

RENEE STEINHAGEN
Atty No. 03869-1989
New Jersey Appleseed Public Interest Law Center
50 Park Place, Room 1025
Newark, New Jersey 07102
973-735-0523

ALEXIS KARTERON*
Rutgers Constitutional Rights Clinic
Center for Law & Justice
123 Washington Street
Newark, New Jersey 07102
**admission pending pursuant to R.1:21-3(c)*

EDWARD BAROCAS
ACLU of New Jersey Foundation
89 Market Street, 7th Floor
Newark, New Jersey 07102

RUTGERS UNIVERSITY STUDENT
ASSEMBLY (RUSA), MATTHEW
CORDEIRO, GABRIELA AGATA
GRYZBOWSKI, BETH ROSE BRESLAW,
EDWARD JAMES VASCONCELLOS, III,
BON-JIN KU, ANNALEE SWITEK,
LATINO LEADERSHIP ALLIANCE OF
NEW JERSEY (LLANJ), NEW JERSEY
CITIZEN ACTION (NJCA), and THE
AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY (ACLU-NJ),

Plaintiffs-Petitioners,

v.

MIDDLESEX COUNTY BOARD OF
ELECTIONS AND DANIEL FRANKEL,
COMMISSIONER OF REGISTRATIONS
OF MIDDLESEX COUNTY,

Defendants-Respondents.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 070844

ON PETITION FOR CERIFICATION OF
FINAL JUDGMENT OF SUPERIOR
COURT OF NEW JERSEY, APPELLATE
DIVISION

APP. DIV. NO. A- 4318-14T2

Sat Below:

MITCHEL E. OSTRER, J.A.D.

MICHAEL J. HAAS, J.A.D.

THOMAS V. MANAHAN, J.A.D.

CIVIL ACTION

PETITION FOR CERTIFICATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
QUESTIONS PRESENTED	2
STATEMENT OF FACTS	2
REASONS TO GRANT THE PETITION/COMMENTS ON THE APPELLATE DIVISION'S RULING	6
I. THERE IS A SUBSTANTIAL CONSTITUTIONAL QUESTION OF WHETHER STRICT SCRUTINY OR ANOTHER FORM OF HEIGHTENED SCRUTINY IS THE APPROPRIATE STANDARD OF REVIEW FOR VOTING RIGHTS CLAIMS UNDER THE NEW JERSEY CONSTITUTION	6
II. THE APPELLATE DIVISION ERRONEOUSLY RESOLVED DISPUTED QUESTIONS OF FACT REGARDING THE BURDEN THAT ADVANCE REGISTRATION PLACES ON VOTERS AND THE LOGISTICS OF ELECTION DAY REGISTRATION.	12
A. The burden on eligible voters.....	13
B. The State's capacity to process and verify registration applications submitted on Election Day	15
C. The impact of Election Day Registration on the integrity of elections.....	19
CONCLUSION	20

TABLE OF AUTHORITIES

Cases

<u>ACORN v. Bysiewicz</u> , 413 <u>F. Supp. 2d</u> 119 (D. Conn. 2005) ...	10, 20
<u>Afran v. Cty. of Somerset</u> , 244 <u>N.J. Super.</u> 229 (App. Div. 1990)	11
<u>Asbury Park Press, Inc. v. Woolley</u> , 33 <u>N.J.</u> 1 (1960)	8
<u>Brill v. Guardian Life Ins. Co. of Am.</u> , 142 <u>N.J.</u> 520 (1995) ...	12
<u>Burdick v. Takushi</u> , 504 <u>U.S.</u> 428 (1992)	6, 10
<u>Diaz v. Cobb</u> , 541 <u>F. Supp. 2d</u> 1319 (S.D. Fla. 2008)	10, 20
<u>Gangemi v. Rosengard</u> , 44 <u>N.J.</u> 166 (1965)	8
<u>Greenberg v. Kimmelman</u> , 99 <u>N.J.</u> 552 (1985)	9
<u>In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp.</u> , 331 <u>N.J. Super.</u> 31 (App. Div. 2000).....	11
<u>In re Att’y Gen.’s “Directive on Exit Polling: Media & Non- Partisan Pub. Interest Grps.”</u> , 200 <u>N.J.</u> 283 (2009).....	7
<u>N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp.</u> , 138 <u>N.J.</u> 326 (1994).....	9
<u>Right to Choose v. Byrne</u> , 91 <u>N.J.</u> 287 (1982)	10
<u>Rodriguez v. Popular Democratic Party</u> , 457 <u>U.S.</u> 1 (1982)	11
<u>Sojourner A. v. N.J. Dep’t of Human Servs.</u> , 177 <u>N.J.</u> 318 (2003) 9	
<u>State v. Hempele</u> , 120 <u>N.J.</u> 182 (1990)	7
<u>State v. Hunt</u> , 91 <u>N.J.</u> 338 (1982)	10
<u>State v. Novembrino</u> , 105 <u>N.J.</u> 95 (1987)	9
<u>Taxpayers Ass’n of Weymouth Twp. v. Weymouth Twp.</u> , 80 <u>N.J.</u> 6 (1976).....	9
<u>Worden v. Mercer Cty. Bd. of Elec.</u> , 61 <u>N.J.</u> 325 (1972)	8, 11

Statutes

<u>N.J. Const.</u> Art. II, § 1, ¶ 3(a)	6, 10
<u>N.J.S.A.</u> 19:31-6.3(b)	6
<u>N.J.S.A.</u> 19:31-6.5(a) (1)	20

STATEMENT OF THE CASE

This case, in which disenfranchised voters and community organizations challenge the constitutionality of New Jersey's advance voter registration requirement, presents this Court with a historic opportunity to ensure that the right to vote receives the robust protection it deserves. Unlike the U.S. Constitution, the New Jersey Constitution grants an affirmative right to vote. As such, the Appellate Division committed serious error when it imported the sliding scale standard of review for federal constitutional claims concerning voting rights. Instead, in accordance with this Court's long history of extending vigorous protection to fundamental rights protected by the State Constitution, heightened scrutiny should apply to claims alleging unnecessary barriers to the franchise.

The Appellate Division also disregarded basic tenets of summary judgment law in concluding that the advance registration requirement does not erect an unjustifiable restriction on the right to vote in light of technology employed by the State—the State Voter Registration System ("SVRS")—that allows the State to verify the eligibility of new voters who register on Election Day. It excused the State from presenting any evidence regarding its justifications for the advance registration requirement, and despite the absence of evidence, resolved factual issues in the State's favor. Specifically, it reached unsupported conclusions

regarding the burden placed on voters by the advance registration requirement, the State's capacity to process voter registration applications, and the supposed link between advance registration and the integrity of an election.

Accordingly, this Court must act to repair the serious damage done by the court below to New Jerseyans's right to vote. The public importance of access to the franchise cannot be overstated.

QUESTIONS PRESENTED

1. Whether the appropriate standard of review for claims alleging violations of the right to vote granted by the New Jersey Constitution is strict scrutiny or some other form of heightened scrutiny.
2. Whether the State's advance voter registration requirement imposes more than a minimal burden on eligible voters.
3. Whether the Appellate Division erred in its affirmance of summary judgment by resolving, without factual support, questions regarding the State's capacity to process new voter registration applications, and the link between advance registration and the integrity of elections.

STATEMENT OF FACTS

The New Jersey Constitution extends an affirmative right to vote to American citizens who are at least 18 years old by Election Day and have resided in New Jersey for at least 30 days

prior to the election. N.J. Const. Art. II, § 1, ¶ 3(a). In addition, New Jersey law requires eligible voters to register at least 21 days before an election. N.J.S.A. 19:31-6.3(b). Thousands of those voters, particularly mobile voters, young voters, and those whose interest in a pending election peaks shortly before the election, are unable to have their ballot counted for failure to comply with the advance registration requirement. Pls.' Br. at 40-43. In addition, this requirement effectively prohibits certain individuals who become eligible to vote after the registration deadline, such as recently naturalized citizens and persons recently released from parole, probation, and prison, from exercising their right to vote because the voter registration form requires those individuals to affirm that they are eligible to vote at the time they complete the application, not on Election Day. Pa428.

Since 2007, New Jersey has had a fully functional SVRS in place. Pa288-89 (20:25-21:6). The SVRS allows counties to synchronize data and check voter information against this database when processing registration forms. Pa292-93 (34:21-35:2); Pa333 (22:16-23:19). The SVRS stores identification information, such as name, age, and address, as well as voting history for all voters in the state. Pa333 (22:16-23:9). When a new voter registers, the SVRS electronically verifies their eligibility to vote by cross-referencing the information

provided by the voter against numerous government databases, such as that of the Motor Vehicle Commission. Pa360 (15:20-16:12).

On Election Day, voters who do not appear on the voter rolls may fill out provisional ballots. Pa373 (65:16-19); Pa430. If the voter has not previously registered, the affirmation form attached to the provisional ballot serves as a registration application permitting the applicant to vote in the next election. Pa367 (41:11-22); Pa376 (77:11-79:3). Like all registration applications, those affirmation statements are verified through the SVRS. Pa365 (35:19-25). The Appellate Court relied on the deposition of Linda Pino, Chief Clerk of the Board of Elections, when concluding that the counties would not have the capacity to timely process additional provisional ballots that may result because of the availability of Election Day registration. Ex. 2 at 6-7. However her testimony indicates that she had no idea how long it takes to process a provisional ballot. Pa360 (14:19-15:2). Rather, Appellants and the State agreed that the SVRS has the capacity to verify information instantaneously and the number of people who may input information into the SVRS at any one time is unlimited. Pa98 (¶¶ 12, 13); Pa122 (¶¶ 12, 13).

The full procedural history of this matter is set forth in the opinion of the Appellate Division. Ex. 2 at 3-7.¹ Briefly stated, the Complaint was filed on April 19, 2011, and Defendants answered on May 27, 2011. Pa34; Pa88. The court granted a Motion to Amend the Complaint in January 2013. Pa71. On March 5, 2013, Plaintiffs filed a Motion for Summary Judgment, and Defendants cross-moved to dismiss. On December 11, 2013, the Hon. Heidi Willis Carrier denied Plaintiffs' motion and granted Defendants' cross-motion, converting the latter into a summary judgment motion.

The Appellate Division heard Plaintiffs' appeal of that Order in 2014, and reversed the trial court in a published decision. Pa632-53. The court reversed and remanded because the trial court failed to make the necessary findings of fact to support its judgment. Ibid.

On remand, without additional discovery, the parties again cross-moved for summary judgment, and the trial court granted Defendants' motion on April 14, 2015. Pa667. Plaintiffs appealed and the Appellate Division rendered its decision on July 1, 2016, affirming the decision below. Ex. 2.

Plaintiffs filed a Notice of Petition for Certification with this Court on July 20, 2016, Ex. 1; and, because this case

¹ The Appellate Division's decision below is annexed as Exhibit 2. Citations to it and other exhibits will be cited as "Ex. ____."

raises substantial constitutional questions, they also filed a Notice of Appeal on August 12, 2016. Ex. 3. This Court also granted Appellants motion for an extension to file this petition on September 12, 2016.

**REASONS TO GRANT THE PETITION/
COMMENTS ON THE APPELLATE DIVISION'S RULING**

I. THERE IS A SUBSTANTIAL CONSTITUTIONAL QUESTION OF WHETHER STRICT SCRUTINY OR ANOTHER FORM OF HEIGHTENED SCRUTINY IS THE APPROPRIATE STANDARD OF REVIEW FOR VOTING RIGHTS CLAIMS UNDER THE NEW JERSEY CONSTITUTION.

This case presents this Court with the opportunity to clarify the appropriate standard of review for claims alleging violations of the right to vote enshrined in the New Jersey Constitution.² Here, the Appellate Division refused to apply strict scrutiny to Plaintiffs' state constitutional claim, and instead imported the sliding scale test used by the U.S. Supreme Court in Burdick v. Takushi, 504 U.S. 428 (1992), a case concerning federal constitutional claims. In doing so, it applied almost no scrutiny to a serious voting rights claim, and, more troublingly, broke with this Court's long record of

² The New Jersey Constitution states:

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

N.J. Const. art. II, § 1, ¶ 3(a).

applying heightened judicial scrutiny to an alleged violation of a fundamental right granted by the New Jersey Constitution.

Even when there is some overlap between the rights protected by the United States and New Jersey Constitutions, this Court has consistently exercised its independent judgment about the scope and meaning of the rights enshrined in the New Jersey Constitution. It has described its approach as follows:

[A]lthough th[e Supreme] Court may be a polestar that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine. In interpreting the New Jersey Constitution, we must look in front of us as well as above us. For most of our country's history, the primary source of protection of individual rights has been state constitutions.

State v. Hempele, 120 N.J. 182, 196 (1990). In this matter, this Court again must ensure that a right granted by the New Jersey Constitution receives robust protection.

Unlike the U.S. Constitution, the New Jersey Constitution affirmatively grants its citizens the right to vote. See In re Att'y Gen.'s "Directive on Exit Polling: Media & Non-Partisan Pub. Interest Grps.", 200 N.J. 283, 302 (2009) ("The right to vote holds an exalted place in our State Constitution. Notably, our State Constitution devotes an entire article enumerating the rights and duties associated with elections and suffrage." (internal citation omitted)). This Court has recognized that the

state constitutional right to vote is "fundamental" more than once. See, e.g., Worden v. Mercer Cty. Bd. of Elec., 61 N.J. 325, 333 (1972) ("[T]he right to vote is a very fundamental one"); Gangemi v. Rosengard, 44 N.J. 166, 170 (1965) ("[The right to vote] is the citizen's sword and shield. Other rights . . . are illusory if the right to vote is undermined. It is the keystone of a truly democratic society." (internal citation and quotation marks omitted)); Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 11 (1960) ("No man can boast of a higher privilege than the right granted to the citizens of our State and Nation of equal suffrage and thereby to equal representation in the making of the laws of the land.").

Given the "exalted place" of the right to vote in the New Jersey Constitution, this Court has previously applied strict scrutiny to voting rights claims and Plaintiffs have urged its use here. See Worden, supra, 61 N.J. at 333 ("[S]ince the right to vote is a very fundamental one, restrictions thereon may be imposed only to the extent necessary to promote 'a compelling state interest.'" (internal citation omitted)). The use of heightened scrutiny accords with this Court's admonition that for state constitutional claims, the standard of review turns in part on the importance of the right at issue, not just the burden imposed by the restriction on that right. See e.g., Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 43

(1976) (holding that "where an important personal right is affected by governmental action, this Court often requires the public authority to demonstrate a greater 'public need' than is traditionally required in construing the federal constitution"); Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985) (observing that for state constitutional claims, this Court "ha[s] considered the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction"). Under this form of heightened scrutiny, the burden rests on the State to prove the need for the challenged restriction. See Sojourner A. v. N.J. Dep't of Human Servs., 177 N.J. 318, 333 (2003) ("[I]f the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial." (internal quotation marks omitted)).

Applying heightened scrutiny to state constitutional voting rights claims conforms to this Court's long tradition of ensuring that the rights granted by the New Jersey Constitution are accorded robust protection -- regardless of the standard applied to analogous federal constitutional claims. See, e.g., N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp., 138 N.J. 326 (1994) (explaining that state constitutional right of free expression is affirmative and broader than the First Amendment); State v. Novembrino, 105 N.J. 95 (1987)

(refusing to recognize good-faith exception to the Fourth Amendment's warrant requirement under New Jersey Constitution's analogue); State v. Hunt, 91 N.J. 338 (1982) (holding that State Constitution's right of privacy extends to telephone billing records and refusing to follow United States Supreme Court's determination that Fourth Amendment does not protect); Right to Choose v. Byrne, 91 N.J. 287, 301 (1982) (applying higher standard of review than federal standard, in part because "where provisions of the federal and state Constitutions differ . . . we must determine whether a more expansive grant of rights is mandated by our state Constitution").

Here, the Appellate Division erroneously imported the Burdick sliding scale standard from the federal constitutional realm, reasoning that it was appropriate to do so because federal courts have used the Burdick standard when reviewing federal constitutional challenges to other states' advance registration schemes. See Ex. 2 at 14-15 (citing Diaz v. Cobb, 541 F. Supp. 2d 1319 (S.D. Fla. 2008); ACORN v. Bysiewicz, 413 F. Supp. 2d 119 (D. Conn. 2005)). This reasoning seriously misapprehends the court's role in evaluating state constitutional claims. As noted above, New Jersey courts must exercise their independent judgment to determine the standard of review for state constitutional claims -- regardless of similarities to federal cases. Here, blind importation of the

Burdick standard ignores that the New Jersey affirmatively grants the right to vote, while the U.S. Constitution does not. See Rodriguez v. Popular Democratic Party, 457 U.S. 1, 9 (1982) (noting that "the right to vote, per se, is not a constitutionally protected right," and "the [U.S.] Constitution 'does not confer the right of suffrage upon any one'").³

Finally, this Court should grant this petition to clarify the appropriate standard of review because the Appellate Division's decision has created a conflict with other voting rights decisions. See, e.g., In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp., 331 N.J. Super. 31, 38 (App. Div. 2000) (applying strict scrutiny to challenge to the voting rights of five residents of a psychiatric hospital); Afran v. Cty. of Somerset, 244 N.J. Super. 229, 231 (App. Div. 1990) (using strict scrutiny where voters were disenfranchised because they moved to a new county less than 30 days before an election, when intra-county movers would be permitted to vote). This Court should grant this petition to make clear that

³ The Appellate Division also declined to apply heightened scrutiny because it distinguished this case from Worden, where the plaintiffs challenged a bar on registration by college students in their school communities. It claimed that Worden "addressed regulations where similarly situated citizens were treated differently, resulting in the exclusion of a large number of otherwise eligible voters," Ex. 2 at 17, while the advance registration requirement applied to all. Ibid. This is a semantic distinction without a difference. In both cases, thousands of people who conform to the State Constitution's eligibility requirements are denied their right to vote.

heightened scrutiny is the appropriate standard for reviewing restrictions on the state constitutional right to vote.

II. THE APPELLATE DIVISION ERRONEOUSLY RESOLVED DISPUTED QUESTIONS OF FACT REGARDING THE BURDEN THAT ADVANCE REGISTRATION PLACES ON VOTERS AND THE LOGISTICS OF ELECTION DAY REGISTRATION.

The Appellate Division's decision below violated well-established principles of summary judgment law: that summary judgment is permitted only when there are no genuine issues of material fact, and that facts must be viewed in the light most favorable to the non-moving party—requiring that any inferences must be drawn in the non-moving party's favor Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Here, the Appellate Division ignored these tenets, and instead shifted the burden to the plaintiffs to "show[] that the [advance registration] statute's repugnancy to the Constitution is clear beyond a reasonable doubt," disenfranchising thousands of voters. Ex. 2 at 9 (internal quotation marks and citation omitted). Ultimately, the Appellate Division impermissibly resolved three issues in the State's favor despite the fact that the State did not provide factual support for those issues or the record was unclear: (1) whether the advanced nature of the registration requirement imposes more than a minimal burden on eligible voters; (2) whether the State has the capacity to process and verify new voter registration applications submitted

on Election Day in a timely manner; and (3) whether advance registration is necessary to ensure the integrity of the electoral process. Each is addressed below.

A. The burden on eligible voters.

The Appellate Division declared that the advance registration requirement "imposes no more than a minimal burden upon plaintiffs' right to vote," because citizens have "ample opportunities to register to vote" Ex. 2 at 18. (describing available registration methods). In support of this claim, it cited individual plaintiffs' certifications that they "were able to register to vote more than twenty-one days in advance of the election," id. at 19, reserving for a footnote the most salient fact: none were able to cast a ballot because they were not properly registered. Id. at 19 n.5.

These observations do not constitute a legal analysis, and most importantly, they ignore the actual burdens created by the advance registration requirement for thousands who ultimately are unable to vote because of it. Impacted citizens fall into two classes: (1) those for whom the inconvenience and attendant costs of procuring and submitting a registration application (i.e., travel to and from a post office, government office, or other location) results in their inability to register at least 21 days before an election, including mobile voters, young voters, and those whose interest in an election does not peak

until shortly before Election Day;⁴ and (2) those who become eligible to vote after the registration deadline, e.g., newly naturalized citizens and those released from parole, probation, or prison.

The burden created by the advance registration requirement is especially intolerable for aspiring voters in the second group. The Appellate Division mentioned such voters only in a footnote, asserting that they are similarly situated to citizens who "do not meet the durational residency or age requirements imposed by . . . our Constitution." Id. at 20 n.6. This is plainly incorrect. Newly naturalized citizens and individuals released from parole or probation within 21 days of an election meet all of the eligibility requirements in the State Constitution. Yet they are ultimately disenfranchised because the New Jersey voter registration application requires an applicant to swear or affirm—in the present tense, at the time the application is completed—that she is a U.S. citizen and not "on parole, probation or serving a sentence due to a conviction for an indictable offense under any federal or state laws." Pa428. This language contrasts with that concerning individuals who will turn 18 after the registration deadline but before the election. Ibid. ("I will be at least 18 years old on or before

⁴ The Plaintiffs' opening Appellate Brief describes these categories of voters in detail. See Pls.' Br. at 40-43.

the next election" (emphasis added)). The discrepancy between the statute cited in Judge Ostrer's concurring opinion, which should "allow citizens to register in advance as long as they will be eligible to vote on election day, even if they are not eligible to vote at the time that they register," Ex. 2, concurring opinion at 4, and the registration application's command that an applicant certify that she meets certain eligibility requirements at the time she signs an application signifies that registration opportunities are not, in fact, available to all New Jersey citizens who meet the State Constitution's eligibility requirements.

Whatever the reason citizens fail to satisfy the advance registration requirement, the ultimate consequence is deprivation of the right to vote guaranteed by the State Constitution. In concluding otherwise, the Appellate Division ignored the substantial evidence establishing that there are thousands of New Jerseyans who are unable to have their provisional ballots count simply because they missed the advance registration deadline, including some organizational plaintiffs' members. Pa44-45 (¶17); Pa188 (¶4); Pa366 (37: 4-13).

B. The State's capacity to process and verify registration applications submitted on Election Day.

The second set of issues that the Appellate Division erroneously resolved in the State's favor concerns the State's

processing and verification of new registration applications submitted on Election Day, in the form of provisional ballots.⁵ Plaintiffs have asserted that the SVRS verification process for such ballots could be accomplished within 24 hours. See Pls. Br. at 12-13; Pa637-38. Although the State never contested this claim, the Appellate Division found the State could not meet this standard, and "weeks would pass before the provisional ballots could be properly processed and verified," undermining "the public's confidence in the integrity of the electoral process." Ex. 2 at 23. It thus concluded: "The proofs before the court do not demonstrate that integrity can be preserved with election day registration." Id. at 7. In the same vein, it determined that the SVRS verification process was insufficient to verify a registrant's address and same-day registration would nullify the use of confirmation cards sent in the mail following registration. See N.J.S.A. 19:31-6.5(a)(1) (requiring confirmation by mail). This analysis turns the summary judgment standard on its head.

The Appellate Division erroneously placed the burden squarely on Plaintiffs and impermissibly drew significant

⁵ Plaintiffs have suggested that the affirmation statement provided with provisional ballots should continue to serve as registration applications for new voters, subject to the verification by the SVRS. The difference between Plaintiffs' proposal and the current practice is that such ballots would be counted for the election in which they were cast if the advance registration requirement were struck down.

inferences in the State's favor. Its conclusion that Plaintiffs' proposal is unworkable rested entirely on its interpretation of a single election official's deposition testimony regarding the amount of time it took the Middlesex County Board of Elections to process provisional ballots in 2008. Ex. 2 at 22-23 ("As the chief clerk of the county board of elections testified in her deposition, it is not possible to input all of the information contained in all of the provisional ballots within twenty-four hours."). But the official said nothing about what difficulties her office might encounter if Election Day Registration were available. Instead, she, like other election officials deposed by Plaintiffs, said multiple times that she could not say how much it would cost or how much time it would take to process additional provisional ballots.⁶ While the record is clear that it took the Middlesex County Board of Elections one week to

⁶ The cited official, Linda Pino, testified that she could not say how many provisional ballots her office could process in one day, how long it would take to input new voter registration applications into the SVRS, nor how many voter registration applications her staff could input in a single day. Pa360 (14:24-15:4); Pa367 (43:2-7). In the same vein, James Vokral, Administrator of the same board of elections testified that he did not know how many provisional ballots could be processed in a day. Pa394 (28:2-10) ("Q: Do you know, roughly, how many provisional ballots can be processed in a day by an employee? A: No. It depends upon the type of provisional ballot and what's-do we have to do research on the address, the residency, where they've come from. There's so many different aspects that could impact the time that we can't say for sure."). Carmen DiSimoni, the State's Deputy Director of Elections, testified that the state does not maintain or have information on how much it costs to process a provisional ballot. Pa310 (108:2-9).

process the 5,617 provisional ballots submitted during the 2008 general election, the record does not provide answers to the following critical questions: how many new registrations would require processing if Election Day registration ("EDR") were available,⁷ the amount of time it would take to process the ballots of such registrants, or the associated costs.

The Appellate Division similarly concluded that "there is no way to use the SVRS to immediately confirm the individual's current address without determining whether mail can be delivered to the voter at that address." Ex. 2 at 24. But the the SVRS does confirm an aspiring voter's address against other databases. Pa360 (15:20-16:12); Pa525-26 (¶¶ 5-6). While the use of confirmation cards may help to facilitate the ability of election officials to verify the addresses of voters whose cards are returned undeliverable, the record does not establish that the use of EDR would nullify the use of confirmation cards. The record is silent as to several crucial facts regarding the impact of EDR on the address verification process, e.g., the volume of confirmation cards that are returned to local boards

⁷ The Appellate Division stated that "Plaintiffs speculate that 'over 110,000 additional votes' would be cast if unregistered individuals could appear at polling places and cast provisional ballots." Ex. 2 at 23. This is incorrect. The plaintiffs simply stated that a two percent increase of additional voters in New Jersey would mean that an additional 110,000 New Jerseyans were able to vote. Pls.' Br. at 32. The plaintiffs never speculated as to the precise number of additional voters who would register to vote on Election Day if EDR were available.

of elections because the address certified by the voter and confirmed by the SVRS was not correct; how long the confirmation card return process takes when a card is undeliverable; and what steps, if any, local elections officials take when a confirmation card is returned. As such, the mere existence of the confirmation card process is insufficient to sustain the conclusion that the availability of EDR would undermine the integrity of the registration process. But that is the conclusion the Appellate Division reached.

C. The impact of EDR on the integrity of elections.

The Appellate Division also erroneously resolved factual questions concerning whether advance registration is necessary to ensure the integrity of the electoral process. The court asserted that the defendants "demonstrated" that the challenge process at the polls would be undermined without an advance registration requirement, and that election officials would not be able to plan adequately for elections, with the possible result of "disorder." Ex. 2 at 26. But Defendants "demonstrated" none of this, leaving the court to cite only statutory provisions regarding the conduct of elections, not any evidence of how they actually work. Ibid. The court therefore seriously erred by impermissibly drawing inferences in the State's favor and relying on speculation rather than evidence. Excusing the State from pleading or presenting factual evidence about its

justifications for advance registration is especially problematic given the constitutional questions at issue. Cf. Diaz, supra, 541 F. Supp. 2d at 1327-28 (concluding, following a five-day trial, that state had sufficiently proved that allowing changes to registration records after voter registration deadline would create chaos among election officials); ACORN, supra, 413 F. Supp. 2d at 135-36 (concluding, after multi-day trial, that because Connecticut did not have a functioning SVRS it would be difficult for the state to manage the increase in turnout due to EDR, which the Court found, based on expert testimony, would be close to one percent).

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Court grant this petition for certification to clarify the appropriate level of scrutiny for voting rights claims brought under the New Jersey Constitution and to correct the Appellate Division's errors in inappropriately resolving key issues without factual basis on a motion for summary judgment.

Respectfully submitted,



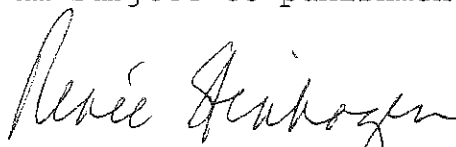
Renée Steinhagen, Esq.
NJ Appleseed PILC
50 Park Place, Room 1525
Newark, New Jersey 07102
973-735-0523

Dated: September 29, 2016

Counsel for Plaintiffs

CERTIFICATION

I certify that this petition presents a substantial question and is filed in good faith and not for purposes of delay. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Renée Steinhagen, Esq.
NJ Appleseed Public Interest Law Center
744 Broad Street, Room 1525
Newark, New Jersey 07102

Attorney for Plaintiffs

Dated: September 29, 2016