14-3882

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

MARK BALSAM; CHARLES DONAHUE; HANS HENKES; REBECCA FELDMAN; JAIME MARTINEZ; WILLIAM CONGER; TIA WILLIAMS; INDEPENDENT VOTER PROJECT; COMMITTEE FOR A UNIFIED INDEPENDENT PARTY INC, doing business as INDEPENDENT VOTING.ORG,

Plaintiffs-Appellants,

—v.—

SECRETARY OF THE STATE OF NEW JERSEY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR PLAINTIFFS-APPELLANTS AND JOINT APPENDIX VOLUME I OF II (Pages A-1 to A-16)

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1) Are the State of New Jersey's ("State") non-presidential primary elections an integral stage of its election process?
2) Does every voter have a fundamental right to vote at all integral stages of an election?
3) Do Appellants state a claim under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution when the State creates two classes of voters: (i) registered voters who 'qualify' to vote in the State's funded, administered, and sanctioned primary elections by virtue of joining the Democratic or Republican political parties; and, (ii) registered voters who are not 'qualified' to vote in primary elections because they have not joined the Republican or Democratic political parties?
4) Do Appellants state a claim under the First Amendment of the United States Constitution when the State requires voters to join the Republican or Democratic political parties as a condition to gaining access to an integral stage of the State's election process?
5) Did the lower court err by relying on precedent related to a political party's right to control access to its candidate nomination proceedings, rather than

[1] All issues were preserved in Plaintiffs' Brief in Opposition to the Defendant's Motion to Dismiss (Docket Entry 16).

precedent related to the rights of individual voters to participate in the election process?

State Claim Issue

1) Does the shield of state sovereignty apply to the state claim in this case?

PRELIMINARY STATEMENT

The right to vote derives from citizenship, not by joining the Republican Party, the Democratic Party, or any other organization.

Appellants presented the lower court the following question: Does the State have an obligation to afford every registered voter an opportunity to cast a meaningful vote at each integral stage of the State's election process? Joint Appendix ("JA") A-34.

The lower court did not respond to the question presented by Appellants, but instead responded to the following question posed by Appellee: If, as a part of its primary election system, the State elects to provide a political party with a forum for the selection of its party candidates for public office, are registered voters who are not members of *that* political party legally entitled to participate in *that* party's candidate selection forum? JA A-8.

These are fundamentally different questions. As such, the lower court's decision failed to address Appellants' federal constitutional claims.

Further, in reaching its decision, the lower court applied precedent related to the right of a political party to exclude non-party members from *that* party's candidate nomination proceedings. JA A-6-11.

The lower court's failure to address Appellants' constitutional claims and the use of inapplicable case law catapults a derivative right of political organizations to control their associations ahead of an individual's fundamental rights: (1) to vote at all integral stages of an election process and, (2) to be treated fairly and equally regardless of affiliation or non-affiliation with a specific political organization. This is because the right of the political parties asserted by Appellee springs only if the State, in its discretion, decides to provide those political parties with a forum for their candidate nomination proceedings, whereas the individual's right to vote is fundamental.

The State must respect and balance both rights. In other words, a state may only fund, administer, and sanction a public election process that protects a political party's private right of association (a derivative right) **and** the right of its citizens to cast a meaningful vote (a fundamental right).

Appellants reassert their original claims and ask this court to reject the lower court's extension of inapplicable case law related to the right of political organizations to control access to their associations, which Appellants have not

challenged, and address Appellants' claims related to the right of all legally entitled and registered individuals to cast a meaningful vote.

Voters who have not affiliated with a political party are absolutely prohibited from participation in the State's primary election. Voters who have affiliated with political parties other than the Democratic and Republican parties are, for all practical purposes, prohibited from participation in the primary election by virtue of having made an ideological choice to affiliate with a political party that does not meet the State's threshold for major party status. Therefore, the State does not treat voters equally.

The State should not be allowed to fund, administer, and sanction the results of a primary election for the exclusive benefit of the Republican and Democratic political parties and their members; particularly where that primary election materially impacts the outcome of the State's election process. To uphold the lower court's ruling would be to permit and defend this outcome.

The lower court's decision, if allowed to stand, would strengthen the power of the two (2) major parties to effectively control elections for public office even though they command the loyalty of a smaller and smaller portion of the electorate. Thus, the direct partisan primary, the key progressive era reform designed to enhance the power of the individual voter, no longer does so. Simply put, the State's primary election system has outlived its intended purpose.

Appellants seek court protection of their rights because the State has not taken it upon itself to scrutinize its century old primary election practices that disenfranchise nearly half of the State's registered voters. Appellee, who in her private capacity is a member of one of the two parties given special rights under New Jersey's current election scheme, argued that because no fundamental right was at issue, no fact-finding was required.

The lower court agreed.

STATEMENT OF JURISDICTION

The lower court exercised jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331, 1343. The lower court had jurisdiction over the state claims pursuant to U.S.C. §1367. The lower court entered judgment on August 14, 2014, granting Defendant's motion to dismiss. JA A-15. A timely notice of appeal was filed in the lower court on September 9, 2014. JA A-1. This court has jurisdiction over the appeal pursuant to 28 USC § 1291.

STANDARD OF REVIEW

The standard of review for a dismissal pursuant to Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6) is de novo. *Pryor v. NCAA*, 288 F.3d 548, 559 (3d Cir. 2002); *Gould Elecs., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000).[2]

RELATED CASES AND PROCEEDINGS

Appellants are aware of no cases or proceedings related to this appeal.

STATEMENT OF THE CASE

On March 5, 2014, Appellants filed a Complaint for Violation of Civil Rights Under 42 U.S.C. § 1983, N.J.S.A. § 10:6-2(c), the United States Constitution, and the New Jersey State Constitution (hereinafter "Complaint"). JA A- 23. The Complaint included two principal and related sets of grievances.

The first set of grievances concerned the State's violation of certain fundamental rights of each Appellant, including: the right to vote, the right of association, and the right to equal protection of the laws. JA A-34-38; U.S. Const. amend. I; U.S. Const. amend. XIV; N.J. Const., Art. II, Sec. I; N.J. Const. Art. I, Para. 18.

[2] De novo review means the issue is looked at anew, with no deference given to the lower court's holding. *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008).

The second, related, set of grievances concerned the State's violation of New Jersey constitutional prohibitions against the use of public funds for a private purpose. JA A-39. N.J. Const., Art. VIII, Sect. III, Para. 3.

On May 9, 2014, Appellee filed a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and a Brief in Support of that motion (hereinafter together the "Motion to Dismiss"). JA A-23. The Motion to Dismiss contended the lower court did not have subject matter jurisdiction for two reasons: (1) Appellants' lack of standing, and (2) New Jersey's sovereign immunity as to the claims based upon state law. Docket Entry 11. The Motion to Dismiss further asserted Appellants failed to state a claim upon which relief could be granted, alleging the issues involved in this matter have been decided in previous cases. *Id.*

Appellants opposed the Motion to Dismiss, submitting a Motion in Opposition on July 3, 2014. The opposition, among other matters, addressed Appellants interest in being allowed to cast a meaningful vote in the State's election process and noted that Appellants expressly disclaimed any interest in voting in the candidate nomination proceedings of any specific political party. Docket Entry 16. Appellee filed a reply to the opposition on July 28, 2014, and the Appellants filed a surreply to the reply on August 12, 2014. Docket Entry 19; Docket Entry 23.

On August 14, 2014, District Judge Stanley R. Chesler entered an opinion and order granting Appellee's motion to dismiss, with prejudice. JA A-3; A-15. All of Appellants' federal claims were dismissed for failure to state a claim. JA A-11. All of Appellants' state claims were dismissed on state sovereignty grounds. JA A-14. Appellants filed a timely notice of appeal on September 9, 2014, to the lower court from the order dismissing their complaint. JA A-1.

STATEMENT OF FACTS

The State's current election process requires voters to declare an affiliation with a political party, as defined in N.J. S.A § 19:1-1, as a condition to participate in the State's non-presidential primary elections ("Primary Election"). JA A-32; N.J.S.A. § 19:23-45. This Primary Election process includes, "the procedure whereby the members of a political party in [New Jersey] or any political subdivision thereof nominate candidates to be voted for at general elections, or elect persons to fill party offices." JA A-31; N.J.S.A. § 19:45-1.

The State's current Primary Election serves only the purpose of providing the major political parties with a private forum for the selection of its party candidates for public office ("Candidate Nomination Proceeding").

In New Jersey, to 'qualify' as a major political party, and therefore, to benefit from holding a partisan Candidate Nomination Proceeding as part of the taxpayer-funded primary election, a political party must receive at least ten percent

(10%) of the total votes cast in a preceding general election. JA A-32; N.J.S.A. § 19:1-1. Of the eight (8) recognized political parties in New Jersey, only the Republican and Democratic parties qualified to hold Candidate Nomination Proceedings as part of the State's Primary Elections in 2012 and 2013. JA A-32. Voters who registered to vote without affiliation with a political party, or with affiliation to a political party other than the Republican or Democratic parties were absolutely disqualified from participating in these Primary Elections because under the State's election law, an individual voter's right to participate in the Primary Elections is conditioned on joining a 'qualified' political party. JA A-33; N.J.S.A. § 19:23-45.

The State's election process includes two stages: a Primary Election and, a following general election. JA A-31. The State's taxpayer funded Primary Election, which directly impacts the outcome of the general election, is currently conducted solely for the purpose of administering the Candidate Nomination Proceedings of the Republican and Democratic parties, giving those select political parties an unjustified advantage in the election process.[3]

[3] As a practical matter, the State's current partisan Primary Election more often than not decides the winner of the increasingly non-competitive general election. Docket Entry 16, page 6. The imbalance created by the State's Primary Election system is not responsive to the reality of its present-day electorate; and the consequences of this imbalance are real and immediate. *Id.*

In 2012, 32.5% of New Jersey voters were registered Democrat, 19.7% were registered Republican, 0.2% were registered as affiliated with a third party, and 47.6% were registered as unaffiliated with any political party. JA A-25. A full 2,621,197 registered voters, including four (4) of the Appellants and a vast plurality of the balance of New Jersey's registered voters, were prohibited by State law from participating in the 2012 Primary Election solely on the basis of exercising their right not to affiliate with either the Democratic or Republican parties. JA A-33.

New Jersey's Primary Election system excludes, entirely, 47 percent of the State's electorate. JA A-33. This imbalance between party and non-party affiliation is expanding nationwide and, specifically, in New Jersey, as the number of voters exercising their right not to affiliate with a political party is growing steadily, both as an absolute number and as a percentage of all registered voters. Docket Entry 16, page 5. When raw numbers are considered, the number of New Jersey voters who have affirmatively chosen to not affiliate with a political party far exceeds the total number of voters registered with either the Republican or Democratic political parties.

In 2013 alone, New Jersey spent at least $12 million[4] conducting non-presidential special primary elections, or over $92 per vote actually cast in the Republican and Democratic Candidate Nomination Proceedings alone. JA A-32.

Individual Appellants Mark Balsam, Charles Donahue, Hans Henkes, and Rebecca Feldman are registered as unaffiliated voters, and as a result were not permitted to vote in New Jersey's 2013 Primary Election. JA A-29. They will likewise be excluded in the future because of their choice not to associate with any political party.

Individual Appellant Jaime Martinez is a registered Democrat, and individual Appellants William Conger and Tia Williams are registered Republicans. JA A-31. These Appellants were required to forfeit their right of non-association in order to exercise their right to vote in the 2013 Primary Election. *Id.* These Appellants have been coerced by law to affiliate with a political party as a condition to casting a meaningful vote in New Jersey's Election Process. *Id.*

Organizational Appellants Independent Voter Project and Committee for a Unified Independent Party seek to protect the rights of all voters to cast a meaningful vote. JA A-29.

REMEDIAL CONSIDERATIONS

[4] This does not include fixed State administrative costs that are expended to the benefit of the 'qualified' political parties.

Appellants seek an order declaring New Jersey's election process governing the State's non-presidential primaries unconstitutional on its face and as applied. Appellants also seek a preliminary and permanent injunction restraining Appellee from funding, administering, and sanctioning the results of its current Primary Election system for all non-presidential elections.

In that regard, Appellants have not suggested that the court require the New Jersey legislature to adopt a particular election system in place of its current system. JA A-42. Rather, numerous and real alternatives to New Jersey's Election Process exist within the United States and elsewhere, and the New Jersey legislature should be directed to design an election system within the constraints of constitutional guarantees afforded to both associations of individuals and individuals themselves.

A potential alternative, for example, could be that the State conduct an "other" nomination proceeding, in addition to the Republican and Democratic Candidate Nomination Proceedings, so that voters not affiliated with the Republican or Democratic parties have an opportunity to participate at this integral stage of the election process.

Still, other election systems such as "Top-Two," "Ranked Choice," "Instant Runoff," "Approval Voting," and "Proportional Representation," have been

offered as potential alternatives.[5] Any number of yet unknown remedies, in addition to these alternatives, may pass constitutional scrutiny.

Of note, other states, including California and Washington, have implemented nonpartisan "Top-Two" primary election systems. These nonpartisan primaries have not obstructed the ability of those states to hold orderly elections, have not resulted in voter confusion, and have not violated the associational rights of political parties and their members. And the Supreme Court has upheld their constitutionality:

> The [Washington nonpartisan primary] law never refers to the candidates as nominees of any party, nor does it treat them as such. To the contrary, the election regulations specifically provide that the primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election.

Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 453, (2008) (internal quotations omitted).

In short, Appellants contend the State can and must do better than its more than century old system and strongly believe that judicial intervention is necessary to compel the State to consider and implement an alternative system.[6] In making this claim, Appellants have merely asked the State to ensure that the state funded,

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[5] Stina Larserud, *Electoral Systems Index*, Ace Project (March 19, 2014) http://aceproject.org/ace-en/topics/es/topic_index

[6] Unlike California and Washington, New Jersey does not have an initiative and referendum process that would allow the voters to achieve such election reform directly.

administered, and sanctioned Primary Election not function as a private enterprise that deprives Appellants of their ability to cast a meaningful vote, and in doing so, confers on two (2) political parties and their membership special access to our democracy. As a consequence, this gives the Republican and Democratic parties a gratuitous advantage in the State's Election Process.

SUMMARY OF THE ARGUMENT

New Jersey's state funded, administered, and sanctioned election process includes a Primary Election that is currently conducted for the exclusive purpose of selecting the Republican and Democratic Party nominees. Yet, more than forty-seven percent (47%) of New Jersey's registered voters exercised their right not to associate with the Republican or Democratic parties and, on that basis alone, are excluded by State law from participating in the State's Primary Elections.

Contrary to Appellee's assertion, on which the lower court based its decision, Appellants have not and do not seek to participate in a political party's Candidate Nomination Proceeding. Rather, Appellants contend that the State's primary election is an integral part of the State's election process and, therefore, the State must adopt a system that provides every voter, irrespective of political party or non-party affiliation, with a meaningful opportunity to cast a vote.

Neither Appellee nor the lower court articulated a legally cognizable State interest in continuing New Jersey's Primary Election system that excludes nearly

half of all registered voters from participation. Indeed, Appellee's rationale treats the interests of the Republican and Democratic parties and those of the State as one and the same. Yet, the only legally cognizable interest of the State in this case is a regulatory one, which is limited, separate, and distinct from the private interests in preserving the *status quo* on which Appellee has rested the State's defense.

Moreover, no political party has availed itself of the opportunity to join this case. Reinforced by the lower court's ruling, the State has not provided those political parties with a reason to come forward and assert their interests on their own behalf. At the very least, this court should demand that the interests in this case are appropriately represented, as Appellants contend the State is carrying forward a case that inures only to the benefit of the Republican and Democratic parties.

New Jersey's current Primary Election serves the expressed purpose of selecting political party nominees and benefits only to the two major parties and their members. *See* N.J.S.A. § 19:23-5. This is a predominantly private purpose because the rights of political parties to limit who can participate in their respective Candidate Nomination Proceedings outweighs the rights of any unaffiliated voter to participate in them, even when that unaffiliated voter has no other alternative way to cast a vote at this integral stage of the election.

Appellants contend that, while states are required to respect the rights of individuals to associate and to not associate with others, no state can do so in a way that infringes on an individual's right to cast a meaningful vote unless such an infringement is justified by the appropriate countervailing regulatory interest of the State in ensuring an orderly election process.

The issue in this case is quite simple: is the State's curtailment on the individual right to vote at every integral stage of an election justified by a real and countervailing need of the State to ensure an orderly election? The lower court's rationale for summary dismissal of Appellants' case, with prejudice, was based on an inaccurate determination that, "[i]ndeed, [Plaintiffs'] entire lawsuit – at least the federal portion of it – proceeds from the premise that all registered voters have a fundamental right to vote in the primary election **conducted by political parties** they are not members of." JA A-8 (emphasis added).

Appellants have not asked this court (and did not ask the lower court) to issue a decision that would require political parties to allow non-party members to access their Candidate Nomination Proceedings. Rather, Appellants have proceeded from the premise that **the State cannot fund, administer, and sanction** an integral stage of its election process that excludes a near majority of all registered voters.

A ruling in Appellant's favor would create no new obligations for political parties. Rather, the New Jersey legislature would simply have to perform its pre-existing constitutional obligation to protect the rights of individual voters by reforming the State's election process in a manner that ensures all voters an equal opportunity to cast a meaningful vote. This has been accomplished in other jurisdictions.

A political party can always hold a Candidate Nomination Proceeding without the blessing or funding of the State. The issue of whether the State should fund, administer, and/or sanction the results of these proceedings requires an inquiry as to the State's regulatory interest in doing so, balanced against the individual right to vote.

Arguing that the State is required to pay for these partisan Candidate Nomination Proceedings as part of the process for electing public representatives at the expense and exclusion of non-affiliated voters raises the question: what, in return, do the non-affiliated voters receive other than a dilution of their vote? The answer: taxation without representation.

I. ARGUMENT ON THE FEDERAL CLAIMS

A. Because New Jersey's Primary Election Effectively Controls Voter Choice, It Is An Integral Stage Of The Election.

The purpose for which states such as New Jersey created public primary elections at the turn of the century was to ensure that individual voters had a

meaningful voice at the nominating stage of the election process.[7] Importantly, for context, the State has no legal obligation to provide any political party with a private forum for its Candidate Nomination Proceedings, as evidenced by the fact that the State only provides a forum for Candidate Nomination Proceedings for the two major political parties and not any of the other unqualified political parties in the State. *See Washington State Grange*, 552 U.S. at 452 n.7.

Proponents of state-administered primary elections wanted to remove power from partisan insiders and thereby democratize the overall election process.[8] In 1904, the first state adopted a mandatory primary election law. By 1910, forty-four of forty-six states had followed suit.[9]

The advent of primary elections was in recognition of the principle that the fundamental right to vote includes the right to exercise a meaningful vote. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964). By the same logic, the court has held that when the Primary Election effectively controls the choice of viable candidates, the right to vote cannot be truly meaningful when restricted to the general election.

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[7] Christine M. Collins, *Primary Elections A look into Four Primary Election Systems*, California Initiative Review (2010), available at http://www.mcgeorge.edu/Documents/Publications/CIR-primaryelections.pdf

[8] Christine M. Collins, *Primary Elections A look into Four Primary Election Systems*, California Initiative Review (2010), available at http://www.mcgeorge.edu/Documents/Publications/CIR-primaryelections.pdf

[9] Todd J. Zywiki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and its Implications for Current Reform Proposals*, 45 Clev. St. L. Rev. 165, 191, (1997).

See United States v. Classic, 313 U.S. 299, 318 (1941) and *Ripon Soc. v. National Republican Party*, 525 F.2d 548, 564 (D.C. Cir. 1975).

In New Jersey, the partisan Primary Election more often than not decides the winner of the increasingly non-competitive general election.[10] As was the conclusion in a comprehensive study by the nonprofit and nonpartisan Lucy Burns Institute concerning congressional candidates nationwide, the "Democratic or Republican candidate is virtually guaranteed victory in a general election. Given that major party candidates win nearly 100% of the time, a candidate running without any major party opposition is essentially assured election -- even if there are third party candidates."[11]

Because New Jersey's Primary Election effectively controls the choice of viable candidates, it is an integral stage of the election.

B. Voters Have A Fundamental Right To Vote At All Integral Stages Of An Election.

It is well established that the right to vote is a basic constitutional right. *Dunn v. Blumstein*, 405 *U.S.* 330, 336 (1972); *Kramer v. Union Free School*

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[10] Office of the Mayor, *Competitiveness of Legislative Elections in the United State: Impact of Redistricting Reform and Nonpartisan Elections* (2010), http://www.nyc.gov/html/om/pdf/2010/pr507-10_report.pdf

[11] Lucy Barns Institute, *Major Party Candidates With Major Party Competition in the November 2014 State Legislative Elections*, Ballotpedia (2014), http://ballotpedia.org/Major_party_candidates_with_major_party_competition_in_the_November_2014_state_legislative_elections.

Dist., 395 *U.S.* 621, 626 (1969); *Carrington v. Rash*, 380 *U.S.* 89, 96 (1965). The fundamental right to a meaningful vote includes voting at the primary stage, where the primary is an integral part of the election process. *Classic*, 313 U.S. at 318. In fact, the courts have held that the right to vote in the Primary Election is "as protected as voting in a general election." *Friedland v. State*, 374 A.2d 60, 63 (1977).[12]

The United States Constitution gives states control over the administration of the election process. U.S. Const., Art. I, § 2; Art. II, § 1. But a state may not violate fundamental constitutional rights in carrying out this mandate. See, *Dunn*, 405 U.S. at 336; *Kramer*, 395 U.S. at 626; and *Carrington*, 380 U.S. at 96.

Appellants assert a principle that the court has already recognized: every individual voter has a fundamental right to an equally meaningful vote. *Reynolds*, 377 U.S. at 565. This right can only be protected when the State regulates all integral stages of an election in a way that protects each voter's right to full and meaningful participation.

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[12] The lower court distinguished *Friedland* on the grounds that the case, "in fact rejected the exact same challenge to N.J.S.A § 19:23-45 Plaintiffs advance here." JA A-10. In *Friedland*, the court held that the fundamental rights of political parties must be recognized even at the primary stage of the election. *Friedland*, 374 A.2d at 494. Appellants in this case, however, cite to *Friedland* not to advance the fundamental rights of the political parties, but rather, for the proposition that the rights of individual voters must be similarly protected at all integral stages of the election.

As the Supreme Court held in *Classic,* before the Voting Rights Act was adopted, and before reapportionment was subjected to federal scrutiny:

> Unless the constitutional protection of the integrity of "elections" extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of representatives is stripped of its constitutional protection save only as Congress, by taking over the control of state elections, may exclude from them the influence of the state primaries.
>
> Such an expedient would end that state autonomy with respect to elections which the Constitution contemplated that Congress should be free to leave undisturbed, subject only to such minimum regulation as it should find necessary to insure the freedom and integrity of the choice.

313 U.S. at 319-20.

Yet, in this case, the federal causes of action were dismissed by the lower court on the grounds that the state may "qualify" the fundamental right to vote in its Primary Election by requiring registered voters to join either the Republican or Democratic parties. JA A-9.

It is Appellants' position that, by its very nature, the fundamental right to vote cannot be 'qualified' by forced association. "[T]he federal right to vote…do[es] not derive from the state power in the first instance but that belong to the voter in his or her capacity as a citizen of the United States." *United States Term Limits v. Thornton*, 514 U.S. 779, 844 (1995) (Kennedy, concurring). Requiring a registered voter to affiliate with a political party only serves to privatize an integral stage of the process, frustrate the constitutional purpose of the

entire election, and legitimize the Democratic and Republican parties' monopoly over the election process, while at the same time alienating nearly half of all registered voters.

As the Supreme Court articulated 50 years ago in *Reynolds v. Sims*, when it held that each state must reapportion their districts equally, "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing -- one person, one vote." 377 U.S. at 568. The Court went on to state:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system.

Id. at 623 (internal quotations omitted).

The lower court held that, "*Classic* itself presupposes that the right it acknowledges only applies to voters who were 'qualified' to cast votes in Louisiana's Democratic primary." JA A-9. The application of this holding is proper only insofar as it is applied to a party member's right to vote in his or her party's private Candidate Nomination Proceedings. However, the Supreme Court's reasoning in *Classic* supports a broader application in this case than the lower court presumes:

> Moreover, we cannot close our eyes to the fact, already mentioned, that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election, even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary, and may thus operate to deprive the voter of his constitutional right of choice.

313 U.S. at 319.

In *Classic*, the court held that members of a political party have a fundamental right to cast a meaningful vote in their Candidate Nomination Proceedings, when such proceedings are an integral stage of the election. *Id.* at 314. If the fundamental right did not exist at this stage of the election, the Court recognized, these voters would be deprived of their constitutional right to choose who governs them. *Id.*

In this case, New Jersey's Primary Election, taken as a whole, is an integral stage of the election. For the State to provide the Republican and Democratic parties and their members with exclusive access to a stage of the election, where the practical effect of the selection of candidates so profoundly affects the choices on the ballot at the general election, deprives Appellants of their constitutional right to cast a meaningful vote. Legislators represent people, not parties.

Therefore, Appellants' citation to *Classic* serves to highlight the need for judicial intervention in protecting the individual voter's fundamental right to vote in this case. At the very least, it supports the need for this court to require fact

finding before concluding the State's Primary Election does not deprive nearly half of all voters in New Jersey of the individual right to vote.

C. Appellants State A Claim Under The First And Fourteenth Amendments

In ruling on the constitutionality of limits placed by states on participation by individual voters in the election process, courts have adopted a balancing test:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.' (requiring 'corresponding interest sufficiently weighty to justify the limitation'). No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. ('No litmus-paper test . . . separates those restrictions that are valid from those that are invidious . . . . The rule is not self-executing and is no substitute for the hard judgments that must be made').

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358-59 (1997) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), *Anderson v. Celebrezze*, 460 U.S. 780, 788 -89 (1983), *Norman v. Reed*, 502 U.S. 279, 288-89 (1992), and *Storer v. Brown*, 415 U.S, 724, 730 (1974)).

Much federal litigation has addressed the issue of what are acceptable state regulatory interests for limiting voter, candidate, and party rights. Thus, in

California Democratic Party v. Jones, the linchpin of the lower court's ruling, Justice Scalia wrote:

> Respondents proffer seven state interests they claim are compelling. Two of them -- producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns -- are simply circumlocution for producing nominees and nominee positions other than those the parties would choose if left to their own devices. Indeed, respondents admit as much. For instance, in substantiating their interest in "representativeness," respondents point to the fact that "officials elected under blanket primaries stand closer to the median policy positions of their districts" than do those selected only by party members. Brief for Respondents 40. And in explaining their desire to increase debate, respondents claim that a blanket primary forces parties to reconsider long standing positions since it "compels [their] candidates to appeal to a larger segment of the electorate." Id. at 46. Both of these supposed interests, therefore, reduce to nothing more than a stark repudiation of freedom of political association: Parties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority.

530 U.S. 567, 582 (2000).

The Court definitively held that the **private** interests of political parties are not to be conflated with the **public** interests of the state.

Significantly, the majority in *Jones* relied on a case in which it was held that the South Boston Allied War Veterans Council had the right to exclude openly gay and lesbian organizations from participating in its annual St. Patrick's Day parade. 530 U.S. at 582 (citing *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U.S. 557 (1995)). In so doing, the Court's majority recognized

that because the plaintiff was a private association it should, therefore, be accorded the private right to set its terms of association.

It would be wrong to uphold the State interest in this case purely based on its interest in protecting private associational rights. As the First Circuit Court of Appeals noted in upholding the right of a political party to control access to its Candidate Nomination Proceedings against a state's attempt to prohibit members of one political party from voting in another party's Candidate Nomination Proceedings when that party attempted to permit such participation by non-party members, "the State must at least articulate [its own] plausible and constitutionally legitimate justifications." *Cool Moose Party v. State of Rhode Island*, 183 F.3d 80, 88 (1999) (citing *Timmons*, 520 U.S. at 378 (Stevens, J., dissenting)).

The Supreme Court has been more direct in asking for, "the **precise interests put forward by the State** as justifications for the burden imposed by its rule, "taking into consideration the extent to which **those interests** make it **necessary to burden the plaintiff's** rights." *Burdick*, 504 U.S. at 434 (1992) (quoting *Anderson*, 460 U.S. at 789 and *Tashjian v. Republican Party*, 479 U.S. 208, 214 (1986))(emphasis added).

The lower court accepted Appellee's false premise that Appellants sought to vote in major political party Candidate Nomination Proceedings. *See* JA A-8. As a result, Appellee and the lower court have yet to address what legitimate interest of

the State, if any, exists to constitutionally justify its voter qualification requirement and exclusionary election process.

By resting the defense on the private right of association enjoyed by organizations that are not litigants in this matter, the State attempts to transpose a private right into a legitimate state interest, which is at odds with the logic of *Jones*. In *Jones*, the court held that, "legitimate state interests and [a political party's] First Amendment rights are not inherently incompatible. To the extent they are in this case, the State of California has made them so by forcing political parties to associate with those who do not share their beliefs." *Jones* at 586.

In *Jones*, the State of California created the conflict by forcing political parties to associate with individuals. In this case, however, the State of New Jersey has created the conflict by forcing individual voters to associate with a political party. The lower court has obfuscated the precedent because California and New Jersey have argued on opposite sides of the conflict.

The Constitution, understandably, imposes a distinction between public and private interests. Traditionally, the parties have fought to establish and defend their status as private associations against state intrusion. The *Jones* decision, for example, had its precursor in *Tashjian*, where the Supreme Court held the Republican Party of Connecticut had the right to allow independent voters to participate in its Candidate Nomination Proceedings even when the state provided

for closed primaries. 479 U.S. at 225. In that case, the State of Connecticut argued that it had a legitimate state interests in defending political party stability. *Id*. at 223. In response, the Court stated:

> The State argues that its statute is well designed to save the Republican Party from undertaking a course of conduct destructive of its own interests. But on this point even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party. The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution. And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.

Id. at 225 (internal quotations and citations omitted).

In the case at bar, however, political parties are not litigants and their rights are not being challenged. Yet Appellee, a representative of the State, asserts precedent decided in favor of arguments made exclusively by political parties to protect their closed Candidate Nomination Proceedings, without offering a single argument in support of New Jersey's state interest in defending this case.

It is also noteworthy that a political party's right of association as it relates to its Candidate Nomination Proceedings has been rejected by the Court when the parties have tried to make it an absolute right. The Democratic Party, for example, invoked its private status to justify the exclusion of African-Americans in its Candidate Nomination Proceedings over 60 years ago. *Terry v. Adams,* 345 U.S. 461, 466 (1953); *Smith* v. *Allwright,* 321 U.S. 649, 663-64 (1944). The

Democratic Party's argument was rejected by the Court on the basis that their private right of association did not outweigh the constitutional guarantees of the Fifteenth Amendment. *Adams*, 345 U.S. at 466; *Allwright*, 321 U.S. at 663-64.

Appellants in this case need not go as far as the Court reached in *Adams* and *Allwright*, because the private right of association is not being challenged by Appellants. Rather, as *Jones* makes clear, a political party's candidate selection process is a private affair and should be protected from state intrusion unless necessary to protect other constitutional guarantees. *Jones*, 530 U.S. at 573 n.4*; see also Eu v. San Francisco County Democratic Cent. Comm*, 489 U.S. 214, 223 (1989). Appellants agree with the holding of *Jones* and are not seeking in this case to open major party Candidate Nomination Proceedings to participation by non-party members. Appellants instead challenge whether the State has an interest in protecting the Republican and Democratic parties from competition in the election process, generally.

In short, Appellants challenge the decision of the State to fund, administer, and sanction the results of a closed Primary Election that excludes more than forty-seven (47%) of all registered voters. This challenge rests on two facts which Appellee must concede: (1) every individual has a fundamental right to cast a meaningful vote; and, (2) the State has no obligation to provide political parties with a state funded, administered, and sanctioned Candidate Nomination

Proceeding in the first place. Appellants' challenge is reinforced by the apparent fact that the only rationale offered by Appellee for such an exclusionary system is to protect the private rights of political parties, which are not at issue in this case. On what basis then can the State legally disregard the rights of a near majority of its voters to further the private interests of the major political parties?

Appellants, by way of this appeal, simply ask that the judiciary answer this question.

i. Appellants State A Claim Under The Equal Protection Clause Of The Fourteenth Amendment Of The United States Constitution Because The State Has Given One Class Of Voters Access To An Integral Stage Of The Election, And Not Others.

In modern legal proceedings, there is risk in harking back to our founding, if only because the other side and the court may perceive a naivety in the party pushing this discussion, or a crude anti-government purpose to the party's end. Appellants assert the fundamental right to vote requires this court to go there and to consider with an open mind the State's Primary Election system and its impact on individual voters.

Appellants, to the best of our knowledge, are the first plaintiffs to come before the court without accepting the false premise that political parties are entitled to exclusive control to the first stage of the State's election process, the Primary Election. Rather, Appellant's have come before the court as individual

voters asserting a right to cast a meaningful vote, including the right to participate in all integral stages of the election process. In this regard, Appellants' case is novel, yet rooted squarely in the Constitution of the United States and our national history.

America's founders rejected a parliamentary style democratic government in favor of the uniquely American construct precisely for the purpose of avoiding the emergence of strong ideologically based political parties. In fact, George Washington warned against the dangers of political factions in his farewell address.[13] State administered primary elections emerged in the late 19th and early 20th century progressive era to combat against the strong control over our public election process by the few people and special interests that control the major party organizations.[14]

However, over the last 100 years, the Republican and Democratic parties have worked to subvert external political competition in the Primary Election. Party central committees, partisan special interests, and partisan lawyers have steadily reframed election law in such a way that the failure to affiliate with one of the two institutionalized political parties subverts an individual's ability to have meaningful participation in the political process.

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[13] Christine M. Collins, *Primary Elections A look into Four Primary Election Systems*, California Initiative Review (2010), available at http://www.mcgeorge.edu/Documents/Publications/CIR-primaryelections.pdf

[14] *Id.*

The consolidation of power in the major political parties has accelerated rapidly over the past 75 years. Even the mainstream media has reorganized around the duopoly and accepted the notion that a virtual pre-requisite for full voter participation is party affiliation.[15] Over the same period, party affiliation has declined so that today forty-two percent (42%) of voters nationally self-identify as independents and more than forty-seven percent (47%) of all registered voters in New Jersey have chosen not to affiliate with a major party when they registered to vote. Opposition to Motion to Dismiss, Docket Entry 16, page 5.

These changes call for re-examination of what kinds of electoral systems pass constitutional muster:

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights…Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.

Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 669 (1966).

As noted in *Reynolds v. Sims*, "the complexions of societies and civilizations change, often with amazing rapidity…representation schemes once fair and equitable become archaic and outdated." 377 U.S. at 567. At the time that *Reynolds*

[15] Amy Mitchell, Jeffrey Gottfried, Jocelyn Kiley, and Katerina Eva Matsa, *Political Polarization & Media Habits*, Pew Research Center (October 21, 2014), http://www.journalism.org/2014/10/21/political-polarization-media-habits/

was decided in the mid-1950s, both major political parties relied on malapportionment to further their own, often minority, interests to block reform efforts.[16] As a natural consequence, state officials elected in the malapportioned landscape vigorously defended minority rule in the legislatures and the courtroom.[17] The Court in *Reynolds* further stated:

> Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.

Id. at 565

At one time, New Jersey's current election process may have served the purpose of protecting majority rule. At the time New Jersey's partisan primaries were first adopted, for example, the purpose of the Primary Election was to reduce the power of party insiders.[18] The sudden rise in non-affiliated voters[19] and the

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[16] *See* J. Douglas Smith, *On Democracy's Doorstep*: *the Inside Story of How the Supreme Court Brought "One Person, One Vote" to the United States*, 20-21 (2014).

[17] *Id.* at 21-22.

[18] Christine M. Collins, *Primary Elections A look into Four Primary Election Systems*, California Initiative Review (2010), available at http://www.mcgeorge.edu/Documents/Publications/CIR-primaryelections.pdf

[19] *Trend in Party Identification*, Pew Research Center (June 1, 2012), http://www.people-press.org/2012/06/01/trend-in-party-identification-1939-2012/

narrowing of the major parties' bases of support, accompanied by the domination of partisan primary elections by party activists, frustrates this purpose.

It should be of little surprise, therefore, that most state officials elected within today's electoral landscape as well as other major party activists and leaders, like those at the time of *Reynolds,* have vigorously opposed more inclusive election reforms in the legislature and the courtroom, including Appellee in the case at bar.[20]

The right to an equal vote serves to prevent an entrenchment of any one group of interests to the exclusion of others, because such an entrenchment in the process of political choice is contrary to the democratic ideal. *See Ripon*, 525 F.2d at 559-60. Without equality of the right to vote within all integral stages of the

[20] In Oregon and Arizona the major parties successfully defeated an effort to move to a top-two system like that adopted by voters in California and Washington. Evan Wyloge, *Failed Top-Two Primary Measure Had Most Support Among Independent Voters*, Arizona Center for Investigative Reporting (2014) http://azcir.org/failed-top-two-primary-measure-had-most-support-among-independent-voters/ ; Richard A. Clucas, *The Oregon Constitution and the Quest for Party Reform*, 87 Or. L. Rev. 1061 (2008), available at http://law.uoregon.edu/org/olrold/archives/87/Clucas.pdf. In Idaho the Republican Party commenced litigation that overturned the State's open primary, which allowed all voters to vote in the party primary of their chose without a requirement for prior registration into that party. *Idaho Republican Party v. Ysursa*, 765 F. Supp. 2d 1266, 1268 (2011). Similar challenges were rejected in South Carolina and Hawaii. *Democratic Party v. Nago*, 982 F. Supp. 2d 1166, 1183 (2013); *Greenville County Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 672 (2011). In Hawaii the State Democratic Party has appealed, as has the Greenville County Republican Organization, the plaintiff in South Carolina.

process, there is essential no meaningful right to vote at all. *See Grey v. Sanders*, 372 U.S. 368, 380 (1963) (political equality extends to all phases of the election.)

New Jersey's election process creates two classes of voters: (1) major party members who enjoy full participation in both the Primary Election and the general election; and, (2) voters who, by reason of choosing not to associate with one of the dominant political parties, are allowed only limited participation in the general election. Because only Republican and Democratic party members may participate in New Jersey's Primary Election, not all voters are treated equally.

As a natural consequence, the State's Primary Elections have entrenched Republican and Democratic parties' minority interests to the exclusion of others, including over 2.6 million New Jersey voters who have actively chosen not to affiliate with either of the two.[21]

Because the State's Primary Election confers a special benefit to the dominant political parties and their members to the complete exclusion of nearly half of all registered voters, the Equal Protection Clause requires the court to fairly balance all the rights being claimed in this case to the extent they may conflict.

[21] It cannot be the case that a state is prohibited from requiring a voter to live in a rural area to have full voting rights but can require a voter to join a party in order to achieve a parity in voting power. *See Reynolds*, 377 U.S. at 557.

ii. Appellants State A Claim Under The First Amendment Of The United States Constitution Because The State Cannot Condition The Exercise Of One Right On The Forfeiture Of Another.

A state cannot condition the exercise of one right on the forfeiture of another. *See Reynolds*, 377 U.S. at 557. Yet, New Jersey law requires that a voter 'qualify' for the right to vote in the Primary Election by joining a political party.

The First Amendment of the constitution protects the right of association. A corollary of the right to associate is the right not to associate. *Jones*, 530 U.S. at 574. And, as recognized since early in United State's history, "[voting] is regarded as a fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

As the Court reasoned in *Williams v. Rhodes* when it held that the State of Ohio's restrictive election laws, taken as a whole, imposed a burden on the right to vote and the First Amendment right of association, and therefore, the rights were entitled to protection from state infringement under the Fourteenth Amendment:

> The fact is, however, that the Ohio system does not merely favor a 'two-party system'; it favors two particular parties the Republicans and the Democrat – and, in effect, tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.

393 U.S. 23, 32 (1968).

Similarly, in this case, the State cannot favor two particular political parties in the competition of ideas and governmental policies. A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution. *Baker*, 369 U.S at 208 . "[E]ven rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008). When poll taxes were prevalent, for example, the Supreme Court recognized that, "the right to vote is too precious, too fundamental to be so burdened or conditioned." *Harper*, 383 U.S. at 670.

The Court in *Harper* reasoned that, "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of discrimination is irrelevant." *Id.* at 668. Similarly, membership with a "qualified" political party is a capricious and irrelevant factor in measuring a voter's qualification to participate at an integral stage of an election.

No extended discussion is required to establish that the New Jersey laws before us give the two old and established political parties a decided advantage over individual voters, and thus place substantially unequal burdens on both the right to vote and the right to associate. *Williams*, 393 U.S. at 31. Therefore, Appellants, who have a fundamental right to associate or not associate by virtue of

their citizenship, state a claim under the First Amendment of the United States Constitution.

D. The Lower Court Erred By Relying On Precedent Related To Whether An Independent Voter Has The Right To Vote In A Political Party's Private Primary Rather Than Precedent Related To The Right Of All Individual Voters To Cast An Equally Meaningful Vote.

Upholding the lower court's ruling would create a new precedent that insulates integral stages of the election process from constitutional scrutiny. In effect, this insulation gives the major political parties a State delivered monopoly over its election process. *See Williams,* 393 U.S. at 393 (1968) ("There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them.")

i. Appellants Assertion Of the Right To Vote At An Integral Stage Of The Election Is Based Upon Long-Standing Precedent

Appellants' federal claims are based on longstanding precedent. Appellants' claims have been characterized as novel only because prior case law concerns issues of access to the private Candidate Nomination Proceedings of the political parties. In substantially all of those cases, the plaintiff was a political party asserting its right of association. No case has been brought to the court, to date, in regards to the more particular and immediate issue of whether a primary election, taken as a whole, can violate the individual voter's right (irrespective of that

individual's race, religion, gender, or party affiliation) when a state makes the primary an integral stage of the election.

The claims in this case can be summarized as: (1) a state may not conduct an election system that abridges a federally protected right without meeting federal constitutional scrutiny (*see Baker v. Carr*, 369 U.S. 186, 231 (1962)), and (2) New Jersey's current election process, which includes funding and administering a closed non-presidential Primary Election, unconstitutionally dilutes the right of some citizens to vote compared to others, in violation of the Supreme Court's "One-Person, One-Vote" standard. *See Reynolds* at 567-68.

Despite Appellee's misrepresentation of Appellants' claims, and the lower court's opinion that succumbs to that misrepresentation, Appellants have not asked the court to allow independent voters to vote in the Republican and/or Democratic Candidate Nomination Proceedings. Rather, Appellants simply assert that the State has an obligation to protect each individual voter's fundamental right to vote at every integral stage of the election process. The State's Primary Election, as currently constructed, violates that right.

Appellants' arguments should not be construed to attack the partisan nature of elections nor the right of political parties to exclusive Candidate Nomination Proceedings. Appellants' challenge is narrower and more targeted. Appellants'

claims concern the obligation of the State to protect the voting rights of its citizens, without challenging the rights of the political parties and their members.

Further, Appellants' complaint should not be so broadly construed as to include issues of candidates' rights, or third party ballot access. Therefore, issues such as a non-party candidate's ability access to the general election ballot by way of petition are wholly irrelevant. *See e.g. Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 68-69 (3d Cir. 1999).

Appellants only assert in this case the longstanding precedent that supports the fundamental right of individual voters to participate at all integral stages of the election process, including the State's Primary Election.

ii. The District Court Mistook A Claim Concerning A Voter's Fundamental Right For A Challenge To A Political Party's State-Granted Right.

The lower court erred by relying on precedent related to the private purpose of Candidate Nomination Proceedings, rather than relying on precedent related to the public purpose of the election process.

A primary can be either partisan or non-partisan. Partisan primaries come in many forms, depending on the access and ballot options a voter is afforded. A partisan primary election is best conceived as individual Candidate Nomination Proceedings conducted at the same time for each qualified political party. Partisan

primaries are practiced in forty-seven (47) of fifty (50) states. However, regardless of their peculiarities, partisan primaries always serve the same predominantly private purpose. *See e.g. Jones*, 530 U.S. at 573-73 ("The purpose of a partisan primary is for members of political parties to nominate candidates for the general election and elect party officers.").

Because partisan elections are conducted predominantly for the private purpose of selecting a political party nominees, a political party's private right of association attaches. "Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" *Id.* at 575 (quoting *Eu,* 489 U.S. at 224).

However, the state-granted rights created by a partisan Primary Election must be balanced with an individual voter's fundamental right to vote. "The rights of party members may to some extent offset the importance of claimed conflicting rights asserted by persons challenging some aspect of the candidate selection process." *Nader v. Schaffer*, 417 F. Supp. 837, 845 (D. Conn. 1976) aff'd, 429 U.S. 989 (1976).

As the ruling in *Nader* presupposes, the fundamental rights of individual voters may to some extent offset the importance of the claimed conflicting rights asserted by persons defending the candidate selection process. But the lower

court's reliance on *Nader*, a summarily affirmed case concerning party rights, to summarily dismiss a case concerning individual rights, is inappropriate. *See* JA A-10.

The lower court's reliance on *Nader* fails to recognize that the First Amendment rights granted to the Republican and Democratic parties by the State, and defended by the parties in that case, must be offset by the conflicting rights asserted by Appellants in this case. The rejection of the right of an independent voter to participate in a political party's Candidate Nomination Proceeding does not justify ignoring the right of all voters to full and equal participation in the electoral process altogether, including the Primary Election.

Private rights and public rights, when conflicting, must be balanced. "No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote. . . . Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit." *Wesberry v. Sanders*, 376 U.S. 1, 19 (1964).

In properly balancing these conflicting rights, it is important to re-emphasize the fundamental nature of the individual right to vote and the State-granted nature of the political parties' First Amendment rights in any state funded, administered, and sanctioned Candidate Nomination Proceedings. A state can, for example, create a primary election for an exclusively public purpose, without conferring

political parties with any right to a state funded, administered, and sanctioned private Candidate Nomination Proceeding. A nonpartisan primary, for example, is conducted for an exclusively public purpose. While nonpartisan primaries can vary in form based on other particularities, their purpose is constant: to provide the machinery to narrow the candidate field for the general election. See *Washington State Grange*, 552 U.S. at 453.

While the fate of partisan open primaries is currently under litigation, open nonpartisan primaries have withstood constitutional scrutiny. *See supra* footnote 20; *Washington State Grange*, 552 U.S. at 458. The Supreme Court stated that under such a nonpartisan system, "a State may ensure more choice, greater participation, increased privacy and sense of fairness – all without severely burdening a political party's First Amendment right of association." *Jones*, 530 U.S. at 586.

This is because nonpartisan elections avoid the parties' First Amendment concerns altogether. "The top two candidates from the primary election proceed to the general election regardless of their party preferences. Whether parties nominate their own candidates outside the state-run primary is simply irrelevant. In fact, parties may now nominate candidates by whatever mechanism they choose." *Washington State Grange*, 552 U.S. at 453.

In this case, Appellants suggest that any state-granted right to a political party must be measured against its consequence to the fundamental rights of each individual voter. Appellants further contend that the State's legitimate interests in the structure of its election process, including each integral stage thereof, should ensure more choice, greater participation, increased privacy, and a sense of fairness.

When more than forty-seven percent (47%) of all New Jersey voters have chosen not to join a major political party, these legitimate interests can only be accomplished when any individual's fundamental right to vote attaches to every integral stage of the election process, unqualified and unconditioned by party membership.

Therefore, the court erred when it relied on precedent related to an independent voter's right to vote in a political party's Candidate Nomination Proceedings rather than relying on precedent related to the right of all individual voters to cast a meaningful vote.

II. ARGUMENT ON THE STATE CLAIMS

A. The Shield Of State Sovereignty Does Not Apply To State Claims Because The Suit Is Actually Against the Individual Charged With Enforcement Of The State Law

As the lower court recognized, "[t]he theory behind *Young* is that a suit to halt the enforcement of a state law in conflict with the federal constitution is an action against the individual officer charged with that enforcement," and is thus not

really a suit against the state itself. *MCI Telecomm. Corp. v. Bell Atlantic Pa.*, 271 F.3d 491, 506 (3d Cir. 2001) (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). When this is the case, the officer is stripped of his or her official or representative character and becomes subject to the consequences of his individual conduct. *See Young*, 209 U.S. at 159-160.

The State law at issue in this case is New Jersey's constitutional prohibition against the use of taxpayer funds for a private purpose. N.J. Const., Art. VIII, Sect. III, Para. 3. If the State's Primary Election is in conflict with the federal constitution, then it cannot serve a legitimate public purpose. Therefore, when Appellee funds, administers, and sanctions an unconstitutional Primary Election, she violates State law while she is stripped of her official or representative character.

Therefore, the state claims are properly before the court.

CONCLUSION

Appellants have a fundamental right to vote at each integral stage of New Jersey's election process, unqualified by a requirement that they join a political party. The State's Primary Election is an integral stage of New Jersey's election process.

Therefore, the order of the lower court dismissing this action should be reversed.

Dated: November 3, 2014

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CERTIFICATE OF BAR MEMBERSHIP

SAMUEL GREGORY certifies as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit. S. Chad Peace and Harry Kresky are also members in good standing of the bar of the United States Court of Appeals for the Third Circuit.
2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: November 3, 2014

/s/ Samuel Gregory
Samuel Gregory

CERTIFICATE OF COMPLIANCE

SAMUEL GREGORY certifies as follows:

1. This brief complies with the page limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,445 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in font 14, Times New Roman.
3. The text of the electronic and hard copy forms of this brief are identical.
4. I caused the electronic version of this brief to be checked for computer viruses using Avast Security 2015, version 10.0. No computer virus was found.
5. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: November 3, 2014

/s/ Samuel Gregory
Samuel Gregory

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/EMF system on November 3, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 3, 2014

/s/ Samuel Gregory
Samuel Gregory

JOINT APPENDIX, VOLUME I OF II

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
VICINAGE OF NEWARK

MARK BALSAM, CHARLES DONAHUE, HANS HENKES, REBECCA FELDMAN, JAIME MARTINEZ, WILLIAM CONGER, TIA WILLIAMS, INDEPENDENT VOTER PROJECT, and COMMITTEE FOR A UNIFIED INDEPENDENT PARTY, INC. (D/B/A INDEPENDENTVOTING.ORG) Plaintiffs, v. KIM GUADAGNO, in her official capacity as New Jersey Secretary of State Defendant.	CIVIL ACTION NO. 14-01388 (SRC-CLW) JUDGE STANLEY R. CHESLER

NOTICE OF APPEAL

Notice is hereby given that Mark Balsam, Charles Donahue, Hans Henkes, Rebecca Feldman, Jaime Martinez, William Conger, Tia Williams, Independent Voter Project, and Committee for a Unified Independent Party, Inc. (d/b/a/ IndependentVoting.org), plaintiffs in the above-named case, hereby appeal to the United States Court of Appeals for the Third Circuit from the August 14, 2014 Order and opinion which granted the defendant's Motion to Dismiss the complaint.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARK BALSAM, CHARLES DONAHUE, HANS HENKES, REBECCA FELDMAN, JAIME MARTINEZ, WILLIAM CONGER, TIA WILLIAMS, INDEPENDENT VOTER PROJECT, and COMMITTEE FOR A UNIFIED INDEPENDENT PARTY, INC., Plaintiffs, v. KIM GUADAGNO, in her official capacity as New Jersey Secretary of State, Defendant.	**Civil Action No. 14-01388 (SRC)** **OPINION**

CHESLER, District Judge

The Complaint filed in this case challenges the manner in which New Jersey conducts its primary elections, the process by which political parties as defined by New Jersey law choose candidates for a general election. The Complaint raises a number of claims under the federal Constitution and its New Jersey counterpart. Plaintiffs are a collection of individual voters and not-for-profit entities who ask this Court to enter judgment (1) declaring unconstitutional certain laws governing New Jersey's primary elections and the way those elections are funded, and (2) ordering Defendant Kim Guadagno ("Defendant") to "implement a constitutional . . . primary election system." (Compl. at 20.) Defendant now moves to dismiss the Complaint, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). [Docket Entry 11.] For the foregoing reasons, the motion will be granted, and the Complaint dismissed with prejudice.

BACKGROUND

Under New Jersey law, general elections are held "on the Tuesday next after the first Monday in November . . . ." N.J. Stat. Ann § 19:2-3. Primary elections, by which "the members of a political party in this State or any subdivision thereof nominate candidates to be voted for at the general elections," N.J. Stat. Ann. § 19:1-1, are held the preceding June. See N.J. Stat. Ann. § 19:2-1. Pursuant to N.J. Stat. Ann. § 19:45-1, all "primary elections for general elections and primary elections for delegates and alternates to national conventions" are "conducted at the expense of the state or its political subdivisions." According to the Complaint, "New Jersey spent at least $12 million conducting non-presidential special primary elections" in 2013. (Compl. ¶ 34.)

New Jersey, similar to at least a dozen other states, limits participation in primary elections to members of the political party conducting the primary. N.J. Stat. Ann. § 19:23-45.[1] This process is known as a "closed" primary. States differ regarding the steps a prospective primary voter must takes to be eligible to participate in the primary; New Jersey conditions that right on a voter being either "newly registered at the first primary at which he is eligible to vote" or "deemed . . . a member of that party" fifty-five days before the primary election. Id. There is no dispute that the only political parties currently recognized by New Jersey law are the Republican and Democratic parties. See N.J. Stat. Ann. § 19:1-1 (defining "political party" to mean any party that garners "at least 10% of the total vote cast" in the last statewide election for New Jersey's General Assembly).

Candidates who are unaffiliated with a "political party" – read, those who are not Republicans or Democrats – and who seek placement on the general election ballot do so by way

[1] For instance, Pennsylvania, Delaware, and New York all conduct "closed" primaries. See 25 Pa. Cons. Stat. § 2812; Del. Code. Ann. tit. 15, § 3110; N.Y. Elec. Law §§ 5-300 to -310.

of a statutorily prescribed "petition" process. See N.J. Stat. Ann. §§ 19:13-3 to -13. As the Third Circuit describes this process, unaffiliated candidates "bypass the primary election and proceed directly to the general election" upon submission of a petition that comports with New Jersey law and which contains the requisite amount of signatures. See Council of Alternative Political Parties v. Hooks, 179 F.3d 64, 68-69 (3d Cir. 1999). In many ways, the direct nomination by petition process presents lower ballot access hurdles to a candidate for public office than does the primary process. See id. at 79. For instance, unaffiliated gubernatorial candidates need to collect fewer signatures than their political party counterparts; unaffiliated candidates also receive nearly two months more time to gather signatures for a general election nominating petition than do those candidates seeking access to a primary election ballot. See id. at 68.

Plaintiffs allege this statutory regime, and specifically N.J. Stat. Ann. § 19:23-45, constitutionally "disenfranchises" them and violates their First and Fourteenth Amendment rights, including their associational and non-associational rights and their rights under the Equal Protection clause.[2] According to Plaintiffs, the fundamental right to vote extends to primary elections, (Compl. ¶ 1), and New Jersey violates this right by conditioning primary participation on voter affiliation "with a political party approved by the State . . . ." (See id. at ¶ 2.) Consequently, by denying New Jersey's 2.6 million registered unaffiliated voters "the right to cast a vote in primary elections, the State has disenfranchised nearly half of its electorate . . . ." (Id. at ¶ 5.) The Complaint also asserts a trio of state law claims, two of which – for violations of the New Jersey Civil Rights Act, N.J. Stat. Ann. § 10:6-2(c) and the right to vote secured by

[2] The Complaint asserts a claim under 42 U.S.C. § 1983 (Count One), as well as three separate federal constitutional claims (Counts Three, Five, and Six). The Court exercises jurisdiction over these causes of action pursuant to 28 U.S.C. § 1331.

Article II, Section I of the New Jersey Constitution – mimic Plaintiffs' federal claims. The third state law claim alleges that because primary elections are "conducted at the expense of the state," N.J. Stat. Ann. § 19:45-1, those elections unconstitutionally appropriate public funds for a private purpose in violation of Article VIII, Section III of the New Jersey Constitution. (Compl. ¶ 72.)[3]

Defendant now moves to dismiss, arguing that N.J. Stat. Ann. §19:23-45 is a constitutionally permissible way to regulate the manner in which political parties select their candidates for the general election ballot. (Mov. Br. at 13, 18.) Defendant also contends that all three state law claims should be dismissed on Eleventh Amendment sovereign immunity grounds and that Plaintiffs lack standing to assert their Article VIII, Section III claim. (See Mov. Br. at 19, 21.)

DISCUSSION

A. Federal Constitutional Claims

Any attempt to use the Constitution to pry open a state-sanctioned closed primary system is precluded by current Supreme Court doctrine, and Plaintiffs' federal claims must therefore be dismissed. Specifically, "[t]he Supreme Court has emphasized – with increasing firmness – that the First Amendment Guarantees a political party great leeway in governing its own affairs." Maslow v. Bd. of Elections of City of New York, 658 F.3d 291, 296 (2d Cir. 2011) (citing, *inter alia*, N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 197 (2008), Cal. Democratic Party v. Jones, 530 U.S. 567 (2000), and Tashjian v. Republic Party of Conn., 479 U.S. 208 (1986)).

[3] The state law claims (Counts Two, Four, and Seven) are before the Court pursuant to the supplemental jurisdiction statute, 28 U.S.C. § 1367(a). (See Compl. ¶ 9.) Count Eight, which alleges that the closed primary system "affords private political parties special access to the voting franchise" in violation of the federal and New Jersey constitutions, appears to be a duplicative amalgamation of the first seven claims.

This power reaches its apex in the primary context. Tashjian, 479 U.S. at 216 ("selecting the Party's candidates" is the "critical juncture at which the appeal to common principles may be translated into concerted action, and hence political power in the community"). Indeed, "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee . . . ." See Jones, 530 U.S. at 575.

For example, to help prevent "party raiding,"[4] the Supreme Court has upheld against a constitutional challenge a New York law that required voters wishing to vote in New York's "closed" primary elections to have enrolled in the party of their choice at least thirty days prior to the previous general election. See Rosario v. Rockefeller, 410 U.S. 752, 760-62 (1973)). More recently, in California Democratic Party v. Jones, the Court invalidated California's "blanket" primary, "reasoning that it [unconstitutionally] permitted non-party-members to determine the candidate bearing the party's standard in the general election." See Lopez Torres, 552 U.S. at 203 (citing Jones, 530 U.S. at 575).[5] Jones, in no uncertain terms, held that a political party's interest in excluding non-members trumps a non-member's interest in sharing in the party's nominating process. See 530 U.S. at 583 ("a 'nonmember's desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own

[4] Party raiding occurs where voters "in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary." Rosario v. Rockefeller, 410 U.S. 752, 760 (1973).

[5] As the Supreme Court explains, "blanket" and "open" primaries are fundamentally different. In the former, "each voter's primary ballot . . . lists every candidate regardless of party affiliation and allows the voter to choose freely among them." Jones, 530 U.S. at 570. In the latter, "any registered voter can vote in the primary of either party." Democratic Party of U.S. v. Wis. ex rel. La Follette, 450 U.S. 107, 111 n.4 (1981) (internal quotation omitted). In other words, the choice of candidate in an "open" primary is more circumscribed, in that the voter's "choice is limited to [one] party's nominees *for all offices.* [An open primary voter] may not, for example, support a Republican nominee for Governor and a Democratic nominee for attorney general." Jones, 530 U.S. at 576 n.6 (emphasis in original).

membership qualifications'" (quoting Tashjian, 479 U.S. at 215 n.6)). As the Second Circuit has concluded, after surveying Jones and other relevant precedent, "[b]ecause political parties have a strong associational right to exclude non-members from their candidate nomination process, [individuals seeking non-member participation in partisan primaries] have no constitutional right pursuant to which such participation may be effected." Maslow, 658 F.3d at 296.

Plaintiffs in this case believe otherwise. Indeed, their entire lawsuit – at least the federal portion of it – proceeds from the premise that all registered voters have a fundamental right to vote in the primary elections conducted by political parties they are not members of. (See Opp. Br. at 18.) This is, however, not the law. The Supreme Court has drawn an important distinction between casting a ballot in a general election, which implicates the "fundamental" right to vote, and nominating a candidate for general election, which does not. According to the Court in Jones, "[s]electing a candidate is quite different from voting for the candidate of one's choice. If the 'fundamental right' to cast a meaningful vote were really at issue in this context [*i.e.*, the primary election], Proposition 198 [California's blanket primary law] would not only be constitutionally permissible but constitutionally required, which no one believes." See 530 U.S. at 573 n.5. Plaintiffs do not cogently explain how their claim that a closed primary abridges the "right to a meaningful vote" survives this pronouncement. See also Nader v. Shaffer, 417 F. Supp. 837 (D. Conn.) (three-judge panel) (rejecting non-party member's challenge to Connecticut's closed primary system and drawing distinction between participating in primary nomination process and voting in general election), aff'd, 429 U.S. 989 (1976); Ziskis v. Symington, 47 F.3d 1004, 1006 (9th Cir. 1995) (citing Nader to reject similar challenge to Arizona's "closed party primary system")

Plaintiffs instead cite to the Supreme Court's decision in United States v. Classic, 313 U.S. 299 (1941), in which the federal government prosecuted certain Louisiana state elections commissioners for allegedly falsifying ballots in the Democratic House of Representatives primary. Classic held that the Constitution gives Congress the power to regulate intraparty primaries through the Criminal Code and secures the right to have one's "vote counted in both the general election and in the primary election, where the latter is a part of the election machinery . . . ." See id. at 322. Seizing on language used in that case, Plaintiffs here contend that "[t]he right to a meaningful vote includes voting at the primary stage, where the primary is an integral part of the electoral process." (Opp. Br. at 18.)

And this statement is true, as far as it goes. Indeed, the proposition that all primary votes cast should count equally, be undiluted, etc. is noncontroversial. Classic, however, does not extend as far as Plaintiffs would stretch it. Classic itself presupposes that the right it acknowledges only applies to voters who were "qualified" to cast votes in Louisiana's Democratic primary. 313 U.S. at 307 (stating that one of the "questions for decision [is] whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right 'secured . . . by the Constitution' within the meaning of . . . the Criminal Code"). But Classic does not expound on who is "qualified," instead leaving that distinction up to Louisiana state law. See id. at 311 ("Pursuant to the authority given by § 2, Article I of the Constitution . . . the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of the representatives in Congress."). In other words, Classic speaks to the constitutional protections that obtain once a primary vote is cast, but is silent as to who under state law has the right to cast one. The decision is therefore of little help to Plaintiffs here.

Also puzzling is Plaintiffs' citation to Friedland v. State, 374 A.2d 60, 63 (N.J. Sup. Ct. App. Div. 1977), for the proposition that the right to cast a primary vote is "as protected as voting in the general election." (See Opp. Br. at 18.) Friedland in fact rejected the exact same challenge to N.J. Stat. Ann. § 19:23-45 Plaintiffs advance here, and after applying rational basis review held that the Constitution allows New Jersey to require voters to affiliate with a political party before participating in a primary election. See 374 A.2d at 63-64 (citing Rosario, 410 U.S. 752, and Nader, 417 F. Supp. 837). More puzzling is that Plaintiffs would cite to any New Jersey law on this topic at all; the New Jersey Supreme Court has held that New Jersey's closed partisan primary system passes both federal and state constitutional muster. Smith v. Penta, 405 A.2d 350, 353 (N.J.) ("Rosario and Nader make it abundantly clear that the New Jersey statute under attack [N.J. Stat. Ann. § 19:23-45] suffers from no federal constitutional infirmity."), appeal dismissed, 444 U.S. 986 (1979); Lesniak v. Budzash, 626 A.2d 1073, 1080-81 (N.J. 1993).

As the foregoing reveals, Plaintiffs base their federal case on what they believe is their unfettered right to participate in the process that New Jersey has established for its major political parties to choose their general election candidates. But this is not a right at all, and if the Plaintiffs had their way, rending open New Jersey's exclusionary primary system against the will of the State would likely tread upon associational rights that have been enshrined by a long and increasingly firm line of Supreme Court precedent.

Thus, whatever guise the Plaintiffs' federal constitutional claims take – right to vote, right to associate or not associate, or right to equal protection – there is no reason here to impose any level of heightened scrutiny to N.J. Stat. Ann. § 19:23-45. See Clingman v. Beaver, 544

U.S. 581, 592 (2005) ("There must be more than a minimal infringement on the rights to vote and of association . . . before strict judicial review is warranted." (quoting Nader, 417 F. Supp. at 849)). The Supreme Court has made it clear that elections laws that impose only minimal burdens on individual rights logically "trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" See Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)); see also Hooks, 179 F.3d at 71 ("When the election regulation imposes a lesser burden . . . it need only be justified by important state regulatory interests."). The regulatory interests implicated in this case are no different than those which have been cited to uphold elections laws in earlier cases – including the prevention of "party raiding" so as to preserve "the integrity of the electoral process," Rosario, 410 U.S. at 760-61, and "preserv[ing] [political] parties as viable and identifiable interest groups," Clingman, 544 U.S. at 594 (quoting Nader, 417 F. Supp. at 845). Plaintiffs fail to suggest a reason in law or logic why these considerations do not govern this case, considering the *de minimis* effect that N.J. Stat. Ann. § 19:23-45 has on their constitutional rights.

Consequently, New Jersey's closed partisan primary system passes muster under the Constitution, and because Plaintiffs cannot state viable claims on the theories presented, the federal causes of action must be dismissed.[6] Fed. R. Civ. P. 12(b)(6).

[6] The Court recognizes that two of the named Plaintiffs are registered Republicans, and one is a registered Democrat. Those Plaintiffs, however, do not in this case assert the associational rights of their respective political parties; because these Plaintiffs allege they chose to register with the two parties strictly to vote in those parties' primaries, they are effectively asserting their own rights as independent voters with this lawsuit. (Compl. ¶ 26 ("These plaintiffs were required to forfeit their First Amendment right to not affiliate with a private organization in order to vote in the State's primary elections.").) This case is therefore dissimilar to Tashjian, in which the Supreme Court sustained the Republican Party's as-applied challenge to Connecticut's closed-primary law on the grounds that the law limited "the group of registered voters whom the Party

B. State Law Claims

Defendants are correct that the Eleventh Amendment operates to bar Plaintiffs' state law official capacity claims against Defendant.[7] The Court is therefore without subject matter jurisdiction to hear those claims.

None of the three limited exceptions to state sovereign immunity – "congressional abrogation," "waiver by the state," and "the doctrine of Ex parte Young" – are present here. See Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310, 323 (3d Cir. 2002). Plaintiffs do not invoke congressional abrogation, nor do they argue that New Jersey has expressly waived its federal immunity to suit under the New Jersey Constitution or the New Jersey Civil Rights Act. Insofar as Plaintiffs opposition brief can be read to invoke an argument that the Ex parte Young doctrine applies, such an argument would be misguided– "[t]he theory behind Young is that a suit to halt the enforcement of a state law in conflict with the federal constitution is an action against the individual officer charged with that enforcement," and is thus not really a suit against the state itself. MCI Telecomm. Corp. v. Bell Atlantic Pa., 271 F.3d 491, 506 (3d Cir. 2001) (citing 209 U.S. 123, 159-60 (1908)). Claims premised upon New Jersey's state constitution and its civil rights statute, even if they are for prospective injunctive relief, could not by definition fit under the Young exception. See Hess, 297 F.3d at 325 ("[I]t is difficult to think of a greater

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may invite to participate in the basic function of selecting the Party's candidates." See 479 U.S. at 215-16. In other words, Tashjian is an "analytically distinct" case where there was "no conflict between the associational interest of members and nonmembers" – the conflict in that case being between Connecticut's closed primary law and the Republican Party's associational interest in welcoming unaffiliated voters into the fold. Ziskis, 47 F.3d at 1005 (quoting Tashjian, 479 U.S. at 215 n.6). Here, Plaintiffs' attempt to inject outsiders into otherwise closed party primaries conflicts directly with the right not to associate (and therefore exclude) held by members of those parties.

[7] Because the Court disposes of the state law claims on sovereign immunity grounds, it need not reach Defendant's standing argument – both are effectively determinations that the Court lacks subject matter jurisdiction over the claims, and thus one need not be considered before the other.

intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." (quoting Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 106 (1984))).

It is unclear why in this context Plaintiffs principally rely City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997), a case that has nothing to do with sovereign immunity. Plaintiffs assert that City of Chicago stands the proposition that a "state law claim can be considered to 'arise under'" federal law when the state law "right to relief . . . requires resolution of a substantial question of federal law." (Opp. Br. at 32 (citing 522 U.S. at 164).) But this rule of federal question jurisdiction – most recently refined in Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308 (2005), and Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677 (2006) – has nothing to do with whether or not New Jersey can be sued in federal court for violations of state law. If Plaintiffs cite to City of Chicago to argue their state law claims are of the "special and small category" which present "an important issue of federal law that sensibly belongs in federal court," see Empire Healthchoice, 547 U.S. at 699-700, Plaintiffs are belied by their own Complaint – Plaintiffs have affirmatively pleaded their state law claims are supplemental or pendent, and only before the Court pursuant to 28 U.S.C. § 1367. (Compl. ¶ 9; Opp. Br. at 28 ("Count VII deals with the violations of the New Jersey state constitution brought under supplemental jurisdiction").) And, if Plaintiffs mean to argue that their federal claims are somehow intertwined with their entirely distinct state constitutional claims, such that Ex parte Young is implicated, Plaintiffs cite no legal authority for this novel proposition.

What is instead reasonably clear is that this Court cannot entertain an official capacity lawsuit based on New Jersey law and initiated by private parties while also remaining faithful to the Eleventh Amendment. Consequently, Plaintiffs' state law claims must be dismissed.[8]

CONCLUSION

For the foregoing reasons, the Court will grant the motion to dismiss filed by Defendant Kim Guadagno. [Docket Entry 11.] An appropriate form of Order accompanies this Opinion.

s/ Stanley R. Chesler
STANLEY R. CHESLER
United States District Judge

Dated: August 14th, 2014

[8] The Court notes that it appears the fundamental right to vote claim brought pursuant to the New Jersey Constitution (Count 4) is foreclosed by New Jersey law. The New Jersey Supreme Court has in no uncertain terms decided that N.J. Stat. Ann. § 19:23-45 does not violate New Jersey's constitutional right to vote. Smith, 405 A.2d at 357 ("Suffice it to say that the two-party system, including a closed primary with durational affiliation requirements such as we have in New Jersey, characterizes the governments of most states. If it is to be changed, the change must come from the legislature or from the people. It cannot come from the courts.").

CLOSED

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARK BALSAM, CHARLES DONAHUE, HANS HENKES, REBECCA FELDMAN, JAIME MARTINEZ, WILLIAM CONGER, TIA WILLIAMS, INDEPENDENT VOTER PROJECT, and COMMITTEE FOR A UNIFIED INDEPENDENT PARTY, INC., Plaintiffs, v. KIM GUADAGNO, in her official capacity as New Jersey Secretary of State, Defendant.	**Civil Action No. 14-01388 (SRC)** **ORDER**

CHESLER, District Judge

This matter having come before the Court on the motion to dismiss the Complaint, filed by Defendant Kim Guadagno pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) Docket Entry 11]; and Plaintiffs having opposed the motion [Docket Entries 16 & 24]; and this Court having opted to rule on the papers submitted, and without oral argument, pursuant to Federal Rule of Civil Procedure 78; and for the reasons expressed in the Opinion filed herewith; and good cause shown,

IT IS on this 14th day of August, 2014,

ORDERED that the motion to dismiss filed by Defendant Kim Guadagno [Docket Entry 11] be and hereby is **GRANTED**; and it is further

ORDERED that the Complaint be and hereby is **DISMISSED WITH PREJUDICE**; and it is further

ORDERED that this case be and hereby is **CLOSED**.

s/ Stanley R. Chesler
STANLEY R. CHESLER
United States District Judge