

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY  
NEWARK DIVISION

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.

**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**

Plaintiffs Mark Balsam, Charles Donahue, Hans Henkes, Rebecca Feldman, Jaime Martinez, William Conger, and Tia Williams (“Individual Plaintiffs”), registered voters and taxpayers residing in the State of New Jersey, the Independent Voter Project, a 501(c)(4) non-profit corporation, and the Committee for a Unified Independent Party, Inc. (d/b/a IndependentVoting.org), a 501(c)(4) non-profit corporation, both of which represent unaffiliated (also known as independent and non-partisan) voters in the State of New Jersey (“Organizational Plaintiffs,” collectively “Plaintiffs”), hereby bring this action for violations of the First and Fourteenth Amendments of the United States Constitution under 42 U.S.C. § 1983, and Article II Section I and Article VIII Section III of the Constitution of the State of New Jersey under N.J.S.A. § 10:6-2(c) against Defendant Kim Guadagno, the New Jersey Secretary of State. Plaintiffs’ allegations against Defendant are based upon information and belief and upon investigation of Plaintiffs’ counsel(s), except for allegations specifically pertaining to Plaintiffs, which are based upon Plaintiffs’ personal beliefs and experiences.

## **INTRODUCTION**

1. The fundamental right to vote includes the right to cast a meaningful vote at all critical stages of the election process, including primary elections.
2. In violation of this fundamental right to vote, N.J.S.A. 19 (the “New Jersey Primary Election Law”) requires, as a precondition to participation in a

primary election, that a voter affiliate with a political party approved by the State of New Jersey (the “State”).

3. The barrier to voter participation created by the New Jersey Primary Election Law is not trivial. In 2013, 32.5% of New Jersey voters were registered Democrats, 19.7% of registered voters were Republican, 0.2% of registered voters were affiliated with a third party, and 47.6% of New Jersey’s registered voters were registered as unaffiliated voters. Defendant barred nearly half of New Jersey’s registered voters from participating in New Jersey’s 2013 primary election because they exercised their right not to associate with either the Democratic or Republican party.

4. This action seeks to protect the fundamental right to vote under the New Jersey Constitution and United States Constitution from the condition required by the New Jersey Primary Election Law that a voter forfeit his or her First Amendment right not to associate with a political party.

5. A primary election is often the most important part of the electoral process. Therefore, all voters must have the right to participate in the primary election. By denying over 2.6 million New Jersey voters the right to cast a vote in primary elections, the State has disenfranchised nearly half of its electorate, thereby, giving private political parties a state subsidized advantage and partisan voters greater and unequal access to the voting franchise. As a result, the State’s

elections are not free, are not equal, and for the reasons demonstrated herein violate the rights guaranteed by the New Jersey State Constitution and the Constitution of the United States.

6. Additionally, by enforcing the New Jersey electoral funding scheme as currently construed, Defendant violates New Jersey's Constitutional prohibition against the use of public State funds for a private purpose. Under the New Jersey Constitution, neither the State nor a county may appropriate money for use of any private association. N.J. Const. art. VIII § 3-3. This action seeks to enjoin the State and its political subdivisions (hereinafter referred to only as "State") from appropriating public funds for the use of private organizations, including partisan primary elections conducted pursuant to New Jersey's current election law scheme.

7. The defining characteristic of a democracy is equal access to the electoral process. It is so fundamental to our democracy that any curtailment of that right of equal access as to a single citizen would demand protection by the Court. When over 2.6 million registered New Jersey voters are denied equal access to the electoral process, which is funded by public monies, the need for judicial intervention is compelling.

8. Plaintiffs seek from this Court an Order declaring New Jersey Election Law governing non-presidential primaries unconstitutional on its face and as applied. Plaintiffs also seek a preliminary and permanent injunction restraining

the Defendant from funding and administering its current primary system for all non-presidential primaries.

### **JURISDICTION AND VENUE**

9. This Court has jurisdictions under 28 U.S.C. § 1331 and § 1343 because this civil action arises out of the Constitution and laws of the United States. This Court also has jurisdiction to render declaratory judgments as requested herein pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 and § 2202. With respect to claims set forth herein, based on violation of the New Jersey Constitution, this Court has supplemental jurisdiction under 28 U.S.C. § 1367.

10. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b)(1) and (2) because Defendant resides and exercises her authority in this district, Plaintiffs reside in this district, and the constitutional, statutory and common law violations sought to be enjoined or prevented by this Complaint have or will occur in this district.

11. This action is brought pursuant to the First and Fourteenth Amendments to the United States Constitution under 42 U.S.C. § 1983 for declaratory and injunctive relief, for the purpose of protecting Plaintiffs'

fundamental right to vote, their right not to associate, and their equal protection rights.

12. This action is also brought pursuant to N.J. Const. art. VIII § 3-3 under N.J.S.A. § 10:6-2(c), for declaratory and injunctive relief, for the purpose of enjoining the State from appropriating money for the use of private associations.

13. The declaratory and injunctive relief sought is authorized by 28 U.S.C. Sections 2201 and 2202, 42 U.S.C. § 1983 and Rule 57 of the Federal Rules of Civil Procedure.

### **THE PARTIES**

14. Plaintiffs Mark Balsam, Charles Donahue, Hans Henkes, Rebecca Feldman, Jamie Martinez, Tia Williams, and William Conger are residents and taxpayers of the State of New Jersey.

15. Plaintiffs Balsam, Jim Martinez and Williams live in Hudson County; Plaintiffs Conger and Feldman live in Morris County; Plaintiff Donahue lives in Bergen County; and Plaintiff Henkes lives in Mercer County.

16. Plaintiffs Mark Balsam, Charles Donahue, Hans Henkes, and Rebecca Feldman are registered as unaffiliated voters. Plaintiff Jaime Martinez is a registered Democrat. Plaintiffs William Conger and Tia Williams are registered Republicans.

17. Each of the above unaffiliated Individual Plaintiffs were unable to vote in the New Jersey non-presidential primaries at all. Additionally, Plaintiffs that are registered as Democrats and Republicans were required to associate with such parties as a condition of voting in the primary. Thus, each of the Individual Plaintiffs have suffered injury at the hands of the Defendant and are likely to continue to do so without the Court's intervention.

18. Additionally, as taxpayers, the individual Plaintiffs, by and through Defendant's actions, subsidize this unlawful voting scheme in violation of the Constitution of the State of New Jersey.

19. Plaintiff Independent Voter Project ("IVP") is a non-profit, non-partisan 501(c)(4) organization dedicated to better informing voters about important public policy issues and to encouraging non-partisan voters to participate in the electoral process.

20. Plaintiff Committee for a Unified Independent Party, Inc. (d/b/a IndependentVoting.org) is a not for profit corporation organized and chartered in New York and exempt from income taxes under Section 501(c)(4) of the Internal Revenue Code. IndependentVoting.org's mission is to seek political and legal recognition for independent voters (known as unaffiliated voters under New Jersey law) and non-partisan voters and to respond to any efforts to marginalize their participation in the political process.

21. Both organizations represent unaffiliated (also known as independent and non-partisan) voters in the State of New Jersey.

22. Because each New Jersey unaffiliated voter is injured in the same way by the Defendant, individual legal analysis is unnecessary. Defendant Kim Guadagno is the acting New Jersey Secretary of State. As the New Jersey Secretary of State, Kim Guadagno is New Jersey's chief election officer. Defendant is responsible for the implementation of the New Jersey Election Law and administers the state election system, which violates both United States and New Jersey Constitutional law. Defendant, as the New Jersey Chief Election Officer, violated and continues to violate Plaintiff's rights as alleged herein.

23. At all times relevant, Defendant acted under the "color of law" of the statutes, ordinances, regulations, customs and/or usages of the State of New Jersey. Defendant is being sued in her official capacity.

### **FACTUAL ALLEGATIONS**

24. Plaintiffs Mark Balsam, Charles Donahue, Hans Henkes, and Rebecca Feldman are registered as unaffiliated voters and were unable to vote in the 2013 primary election unless they affiliated with a political party. They will be likewise excluded in the future because of their choice not to affiliate with a political party.

25. These plaintiffs consider themselves disenfranchised.



26. Plaintiff Jaime Martinez is a registered Democrat and Plaintiff William Conger and Tia Williams are registered Republicans. 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.

27. Plaintiff Williams states, "It was a difficult decision to register as a Republican. Unfortunately, I felt obligated to do so in order to enjoy the same voting rights as many others."

28. Plaintiff Hans Henkes states, "During the last presidential election, I wanted to vote in the Primary, but could not because I did not have a party affiliation. I am and always have been an independent voter. I returned home from my polling station with the sense that I was excluded from the election process.

29. Plaintiff Mark Balsam states, "I don't want to pay for a primary that I am not able to vote in unless I join a party."

30. The State has conferred special rights benefiting private political parties at the expense of individual rights.

31. The New Jersey election process includes a non-presidential partisan primary election. N.J.S.A. 19:23. This partisan primary election is "the procedure whereby the members of a political party in this State or any political subdivision thereof nominate candidates to be voted for at general elections, or elect persons to fill party offices." N.J.S.A. 19:1-1.

32. In New Jersey, to qualify for a State funded primary election a political party is any party receiving 10% or more of the total votes cast in a preceding general election. N.J.S.A. 19:1-1. Of the eight qualified parties in New Jersey, only the Republican and Democratic parties qualified to have State funded primaries in 2012 and 2013.

33. To qualify for the general election ballot, the party candidate receiving the highest number of votes at the party primary is designated for nomination. N.J.S.A. 19:13-14. An alternative means to qualify for the general election is by petition, which requires signatures “equal in number to at least two per centum (2%) of the entire vote cast for members of the General Assembly.” N.J.S.A. 19:13-5. Third party and independent candidates must use this latter method to appear on the ballot as they are not entitled to participate in the primary election. N.J.S.A. 19:13-4.

34. New Jersey’s primary elections are “conducted at the expense of the state or its political subdivisions.” N.J.S.A. 19:45-1. In 2013, New Jersey spent at least \$12 million conducting non-presidential special primary elections, or over \$92 per vote actually cast in said election.

35. A voter is permitted to vote in a party’s State funded primary election if (1) he/she is deemed to be a member of such political party 55 days preceding the election date, or (2) he is a newly registered voter at his first primary he/she is

eligible to vote; or, (3) he is an unaffiliated voter who has not previously voted in a primary election. In the last two instances, the first-time voter and unaffiliated voter must register with the political party for the primary in which they choose to vote, or they are automatically registered with that party by casting a ballot. To disassociate with the party, the voter must re-register with the state as an unaffiliated voter. N.J.S.A. 19:23-4.

36. If an unaffiliated voter refuses to register with a political party approved to be on the primary election ballot, he/she cannot vote in the primary election at all. A voter who has previously disassociated with a political party cannot then vote in a primary election unless he or she registers back into a party 55 or more days prior to the primary election.

37. Nearly half of all New Jersey voters have chosen to exercise their First Amendment right not to affiliate with a political party. In 2012, 32.5% of New Jersey voters were registered Democrats, 19.7% of registered voters were Republican, 0.2% of registered voters were affiliated with a third party, and 47.6% of voters registered as unaffiliated voters.

38. And although 62.6% of all registered New Jersey voters participated in the 2012 general election, just 8.8% of all registered voters participated in the 2012 primary election. There were 5,885,472 total registered voters in New Jersey in 2012. Of the 3,264,275 eligible to vote in the primary election, only 515,138

voters actually participated. 2,621,197 voters, including 4 Plaintiffs, were not allowed to participate in the primary because they were not affiliated with either the Democratic or Republican parties.

**FIRST CAUSE OF ACTION**  
**Violation of Federal Civil Rights Act (42 U.S.C. § 1983)**

39. Plaintiffs hereby incorporate the foregoing paragraphs of this Complaint and restate them as if fully set forth at length herein.

40. The New Jersey Primary Election Law, as complained herein, deprives Plaintiffs, unaffiliated voters, and all such voters of the right to not associate under the First Amendment of the United States Constitution.

41. The New Jersey Primary Election Law, as complained herein, deprives Plaintiffs and/or Plaintiffs' members of equal protection under the Fourteenth Amendment of the United States Constitution.

42. The New Jersey Primary Election Law, as complained herein, deprives Plaintiffs and/or Plaintiffs members of due process under the Fourteenth Amendment of the United States Constitution.

43. The Defendant, under the "color of law," subjected, caused to be subjected, and is likely to continue subjecting Plaintiffs, unaffiliated and all non-partisan voters of the State of New Jersey to the deprivation of rights, privileges, or

immunities secured by the U.S. Constitution including the First and Fourteenth Amendments.

44. No countervailing state interest overrides Plaintiffs, unaffiliated, and non-partisan voters' right to meaningful participation in the voting franchise.

### **SECOND CAUSE OF ACTION**

#### **Violation of New Jersey Civil Rights Act (N.J.S.A. § 10:6-2(c))**

45. Plaintiffs hereby incorporate the foregoing paragraphs of this Complaint and restate them as if fully set forth at length herein.

46. The unconstitutional acts of the Defendant have deprived, caused to be deprived, and are likely to continue depriving Plaintiffs, unaffiliated and all non-partisan voters of the State of New Jersey rights guaranteed by the U.S. Constitution including the First and Fourteenth Amendments, and rights guaranteed by the New Jersey State Constitution including Article VIII Section 3.

### **THIRD CAUSE OF ACTION**

#### **Plaintiffs are denied the fundamental right to a meaningful vote guaranteed by the First and Fourteenth Amendments to the Constitution.**

47. Plaintiffs hereby incorporate the foregoing paragraphs of this Complaint and restate them as if fully set forth at length herein.

48. The United States Constitution extends to each citizen the right to vote, the right to associate or to not associate, and the right to equal protection of the laws. U.S. Const. amend I; U.S. Const. amend XIV; see e.g. *Reynolds v. Sims*,

377 U.S. 533, 554 (1964); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Hadley v. Junior College Dist. Of Metropolitan Kansas City*, 397 U.S. 50, 55 (1970).

49. The right to vote in a primary election is a fundamental right. *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 (1972); *Friedland v. State*, 374 A.2d 60, 63 (N.J. Super. Ct. Law Div. 1977). Such a right is acknowledged when State has made the primary an integral part of the election process, or when “the primary effectively controls the choice.” *United States v. Classic*, 313 U.S. 299, 318 (1941). The fundamental right to vote includes the right to exercise a meaningful vote, which is to have one’s vote counted, undiluted and handled without discrimination. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); *Baker v. Carr*, 369 U.S. 186, 247-48 (1962).

50. As is set forth in Count 2 below, the partisan primary is an integral part of New Jersey’s election process.

51. The New Jersey government funded partisan non-presidential primary system infringes on this fundamental right under the First and Fourteenth Amendments of the U.S. Constitution.

#### **FOURTH CAUSE OF ACTION**

**Plaintiffs are denied the fundamental right to vote guaranteed by Article II  
Section I of the New Jersey Constitution.**

52. Plaintiffs hereby incorporate the foregoing paragraphs of this Complaint and restate them as if fully set forth at length herein.

53. Under New Jersey law, the right to vote in a primary is a fundamental right because New Jersey's primaries serve as the mechanism by which candidates qualify to participate in the general election. N.J.S.A. 19:1-1. The four chapters and sixty-eight statutes governing every aspect of a primary election are further evidence that the primaries are an integral part of New Jersey's election process. N.J.S.A. 19:23-1 to 19:26-3.

54. New Jersey's government funded partisan non-presidential primary system infringes on the aforesaid rights under the New Jersey State Constitution.

#### **FIFTH CAUSE OF ACTION**

**Plaintiffs are denied their unconditioned right of non-association guaranteed by the First Amendment of the United States Constitution.**

55. Plaintiffs hereby incorporate the foregoing paragraphs of this Complaint and restate them as if fully set forth at length herein.

56. The New Jersey Election Law also violates the unaffiliated voter's right to not associate. Unaffiliated voters have the right to associate with each other or to not associate with political parties to further political beliefs. *California Democratic Party v. Jones*, 530 U.S. 567, 567-68 (2000).

57. Because New Jersey election law requires an individual to register with one of two political parties in order to vote in the primary, the right to vote is conditioned on association.

58. Many voters, such as plaintiff Williams, register into a political party in order to vote in a primary election even though they would prefer to remain unaffiliated.

59. The aforesaid violates the unaffiliated voter's First Amendment right under the United States Constitution to not associate, as well as the right of affiliated voters such as plaintiff Williams.

#### **SIXTH CAUSE OF ACTION**

#### **Plaintiffs are denied the right to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution.**

60. Plaintiffs hereby incorporate the foregoing paragraphs of this Complaint and restate them as if fully set forth at length herein.

61. The current New Jersey non-presidential primary system law violates an unaffiliated voter's right to equal protection.

62. The equal protection clause of the Fourteenth Amendment of the United States Constitution requires that each qualified voter be given equal opportunity to participate in an election, no matter the purpose of the election. *Hadley*, 397 U.S. at 55.



63. During the election process, Republican and Democratic voters are given two opportunities to participate in the State electoral process: (1) a vote in their party's primary to narrow the candidates that will appear on the general election ballot, and (2) a vote in the general election.

64. An unaffiliated voter, however, has only one vote: a vote in the general election. He/she cannot participate in the narrowing process that determines the field of candidates for the general election without forfeiting his/her right not to associate.

65. The unaffiliated voter's ability to express his/her preference is conditioned on the preference of voters who have access to the primary stage of the electoral process.

66. Because unaffiliated voters are not given equal opportunity to participate in the electoral process, New Jersey's system of non-presidential partisan primaries law violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

#### **SEVENTH CAUSE OF ACTION**

**New Jersey's non-presidential primary law unconstitutionally appropriates public funds for a private purpose, prohibited by Article VIII Section III of the New Jersey Constitution.**

67. Plaintiffs hereby incorporate the foregoing paragraphs of this Complaint and restate them as if fully set forth at length herein.

68. Under the New Jersey Constitution, neither the State nor a county may appropriate money for use of any private association. N.J. Const. art. VIII § 3-3.

69. The primary purpose of the expenditure determines its classification as “private” or “public.” *Roe v. Kervick*, 199 A.2d 834, 852 (N.J. 1964). The purpose of New Jersey’s primary elections are for members of political parties to nominate their party’s candidates for the general election and to elect their party officers. N.J.S.A. 19:1-1; also see *California Democratic Party*, 530 U.S. at 567-68. Yet, primary elections are “conducted at the expense of the state,” violating the aforesaid New Jersey constitutional provision. N.J.S.A. 19:45-1.

70. New Jersey non-presidential primary elections do not serve a predominately public interest. Because the partisan primary elections are private associational affairs, any public interest is necessarily incidental, no matter how great it may be.

71. Because various alternative primary systems exist that serve a predominately public purpose and a more compelling public interest than New Jersey’s current election process, the current electoral process violates the New Jersey Constitution.

72. Public funding of New Jersey’s system of partisan non-presidential primaries violates the aforesaid provisions of the New Jersey State Constitution,

which prohibit the expenditure of public funds for the use of a private entity, association, or purpose.

### **EIGHTH CAUSE OF ACTION**

**New Jersey's statutory scheme affords private political parties special access to the voting franchise in violation of the First and Fourteenth Amendments of the United States Constitution and Article II and Article VIII of the New Jersey Constitution.**

73. Plaintiffs hereby incorporate the foregoing paragraphs of this Complaint and restate them as if fully set forth at length herein.

74. All voters have the right to meaningful and equal participation in every phase of the electoral process. The present system of publicly funded major-party primaries provides meaningful participation to the adherents of these parties. It does not do so for independents, now 42% of the American electorate (by self-identification) and 47.6% of the voters of New Jersey (by registration as “unaffiliated”).

75. In addition to preventing unaffiliated voters from meaningful participation in the primary, the current state-funded primary election system provides major parties, their candidates, and their voters an unequal opportunity to frame the public political discourse and legitimize their nominees. This is a practical consequence that cannot be quantified, but is evidenced by the correlation

between the increasing polarization of our political dialogue and the decline in political participation.

76. Continued state funding of party primaries under these circumstances places the government of NJ in the position of subsidizing and giving its imprimatur to a system of candidate selection that marginalizes unaffiliated voters and makes “official” a party-driven electoral process that they cannot participate in, but must pay for.

77. A party-driven electoral process requiring unaffiliated voters to pay for an election process which denies them full meaningful participation depreciates our representative democracy. This form of taxation without representation violates the First and Fourteenth Amendments to the U.S. Constitution and Article II and Article VIII of the New Jersey Constitution.

### **PRAYER FOR RELIEF**

78. WHEREFORE, Plaintiffs request that judgment be entered:

- a. Declaring the New Jersey election laws governing non-presidential primary elections and the public funding thereof unconstitutional and enjoining further use and funding of the current non-presidential primary election system;
- b. Ordering the New Jersey State legislature or Secretary of State Kim Guadagno to implement a Constitutional non-presidential primary election system.

c. Awarding Plaintiffs reasonable attorneys' fees and costs pursuant to 42 U.S.C. Sec. 1988, 28 U.S.C. § 2412, N.J.S.A. 10:6-2(f), and otherwise as provided by law;

d. Pre- and post-judgment interest; and

e. Granting such other relief as the Court deems just and proper.

Dated: March 5, 2014

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### CERTIFICATION

I hereby certify that to the best of my knowledge, information and belief, the within matter is not the subject of any other action pending in any court or the subject of a pending arbitration proceeding, and no other parties known to the plaintiffs at this time should be joined.

Dated: March 5, 2014

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