IN THE SUPREME COURT OF THE STATE OF VERMONT

GERALD TRUDELL and MYRON DORFMAN
Plaintiffs/Appellants

v.

STATE OF VERMONT
and DEBORAH MARKOWITZ, SECRETARY OF STATE
Defendants/Appellees

Supreme Court Docket No. 2011-311

Appeal from the
Superior Court, Washington Unit
Civil Division
Docket No. 612-8-10 Wncv

Brief of the Appellees

STATE OF VERMONT

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ISSUE PRESENTED

Is Act 73, setting the same filing deadline for nominating petitions for independent candidates for the general election and candidates for party primaries, constitutional?

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STATEMENT OF THE CASE

This appeal is a challenge to the constitutionality of legislation enacted in 2010 that changed the filing deadline for petitions by independent candidates to be listed on the general election ballot. Plaintiff Gerald Trudell wished to have his name listed on the November 2010 general election ballot as an independent candidate for U.S. Congress, while Plaintiff Myron Dorfman wanted to vote for Mr. Trudell. After a trial on Plaintiffs' claims, the Washington Superior Court upheld the constitutionality of the filing deadline. Plaintiffs appeal from that ruling.

Statutory Framework & Legislative History of Act 73

In 2010, the Legislature amended the Vermont election statutes to change the date for primary elections and establish new filing deadlines for candidates for the primary and general elections. 2009, No. 73 (Adj. Sess.), § 1. These amendments, enacted as part of Act 73, were made necessary by the federal MOVE Act of 2009. PC 2. In the MOVE Act, Congress imposed a fixed deadline for states to prepare and send ballots to overseas voters. 42 U.S.C. § 1973ff-1(a)(8)(A); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat.2190, 2322 (2009) (adding subsection 8 to 42 U.S.C. § 1973ff-1(a)) The former September primary date did not allow enough time to prepare the absentee ballots for the November general election, so Act 73 moved the primary election to August. SPC 18; PC 2.

Act 73 also changed the candidate filing deadlines. Before the 2010 amendments, 17 V.S.A. § 2402(d) required that independent candidates file a

"statement of nomination" no later than the third day after the primary election. 17 V.S.A. § 2402(d)(2002). Candidates entering major party primaries were required to file petitions no later than the third Monday of July preceding the primary election. 17 V.S.A. § 2356 (2002). Effective in 2010, the amended statute states that "[p]rimary petitions and statements of nomination from minor party candidates and independent candidates shall be filed . . . on the second Thursday after the first Monday in June preceding the primary election . . . ." PC 33 (Journal of the Senate, March 19, 2010, at 368).

Act 73 left unchanged other aspects of the candidate registration process. For example, the number of petition signatures required for both primary candidates and independent candidates for state and congressional offices remains unchanged at 500. 17 V.S.A. §§ 2355 and 2402(b)(2) (2002 & Supp. 2011).

Act 73 does not include a statement of findings or purpose. The legislative record provides some context for the deliberations on the bill, known as S. 117. Senator Jeanette White, who reported the bill at the outset of the Senate floor debate, explained S. 117 changed the primary date to comply with the federal mandate that ballots be sent to overseas voters 45 days before the general election. PC 32 (Floor testimony, March 19, 2010). According to Senator White, the House amended the bill to require that major party candidates and independent candidates have the same filing deadline. Senator White reported that her committee (the Committee on Government Operations), recommended adopting the House amendments. *Id.* She stated that the simultaneous deadline for

independent candidates and primary candidates creates "an even playing field." *Id.* That is, when one candidate is circulating petitions, all candidates are circulating petitions. *Id.* Senator White also noted that under the new filing deadline, voters could now know all candidates running and educate themselves about the candidates before the election. *Id.*

Senator Randy Brock also spoke about the policy reasons for the bill in comments recorded in the Senate Journal. While Senator Brock was not in favor of moving the primary date from September to August, he supported the simultaneous filing deadline, explaining that it placed independent candidates in the same position as primary candidates. *Id.* According to Senator Brock, this ensures that voters have the benefit of seeing the entire field of candidates for the election prior to voting in a primary. Senator Brock noted that Vermont has an open primary system, that is, anyone – Republican, Democratic, or independent – can vote in any major party's primary. Consequently, determining whom to vote for, and indeed in which primary to vote, depends in great extent on understanding who is running for which office. Knowing who the independents are before the primary, Senator Brock said, enables voters to make an informed decision at the time of the primary election. *Id.*

Facts and Proceedings Below

Mr. Trudell sought to file nominating petitions with the Vermont Secretary of State in mid-August, 2010 for placement on the November general election ballot. The Secretary of State's Office rejected Mr. Trudell's late filing.

After Mr. Trudell tried and failed to successfully register his petition with the Secretary of State's Office, he and Mr. Dorfman brought this suit against Defendants. They alleged that the Secretary of State's refusal to accept the late-filed petition deprives them of their rights under the First and Fourteenth Amendments to the United States Constitution and the 8th Article of the Vermont Constitution. PC 14.

The State unsuccessfully moved to dismiss. PC 16. At a status conference on May 20, 2011, the superior court set a date of July 14 and 15 for a two-day trial on issues identified by the trial court in its order on the motion to dismiss. PC 49-50. The trial schedule provided and insufficient time for discovery or to order committee transcripts of legislative committee proceedings. In order to provide evidence on the issues as framed by the trial court, Defendants called witnesses, including legislators, who had been involved in the committee proceedings for Act 73.

At trial, the State presented testimony regarding the State's important interests in enacting Act 73. Witnesses included the Director of Elections, Katherine Scheele; the Acting Chair of the Democratic Party, Jacob Perkinson; State Senator Robert Starr; State Senator Randolph Brock; and former State Representative Patricia McDonald. The legislators' testimony took the place of a transcript of the committee hearings. SPC 50-52 (Trial Tr., 113-115, July 15, 2011). Director Scheele testified that it was physically impossible to meet the requirements of the MOVE Act without changing the primary date. SPC 16-18. She also presented evidence that independent candidates participated in greater

numbers in 2010 than in previous years, refuting Plaintiffs' claim that Act 73 imposed a demonstrable burden on independent candidates. SPC 40. Representative McDonald, who heard testimony as a member of the Government Operations Committee, reported that among the concerns the committee heard was testimony about "sore losers" getting a "second bite at the apple." SPC 52. Senator Brock testified, as he did on the Senate floor, that he ultimately supported the bill as it came before the Senate because the simultaneous filing deadline provided transparency to voters and allowed more time for them to educate themselves about the entire field of candidates. SPC 45; PC at 32 (Floor testimony March 19, 2010)

The trial court ruled in favor of Defendants. The court reasoned that the filing deadline is "nondiscriminatory" and "applies equally to all candidates." PC 6. The deadline is similar, the court observed, to the Hawaii filing deadline upheld by the U.S. Supreme Court in *Burdick v. Takushi*, 504 U.S. 428, 433-434 (1992) and is likewise "subject to the less stringent standard of constitutional review." *Id.* The court described any injury to independent candidates caused by the filing deadline as "mild." The court held that the interests advanced by the State (including transparency and discouraging "sore loser" candidacies) were "legitimate" and provided a sufficient basis to uphold statute.

Plaintiffs timely appealed.

SUMMARY OF THE ARGUMENT

The adoption of a uniform registration deadline for all candidates is constitutional. Act 73 merely requires independent candidates, like major party

candidates, to meet a June filing deadline. Both the United States Supreme Court and decisions of other federal courts have upheld similar regulations of the election process. The balancing test prescribed by the U.S. Supreme Court looks to the character and magnitude of the burden imposed on voters and candidates. Where, as here, that burden is insignificant, a reasonable, non-discriminatory regulation will generally be upheld.

Act 73's simultaneous registration of candidates 60 days before the primary is reasonable and non-discriminatory. The State's asserted interests – including transparency, education, sore losers, and the need to meet the MOVE Act deadline – are more than sufficient to uphold the law.

STANDARD OF REVIEW

The constitutionality of a challenged statute, including the interpretation of the statute and the evaluation, if any, of legislative history is a question of law that this Court reviews *de novo*. *Badgley v. Walton*, 2010 VT 68, ¶¶ 4, 38, 42, 188 Vt. 367, 10 A.3d 469 (Court reviews de novo with deference to the legislature); *cf. State v. Handy*, 2012 VT 21, ¶ 30, ___ Vt. ___, ___ A.3d ___ (Reiber, C.J. dissenting). To the extent this Court's review turns on historical facts found by the trial court, such as the reason for Mr. Trudell's late filing in 2010 or the historical facts about independent candidates (as set forth under the heading "Independent Candidacies in Vermont, PC 3), those findings should be accepted unless they are clearly erroneous. *See, e.g., Quenneville v. Buttolph,* 2003 VT 82, ¶ 11, 175 Vt. 444, 833 A.2d 1263.

ARGUMENT

I. Act 73 is a neutral, uniformly applied election regulation which imposes a minimal burden on voters and candidates while promoting Vermont's interests in orderly elections.

A. Election regulations that impose a minimal burden are justified by a state's judicially recognized interests in fair and orderly election administration.

While ballot access rights are fundamental, they are not absolute. *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process". *Timmons v. Twin Cities Area New Party*, 520 US 351, 358 (1997) (quoting *Burdick*, 504 U.S. at 433-434.). Election regulations "inevitably affect[ ] -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Not all such restrictions, however, impose constitutionally suspect burdens. *Id.* In fact, states have broad power to enact election codes that comprehensively regulate the electoral process. *Council of Alternative Political Parties v. Hooks,* 179 F.3d 64, 70 (3d Cir. 1999). Indeed, to scrutinize every voting regulation, requiring empirical justification of the state's interest, "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. Thus, restrictions instituting limits on election behavior do not automatically compel close scrutiny. *Id.* Instead, a flexible standard for weighing the state's interests against the asserted burden applies.

The United States Supreme Court and other federal courts have consistently held that, as long as the election restriction at issue imposes only minimal burdens on voters and candidates, the state's important interests are sufficient to justify the regulation.[1] *Burdick*, 504 U.S. at 432-33; *See Hooks,* 179 F.3d at 70 n.8 (collecting cases and holding that a state's asserted interests are sufficient to outweigh burden imposed on parties by requiring them to register before the major party primaries); *see, e.g., Jenness v. Fortson,* 403 U.S. 431, 433-34 (1971) (upholding statute requiring independent and minor party candidates to file nominating petitions on the second Wednesday in June, signed by 5% of previous election's voters); *cf. Campbell v. Buckley*, 203 F.3d 738, 743 (2000) (upholding a facially neutral ballot restriction where the "state has offered reasonable justification"); *see also Timmons,* 520 U.S. at 358 ("Lesser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."); *Munro v. Socialist Workers Party,* 479 U.S. 189 (1986) (upholding statute requiring parties to garner 1% of primary votes to obtain place on general election ballot); *Storer v. Brown,* 415 U.S. 724 (1974) (upholding statute requiring independent candidates to be politically disaffiliated for at least one year before declaring candidacy, reasoning that the State's interests were sufficiently compelling); *Rosario v. Rockefeller,* 410 U.S. 752 (1973) (upholding

[1] There is another level of scrutiny in cases where the burden is severe. *Timmons*, 520 U.S. at 358 ("Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest."). Here, Plaintiffs have not asserted – nor could they – that Act 73's uniform filing deadline severely burdens their rights, and the more stringent standard does not apply.

statute requiring voters affiliated with one party to wait 11 months prior to voting for another party's candidate).

The Supreme Court applied this standard in *Burdick v. Takushi.* In that case, the Court prescribed the analytical process by which a court must resolve a constitutional challenge to an election regulation. First, a court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury" to the First and Fourteenth Amendment rights the plaintiff seeks to vindicate. *Burdick*, 504 U.S. at 434. Taking the asserted burden into account, it then must weigh that burden against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* (quotations omitted). "But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* The *Burdick* Court ruled that Hawaii's regulation -- a ban on write-in votes and requirement for nominating petitions from all candidates -- imposed a "very limited burden" compelling only the lightest review. *Id.* at 436-37. As explained below, the *Burdick* standard governs this case, and Act 73 readily survives review under that standard.

B. The simultaneous petition filing deadline under Act 73 for candidates for the general election and candidates for party primaries imposes a minimal burden on the rights to political association and to cast an effective vote.

Burdick controls here and requires no more than minimal scrutiny because Vermont's regulation is content neutral and non-discriminatory. The Act sets a

registration deadline that applies to all candidates regardless of affiliation. Any burden imposed by this new filing deadline is minor -- indeed, Plaintiffs failed to proffer evidence of anything more than a minimal burden on their interests. There is nothing facially discriminatory about a filing deadline that is the same for all candidates and requires those candidates make themselves known to voters 60 days before the party primaries.

The U.S. Supreme Court has considered a similar and even more restrictive election regulation and found the burden imposed to be only a minimal burden on independent candidates. In *Burdick v. Takushi,* the Court reviewed a Hawaii election statute that required all candidates to file nominating petitions by the same deadline and eliminated write-in voting all together. The *Burdick* Court concluded that Hawaii's statute prohibiting write-in ballots passed this constitutional test because it burdened only "the interest the candidate and supporters may have in making a later rather than early decision to seek independent ballot status," an interest to which the Court assigned "little weight." *Id.* at 437. The Court explained that Hawaii had three mechanisms by which candidates could appear on the ballot, all of which required filing nominating petitions 60 days before the primary. 504 U.S. at 435-36. That is, under Hawaii's regulations, as in Vermont, all candidates must file petitions by the same deadline. The Court stated that Hawaii's system "provides for easy access to the ballot until the cutoff date for the filing of nominating petitions, two months before the primary." *Id.* at 436. "Consequently, any burden on voters' freedom of choice and

association is borne only by those who fail to identify their candidate of choice until days before the primary." *Id.* at 436-37 (citing *Storer*, 415 U.S. at 736). The Court concluded that any burden imposed by Hawaii's write-in vote prohibition was a very limited one. *Id.*

The Supreme Court's reasoning in *Burdick* confirms that Vermont's requirement that party candidates and independent candidates file nominating petitions by the same deadline imposes only a very limited burden. An earlier Supreme Court decision, *Jenness*, 403 U.S. at 433-34, also supports the constitutionality of Vermont's filing deadline. The Georgia law challenged in *Jenness* required independent candidates to meet the same filing deadline as party candidates, i.e., the second Wednesday in June. The Supreme Court held that this filing date "does not fix an unreasonably early deadline for candidates not endorsed by established parties." *Id.* at 438.

Other federal courts have likewise found similar deadlines to pose a trivial burden. For example, Washington State's requirement that minor party candidates announce their candidacies approximately four weeks before major party candidates must announce is a *de minimus* burden. *Libertarian Party of Wash. v. Munro*, 31 F.3d 759, 761-63 (9th Cir. 1994). West Virginia's primary-eve filing deadline is not a severe restriction on minor parties' access to the ballot and is constitutional. *Fishbeck v. Hechler*, 85 F.3d 162, 165 (4th Cir. 1996). The Illinois requirement that persons seeking to run as independent candidates for state and county offices file with the state 323 days before the general election is constitutionally permissible.

Stevenson v. State Bd. of Elections, 794 F.2d 1176, 1177 (7th Cir. 1986). Directly rejecting the argument asserted in Plaintiffs' Complaint, one federal court held that "[p]laintiffs do not have a constitutional entitlement to gather signatures for the nominating papers after the nomination of party candidates." *Perry v. Grant*, 775 F. Supp. 821, 829 (M.D. Pa. 1991).

Nothing in the facts or record of this case provides a basis for departing from this precedent. Plaintiffs did not show that Act 73 presented any barriers to exercising their constitutional rights. Mr. Trudell's only testimony about why he didn't register was that he had decided not to run, stating that, instead, "I made [the] decision to finish my bachelor's degree." Tr. 26. He changed his mind "roughly" June 15, too late, he thought, to gather the requisite signatures. Tr. 32. Neither Mr. Trudell nor Mr. Dorfman proffered testimony establishing any reason the deadline prevented Trudell from running, other than Trudell's late decision. While Plaintiffs articulated an interest in having more time to make a decision and file nominating papers, that interest does not merit any significant weight in the constitutional analysis. *See Storer*, 415 U.S. at 736. Likewise, Plaintiffs do not have a constitutional entitlement to gather signatures for nominating papers after the nomination of Party candidates. *See, e.g., Perry,* 775 F. Supp. at 829. Moreover, the evidence showed that the law has not deterred independent candidates -- in fact, the opposite has happened. Ms. Scheele, the Director of Elections, testified that the number of independent candidacies has increased each year up to and including 2010, when the law went into effect. SPC 40. The trial court found this

testimony persuasive, noting the number of independent candidates increased 40 percent after the registration deadline changed. PC 4.

As *Burdick* and the substantial body of precedent cited above shows, Vermont's requirement that independent candidates file nominating petitions in mid-June, at the same time as party candidates, poses no more than a minimal burden on protected rights. Because the filing deadline imposes only minimal burdens, the Court's scrutiny is accordingly light. No compelling state interest is necessary to justify the filing deadline; instead, the State's "important regulatory interests" are sufficient. *Timmons*, 520 U.S. at 358. Indeed, as the Second Circuit has explained, where the burden is trivial or non-existent, any rational relationship between a legitimate state interest and the laws effect will suffice. *Price v. N.Y. State Bd. of Elections*, 540 F.3d 101, 108-109 (2d Cir. 2008).

C. Because any burden imposed by the registration deadline is minor, the Court's scrutiny is minimal and the State's asserted interests are more than sufficient to uphold the statute.

Act 73 promotes several important state interests, any one of which provides an adequate basis to uphold the statute. *See FCC v. Beach Commc'ns*, 508 U.S. 307, 313 (1993) (court may look to any conceivable interest). The State's asserted interests include: complying with federal election law; the ability of the Secretary of State's Office to physically complete and send the ballots to town clerks within the 45-day deadline for finalizing and sending ballots for the general election; transparency and promoting voter education; and deterring "sore loser" candidates.

These established state interests in regulation of elections are, as a matter of law, sufficient to justify Act 73's uniform filing deadline. *Burdick,* 504 U.S. at 440; *see also Timmons*, 520 U.S. at 358 (minimal burden shown by Plaintiff results in less exacting scrutiny of state interests in passing law). Again, *Burdick* does not call for a searching analysis of the State's proffered interests in this context. In fact, the Court "may look to any conceivable interest promoted by the challenge procedures, whether or not the state cited that interest." *Libertarian Party of Wash.,* 31 F.3d at 763. And the State need not proffer affirmative evidence prior to imposition of reasonable restrictions. *Hooks*, 179 F.3d at 76. That approach would require a state's political system to sustain some type of demonstrable damage prior to regulation. The Court's task is not to determine whether the Legislature has made the best policy choice. *See, e.g., Badgley v. Walton*, 2010 VT 68, ¶ 38 ("We emphasized at the outset that statutes are presumed to be constitutional and we must accord deference to the policy choices made by the Legislature."). It is sufficient for the State to identify reasonable, legitimate policy aims that are served by the challenged regulation.

The State has done so here. The U.S. Supreme Court and other federal courts have upheld election regulations based on state interests that are identical or similar to the interests that justify Act 73. Treating candidates equally is, as a matter of law, an important state interest. *See, e.g., Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 78 (3d Cir. 1999) (recognizing a "strong" state interest in treating all candidates equally). Likewise, allowing the voters to educate

themselves about the candidates is an important state interest. *Storer*, 415 U.S. at 735. "There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Anderson,* 460 U.S. at 796. The Supreme Court has ruled that averting "sore loser" candidacies is an important state interest. *Burdick*, 540 U.S. at 439; *see also Storer*, 415 U.S. at 735-36 (state's interest in the stability of its political system is "not only permissible, but compelling and . . . outweigh[s] the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status"); *Hooks*, 179 F.3d at 80 ("New Jersey's interest in preventing 'sore losers' rises to the level of a legitimate and important State interest."). Courts have also identified and accepted state interests in regulating the number of candidates, *Storer*, 415 U.S. at 732; *Jenness*, 403 U.S. at 440; in inhibiting party raiding, *Rosario v. Rockefeller*, 410 U.S. 752 (1973); in setting a minimum level of support required to have ones name appear on the ballot, *Jenness*, 403 U.S. 442; and in channeling expressive activity at the polls. *Burdick,* 504 U.S. at 438.

Although the State's asserted interests are sufficient to uphold Act 73 as a matter of law, the record evidence also provides further support for those interests. It is undisputed that Vermont enacted Act 73 to comply with federal election requirements. The mandate embodied in the MOVE Act required the Legislature to change the election calendar. SPC 16-17 (Testimony of Director Scheele, July 14, 2011); PC 2. Director Scheele testified that to meet the new general election

requirements, the registration deadline for all candidates, including independents, had to be before the primary. SPC 32 (Testimony of Director Scheele, July 14, 2011). The State also proffered evidence that the uniform filing deadline discourages sore loser candidates. PC 32. Although a candidate may register both as a major party candidate and as an independent, the candidate must do so before the primary election. PC 7. A candidate may not lose the primary and then decide to run as an independent. *Id.* The uniform filing deadline promotes voter education and transparency, because voters learn the entire field of candidates before they have to make a decision about voting in the primary. PC 32. As the precedent cited above shows, these interests are sufficient to uphold Act 73's reasonable and non-discriminatory filing deadline.

In sum, the court correctly applied *Anderson* and *Burdick* in assessing the relative strengths of the State's interests and the minimal burdens imposed by Act 73. Plaintiffs identified "relatively minor problems which are offset by the short time between registration and the primary (approximately 70 days) and the liberal rules for access to the Vermont ballot." PC 7. As the trial court correctly noted, ballot access remains relatively easy in Vermont. Given Act 73's minimal effect on ballot access, any one of State's interests is sufficiently related to the State's overarching interest in orderly administration of elections.

D. No argument asserted by plaintiffs support striking down Act 73.

Plaintiffs assert in their brief that the court erred in not requiring empirical support for the State's asserted interests. The constitutional standard does not

require a state to produce empirical verification of its asserted interests. As the *Burdick* Court recognized, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." 504 U.S. at 433. Given the reasonableness of the State's interests, the fact that similar interests have been routinely accepted by courts, and the minimal burdens imposed by the filing deadline, the State was not obligated to present detailed empirical evidence. In any event, the State did present evidence, as cited above, that explained and supported the interests asserted in support of Act 73.

II. Plaintiffs have not adequately presented claims under the Vermont Constitution and, in any event, there is no basis to invalidate the Act under the Vermont Constitution.

Plaintiffs' arguments under the Vermont Constitution are not adequately briefed and, with respect to the Common Benefits Clause argument, not preserved below. Moreover, even if the Court reaches these arguments, the Court should uphold Act 73. Plaintiffs have not offered any persuasive basis for invaliding the Act under Articles 7 or 8 of the Vermont Constitution.

First, Plaintiffs did not properly raise a claim under the Common Benefits Clause before the trial court. Plaintiffs' complaint referenced only Article 8 of the Vermont Constitution. PC 14. The court asked, at trial, whether Plaintiffs had a Common Benefits Clause argument or whether their "constitutional claims [were] within the [F]irst [A]mendment." SPC 53 (Trial Tr. July 14, 2011, 16, Testimony of

Paul Gilles). Plaintiffs' counsel replied, "We don't have a [C]ommon [B]enefits claim in our complaint." *Id.* In a short post-trial filing, however, Plaintiffs asked the trial court to disregard counsel's statement and consider an argument under the Common Benefits Clause. PC 80-81. This request came too late, because the State had no opportunity to address the claim before the trial record closed. Plaintiffs now argue that the State presented insufficient evidence at trial to satisfy the Common Benefits Clause. Pls. Br. 10. They are mistaken on that point – but even if they were correct, the State cannot be faulted for failing to address a claim that Plaintiffs waived. For this reason, even though the Superior Court reached the Common Benefits Clause issue, this Court should not. *See, e.g., In re Lawrence White*, 172 Vt. 335, 343, 779 A.2d 1264, 1270 (2001) (Court "will not address arguments not properly preserved for appeal").

Second, Plaintiffs' arguments on appeal are conclusory and inadequate, given the Court's standard for addressing claims under the Vermont Constitution. The party asserting its rights under the state charter bears the burden of explaining how or why under the facts of his case the Vermont Constitution provides greater protection than the federal constitution. *State v. Read*, 165 Vt. 141, 680 A.2d 944 (1996). Where the issues are inadequately briefed, this Court will decline to address the state constitutional question. *State v. Jewett*, 146 Vt. 221, 222, 500 A.2d 233, 234 (1985). Here, Plaintiffs fail to explain how the rights they assert under the Vermont Constitution are distinguishable from the protections afforded under the First and Fourteenth Amendments of the United States Constitution.

Given the lack of adequate briefing, the Court should not address Plaintiffs' claims under the Vermont Constitution.

Third, if the Court does reach Plaintiffs' claims under the Vermont Constitution, the Court should affirm the trial court's decision upholding Act 73. The Act's uniform filing deadline does not burden the right to vote or to be elected into office and thus does not violate Article 8. *See* Vt. Const. Ch. 1, Art. 8 ("That all elections ought to be free and without corruption, and that all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers, and be elected into office, agreeably to the regulations made in this constitution."). With respect to the Common Benefits Clause, as the trial court correctly concluded, a "registration deadline which is symmetrical and applies in exactly the same way to all candidates is consistent with the Common Benefits Clause." PC 8.

III. The testimony given by legislators provides no basis for reversal.

Plaintiffs failed to meet their burden of showing that Act 73 places anything other than a minor -- and nondiscriminatory -- burden on their constitutional rights. As explained above, because the burden imposed by Act 73 is minimal, the Court's scrutiny is not searching, and the State need only assert a reasonable policy goal that is rationally served by the Act's regulation of the filing deadline. The State did so, *see supra* part I.C., and that is sufficient to uphold the Act. The Court need not draw conclusions about legislative intent as part of its analysis. *See, e.g., Smith v. Town of St. Johnsbury*, 150 Vt. 351, 359, 554 A.2d 233, 239 (1988) ("As long as the

court can conceive of a possible rational basis for a legislative distinction, the classification should be upheld."). Indeed, the State argued below that this case could be decided without hearing. *See* PC 51. Because the trial court ordered an expedited evidentiary hearing, *see* PC 10, the State presented evidence at trial that corresponded to concerns expressed by the trial court in that court's ruling denying the State's motion to dismiss, *see* PC 50. The State presented testimony from three legislators, but not to elicit their opinions about the intent of the Legislature. The testimony cannot be used for that purpose nor was it proffered for that purpose. *See* SPC 55 (colloquy regarding testimony of Senator Starr); SPC 50-51 (colloquy regarding testimony of Representative McDonald). Rather, the legislators' testimony was potentially useful in two ways. First, the State's counsel explained at the hearing that, given the expedited proceeding, the State did not have transcripts of the legislative hearings, and the legislative witnesses could give "factual" testimony about those hearings. SPC 50. The Court accepted this testimony as "historical" and "factual." *Id.*; *see also id.* at 51 (counsel asking Representative McDonald what "was expressed" and what was "topic of conversation" in committee); *id.* at 98 (counsel asking Senator Brock "what were the issues before the committee"). Second, as candidates for elected office with substantial relevant experience, the legislators were in a position to provide

testimony that supported the reasonableness of the State's asserted policy goals. SPC 50. Plaintiffs do not dispute the relevance of testimony on this latter point.[2]

To be clear, the State does not contend that this evidence was necessary. In particular, the State was not obligated to show that the Legislature debated or adopted a particular policy objective. Plaintiffs point to the Supreme Court's suggestion in *Anderson* that a court "must identify and evaluate the precise interests put forward by the State as justifications." 460 U.S. at 789. But that means only that the State must identify its interests with specificity (which the State has done here), not that the Legislature has to make a formal statement of intent. And even if the legislative record were relevant, the published remarks in the Senate Journal, *see* PC 32, are sufficient to show that the interests asserted by the State were part of the legislative deliberations. Given the trial court's expressed preference for an evidentiary hearing, however, the State offered the legislators' testimony to respond to some of the questions raised by the court in its ruling denying the State's motion to dismiss. The trial court, in turn, was clear that the legislative witnesses could not give their opinions on the meaning of Act 73. SPC 54-55 (Trial Tr. July 15, 2011, 91-92, colloquy during testimony of Robert Starr).

Against this background, Plaintiffs cannot prevail on their argument that the admission of the legislators' testimony requires reversal. Although it was not

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[2] The State presented similar testimony from another officeholder who was not part of the Legislature that adopted Act 73. *See, e.g.,* Tr. July 14, 2011, 174-76 (testimony of Daryl Pillsbury). Plaintiffs likewise proffered testimony from witnesses who gave their views about the possible impacts of Act 73's uniform filing deadline. *See e.g.,* Trial Tr. July 14, 2011, 11 (Testimony of Gerald Trudell), July 15, 2011, 49 (Testimony of Myron Dorfman).

necessary for the trial court to consider what issues were discussed by the Legislature in its deliberations on Act 73, Plaintiffs cannot show that they were prejudiced by the trial court's interest in this point. The erroneous admission of evidence is grounds for reversal only if a substantial right of the party is affected. *See* V.R.C.P. 61 (error in admission of evidence is grounds for new hearing only if "refusal to take such action appears to the court inconsistent with substantial justice"). The burden "is on the excepting party to demonstrate that the error resulted in prejudice, and this Court considers the effect of the improper testimony on the court's decision." *In re B.S.*, 163 Vt. 445, 454, 659 A.2d 1137, 1143 (1995). Plaintiffs cannot show prejudicial error here, for at least two reasons. First, any testimony from the legislators that went to legislative intent was irrelevant. As explained above, the court did not need to conclude that the interests asserted by the State were addressed during the legislative process, and even if it did, the legislative record of the Senate Journal was adequate on this point. Second, this Court reviews *de novo* the lower court's conclusions of law regarding the interpretation and constitutionality of the Act. The admission of the legislators' testimony by definition cannot affect the outcome of the case, because this Court is free to disregard any of the testimony it deems improper. In short, although Plaintiffs contest the admission of certain testimony from legislators, they have not shown, nor could they, that such testimony affects the outcome of the case.

CONCLUSION

For the reasons stated above, the judgment below should affirmed.

Dated at Montpelier, Vermont, this 5th day of June, 2012.

STATE OF VERMONT

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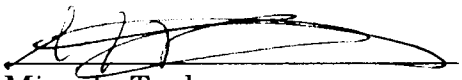
ATTORNEY GENERAL

By: 

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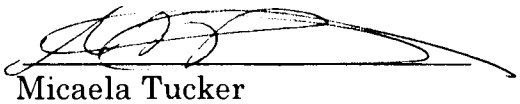
V.R.A.P. 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

The undersigned, pursuant to V.R.A.P. 32 (a)(7)(C), certifies that this Brief of the Appellees complies with the word-count limitation of V.R.A.P. 32(a)(7)(A). The word processing system used was Microsoft Office Word 2007, which indicates there are words in the brief.

Dated at Montpelier, Vermont, this 5th day of June, 2012.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: 

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