



REFORM BEGINS AT HOME: INTEGRATING VOTING RIGHTS LITIGATION AND ADVOCACY IN PROGRESSIVE STATES

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INTRODUCTION

Recent U.S. Supreme Court decisions have drastically limited nationally applicable legislative and case-based voting rights protections. The trend intensified in 2013 in Shelby County, Alabama v. Holder,1 where the Court struck down Section 5 of the Voting Rights Act (“VRA”),2 a crucial safeguard against discriminatory practices that required some jurisdictions to “preclear” changes to their voting laws.3 More narrowing

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1. 570 U.S. 529 (2013).
2. 52 U.S.C. § 10101 (1965). The Court did not issue a ruling specifically on Section 5, however when the Court struck down Section 4, it in turn made Section 5 inoperable.
3. See Shelby County, 570 U.S. at 557.

followed in *Husted v. A. Philip Randolph Institute*,⁴ where the Court cabined the National Voter Registration Act of 1993 (“NVRA”)⁵ to say that states could rely on someone’s failure to vote in two consecutive elections to start procedures to remove them from the voter rolls.⁶ And last year, in *Brnovich v. Democratic National Committee*,⁷ the Court made it harder for plaintiffs to challenge discriminatory barriers to voting by adding factors that courts must assess when considering a claim under Section 2 of the VRA.⁸ While elsewhere, the Court has closed the federal courts’ doors to many voting rights claims, including challenges to partisan gerrymanders.⁹

These setbacks are alarming. They undercut a decades-long commitment from Congress—since, at least, the 1960s—to securing voting rights at the national level.¹⁰ They have met expected reaction from voting rights advocates and organizers,¹¹ who have swiftly mobilized to push for measures that would rehabilitate federal protections for the right to vote—for example, by restoring a preclearance “formula” that would again compel jurisdictions with a discriminatory record to submit voting law changes to the Justice Department.¹² While necessary and admirable, that response has, to date, unfortunately

4. 138 S. Ct. 1833 (2018).

5. 42 U.S.C. ch. 20 (1993).

6. See *Husted*, 138 S. Ct. at 1848.

7. 141 S. Ct. 2321 (2021).

8. See *id.* at 2338–40.

9. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

10. See *Brnovich v. Democratic National Committee*, BRENNAN CTR. FOR JUST. (July 1, 2021), <https://www.brennancenter.org/our-work/court-cases/brnovich-v-democratic-national-committee>.

11. See, e.g., *Brnovich: A Significant Blow to Our Freedom to Vote*, LEAGUE OF WOMEN VOTERS: BLOG (Sept. 2, 2021), <https://www.lwv.org/blog/brnovich-significant-blow-our-freedom-vote> (describing the *Brnovich* decision as a sign that democracy is under threat); *Brnovich v. Democratic National Committee*, *supra* note 10 (asserting that the *Brnovich* decision will make it “even more difficult for voting rights advocates to challenge discriminatory voting laws”); David Gans, *The Roberts Court, the Shadow Docket, and the Unraveling of Voting Rights Remedies*, AM. CONST. SOC’Y (Oct. 2020), <https://www.acslaw.org/wp-content/uploads/2020/10/Purcell-Voting-Rights-IB-Final-Version.pdf> (criticizing the use of the *Purcell* principle and the Supreme Court’s reliance on its “shadow docket”).

12. See, e.g., *Strengthening the Voting Rights Act*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-reform/strengthening-voting-rights-act> (last visited July 20, 2022) (calling on Congress to pass the John R. Lewis Voting Rights Advancement Act); see also Brian Naylor, *The Senate Is Set to Debate Voting Rights. Here’s What the Bills Would Do*, NPR (Jan. 18, 2022, 5:00 AM), <https://www.npr.org/2022/01/18/1073021462/senate-voting-rights-freedom-to-vote-john-lewis-voting-rights-advancement-act> (describing the John R. Lewis Voting Rights Advancement Act and the Freedom to Vote Act).

extracted little from Congress in the way of tangible national protections.¹³

Instead, the run of play continues to be largely dictated by aggressive state-level legislation—mostly, from politically conservative legislatures—seizing on a widespread voter fraud narrative to restrict access to the ballot. In the past decade, these laws have taken many and continually shifting forms. From “strict” voter ID laws to the growing number of states that routinely purge voters from their registration rolls *en masse*¹⁴—commonly, to the clear detriment and disparate injury of minority voters.¹⁵ And the trend only accelerated following the 2020 election and ensuing claims of widespread voter fraud from President Donald Trump.¹⁶ Even as election security agencies stressed that the 2020 election was “the most secure in American history,”¹⁷ dozens of states introduced legislation to restrict voting and ballot access in response to unproved claims of rampant voter fraud.¹⁸ Many of those rolled back absentee voting procedures that benefitted countless voters in the midst of a pandemic.¹⁹ Others made it harder to register or cut back on innovations designed to make voting easier like early voting or voting by drop box.²⁰ “Between January 1 and December 7, [2021],” a Brennan Center report explained, “at least 19 states passed 34 laws

13. See Carl Hulse, *After a Day of Debate, the Voting Rights Bill Is Blocked in the Senate*, N.Y. TIMES (Jan. 19, 2022), <https://www.nytimes.com/2022/01/19/us/politics/senate-voting-rights-filibuster.html> (describing the failure of the Freedom to Vote Act and the John Lewis Voting Rights Advancement Act to pass debate in the Senate); see also Sean Eldridge, *Voting Rights Failed in the Senate – Where Do We Go from Here?*, HILL (Jan. 23, 2022, 7:00 PM), <https://thehill.com/blogs/congress-blog/politics/590989-voting-rights-failed-in-the-senate-where-do-we-go-from-here> (encouraging activists to continue pushing for increased voting rights protections despite setbacks in the Senate).

14. E.g., *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> (tabulating state legislation that has made it more difficult to vote throughout the country).

15. *Id.*; see also *Block the Vote: How Politicians Are Trying to Block Voters from the Ballot Box*, ACLU (Aug. 18, 2021), <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/> (describing the disproportionate impact new restrictive voting laws have on minority communities).

16. Jen Kirby, *Trump’s Own Officials Say 2020 Was America’s Most Secure Election in History*, VOX (Nov. 13, 2020, 4:40 PM), <https://www.vox.com/2020/11/13/21563825/2020-elections-most-secure-dhs-cisa-krebs>.

17. *Id.*

18. See *Voting Laws Roundup: December 2021*, *supra* note 14.

19. Kirby, *supra* note 16.

20. *Voting Laws Roundup: December 2021*, *supra* note 14.

restricting access to voting.”²¹ In the current legislative session, at least twenty-seven states have introduced more than 250 restrictive bills.²²

Still, amidst that flurry of activity in majority-conservative states, voting rights advocates chalked up nationwide legislative wins across many jurisdictions. Many of those adopted measures making voting easier, for example, by clearing hurdles to vote by mail or expanding opportunities for early voting.²³ Others made it easier to register to vote.²⁴ And yet others restored voting rights for citizens returning from incarceration.²⁵

Those wins made the defeat of a key rights-expansive ballot initiative in New York particularly difficult to swallow. On November 2, 2021, ballot propositions to amend the New York State Constitution to permit same-day registration (“SDR”)²⁶ failed by a margin of more than ten points.²⁷ SDR or Election Day Registration (“EDR”), as it is also known, allows qualified residents of a state to register to vote and cast their ballot at the same time.²⁸ It tends to benefit highly mobile populations, including young voters and students—the groups most affected by advance-registration requirements.²⁹ And where SDR has already been implemented in some form, its elimination is likely to have a disproportionate impact on poor and minority voters.³⁰ It is also secure,

21. *Id.*

22. *Voting Laws Roundup: February 2022*, BRENNAN CTR. FOR JUST. (Feb. 9, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022>.

23. *See These 24 States Improved Access to Voting This Year*, DEMOCRACY DOCKET (Dec. 28, 2021), <https://www.democracydocket.com/news/these-24-states-improved-access-to-voting-this-year/> (highlighting states that have expanded voting rights, like California, which will now automatically send mail-in ballots to all registered voters, and Maryland, which expanded early voting hours).

24. *See id.*

25. *E.g.*, Taylor Romine & Chandelis Duster, *New York Gov. Cuomo Signs Bill That Automatically Restores Felons’ Right to Vote After Release*, CNN: POLITICS (May 5, 2021, 8:23 PM), <https://www.cnn.com/2021/05/05/politics/new-york-felons-voting-rights/index.html>.

26. *2021 Statewide Ballot Proposals*, N.Y. STATE BD. OF ELECTIONS, <https://www.elections.ny.gov/2021BallotProposals.html> (last visited July 19, 2022).

27. Jon Campbell, *NY Ballot Proposals: Voters Reject Voting Reforms Backed by Democrats*, DEMOCRAT & CHRON. (Nov. 3, 2021, 3:56 PM), <https://www.democratandchronicle.com/story/news/2021/11/03/ny-ballot-proposal-results/6249894001/>.

28. Estelle H. Rogers, *Same Day Registration Fact Sheet*, PROJECT VOTE (Feb. 2015), <http://www.projectvote.org/wp-content/uploads/2015/06/SameDayFactSheet-PV-Feb2015.pdf>.

29. *Id.*

30. *See, e.g.*, Sean J. Young, *The Validity of Voter Registration Deadlines Under State Constitutions*, 66 SYRACUSE L. REV. 289, 292 (2016); Pedro De Oliveira, *Same Day Voter*

effective, and well-known to increase voter turnout and generally make it easier to vote.³¹ At least twenty-one states (and Washington, D.C.) have implemented some form of SDR/EDR as of 2021.³²

The defeat of New York's SDR initiative, however, took many of the measure's supporters by surprise and gave prominent voting rights opponents a talking point tying New York's experience to the "rampant voter fraud" narrative they had long touted.³³ Senate Minority Leader Mitch McConnell, for example, took advantage of the loss to urge lawmakers to vote against federal legislation that would have adopted both measures on a national scale.³⁴ McConnell parroted the false claims of the New York ballot measure's opponents that same-day registration and no-excuse absentee voting would result in "weaker elections."³⁵ New York showed—Senator McConnell seemed to argue—that the Overton Window, that is, the range of politically acceptable policies, has shifted in favor of voter suppression.³⁶

One thing was sure: the ballot initiative's opponents had surely put in the work (and funds) to secure its defeat. The same claims of "weaker elections" that Senator McConnell repeated went essentially unchecked in New York throughout the fall 2021 election season. The New York State Conservative Party spent millions on a blistering "Just Say No" ad campaign designed by a longtime Republican strategist that "raise[d] the spectre of voter fraud without explanation."³⁷ State Republican and Conservative Party officials touted the familiar language of antidemocracy advocates, making the baseless assertions that same-day

Registration: Post-Crawford Reform to Address the Growing Burdens on Lower-Income Voters, 16 GEO. J. POVERTY L. & POL'Y 345, 353–55 (2009).

31. See Dale E. Ho, *Election Day Registration and the Limits of Litigation*, 129 YALE L.J.F. 185, 186, 194 (2019) ("EDR is perhaps the single legal reform that could do the most to improve our voter-turnout rates, which are dismally low compared to those of most economically developed democracies.").

32. *Same Day Voter Registration*, NAT'L CONF. STATE LEGISLATURES (June 13, 2022), <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

33. See Vera Bergengruen, *How Republicans Are Selling the Myth of Rampant Voter Fraud*, TIME (Oct. 22, 2020, 6:03 AM), <https://time.com/5902728/voter-fraud-2020-2/>.

34. Press Release, Mitch McConnell, Minority Leader, Senate, McConnell: Democrats' Latest Attempt to Federalize Elections Will Fail (Nov. 3, 2021), <https://www.mcconnell.senate.gov/public/index.cfm/pressreleases?ID=B31560E8-E6BB-4948-BB0B-9CE19A65C518>.

35. *Id.*; see also *Same Day Voter Registration*, *supra* note 32.

36. Press Release, Mitch McConnell, Minority Leader, Senate, *supra* note 34; see also *A Brief Explanation of the Overton Window*, MACKINAC CTR. FOR PUB. POL'Y, <https://www.mackinac.org/OvertonWindow> (last visited July 19, 2022).

37. Brigid Bergin, *How Warring Democrats Lost a Battle Over Voting Rights 'Even in Deep Blue New York'*, GOTHAMIST (Nov. 5, 2021), <https://gothamist.com/news/how-new-york-democrats-lost-battle-over-voting-rights-ballot-proposals-2021>.

registration and no-excuse absentee voting—measures widely adopted by both red and blue states—would undermine “election integrity” and promote fraud.³⁸ The staunch opponents of the democracy-expanding measures outspent New York state Democrats, who had shepherded the two proposals onto the ballot, by a margin of at least ten-to-one.³⁹

The fraud narrative’s success in “progressive” New York triggered some needed introspection among advocates. Susan Lerner, executive director of Common Cause New York, which pushed for the failed measures, summed it up: “These results are a cautionary tale showing that even in deep blue New York . . . [a]nti-democracy forces are drowning out common-sense reforms with fear-mongering scare tactics, and voters are listening.”⁴⁰ Having come achingly short of the finish line after years of dedicated advocacy and organizing to get constitutional amendments through the legislature and onto the ballot, others blamed themselves.⁴¹ Jennifer Wilson of the League of Women Voters of New York State, for example, said, “We didn’t do a good job of reassuring voters ‘don’t worry this isn’t gonna cause fraud. All it’s gonna do is make voting easier.’”⁴²

Advocates, however, deserve far less blame than they would put on themselves: the 2021 ballot measure loss was tough, but not

38. Karen Dewitt, *NY Ballot Propositions That Would Expand Voting Access Face GOP Backlash*, WAMC NE. PUB. RADIO (Oct. 26, 2021, 3:30 PM), <https://www.wamc.org/news/2021-10-26/ny-ballot-propositions-that-would-expand-voting-access-face-gop-backlash> (quoting Republican and Conservative Party leaders expressing concern that same-day registration could lead to fraud).

39. Joshua Solomon, *State Democratic Party Did Not Spend Money on Props 1, 3, 4*, TIMES UNION (Nov. 3, 2021 6:53 PM), <https://www.timesunion.com/state/article/State-Democratic-Party-did-not-spend-money-on-16589509.php>; see Bergin, *supra* note 37 (“New York Republican Party Chairman Nick Langworthy toured the state in the final weeks before the election making dozens of media appearances, while the New York State Conservative Party Chairman Gerard Kassar said his organization sunk north of \$3 million on issue ads The only money that was spent to support the ballot initiatives came from the State Senate Democratic Campaign Committee, which put \$327,000 towards supporting the questions.”)

40. David Cruz, *‘A Black Eye for Democracy’: New Yorkers Reject Ballot Measures Aimed at Making Voting Easier*, GOTHAMIST (Nov. 3, 2021), <https://gothamist.com/news/a-black-eye-for-democracy-new-yorkers-reject-ballot-measures-aimed-at-making-voting-easier>.

41. See Sam Levine, *New Yorkers Reject Expanded Voting Access in Stunning Result*, GUARDIAN (Nov. 9, 2021, 6:00 AM), <https://www.theguardian.com/us-news/2021/nov/09/new-york-voters-reject-ballot-measures-voting-access> (“Republicans spent millions of dollars upstate and on Long Island educating voters to vote no and we did not spend hardly any money or even effort to educate voters on the other side,” said Jan Combopiano, senior policy director and executive committee member at the Brooklyn Voters Alliance.”)

42. *Id.*

unforeseeable. The election's timing—an off-cycle election with no state or federal races on the ballot and on the heels of a draining 2020 cycle—made conditions ideal for the ballot measure's opponents.⁴³ Voting rights and good government groups faced significant difficulty raising funds for pro-democracy ballot initiatives that most viewed as sure to pass in deep blue New York.⁴⁴ Lerner observed that it was hard to interest donors in supporting efforts to combat misinformation promulgated by the “Just Say No” campaign.⁴⁵ “What we found was a lack of urgency, of complacency, and a focus on national races instead of what's happening in our own backyard.”⁴⁶

Prop 3 failed in part because in taking its ratification for granted, the measure's proponents not only failed to rebut mendacious claims that same-day registration would “weaken elections,”⁴⁷ they also failed to make a strong affirmative case for enacting same-day registration to the public.

As voting rights litigators who brought a state constitutional challenge to New York's early voter registration cutoff, we also hold ourselves to account. These failures are personally frustrating because our case developed evidence and an argument that could have been used to confront antidemocracy advocates and to organize more effectively in support of democracy. This is blindingly obvious in retrospect: litigation, by nature, sharpens the presentation of adversarial narratives, evidence, and legal imperative. Our case undertook that exercise to show the needless burden of an early voter registration cutoff, how easily election officials could implement SDR, and the fundamental state constitutional value of preventing qualified voters' disenfranchisement.⁴⁸ Those facts and arguments seem equally valuable to educate, organize, and mobilize voters as they are to persuade courts.

43. See, e.g., David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 818 (2017) (“[T]here is substantial evidence that holding elections off cycle radically reduces turnout, even in cities with high turnout in presidential election years.”); see also *id.* at 818–19 (noting “organized interest groups . . . fare better in off-cycle elections”). It does not help that the propositions were printed on the back of the ballot. Morgan McKay, *New York Voters Reject 3 Ballot Propositions Backed by Democrats*, SPECTRUM NEWS NY1 (Nov. 3, 2021 8:45 PM), <https://www.ny1.com/nyc/all-boroughs/politics/2021/11/04/new-york-voters-reject-3-ballot-propositions-backed-by-democrats> (“So even a low percentage, 14% (who left the ballot blank) is still a lot right, particularly in a low turnout election,” according to Blair Horner, Executive Director, NYPIRG).

44. Bergin, *supra* note 37.

45. See *id.*

46. *Id.*

47. Press Release, Mitch McConnell, *supra* note 34.

48. Complaint at 3–5, League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections, No. 160342/2018 (N.Y. Sup. Ct. Nov. 6, 2018).

The struggle to pass SDR and no-excuse absentee voting in New York underscores the need for voting rights advocates to holistically leverage organizers' and litigators' scarce resources to effectively oppose antidemocratic efforts. Litigation can play an integral role supporting organizing, lobbying, and communications resources—not only winning relief from judges, but to provide facts and build narratives—and arming organizers, legislative advocates, and communications professionals in the process.

We consider where we have fallen short, but also what our cases and other similar litigation has achieved. Most importantly, we explore how litigators could better integrate their efforts with organizer allies to achieve vital reforms in progressive states, using the fight against voter registration deadlines as blueprint. As long as progressive states hold out on SDR and election day registration, antidemocracy advocates will have fodder to block those and other reforms elsewhere and federally. The New York experience shows how we are learning our lessons.

UNDERSTANDING LITIGATION'S LIMITS WITHOUT LOSING SIGHT OF ITS CONTRIBUTIONS

The most obvious shortcoming of recent litigation challenging state laws requiring voters to register well in advance of election day is the failure, to date, of any of those cases to achieve relief by judicial order.⁴⁹ Our colleague, Dale Ho, catalogued those cases—two federal and three state—in his 2019 article, *Election Day Registration and the Limits of Litigation*.⁵⁰ There, he framed the cases as affirmative attempts to strike down longstanding laws imposing burdens on the right to vote.⁵¹ He contrasted those cases with “defensive voting-rights litigation—[which] block[s] new barriers to voting, or prevent[s] rollbacks of existing reforms.”⁵² While voting rights advocates have enjoyed some recent success in the latter,⁵³ Ho observed that “it is difficult to think of a major affirmative reform . . . that has been accomplished through litigation over the last four decades.”⁵⁴ And he attributed those affirmative cases' poor track record to a “status-quo bias,” noting “[c]ourts are generally

49. Ho, *supra* note 31, at 194 (“When it comes to EDR, however, litigation has been unsuccessful to date . . .”).

50. *See id.* at 194–95.

51. *See id.* at 195.

52. *Id.* at 202 (alteration in original).

53. *Id.*; *see also* *Voting Rights Litigation Tracker*, BRENNAN CTR. FOR JUST. (July 11, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker> (tracking voting rights litigation throughout the United States).

54. Ho, *supra* note 31, at 202.

conservative institutions.”⁵⁵ Speaking to recent cases challenging state voter registration deadlines, Ho noted their persuasive legal theories, robust factual records, and the weak justification for lengthy registration deadlines enacted before modern computing.⁵⁶ And yet, none of these cases have to date successfully changed a state’s registration deadline.⁵⁷ Ho labeled the lawsuits “failure[s]” that highlight “the practical limitations of courts as vehicles for affirmative reform.”⁵⁸

It is not unreasonable to measure a lawsuit’s success by comparing the relief obtained to the relief sought. But here, looking only at a win or loss falls prey to the adage that “to a hammer, everything looks like a nail.”⁵⁹ In focusing on the “limits of litigation,” Ho left unaddressed several important contributions that these cases have made and continue to make to support the long-term process of building and sustaining a more expansive democracy.⁶⁰ Chief among these is how litigation can contribute to organizing and, ultimately, to eroding the “status-quo bias” in the courts, legislatures, and the public.⁶¹

For example, the failure of SDR/EDR lawsuits to achieve judicial relief could, sure enough, “counsel[] a strategy that focuses primarily on legislative efforts,” and federal reform in particular.⁶² But New York’s recent vote suggests that “solidly ‘red’ states may [*not*] be the most promising targets for state-level EDR reforms in the short term.”⁶³ That risks discounting the prospects for “solidly blue” states that have yet to adopt EDR, such as Massachusetts, New Jersey, or New York, where state constitutional cases challenging early voter registration cutoffs have failed to secure judicial relief.⁶⁴ The omission was likely due to Ho’s confidence that reform in these states was imminent. But the November 2021 failure of Prop 3,⁶⁵ which would have paved the way for same-day registration, shows that the story is not that easy. These “solidly blue” states do present the best, next targets for reform, especially in light of

55. *Id.*

56. *See id.* at 199–200.

57. *See id.* at 194.

58. *Id.*

59. *Id.*

60. *See generally id.*

61. *Id.* at 202. As the name suggests, “status-quo bias” refers to the notion that “individuals tend to prefer the present state of the world to alternative states, all other things being equal.” Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228–29 (2002).

62. Ho, *supra* note 31, at 194.

63. *Id.* at 202 (alteration in original) (emphasis added).

64. *See id.*

65. *2021 Statewide Ballot Proposals*, *supra* note 26 (“Ballot Proposal 3: . . . Eliminating Ten-Day-Advance Voter Registration Requirement”).

the recent frustration of proposed federal legislation.⁶⁶ But we are now all aware that we cannot even take that for granted.

We therefore look at the small, but significant incremental ways that state constitutional EDR/SDR cases have improved the landscape for reform in the courts, the legislature, and among the public. We focus on cases articulating theories under state constitutional provisions because we recognize that progressive states such as those where these cases have been litigated offer a relatively hospitable climate for vindicating voting rights and shifting the local and national Overton Window towards expanding democratic participation.

A. *Eroding Status Quo Bias in State Courts*

In Massachusetts, New Jersey, and New York, state constitutional litigation has taken aim at the unnecessary burdens on the right to vote posed by early voter registration cutoffs. The cases vary in their details but are fundamentally similar in their approaches.

They each take advantage of those respective states' constitutions' express textual commitments to the right to vote.⁶⁷ The Constitutions in Massachusetts, New Jersey, and New York each enshrine the right to vote in strong, positive text.⁶⁸ Indeed, the New York State Constitution provides not only an express guarantee of the right to vote, but also a separate provision in the State's bill of rights that protects qualified voters from disenfranchisement.⁶⁹ By contrast—and famously—the U.S. Constitution has no express textual commitment at all.⁷⁰ Moreover, these state constitutional provisions had also each been under-litigated compared to the fundamental right to vote implied in the federal constitution or other federal voting rights protections. For example, in New York, the seminal case law constructing an exacting standard of review for restrictions on the right to vote dates back to the 1910s.⁷¹ The

66. See Ho, *supra* note 31, at 202.

67. See e.g., *Chelsea Collaborative, Inc. v. Sec'y of Commonwealth*, 100 N.E.3d 326, 329–30 (Mass. 2018).

68. See MASS. CONST. Decl. of Rights art. IX; MASS. CONST. amends., art. III.; N.J. CONST. art. II, § 1; N.Y. CONST. art. II, § 1; *id.* art. I, § 1.

69. See N.Y. CONST. art. II, § 1; *id.* art. I, § 1.

70. Although there is no express textual commitment, “[t]he individual’s right to vote is firmly implied in the 1st Amendment of the United States Constitution and is protected as a fundamental right by both the Due Process and Equal Protection Clauses of the 14th Amendment.” See *Veasey v. Perry*, 71 F. Supp. 3d 627, 684–85 & nn.437 & 438 (S.D. Tex. 2014) (collecting cases), *aff’d in part, vacated in part, remanded sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015), *on reh’g en banc*, 830 F.3d 216 (5th Cir. 2016), *aff’d in part, vacated in part, rev’d in part sub nom. Veasey v. Abbott*, 830 F.3d 216, 265 (5th Cir. 2016).

71. See, e.g., *People ex rel. Hotchkiss v. Smith*, 99 N.E. 568, 571–72 (N.Y. 1912); *Hopper v. Britt*, 203 N.Y. 144, 150 (1911).

relatively clean slate of state constitutional law in this area leaves an opening to develop jurisprudence that holds that these express, affirmative rights to vote demand more exacting scrutiny on voting restrictions than the U.S. Constitution.

Massachusetts, New Jersey, and New York also possessed relatively early voter registration cutoffs. Nineteen states and the District of Columbia offer EDR, nearly double the number that offered the practice in 2013.⁷² Reliably progressive states make up the majority of that list.⁷³ And yet, to date, Massachusetts maintains a twenty-day cutoff, New Jersey maintains a twenty-one-day cutoff, and New York maintains a twenty-five-day cutoff.⁷⁴ In each of the three states, current deadlines were set decades ago when election officials lacked computerized voter registration lists and efficient means to access voter rolls on Election Day.⁷⁵ With those days long gone, the state constitutional cases each sought to enjoin the states' archaic registration cutoffs, with the best case scenario aim of facilitating SDR/EDR through judicial order.⁷⁶

The cases ultimately did not achieve that relief or generate clear, durable holdings providing greater protection for voting rights than the federal constitution. But even if these cases fell short of meaningfully reshaping state constitutional and election law, they should be seen as part of a longer and more incremental process of developing robust state constitutional voting rights.⁷⁷ By any measure, the cases have made notable—even if modest or interstitial—advances towards eroding courts' status quo bias.

72. Compare *Same Day Voter Registration*, *supra* note 32 (explaining that nineteen states and the District of Columbia offered EDR by 2021), with *Election Day Registration: FAQs*, NAT'L CONF. STATE LEGISLATURES: THE CANVASS (May 2013), https://www.ncsl.org/documents/legismgt/elect/Canvass_May_2013_No_40.pdf (listing only eight states and the District of Columbia offering EDR as of 2013).

73. See *Election Day Registration: FAQs*, *supra* note 72.

74. *Register to Vote in Massachusetts*, VOTE.GOV, <https://vote.gov/register/ma/> (last visited July 20, 2022); *Register to Vote in New Jersey*, VOTE.GOV, <https://vote.gov/register/nj/> (last visited July 20, 2022); *Register to Vote in New York*, VOTE.GOV, <https://vote.gov/register/ny/> (last visited July 20, 2022).

75. *A Hopelessly Outdated Voter Registration Deadline*, BOS. GLOBE (July 10, 2017, 12:00 AM), <https://www.bostonglobe.com/opinion/editorials/2017/07/09/hopelessly-outdated-voter-registration-deadline/hkDEFtrY09Z9EZUNtEk0LL/story.html>; Emily Rong Zhang, *New York Registration Deadline Prevents Tens of Thousands from Voting*, ACLU (Nov. 7, 2018, 11:45 AM), <https://www.aclu.org/blog/voting-rights/fighting-voter-suppression/new-york-registration-deadline-prevents-tens-thousands>; N.J. STAT. ANN. § 19:31-6.3 (West 2006).

76. See, e.g., *Chelsea Collaborative, Inc. v. Sec'y of Commonwealth*, 100 N.E.3d 326, 329–30 (Mass. 2018).

77. See, e.g., *id.* at 327, 329–30.

In Massachusetts, the Supreme Judicial Court upheld the twenty-day cutoff, unfortunately overturning a strong, well-reasoned trial court decision in *Chelsea Collaborative, Inc. v. Secretary of Commonwealth*.⁷⁸ But the decision came with a clear silver lining. Even as it upheld the State's archaic registration cutoff, the court put the legislature on notice of a "continuing duty to ensure that the deadline is no further from election day than what the Legislature reasonably believes is consistent with . . . [an] interest in conducting a fair and orderly election."⁷⁹ What was reasonable once would not always be so, the court explained.⁸⁰ And regulations "that insignificantly interfered with the right to vote thirty-five, one hundred, or 200 years ago may . . . significantly interfere with the exercise of that right today in light of technological change and the reasonable expectations of Massachusetts citizens."⁸¹ That commonsense principle has already had beneficial downstream effects for Massachusetts voters.⁸² In April 2020, in a ruling striking down a minimum signature requirement for candidates that appear on Massachusetts ballots at the height of the COVID-19 emergency, the Supreme Judicial Court relied on *Chelsea Collaborative* to hold that limitations that "in ordinary times impose only modest burdens" may well "significantly interfere" with fundamental rights "in a time of pandemic."⁸³

In New York, *League of Women Voters of New York State v. Board of Elections*, the state constitutional challenge remains pending, having been slowed by the pandemic and several administrative changes in judges assigned to the case.⁸⁴ To date, the most significant ruling remains the trial court's order denying the state's motion to dismiss, which affirmed the continuing vitality and applicability of a 1912 case that held "[l]aws which 'disfranchise constitutionally qualified electors' or 'unnecessarily prevent[] the elector from voting . . . violate[] the Constitution.'"⁸⁵ The trial court further acknowledged that "[t]he laws that plaintiffs challenge here potentially have a broad impact on the

78. *Id.*

79. *Id.* at 327–28.

80. *See id.* at 334.

81. *Id.*

82. *See* Goldstein v. Sec'y of Commonwealth, 142 N.E.3d 560, 570 (Mass. 2020) ("[A]s we have recognized, statutory requirements that were once considered constitutionally permissible may later be found to interfere significantly with a fundamental right as societal conditions and technology change." (citing *Chelsea Collaborative*, 100 N.E.3d at 326)).

83. *Id.*

84. *See* Decision & Order on Motion, *League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections*, No. 160342/2018 (N.Y. Sup. Ct. Oct. 4, 2019), 2019 WL 4899034.

85. *Id.* at *6 (quoting *People ex rel. Hotchkiss v. Smith*, 99 N.E. 568, 571 (N.Y. 1912)).

voting population,” and referenced estimates by Professors Barry Burden and Alexander Street that the plaintiffs submitted in expert reports.⁸⁶ Those reports estimated that the registration cutoff precluded tens of thousands of otherwise eligible voters from casting a valid ballot and deterred over 100,000 from registering at all.⁸⁷ During the early months of the pandemic, as lockdowns and social distancing dramatically slowed voter registration to the tune of at least 100,000 fewer voters registered than during the same period in 2016, the New York plaintiffs filed a motion seeking urgent relief.⁸⁸ That motion was denied.⁸⁹

Still, in New York, litigation against an early voter registration cutoff has not yet reached its endpoint. Discovery remains ongoing, and an unfavorable ruling on the preliminary injunction motion does not preclude lasting relief.⁹⁰ Moreover, while the case has been slowed by the pandemic, new facts have emerged revealing that the early registration cutoff can disenfranchise voters in catastrophic ways,⁹¹ as well as the extent to which New York’s election administration privileges patronage over professional competence, presenting an illegitimate bar to modernization.⁹²

However, even if litigation fails to change registration deadlines overnight or stops short of eroding courts’ status quo bias, building litigation gives trial lawyers new opportunities to better support and coordinate with ally organizers and advocates. At the risk of suggesting “the real victory was the friends we made along the way,” student-voter

86. *Id.*

87. *Id.*

88. Plaintiffs’ Memorandum of Law in Support of a Motion for Preliminary Injunction at 2, League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections, No. 160342/2018 (N.Y. Sup. Ct. July 28, 2020), 2020 WL 5806426 [hereinafter Plaintiffs’ Memorandum].

89. Decision & Order on Motion at 3, League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections, No. 160342/2018 (N.Y. Sup. Ct. Sept. 25, 2020), 2020 WL 5745625.

90. Stipulation, League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections, No. 160342/2018 (N.Y. Sup. Ct. July 26, 2022), NYSCEF No. 118 (reflecting stipulation of defendants to supplement discovery responses).

91. See Tom Magnarelli, *In Brindisi-Tenney Race, Judge Orders Review of 1,000 Rejected Oneida County Affidavit Ballots*, WSKG (Jan. 21, 2021), <https://wskg.org/in-brindisi-tenney-race-judge-orders-review-of-1000-rejectedoneida-county-affidavit-ballots/> (“State Supreme Court Justice Scott DelConte is ordering the [Oneida County] Board [of Elections] to properly canvass all of its affidavit ballots, after it was discovered that the Board failed to process more than 2,400 voter registration applications that were filed on time through the state DMV website,” in a Congressional race decided by 109 votes); see also Luis Ferré-Sadurní, *Last Undecided House Race Finally Goes to Republican, by 109 Votes*, N.Y. TIMES (Apr. 26, 2021), <https://www.nytimes.com/2021/02/05/nyregion/claudia-tenney-brindisi-election.html>.

92. Joanna Zdanys et al., *How to Fix the New York City Board of Elections*, BRENNAN CTR. FOR JUST. 3 (Sept. 9, 2021), <https://www.brennancenter.org/our-work/policy-solutions/how-fix-new-york-city-board-elections>.

engagement in New Jersey may ultimately prove to have contributed a positive and durable impact in this space.

Specifically, in *Rutgers University Student Assembly (RUSA) v. Middlesex County Board of Elections*, a group of students challenged the state's twenty-one-day registration cutoff under Article II of New Jersey's Constitution, which entitles all qualified residents to vote in any election so long as they have resided in-state for at least thirty days.⁹³ The students argued that only an SDR/EDR system would be "constitutional and that pre-election day registration requirements violate an individual's" right to vote in New Jersey.⁹⁴ Despite some initial suggestions that New Jersey courts would be "open to the possibility that registration deadlines may no longer be justifiable under [the] state constitution,"⁹⁵ the courts were ultimately unpersuaded.⁹⁶ Even as they acknowledged that New Jersey's elections had "dramatically changed" over the years, and that election officials can quickly "upload and verify a potential voter's identifying information,"⁹⁷ the appellate division eventually held that the cutoff somewhat easily passed constitutional muster.⁹⁸

But litigation in New Jersey was still a catalyst for student organizing and advocacy for pro-voter reform as well as increased political participation. Matt Cordeiro, a plaintiff in the case who was a Rutgers student and a RUSA leader when the case was filed, said that the case provided an opportunity to introduce students into the movement to reform New Jersey's retrograde voting laws that had mostly the province of established civil rights groups.⁹⁹ "The Election Day Registration case gave student government a platform to raise the issue of student voter suppression and to work experienced advocates and established civil rights groups to help students become more effective advocates," Cordeiro said.¹⁰⁰ Complementary organizing in building and sustaining the *RUSA* case has contributed to fomenting a political climate where student voting is on the rise and New Jersey is ripe for reform.

93. *Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections (RUSA I)*, 102 A.3d 408, 409–11 (N.J. Super. Ct. App. Div. 2014).

94. *Id.* at 411.

95. Young, *supra* note 30, at 291.

96. *See, e.g., Rutgers Univ. Student Assembly v. Middlesex Cty. Bd. of Elections (RUSA II)*, 141 A.3d 335, 347 (N.J. Super. Ct. App. Div. 2016).

97. *RUSA I*, 102 A.3d at 410.

98. *See RUSA II*, 141 A.3d at 347.

99. Telephone Interview with Matt Cordiero, RUSA Plaintiff (Mar. 24, 2022).

100. *Id.*

Collaborating to educate voters and shape public opinion may also ultimately improve the prospects of litigation before an elected state trial court judiciary. For better or worse, judicial elections are “practical instruments for translating that sovereignty into concrete outcomes, for ensuring that the adjudicated Constitution remains aligned with public opinion.”¹⁰¹ If effective organizing can encourage the public to demand a more inclusive and equitable democracy, an elected state judiciary may be held accountable for interpreting state constitutional voting rights consistent with that popular constitutionalism.

B. The Virtuous Cycle of Integrated Litigation, Organizing, and Legislative Advocacy

As lawyers who are challenging New York’s antiquated registration deadline in court, we were disheartened to see Prop 3’s failure in November 2021. And it was especially discouraging to see the measure fall prey to baseless claims that SDR would “weaken” New York’s elections.¹⁰² Of course, the opposite is true: by making it possible for thousands of New Yorkers to register in the days immediately leading up to an election and on Election Day, SDR would only increase civic participation,¹⁰³ decrease burdens on vulnerable voters,¹⁰⁴ and strengthen democratic institutions.¹⁰⁵

Prop 3’s defeat stung in another more personal way: the measure’s failure underscored that we, as voting rights litigators, disserve our broader cause when we focus too narrowly on the contributions we stand to make in the courtroom. Rather, as Deborah Archer has written about “political lawyering,” litigation can both be “central” to the effort or cause advanced, while “recogniz[ing] that litigation, interdisciplinary

101. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2070 (2010).

102. *E.g.*, *NY Expands Absentee Voting after Defeat of Ballot Measure*, WSKG (Jan. 23, 2022), <https://wskg.org/ny-expands-absentee-voting-after-defeat-of-ballot-measure/>.

103. See Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL’Y REV. 71, 95 (2014) (“[L]iberalization of voter registration has the best track record of improving participation by eligible citizens. The gold standard is same-day registration.”).

104. See De Oliveira, *supra* note 30, at 354. (“Allowing Americans to register to vote at the polls . . . would address . . . burdens on lower-income citizens and partially ameliorate the income disparities in registration rates.”).

105. See Elizabeth Aloi, *Thirty-Five Years After the 26th Amendment and Still Disenfranchised: Current Controversies in Student Voting*, 18 NAT’L BLACK L.J. 283, 302 (2004) (“[Same-day registration] would force politicians to address a wider variety of public policy issues during their campaigns. Every citizen would be a likely voter and therefore there would be less of an inclination to tailor the political dialogue towards traditional voting blocs.”).

collaboration, policy reform, and community organization must proceed together.”¹⁰⁶ And in this sense, our contribution to the movement to modernize New York’s registration deadlines had likely been too siloed from the messaging and evidence that organizers and legislative advocates deployed in 2021 to help Prop 3 in any meaningful way.

When litigation supports efforts to organize and shape public discourse in favor of democracy-enhancing measures such as SDR, it also contributes to a positive feedback loop. Creating a climate of popular constitutionalism that favors robust voting rights benefits every stakeholder in a more modern, efficient, and inclusive democracy by opening legislative and administrative, as well as judicial, channels for change.

But hindsight is—here, quite literally in—2020. Instead of highlighting what could have been done differently, we address ongoing litigation challenging New York’s lengthy registration cutoff and discuss how it can work in parallel with legislative efforts to change that rule to democracy’s benefit. We part from the premise that New York (and other “progressive” states like Massachusetts and New Jersey) must go from being an antidemocratic punchline to instead contributing to shifting the Overton Window towards a more modern, equitable, and inclusive nationwide democracy. Voters benefit when litigation and organizing erodes the status quo bias of all stakeholders—including legislators, the press, and the public as well as courts—to open greater access to the ballot. To successfully do this, lawyers, advocates, and organizers must center the young people who are both most negatively affected by antiquated voting practices that might keep them from the franchise and least invested in the status quo.

1. Developing the Affirmative Case for Reform

First, the publicly available record in *League of Women Voters of New York* can contribute to the affirmative case for ending New York’s early registration cutoff. Quantifying the number of otherwise eligible voters who are either precluded from casting a valid ballot or deterred from registering can only clarify the deadline’s voter suppressive effect and highlight of the benefits of repealing it. In *League of Women Voters of New York*, an expert witness holding a Ph.D. in political science engaged

106. Deborah N. Archer, *Political Lawyering for the 21st Century*, 96 DEN. L. REV. 399, 402 (2019). “Political lawyering,” Archer explains, “acknowledges the truth that political, along with social and economic, forces are critical parts of legal analysis and challenging social injustice.” *Id.* at 402 n.11.

in precisely that exercise.¹⁰⁷ Professor Alexander Street found that in general federal elections between 2004 and 2018, more than 200,000 otherwise eligible New York voters were precluded from casting a valid ballot by the twenty-five-day registration cutoff.¹⁰⁸ More than twice as many may have been deterred from even registering.¹⁰⁹ Young people feature disproportionately among these thousands of would-be voters, since early registration deadlines particularly impact those intending to vote for the first time.¹¹⁰

But effective organizing and public education campaigns put numbers in context; they humanize how voter suppression works and whom it hurts. The New York registration litigation does that too. For example, Nitch Jones, a witness and Black youth pastor and civic engagement activist from Syracuse, described how the early registration cutoff hurt his efforts to register voters during protests in the aftermath of George Floyd's murder.¹¹¹ Protests in Syracuse began on May 30, and Mr. Jones and a team of volunteers he recruited set out to register new voters the following day.¹¹² Many of these new voters were particularly enthused about the upcoming June 23, 2020, primary election for city court judge because two of the five candidates in the Democratic primary were women of color.¹¹³ Unfortunately, the twenty-five-day cutoff for the June 2020 primary election was May 29.¹¹⁴ Mr. Jones recounted that some potential new voters were so discouraged after learning that they would not be able to vote in the upcoming primary that they declined to register at all.¹¹⁵

For another example: Helena Holland Breger, a young woman in New York City who had been registered to vote and had voted in the past two

107. See generally Affidavit of Alexander Street in Support of Plaintiffs' Motion for Preliminary Injunction, League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections, No. 160342/2018 (N.Y. Sup. Ct. Aug. 21, 2020).

108. *Id.* at 9.

109. *Id.* at 9 tbl.3, 12–13 tbl.4.

110. See Ceridwen Cherry, *Increasing Youth Participation: The Case for a National Voter Pre-Registration Law*, 45 U. MICH. J.L. REFORM 481, 485 (2012) ("Young voters face particular disadvantages within the voluntary registration system [M]any newly eligible voters inadvertently miss voter registration deadlines."); Jesse Barber, *Analysis: Young Voters Hurt Most by Early Registration Deadline*, NYCLU (Apr. 15, 2022), <https://www.nyclu.org/en/news/analysis-young-voters-hurt-most-voter-registration-deadline>.

111. Affidavit of Nitch Jones in Support of Plaintiffs' Motion for Preliminary Injunction at 2–3, League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections, No. 160342/2018 (N.Y. Sup. Ct. July 28, 2020), NYSCEF No. 74.

112. *Id.*

113. *Id.* at 2.

114. *Id.* at 3.

115. *Id.*

federal elections described the experience of finding out that she was wrongfully removed from the city's voter rolls.¹¹⁶ Ms. Breger went to the polls after requesting an absentee ballot that she never received.¹¹⁷ She called New York City's Board of Elections ("BOE") to make sure the affidavit ballot she cast was counted.¹¹⁸ She then learned it was because, rightly or wrongly (and wrongly, in this case), the BOE did not have her registration record.¹¹⁹ As hard as she tried, Ms. Breger—a duly qualified, eligible, and *registered* voter—was unable to participate in the November 2020 election and her vote went uncounted just because the BOE lost her voter record.¹²⁰ SDR would have saved Ms. Breger's right to vote from the BOE's blunder.

The evidence of needlessly lengthy registration deadlines' disenfranchising effect has not gone unnoticed. While organizers and advocates work to bring a constitutional amendment to enable EDR back to the ballot in 2024, in the meantime, they are urging the New York State Legislature to reduce the registration cutoff from twenty-five days to the constitutional minimum of ten days.¹²¹ "The value of constitution litigation to a legislator is that it clarifies the fundamental values at stake and provides evidence to illustrate the impact of action on our constituents," said New York State Senate Elections Committee Chair Senator Zellnor Myrie.¹²² The publicly-available record from *League of Women Voters of New York State* has aided the democracy-expanding push. "Being able to point to evidence that the [twenty-five-day registration] deadline was disenfranchising tens of thousands of New Yorkers in every election and that the New York State Constitution prohibits more restrictions than necessary on the right to vote underscored the need to get off the mat and take action after the loss of the same-day registration proposition."¹²³ The bill passed the New York State Senate on January 10, 2022.¹²⁴

116. Affidavit of Helena Holland Breger in Support of Plaintiffs' Motion for Preliminary Injunction at 3–4, *League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections*, No. 160342/2018 (N.Y. Sup. Ct. July 28, 2020), NYSCEF No. 67.

117. *Id.* at 3–4.

118. *Id.* at 4.

119. *Id.*

120. *Id.*

121. See Barber, *supra* note 110.

122. Telephone Interview with Senator Zellnor Myrie, Chair, N.Y. State Senate Elections Comm. (Mar. 30, 2022).

123. *Id.*

124. Karen Dewitt, *NYS Senate Approves Voting Expansion Measures*, WAMC NE. PUB. RADIO (Jan. 10, 2022, 5:59 PM), <https://www.wamc.org/news/2022-01-10/nys-senate-to-approve-voting-expansion-measures>; Anna M. Kaplan, *Senator Kaplan Helps Pass Legislation Protecting Democracy & Expanding Voting Rights*, N.Y. STATE SENATE (Jan. 10,

Similarly, the Assembly Election Law Committee Chair, Assembly Member Latrice Walker, has focused on other key evidence in *League of Women Voters of New York*—specifically, Pastor Nitch Jones’s testimony. Speaking to the narrative and moral force of Pastor Jones’s experience, Assembly Member Walker said: “I remember the feeling in the streets during those days after George Floyd’s murder, the exigency, and when I read about Pastor Jones encountering people who were also moved to protest, but discouraged from registering to vote because of the deadline, it reinforced my conviction that we cannot wait for 2024.”¹²⁵ In a March 30 interview, Walker said she planned to urge her colleagues to take up the bill after the budget is finalized in April.¹²⁶ The Assembly passed the bill on June 3 and it now awaits delivery to the Governor for her signature.¹²⁷

2. Debunking the False Claims of Antidemocracy Advocates

Litigators can play a meaningful role exposing the falsehoods and inconsistencies at the heart of antidemocracy’s rhetoric. The “Just Say No” campaign against Prop 3 trafficked in misinformation to justify the need for an early registration cutoff and to disparage SDR as susceptible to fraud.¹²⁸ None of that was true, but the claims unfortunately went largely unchallenged. However, litigation holds parties to a higher bar, demanding that proffered justifications be supported by actual evidence.

Consider a press conference given by proponents of the successful “Just Say No” campaign in late October 2021 as a likely pattern for future messaging against same-day registration.¹²⁹ At that press conference, New York State Republican Party Chairman Nick Langworthy acknowledged that New York has “honest and fair elections currently,” but “posited that same-day voter registration is a ‘*red carpet for voter fraud*,’ and could potentially allow non-residents to vote in an election, particularly as the state has no voter identification requirements at the polls.”¹³⁰

2022), <https://www.nysenate.gov/newsroom/press-releases/anna-m-kaplan/senator-kaplan-helps-pass-legislation-protecting-democracy>.

125. Telephone Interview with Latrice Walker, Assembly Member, Assembly Election L. Comm. (Mar. 30, 2020).

126. *Id.*

127. Assemb. 8858, 2021-2022 Leg. Sess. (N.Y. 2022).

128. *See supra* text accompanying notes 26–32.

129. Cara Chapman, *GOP Rails Against Ballot Props in Clinton County*, ADIRONDACK DAILY ENTER. (Oct. 29, 2021), <https://www.adirondackdailyenterprise.com/news/local-news/2021/10/gop-rails-against-ballot-props-in-clinton-county/>.

130. *Id.*

Evidence and the legal argument in *League of Women Voters of New York* put lies to these claims. There, the State Board of Election supported its opposition to our Plaintiffs' constitutional arguments with affidavits from two Republican elected officials.¹³¹ Between the three documents spanning seventy pages, you could count every use of the word "fraud" on one hand and still have three fingers to spare.¹³² Neither the Republican co-executive director of the State Board of Elections, nor the Republican Commissioner of the Erie County Board of Elections, nor their lawyers, identified even a single incident of fraud prevented by the registration cutoff.¹³³

It is easy to see why: there is simply no documented pattern of fraud to speak of in modern New York elections—let alone one to justify archaic and suppressive registration deadlines. The conservative Heritage Institute's database of election fraud cases reveals only seven convictions for "false registrations" since 1983 in New York, and nearly half were linked to a single conspiracy.¹³⁴ Even among these seven convictions, there is no evidence that any of them were non-citizens.¹³⁵ Records from New York State's Department of Criminal Justice Services similarly show that between 2002 (the earliest year for which the department maintains data) and 2018, there was not a single arrest by a state or local law enforcement agency or a conviction in a state court for false registration in any of New York's sixty-two counties.¹³⁶ Of course, these

131. See Memorandum of L. of Defendant New York State Bd. of Elections in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 12, *League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections*, No. 160342/2018 (N.Y. Sup. Ct. Aug. 14, 2020) [hereinafter Defendant's Memorandum]; Affidavit of Ralph M. Mohr in Opposition to the Motion for Preliminary Injunction at 4, *League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections*, No. 160342/2018 (N.Y. Sup. Ct. Aug. 14, 2020), NYSCEF Doc. No. 91 [hereinafter Affidavit of Ralph M. Mohr]. See generally Affidavit of Todd D. Valentine in Opposition to the Motion for Preliminary Injunction, *League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections*, No. 160342/2018 (N.Y. Sup. Ct. Aug. 14, 2020), NYSCEF Doc. No. 81 [hereinafter Affidavit of Todd D. Valentine].

132. See generally Defendant's Memorandum, *supra* note 131; Affidavit of Ralph M. Mohr, *supra* note 131; Affidavit of Todd D. Valentine, *supra* note 131 (no mention of fraud).

133. See Defendant's Memorandum, *supra* note 131, at 12; Affidavit of Ralph M. Mohr, *supra* note 131, at 4. See generally Affidavit of Todd D. Valentine, *supra* note 131.

134. *Voter Fraud Map: Election Fraud Cases*, HERITAGE FOUND., https://www.heritage.org/voterfraud/search?combine=&state=NY&year=&case_type=24487&fraud_type=24505 (last visited July 20, 2022).

135. See *id.*

136. E-mail from N.Y. State Div. of Crim. Just. Servs., Stat. Servs. Unit, Off. of Just. Rsch. & Performance, to Perry Grossman, NYCLU (Aug. 23, 2019 11:55 AM EST) (on file with authors), attaching in response to a Freedom of Information Law ("FOIL") request a spreadsheet reflecting all arrests and convictions by county for every county in New York State since January 1, 2000, for violations of N.Y. ELEC. LAW §§ 17-102, 17-104, 17-132, 17-

local trends are consistent with national evidence showing that “voter fraud” is virtually non-existent. Another expert witness in the cutoff litigation, Professor Barry Burden, a political scientist at the University of Wisconsin-Madison, collected studies about the prevalence of fraud arising from EDR in states that offer it.¹³⁷ He found that fraud was, at most, “rare” and that EDR did not make elections more susceptible to fraud.¹³⁸ Advocates for eliminating the voter registration cutoff should bury their claims of fraud in light of this evidence.

Borrowing an obvious argument that is already featured in New York registration deadline litigation, advocates can use Langworthy’s claim that New York “does have honest and fair elections currently” to show precisely how same-day registration can be implemented in an “honest and fair” way, using our state’s current election procedures.¹³⁹ As we have argued, Election Law § 8-302(3)(e)(iii)¹⁴⁰ already allows any prospective voter whose name does not appear in the poll book to cast an affidavit ballot.¹⁴¹ During the canvass, those affidavit ballots are checked against registration records.¹⁴² Ballots are then counted if the person is registered.¹⁴³ If the person is not already registered, then the affidavit ballot serves as a registration form and the voter is registered but the ballot is not counted.¹⁴⁴ To give effect to same-day registration, the Board of Elections need only take the additional step of counting all affidavit ballots cast by verifiably eligible voters instead of only registered voters.¹⁴⁵

A pending commonsense bill introduced by Senator Myrie would implement SDR during early voting by simply making good use of these existing procedures.¹⁴⁶ The bill includes a trigger that would implement same-day registration through Election Day if and when a constitutional

144, 17-160 (on file with authors, but publicly available from the New York Division of Criminal Justice Services in response to any FOIL request).

137. See generally Affidavit of Barry C. Burden in Opposition to the Motion for Preliminary Injunction, League of Women Voters of N.Y. State v. N.Y. State Bd. of Elections, No. 160342/2018 (N.Y. Sup. Ct. Nov. 2, 2018), 2018 WL 10419713.

138. *Id.* at 9 (quoting MICHAEL J. HANMER, DISCOUNT VOTING: VOTER REGISTRATION REFORMS AND THEIR EFFECTS (2009)); see also *id.* at 20–21.

139. Chapman, *supra* note 129.

140. N.Y. ELEC. LAW § 8-302(3)(e)(iii).

141. Plaintiffs’ Memorandum, *supra* note 88, at 8.

142. FAQs, BD. OF ELECTIONS IN THE CITY OF N.Y., <https://www.vote.nyc/page/faqs#q18> (last visited July 20, 2022).

143. *Id.*

144. *Id.*

145. *Id.*

146. S. 1552, 2021-2022 Reg. Sess. (N.Y. 2021), <https://www.nysenate.gov/legislation/bills/2021/s1552>.

amendment to repeal the ten-day deadline is ratified.¹⁴⁷ The entire affidavit ballot canvass process is currently conducted without a photo ID requirement and there is no reason why same-day registration using that procedure would be any less secure without a photo ID requirement. Maine and Minnesota have each provided EDR since 1976, neither state requires a photo ID to vote, and there is no evidence that EDR has resulted in any appreciable increase in fraud there or in other EDR states.¹⁴⁸ Professor Burden's expert report, which surveys evidence of EDR's impact and administrability, is essentially a handbook for organizers and advocates to rebut antidemocratic aspersions cast against this crucial measure.¹⁴⁹

3. Centering Impacted Groups and Elevating Their Leadership

Youth leadership has been a consistent cornerstone of successful social and political movements in America, including the civil rights, anti-war, and gay rights movements.¹⁵⁰ More recently, youth leadership has been critical to successful organizing and advocacy around climate change and gun violence.¹⁵¹ As the generation facing these existential threats, youth bring to bear "moral authority" and urgency to advocate for solutions.¹⁵² They also bring critical communications savvy to organize and catalyze their peers into activism, as well as to project a message that resonates across generations.¹⁵³

The erosion of democracy is a similar existential threat; young voters recognize it. The proliferation of vote suppression, vote dilution, and election subversion measures—fueled by the Big Lie and other efforts of organized antidemocracy—are more than an abstract threat to public

147. *Id.*

148. See R. Michael Alvarez et al., *Election Day Voter Registration in the United States: How One-Step Voting Can Change the Composition of the American Electorate* 3 (CalTech/MIT Voting Tech. Project, Working Paper No. 5, 2008), <https://vote.caltech.edu/working-papers/5>; *Same Day Voter Registration*, *supra* note 32 (providing verification procedures for election day registration in Maine, which do not include a photo ID requirement, and noting "Maine has had election day registration since 1975 and has only had four prosecutions for double voting").

149. Affidavit of Barry C. Burden, *supra* note 137.

150. Andrew Winston, *Young People Are Leading the Way on Climate Change, and Companies Need to Pay Attention*, HARV. BUS. REV. (Mar. 26, 2019), <https://hbr.org/2019/03/young-people-are-leading-the-way-on-climate-change-and-companies-need-to-pay-attention>.

151. *Id.*

152. Emma Marris, *Why the World is Watching Young Climate Activists*, NATURE, Sept. 26, 2019, at 471, <https://media.nature.com/original/magazine-assets/d41586-019-02696-0/d41586-019-02696-0.pdf>.

153. *Id.*

confidence in the political process. They threaten to disable the ability of the democratic processes to hold elected officials accountable at an inflection point in American history. “Between the climate emergency, efforts to restrict access to essential healthcare, the crises of affordability in housing and student debt, among other issues, our future is under threat,” said Brianna Cea, Executive Director and founder of Generation Vote, an intersectional youth-led movement based in New York that fights for equitable access to the right to vote and a just democracy for all.¹⁵⁴ “But the generation that will be the most affected, the youngest and most diverse generation, are denied access to the ballot and an equitable opportunity to make elected officials listen to us.”¹⁵⁵ In the aftermath of January 6, 2021, Generation Vote went on a virtual listening tour to hear from young people in Texas, New Hampshire, Florida, Michigan, and New York about their voting experiences and their vision for pro-democracy youth organizing.¹⁵⁶ “We heard frustration with relying too much on litigation and urgent calls for a ‘Sunrise Movement-level intervention in the democracy space,’” said Cea.¹⁵⁷ “We have to seize this opportunity to reclaim our democracy and organize around making electoral justice a major priority for our generation.”¹⁵⁸

The registration deadline and the failure to pass Prop 3 illustrate both the positive impact that breaking down antiquated barriers can have on youth participation and the consequences of failing to engage youth voters in that struggle. Scholars long ago predicted and have since confirmed that Election Day Registration would likely significantly increase voting among “groups that currently have low participation rates, especially the young, minorities, and those who move frequently,” the latter group overlapping much with the former two.¹⁵⁹ Our colleague Jesse Barber, drawing on methods and data gained through working with Professor Street on *League of Women Voters of New York*, confirms that the state’s twenty-five-day registration cutoff disproportionately disenfranchised young voters.¹⁶⁰ For example, in the 2016 presidential primary, close to 43,000 people—68.4% of whom were eighteen- to thirty-

154. Telephone Interview with Brianna Cea, Exec. Dir., Generation Vote (Mar. 29, 2022).

155. *Id.*

156. *Id.*; see also *GenVote Youth Voting Rights Listening Tour*, GENERATION VOTE, <https://www.genvote.org/listening-tour.html> (last visited July 20, 2022).

157. Interview with Brianna Cea, *supra* note 154.

158. *Id.*

159. Alvarez et al., *supra* note 148, at 17; see Charlotte Hill & Jacob Grumbach, *An Excitingly Simple Solution to Youth Turnout, for the Primaries and Beyond*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/2019/06/26/opinion/graphics-an-excitingly-simple-solution-to-youth-turnout-for-the-primaries-and-beyond.html>.

160. Barber, *supra* note 110.

four-year-olds—registered to vote after the twenty-five-day registration cutoff but before the ten-day constitutional registration requirement, which made them ineligible to vote in the election.¹⁶¹ If Election Day Registration had been in place, a bare minimum of 70,000 more New Yorkers would have been eligible to vote, 65% of whom were eighteen- to thirty-four-year-olds.¹⁶² In larger turnout elections, the enfranchising effect of Election Day Registration would be even larger.¹⁶³

However, Barber also finds that the constitutional amendment that would have paved the way to same-day registration was defeated in November 2021 by an older electorate.¹⁶⁴ Voters aged eighteen to twenty-four accounted for only 2.9% of the ballots cast in the November 2021 elections, less than half their share of the November 2018 elections (6.0%), and barely more than one third of the November 2020 elections (8.4%).¹⁶⁵ By contrast, voters over fifty-five accounted for nearly 62% of the November 2021 electorate, compared to less than 45% of the November 2020 electorate.¹⁶⁶ The contrasting drop-off in turnout for these two groups between November 2020 and November 2021 is even more stark.¹⁶⁷ While turnout for voters aged fifty-five and older in November 2021 was about 53.7% of its November 2020 total turnout, turnout for voters aged eighteen to twenty-four in November 2021 was only 13.3% of its turnout from the prior year.¹⁶⁸ “These data are critical for mobilizing young people around the urgency of fighting the voter registration cutoff and implementing same-day registration because they show both just how much we can gain from breaking down these barriers but also just how much opposition we have to overcome,” Cea says.¹⁶⁹

Her approach makes sense. According to analysis of survey research by McKinsey & Company, members of Generation Z “make decisions and relate to institutions in a highly analytical and pragmatic way.”¹⁷⁰ Instead of underestimating or dismissing them, litigators may find youth organizers and audiences more receptive and prepared than judges to act

161. *Id.*

162. *See id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Interview with Brianna Cea, *supra* note 154.

168. Barber, *supra* note 110.

169. Interview with Brianna Cea, *supra* note 154.

170. Tracy Francis & Fernanda Hoefel, “True Gen’: Generation Z and Its Implications for Companies,” MCKINSEY & CO. (Nov. 12, 2018), <https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/true-generation-z-and-its-implications-for-companies>.

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on their evidentiary case, particularly the sophisticated quantitative elements.

Finally, as we continue litigating the New York registration deadline case, contributing to the virtuous cycle of integrated advocacy, we intend to take advantage of support from organizers, communications professionals, legislative advocates, and legislators in developing facts and constructing narrative. However, our efforts will prove most durable if we are able to collaborate with youth leadership to leverage our efforts into mobilization for legislative advocacy and voting, shaping public opinion to reflect the urgent need to make the political processes more modern, equitable, and inclusive. That sense of urgency did not take hold in New York in time for the November 2021 election, but Prop 3's failure may prove to be the wake-up call we need for all hands to come together to push back forcefully against the tide of organized antidemocracy.