

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

LEAGUE OF WOMEN VOTERS OF NEW YORK  
STATE and NICHOLAS DINNERSTEIN,

Plaintiffs,

-against-

NEW YORK STATE BOARD OF ELECTIONS and  
BOARD OF ELECTIONS IN THE CITY OF NEW  
YORK,

Defendants.

Index No. 160342/2018

Hon. Laurence L. Love

Mot. Seq. No. TBD

**ORAL ARGUMENT  
REQUESTED**

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF A MOTION FOR  
PRELIMINARY INJUNCTION**

## TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT .....	1
STATEMENT OF FACTS .....	3
A. New York's Cutoff Law .....	3
B. Voter Registration Technology and Procedures in New York Have Improved Dramatically Since 1991 .....	4
C. Existing Registration and Voting Procedures Can Provide People who Register After the Voter Registration Cutoff an Opportunity to Vote.....	9
D. The Cutoff Law Suppresses Voter Registration Turnout and Decreases the Efficiency of Election Administration Compared to a 10-Day Cutoff.....	10
E. The Cutoff Law Has Exacerbated Historically Low New Voter Registration in 2020 and Will Continue to Do So Through November 2020.....	13
ARGUMENT.....	15
A. The Plaintiffs Are Likely to Succeed on the Merits Because the Cutoff Law Unnecessarily Disenfranchises Tens of Thousands of Voters Each Election Cycle And The Cutoff Law Does Not Pass Strict Scrutiny.....	16
1. The Cutoff Law Severely Burdens the Right to Vote.....	16
2. No Legitimate State Interest is Served by the Cutoff Law .....	19
3. Far Less Restrictive Alternatives to a 25-Day Registration Cutoff Are Available to Defendants.....	20
B. Tens of Thousands of New Yorkers Face the Irreparable Harm of Being Unable to Vote This November Due to the Cutoff Law .....	22
C. Extending the Right to Vote to Tens of Thousands of New Yorkers Outweighs any Additional Burden Faced by Defendants.....	25
CONCLUSION.....	27

## TABLE OF AUTHORITIES

## Page(s)

## CASES

<i>Alevy v. Downstate Med. Ctr.</i> , 39 N.Y.2d 326 (1976) .....	16, 20
<i>Allstate Ins. Co. v. Harvey Family Chiropractic</i> , 677 Fed. App'x. 718 (2d Cir. 2017).....	23
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	19
<i>Atkin v. Onondaga Cty. Bd. of Elections</i> , 30 N.Y.2d 401 (1972) .....	16
<i>Barbes Rest. Inc. v. ASRR Suzer 218, LLC</i> , 140 A.D.3d 430 (1st Dep't 2016) .....	25
<i>Burns v. Fortson</i> , 410 U.S. 686 (1973).....	19
<i>Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.</i> , 518 U.S. 727 (1996).....	20
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972).....	16, 17, 21
<i>Farmer v. D'Agostino Supermarkets</i> , 144 Misc.2d 631 (Sup. Ct. New York Co. 1989) .....	25
<i>Fla. Democratic Party v. Detzner</i> , 2016 U.S. Dist. LEXIS 143620 (N.D. Fla. Oct. 16, 2016) .....	26
<i>Ga. Coal. for People's Agenda, Inc. v. Kemp</i> , 347 F.Supp.3d 1251 (N.D. Ga. 2018).....	26
<i>Held v. Hall</i> , 190 Misc.2d 444 (Sup. Ct. Westchester Co. 2002).....	25
<i>Hopper v. Britt</i> , 203 N.Y. 144 (1911) .....	23
<i>People ex rel. Hotchkiss v Smith</i> , 206 NY 231 (1912) .....	23

<i>League of Women Voters of Fla. v. Browning</i> , 863 F. Supp. 2d 1155 (N.D. Fla. 2012).....	24
<i>League of Women Voters of Mo. v. Ashcroft</i> , 336 F. Supp. 3d 998 (W.D. Mo. 2018) .....	24
<i>League of Women Voters of New York State v. New York State Board of Elections</i> , Index No. 160342/2018 (Sup. Ct. New York Co. 2018) .....	23
<i>League of Women Voters of N.C. v. North Carolina</i> , 769 F.3d 224 (4th Cir. 2014) .....	23
<i>Lily Pond Lane Corp. v. Technicolor, Inc.</i> , 414 N.Y.S.2d 596 (Sup. Ct. New York Co. 1979) .....	24
<i>Marston v. Lewis</i> , 410 U.S. 679 (1973).....	19
<i>Nobu Next Door, LLC v. Fine Arts Hous., Inc.</i> , 4 N.Y.3d 839 (2005) .....	15
<i>Obama for Am. v. Husted</i> , 697 F.3d 423 (6th Cir. 2012) .....	23
<i>Phelan v. City of Buffalo</i> , 54 A.D.2d 262 (4th Dep’t 1976).....	17
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	17
<i>Matter of Rosenstock v. Scaringe</i> , 40 N.Y.2d 563 (1976) .....	16, 17
<i>People ex rel. Stapleton v Bell</i> , 119 N.Y. 175 (1889) .....	25
<i>Tucker v. Toia</i> , 54 A.D.2d 322 (4th Dep’t 1976).....	24
<i>UAH-Mayfair Mgmt. Grp. LLC v. Clark</i> , 177 A.D.3d 572 (1st Dep’t 2019) .....	15
<i>United States v. Georgia</i> , 892 F.Supp.2d 1367 (N.D. Ga. 2012) .....	26
<i>Matter of Walsh v. Katz</i> , 17 N.Y.3d 336 (2011) .....	19

<i>Williams v. Salerno</i> , 792 F.2d 323 (2d Cir. 1986).....	23
<i>Yang v. Kellner</i> , 2020 U.S. Dist. LEXIS 79331 (S.D.N.Y. May 5, 2020) .....	26
<i>Zoller v. HSBC Mtge. Comp. (USA)</i> , 135 A.D.3d 932 (2d Dep’t 2016) .....	15

## STATUTES

52 U.S.C. §§ 20901-21145 (2002).....	6
Me. Rev. Stat. tit. 21-A, §121-A.....	4
Minn. Stat. Ann. §201.054, 201.061 .....	4
N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.6.....	7
N.Y. Election Law (1975) § 153.....	4
N.Y. Election Law (2019)	
§ 1-104 (38).....	7
§ 3-102(14).....	26
§ 5-210 .....	3
§ 5-210(3).....	3, 4
§ 5-210(4).....	1, 21, 25
§ 5-211 .....	3
§ 5-212 .....	3
§ 8-302(3)(e)(i-ii).....	9, 21, 26
Wis. Stat. § 6.28.....	4

## RULES

CPLR § 6301.....	15
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## CONSTITUTIONAL PROVISIONS

N.Y. Const. (1867).....	3
N.Y. Const. Art. I § 1 .....	22
N.Y. Const. Art. II § 1 .....	22
N.Y. Const. Art. II § 5 .....	4

## OTHER AUTHORITIES

1991 Sess. Laws of N.Y. Ch. 90 (S. 4238-A).....	4
Board of Elections in the City of New York, FAQs, <a href="https://www.vote.nyc/page/faqs#q18">https://www.vote.nyc/page/faqs#q18</a> (last visited July 23, 2020) .....	9
Brian Schwartz, <i>George Floyd Protests Created a Surge in Voter Registrations, Groups Say</i> , (June 5, 2020), <a href="https://www.cnn.com/2020/06/05/george-floyd-protests-created-surge-in-voter-registrations-groups-say.html">https://www.cnn.com/2020/06/05/george-floyd-protests-created-surge-in-voter-registrations-groups-say.html</a> .....	18
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Commission on Presidential Debates, <a href="https://www.debates.org">https://www.debates.org</a> (last visited July 23, 2020) .....	15
The Editorial Board, “New York Voters Can Send Some Promising New Faces to Congress,” N.Y. Times, (June 12, 2020), <a href="https://www.nytimes.com/2020/06/12/opinion/new-york-congress-endorsements.html">https://www.nytimes.com/2020/06/12/opinion/new-york-congress-endorsements.html</a> .....	14
<i>Electronic Poll Books</i> , NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 25, 2019), <a href="https://www.ncsl.org/research/elections-and-campaigns/electronic-pollbooks.aspx">https://www.ncsl.org/research/elections-and-campaigns/electronic-pollbooks.aspx</a> .....	7
<i>Hearing on Voter Registration before the Joint Senate Standing Comm. on Elections and Assembly Standing Comm. on Election Law</i> (Mar. 13, 1984) .....	5, 19
James C. McKinley Jr., “Official Tally of Council Election Starts,” N.Y. TIMES (Sept. 23, 1991), <a href="https://www.nytimes.com/1991/09/23/nyregion/official-tally-of-council-election-starts.html">https://www.nytimes.com/1991/09/23/nyregion/official-tally-of-council-election-starts.html</a> .....	5
Jesse McKinley and Jeffery C. Mays, “‘The State Kind of Dumped This On Us’: Early Voting Stirs Anxiety in N.Y.,” N.Y. TIMES (Oct. 24, 2019) <a href="https://www.nytimes.com/2019/10/24/nyregion/early-voting-ny-election.html">https://www.nytimes.com/2019/10/24/nyregion/early-voting-ny-election.html</a> .....	7
Law No. 2017/238, Section 1 (Amendment to Chapter 46 of the New York City charter, §1057-f).....	8
<i>Mem. from Pat Murray, Deputy Counsel of the State Board of Elections State of New York to County Board Commissioners</i> (Jan. 28, 2003), <a href="https://www.elections.ny.gov/NYSBOE/hava/sum_hava_fed_leg.pdf">https://www.elections.ny.gov/NYSBOE/hava/sum_hava_fed_leg.pdf</a> .....	6
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Problems Relating to Home Rule and Local Government, 1938 Rep. of N.Y. Const. Convention Comm., Art. II, Sec. 4.....	3
S.1048, 2019-2020 Reg. Session (N.Y. 2019).....	22
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Plaintiffs Nicholas Dinnerstein and the League of Women Voters of New York State (the “League”) respectfully submit this Memorandum of Law in support of their motion for a preliminary injunction to enjoin the New York State Board of Elections (the “State Board”) and New York City Board of Elections (the “City Board”) from enforcing the provisions of the New York Election Law that require voters to register at least 25 days before the November 2020 election in order to exercise their right to vote (the “Cutoff Law”).

### **PRELIMINARY STATEMENT**

New York’s Cutoff Law was an anachronistic form of disenfranchisement when this case was filed 20 months ago. In 2020, with new voter registrations at shockingly low levels and a critical election rapidly approaching, enjoining enforcement of the obsolete Cutoff Law is a constitutional imperative. The relief Plaintiffs seek is modest, but essential: enjoining the enforcement of the Cutoff Law and reverting to the 10-day deadline set forth in the New York State Constitution (“State Constitution”). This will allow thousands of eligible New York voters who would otherwise be blocked from casting a ballot to vote in November’s election.

Since at least 1894, the State Constitution has said that eligible citizens who register just 10 days before an election may lawfully vote in that contest. Since 1991, however, the Cutoff Law has prevented most New Yorkers who register within 25 days of an election from participating in that election. While the vast majority of New Yorkers are subject to the Cutoff Law, certain classes of voters are exempt, such as individuals honorably discharged from the military before the 10-day Constitutional cutoff. N.Y. Election Law § 5-210(4). When enacted 29 years ago, officials justified the Cutoff Law by pointing to technological limitations and the need to print voter registration “buff cards” weeks in advance. But those days are long gone. The “buff cards” of the past have been replaced by computerized systems. What took weeks in 1991 now happens in an instant. Indeed, a large and growing number of states allow eligible citizens to register and cast a



ballot on election day. Still, New York's Cutoff Law remains unchanged, and unnecessarily disenfranchises many thousands of otherwise eligible New Yorkers each election cycle.

The Cutoff Law's suppressive impact is particularly grave because it kicks in precisely when public interest in elections is at its peak. In the 25 days before an election, voters are galvanized, campaigns ramp up their outreach, media coverage peaks, candidate debates and forums are held, and key endorsements are published. The evidence is clear: voters who register close to election day are more likely to vote than those who register earlier in the election cycle. The Cutoff Law depresses voter turnout by disenfranchising thousands of highly likely voters in every election.

The events of June 2020 bears this out: while the COVID-19 pandemic caused voter registrations to plummet, recent protests for racial justice and police accountability sparked a critical opportunity for new voter registration efforts—particularly among young and minority voters. But the first reported protests in New York were on Thursday, May 28—one day before the May 29 voter registration cutoff. They then escalated significantly on May 30, and continued growing for at least a week *after* the cutoff. New Yorkers moved to register by the largest civic demonstrations in recent history could not hold elected officials accountable at the ballot box in those elections.

That massive disenfranchisement will repeat this November on an even larger scale than in prior years. A steep decline in voter registrations during the 2020 primary season—at least 100,000 fewer than in the same period in 2016—means that the number of unregistered-but-eligible and interested voters heading into the November election will be unusually large compared to recent years. More eligible New York voters than ever will join the tens of thousands of voters who have been already disenfranchised by the outdated Cutoff Law.

Unlike the U.S. Constitution, the State Constitution expressly protects the right to vote, including in the first sentence of its bill of rights. At a time when the federal courts have proved aloof to voting rights—even forcing voters to brave dangerous conditions to cast ballots during the pandemic—New York’s courts ought to show New Yorkers that its State Constitution will protect them from voter suppression.

## STATEMENT OF FACTS

### A. New York’s Cutoff Law

On November 3, 2020, New Yorkers will vote for the President of the United States, members of the U.S. House of Representatives, and every seat in both chambers of the state legislature. Any qualified New Yorker wishing to vote in this election must register no later than 25 days before Election Day pursuant to the state’s Cutoff Law. N.Y. Election Law § 5-210. Registration applications mailed to New York Boards of Elections must be postmarked 25 days before an election for an applicant to vote, and the Board of Elections must receive the application no later than 20 days before the election. N.Y. Election Law § 5-210(3). If a New Yorker applies to a state agency like the Department of Motor Vehicles (“DMV”), the applicant’s forms must likewise be received 25 days before the election for the applicant to be able to vote. N.Y. Election Law § 5-212. The agency must then transmit applications to the appropriate Board of Elections in a manner that ensures its receipt no later than 20 days prior to the election. N.Y. Election Law § 5-211.

The Cutoff Law has been set at the current deadline since 1991, when the State Legislature shortened it from 30 to 25 days.<sup>1</sup> *See* Salomon Aff. Ex. B, Mem. to the Governor Regarding Senate

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<sup>1</sup> New York first introduced a registration deadline in the 1867 Constitution, providing that “[t]he Legislature shall provide for a registry of citizens entitled to vote in each election district, to be completed at least four days before each general and special election.” Ex. A to the Aff. of Claudia T. Salomon in Support of Mot. for Preliminary Injunction, dated July 28, 2020 (“Salomon Aff.”), Problems Relating to Home Rule and Local Government, 1938 Rep. of N.Y.

Bill 4238-A 1 (May 3, 1991); *see also* Salomon Aff. Ex. C, 1991 Sess. Laws of N.Y. Ch. 90 (S. 4238-A) (providing for a 25-day cutoff for mail-in registration). Even in 1991, public officials widely acknowledged that the State Legislature could have shortened the deadline even further. For example, then-Governor Mario Cuomo emphasized that the law did not provide “*nearly as much time [for registration] as could be provided by law.*” Salomon Aff. Ex. B (emphasis added). Robert Abrams, then-Attorney General, remarked that the enacted bill was “modest” and “[c]learly . . . far from the reform measures that are needed”—not least, because “election day registration c[ould] and should” have been adopted. *Id.* Legislators agreed that the enacted cutoff “[did] not go far enough and may reduce momentum for more substantial changes related to Agency-Based Registration.” Salomon Aff. Ex. D, Budget Report on Bill No. 4238-A, N.Y. Sen., para. 5 (1991). Indeed, by the time the 25-day registration deadline in New York was established, Maine, Minnesota, and Wisconsin already allowed their voters to register and cast a ballot on the election day. *See* Me. Rev. Stat. tit. 21-A, §121-A; Minn. Stat. Ann. §201.054, 201.061; Wis. Stat. § 6.28.

#### **B. Voter Registration Technology and Procedures in New York Have Improved Dramatically Since 1991**

The State Board has long recognized that a later registration deadline would be possible with technological advancements in voter registration. In March 1984, then-Executive Director of

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Const. Convention Comm., Art. II, Sec. 4. In 1894, the State Constitution was amended to expand this registration cutoff, declaring that voter registration “shall be completed at least ten days before each election.” N.Y. Const. Art. II, § 5. To this day, the registration deadline codified in the State Constitution is 10 days.

A voter registration cutoff longer than the 10 days found in the State Constitution first became law in 1975, when the State Legislature amended the New York Election Law of 1949—then-silent on a voter registration cutoff—to read: “Completed applications, when received by any county board of elections **not later than the thirtieth day before the next following general or special election**, shall entitle applicant to vote in such election, if he is otherwise qualified.” N.Y. Election Law (1975) § 153 (emphasis added). In 1976, New York State renumbered the amendments, but the registration deadline stayed the same. *See* N.Y. Election Law § 5-210(3). Nearly 20 years later, the State Legislature voted to shorten the deadline to register voters from 30 to 25 days in 1991. *See* 1991 Sess. Laws of N.Y. Ch. 90 (S. 4238-A) (providing for a 25-day cutoff for mail-in registration).

the State Board, Thomas Wallace, testified about the feasibility of a later deadline before the State Legislature:

We could provide for later deadlines of registration. *The only reason* we have the deadlines we have now for registration is because of the *mechanical or administrative process* that must be taken care of between the last day of registration and the day of election. ***With a computerized system, this could be done in much quicker time, therefore, allowing registration up to very close to the election.***<sup>2</sup>

When the Cutoff Law was enacted in 1991, New York’s registration and voting processes were manual, relying upon “buff cards,” or hard-copy registration forms, that had to be individually filed and alphabetically arranged in binders by elections officials so that they could be used on Election Day to process voters. *See* Salomon Aff. Ex. E, James C. McKinley Jr., “Official Tally of Council Election Starts,” N.Y. TIMES (Sept. 23, 1991), <https://www.nytimes.com/1991/09/23/nyregion/official-tally-of-council-election-starts.html>. However, by the late 1990s, most New York voter registrations were no longer processed in this cumbersome manner.

Boards of Elections now have highly sophisticated, computer systems to rapidly process many voter registration forms at once. For example, the City Board—which oversees elections for over 40 percent of the State’s currently registered voters—long ago adopted a system for the rapid, simultaneous processing dozens of voter registrations, known as Archival for Voter Images and Data system for voter registration (“AVID”). *See* Salomon Aff. Ex. H, New York State Board of Elections, Enrollment by County, <https://www.elections.ny.gov/EnrollmentCounty.html> (last

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<sup>2</sup> Salomon Aff. Ex. G, *Hearing on Voter Registration before the Joint Senate Standing Comm. on Elections and Assembly Standing Comm. On Election Law*, at 88-89 (March 13, 1984) (emphasis added).

visited July 7, 2020). *See also* Salomon Aff. Ex. F at NYCBOE000278, AVID Procedures, Section 3 – Voter Registration (revised May 23, 2016).<sup>3</sup>

Other advancements followed as a result of federal law. In 2002, Congress enacted the Help America Vote Act of 2002 (“HAVA”) to, among other things, “establish a program to provide funds to States to replace punch card voting systems” and “to establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections.” 52 U.S.C. §§ 20901-21145 (2002). HAVA required states to meet minimum standards for voting systems and for the administration of the electoral process. Among these, HAVA directed states to implement a “statewide, interactive computerized registration list” by January 2004. *See* Salomon Aff. Ex. I, *Mem. from Pat Murray, Deputy Counsel of the State Board of Elections State of New York to County Board Commissioners*, at 1 (Jan. 28, 2003), [https://www.elections.ny.gov/NYSBOE/hava/sum\\_hava\\_fed\\_leg.pdf](https://www.elections.ny.gov/NYSBOE/hava/sum_hava_fed_leg.pdf). HAVA further required states’ systems to be “immediately accessed by local election officials to electronically add or remove voters.” *Id.* at 4.

In 2009, to comply with HAVA, the State Board “developed, and implemented a ‘bottom-up’ system which communicates with local voter registration systems in near real time.” *See* Salomon Aff. Ex. J at 23, Help America Vote Act (“HAVA”) Amended State Implementation Plan, Version 5-20, (2009). Under this plan, each of the State’s county Boards of Elections is responsible for determining whether each applicant meets constitutional and statutory requirements to vote. The Board of Elections must “promptly, and in any event, not later than 21

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<sup>3</sup> Citations to documents with prefixes “NYSB” or “NYCBOE” have been produced by the New York State Board of Elections and the Board of Elections in the City of New York respectively in this litigation.

days” after receipt of an application, verify the identity of the applicant. N.Y. Comp. Codes R. & Regs. tit. 9, § 6217.6.

In February 2019, New York amended the election law to authorize the use of electronic poll books and directed the State Board to promulgate security standards and a list of approved devices. N.Y. Election Law § 1-104 (38). Electronic poll books are tablets that allow voters to sign in electronically and poll workers to look up voters from the entire county or state, and redirect voters if they are at the wrong polling location. *See* Salomon Aff. Ex. K, *Electronic Poll Books*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 25, 2019), <https://www.ncsl.org/research/elections-and-campaigns/electronic-pollbooks.aspx>. Importantly, electronic poll books allow for real-time updates, and are used by states with same-day voter registration. *Id.* Instead of relying on paper poll books that have to be printed well before election day, New York polling locations can now rely on electronic poll books to check in voters. These tablets were used in the November 2019 and June 2020 elections, showing that the City Board should be able to use electronic poll books during the upcoming election. *See* Salomon Aff. Ex. L, Jesse McKinley and Jeffery C. Mays, “‘The State Kind of Dumped This On Us’: Early Voting Stirs Anxiety in N.Y.,” N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/nyregion/early-voting-ny-election.html>.

While electronic poll books are not necessary to adopting later registration deadlines—indeed, many states adopted later deadlines before the advent of personal computers—electronic poll books have facilitated the implementation of later voter registration and/or same-day registration in many states. *See* Salomon Aff. Ex. Y, Expert Report of Professor Barry Burden (“Burden Report”) at 16.

Finally, New York has also implemented electronic and online voter registration through the DMV. *See* Salomon Aff. Ex. M, N.Y. State Dep’t of Motor Vehicles, *Voter Registration Application Frequently Asked Questions*, <https://dmv.ny.gov/more-info/motor-voter-faqs-0>. With this technology, eligible citizens can now complete a registration form while applying for the driver’s license and non-driver ID and their voter registration information, including their photostatic signature, is transmitted electronically to the Board of Elections, a process referred to as “automated” registration. *See* Salomon Aff. Ex. M. *See* Affidavit of Amanda Melillo (“CFB Aff.”) at ¶¶ 16-18. This development proves that the Boards of Elections can and do automatically process many voter registrations electronically, including using voters’ digital signatures. The Boards of Elections’ acceptance of digital registration information, including digital signatures, is consistent with a 2016 opinion of the Office of the Attorney General, which concluded that “state law governing voter registration does not require a wet signature and that a signature can be affixed electronically.” *See* Salomon Aff. Ex. N, New York Office of the Attorney General, Informal Opinion No. 2016-1 (Apr. 25, 2016).

Because many New York City residents do not have DMV-issued forms of identification, in 2017, the New York City Council directed the New York City Campaign Finance Board (“CFB”) to build an online website or mobile application to allow individuals to register to vote or update their voter registration. *See* Law No. 2017/238, Section 1 (Amendment to Chapter 46 of the New York City charter, §1057-f); *see also* Affidavit of Lindsay Acker of DemocracyNYC (“DNYC Aff.”) at ¶ 8 (approximately 750,000 voting eligible New York City residents do not have a DMV-issued ID). The CFB built that online voter registration portal, including a web site and mobile application, which required voters to upload a photographic image of their “wet ink” signature, consistent with the DMV’s use of photostatic signatures on electronically transmitted

voter registration forms. CFB Aff. ¶¶ 16-18. The online portal was built in time to meet the June 17, 2019 deadline that the New York City Charter required. CFB Aff. ¶ 17. But notwithstanding that they have received electronic and online voter registrations from the DMV for years, the State and City Boards blocked the online system's implementation (even while praising the system). CFB Aff. ¶¶ 23-24. While the pandemic continues to inhibit in-person voter registration at both government agencies and by third party groups, the CFB's touchless digital registration portal remains offline. CFB Aff. ¶¶ 12-14; DNYC Aff. ¶ 10.

**C. Existing Registration and Voting Procedures Can Provide People who Register After the Voter Registration Cutoff an Opportunity to Vote**

New York could easily accommodate people who register to vote after the cutoff, even if their information cannot be entered into the poll book. New York already allows eligible citizens to submit registration forms without a DMV identification number or the last four digits of their social security number. *See* Salomon Aff. Ex. O, New York State Voter Registration Form, [https://www.elections.ny.gov/NYSBOE/download/voting/voteform\\_enterable.pdf](https://www.elections.ny.gov/NYSBOE/download/voting/voteform_enterable.pdf) (last visited July 23, 2020). Those voters are permitted to vote in-person at the polls where the voters verify their identity on election day by presenting a current utility bill, bank statement, paycheck, or government document includes their name and address. *See id.*

The Boards of Elections are also accustomed to processing thousands of "affidavit" ballots, including from voters who register after the cutoff: if a prospective voter arrives at a poll site and claims they are registered to vote and at the correct location, but their information does not appear in the poll book, that person may still vote an affidavit ballot. N.Y. Election Law § 8-302(3)(e)(i-ii). After the election, the Board of Elections checks its registration records to determine whether voters who cast affidavits ballots were properly registered. *See* Salomon Aff. Ex. P, Board of Elections in the City of New York, FAQs, <https://www.vote.nyc/page/faqs#q18> (last visited July



23, 2020) (“What if I’m not permitted to vote”). If the Board of Elections finds that they are, then the Board of Elections opens and counts their affidavit ballot. *Id.* If not, the voter receives a notice that their affidavit ballot went uncounted. *Id.*; *see also* Affidavit of Helena Breger (“Breger Aff.”) at ¶ 12. It is not uncommon for just over a half of affidavit ballots case to count. For example, in the November 2016 election, voters cast 268,964 affidavit ballots statewide; 141,293 were ultimately deemed valid. *See* Salomon Aff. Ex. Q, Def’s Initial Proposed Findings of Fact and Conclusions of Law, *Common Cause/New York v. Brehm*, 1:17-cv-06770-AJN, ECF No. 132, at 15 ¶ 77. In November 2018, 125,920 affidavit ballots were cast statewide; 73,922 were found valid. *Id.* ¶ 75.

**D. The Cutoff Law Suppresses Voter Registration Turnout and Decreases the Efficiency of Election Administration Compared to a 10-Day Cutoff**

The Cutoff Law suppresses voter registration and further depresses New York’s historically low voter registration and turnout. Dr. Barry C. Burden, Professor of Political Science and Director of the Elections Research Center at the University of Wisconsin-Madison and an expert in election administration, assessed the effect of the statutory cutoff on voter registration and turnout rates compared to the constitutional 10-day cutoff that Plaintiffs seek, as well as election administration. *See* Burden Report. Dr. Burden concluded that a later registration deadline “would facilitate a more current and accurate voter registration list and would lead to an increase in voter turnout while imposing a modest increase and time shift in the administrative work of running elections.” *See id.* at 1-2. Dr. Burden found early registration closing dates depresses voter turnout, noting that “[t]he relationship between closing dates and turnout is quite robust” and “has been replicated in analyses of turnout in different election years using different methodologies and a variety of data.” *See id.* at 5.

Dr. Burden found that 25-day cut off “occurs at a time when public interest in the election is rising before it has hit its peak.” *See id.* at 7. As elections draw closer, campaigns ramp up their activities and the public become more engaged. *See* DNYC Aff. at ¶¶ 6-7. During the 2018 and 2020 elections, the number of news articles mentioning candidates more than tripled during the 24 days preceding the election as compared to the 50 days before the 2018 General Election and 2020 Primary Election. *See* Affidavit of Jesse Barber (“Barber Aff.”) at ¶ 16. Additionally, 21 of 22 candidate debates held for the 2018 general election occurred in the 24 days leading up to election day, while 14 of 18 (78%) candidate debates and forums that were held for the 2020 primary election occurred in those last 24 days. *Id.* at 6 ¶ 21.

Studies also show that people who register to vote late in a campaign are substantially more likely to vote than people who register one year earlier. Burden Report at 12 (people who registered in the final week permitted in their states during the 2000 presidential campaign were 16.3 percentage points more likely to vote than those who registered one year earlier). Dr. Burden explains that “interest in registering late in the campaign is genuine and frequently translates to actual registration and voting when state laws permit it.” *See id.*

That assessment of the suppressive effect of the Cutoff Law is consistent with the findings of Dr. Alex Street, Associate Professor of Political Science at Carroll College, who used state voter file data to calculate how many otherwise eligible voters the Cutoff Law disenfranchised. *See* Salomon Aff. Ex. Z, Expert Report of Professor Alex Street (“Street Report”) at 13. Dr. Street also used Google Search data to estimate how many potential voters the Cutoff Law deterred from registering. First, Dr. Street examined New York State voter registration and voter history data from federal elections dating back to 2004 to calculate how many people registered between the 25-day statutory Cutoff and the 10-day constitution cutoff in each cycle, but did not vote in the

general election. Street Report at 2. This method gave Dr. Street the most conservative of “plausible estimates for the restrictive effect of closing voter registration well in advance of the general election.” *Id.* at 5. For example, during the most recent federal election—the November 2018 midterm—27,071 people registered in the period between 25 days and 10 days before election day but did not go on to cast a ballot. Street Report at 8. In analyzing earlier elections, Dr. Street noted that the voter file “is updated continually as people register, move, etc. Hence the file provides a snapshot of the electorate at a particular time. The numbers may lag recent events.” Street Report at 5. Nonetheless, even with these conservative estimates, Dr. Street found that for the eight federal elections between 2004 and 2018, the Cutoff Law prevented nearly 200,000 of New York voters from casting a valid ballot in the election immediately subsequent to their registration. Street Report at 9.

Dr. Street’s research also shows that in addition to disenfranchising potential voters who actually register after the deadline, the Cutoff Law also deters thousands more individuals from even attempting to register each election. Street Report at 2, 5, 9. Addressing a large body of research that shows that early voter registration deadlines reduce voter registration and turnout, Dr. Street and his co-authors developed a peer-reviewed, published methodology to estimate the number of additional people who would register if the deadline were extended. Street Report at 12, 14. The methodology uses data from Google on the timing and content of specific searches for voter registration information to measure to interest in voter registration and then uses data on the timing of actual voter registrations before the deadline to estimate how strongly web searches predicted registration. Street Report at 4, 9, 10. Having analyzed the strength of the relationship between searches and actual registrations in the pre-deadline period, Dr. Street generated projections based on Google search data in the post-deadline period to estimate the number of

people who would have likely registered to vote after the deadline. *Id.* Applying that methodology to data from New York elections in 2014-2018, Dr. Street estimated 107,000 additional voters would have registered in the period between the 25-day cutoff and the 10-day constitutional cutoff in the November 2016 general presidential election. Street Report at 13. For November 2014 and November 2018, Dr. Street estimated that 32,000 and 44,000 additional voters would have registered during that time. *See id.* at 13-14.

**E. The Cutoff Law Has Exacerbated Historically Low New Voter Registration in 2020 and Will Continue to Do So Through November 2020**

New York consistently ranks among the states with the lowest rates of voter registration. According to data from the U.S. Census Bureau, New York ranked 47th in terms of the percentage of citizens registered to vote for the November 2016 election and 45th for the November 2018 election. Barber Aff. ¶ 32. But even measured against New York's traditionally low registration rates, 2020 has seen precipitously low rates of new voter registrations. Through the first 10 weeks of 2020, new registrations in New York outpaced those in 2016 by a healthy margin, suggesting greater voter enthusiasm. CFB Aff. ¶ 16. However, starting the week after Governor Cuomo's emergency declaration in March from the COVID-19 pandemic, voter registrations plummeted statewide—especially in New York City. Through May 2020, new registrations statewide were down by 33% as compared to 2016 and nearly 50% down in New York City. Well over 100,000 fewer new voters have registered so far this year when compared to 2016 numbers. CFB Aff. ¶ 12.

The registration cutoff for the June 2020 primary, on May 29, could also not have come at a worse time from a voter suppression standpoint. Protests for racial justice and police accountability in New York following the murder of George Floyd by members of the Minneapolis

Police Department began on Thursday, May 28,<sup>4</sup> escalated significantly over the weekend on Saturday, May 30 and Sunday, May 31,<sup>5</sup> and became widespread around the State over the following week.<sup>6</sup> In spite of efforts by groups and individual to take advantage of the opportunity to register voters at the protests, the May 29, 2020 voter registration cutoff ensured that few, if any, of those new voters would be able to have their ballots counted in the June 23, 2020 primary election. CFB Aff. ¶ 15; *see also* Affidavit of Nitch Jones (“Jones Aff.”) at ¶ 9. As usual, media coverage of elections ramped up and key endorsements also came after the registration deadline. *See* Barber Aff. ¶¶ 11, 24. For example, 11 days before the election, the New York Times published its endorsements for congressional primaries, including in hotly contested races around the State. *See* Salomon Aff. Ex. U, The Editorial Board, “New York Voters Can Send Some Promising New Faces to Congress,” N.Y. Times, (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/new-york-congress-endorsements.html>.

The Cutoff Law will again suppress tens of thousands of eligible voters’ participation in the November 3, 2020 election, as those who register after the cutoff will be denied the opportunity to cast a ballot. It will also deter thousands of others from registering altogether. Professor Street’s analyses of voter file data reflect that the Cutoff Law has disenfranchised tens of thousands of otherwise eligible New Yorkers in every general presidential election since 2004. Street Report at 7-8. This year’s general election will not be an exception. In addition to the predictable increase in

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<sup>4</sup> *See* Salomon Aff. Ex. R. CBS, “At Least 40 Arrests Made at Union Square Protest Over George Floyd’s Death,” (May 28, 2020), <https://newyork.cbslocal.com/2020/05/28/several-arrests-made-at-union-square-protest-over-george-floyd-death>.

<sup>5</sup> *See* Salomon Aff. Ex. S. Spectrum News, “Clashes Continue Between Police and Demonstrators Amid Protests Over George Floyd’s Death” (May 31, 2020), <https://www.nyl.com/nyc/all-boroughs/news/2020/05/30/new-york-city-george-floyd-protests-saturday>.

<sup>6</sup> *See* Salomon Aff. Ex. T. NBC News, “June 7 coverage of nationwide unrest and ongoing protests” (June 7, 2020), <https://www.nbcnews.com/news/us-news/blog/2020-06-07-george-floyd-protests-n1226881/ncrd1227056#blogHeader>.

campaign activities and media coverage that occur after the cutoff, significant campaign events are already scheduled for those 25 days. Absent relief, the last day to register to vote for the November 2020 election will be October 9. Two of the three nationally-televised presidential debates are scheduled to take place after that date, on October 15 and October 22 respectively. *See* Salomon Aff. Ex. V, Commission on Presidential Debates, <https://www.debates.org> (last visited July 23, 2020). Predicting late-breaking “October surprises” may be impossible, but as media coverage and campaign events reach their climax, individuals who are inspired to register and vote will find that New York law arbitrarily denies them the chance.

### ARGUMENT

The Court has broad discretion to grant a preliminary injunction where a plaintiff “would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which . . . would produce injury to the plaintiff.” CPLR § 6301. To determine whether a preliminary injunction should issue, courts consider whether the plaintiff has demonstrated (1) a likelihood of success on the merits, (2) a danger of irreparable injury in the absence of a preliminary injunction, and (3) a balance of equities that favors preliminary relief for plaintiff. *See Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005); *UAH-Mayfair Mgmt. Grp. LLC v. Clark*, 177 A.D.3d 572, 573 (1st Dep’t 2019); *Zoller v. HSBC Mtge. Comp. (USA)*, 135 A.D.3d 932, 933 (2d Dep’t 2016).

This Court should use its broad discretion to grant Plaintiffs’ motion and enjoin enforcement of the Cutoff Law. The injunction will return the voter registration cutoff to the Constitutionally-mandated ten-day period, preventing the arbitrary disenfranchisement of tens of thousands of otherwise qualified New Yorkers this election year. *First*, it is likely that Plaintiffs will succeed on the merits because the Cutoff Law severely burdens the constitutional right to vote, and does not survive strict scrutiny. *Second*, there is a danger of irreparable injury because tens of

thousands of New Yorkers risk not being able to exercise their fundamental right to vote in the upcoming election. *Third*, the balance of equities clearly weighs in favor of preliminary relief.

**A. The Plaintiffs Are Likely to Succeed on the Merits Because the Cutoff Law Unnecessarily Disenfranchises Tens of Thousands of Voters Each Election Cycle And The Cutoff Law Does Not Pass Strict Scrutiny**

In *Matter of Rosenstock v. Scaringe*, the Court of Appeals reaffirmed that “[w]here a statute directly infringes upon the fundamental right to vote, the appropriate standard of review is to strictly scrutinize the legislation to determine if it is necessary to promote a compelling State interest.” 40 N.Y.2d 563, 564 (1976). The Cutoff Law imposes a severe burden on the right to vote, and with very limited exceptions, it categorically denies otherwise eligible New Yorkers who register within 25 days of an election that right. The Cutoff Law can therefore only be upheld if the State can show that it “furthers a compelling state interest by the least restrictive means practically available.” *Atkin v. Onondaga Cty. Bd. of Elections*, 30 N.Y.2d 401, 404 (1972). Applying this exacting level of review, this Court engages in “a painstaking inquiry” which imposes a “very heavy” burden on the State that is rarely satisfied. *Alevy v. Downstate Med. Ctr.*, 39 N.Y.2d 326, 333 (1976). The Cutoff Law cannot survive that inquiry. Even if it was ever justified by an adequate government interest, those reasons have long lapsed. The State has for years had numerous alternatives to register voters and properly administer its elections *without* disenfranchising thousands of New Yorkers.

**1. The Cutoff Law Severely Burdens the Right to Vote**

Both New York courts and the U.S. Supreme Court recognize that laws imposing a deadline by which a voter must take an action or otherwise forfeit their right to cast a ballot may severely burden the right to vote and could merit strict scrutiny. In *Dunn v. Blumstein*, the U.S. Supreme Court struck down Tennessee’s three-month durational residency requirement for voting as violating the U.S. Constitution in light of the importance of the right to vote as a “fundamental

political right . . . preservative of all rights.” 405 U.S. 330, 336 (1972) (citing *Reynolds v. Sims*, 377 U.S. 533, 562 (1964)). In reaching this result, the Supreme Court held that durational residency requirements must satisfy “strict” or “close scrutiny,” under which legislation is invalid unless it is “necessary” to “promote a compelling governmental interest.” *Id.* at 342.

While *Dunn* concerned violations of the federal Equal Protection Clause, New York courts follow the strict scrutiny standard it articulated when they evaluate violations of the right to vote under the State Constitution. Considering claims that a law restricting eligibility for local school board nominations violated the State Constitution, the Court of Appeals in *Rosenstock* reaffirmed that “[w]here a statute directly infringes upon the fundamental right to vote, the appropriate standard of review is to strictly scrutinize the legislation to determine if it is necessary to promote a compelling State interest.” 40 N.Y.2d at 564. Similarly, applying strict scrutiny in *Phelan v. City of Buffalo*, the court invalidated a durational residency requirement for local office under both the federal and State Constitutions. 54 A.D.2d 262, 264 (4th Dep’t 1976). Thus, under either the Equal Protection Clause or the fundamental right to vote, New York courts apply strict scrutiny to restrictions that would deny otherwise qualified voters from casting a ballot.

The Cutoff Law severely burdens the right to vote because the period after the cutoff coincides with when voters pay most attention to elections: campaign activities, candidate debates, critical endorsements, and campaign activities all ramp up in the four weeks leading up to an election day. Barber Aff ¶¶ 11, 19, 24. Moreover, major events taking place after the 25-day deadline often compel even previously unengaged eligible persons to register and vote. For example, in 2020, the killing of George Floyd just four days before the New York primary registration deadline sparked nationwide protests, calls (and counter-calls) to reform police, and profound interest in a broad range of issues affecting civil society, all driving a surge in nationwide



voter registration. *See* Salomon Aff. Ex. W. Brian Schwartz, *George Floyd Protests Created a Surge in Voter Registrations, Groups Say*, (June 5, 2020), <https://www.cnbc.com/2020/06/05/george-floyd-protests-created-surge-in-voter-registrations-groups-say.html>. Hundreds of thousands of New Yorkers participated in this civic response, but most would have been unable to translate their interest into political participation on June 23 unless they registered by May 29—well before most memorials, protests, and marches occurred. *See* Jones Aff. ¶¶ 4-9.

The situation is not unique to this year. Tens of thousands of New Yorkers are disenfranchised by the Cutoff Law each election cycle because it “occurs at a time when public interest is rising but before it has hit its peak.” Burden Report at 7; Street Report at 7-9; 12, n.13; 13-14. For example, during the November 2016 presidential election, the Cutoff Law disenfranchised 33,366 voters who registered after the voter registration 25-day statutory cutoff but before the 10-day constitutional cutoff (the “Cutoff Period”). *See* Street Report at 7. That figure is a conservative estimate; it does not account for the thousands of New Yorkers who searched for voter registration information during the Cutoff Period, *i.e.*, demonstrated an interest in and likely intent to register, but were deterred from doing so upon learning that their vote in the imminent election would not be counted.

As Professor Street’s analysis shows, the result is extensive disenfranchisement. By accounting for voters who (i) actually registered during the Cutoff Period but (ii) were not recorded as casting a valid ballot in the subsequent election, Professor Street found that the Cutoff Law blocked approximately 107,000 potential voters from casting ballots during the November 2016 presidential election; 44,000 in the November 2018 midterm election; and 32,000 in the November 2014 midterm elections. *See* Street Report at 13-14. Further, because “interest in registering late

in the campaign is genuine” it is understood to “frequently translate[] to actual registration and voting when state laws permit it.” *See* Burden Report at 12. Indeed, social scientific research strongly indicates that early registration closing dates depress voter turnout, which contributes to New York’s abysmally low voter turnout. *Id.* at 5.

## 2. No Legitimate State Interest is Served by the Cutoff Law

The Cutoff Law does not serve a legitimate state interest. When evaluating whether the duration of a particular voter registration cutoff serves a legitimate state interest, and is “necessary,” courts examine the law in light of contemporaneous conditions, including technological advances. *See Marston v. Lewis*, 410 U.S. 679 (1973); *see also Burns v. Fortson*, 410 U.S. 686 (1973). These constitutional principles apply almost identically as a matter of New York law. *See Matter of Walsh v. Katz*, 17 N.Y.3d 336, 343 (2011) (court weights “character and magnitude of the asserted injury to the rights protected” against “precise interests put forward by the State”) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

In nearly 30 years since the enactment of the Cutoff Law, the world has gone digital and online. Voter registration processes are not an exception. Indeed, over 35 years ago, back in 1984, the Executive Director of the State Board, one of the defendants in this case, testified that the “only reason” for a lengthy registration cutoff was due to “mechanical or administrative process . . . . ***With a computerized system, this could be done in much quicker time, therefore, allowing registration up to very close to the election.***” Salomon Aff. Ex. G, *Hearing on Voter Registration before the Joint Senate Standing Comm. on Elections and Assembly Standing Comm. on Election Law*, at 88-89, (Mar. 13, 1984) (emphasis added).

Today, Boards of Elections have computerized systems available to them. Boards of Elections receive voter registrations electronically from the DMV and rapidly process, verify, and enter dozens of paper forms at once. CFB Aff. ¶ 24. Further, reams of paper poll books have been

replaced by electronic poll books that can be updated with new registered voters instantaneously and continuously. *See* Salomon Aff. Ex. X, Robert Harding, “NY elections board OKs three e-poll book vendors to help counties with early voting,” Auburn Pub, (June 7, 2019). Since 1991, new technologies have made voter registration and enrollment drastically less time consuming. *See* Burden Report at 4. New York no longer uses a system of “buff cards” to register voters—a cumbersome process that required the Board of Elections to process new registration applications manually by filing buff cards alphabetically in binders. Salomon Aff. Ex. E. Instead, Boards of Elections utilize computerized systems capable of rapidly receiving, processing, verifying, and entering dozens of forms onto the voter rolls at once. *See* Salomon Aff. Ex. F. Boards of Elections also process large numbers of already digitized forms transmitted electronically from the DMV. CFB Aff. ¶ 16. New York’s long overdue adoption and implementation of electronic poll books, which can be updated daily and instantaneously, have also made obsolete paper poll books, which once required days (and sometimes weeks) to print and distribute. *See* Burden Report at 15-16, 18; Salomon Aff. Exs. K, L, X. Just as technology long ago obviated the need for buff cards and paper poll books, so too has it obviated any justification for the Cutoff Law.

**3. Far Less Restrictive Alternatives to a 25-Day Registration Cutoff Are Available to Defendants**

A law fails strict scrutiny if there are less onerous alternatives that can ensure the governmental objective. *See Alevy*, 39 N.Y.2d at 333. “When applying strict scrutiny, [courts] will not assume plausible alternatives will fail to protect compelling interests; there must be some basis in the record, in legislative findings or otherwise, establishing the law enacted as the least restrictive means.” *Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 807 (1996). In the context of strict scrutiny, legislation is not “necessary” unless it is the least restrictive means to achieve a compelling state interest, meaning that the availability of less

burdensome measures that would achieve the same state interest renders the challenged legislation invalid. *Dunn*, 405 U.S. at 343.

The Cutoff Law fails strict scrutiny because there are at least three alternatives to the law that can ensure electoral integrity while not disenfranchising thousands of otherwise qualified voters. *First*, the Election Law currently permits certain classes of voters from registering during the Cutoff Period and the Board of Elections could simply apply the processes that accommodate those voters to all other classes of voters. Specifically, the law allows individuals honorably discharged from the military during the Cutoff Period to cast a ballot if they register within 10 days of an election. N.Y. Election Law § 5-210(4). Nobody disputes that veterans ought to be allowed to register within 10 days of an election; but there is also no rational reason to exclude nurses, grocery store workers, teachers, bus drivers, janitors, doormen, doctors, food delivery workers, or any other qualified voter from the same solicitude. Defendants can expand the same processes that allow veterans to register within 10 days of an election to all New Yorkers.

*Second*, New York State's existing affidavit ballot system also provides a ready alternative to disenfranchising otherwise qualified voters who register during the Cutoff Period. Under this system, if such an individual arrived at a polling site and their information had not yet been entered into a poll book, they would be permitted to cast a ballot by swearing under penalty of perjury that they were qualified to vote and registered. *See* N.Y. Election Law §8-302(3)(e)(ii); *see, e.g.*, *Breger Aff.* ¶ 12. Those voters' registration records are then verified by the Boards of Elections after election day. *See* *Salomon Aff. Ex. P* ("If you believe that you are eligible, you can still vote. Ask for an affidavit ballot. After the election, the Board of Elections in the City of New York will check its records and your vote will be counted if you are indeed eligible to vote and are at the correct poll site."); *Breger Aff.* ¶¶ 11-12. The only change to existing procedures necessary to

provide a complete alternative to the Cutoff Law would be to count the ballots of voters who registered at least 10 days prior to the election instead of 25 days.

*Finally*, computerized registration processes, electronic poll books, and online registration—all now in use to at least some extent in New York—make it feasible for the Cutoff Law to revert to the 10 days in the State’s Constitution and still conduct orderly, accurate, and efficient elections. *See* Burden Report at 4, 15. Using advanced technologies already available to the Boards of Elections to process and upload new registrations into electronic poll books up to 10 before the election is a much less restrictive alternative than denying thousands of otherwise qualified voters the opportunity to cast a valid ballot in this November’s election.

A registration cutoff closer to election day is not just a possible alternative; it is a reality in a growing number of states, including New York. *See* Salomon Aff. Ex. K. In 2019, the State Legislature passed the first step towards a constitutional amendment to permit Election Day and Same-Day Registration, S.1048, 2019-2020 Reg. Session (N.Y. 2019). But that process of amending the State Constitution cannot be completed before the end of 2021, nor could any amendment take effect before 2022, leaving many New Yorkers disenfranchised in this pivotal election absent relief from the Cutoff Law. In the interim, the Cutoff Law is not only unnecessary to ensure orderly, accurate, and efficient elections, it is unreasonable in 2020. Plaintiffs are likely to prevail on their claim that the Cutoff Law violates the right to vote expressly protected by the State Constitution, Art. I, § 1; Art. II § 1.

**B. Tens of Thousands of New Yorkers Face the Irreparable Harm of Being Unable to Vote This November Due to the Cutoff Law**

Courts grant preliminary injunctions where, as here, a party faces “certain and imminent harm,” and “but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied.”

*Allstate Ins. Co. v. Harvey Family Chiropractic*, 677 Fed. App'x. 718, 718 (2d Cir. 2017). When, as here, the injunction sought would prevent a constitutional injury to a large group of people, courts weigh the certainty and imminence of the harm as to all of the individuals. This Court has already held that the injury is the type of harm that is “capable of repetition yet evading review.” *League of Women Voters of New York State v. New York State Board of Elections, et al.*, Index No. 160342/2018 (Sup. Ct. New York Co. 2018), NYSCEF Doc. No. 29, Decision and Order on Motion at 6-7 (holding that Plaintiffs have standing and the exception to the mootness doctrine applies because the issue presented is likely to recur, typically will evade review due to the length of 25-day Voter Registration Cutoff, and is a substantial and novel issue). Therefore, consideration of harm to New Yorkers writ large is appropriate.

There is no question that regulations that “disfranchise constitutionally qualified electors” voting . . . violate[] the Constitution.” *People ex rel. Hotchkiss v Smith*, 206 NY 231, 242 (1912). Indeed, “any system of election that unnecessarily prevents the elector from voting” does. *Hopper v. Britt*, 203 N.Y. 144, 150 (1911) (emphasis added). As this Court has held, “regulations that affect enfranchisement are subject to . . . constitutional right [to vote].” *League of Women Voters of New York State v. New York State Board of Elections, et al.*, Index No. 160342/2018 (Sup. Ct. New York Co. 2018), NYSCEF Doc. No. 29, Decision and Order on Motion at 10 (noting that Plaintiffs frame their complaint as “a constitutional issue, and the court agrees”). As a result, courts routinely find disenfranchisement to be an irreparable harm. *See Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986) (noting that student applicants “would certainly suffer irreparable harm if their right to vote were impinged upon”). New York courts have similarly held that laws that violate the State Constitution irreparable harm

plaintiffs. *See Tucker v. Toia*, 54 A.D.2d 322, 326 (4th Dep’t 1976) (conceding “irreparable harm” where plaintiffs claimed violation of the New York Constitution); *Lily Pond Lane Corp. v. Technicolor, Inc.*, 414 N.Y.S.2d 596, 597 (Sup. Ct. New York Co. 1979) (finding that deprivation of constitutional right to due process in itself demonstrates irreparable harm).

This June, too many New Yorkers motivated to register to vote during the protests for racial justice and police accountability were irreparably harmed when the Cutoff Law denied them the opportunity to vote in the primary election. *See, e.g.*, Jones Aff. ¶¶ 4-9. Some New Yorkers who were registered to vote after the Cutoff were prevent from casting a ballot that counted. *See Street Report* at 5-9; *see, e.g.*, Jones Aff. at ¶ 9; Breger Aff. ¶¶ 7-12. Others were deterred from registering altogether. *See Street Report* at 2, 59-14; *see, e.g.*, Jones Aff. ¶ 9. Further, local government entities with a mandate to encourage civic engagement such as the CFB and DemocracyNYC face irreparable harm because they lose the opportunity to register voters after the cutoff. *See CFB Aff.* ¶¶ 6, 8, 15; *DNYC Aff.* ¶¶ 4, 6, 11. When an organization “loses an opportunity to register a voter, the opportunity is gone forever,” and thus “almost always inflicts irreparable harm.” *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012); *see also League of Women Voters of Mo. v. Ashcroft*, 336 F. Supp. 3d 998, 1005 (W.D. Mo. 2018).

If preliminary relief is not granted, tens of thousands of New Yorkers will miss the registration deadline for a critical election in November. Resolution of this action will be critical for future elections, but it will never make whole the New Yorkers who could not participate in this pivotal election. Absent injunctive relief, tens of thousands of New Yorkers will be irreparably harmed by the arbitrary and unconstitutional Cutoff Law in this November’s election.

**C. Extending the Right to Vote to Tens of Thousands of New Yorkers Outweighs any Additional Burden Faced by Defendants**

Plaintiffs also meet the third requirement for a preliminary injunction, which “balance[es] the equities,” and “requires the court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief.” *Barbes Rest. Inc. v. ASRR Suzer 218, LLC*, 140 A.D.3d 430, 432 (1st Dep’t 2016). To meet this factor, the harm to the movant must outweigh the harm to the defendant. *See Farmer v. D’Agostino Supermarkets*, 144 Misc.2d 631, 639 (Sup. Ct. New York Co. 1989). Here, the constitutional rights of New York voters far outweigh any state interests in enforcing the Cutoff Law.

Plaintiffs’ and similarly situated New Yorkers’ interest in exercising their right to vote is substantial. “The right of suffrage is one of the most valuable and sacred rights which the Constitution has conferred upon the citizen of the state.” *People ex rel. Stapleton v Bell*, 119 N.Y. 175, 178 (1889). It “shall be given the highest respect, especially by our courts, and shall not be compromised, or allowed to be diminished.” *Held v. Hall*, 190 Misc.2d 444, 459 (Sup. Ct. Westchester Co. 2002) (internal citations omitted) (noting where a preliminary injunction involves the disenfranchisement of voters, “the equities might weigh” in favor of upholding the right to vote). Granting the requested relief will protect the right of thousands of qualified voters to participate in the democratic process in a year where “lagging voter registration numbers [during] the viral COVID-19 pandemic, coupled with high levels of political interest, impl[y] [a] high pent-up demand for voter registration.” Street Report at 14.

By contrast, the costs to Defendants of decreasing the voter registration cutoff from 25 days to 10 days are not significant. New York law already permits certain classes of eligible citizens to register up to ten days in advance of an election and the processes used to ensure those voters are able to have their votes counted can be applied to other voters. *See N.Y. Election Law*



§ 5-210(4). Technology already available and in use, i.e., electronic poll books, can be used to add those voters to the poll books. *See* Burden Report at 15-16, 18; Salomon Aff. Exs. K, L, X. Failing that, there are well-established processes to provide affidavit ballots to voters who cannot be added to the poll books in time and to canvass those ballots. N.Y. Election Law § 8-302(3)(e)(i-ii); *see, e.g.*, Breger Aff. ¶¶ 11-12. To the extent the Boards of Elections will incur the cost of processing more registration forms and counting more votes, those costs would be entirely consistent with fulfilling the statutory purpose of the State Board of Elections, i.e., “to encourage the broadest possible voter participation in elections.” N.Y. Election Law § 3-102(14).

Courts regularly hold that the balance of the equities weighs in favor of the right to vote when weighed against the administrative burdens of increasing access to the ballot. *See, e.g., Ga. Coal. for People’s Agenda, Inc. v. Kemp*, 347 F.Supp.3d 1251, 1268 (N.D. Ga. 2018) (holding increased administrative burden of “disseminating information” and “training poll managers. . . is minimal compared to the potential loss of a right to vote”); *United States v. Georgia*, 892 F.Supp.2d 1367, 1377 (N.D. Ga. 2012) (“[t]he potential hardships that Georgia might experience are minor when balanced against the right to vote, a right that is essential to an effective democracy.”); *Fla. Democratic Party v. Detzner*, 2016 U.S. Dist. LEXIS 143620 at \*26 (N.D. Fla. Oct. 16, 2016) (“Any potential hardship [to the state] imposed by providing the same opportunity . . . for [] voters pales in comparison to that imposed by unconstitutionally depriving those voters of their right to vote and to have their votes counted”]); *see also Yang v. Kellner*, 2020 U.S. Dist. LEXIS 79331 at \*39 (S.D.N.Y. May 5, 2020) (holding that even where, unlike here, the injunction will impose great costs on the state, an injunction was proper because the state agreed to take on the costs when “it assumed the responsibility of regulating and holding the primary election”).

Thus, given the interests of Plaintiffs and similarly situated New Yorkers in exercising their right to vote, the balance of the equities weighs strongly in favor granting the requested preliminary injunction.

### CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for a preliminary injunction.

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