unable to seek additional information, due to his demanding school and work schedule, before the registration deadline elapsed. PPF ¶ 114 (Ex. 22, Roos Decl. ¶¶ 11-15).

c. Personal Circumstances that Make Compliance with the Deadline Burdensome

In addition to young people, Connecticut's registration deadline also disproportionately affects low-income individuals who tend to move more often and are therefore more likely not to be registered in the town or city where they are currently residing. PPF ¶ 124 (Lagstein Dep. at 172:14-24; Ex. 17, Santiago Decl. ¶ 13; Ex. 18, J. Green Decl. ¶ 17). Although there are procedures in Connecticut law to enable citizens who move *within* a city or town to transfer their registration on Election Day, those procedures are not always followed in practice, resulting in many voters being sent away entirely or directed to multiple polling places on Election Day. PPF ¶ 125 (Lagstein Dep. at 173:7-174:22; Ex. 1, Bysiewicz Test. at 15).

The registration deadline also severely burdens people for whom personal circumstances, such as family or work commitments, prevent compliance. PPF ¶ 126 (Ex. 22, Roos Decl. ¶ 15); *see also* Lagstein Dep. at 170:8-10 (testifying that some unregistered citizens told ACORN workers that they did not have time to register because

of their work or family situations); Ex. 17, Santiago Decl. ¶ 13 (noting that low income people, many of whom work long hours and juggle child care arrangements, often do not have the time to pay attention to politics until it is too late to register).

d. Registration Problems at the Polls

A final category of citizens who are burdened by Connecticut's registration deadline are those who experience problems with their registrations. PPF ¶ 130 (Ex. 124, Sorensen Decl. ¶¶ 11-17). Plaintiff Susan Sorensen, for example, learned when she went to her polling place on Election Day that she was not on the registration list although she thought she had registered online. PPF ¶ 131 (Ex. 124, Sorensen Decl. ¶¶ 12-13).⁸ Rather than being offered a provisional ballot at her polling place, as required by the Help America Vote Act ("HAVA"), she was sent to a different location to vote by presidential ballot, which was limited to President and Vice-President. PPF ¶ 132 (Ex. 124, Sorensen Decl. ¶¶ 13-17); *see also* PPF ¶ 133 (Bromley Dep. at 207: 5-13).⁹ As Tramontano explained to the Government Administration & Election ("GAE") Committee:

"Unfortunately, the presidential ballot didn't always fill the[] needs" of the "many disappointed people in New Haven on Election Day who thought they were registered to vote" because "they wanted to vote for the State Reps and the under ticket." PPF ¶ 136 (Ex. 12, Tramontano Test. at 122). If Connecticut had Election Day Registration, by contrast, people with registration problems could re-register on Election Day and cast a

⁸ There is a history in Connecticut of problems with the Department of Motor Vehicles losing or not timely forwarding registration applications to registrars for processing, which results in voters thinking they are registered when they may not be. Ex. 12, Bysiewicz Test. at 7. Although the problem has improved, Bromley Dep. at 209: 21-22, there were still many voters in this predicament on November 2, 2004. Hutton Decl. ¶ 24.

⁹ A provisional ballot would have entitled her to vote for all federal races and to have her votes counted if it could be confirmed that she had indeed registered. Conn. Gen. Stat. § 9-232l(a) & (b); Public Act 03-6.

vote for all races that would definitely count. PPF ¶ 137 (Ex. 19, Bysiewicz Test. at 2, 12-13; Ex. 1, Bysiewicz Test. at 16-17).

6. Burdens Imposed on Organizational Plaintiffs

The 14-day deadline severely hinders organizations' ability to use that critical period to build support and spread their message. Voter registration is an integral part of the organizations' efforts to advance issues of concern to their members. Ex. 18, J. Green Decl. ¶¶ 4, 12; Lagstein Dep. at 9:24-10:6. Because the organizations seek to engage people not yet focused on electoral politics, who are therefore less likely to be frequent voters, the organizations could potentially energize and mobilize many more supporters if they could target registered *and* unregistered voters up until Election Day. Ex. 18, J. Green Decl. ¶¶ 12-13. Instead, because their unregistered supporters would be unable to show their support by voting, the organizations focus their resources on efforts to get-out-the-vote among registered voters during the critical last two weeks before the election. Ex. 18, J. Green Decl. ¶ 12; Ex. 20, Noonan Decl. ¶ 10; Lagstein Dep. at 162:22-163:5. WFP and ACORN are also injured because the deadline causes the candidates that the organizations' members support to lose actual votes, thereby weakening their electoral prospects and their voice for low-income families, minorities, and immigrants in the public debate. Lagstein Dep. at 171:13-23; Ex. 18, J. Green Decl. ¶ 15.

7. Historical Evidence Indicates that Registration Deadlines Were Designed in Part to Restrict the Electorate

Registration laws were originally developed and implemented to prevent “undesirable” voters (commonly poor members of non-dominant ethnic or racial groups) from casting ballots. PPF ¶ 139 (Ex. 13, Keyssar Rpt. at 3). Between the 1870s and World War I, however, a majority of states adopted formal registration procedures, particularly in larger cities. PPF ¶ 140 (Ex. 13, Keyssar Rpt. at 3). The stated rationale for registration rules was that certifying voters’ eligibility in advance of elections would help eliminate fraud and Election Day conflicts. But registration’s goal was at the same time to prevent targeted populations from being able to vote. PPF ¶ 141 (Ex. 13, Keyssar Rpt. at 3). Although it is impossible to quantify how much voter suppression was achieved through registration laws, Keyssar concludes that such laws likely barred millions of eligible voters from the polls. PPF ¶ 145 (Ex. 13, Keyssar Rpt. at 4).

C. The Registration Deadline in the Context of Connecticut’s Electoral Laws

Connecticut maintains a myriad of different registration rules. In addition to foregoing registration altogether for the nation’s highest office, the State also imposes less restrictive deadlines in primary elections, which are often the determinative election; for persons whose right to vote matures after the 14-day deadline; for members of the armed forces; and for persons whose registration applications are improperly processed. These exceptions to the registration deadline are detailed below.

1. Connecticut’s Presidential Ballot

Connecticut currently allows unregistered citizens to apply for and cast a presidential ballot on Election Day. An unregistered United States citizen who is: (1) at least 18 years old; (2) a resident or former resident of Connecticut; and (3) has not had

her electoral privileges forfeited because of a disenfranchising crime, may request and cast a presidential ballot on Election Day. PPF ¶ 274 (Conn. Gen. Stat. § 9-158b; Stip. ¶ 11).

To cast a presidential ballot, an applicant must prove her identity and residence in the town by showing: either a current and valid photo identification, or a copy of a current utility bill, bank statement, government check, paycheck, or government document. PPF ¶ 299 (Conn. Gen. Stat. § 9-158e(a)).¹⁰ The applicant then may vote for United States President and Vice President, but no other office. PPF ¶ 277 (Conn. Gen. Stat. § 9-158b). After the election, the town clerk – the local election official tasked with handling presidential ballots – must take measures to ensure no electoral fraud has occurred. First, the town clerk must mail a duplicate copy of the application to the appropriate election official of the town or state in which the person last lived, or (if the applicant is a former resident), to the state or town in which the voter currently lives. PPF ¶ 301 (Conn. Gen. Stat. § 9-158e(a)). The town clerk also forwards her town's registrar a copy of the names of those who applied for presidential ballots, so that the registrar can verify those persons have not voted otherwise. PPF ¶ 305 (Conn. Gen. Stat. § 9-158j).

While Connecticut has had presidential ballots since 1963, the State until 1997 imposed a 7-day registration deadline for presidential ballots. PPF ¶¶ 279, 283 (Stip. ¶¶ 12, 13). In 1997, Connecticut's legislature eliminated the 7-day deadline in response to concerns that people who wanted to vote had missed the deadline for registration, but nonetheless wanted to participate in the presidential election. PPF ¶ 283 (Stip. ¶ 13).

¹⁰ This identification requirement is less stringent than that proposed in the EDR legislation. *See infra*, at 23-25.

Testimony in uniform support of removing all registration requirements for presidential ballots came from then-Secretary of State Miles Rapoport, the Executive Director of the State Election Enforcement Commission (“SEEC”) Jeffrey Garfield, then-ROVAC President Judith Beaudreau, and town clerks. PPF ¶¶ 288-295 (Ex. 28, Rapoport Test. at 6; Ex. 28, Beaudreau Test. at 49-50; Ex. 29, Guinin Test. at 41; Ex. 29, Mein Test. at 45; Ex. 3, Beaudreau Test. at 58; Ex. 28, Garfield Test. at 13; Ex. 2, 11/20/00 OLR Rpt. at MNT 00005). Notably, no one testified that the elimination of the registration rule would lead to room for potential fraud. PPF ¶ 296 (Stip. ¶ 13).

In practice, the elimination of the registration rule has not led to an increase in voter fraud in Connecticut. Despite the absence of any identification requirement in 2000, as the Executive Director of the SEEC conceded, only one complaint of fraud was filed with the SEEC regarding the 30,000+ presidential ballots cast, and that complaint was not substantiated. PPF ¶ 664 (Garfield Dep. at 33:20-35:2, Bromley Dep. at 197: 15-17). In the 2004 election, in which an identification requirement applied, again only one case of election fraud was alleged, and never proven, among 30,000+ presidential ballots. PPF ¶ 665 (Garfield Dep. at 35:1-4).¹¹

According to Sandra Hutton, the President of the Connecticut Town Clerk’s Association and town clerk of Middletown, processing presidential ballots on Election Day is no more complicated than processing voter registration applications. PPF ¶ 336 (Ex. 123, Hutton Decl. ¶ 28). To be sure, in 2000, the unanticipated surge in numbers applying for presidential ballots led to long lines at town clerks’ offices and shortages of ballot papers, but, by 2004, town clerks had anticipated the volume of applicants and both

¹¹ Plaintiffs learned on April 12, 2005, that an additional complaint regarding the use of presidential ballots in the 2004 election was filed with the SEEC by the Secretary’s office in March 2004. Ex. 531, SEEC Complaint. The complaint is still pending.

hired extra personnel and set up separate balloting facilities. PPF ¶ 664 (Ex. 123, Hutton Decl. ¶ 25; Ex. 1, Bysiewicz Test. at 4). At present, presidential balloting leads to greater administrative burdens than ballots cast for a full slate in a general election. Presidential ballots, for example, must be hand counted, rather than machine-counted like other ballots. PPF ¶ 339 (Ex. 123, Hutton Decl. ¶ 29). EDR would eliminate most of the need for presidential ballots. PPF ¶¶ 340-42 (Ex. 68, Bysiewicz Test. at 00455).

2. Primary Elections and Other Exceptions to the Registration Deadline

In primary elections, Connecticut waives the generally applicable, and purportedly necessary, 14-day registration deadline. Although electors must be registered to vote in primary elections, the deadline is 13 days shorter than in general elections. A citizen may register in person at a registrar's office any time up to noon on the last business day before a primary election (or may send by mail a registration application that is postmarked by the fifth day prior to the primary election). PPF ¶¶ 344-45 (Conn. Gen. Stat. §§ 9-23a, 9-23g(c), 9-56, 9-57; Ex. 25, 2004 Election Calendar at 19). The deadlines are so short that Connecticut is practically doing Election Day Registration for primary elections. Yet the State's interest in ensuring fair elections is just as great in primary elections, which are often hotly contested and outcome determinative, particularly for municipal offices. Green Dep. at 44:18-19, 90:3-8.

Besides primaries, a host of elections are held without any strict 14-day deadline being imposed. First, persons who turn 18, become citizens, or move into a new Connecticut town after the registration cut-off nonetheless can register up to noon on the last business day before a general election. PPF ¶¶ 351-52 (Ex. 25, 2004 Election Calendar at 31; Conn. Gen. Stat. § 9-19b(d)). The State's witness Steven Mason ran a

report that showed that 787 people moved to another Connecticut town between the registration cutoff and Election Day in 2002. PPF ¶ 356 (Bromley Dep. at 105:4-17; Ex. 46, Report of Voters who Moved).¹²

Second, up until 5:00 p.m. on the day before a general election, mere hours before polling begins, Connecticut registrars admit as electors current, qualified members of the armed forces, as well as those who were discharged during the calendar year immediately preceding such a request. PPF ¶ 357 (Conn. Gen. Stat. § 9-25, Ex. 25, 2004 Election Calendar at 31). Members of the armed services, or their spouses, who are serving overseas, may “at *any time*” mail in a registration application, and be admitted as an elector. PPF ¶ 358 (Conn. Gen. Stat. § 9-26, Ex. 25, 2004 Election Calendar at 31).

On Election Day itself, registration continues. Persons who have “an application receipt” issued when they registered to vote at a state registration agency, like the DMV, but who have not been placed on the registration rolls due to administrative error, may re-register at the polls and cast ballots on Election Day. PPF ¶ 360 (Conn. Gen. Stat. § 9-23(d), Ex. 25, 2004 Election Calendar at 33; Bromley Dep. at 111:2-12). The State also operates an “inactive list,” comprised of persons who have failed to respond to the annual canvass of voters and others who may no longer live in the State; persons on the inactive list, nevertheless, can vote simply by turning up at the polls, and signing a statement under penalty of false statement, that they are bona fide residents of the town; their records are updated on the CVR database only after the election. PPF ¶ 366 (Conn. Gen. Stat. § 9-42b). In addition, voters may be transferred from one district to another within the same municipality, a change in their registration that permits them to vote in a new

¹² This statistic is understated because it is limited to the number of towns that were on the State’s Centralized Voter Registration System (“CVR database”) at the time, which was approximately 140 out of 169. PPF ¶ 356 (Ex. 92, 3/15/02 OLR Rpt. at 2, at MNT 04995).

location. PPF ¶ 362 (Conn. Gen. Stat. § 9-35(e); Ex. 47, Moderator's Handbook at 21-22). In contrast to all these varying procedures, EDR is simple: All voters not on the rolls on Election Day fill out the same registration form and follow the same procedures. *See, e.g.*, PPF ¶ 483 (Kennedy Decl. ¶ 25; Wis. Stat. § 6.55(a)).

D. Less Restrictive Alternatives to a 14-Day Registration Deadline

1. EDR Legislation In Connecticut

Legislation to implement a less restrictive alternative to Connecticut's 14-day registration deadline – namely, EDR – has been introduced in the Connecticut legislature every year since 2001.¹³ While the approach to EDR differs in some of the bills, each contains adequate mechanisms for deterring and preventing fraud, as evidenced by their support by Secretary Bysiewicz and other key elections and elections enforcement officials.¹⁴

In 2003, a bi-partisan coalition within the Connecticut legislature passed Public Act 03-204 (“the EDR Act”), formerly H.B. 6370. PPF ¶ 402 (Ex. 66, P.A. 03-204). The EDR Act would have allowed eligible residents to register to vote and cast a ballot on Election Day. *Id.*¹⁵ To protect against any potential threat of increased fraud, the EDR Act imposed stringent identification requirements on Election Day registrants – stricter than for presidential ballots. All Election Day applicants would need to show

¹³ *See* PPF ¶ 392 (Ex. 52, sH.B. 6823 (2001); Ex. 53, H.B. 5700 (2002); Ex. 54, H.B. 6370 (2003); Ex. 55, H.B. 6371 (2003); Ex. 56, H.B. 5819 (2003); Ex. 57, S.B. 20 (2004); Ex. 58, S.B. 59 (2005); Ex. 59, H.B. 6529 (2005); Ex. 60, H.B. 5663 (2005); Ex. 61, sH.B. 6669 (2005)).

¹⁴ Plaintiffs do not take a position on which approach is preferable, but rather note that there are several less restrictive options available.

¹⁵ The 2003 legislation would have closed registration for 14-days and then re-opened it on Election Day. Ex. 66, P.A. 03-204(1)(a). A competing bill sponsored by Connecticut's registrars would have closed registration for seven-days and then allowed registration on Election Day. Ex. 55, H.B. 6371. *See also* PPF ¶ 837 (Ex. 26, Abbate Test. at 64-65 (acknowledging registrars do not need 14 days). Plaintiffs would not object to an EDR procedure that closes registration for a limited time period if it would ease local election officials' preparation for the election.

identification with their name, address, and photograph. Registrars would photograph those without photo identification. PPF ¶ 404 (Ex. 66, P.A. 03-204(2)(1)). In addition, an applicant would sign, in front of the registrar, a statement swearing that she met the eligibility requirements to register and had not registered or voted elsewhere. PPF ¶ 405 (Ex. 66, P.A. 03-204(2)(2)(A)). This statement warns applicants of the penalties for false statement, which include five years' imprisonment and up to \$5,000 in fines. PPF ¶ 406 (Ex. 66, P.A. 03-204(2)(3)).

Among the many supporters of the legislation, both Secretary Bysiewicz and SEEC Director Jeffrey Garfield, testified in support of the EDR Act. PPF ¶¶ 416-18 (Ex. 68, Bysiewicz Test. at 000455-57; Ex. 68, Garfield Test. at 000463; Ex. 26, Garfield Test. at 24-25). Declaring herself “a long-time advocate of Election Day Registration,” Secretary Bysiewicz described the EDR Act as “well drafted because it balances voter rights with an improved identification process than we already have in Connecticut law.” PPF ¶¶ 416-17 (Ex. 68, Bysiewicz Test. at 000455-57). Garfield agreed that the EDR Act “strike[s] the appropriate balance” between increasing voter participation and protecting the integrity of the election process. PPF ¶ 418 (Ex. 68, Garfield Test. at 000463; Ex. 26, Garfield Test. at 24-25). According to Abbate, the current president of ROVAC, the EDR Act does all that is necessary to eliminate fraud. Abbate Dep. at 134:19-135:16. None of these election officials would have supported the legislation if they believed it would lead to opportunities for fraud. Despite their endorsements, however, former Governor John Rowland vetoed the EDR Act, citing the lack of an “accurate, complete, up-to-date and real-time centralized voter registration database.” PPF ¶ 421 (Ex. 69, Rowland Letter, at BCJ 00276).

A substantially similar EDR bill was introduced in 2004, again with endorsements from Secretary Bysiewicz and registrars, including the State's witness Abbate. PPF ¶¶ 422-23, 425-26 (Ex. 57, S.B. 20; Ex. 19, Bysiewicz Test. at 1-2; Ex. 71, Bysiewicz Test. at 000214; Ex. 19, Beaudreau Test. at 104-105; Ex. 43, Abbate Test. at 41). Significantly, in December 2004, after the filing of this litigation, Attorney General Richard Blumenthal testified in support of EDR legislation. *See* PPF ¶ 430 (Ex. 1, Blumenthal Test. at 48).

In 2005, further alternatives to the 14-day registration deadline were introduced in the legislature, many of which contain different – but equally, if not more stringent – protections against fraud. For example, Substitute Bill 6669, which passed the GAE Committee on March 13, 2005 by 18-to-2, with bi-partisan support, would permit citizens to register and cast a conditional ballot on the day of a primary or a general election. PPF ¶ 437 (Ex. 61, sH.B. 6669(29)(1)). In addition to checking identification, the registrar would verify the Election Day registrant's information after the election through the CVR database and the mailing of a non-forwardable notice of acceptance. PPF ¶¶ 441-43 (Ex. 61, sH.B. 6669(29)(4)(B) & (5)). Besides these precautions, which are identical to the protections against fraud that are currently in place in Connecticut law for regular registration, Substitute Bill 6669 forces a further step: If a registrar determines within seven days of an election or primary that a registration is invalid, or that a person voted in another municipality, the ballot is not counted, and the person's name is both placed on the inactive list and forwarded to the SEEC. PPF ¶¶ 444-45 (sH.B. 6669(29)(5)).

2. EDR in Other States

Six states have eliminated the burden imposed by registration deadlines by allowing residents to register and vote on Election Day. Maine, Minnesota and Wisconsin adopted EDR in the early 1970s as a natural extension of the movements in the 1960s to expand the franchise to new voters. PPF ¶¶ 454-55 (Ex. 73, Minnite Rpt. at 9). Idaho, New Hampshire and Wyoming adopted EDR in the early 1990s as a pragmatic move to take advantage of an exemption in the 1993 National Voter Registration Act (“NVRA”), which released states with same-day registration from some of the requirements of the Act. PPF ¶¶ 456-57 (Ex. 73, Minnite Rpt. 1 at 9).¹⁶ Another state, North Dakota, has no registration requirement at all. PPF ¶ 598 (N. D. Cent. Code § 16.1-01-04).

In return for significant increases in turnout, the states with EDR have not sacrificed the integrity and efficiency of their election systems. Election officials in the six states that allow people to register to vote on Election Day report no increased incidents of voter fraud in connection with EDR. Ex. 125, 4/11/02 OLR Rpt. at 1-2. Kevin Kennedy, the Executive Director of the Wisconsin State Elections Board, testified that in his 25 years with the Board, he has never had a sense that voter fraud is a problem in Wisconsin. PPF ¶¶ 618-19 (Ex. 74, Kennedy Decl. ¶¶ 36, 37). Likewise, the Secretary of State of Wyoming, Joseph Meyer, testified he has no reason to believe that EDR has led to an increase in voter fraud in Wyoming. PPF ¶ 634 (Meyer Dep. at 118:11-14). Secretary Bysiewicz herself acknowledged that in the six states with EDR,

¹⁶ Since 1952, Wyoming has allowed voters to register on the day of a primary election. PPF ¶ 457 (Meyer Dep. at 42:1-3).

fraud has not been an issue or problem even without a centralized voter registration system. PPF ¶ 616 (Ex. 19, Bysiewicz Test. at 9).

Plaintiffs' expert, Lorraine Minnite, a professor of political science at Barnard College and the only scholar who has attempted to assess in any systematic way the extent of voter fraud today, independently analyzed reported incidents of voter fraud in the six EDR states by using a mixed methods approach similar to that used by United States General Accounting Office in its massive study of the U.S. elections system. Ex. 73, Minnite Rpt. 1 at 1, 2, 4. Professor Minnite's research included a Lexis/Nexis review of over 3000 national, state and local newspaper accounts of voter and election fraud in each of the EDR states, dating back to 1990. PPF ¶ 613 (Ex. 73, Minnite Rpt. 1 at 6). Professor Minnite found through this research that voter fraud is extremely rare in the EDR states, especially if one takes into consideration the fact that over 20 million votes have been cast in these states in just the past three presidential elections alone. PPF ¶ 614 (Ex. 73, Minnite Rpt. 1 at 12). Moreover, most of the relatively few cases of fraud were cases in which there was no intent to commit fraud or where the intent was disputed; none of these cases was committed by violating the states' EDR procedures. PPF ¶ 614 (Ex. 73, Minnite Report 1 at 12).

Unlike Connecticut, none of the six EDR states had a statewide-computerized database when these states adopted Election Day Registration. Ex. 73, Minnite Rpt. 1 at 12. Today, only Minnesota has a functioning statewide database, while the remaining five states will implement one by January 2006, as required by HAVA. Ex. 73, Minnite Rpt. 1 at 12-13; PPF ¶¶ 460, 513 (Ex. 74, Kennedy Decl. ¶ 6; Meyer Dep. at 32:5-10, 18-22). While the EDR states recognize that the database will provide further protections

against fraud because it will enable users to search for duplicate registrations and will interface with other statewide databases to verify information provided, they do not expect to have the capacity by January 2006 to look up at the polling place each voter on the database on Election Day. PPF ¶¶ 499, 500-01, 514-17 (Meyer Dep. at 33:16-23, 34:15-35:9, 75:7-14, 92:23-93:10, 114:26-23, 115:4-116:16; Ex. 74, Kennedy Decl. ¶¶ 40-41).

Even without a statewide database, these states have several measures in place to deter and safeguard against fraudulent voting. Any combination of these measures could with ease be implemented in Connecticut. In all EDR states, voters who register on Election Day must take an oath affirming their eligibility to vote and/or submit some form of identification or proof of residency.¹⁷ In each state, the identification requirements for voters registering on Election Day are equal to or more stringent than they are for those walking into the polling place that are already registered.¹⁸ Ex. 73,

¹⁷ See PPF ¶¶ 485-86, 474 (Ex. 74, Kennedy Decl. ¶¶ 19, 26, 27; Wisc. Stat. §§ 6.29(2), 6.55(5-7) (certification and proof of residence or corroboration by someone who resides in district); PPF ¶¶ 509-10 (Meyer Dep. at 68:18-23, 69:3-6; Wyo. Stat. Ann. §§ 22-3-104, 22-1-102(xxxix)) (acceptable identification and oath in presence of registry agent); PPF ¶¶ 527-28 (Minn. Stat. §§ 201.054(1); 201.061(3)) (oath and proof of residence); PPF ¶ 550 (Me. Rev. Stat. Ann. 21-A § 112(1)(A)) (possible oath and proof of residence); PPF ¶¶ 576, 564-70 (N.H. Rev. Stat. Ann. § 654:12) (proof of citizenship, age and domicile)); PPF ¶¶ 586-88 (Idaho Code § 4-408A) (oath, proof of residence, and photo identification).

¹⁸ Before 2003, Connecticut did not require identification at the polls from any voter. Conn. Gen. Stat. § 9-261(a) (allowing electors to sign a statement in lieu of providing identification). Under new provisions that took effect January 1, 2003, first-time voters in the state who registered by mail are required to provide identification with their registration applications or when they vote, as mandated by the HAVA. PPF ¶ 223 (Stip. ¶ 6). Those who register by mail but are not first-time voters still do not have to show identification when they register or vote. PPF ¶ 225 (Bromley Dep. at 78:24-25). In contrast, all voters who submit an application on Election Day would likely be required to show identification in Connecticut, as in the other states with EDR. Ex. 66, P.A. 03-204 (requiring photo identification or that a picture be taken of the registrant on Election Day).

Minnite Rpt. 1 at 10. All EDR states also impose strict penalties for fraudulent registration and voting.¹⁹

Some EDR states also attempt to verify voters' addresses after the election in order to detect and deter fraud. In Wisconsin, for example, election officials send a non-forwardable postcard to all voters who register on Election Day. If the postcard is returned undeliverable, the clerk must remove the elector's name from the registration list and notify her of the removal. Additionally, the clerk must notify the district attorney for the county where the polling place is located. PPF ¶ 493 (Ex. 74, Kennedy Decl. ¶ 33; Wis. Stat. § 6.56(2) & (3)).²⁰

Election officials in states with EDR report that there are significant administrative benefits to EDR, such as increased participation, no agency registration, decreased registration through third-party registration drives, and fewer provisional ballots. PPF ¶¶ 601-12 (Ex. 74, Kennedy Decl. ¶¶ 12, 16, 30; Meyer Dep. at 15:4-7, 17:6-19, 41:4-22, 114:5-15, 116:24-117:1; Ex. 73, Minnite Rep. 1 at 10-11). Furthermore, these states have not experienced any significant administrative problems or difficulties as a result of EDR that cannot be addressed with careful planning. PPF ¶¶ 639-43 (Ex. 74, Kennedy Decl. ¶ 34; Meyer Dep. at 67:1-5, 12-16). In addition, by requiring voters to register *in person* with appropriate identification, EDR is more secure

¹⁹ PPF ¶¶ 497-98 (Wis. Stat. Ann. §§ 12.13(1), 12.13(3)(g), 12.6(6)); PPF ¶ 521 (Wyo. Stat. Ann. § 22-26-101); PPF ¶ 543 (Minn. Stat. § 609.03); PPF ¶ 558 (Me. Rev. Stat. Ann. 17-A § 1252, 21-A § 674,); PPF ¶ 575 (N.H. Rev. St. Ann. §§ 659:34); PPF ¶¶ 590-94 (Idaho Code §§ 4-411, 18-2302, 18-5409, 18-112, 18-2306, 18-2322).

²⁰ Minnesota also sends non-forwardable postcards to Election Day registrants in order to confirm their residence and assure there was no organized activity to violate the election laws. PPF ¶¶ 540-41 (Minn. Stat. §§ 201.121(2 & 3); 204C:12). Wyoming uses other methods to detect fraudulent voting. According to the Secretary of State, fraud can also be detected through complaints by challengers at polling places and complaints by voters or candidates filed with county clerks or the Secretary of State. Meyer Dep. at 77:19-21, 113:24-114:3.

than registration by mail. PPF ¶ 620 (Ex. 74, Kennedy Decl. ¶ 36; Ex. 73, Minnite Rpt. 1 at 3-4; 2/25/05 Minnite Dep. at 133:4-5).

E. The State's Attempted Justifications

The State vaguely states that its interest in the registration deadlines is “to insure [sic] orderly and fair elections and to avoid fraud and chaos.” Plaintiffs Proposed Conclusions of Law and Defendant's Responses (“DRCL”) ¶ 17.

1. Existing Protections Against Fraud

Although Connecticut has had no problem with voter fraud, as recognized by Secretary Bysiewicz, former-Secretary Miles Rapoport, and Jeffrey Garfield, it has an impressive arsenal of fraud deterrence, detection, and prevention tools. These are not currently being utilized as well as they could. These tools could easily be employed in connection with whatever new protections are written into the law to deter and prevent fraud in connection with Election Day Registration. PPF ¶¶ 659-71 (Ex. 73, Minnite Rpt. 1 at 24; Ex. 110, Email to SEEC; Garfield Dep. at 19:1-20, 25:13-26:4, 33:20-35:5; Bromley Dep. at 197:15-17; Ex. 28, Rapoport Test. at 13; Ex. 19, Bysiewicz Test. at 6).

a. Connecticut's Statewide Registration Database

Since the first day of her administration, Secretary Bysiewicz has made the completion of the State's CVR database, begun in 1994, a priority because she believes it “is a means to protect voter's rights, combat fraud, and improve voter participation.” PPF ¶ 693 (Ex. 91, Bysiewicz Test. at 000497; Ex. 94, Bysiewicz Test. at 000745; Ex. 37, Bysiewicz Test. at 01319-01320). *See also* PPF ¶ 726 (Ex. 101, Garfield Test. at 000150) (stating that the database is “an important deterrent and safeguard against

multiple registrations”). By January 2004, all 169 towns were connected to the CVR database. PPF ¶ 695 (Bromley Dep. at 185:15-22).

The CVR database stores the voter registration information of all registered voters in the State in a single statewide database, rather than the previous system where registrars maintained independent lists at the local level. PPF ¶ 706 (Ex. 96, Bromley Mem. at BCJ 00315). It is used to add and change voter registrations, compile statistics required by the NVRA, generate official voter lists and other reports, and conduct online inquiries of the entire statewide voter list. PPF ¶ 703 (Ex. 97, Help Screen at 000512).

The CVR database helps to deter and prevent fraud because it indicates whether a voter is registered in multiple towns. PPF ¶ 734 (Ex. 96, Bromley Mem. at BCJ 00316; Ex. 113, 11/12/04 OLR Rpt. at 00201; Bromley Dep. at 32: 5-10, 146: 9-17, 229: 9-12). As soon as a registrar enters a new voter’s name and date of birth off a registration card, the database does a real-time search to determine if that same individual is registered somewhere else in the state. PPF ¶ 735 (Ex. 96, Bromley Mem. at BCJ 00316; Bromley Dep. at 120:9-19). If there is an exact match on the last name and date of birth, the database will instantaneously display identifying information regarding any matching voters. PPF ¶ 736 (Ex. 33, User Manual at 001596; Ex. 97, Help Screen at 000513). Additionally, if the registrant provided a prior voting address on the registration card that matches the address in the record(s) that came up, the registrar may immediately change the voter’s address if it is within the town or send a cancellation to the former jurisdiction if the address is outside the registrar’s town. PPF ¶ 737 (Bromley Dep. at 120:15-121:2). If the registrant did not provide a prior voting address, although required on the registration card, the registrar must scan the list of potential matches to ascertain whether

any could be a true duplicate; this does not take long, even if the name is common.²¹ PPF ¶¶ 741-42 (Bromley Dep. at 121:3-13; Ex. 24, Registrars' Manual at BRM 485; Ex. 30, Voter DB). In the rare instances when a registrar is unable to determine whether a potential match is the same person, the registrar must enter the applicant as a new voter, thereby creating a temporary duplicate registration. PPF ¶ 745 (Bromley Dep. at 121:16-1).²²

The CVR database helps eliminate potential fraud by communicating in real time with the Department of Motor Vehicles ("DMV") to verify automatically any driver's license number or last four digits of a Social Security number that are provided with an application for voter registration. PPF ¶ 762 (Ex. 96, Bromley Mem. at BCJ 00317; Ex. 105, Womack Email at 002981; Bromley Dep. at 185:23-186:17). After a new voter is entered into the CVR database, a screen will appear indicating whether the voter's driver's license number or Social Security number has been verified. PPF ¶ 763 (Ex. 33, User Manual at 001598-99).

According to Secretary Bysiewicz and the State's witnesses, the CVR database has worked well apart from a handful of limited service interruptions. PPF ¶¶ 768-73 (Ex. 1, Bysiewicz Test. at 3-4,11; Ex. 96, Bromley Mem. at BCJ 00317; Bromley Dep. at 158:10-159:3; Abbate Dep. at 154:5-20, 185:2-4). On or around October 19, 2004, there

²¹ Some registrars make phone calls to applicants to inquire about their prior voting address. PPF ¶ 743 (Bromley Dep. at 123:11-16; Abbate Dep. at 209:13-15; Tramontano Dep. at 81:8 – 82:4). If the applicant were registering in person on Election Day, the registrar could simply ask the applicant about her prior voting address. PPF ¶ 744 (Tramontano Dep. at 84:5-19).

²² Connecticut could make the process of evaluating potential matches even more efficient and precise by broadening the search criteria to include more fields than merely last name and date of birth. Both Wyoming's and Wisconsin's statewide databases, for example, are being designed to enable the user to search by any combination of fields she wishes, including driver's license number. PPF ¶ 748 (Abbate Dep. at 27:13-19, 76:24-77:3; Ex. 74, Kennedy Decl. ¶ 40; Meyer Dep. at 111:3-11).

was a breakdown in the communication system between the servers housing the CVR application and the state mainframe.²³ The State's Department of Information Technology ("DOIT") was able to work on the problem and the CVR system was able to function, albeit at a slower rate, throughout the day.²⁴ PPF ¶ 779 (Ex. 1, Bysiewicz Test. at 3-4; Ex. 21, Bysiewicz Test.; Bromley Dep. at 46:25-7; 46:20-24; Mason Dep. at 168:2-3, 168:15-20, 169:19-25). According to Bromley, DOIT has taken steps to prevent the problem that occurred on October 19, 2004 from happening again. PPF ¶ 783 (Bromley Dep. at 48:8-21). Abbate testified twice that he was promised by the Secretary that the October 19th "glitch" was never going to happen again. PPF ¶¶ 784-85 (Ex. 23, Abbate Test. at 206; Abbate Dep. at 104:17, 105:1-3, 107:11-19, 108:9-10).

Mason testified that he is unaware of any changes that would need to be made to the CVR database in order for it to be used in conjunction with EDR. PPF ¶ 798 (Mason Dep. at 141:17-22). *See also* PPF ¶ 798 (Mason Dep. At 141:17-22) (stating he is unaware of any limitations on the number of concurrent users of the CVR database). In order to prevent multiple Election Day registrations, registrars only need to be able to search the CVR database, which has not been problematic even when all registrars are using the database at the same time. PPF ¶ 801 (Abbate Dep. at 90:6-24, 148:22-24).

Nor is it imperative that new registrations be inputted into the CVR database on Election

²³ According to Abbate, the problem was limited to cross-town registration (*i.e.*, taking a voter from one town and adding her to another), which requires three-way communication among the two towns and the mainframe in Hartford. Changes within a town did not seem to cause any problem. PPF ¶ 780 (Ex. 1, Abbate Test. at 61-62; Ex. 23, Abbate Test. at 224).

²⁴ Even though the CVR database was slower on October 19, 2004 than usual, registrars were still able to perform 32,167 transactions that day and add 18,184 new voters – significantly more than they added on any day in the two weeks before or following the registration deadline. The second highest number of new registrants entered during that period (8,570) was on October 20, 2004, a day in which the CVR database was also reportedly slow. PPF ¶ 782 (Ex. 115, Mason Email at 002801; Ex. 108, Chart re: New Registrants).

Day because, in Connecticut, voter registration is achieved by acceptance of the card, not entry into the system. PPF ¶ 802 (Bromley Dep. at 47:14-18, 74:15-22, 75:17-19). If necessary, voters can be handwritten on the official voter list on Election Day and entered into the database after the election. PPF ¶ 803 (Bromley Dep. at 85:11-18).

b. Notices of Acceptance

The State has an additional means of preventing fraud that is not currently serving as a deterrent, but easily could be used to deter and prevent any fraud in connection with EDR: the mailing of acceptance notices. After receiving and processing a registration card, registrars mail a notice of acceptance to the address on the card indicating that the person has been registered and notifying her of her polling place. PPF ¶ 226 (Conn. Gen. Stat. § 9-23g(c)). If this notice is returned as undeliverable, the registrar sends a second notice, called the confirmation of voting residence notice. Only if this second notice is returned as undeliverable is a person removed from the list of “active” registered voters and placed on a list of “inactive” voters. PPF ¶ 238 (Conn. Gen. Stat. § 9-35e; Ex. 25, 2004 Election Calendar at 002106).²⁵

In the period before a general election, however, not all notices are sent and received back as undeliverable in a timely fashion. Registrars put forward as the State’s witnesses explained that around the time of the registration cut-off, registrars typically do not send acceptance notices on the day that a registration card is received, as Connecticut law mandates. PPF ¶ 242 (Tramontano Dep. at 98:8-11, 138:5-12; Abbate Dep. at

²⁵ A few registrars place telephone calls to confirm voters’ addresses. PPF ¶ 813 (Tramontano Dep. at 81:8-82:4, 88:23-89:6; Abbate Dep. at 209:9-20). However, as the State’s registrar witnesses underscored, not all, or even most, of Connecticut’s 169 registrar offices make inquiries beyond the mailed notices. PPF ¶ 814 (Tramontano Dep. at 89:14-15, 93:23). In the narrow class of cases in which such inquiries are made, the New Haven registrar explained, the inquiry is limited to asking “the spelling of their name, their last addresses.” PPF ¶ 816 (Tramontano Dep. at 87:17-19). An affirmative response is accepted without further inquiry. PPF ¶ 815 (Tramontano Dep. at 82:16-18).

209:14-215:5; Bramante Dep. at 69:25-70:1, 83:14-84:9). Hence, not all acceptance notices – let alone the second confirmation of voter residence – can be sent and returned before the election. PPF ¶ 812 (Tramontano Dep. at 117:21-118:3). There are also several classes of registrants who are permitted to vote even though there is no time or effort made to confirm their addresses through the mailing of acceptance notices (i.e., in-person registrants, registrants for primaries, and registrants for general elections whose applications are postmarked by the cut-off date, but received by the registrar’s office on the day before the election). PPF ¶¶ 248-49, 255 (Bromley Dep. at 80:2-8, 84:23-85:3, 85:19-86:6, 86:7-97:4; Ex. 25, 2004 Election Calendar at 002107). As the State’s registrar witnesses explained, acceptance notices are not necessary for in-person registration—which is what EDR would be—because it is more secure than mail registration: “[S]omeone who is interested in perpetrating fraud is going to be less inclined to do so if they have to face an elections official and produce some form of identification under penalty of law than if they’re just going to do it by mail.” PPF ¶¶ 258-60 (Abbate Dep. at 128:2-8, 129:4-14, 130:7-18; Tramontano Dep. at 84:8-19, 136:5-17). *See also* PPF ¶ 245 (Ex. 29, Guinin Test. at 42-43).

While Connecticut’s notices of acceptance currently serve little, if any, protection against fraud, they could be used more effectively *after* an election to confirm the addresses of Election Day registrants, as contemplated by the EDR bills. Whereas the 2003 EDR Act sought to use acceptance notices only as a fraud deterrent, the pending 2005 bill proposes to use notices as a fraud detection device, making the counting of the ballot contingent upon verification of the registrant’s address. *Compare* Ex. 66, P.A. 03-204(2)(5) *with* Ex. 61, sH.B. 6669(29)(4)(B).

c. Challenges

Connecticut law allows both election officials and electors themselves to challenge other electors at the polls if they have a reasonable suspicion that a person is not qualified or entitled to vote on the basis of her identity; disenfranchisement for a conviction; or lack of a bona fide residence. PPF ¶ 678 (Conn. Gen. Stat. § 9-232). If the election moderator accepts a challenge, the challenged voter may vote using a challenge ballot, which allows balloting for state offices only. PPF ¶ 681 (Conn. Gen. Stat. § 9-232c-f). According to the State's registrar witnesses, challenge procedures are underutilized by elections staff: "People are reluctant to challenge." PPF ¶ 683 (Tramontano Dep. at 190:16-23, 204:21-22).

d. Criminal Penalties

To deter potential electoral fraud, Connecticut imposes stringent criminal penalties for false registration and fraudulent voting activity. Hence, a person registering falsely, or procuring another to register falsely, may be imprisoned for up to one year, and fined up to \$500. PPF ¶ 804 (Conn. Gen. Stat. § 9-357). Fraudulent voting by an unqualified person or voting more than once in the same election may be subject to a fine of not less than \$300, one to two years' imprisonment, and disenfranchisement. PPF ¶ 805 (Conn. Gen. Stat. § 9-360). Voting, or even attempting to vote, with another person's name is also criminal offense, subject to a fine of five hundred dollars and one year's imprisonment. PPF ¶ 806 (Conn. Gen. Stat. § 9-360). In general, a person making a false statement to an election moderator is guilty of perjury, a Class D felony, and is subject to a term of imprisonment not to exceed five years and a fine not to exceed \$5000, or both. PPF ¶ 807 (Conn. Gen. Stat. §§ 9-8, 9-232a, 53a-35, 53a-41(4); 53a-

156). The EDR bills require registrants to sign an affirmation that they understand that they can be convicted of perjury if they sign the registration application knowing it to be false. *See, e.g.*, Ex. 66, P. A. 03-204; Ex. 61 sH.B. 6669(29)(3)(A).

2. Attempted Administrative Justifications for the 14-Day Registration Deadline

Some of the State's witnesses expressed a few concerns about the administrative feasibility of EDR, which they themselves acknowledge can be easily addressed. For example, some of the State's witnesses testified that local election officials' low pay is a barrier to EDR, but admitted their demands for increased salaries would stand "without regard to election day registration." PPF ¶ 829 (Abbate Dep. at 11:21-12:15, 13:17-14:20, 16:20-24). While the President of ROVAC testified that some more training was needed for EDR, the State's other registrar witnesses conceded that the training needed is minimal and can be accomplished in one week. PPF ¶¶ 826, 828 (Ex. 1, Abbate Test. at 78; Abbate Dep. at 62:19-64:15; Bramante Dep. at 31:5-9; Tramontano Dep. at 160:7-9). Finally, registrar witnesses claim they need more staff to implement EDR, but acknowledge that a few temporary workers can be hired for the period around the election alone. PPF ¶¶ 826, 830-31, 835 (Abbate Dep. at 54:5-55:16, 57:5-12, 59:18-60:14, Bramante Dep. at 30:14-23; Tramontano Dep. at 62:12-23). For example, Abbate believes he could handle EDR with only two more part-time workers (paid between \$8.50 and \$10.50 an hour) than he had to assist with presidential ballots. PPF ¶ 835 (Abbate Dep. at 54:6-55:11, 61:23-62:8). With proper planning and the assistance of town clerks, registrars can easily deal with the volume of Election Day registrants, just as they have with the tens of thousands of unregistered voters who cast presidential ballots. PPF ¶¶ 840-42 (Hutton Dep. at 122-23, 124:2-12; Ex. 23, Sturgeon Test. at 239).

ARGUMENT

The Constitution's Equal Protection and First Amendment guarantees demand that states make voting no harder than it has to be. Connecticut violates this bedrock principle in two ways. First, the Equal Protection Clause is contravened when the State imposes totally different barriers to access in similar political races. Yet, in every general election, the State imposes different threshold rules for access to the ballot for President on the one hand, and all other offices on the other hand. Second, the 14-day registration deadline severely burdens access to the polls, to the point of disenfranchising tens of thousands of voters. An election regulation that so severely burdens the rights to vote and to free association must be justified by the State as "necessary" to withstand constitutional scrutiny. The State falls far short of that burden of justification: Although it identifies a legitimate goal of holding orderly and fraud-free elections, it cannot show that the 14-day deadline rationally furthers, let alone is necessary to, these goals. Plaintiffs first address the clear, facial violation of the Equal Protection Clause. *See infra*, at Law Sec. A. Plaintiffs then explain why the 14-day registration deadline imposes unconstitutional burdens on Connecticut citizens' right to vote. *See infra*, at Law Sec. B.

A. Permitting Unregistered Citizens To Vote For President, But Stopping Them From Voting For Any Other Office Violates Equal Protection

This Court confronts a clear violation of foundational Equal Protection principles, one that requires no fact findings for a determination of unconstitutionality. The State violates the Equal Protection Clause by irrationally imposing a more onerous registration rule on one election than on another similar election held at the same time. Every general

election, Connecticut permits electors to cast ballots for President and Vice-President, but then stops them from voting *in any other race*. There is simply no reason that a citizen who has been trusted with a ballot for the highest office in the nation should be denied access to the ballot for senator, Congress, governor, mayor, or registrar. *Cf.* PPF ¶ 336 (Hutton Decl. ¶ 28) (qualifying voters for a presidential ballot involves the same efforts as qualifying them for the whole ballot).

A difference in election rules that irrationally burdens voters in races that are not meaningfully different violates the Equal Protection Clause. The Supreme Court in 1979 considered Illinois's ballot-access rules for new parties and independent candidates. *See Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 175 (1979). Such parties and candidates were required to obtain about 25,000 signatures to get on statewide ballots, but a greater number of signatures for elections in certain counties, like Chicago's. *Id.* at 177, n. 3. Concentrating on the "geographic classification," the Court struck down the irrationally burdensome signature rule for counties. *Id.* at 183. Although it applied strict scrutiny, the Court observed that there was "no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago." *Id.* at 186. That is, the disparately burdensome rule failed any level of scrutiny. *Socialist Workers Party* therefore holds that the imposition of disparate access rules for elections that are similar in all relevant respects violates the Equal Protection Clause.

In *Norman v. Reed*, the Court confirmed the continuing applicability of the *Socialist Workers Party* principle. 502 U.S. 279 (1992). Although Illinois had revised its ballot access scheme, it had failed to eliminate the possibility that a candidate for a multi-

district subdivision would be subject to a substantially higher signature requirement than a candidate for a statewide election. *Id.* at 291-93.

Connecticut imposes a substantially different threshold rule on voters in presidential races, as opposed to those who want to cast their votes in the other races in the general election. The State thus imposes disparate voter access rules in different elections, even though there is no meaningful difference between these elections. Indeed, the equal protection violation here is more acute than in *Socialist Workers Party*. There, one rule, specific to Chicago, was in degree more burdensome than the other statewide rule. Here, however, one rule imposes an absolute bar, *i.e.*, a prior registration requirement, while the other rule imposes no registration requirement at all.

Just as a state cannot impose different ballot-access rules on substantially similar elections, it cannot impose totally different voter-access rules on elections that are not meaningfully different. When “the State is faced with the fact that it must defend two separate waiting periods of different lengths,” the Supreme Court has explained that “[i]t is impossible to see how both could be ‘necessary’ to fulfill the pertinent state objective.” *Dunn v. Blumstein*, 405 U.S. 330, 347 (1972). As in *Socialist Workers Party* and *Norman*, the State has no warrant for imposing a more stringent access rule in elections for senator, Congress, governor, mayor, or registrar, than for President of the United States.

The State has never come forward with a justification for the differential between its rules. In this litigation, it defends the difference on the ground that “regulations that expand opportunities to vote do not render other regulations that restrict them unconstitutional.” *See* DRCL ¶¶ 14, 21. It cites for this proposition the Second Circuit’s

ruling in *LaRouche v. Kezer*, 990 F.2d 36 (2d Cir. 1993). In *LaRouche*, the Second Circuit reviewed a Connecticut ballot access scheme that gave candidates two different avenues to obtain a place on the ballot. *Id.* at 37. The *LaRouche* Court concluded that if one alternative was valid, “the other must be viewed as broadening the opportunities for ballot access and is *a fortiori* constitutional.” *Id.* at 39. Fair enough. But irrelevant. Unlike *Socialist Workers Party* or this case, the *LaRouche* Court did not face different rules applying to different races, but to alternative rules applicable to the *same* race. Here, as in *Socialist Workers Party*, Connecticut has not “expand[ed] opportunities to vote” by opening two avenues to the same election, as it did in *LaRouche*, but imposed an absolute burden on one election that is not imposed on another, analogous election.

The President’s role in our polity is pivotal. *See Anderson v. Celebrezze*, 460 U.S. 780, 819 (1983) (Rehnquist, J. dissenting) (underscoring the special importance of presidential elections). The election of the President – the most important and prestigious in the nation – unquestionably implicates heightened concerns about integrity and fairness. The State certainly cannot argue that less stringent rules for access to the franchise are warranted for presidential elections alone.

In short, given the use of presidential ballots without a registration deadline, Connecticut’s 14-day registration deadline for all other races violates equal protection on its face. This unabashed and unjustifiable deviation from rationality, which the State does not even attempt to explain, compels a finding of unconstitutionality.

B. Connecticut’s 14-Day General Election Registration Deadline Also Violates the Equal Protection Clause and the First Amendment By Imposing A Severe and Unjustified Burden on the Rights to Vote and Associate

Connecticut’s 14-day registration deadline violates the First Amendment and the Equal Protection Clause for a second reason: It imposes a severe burden on the rights to vote and to associate. *See infra*, Law Sec. B.2. The registration deadline should be subject to especially careful scrutiny as it trenches on political speech within the First Amendment’s core. *See infra*, Law Sec.B.2.c. Under well-settled Supreme Court precedent, the State therefore has the burden of justification – showing its onerous registration rule is necessary. *See infra*, Law Sec. B.3 The State falls far short of that standard in this case. Indeed, it cannot even demonstrate that the registration deadline rationally furthers its goals. *See infra*, Law Sec.B.4.

1. The Right to Vote is a Fundamental Right

The right to vote is a “fundamental political right” protected by the Constitution. *Dunn*, 405 U.S. at 336 (citing *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (citation marks omitted)); accord *Romer v. Evans*, 517 U.S. 620, 650 n. 3 (1996) (Scalia, J., dissenting). The validity of an election regulation that burdens the right to vote depends on “the extent to which [the State’s] interests makes it *necessary* to burden the plaintiff’s rights.” *Anderson*, 460 U.S. at 789 (emphasis added); *see also Marston v. Lewis*, 410 U.S. 679, 681 (1973) (*per curiam*) (asking whether state’s interest makes a registration deadline “necessary”).²⁶ In *Anderson*, which first articulated this analysis for state election

²⁶ The same analysis applies to Plaintiffs’ right-to-vote claims under both the First Amendment and the Equal Protection Clause. *See Green Party of N.Y. State v. N.Y. State Bd. of Elections*, 389 F.3d 411, 420 (2d Cir. 2004); *see also Anderson*, 460 U.S. at 790, n. 10 (citing Equal Protection cases as a basis for the standard for First Amendment review). For the sake of convenience, these are referred to as Plaintiffs’ “right to vote claims” or “voting rights claim.”

regulations, the Court struck down a different election-related deadline: Ohio's deadline for announcement of an independent presidential candidacy. 460 U.S. at 806.²⁷

This Court must therefore weigh the burdens placed by the 14-day deadline on constitutional rights against the specific interests articulated by the state. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (a law's validity "depends upon *the extent* to which a challenged regulation burdens First and Fourteenth Amendment rights") (emphasis added); *see also Greidinger v. Davis*, 988 F.2d 1344, 1351 (4th Cir. 1993) (emphasizing that the judicial duty requires "a weighing of factors" to assess the constitutionality of election regulations).²⁸

This Court has established "[a] three-fold test" to evaluate the constitutionality of any infringement on the right to vote: "1) the character and the magnitude of the right allegedly violated; 2) the interests claimed to be advanced by the intrusion on the right; 3) the extent to which the interests asserted make it necessary to burden the rights in the manner challenged." *Campbell v. Bysiewicz*, 242 F. Supp. 2d 164, 172 (D. Conn.

²⁷ The State invokes the Constitution's reference to states' authority to establish "Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl. 1; *see* DRCL ¶ 1. But "[a] State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens.'" *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)). In the very case from which the State selectively quotes, the Supreme Court confirmed that "the rigorousness of [judicial] inquiry" does not hinge on Article I's text, but rather on "the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Indeed, the purpose of the Fourteenth Amendment's Equal Protection Clause – assessment of governmental action for impropriety – would be rendered futile were core functions of the State, such as electoral arrangements, not subject to searching judicial review. *Cf. Reynolds*, 377 U.S. at 562 ("[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

²⁸ According to the State, *Greidinger* is "inapposite" because it concerned a different election regulation. *See* DRCL ¶ 4. But Plaintiffs cite *Greidinger* only for the specific legal principle stated above. The State's other attempts to respond to discrete, applicable legal principles by invoking irrelevant factual differences are also entitled to no weight. *See* DRCL ¶¶ 8, 10, 13, 20, 23.

2003).²⁹ In this assessment, the “rigorousness of [judicial] inquiry” into the State’s reasons hinges on “the weight of the burden imposed by the challenged requirement ... *in light of the state’s overall election scheme.*” *Schulz v. Williams*, 44 F.3d 48, 56 (2d Cir. 1994) (emphasis added) (citation omitted). Plaintiffs thus explain first how the registration deadline imposes considerable burdens on voters. Plaintiffs then examine the State’s deeply flawed justifications for the deadline.

2. The Registration Deadline Severely Burdens Voting and Free Association Rights

As the First Amendment recognizes, citizens need information and mobilization to participate in the political process. A citizen’s right to vote is rendered a nullity, however, if the State burdens severely the antecedent judgment to participate in electoral politics by demanding that citizens make that judgment even before the crescendo of campaigning and media attention engages many for the first time.

As the unchallenged evidence presented by Plaintiffs shows, citizens do not receive information about the election or become mobilized until the weeks before the election for good reasons. At the moment tens of thousands of voters make the necessary, preliminary decision to participate in the electoral process, the State already has made it impossible for them to do so. The young, new citizens, and low-income groups are especially burdened by the State’s unjustified demand for a judgment that participation is worthwhile even before information about an election is disseminated and campaigning has accelerated.

²⁹ The State seeks to distinguish *Campbell* from *Burdick*, suggesting the *Campbell* Court erred by ignoring *Burdick*, a directly applicable Supreme Court precedent. DRCL ¶ 2. But *Burdick*, *Campbell*, and *Anderson* all apply the same governing test. The State’s error demonstrates a fundamental misunderstanding of the governing law. “*Burdick* cites *Anderson* with approval, and in fact adopts the *Anderson* test.” *Schulz v. Williams*, 44 F.3d 48, 58 (2d Cir. 1994). The *Campbell* Court was similarly describing the *Anderson* test.

a. The Burden Imposed by the Registration Deadline Is Proven By Statistical and Testimonial Evidence of Mass Disenfranchisement

Plaintiffs have amassed an enormous body of statistical, testimonial, and expert evidence that the State's demand for prior registration has a staggering impact on the right to vote. Principle among this evidence is Connecticut's past experience with presidential ballots, which can be cast by unregistered voters. *See Schulz*, 44 F.3d at 56 ("We look further to how [plaintiffs in that case] have fared in the past [to assess how burdensome a regulation is]."); *Gjersten v. Bd. of Election Comm'rs*, 791 F.2d 472, 477 (7th Cir. 1986) (statute's effect in past elections relevant for assessing its constitutionality). That evidence is corroborated by expert analysis of the reasons for disenfranchisement and testimonial evidence from those on the front lines of Connecticut's elections.

The Supreme Court, assessing regulation of petition circulation, has looked initially to whether "the [petition circular] registration requirement drastically reduces the number of persons ... available to circulate petitions." *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 193 (1999); accord *Lerman v. Bd. of Elections in the City of N.Y.*, 232 F.3d 135, 146 (2d Cir. 2000) (focusing on the number of people excluded from the political process due to an election rule). Connecticut's numbers paint a stark portrait of its registration deadline's impact. Tens of thousands of unregistered Connecticut citizens wanted to vote in 2000 and 2004, but were unable to register, and therefore used presidential ballots. PPF ¶¶ 9, 10 (Stip. ¶ 14; Ex. 1, Bysiewicz Test. at 4). By contrast, when presidential ballots also had a registration deadline, only 1000, rather than 30,000 people, used that ballot. PPF ¶ 13 (Ex. 2, 11/20/00 OLR Rpt. at MNT

00002). The numbers of unregistered voters who used the presidential ballot in 2000 and 2004, moreover, only hint at the scope of wider disenfranchisement: Many do not know of the presidential ballot, or do not see the value in going unregistered to the polls. *Cf.* Nagler Dep. at 90:1-5 (number of presidential ballots is one-fifth or one-sixth of the increase in voter turnout with EDR).

“[T]estimonial evidence complement[s] the statistical picture.” *Buckley*, 525 U.S. at 194. Evidence from both the State’s registrar witnesses and Plaintiffs’ witnesses, such as Santiago and Lagstein, confirms that many people are unaware of the deadline until it has passed, but nonetheless want to vote. *See supra*, at 13-15. The struggles of the individual plaintiffs Susan Sorenson and Gavin Roos are also mere snapshots of the broader canvas of disenfranchisement. *See supra*, at 15-16. The 14-day registration deadline falls especially hard on groups already marginalized from politics, such as the young, new citizens, and low-income communities that tend to move often. *See supra*, at 7, 14-15.

A broader focus, encompassing expert testimony of EDR’s predicted impact and evidence from states that have EDR, provides further confirmation of the 14-day deadline’s disenfranchising effect. Hence, states that have moved their deadline to Election Day have 13 percentage points more voter turnout. PPF ¶ 42 (Stip. ¶ 20). Plaintiffs’ expert Professor Jonathon Nagler demonstrates that a 14-day registration deadline depresses voter participation by between three and six percentage points. PPF ¶ 43 (Ex. 4, Nagler Rpt. at 3-4; Ex. 7, “Making Voting Easier” at 4). This imposition on voting rights transpires against a backdrop of diminishing voter turnout across the United States.

An electoral regulation, such as the 14-day registration deadline, that severely burdens voting rights, even if it does not absolutely bar an entire class from the franchise, is subject to strict scrutiny. *See, e.g., Norman*, 502 U.S. at 289 (“[W]e have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance.”); *accord Greidinger*, 988 F.2d at 1352. *Molinari v. Powers*, for example, underscored how “difficult” the ballot-access rules challenged in that case made such access for insurgent Republican presidential candidates. 82 F. Supp. 2d 57, 70 (E.D.N.Y. 2000) (primary ballot access signature requirement “severely” burdens constitutional rights); *accord Campbell*, 242 F. Supp. 2d at 164. Similarly, the Second Circuit invalidated a petition-witnessing rule that “reduce[d],” but did not eliminate, the protected activity. *Lerman*, 232 F.3d at 146; *id.* at 147 (characterizing the law’s burden as “severe”). By contrast, a “statutory scheme ... designed to make voting available to some groups who cannot easily get to the polls” is subject to rational-basis analysis. *McDonald v. Bd. of Election Comm’rs*, 394 U.S. 802, 807-08 (1969). Unlike the absentee ballot regulation in *McDonald*, the registration rule at issue here is an obligatory gate to the franchise.³⁰

b. The 14-Day Registration Deadline Disenfranchises Tens of Thousands of Voters Due to the Structure of Campaigning and Media Attention

The staggering quantity of disenfranchisement in Connecticut follows directly from how citizens learn about and become mobilized in electoral contests. Electoral

³⁰ Blithely disregarding evidence of past disenfranchisement, *see* DRCL ¶ 8, the State focuses on the mechanical ease of “fill[ing] out a registration card and mail[ing] or deliver[ing] it,” DRCL ¶ 7. But this is not a case about whether the *mechanical* acts required for registration generate transactions costs that burden voting rights. Whether or not it is easy to fill out a registration card is simply irrelevant to the question at hand. Indeed, in another context, the Supreme Court has confirmed that “[t]he ease with which qualified voters may register to vote does not lift the burden on speech.” *Buckley*, 525 U.S. at 195. Impermissible qualifications on the right to vote, such as literacy tests, poll taxes, and property qualifications, are often easy to satisfy for many. That makes them no less constitutionally suspect.

engagement hinges on a prior judgment by a citizen to participate. As uncontroverted expert and statistical evidence submitted by Plaintiffs demonstrates, voters learn the essential information to participate, and in fact engage with politics, only in a campaign's final days. By demanding that citizens make the decision to participate before campaigning and media attention intensifies, Connecticut cuts tens of thousands of citizens off from the ballot.

The Supreme Court has long recognized that campaigning and media attention to elections is concentrated in the last days before an election, a conclusion that the uncontroverted expert and statistical evidence in this case merely confirms. *See supra*, at 9-13. The Supreme Court, moreover, has highlighted the compression of campaigning, as it has developed during the past 30 years. As Justice Kennedy recently explained, “[u]ntil *a few weeks or even days* before an election, many voters pay little attention to campaigns and even less to the details of party politics.” *California Democratic Party v. Jones*, 530 U.S. 567, 586 (2000) (Kennedy, J., concurring) (emphasis added). Thirty years previously, the Supreme Court observed that “campaign spending and voter education occur largely during *the month before* an election.” *Dunn*, 405 U.S. at 358 (emphasis added); *Anderson*, 460 U.S. at 797 (same).

The fact that the time-frame for campaigning has shrunk over the last decades does change the constitutional analysis of electoral provisions. In *Anderson*, for example, the Court identified a state interest in voter education, but held that while that interest would have justified an eight-month deadline for presidential candidacy declarations at the time of the Constitutional Convention of 1787, “[t]he passage of time ... has brought

about ... changes that are relevant to the reasonableness of [the regulation].” 460 U.S. at 796-97.

Plaintiffs’ statistical and expert evidence in this case substantiates Justice Kennedy’s observation about the brevity of today’s political campaigns and media focus on elections. Scrutinizing Connecticut’s experience, Professor Green explains that state and local races are particularly prone to generating voter interest only at the election’s eve, as those races are waged on a smaller scale with fewer resources. PPF ¶ 92 (Ex. 14, D. Green Rpt. at 5). Testimony from Plaintiff Working Families Party confirms that campaigning is most effective within the last two weeks of a campaign, by which time it is futile if directed at unregistered voters. *See* PPF ¶ 98 (Ex. 18, J. Green Decl. ¶ 9); *see supra* at 13. Professor Goldstein confirms that the same compression occurs in media coverage of elections. A disproportionate amount of television advertising and most local news coverage, which are the major information source and incentive for the American electorate, air after Connecticut’s registration deadline has passed. PPF ¶¶ 75-80, 85 (Ex. 16, Goldstein Rpt. at 1-4); *supra* at 10-11.

Polling data confirms that citizens become interested in elections only immediately before Election Day. *See* PPF ¶ 71 (Ex. 14, D. Green Rpt. at 4). Equally unsurprising is the widespread unawareness of the registration deadline. *See supra*, at 13-15.

Set against these realities, the 14-day registration deadline “really means that for that segment of the population that is not politically engaged, there is no opportunity for them to become politically engaged in the period where engagement is most likely.” Green Dep. at 134:10-13. The registration deadline’s exclusionary effect, moreover,

snowballs across election cycles. As Professor Green explained, these citizens “develop a sense that ... [politics] isn’t all that valuable,” and that “they are not part of the conversation,” and so *remain* disengaged from politics. *Id.* at 136:3-7, 136:23-25. As one of the State’s witnesses revealingly – and inappropriately – stated, Connecticut’s 14-day registration deadline sorts the “informed” voter from the chaff of citizenry at the margins of political life. Tramontano Dep. at 197:15; *supra*, at 7, 14-15 (noting that new citizens, young voters, and low-income populations are particularly likely to be caught unaware by the 14-day registration deadline); *cf. Anderson*, 460 U.S. at 792 (condemning an early candidacy registration deadline that “places a particular burden on an identifiable segment of Ohio’s [citizenry]”).

In summary, the registration deadline ends access to the polls before tens of thousands of Connecticut citizens have sufficient information to decide to participate, let alone take the antecedent steps that the State demands.

c. The 14-Day Registration Deadline Burdens Core Political Speech

The 14-day registration deadline is also an “undue hindrance[e] to political conversations and the exchange of ideas.” *Buckley*, 525 U.S. at 192. Critical information reaching unregistered citizens in the two weeks before the election is rendered irrelevant by the general-election deadline. But “the First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971)); *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (“The political speech of candidates is at the heart of the First Amendment”). And campaigns, as the evidence in this case

shows, are concentrated in the two weeks before an election. Just as this “core” First Amendment activity reaches its zenith, *National Endowment for the Arts v. Finley*, 524 U.S. 569, 597 (1998) (Scalia, J., concurring), the State renders that activity substantially less effective *in political terms*. Cf. *Anderson*, 460 U.S. at 798 (“A State’s claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism.”).

The State’s repeated attempts to style its restriction as “reasonable,” *see, e.g.*, DRCL ¶¶ 11-12, fly in the face of the Supreme Court’s cautions that the First Amendment requires courts “be vigilant” when confronting state regulations that “significantly inhibit communication with voters about proposed political change and are not warranted by the state interests” *Buckley*, 525 U.S. at 192; *accord Lerman*, 232 F. 3d at 146. Neither of the challenged regulations in *Buckley* and *Lerman* barred people entirely from approaching fellow citizens and discussing politics. Rather, both regulations rendered such efforts substantially less effective *in political terms*. For this reason, the 14-day deadline, which similarly undermines core political speech, must be reviewed with heightened skepticism. Cf. *Dunn*, 405 U.S. at 338 (noting that a durational prerequisite to the right to vote is subject to “exacting” scrutiny when it burdens “fundamental personal right[s],” in that case the right to travel).

d. The Registration Deadline Severely Burdens Organizational Plaintiffs’ Right to Associate

The institutional goals of the organizational Plaintiffs – voter mobilization and community empowerment – are critically impaired by a 14-day registration moratorium, which renders their efforts futile just as these efforts become effective. *See supra*, at 17.

“It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments.” *Eu*, 489 U.S. at 224. A statute does not need to “deprive [a person] of all opportunities to associate with the political party [or organization] of their choice” before trenching on constitutional rights. *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973). Rather, all restrictions that impose a “‘substantial restraint’ or a ‘significant interference’ with the exercise of the constitutionally protected right to free association” must fail. *Ibid.* (quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) and *Bates v. Little Rock*, 361 U.S. 516, 523 (1960)); accord *Lerman*, 232 F. 3d at 247-48; cf. *Green Party of N.Y. State v. N.Y. State Bd. of Elections*, 389 F.3d 411, 414-15, 420 (2d Cir. 2004) (voter enrollment scheme, which denied certain statutory benefits to a party that failed to gain 50,000 votes in gubernatorial elections, violated right to association).

The right to associate necessarily is strongest when the “basic function” or “prime objective” of an organization is at stake. *Kusper*, 414 U.S. at 58. The organizational Plaintiffs’ aims hinge around citizen participation in politics. But a 14-day registration cut-off, like another Connecticut law the Supreme Court invalidated, “limits . . . associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.” *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986); see also *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981) (associational right includes right to identify potential members of group). Like the Illinois law at issue in *Kusper*, the 14-day deadline “substantially abridge[s] Plaintiffs’] ability to associate *effectively*” with the organization of their choice. 414 U.S.

at 58 (emphasis added). In short, the 14-day deadline heavily burdens not only voting but also free association rights.³¹

3. Registration Deadlines, Which Severely Burden Voting Rights, Are Invalid Unless “Necessary” to Achieve a State Interest

Confronting a burden on plaintiffs’ voting rights that is “severe, [the Court] must next analyze the state’s purported interests to determine whether those interests are compelling and, if so, whether the alleged burdens are *necessary* for the state to achieve its compelling interests.” *Green Party*, 389 F.3d at 420 (emphasis added) (discussing associational rights claims); *accord Anderson*, 460 U.S. at 786; *Campbell*, 242 F. Supp. 2d at 172.³² Application of the “necessity” standard is further compelled by two 1973 Supreme Court precedents on registration deadlines. In those cases, the Supreme Court carefully scrutinized the factual predicates for the State’s justifications using a strict scrutiny standard. Applying the same demanding eye to Connecticut’s justifications for its 14-day registration deadline yields the unavoidable conclusion that its burdensome registration cut-off cannot be constitutionally justified today.

³¹ The State argues that the 14-day registration deadline leaves Plaintiffs “unencumbered in their ability to approach, converse with and even encourage citizens to register to vote.” DRCL ¶ 12. The State thus simply ignores the repeated statements by the Supreme Court that it is simply irrelevant that a burdensome regulation of the right to vote leaves open other, substantially less meaningful, opportunities to associate. Moreover, the State’s contention that the right to associate is “derivative” of the right to vote finds no support in precedent. *See* DRCL ¶ 12. As explained *supra*, the right to associate protects an organization’s goals, however those goals are understood. The “right to associate with others” is a right to pursue “a wide variety of *political*, social, economic, educational, religious, and cultural ends,” not a derivative function of the right to vote. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added); *accord Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000). When the goal of an association is political activity, however, regulation that hamstring that activity is subject to intense judicial scrutiny.

³² To avoid this conclusion, the State erroneously describes the registration deadline as “a reasonable and nondiscriminatory time, place and manner restriction.” DRCL ¶ 10. The State’s dependence on this peculiar characterization lacks support in precedent. No federal court has ever suggested that the First Amendment’s “time, place and manner” doctrine applies to Equal Protection analysis of election regulations.

a. Supreme Court Precedent Requires That a Registration Deadline Be “Necessary”

The Supreme Court has held that a State must “demonstra[e] that ” its registration deadline is “necessary” for it to be upheld. *Marston v. Lewis*, 410 U.S. 679, 681 (1973) (*per curiam*); *see also Burns v. Fortson*, 410 U.S. 686 (1973) (*per curiam*). On two occasions in 1973, the Supreme Court analyzed registration deadlines and engaged in searching fact review of the state’s specific justifications for shutting voters off from the polls. The Court’s searching inquiry can be understood only as an instance of strict scrutiny. Moreover, the Second Circuit Court of Appeals has confirmed that *Marston* and *Burns* are among the “numerous decisions of the Supreme Court subjecting to *strict scrutiny* state laws denying various classes of individuals the right to vote.” *Auerbach v. Rettaliata*, 765 F.2d 350, 354 (2d Cir. 1985) (emphasis added); *accord Beare v. Briscoe*, 498 F.2d 244, 247 (5th Cir. 1974) (*per curiam*) (noting that the Supreme Court in *Burns* and *Marston* sought “compelling state interests” to uphold registration deadlines). The “strict scrutiny” legal standard applies here. While they precede the path-marking case of *Anderson v. Celebrezze*, *Marston* and *Burns* anticipated *Anderson*’s balancing test, in which a finding that an election rule substantially burdens constitutional rights leads to strict scrutiny of the State’s justifications.

The State relies on Ninth Circuit precedent that explicitly disagreed with *Auerbach*, the controlling Second Circuit law. *See* DRCL ¶¶ 3, 15 (citing *Barilla v. Ervin*, 886 F.2d 1514 (9th Cir. 1989), *overruled on other grounds by Simpson v. Lear Astronics Corp.*, 73 F.3d 1170, 1174 (9th Cir. 1995)).³³ The State’s novel argument,

³³ The defendant in *Barilla*, unlike the State in the case at bar, furnished a specific justification for Oregon’s 20-day registration rule, further distinguishing that case from the one at bar. *See* 886 F. 2d at 1523 (finding that the State had made a showing of “necessity”).

urging this Court to ignore a controlling rule of law from the Second Circuit, and instead follow another Circuit, should be rejected.³⁴

The State goes further astray by erroneously invoking *Rosario v. Rockefeller*, a case in which the Supreme Court upheld an eight-month party enrollment deadline for a closed party primary. 410 U.S. 752 (1973). See DRCL ¶¶ 5-7. The State argues that *Rosario* authorizes “a registration cutoff of up to eleven months.” DRCL ¶ 7. This is plainly wrong.

In the same year *Rosario* was decided, the Supreme Court in *Burns* stated that a “50-day registration period approaches the outer constitutional limits [for a registration deadline].” 410 U.S. at 687. This cannot be squared with the State’s assertion that *Rosario* authorizes a substantially longer registration cut-off. Cf. *Young v. Gness*, 7 Cal. 3d 18, 24 (1972) (invalidating a 54-day registration deadline).³⁵ *Rosario*, instead of hinging on the length of the cut-off period, turned on two key facts that were absent in both *Burns* and *Marston*, and that are not present in this case.

First, the delayed party-enrollment rule in *Rosario* was justified by a specific state interest in preventing “party ‘raiding,’ whereby voters in sympathy with one party

³⁴ *Auerbach*’s statement concerning strict scrutiny is simply not dicta. In the course of adjudicating a facial challenge to New York’s voter residency requirements for students, the *Auerbach* Court stated in an unambiguous declarative statement essential to its reasoning that “numerous decisions of the Supreme Court subjec[t] to strict scrutiny state laws denying various classes of individuals the right to vote,” and citing both *Marston* and *Burns*. *Auerbach*, 765 F. 2d at 354. Moreover, the *Auerbach* Court held that “even according the [New York residency] provision ... strict scrutiny,” that provision was constitutional. *Id.* at 354-55. In applying this “strict scrutiny,” the *Auerbach* Court cited *Marston*. That is, the conclusion that *Marston* involved strict scrutiny was a necessary step in resolution of the case.

³⁵ The State’s hasty misreading of *Rosario* is also in considerable tension with *Anderson*, in which the Court invalidated an eight-month deadline for the filing of a presidential candidacy statement. 460 U.S. at 806; cf. *Burdick*, 504 U.S. at 435-37 (rejecting right to vote for a write-in candidate because Hawaii gave candidates three straightforward, though different, means of getting onto the ballot). The bizarre conclusion that the State would have this Court draw is that candidates cannot be required to declare their intentions eight months before an election, but citizens may be forced to register up to eleven months prior to polling.

designate themselves as voters of another party so as to influence or determine the results of the other party's primary." *Rosario*, 410 U.S. at 760. The time limitation at issue in *Rosario* was specifically calibrated to meet a "particularized legitimate purpose," *id.* at 761, that is entirely absent in *Burns*, *Marston*, or this case. In contrast to *Rosario*, Plaintiffs and other disenfranchised voters are not gaming the electoral system to disrupt their political opponents, but are excluded from participation in all races except the presidential.

Second, *Rosario* hinged on "the *voluntary* decision of the [plaintiffs] not to register within the prescribed time." *Beare*, 498 F.2d at 247 (emphasis added); *see Rosario*, 410 U.S. at 758 ("The petitioners do not say why they did not enroll prior to the cutoff date; however, it is clear that they *could* have done so, *but chose not to.*") (emphases added); *id.* at 758, n. 7 ("[The plaintiffs] do not claim that they were unaware of [the] deadline for enrollment."). The *Rosario* plaintiffs, in other words, knew of the deadline and intended to miss that deadline. This case could not be more different. No one contends that Plaintiffs here, or the more than 60,000 Connecticut citizens who have used presidential ballots, acted in anything other than good faith.

In sum, *Rosario* does not apply to this case. Rather, the rule of law articulated in *Burns* and *Marston* – that is, strict scrutiny – controls.

b. *Burns* and *Marston* Compel the Conclusion that the 14-Day Registration Deadline is Invalid

The Supreme Court's holdings in *Burns* and *Marston* bind this Court. Plaintiffs ask this Court to apply the rule of law articulated in *Burns* and *Marston* in 1973 to the specific, distinct facts of Connecticut in 2005.

In *Marston*, the Court highlighted the timing of Arizona’s primary elections and its volunteer deputy registrar system as the state interests that made a registration deadline necessary. *See* 410 U.S. at 680-81 (noting that the registrar system necessitated a 30-day registration-free gap to correct volunteers’ errors). Reviewing Arizona’s electoral laws in detail, the Court endorsed the state’s “recent and amply justifiable legislative judgment” about the length of time “necessary” for registration. *Id.* at 681.

In *Burns*, the State “offered *extensive* evidence” to establish its registration cut-off was “necessary,” but “[p]laintiffs introduced *no* evidence” at all. 410 U.S. at 686-87 (citation omitted) (emphases added). The Court also relied heavily on the “record before [the district court]” to justify its holding. *Ibid.*; *see also Key v. Bd. of Voter Registration*, 622 F. 2d 88, 90 (4th Cir. 1980) (upholding 30-day registration deadline).

Like the Supreme Court in *Burns* and *Marston*, this Court’s focus is properly directed to the specific reasons offered by the State and to the extensive record Plaintiffs have compiled. The record in this case, however, could not be more different from the record in *Burns* and *Marston*. Unlike *Burns*, in which the “[p]laintiffs introduced no evidence,” 410 U.S. at 686, here “[p]laintiffs submit a great deal of evidence,” *Molinari*, 82 F. Supp. at 61; *see also* Jurisdictional Statement of *Marston v. Lewis*, No. 72-899, App. A, pp. 22-44 (unpublished district court opinion describing evidence offered by the State, but citing no evidence offered by plaintiffs). This Court thus benefits from a full factual record that allows meaningful examination of the State’s justifications. Moreover, in 1973, the Supreme Court could not examine any state’s experience of EDR, much less Connecticut’s system of presidential ballots that operates without a registration deadline. Such new information facilitates informed assessment about the purported

necessity of a registration deadline. Hence, this Court writes on a blank page on the factual specifics of “necessity.”

Fresh analysis is particularly important here because “[t]he passage of time” can bring “changes that are relevant to the reasonableness of [an electoral] statutory requirement.” *Anderson*, 460 U.S. at 796. *Anderson* identified technological change and increasing literacy as factors that made an electoral rule valid at the time of the Founding invalid by 1983. *Ibid.* The Second Circuit specifically has recognized that “the advent and accessibility of advanced computer technology” can “potentially chang[e] the calculus” in determining the constitutionality of electoral laws. *Schulz*, 44 F.3d at 59; *accord Molinari*, 82 F. Supp. 2d at 72-73. Technological change has accelerated since *Anderson*. Recently, the Supreme Court, reviewing federal Internet regulation, stated that the “rapid pace” of information technology development meant that “technological developments important to the First Amendment analysis have also occurred” even after the case began. *Ashcroft v. Am. Civil Liberties Union*, 124 S. Ct. 2783, 2795 (2004). Moreover, alongside accelerating technological changes, there has been increasing “constitutionalization” of democratic design questions. *See* Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 31 (2004); *accord Lubin v. Panish*, 415 U.S. 709, 713 (1974). Not only has the factual backdrop changed, the legal landscape also has shifted, rendering Connecticut’s 14-day deadline unjustified and unconstitutional.³⁶

³⁶ The State also erroneously suggests that Plaintiffs tilt against *Marston*’s statement that “a person does not have a federal constitutional right to walk up to a voting place and demand a ballot.” 410 U.S. at 680; DRCL ¶ 9. But Plaintiffs ask this Court to hold a registration *deadline* invalid under the federal Constitution. Plaintiffs do not challenge the validity of a registration requirement; the validity of identification requirements; the validity of affirmation rules; the validity of a rule that photographs of electors; or any of the *other* threshold requirements that the State legitimately might impose. The State

4. The 14-Day Registration Deadline is Not Justified by Any State Interest

After Plaintiffs have demonstrated a burden on voting and free association rights, the State has the burden of justification of coming forward with reasons to support a regulation that burdens such rights. *See Anderson*, 460 U.S. at 789 (requiring courts to evaluate “the *precise* interests *put forward by the State*”) (emphases added). Given the severity of the burden on voting and free association rights imposed by the 14-day registration deadline, the State must demonstrate that the deadline is “necessary” to achieve particular interests. Not only does the State fall short of a showing of “necessity,” it cannot demonstrate that its deadline is even reasonable.

The State contends that its registration deadline is necessary “to insure [sic] orderly and fair elections and to avoid fraud and chaos.” DRCL ¶ 17. These attempted justifications are deeply flawed.³⁷ At the threshold, the State’s own electoral framework demonstrates that “orderly and fair” elections can be conducted with 30,000 citizens’ participation without a 14-day registration deadline. Even if the State identifies a valid interest related to deterring and preventing fraud, evidence submitted in this case undermines the applicability of that interest here. First, not only is there no proven evidence of an increase in voter fraud with presidential ballots, which lack a registration deadline, but the State’s own elections enforcement officials supported EDR, which they would not have done if they had believed EDR creates enhanced opportunities for fraud. Second, and relatedly, the State fails to identify any plausible reason why its registration

seriously mischaracterizes Plaintiffs’ argument in order to shoehorn it into a novel rule fashioned from an off-the-cuff comment.

³⁷ Plaintiffs note that the State’s interests were described at a high level of generality, in terms simply lifted directly from precedent with no specific detail about the reasons for the particular registration rule in question, until two and one-half days before the filing date for this Joint Trial Memorandum. Until that point, the State failed to provide any indication of how it would attempt to meet its burden of justification.

deadline deters or prevents fraud. Some of its witnesses point to one measure, the mailing of notices of acceptance. As currently used, however, such notices are unlikely to identify any potential fraud. They could be more effectively incorporated into an EDR legislative scheme. Third, the State has ample other means to prevent fraud. Some of the State's witnesses also suggested administrative difficulties. Besides being speculative and minimal, these alleged difficulties do not give a constitutionally relevant reason to maintain a highly burdensome 14-day registration deadline.

a. Connecticut's Own Electoral System Shows that a 14-Day Registration Deadline Is Unnecessary to Achieve Any State Interest

Courts examine challenged election regulations not “in isolation, but within the context of the state’s overall scheme of election regulations.” *Lerman*, 232 F.3d at 145; accord *Prestia v. O’Connor*, 178 F.3d 86, 88 (2d Cir. 1999) (*per curiam*); *Schulz*, 44 F.3d at 56. In examining the State’s overall electoral scheme, the Court must consider whether a less burdensome election rule “surfaces in contrast to [a more stringent election rule], to show that a less stringent standard ... is at least equally effective in achieving the state’s ... interests.” *Campbell*, 242 F. Supp. 2d at 173. The presidential ballot, as well as Connecticut’s other registration procedures, demonstrate beyond doubt ways at least as effective in achieving “orderly and fair elections” and avoiding “fraud and chaos” as a 14-day registration deadline. DRCL ¶ 17.

Connecticut’s presidential ballot mechanism demonstrates unequivocally that fair and orderly elections enfranchising tens of thousands of voters are feasible in the absence of a 14-day registration deadline. *See supra* at 18-21; PPF ¶ 274 (Conn. Gen. Stat. § 9-158b; Stip. ¶ 11). Accepting an application for a presidential ballot is a process no more

complicated than registering people in order to qualify them to vote. PPF ¶ 336 (Hutton Decl. ¶ 28). Presidential ballot procedures, moreover, contain identification requirements, implemented for the first time in 2004, and provide for post-election verification of ballots. *See* PPF ¶¶ 301, 305 (Conn. Gen. Stat. §§ 9-158e(a), 9-158j); *supra* at 19.

Two election cycles have yielded no evidence that any of the State's objectives would be hindered by less burdensome alternatives to the 14-day registration deadline. Presidential ballots have been implemented without increased fraud or administrative problems. PPF ¶ 664 (Garfield Dep. at 33:20-35:2, Bromley Dep. at 197:15-17). Although the volume of presidential ballot applicants was unanticipated in 2000, town clerks were able to plan for and manage the tide of presidential ballot voters in 2004. PPF ¶ 664 (Hutton Decl. ¶ 25; Ex. 1, Bysiewicz Test. at 4). The experience of the presidential ballot amply demonstrates that the State's reliance on a threat to "orderly" elections is unwarranted.

Connecticut's menagerie of registration rules further erodes the State's effort to satisfy its burden of justification by proving the 14-day deadline necessary. In primaries, the registration deadline is considerably shorter than in general elections; indeed, a person can register in person up to noon on the last business day before an election, a mere 18 hours before polling begins. PPF ¶¶ 344-45 (Conn. Gen. Stat. §§ 9-23a, 9-23g(c), 9-56, 9-57, Ex. 25, 2004 Election Calendar at 19); *see supra*, at 21-23. In many elections, particularly local elections, the primary effectively determines who will win the elective office, even if the general election is contested. *See* Green Dep. at 44:18-19, 90:3-8. Because primaries generally have smaller electorates than general elections, a

smaller quantity of voter fraud would be needed to shift the contest's result. The State's interest in ensuring fair elections, if anything, should be at a higher pitch in the context of primaries, which presently are conducted with eighteen hours between the end of registration and the casting of the first ballot.³⁸

Nor are primaries the only exception to the general 14-day rule for registration. *See supra*, at 21-23 (summarizing exceptions). Up to and including Election Day, registration indeed continues. Those registered include: people whose rights have matured; military personnel; and those with state registration agency receipts. *See* PPF ¶¶ 351-352, 357, 360 (Ex. 25, 2004 Election Calendar at 31; Conn. Gen. Stat. §§ 9-19b(d) 9-25, 9-23(d); Ex. 25, 2004 Election Calendar at 31, 33; Bromley Dep. at 111:2-12). In addition, some voters are transferred from one polling place to another, or restored to the active registration list, both of which require adjustment of the State's voter registration records. *See* PPF ¶¶ 362, 366 (Conn. Gen. Stat. §§ 9-42b, 9-35(e); Ex. 47, Moderator's Handbook at 21-22).

In short, a first order of evidence that a 14-day registration deadline is not necessary comes from the State's own electoral scheme. There is simply no evidence that Connecticut's elections are riddled with fraud or mired in administrative chaos; indeed, the State is not contending that fraud and chaos are endemic in its own elections at present. Absent such assertions, the many exceptions to the 14-day registration deadline undermine entirely any credible claim that the deadline is necessary for fair and orderly elections.

³⁸ The State has not suggested – and there is no evidence that – primaries are compromised by fraud because the period between registration's end and the beginning of polling is only a matter of hours.

b. Connecticut Has No Historical Record of Fraud and Does Not Use the 14 Days Before an Election to Deter and Prevent Fraud

It is further evidence of the irrationality (not to mention superfluity) of Connecticut's 14-day registration deadline that there is no evidence of voter fraud in the absence of that deadline, and that Connecticut presently does nothing effective to prevent fraud in the 14 days before an election. States cannot satisfy their burden of justification by mere recitation of generic language about concededly legitimate state interests drawn from the U.S. Reports. "[T]he fact that the [State's] asserted interests are 'important in the abstract' does not necessarily mean that its chosen means of regulation 'will in fact advance those interests.'" *Lerman*, 232 F.3d at 149 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)); *see also Bullock v. Carter*, 405 U.S. 134, 145 (1972) ("[T]he criterion for differing treatment must bear some relevance to the object of the legislation."). Putting this principle into practice, the Second Circuit in a recent case stated that it was "obviou[s]" that "preventing voter confusion is a compelling [state interest]," but nonetheless concluded that the challenged statutory provision was "not necessary" to prevent such confusion. *See Green Party*, 389 F.3d at 421-22.

The *Green Party* analysis applies to this case for two reasons. First, there is simply *no* evidence that voter fraud has increased with the use of presidential ballots without a registration deadline, even though the presidential ballots have less protection against potential fraud than proposed EDR legislation does. *See* PPF ¶ 664 (Garfield Dep. at 33:20-35:2, Bromley Dep. at 197:15-17). Whatever fraud might occur in Connecticut, prior registration deadlines have little impact upon it. The absence of any connection between a registration deadline and the potential for fraud is underscored by the six EDR states' experiences. As Secretary Bysiewicz herself conceded, and the

Connecticut Office of Legislative Research has confirmed, those states saw no increased incidence of voter fraud in connection with EDR. PPF ¶ 616 (Ex. 19, Bysiewicz Test. at 9); Ex. 125, 4/11/02 OLR Rpt. at 1-2; *see also* PPF ¶¶ 618-19, 634 (Ex. 74, Kennedy Decl. ¶¶ 36-37; Meyer Dep. at 118:11-14; Ex. 73, Minnite Rpt. 1 at 12-13).

In addition, proposed EDR legislation has garnered a unanimous chorus of support from Connecticut's chief election enforcement officials. The Secretary of State, the Attorney General, and the Director of SEEC all have endorsed legislation that would adopt EDR. *See* PPF ¶¶ 416-18, 430 (Ex. 68, Bysiewicz Test. at 000455-57; Ex. 68, Garfield Test. at 000463; Ex. 26, Garfield Test. at 24-25; Ex. 1, Blumenthal Test. at 48). The State's position that registration deadlines are necessary to stave off fraud means that every one of these officials either lied or grossly derogated from the obligation of their public office in endorsing EDR proposals. This is simply not a credible position.³⁹

In addition, election officials do nothing of significance in the 14 days before an election that would deter or prevent fraud. The only significant measure that election officials could need 14 days to accomplish is ill-matched to these goals. The State's witnesses explained that registrars mail two rounds of notices, as required by Connecticut statute to verify new registrants' addresses. *See* PPF ¶ 242 (Tramontano Dep. at 98:8-11, 138: 5-12, Abbate Dep. at 209:14-215:5, Bramante Dep. at 69:25-70:1, 83:14-84:9).

³⁹ The Supreme Court's observation that the historical evidence of voter confusion is not needed to justify a state's restriction of ballot access does not mean that the State can ignore evidence that the presidential ballot has not led to an increase in opportunities for fraud. *See Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986). "[T]o prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies" is substantially more difficult than documenting the quantity of fraud detected. *Id.* at 195. The first involves complex polling surveys and contested notions of "voter confusion." Counting incidents of fraud and reviewing state officials' assessments of potential fraud risks is a more straightforward task. Moreover, Plaintiffs' focus narrowly on the presidential ballots, not the entire electoral framework of Connecticut, and argue only that all empirical and testimonial evidence demonstrates that the elimination of a registration deadline will not increase potential fraud.

As currently used, mailed notices of acceptance are largely ineffectual as fraud-detection devices. After the registration cut-off, initial notices are not mailed in a timely fashion, as Connecticut law mandates, and consequently not all undeliverable notices are received back before the election. There is thus no guarantee that persons who gave potentially incorrect addresses will be identified before the election, let alone that the second notice will be mailed out and received back as undeliverable before the election. *See supra*, at 34-35. Registrars also continue to receive new registrations, including cards delayed in the mail and “matured rights” voters, up to the day before the election, and accept all such applications that are facially valid. PPF ¶¶ 248-49, 255 (Bromley Dep. at 80:2-8, 84:23-85:3, 85:19-86:6, 86:7-97:4; Ex. 25, 2004 Election Calendar at 002107). For these newly registering voters, like voters in a primary and voters whose registration is changed on Election Day, there is no opportunity to verify their mailing address.

Further, the return of a mailed notice as undeliverable is a highly inaccurate proxy for fraud: It is both grossly underinclusive and overinclusive. Mailings cannot identify fraud in which a person gives a functional, but improper, address, such as a business address. It is overinclusive because there are many reasons a card may be returned as undeliverable that are unrelated to fraud. PPF ¶ 818 (Tramontano Dep. at 119:17-24; Ex. 74, Kennedy Decl ¶ 33). Finally, to the extent a handful of registrars – indeed, the State identifies only two, *see supra*, at 34, n. 25 – make follow-up calls to confirm addresses, those calls are unlikely to yield evidence of fraud because registrars query only “the spelling of [a person’s] name, their last addresses,” and accept affirmative responses without any further inquiry. PPF ¶¶ 815-16 (Tramontano Dep. at 87:17-19). With new EDR legislation, by contrast, a system of mailed notices could be made more effective.

In summary, there is no evidence of a connection between a 14-day registration deadline and any potential increase in voter fraud. The State's burden of justification, therefore cannot be satisfied.

c. The State Has Numerous Less Burdensome Means of Deterring and Preventing Fraud

The State has ample less restrictive means to deter and prevent potential voter fraud than a 14-day registration deadline. The presidential ballot procedure, indeed, provides for no prior registration, but has not generated an increase in proven fraud. Indeed, Connecticut's legislature already has identified ways in which any potential fraud can be deterred and prevented without a burdensome registration deadline. EDR States such as Wisconsin, moreover, provide a rich menu of options for deterring and preventing fraud without imposing burdensome registration deadlines. *See supra*, at 26-30. In addition, Connecticut's existing resources, especially its statewide registration database, supply additional resources to provide comfort for those concerned with potential fraud.

The best evidence of the manifold less burdensome alternatives to a 14-day registration deadline comes from the EDR legislation proposed, and in one case enacted, by Connecticut's elected representatives. Two alternatives to the 14-day registration deadline merit special emphasis. First, Public Act 03-204, which was passed by the legislature but vetoed by former Governor Rowland, contained stringent affirmation and photographic identification requirements. *See* PPF ¶ 402 (Ex. 66, P.A. 03-204); *supra* at 23-24. Notably, versions of this bill were supported by the Secretary of the State, the Executive Director of SEEC, and the Attorney General. *See* PPF ¶¶ 416-18, 430 (Ex. 68, Bysiewicz Test. at 000455-57; Ex. 68, Garfield Test. at 000463; Ex. 26, Garfield Test. at

24-25; Ex. 1, Blumenthal Test. at 48). Second, a bill in the present legislative session would institute a system of conditional ballots that are verified (by mailed notices and the database) after an election before they can be counted. PPF ¶ 437 (Ex. 61, sH.B. 6669(29)(1)).

Such mechanisms are merely illustrative of the array of means at the State's disposal in lieu of a burdensome and ineffectual 14-day registration deadline; EDR states' procedures furnish more ways in which orderly and fair elections can be ensured. The best evidence that these measures work derives from states that have put similar safeguards into practice without increased incidents of registration-related voter fraud. *See* PPF ¶ 616 (Ex. 19, Bysiewicz Test. at 9); Ex. 125, 4/11/02 OLR Rpt. at 1-2; *see also* PPF ¶¶ 618-19, 634 (Ex. 74, Kennedy Decl. ¶¶ 36-37; Meyer Dep. at 118:11-14; Ex. 73, Minnite Rpt. 1 at 12-13).

The State nonetheless resists the proposed EDR bills and the EDR states' experiences as evidence that less restrictive alternatives than the 14-day registration deadline exist, trading on the inevitable difficulty of proving a negative. The State, however, cannot satisfy its burden of justification with mere phantoms. Confronted with a "familiar parade of dreadfuls" concerning hypothetical fraud if petition circulators in Colorado were not required to be registered voters, the Supreme Court firmly rejected such speculation as "undue" and "imaginary," and invoked the following "wise counsel: 'Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.'" *Buckley*, 525 U.S. at 194, n. 16 (quoting Bork, *The Tempting of America* 169 (1990)).

Even at present, the State also has a gamut of criminal statutes to apply to the same end. PPF ¶¶ 804-07 (Conn. Gen. Stat. §§ 9-8, 9-537, 9-360, 9-232a, 53a-35, 53a-41(4); 53a-156); *cf. Dunn*, 405 U.S. at 353 (striking down a durational residency because Tennessee “has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared”); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 830 (2000) (Thomas, J., concurring) (“The ‘starch’ in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government.”) (citation omitted).

The State also maintains and operates a statewide registration database, which can perform real-time searches and verify information against the DMV database. *See* PPF ¶¶ 735, 762 (Ex. 96, Bromley Mem. at BCJ 00316-17; Bromley Dep. at 120:9-19, 185:23-186:17; Ex. 105, Womack Email at 002981); *supra*, at 30-34. That database has the capacity to handle the traffic in searches and registrations that new registration on Election Day would create. *See* PPF ¶ 798 (Mason Dep. at 141:17-22). And, as the State’s own witnesses have testified, whatever “glitch” in the system resulted in October 2004 from ill-timed activity by the State’s own Department of Information Technology has been resolved. *See* PPF ¶¶ 779, 783 (Ex. 1, Bysiewicz Test. at 3-4; Ex. 21, Bysiewicz Test.; Bromley Dep. at 46:25-7, 48:8-21; 46:20-24; Mason Dep. at 168:2-3, 168:15-20, 169:19-25).

The State argues that Plaintiffs seek the “*implementation* of state-of-the-art technology.” DRCL ¶ 28 (emphasis added). This distorts Plaintiffs’ arguments and twists the facts beyond recognition. The State’s own Rule 30(b)(6) witness Steve Mason testified that the database already has capacity to support implementation of EDR. *See*

PPF ¶ 798 (Mason Dep. at 141:17-22). The State simply errs in asserting that Plaintiffs’ contend that “*adoption* of technology is constitutionally required.” DRCL ¶ 28 (emphasis added). To the contrary, Plaintiffs argue that the State *already* has the necessary technology to facilitate less restrictive alternatives to a 14-day registration deadline, that the database has the capacity in particular to aid registration on Election Day, and that past glitches, by the State’s admission, present no hurdle.

Sound precedent squarely supports Plaintiffs’ position. In *Schulz v. Williams*, a challenge to a ballot-access rule, the Second Circuit Court of Appeals recognized that a technology that had not been implemented in New York—a statewide computer database—could have rendered the challenged ballot-access rule “obsolete.” 44 F.3d at 59. In view of the “slight burden upon the plaintiffs’ rights,” the Court declined to order New York “to expend both the money and the human and other resources” on the database. *Id.* at 57, 59. The Court emphasized that “neither the plaintiffs, their witnesses, not the district court contends that the State has the ... capacity at this time.” *Id.* at 59. Unlike *Schulz*, Plaintiffs here challenge a rule that *substantially* burdens constitutional rights. And, in any event, a different result is warranted when the relevant technology already is in place. Six years after *Schulz*, a similar New York ballot access rule was challenged again. In the intervening time, New York had implemented a statewide computer database. *See Molinari*, 82 F. Supp. 2d at 72. Applying *Schulz*’s teaching that new technology “changes the calculus,” the *Molinari* Court found “no rational, much less compelling reason” for keeping a practice that imposed even a slight burden on fundamental rights. *Id.* at 73 (citation omitted). Like *Molinari*, this case involves a situation where the necessary technology exists.

In short, the State cannot deny the plethora of present and future mechanisms of fraud deterrence and prevention that it has at its disposal. These methods range from the statewide database presently up and running, to a gamut of new anti-fraud measures embodied in proposed EDR legislation, many of which have been tried and tested in other states.

d. Speculative and Marginal Administrative Costs are No Justification for Abrogating Constitutional Rights

Some of the State's witnesses have invoked the specter of administrative costs as a ground for resisting any change to the 14-day registration deadline. Federal courts, however, consistently have rejected states' attempts to invoke cost and staffing burdens justification for the abrogation of constitutional rights. As the Supreme Court has explained, "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State." *Carrington v. Rash*, 380 U.S. 89, 96 (1965); *Dunn*, 405 U.S. at 351 (same); *see also Young*, 7 Cal. 3d at 24-25 (rejecting state's reliance on "mechanical requirements" of election administration to justify a 54-day deadline on registration).

This skepticism is evident in constitutional challenges to election regulations. When Connecticut raised a cost argument in a 1986 challenge to rules for party primaries, the Supreme Court flatly rejected the argument: "[T]he possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing [plaintiffs'] First Amendment rights." *Tashjian*, 479 U.S. at 218. In *Tashjian*, the Supreme Court struck down Connecticut's closed primary law even though its ruling meant that "[c]osts of administration would ... increase Additional voting machines, poll workers, and ballot materials would all be necessary" *Ibid*. Nevertheless, it

emphasized that these costs could not vindicate the State's continuing abrogation of electors' constitutional entitlements. *Ibid.*; accord *Patriot Party of Allegheny County v. Allegheny County Dep't of Elections*, 95 F.3d 253, 266 (3d Cir. 1996).⁴⁰

In any event, assertions of administrative hurdles by some of the State's witnesses are speculative and marginal. At an initial matter, EDR can be implemented while preserving a bar on registration for two weeks before the election. As those witnesses who expressed concerns about administrative details in terms of staffing, pay, and training conceded: a mere week of training is needed to familiarize staff with the CVR database, and only two part-time workers, paid between \$8.50 and \$10.50 per hour for one or two days, would be needed for EDR. PPF ¶¶ 826, 828 (Ex. 1, Abbate Test. at 78; Abbate Dep. at 62:19-64:15; Bramante Dep. at 31:5-9; Tramontano Dep. at 160:7-9); *see supra*, at 37. Registrars' need to hire new staff would be reduced because local election staff currently tasked with managing the presidential ballot process could be shifted to handling new registrations on Election Day, and because town clerks are statutorily able to assist with registration. In short, the State has failed to produce *any* evidence that administrative problems would prevent less burdensome alternatives to the registration deadline.

* * *

⁴⁰ Indeed, the State's arguments based on EDR's cost and administrative burdens prove too much. Vindication of *any* constitutional right requires governmental action and hence expenditure. *See* Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* 48-58 (1999). Inflated estimates of cost can always be deployed against asserted constitutional rights.

As one of the State's witnesses candidly conceded, the goal of the 14-day deadline is to ensure that only "informed" citizens vote. Tramontano Dep. at 197; *cf.* Ex. 19 Mulhall Test. at 153 (expressing fear that those who are "not quality voters" will be able to vote without a registration deadline). Tramontano echoed one key historical justification for registration deadlines – the elimination of "undesirable" voters from the franchise. Keyssar Rpt. at 2. Citizens not already engaged with the political process are disabled by the State's demand that they take the decision to participate in politics even before information about and campaigning for the election have begun in earnest. Thus, tens of thousands are unconstitutionally barred from voting as "undesirable" or not "informed."

CONCLUSION

For the aforementioned reasons, Plaintiffs seek a declaration from this Court finding that failure to permit Election Day Registration is unconstitutional; providing the legislature and governor with a window of opportunity to replace the registration deadline with an Election Day Registration system that is consistent with this Court's findings and with the Constitution; and, in the absence of such action by the Legislature and Governor, enjoining the State's use of a deadline for registration prior to Election Day unless it also provides for Election Day Registration.

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