UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
VICINAGE OF NEWARK

MARK BALSAM, et al.,	:	
	:	HONORABLE STANLEY R. CHESLER,
Plaintiffs,	:	U.S.D.J.
	:	
v.	:	CIVIL ACTION NO. 14-1388
	:	(SRC-CLW)
KIM GUADAGNO, in her official capacity as the New Jersey Secretary of State.	:	
	:	
Defendant.	:	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(1) AND 12(B)(6)

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625
Attorney for Defendant, New Jersey Judiciary
609-292-8562
Eric.Pasternack@dol.lps.state.nj.us

ROBERT T. LOUGY
DONNA KELLY
Assistant Attorneys General
Of Counsel

ERIC S. PASTERNACK
Deputy Attorney General
On the Brief

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PRELIMINARY STATEMENT

The Supreme Court of the United States has already determined that the Constitution of the United States allows states to maintain closed and semi-closed primary elections systems.

Plaintiffs -- who include four unaffiliated voters, one member of the Democratic Party, two members of the Republican Party, and two organizations that claim to represent unaffiliated voters in the State -- nevertheless allege that the State's primary election scheme violates their First Amendment associational rights and deprives them of equal protection. However, plaintiffs do not have a constitutional right to participate in primary elections, and their mere desire is overborne by the countervailing and legitimate right of political parties to exclude non-members from their nominating processes. Therefore, the State's "closed" primary system fully comports with the requirements of the First Amendment.

Plaintiffs' Equal Protection challenge similarly fails because they neither belong to a suspect class nor enjoy a fundamental right to participate in primaries, and the "closed" primary system is rationally related the State's legitimate interests in protecting the associational rights of political parties, maintaining ballot integrity, avoiding voter confusion, and ensuring electoral fairness.

Furthermore, Defendant Secretary of State Kim Guadagno is immune from plaintiffs' claim in this Court that the public financing of primary elections violates

the New Jersey Constitution. Plaintiffs also do not have standing to bring this claim because they only allege a generally available grievance about government, and have not, themselves, suffered a concrete and particularized injury.

Finally, Defendant submits that discovery should be stayed pending the resolution of this Motion to Dismiss because defendant has valid defenses and immunities that will entitle her to a judgment in her favor.

Therefore, plaintiffs have failed to state a claim upon which relief can be granted and this Court should grant defendant's Motion to Dismiss in its entirety with prejudice.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

A. PLAINTIFFS' COMPLAINT

On March 5, 2014, plaintiffs Mark Balsam, Charles Donahue, Hans Henkes, Rebecca Feldman, Jaime Martinez, William Conger, Tia Williams, the Independent Voter Project, and the Committee for a Unified Independent Party, Inc., filed this lawsuit against Secretary of State Kim Guadagno, in her official capacity, seeking declaratory and injunctive relief pursuant 42 U.S.C. § 1983 and N.J. Stat Ann. §§ 10:6-1 to -2. (CM/ECF # 1). In particular, plaintiffs seek both a declaration that the use of a "closed" primary infringes upon the rights of unaffiliated voters to participate in the electoral process and an order requiring the implementation of a "Constitutional" non-presidential primary election system. (Pl. Comp., ¶ 78). Plaintiffs also allege that N.J. Stat. Ann. § 19:45-1 violates the New Jersey Constitution by appropriating public funds to cover the expenses that result from primary elections. (Pl. Comp., ¶¶ 67-72).

As set forth in the Complaint, the individually named plaintiffs are residents and taxpayers in the State of New Jersey. (Pl. Comp., ¶ 14). The Complaint alleges that plaintiffs Balsam, Donahue, Henkes, and Feldman are registered as unaffiliated voters; that plaintiff Martinez is registered as a Democrat; and that plaintiffs Conger and Williams are registered as Republicans. (Pl. Comp., ¶ 16).

[1] The Procedural History and the Statement of Facts are being combined for the convenience of the Court.

The Complaint alleges that each of the unaffiliated plaintiffs were unable to cast votes in primaries, and that the individually named plaintiffs who have registered as either Democrats or Republicans were required to associate with their respective parties, as a condition to vote in the primaries. (Pl. Comp., ¶ 17). Additionally, plaintiffs allege that as taxpayers, they were required to "subsidize" the primaries. (Pl. Comp., ¶ 18).

Plaintiff Committee for a Unified Independent Party, Inc. and Plaintiff Independent Voter Project claim to represent unaffiliated voters in the State of New Jersey. (Pl. Comp., ¶¶ 19-21).

B. THE STATE'S STATUTORY SCHEME GOVERNING THE ELECTORAL PROCESS

The New Jersey Legislature has created a comprehensive statutory scheme governing elections in the State of New Jersey. *See* N.J. Stat. Ann. §§ 19:1-1 to 19:63-28. As defined by N.J. Stat. Ann. § 19:1-1, a "primary election" is the "procedure whereby the members of a political party in this State or any political subdivision thereof nominate candidates to be voted for at the general elections, or elect persons to fill party offices." The expense of conducting a primary election shall, according to N.J. Stat. Ann. § 19:45-1, be borne by the State or its political subdivisions.

N.J. Stat. Ann. § 19:23-45 sets forth the requirements for participation in a primary election. To be eligible to vote in a primary, a voter must be deemed a

member of the party, in which he or she seeks to vote, fifty-five days before the election, unless the voter is newly registered or the voter has not previously voted in primary election. *Id.*

STANDARD OF REVIEW

A. MOTION TO DISMISS, PURSUANT TO FED. R. CIV. P. 12(B)(1)

When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(1), a District Court must distinguish between facial and factual challenges to its subject matter jurisdiction. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). "In a facial attack a defendant argues that the plaintiff did not properly plead jurisdiction . . . [whereas] a 'factual attack' asserts that jurisdiction is lacking on the basis of facts outside of the pleadings." *Smolow v. Hafer*, 353 F. Supp. 2d 561, 566 (E.D. Pa. 2005). If the court is considering a "factual" attack, where a challenge is based on the sufficiency of the jurisdictional fact, the court is free to weigh the evidence and satisfy itself whether it has the power to hear the case. *Brown v. U.S. Steel Corp.*, 2010 U.S. Dist. LEXIS 115503, at *6 (W.D. Pa. Oct. 29, 2010). In doing so, the court should "consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff." *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) (citations omitted). Nevertheless, for either a facial or factual attack, the burden is on the plaintiff to prove jurisdiction. *McNutt v. Gen. Mortors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936).

In the instant case, this Court lacks jurisdiction to hear plaintiffs' state law claims because plaintiffs lack standing and the defendant is entitled to Eleventh

Amendment immunity. *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 541 (2002); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding that a plaintiff must have standing to present a justiciable "case" or "controversy" over which the federal courts have subject matter jurisdiction); *Gould Elecs.*, 220 F.3d at 178 (holding Eleventh Amendment immunity is properly addressed in motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), and not 12(b)(6)) (citation omitted).

B. MOTION TO DISMISS, PURSUANT TO FED. R. CIV. P. 12(B)(6)

On a motion to dismiss pursuant to Fed. R. Civ. P. 12(B)(6), a reviewing court must accept the plaintiff's factual allegations as true. However, the plaintiff's conclusory allegations and legal conclusions do not enjoy the same assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); s*ee also Anspach v. City of Philadelphia*, 503 F.3d 256, 260 (3d Cir. 2007) (recognizing that conclusory allegations or legal conclusions masquerading as factual allegations will not prevent dismissal).

"[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 678. Where the claims asserted are fatally defective and the plaintiff cannot plead any facts to support his claims, it is appropriate for the court to dismiss a complaint without permitting the plaintiff to make a curative amendment of his pleading. *Oran v. Stafford*, 34 F. Supp. 2d 906, 913-14 (D.N.J.

1999), *aff'd*, 226 F.3d 275 (3d Cir. 2000). Thus, dismissal for failure to state a claim is justified where the asserted claim lacks a required element, *Campbell v. City of San Antonio*, 43 F. 3d 973, 975 (5th Cir. 1995), or where there is an "insuperable barrier" to a claim such as an immunity. *See Flight Sys., Inc. v. Elec. Data Sys.*, 112 F.3d 124, 127-28 (3d Cir. 1997*); Camero v. Kostos*, 253 F. Supp. 331, 338 (D.N.J. 1966).

When evaluating motions to dismiss, "courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim*." Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004). A document is found to form the basis of a claim where it is "integral to or explicitly relied upon in the complaint." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997). "The purpose of this rule is to avoid the situation where a plaintiff with a legally deficient claim that is based on a particular document can avoid dismissal of that claim by failing to attach the relied upon document." *Lum*, 361 F.3d at 222 n.3.

In this case, even drawing all reasonable inferences in plaintiffs' favor, their claims against the defendant should be dismissed because plaintiffs have failed to articulate any factual or legal basis for relief. Thus, a review of the Complaint reveals no legal theory upon which plaintiffs can prevail against the defendant, and consequently, plaintiffs' Complaint should be dismissed with prejudice.

ARGUMENT

POINT I

PLAINTIFFS DO NOT HAVE A CONSTITUTIONAL RIGHT UNDER THE FIRST AMENDMENT TO VOTE IN PRIMARY ELECTIONS; AND THEREFORE, N.J. STAT. ANN. § 19:23-45 PASSES CONSTITUTIONAL MUSTER.

The freedom of association guaranteed by the First Amendment "would prove an empty guarantee" if plaintiffs are granted the broad injunctive and declaratory relief they seek -- namely, a declaration that the use of a "closed" primary infringes upon the rights of unaffiliated voters to participate in the electoral process. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574-75 (2000).

"It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). However, "[i]t does not follow . . . that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute." *Id.* (citing *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986)). "States have a major role to play in structuring and monitoring the election process, including primaries." *Cal. Democratic Party*, 530 U.S. at 572. Indeed, the Supreme Court has recognized that it is "too plain for argument" that a State may mandate the use of the primary format for selecting party nominees "to assure that intraparty

competition is resolved in a democratic fashion." *Id.*; *American Party of Tex. v. White*, 415 U.S. 767, 781 (1974). The States may, likewise, require party registration a reasonable period of time before a primary election to avoid "'party raiding'-- a process in which dedicated members of one party formally switch to another party to alter the outcome of that party's primary . . . ." *Cal. Democratic Party*, 530 U.S. at 572.

Consistent with these principles, the Supreme Court has held that "the processes by which political parties select their nominees are" not "wholly public affairs that States may regulate freely." *Id.* at 572-73. Instead, as the Supreme Court observed, regulations affecting the primary process must comport with the protections guaranteed by the First Amendment. *Id.* at 573.

"'The First Amendment protects 'the freedom to join together in furtherance of common beliefs,' which 'necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only[.]'" *Id.* at 574 (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214-15 (1986); *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). "That is to say, a corollary of the right to associate is the right to not associate." *Id.*

Against this backdrop, plaintiffs allege that N.J. Stat. Ann. § 19:23-45 violates their First Amendment associational rights. (Pl. Comp., ¶¶ 55-59).

However, their mere desire to participate in the affairs of the political parties "is overborne by the countervailing and legitimate right of the parties to determine their own membership qualifications. *Tashjian*, 479 U.S. at 215-16 n.6 (citing *Rosario v. Rockerfeller*, 410 U.S. 752 (1973)). The freedom of association would, otherwise, "prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'" *Cal. Democratic Party*, 530 U.S. at 574-75 (quoting *La Follette*, 450 U.S. at 122, n.22).

In *California Democratic Party v. Jones*, the Supreme Court invalidated Proposition 198, which the voters of California had adopted to change California's electoral system from a closed primary[2] to a blanket primary. *Id.* at 570, 582-86. The Supreme Court reasoned that Proposition 198 placed a "severe and unnecessary" burden on the associational rights of the political parties in California by forcing them to associate with voters who do not share the party's beliefs at the "crucial juncture" when "party members traditionally find their collective voice and select their spokesman." *Id.* at 586 (citing *Tashjian*, 479 U.S. at 216).

Although the Supreme Court applied strict scrutiny to Proposition 198 in *California Democratic Party v. Jones*, not every electoral law that burdens

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[2] In a closed primary, each voter receives a ballot limited to the candidates of his or her own party. *Id.* Meanwhile, in a blanket primary, all persons entitled to vote have the right to vote for any candidate regardless of the candidate's political affiliation.

associational rights is subject to such exacting review. *Clingman v. Beaver*, 544 U.S. 581, 592 (2005). Strict scrutiny is only appropriate where the burden is severe. *Id.* (citing *Cal. Democratic Party*, 530 U.S. at 582; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

Guided by the Supreme Court's jurisprudence, this Court should find that strict scrutiny is not warranted in the present challenge. Although plaintiffs maintain that unaffiliated voters possess a fundamental right to vote in primary elections under both Federal and State law, (Pl. Comp., ¶¶ 49, 53), the Supreme Court expressly refused to find that such a right exists in *California Democratic Party v. Jones*, 530 U.S. at 573 n.5. Indeed, the Court went so far as to proclaim in that case that an unaffiliated voter's "interest" in selecting the candidate for a group to which he or she does not belong is not even an "interest." *Id.* But rather, a mere "desire," which the Court has "rejected as a basis for disregarding the First Amendment right to exclude." *Id.* Therefore, since plaintiffs do not have an interest in voting in the primary elections of parties to which they do not belong, much less a fundamental right to do so, N.J. Stat. Ann. § 19:23-45 does not compel strict scrutiny. *See Clingman*, 544 U.S. at 587, 594 ("'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'").

But even if N.J. Stat. Ann. § 19:23-45 was found to burden plaintiffs' associational rights, the burden is minimal and does not warrant strict scrutiny. "Many electoral regulations, including voter registration generally, require that voters take some action to participate in the primary process." *Clingman*, 544 U.S. at 593. For instance, in *Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973), the Supreme Court upheld a requirement that voters change their party affiliation eleven months in advance of the primary election they seek to vote in. When compared against this precedent, the voter declaration scheme in N.J. Stat. Ann. § 19:23-45 surely passes constitutional muster as it only requires an individual who has previously voted in a primary to declare his or her new party affiliation fifty-five days before the primary election. Thus, strict scrutiny is not applicable to the present challenge because N.J. Stat. Ann. § 19:23-45, is at most a minimal burden on plaintiffs' associational rights. *See Clingman*, 544 U.S. at 581.

Accordingly, plaintiffs' challenge to N.J. Stat. Ann. § 19:23-45 fails because of the State's legitimate interests in protecting the associational rights of political associations, maintaining ballot integrity, avoiding voter confusion, and ensuring electoral fairness. *Ray v. Blair*, 343 U.S. 214, 221, 222 (1952); *Nader v. Schaffer*, 417 F. Supp. 837, 848 (D. Conn. 1976), *aff'd*, 429 U.S. 989 (1976); *Lesniak v. Budzash*, 626 A.2d 1073, 1080-81 (N.J. 1993); *Council of Alternative Political Parties v. Div. of Elections*, 781 A.2d 1041, 1052 (N.J. App. Div. 2001). Plaintiffs'

arguments to the contrary are also patently insufficient because the Supreme Court had rejected the same arguments in *California Democratic Party v. Jones*, when it invalidated Proposition 198, which the voters of California had adopted to change California's electoral system from a closed primary to a blanket primary. 530 U.S. at 570, 582-86.

In particular, plaintiffs allege that a blanket primary is the only way to guarantee that disenfranchised voters enjoy the right to an effective vote. (Pl. Comp., ¶¶ 5, 25, 49, 62). The respondents in *California Democratic Party* made this same argument, which the Court rejected. *Cal. Democratic Party*, 530 U.S. at 583. As the Court explained, "The voter who feels himself disenfranchised should simply join the party. That may put him to a hard choice, but it is not a state-imposed restriction upon his freedom of association, whereas compelling party members to accept his selection of their nominees *is* a state imposed restriction upon theirs." *Id.* at 584. Thus, denying an individual the opportunity to vote for a candidate in a primary election does not infringe on the voter's First Amendment rights, but permitting an unaffiliated voter to do the same would infringe upon the associational rights of political parties. *Duke v. Smith*, 784 F. Supp. 865, 871 (S.D. Fl. 1992).

Plaintiffs also assert that New Jersey's primary election system lowers voter turnout. (Pl. Comp., ¶¶ 3, 37, 38, 75). However, this too, was found by the

Supreme Court in *California Democratic Party* to be an insufficient basis to restrict the First Amendment rights of political parties to not associate. 530 U.S. at 584.

In sum, the various interests advanced by plaintiffs in this matter are no different than those asserted by the respondents in defense of Proposition 198; and therefore, it would certainly be a peculiar result if plaintiffs could accomplish by judicial fiat what the citizens of California could not achieve by popular initiative -- namely, to cause the State to adopt a blanket or open primary system. *See*, *e.g.*, *United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring) (explaining that "the counter-majoritarian implications of judicial review" require that courts refrain from exercising "some amorphous, general supervision of the operations of government" except to correct governmental action which otherwise conflicts with express terms of the Constitution); *Nader*, 417 F. Supp. at 850 (observing that the "presently popular course of raising a federal question and seeking a change in the law by judicial fiat . . . tends in itself to work in derogation of the separation of powers and our democratic system of government.").

Accordingly, plaintiffs' argument that the partisan primary system violates their First Amendment rights is wholly without merit, and N.J. Stat. Ann. § 19:23-45 survives constitutional review due to the State's legitimate interests in

protecting the associational rights of party members, as well as maintaining ballot integrity, avoiding voter confusion, and ensuring electoral fairness.

POINT II

BECAUSE PLAINTIFFS ARE NEITHER MEMBERS OF A SUSPECT CLASS NOR ENJOY A FUNDAMENTAL RIGHT TO PARTICIPATE IN PRIMARY ELECTIONS, THEIR EQUAL PROTECTION CHALLENGE FAILS.

Plaintiffs' Equal Protection challenge similarly fails because plaintiffs are not members of a suspect class and they do not have a fundamental right to vote in primary elections. N.J. Stat. Ann. § 19:23-45 is, therefore, subject only to rational basis review, which it easily survives because the statute is rationally related to the State's legitimate interests in protecting the associational rights of party members, maintaining ballot integrity, avoiding voter confusion and ensuring electoral fairness.

The Equal Protection Clause is essentially a directive that all individuals similarly situated should be treated alike. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). "The state's creation of a classification is not 'per se unconstitutional or automatically subject to heightened scrutiny.'" *Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 213 (3d Cir. 2013) (quoting *Maldonado v. Houstoun*, 157 F.3d 179, 184 (3d Cir. 1998)). Courts will, as a result, uphold a

classification "so long as it bears a rational relation to some legitimate end" and it neither burdens a fundamental right nor targets a suspect class. *Id.*

Plaintiffs, notably, do not allege that they are members of a suspect class. While they do assert that there is a fundamental right to vote in primaries, (Pl. Comp., ¶ 1), there is, in fact, no constitutional right to participate in primary elections. *Cal. Democratic Party*, 530 U.S. at 573 n.5; *Duke*, 784 F. Supp. at 872 (citing *Consumer Party v. Davis*, 633 F. Supp. 877, 888 (E.D. Pa. 1986). Therefore, N.J. Stat. Ann. § 19:23-45 is subject only to rational basis review.

"'[I]n facilitating the effective operation of [a] democratic government, a state might reasonably classify voters or candidates according to political affiliations.'" *Clingman v. Beaver*, 544 U.S. 581, 594 (2005) (quoting *Nader v. Schaffer*, 417 F. Supp. at 845-46). Indeed, it has been recognized that a state does not deprive an individual of equal protection in drawing a distinction between affiliated and unaffiliated voters. *Nader*, 417 F. Supp. at 848.

As the District Court explained in *Nader*, the interest that unaffiliated voters have in "the ultimate selection of their governmental leaders" is fundamentally different from the interest that party members' have in the selection of party nominees. *Id.* To be sure, unaffiliated voters "are *not* 'interested' in nominating the candidate who presents the best chance of winning the general election while remaining most faithful to party policies and philosophies." *Id.* Rather, their

refusal to join a political association, which is "organized for the purpose of effectuating [its] members' political goals, is fundamentally inconsistent with any claim that [unaffiliated voters] are as 'interest' as party members in the outcome of the party nominating process." *Id.* As such, N.J. Stat. Ann. § 19:23-45 does not deprive plaintiffs of the equal protection of the law because there is a rational basis for drawing a distinction between party members and unaffiliated voters. *Id.*; *see also American Party of Texas*, 415 U.S. at 781 (explaining that a "State may limit each political party to one candidate for each office on the ballot and may insist that intraparty competition be settled before the general election by primary election or by party convention.").

Plaintiffs' allegations to the contrary are without merit. According to plaintiffs, "the Fourteenth Amendment of the United States Constitution requires that each qualified voter be given equal opportunity to participate in an election, no matter the purpose of the election." (Pl. Comp., ¶ 62). However, plaintiffs err by relying on *Hadley v. Junior College District*, 397 U.S. 50 (1970). In that case, the Supreme Court reversed a decision of Missouri Supreme Court, which had held that the "one man, one vote" principle was not applicable in school board elections. *Id.* at 51-52. In so concluding, the United States Supreme Court did not hold that unaffiliated voters must be afforded the same opportunity that party members enjoy to vote in primary elections, but rather, that the "one man, one vote"

principle applies to all general elections. *Hadley*, 397 U.S. at 51-52; *see generally Reynolds v. Sims*, 377 U.S. 533 (1965) (establishing "one man, one vote" principle). The Supreme Court's decision in *Hadely*, thus, casts no doubt on the legitimate right of the parties to determine their own membership qualifications. *Tashjian*, 479 U.S. at 215-16 n.6. *Cal. Democratic Party*, 530 U.S. at 584; *Hole v. North Carolina Bd. of Elections*, 112 F. Supp. 2d 475, 482-83 (M.D.N.C. 2000).

Accordingly, N.J. Stat. Ann. § 19:23-45 is subject to and survives rational basis review because plaintiffs neither belong to a suspect class nor enjoy a fundamental right to participate in primaries, and the statute is rationally related to the State's legitimate interests in protecting the associational rights of party members, maintaining ballot integrity, avoiding voter confusion and ensuring electoral fairness.

POINT III

PLAINTIFFS CANNOT ESTABLISH TAXPAYER STANDING TO CHALLENGE N.J. STAT. ANN. § 19:45-1 BECAUSE THEY ONLY CLAIM A GENERALLY AVAILABLE GRIEVANCE ABOUT GOVERNMENT.

The "judicial Power of the United States[,]" which this Court exercises as an Article III tribunal, may only be employed in a "Case" or "Controversy" within the meaning of Article III. *See* U.S. Const., Art. III, § 1. In order for an action to constitute a "Case" or "Controversy," the plaintiff who instituted the action must

have "standing." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The Supreme Court has confirmed the well-established elements necessary to establish standing as required by Article III of the Constitution:

> First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.
>
> [*United States v. Hays*, 515 U.S. 737, 742-43 (1995) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).]

Such standing must be demonstrated separately for each form of relief sought. *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 528 U.S. 167, 185 (2000). Thus, "[a] private litigant, whether he be a legislator, a citizen or a taxpayer must, in order to have 'standing' to sue, demonstrate a personal stake in the outcome, and demonstrate that he is the proper party to request adjudication of the particular issue." *Goode v. City of Philadelphia*, 539 F.3d 311, 318 (3d Cir. 2008) (quoting *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 770 (10th Cir. 1980)).

Here, plaintiffs allege that N.J. Stat. Ann. § 19:45-1 violates the New Jersey Constitution by appropriating public funds for the partisan non-presidential primaries, which plaintiffs contend are primarily private affairs. (Pl. Comp., ¶¶ 67-

72). The Complaint, however, does not include any allegations adequately explaining how the public financing of primary elections injures plaintiffs specifically. Plaintiffs, rather, allege only a generalized injury that all unaffiliated voters in New Jersey allegedly suffer by virtue of the public financing of primary elections. *Goode*, 539 F.3d at 322. As a result, plaintiffs have failed to establish the requisite injury in fact to confer Article III standing on this Court. *Lujan*, 504 U.S. at 560; *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989).

Accordingly, Count VII must be dismissed for lack of standing.

POINT IV

THE ELEVENTH AMENDMENT PROHIBITS PLAINTIFFS' STATE LAW CLAIMS IN THEIR ENTIRETY.

It is well-recognized that the states, state agencies and state officials acting in their official capacity cannot be sued under the principles of sovereign immunity and the Eleventh Amendment. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 69-71 (1989). "[T]he states' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today." *Alden v. Maine*, 527 U.S. 706, 712-13 (1999) (citations omitted).

The Eleventh Amendment to the United States Constitution makes explicit reference to the states' immunity from suit:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.
>
> [U.S. Const. amend. XI.]

This immunity extends to state agencies and state officers who act on behalf of the state, *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429 (1997), and bars recovery in suits brought pursuant to 42 U.S.C. §1983. *Will v. Michigan Dep't of State Police*, 491 U.S. at 64.

Although the Eleventh Amendment does not bar plaintiffs from bringing suit for prospective injunctive relief, *Ex Parte Young*, 209 U.S. 123 (1908), "State officials are immune from suits in federal court based on violations of state law, including suits for prospective injunctive relief under state law, unless the state waives sovereign immunity." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *Major Tours, Inc. v. Colorel*, 720. F. Supp. 2d 587, 602 (D.N.J. 2010). Moreover, the supplemental jurisdiction statute, 28 U.S.C. § 1367, does not authorize district courts to exercise jurisdiction over claims against non-consenting States. *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 541 (2002); *see also Figueroa v. City of Camden*, 580 F. Supp. 2d 390, 405 (D.N.J. 2008) (acknowledging that "Supreme Court has stated unequivocally that § 1367(a)" does not override State's sovereign immunity). Therefore, plaintiffs'

state constitutional claims brought under the New Jersey Civil Rights Act, N.J. Stat. Ann. §§ 10:6-1 to -2, must be dismissed because the State has not unequivocally waived its immunity. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974).

POINT V

DISCOVERY SHOULD BE STAYED PENDING THE RESOLUTION OF THE THRESHOLD IMMUNITY QUESTION PRESENTED.

The defendant also requests that discovery be stayed pending resolution of their motion to dismiss. The defendant has asserted defenses and immunities, including Eleventh Amendment immunity. As noted by the United States Supreme Court in *Harlow v. Fitzgerald*, "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." 457 U.S. 800, 818 (1982). Indeed, the entitlement is an immunity from suit and not a mere defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 766 (2002).

For that reason, defendant respectfully requests that discovery be stayed during the pendency of this motion to dismiss.

CONCLUSION

For the foregoing reasons, defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6) should be granted, all claims against the defendant dismissed with prejudice, and discovery stayed pending this Court's determination in the matter.

Respectfully submitted,

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Eric S. Pasternack
Eric S. Pasternack
Deputy Attorney General

Dated: May 9, 2014