

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
VICINAGE OF NEWARK

MARK BALSAM, et al.,

Plaintiffs,

v.

KIM GUADAGNO, in her official
capacity as New Jersey Secretary of
State

Defendant.

CIVIL ACTION NO. 14-1388
(SRC-CLW)

**ORAL ARGUMENT
REQUESTED**

**BRIEF IN OPPOSITION TO DEFENDANT'S MOTIONS TO DISMISS
COMPLAINT WITH PREJUDICE**

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I. PRELIMINARY STATEMENT

A. Statement Of The Case

On March 5, 2014, four registered unaffiliated voters: Mark Balsam, Charles Donahue, Hans Henkes, and Rebecca Feldman; two registered Republican voters: William Conger and Tia Williams; one registered Democrat voter: Jamie Martinez; and two organizations which represent voters in the State of New Jersey (hereinafter the “State” or “New Jersey”): Independent Voter Project and Committee for a Unified Independent Party, 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”). The Complaint included two principal and related sets of grievances.

The first set of grievances concerns the State’s violation of certain fundamental rights of each Plaintiff, including: the right to vote, the right of association, and the right to equal protection of the law. U.S. Const. amend. I; U.S. Const. amend. XIV; N.J. Const., Art. II, Sec. I; N.J. Const. Art. I, Para. 18.

The second, related, set of grievances concerns the State’s violation of New Jersey constitutional prohibitions against the use of public funds for a private purpose (N.J. Const., Art. VIII, Sect. III, Para. 3) based on three factors: (1) the State’s publicly funded primary election system confers a benefit to selected private political parties and their members without conferring any like benefit to

the more than two and a half million registered voters in the New Jersey who have chosen not to affiliate with those selected private political parties, rendering the State's primary election system a private exercise, (2) the State's primary election is an integral part of the State's election process and, as a result, registered voters who have been denied the opportunity to participate in the State's primary election have been deprived of their right to cast a meaningful vote, and (3) the State does not have an adequate public interest in maintaining a system that disenfranchises nearly half of all registered voters in New Jersey.

On May 9, 2014, Defendant filed a Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) and Brief in Support of that motion (hereinafter "Motion to Dismiss"). The Motion to Dismiss contends the Court does not have subject matter jurisdiction for two reasons: (1) Plaintiffs' lack of standing, and (2) New Jersey's sovereign immunity as to the claims based upon state law. The Motion to Dismiss further asserts that Plaintiffs failed to state a claim upon which relief can be granted, alleging that the issues involved in this matter have been decided in previous cases. Defendant concludes that this matter can and should be immediately dismissed without discovery and with prejudice.

Defendant's motion should be denied for the following reasons.

B. Statement Of Facts

The facts as set forth in the Complaint (except where otherwise indicated) are recited below.

The individual Plaintiffs are New Jersey residents and taxpayers. The organizational Plaintiffs represent voters in New Jersey.

Under the laws of the United States and State of New Jersey, individuals are guaranteed the right to associate, and not to associate, with private political parties and organizations. U.S. Const. amend. I; N.J. Const., Art. I, Para.18; *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (“a corollary of the right to associate is the right not to associate.”). Under the New Jersey Constitution, no “appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever.” N.J. Const., Art. VIII, Sect. III, Para. 3.

The State’s current election process includes a non-presidential partisan primary election.¹ N.J. Stat. Ann. § 19:23. This partisan primary election process 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

¹ A “non-presidential partisan primary election” is an election, except for the office of President of the United States, conducted for members of political parties to nominate candidates for the general election and elect party officers. *See e.g. Jones*, 530 U.S. at 572-73.

elections, or elect persons to fill party offices.” N.J. Stat. Ann. § 19:1-1. New Jersey’s primary elections are “conducted at the expense of the state or its political subdivisions.” N.J. Stat. Ann. § 19:45-1.

To qualify for receiving the benefit of a State-funded partisan primary election, a private political party must receive 10% or more of the total votes cast in the State’s preceding general election. N.J. Stat. Ann. § 19:1-1. Voters who choose not to affiliate with any political party qualified to benefit from the State-sponsored primary election are, as a consequence of exercising this right, prohibited from participating in that election. N.J. Stat. Ann. § 19:23-45. In short, the State’s primary election system serves solely as a forum for the partisan elections of the dominant political parties.

In 2012, 32.5% of New Jersey voters were registered Democrats, 19.7% of New Jersey voters were registered Republican, 0.2% of New Jersey voters were registered as affiliated with a third party, and 47.6% of voters were registered as unaffiliated with any political party. According to Pew Research, the percentage of unaffiliated voters nationally has risen from 18% in 1939 to 38% in 2012,² and New Jersey outpaces the national growth with 47.6% of voters registered as unaffiliated. Further, a recent Gallup poll shows that 46% of voters nationwide

² Pew Research, *More Americans Say They Are Political Independents* (June 6, 2012), <http://www.pewresearch.org/daily-number/more-americans-say-they-are-political-independents/>. These facts were not set forth in the Complaint.

now self-identify as independent of any political party, irrespective of their registered affiliation.³

Of the eight private political parties operating in New Jersey, only the Republican and Democratic parties qualified to participate in the State's primary election during the 2012 and 2013 election cycles. In 2013, New Jersey spent at least \$12 million⁴ conducting non-presidential special primary elections, or over \$92 per vote actually cast in the primary election.⁵

Although 62.6% of all registered New Jersey voters participated in the 2012 general election, only 8.8% of all registered New Jersey voters participated in the 2012 non-presidential primary election. There were 5,885,472 total registered voters in New Jersey in 2012. Of the 3,264,275 voters eligible to vote in the primary election, only 515,138 voters actually voted. The remaining 2,621,197 voters, including four Plaintiffs, were prohibited from participating in the primary election because they had exercised their right not to affiliate with either the Democratic or Republican parties. As a consequence, New Jersey's primary

³ Gallup, *Party Affiliation* (June 30, 2014), <http://www.gallup.com/poll/15370/Party-Affiliation.aspx>. These facts were not set forth in the Complaint.

⁴ This does not include fixed State administrative costs that are expended to the benefit of the parties. These facts were not set forth in the Complaint.

⁵ National Journal, *New Jersey's Special Elections Will Cost a Whopping \$24 Million* (June 5, 2013), <http://www.nationaljournal.com/politics/new-jersey-s-special-elections-will-cost-a-whopping-24-million-20130605>. These facts were not set forth in the Complaint.

election system excludes, entirely, 47 percent of the State's total electorate. This imbalance is expanding. Nationwide and, specifically, in New Jersey, the number of voters exercising their right not to affiliate with a private political party is growing steadily, both as an absolute number and as a percentage of all registered voters.

The partisan primary election more often than not decides the winner of the increasingly non-competitive general election.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.⁷ Other states have implemented alternative primary election systems that support broader voter participation. These alternative systems do not deny voters the right to cast a meaningful vote as a consequence of choosing not to associate with a specific political party. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S.

⁶ Election competitiveness may be determined by the margin of victory. Generally, any race that results in greater than a 10% margin of victory is deemed a noncompetitive race. James E. Campbell & Steve J. Jurek, *Decline of Competition and Change in Congressional Elections*, in *Congress Responds to the Twentieth Century* 43-72 (Sunil Ahuja & Robert E. Dewhirst eds., Ohio State Univ. Press 2003)

⁷ In 2012, 91% of New Jersey's House of Representatives races and 76% of New Jersey's Senate races were noncompetitive. Politico, 2012 New Jersey House Results (Nov. 19, 2012, 2:48 PM), <http://www.politico.com/2012-election/results/house/new-jersey/>; Politico, 2012 New Jersey Senate Results (Nov. 19, 2012, 2:48 PM), <http://www.politico.com/2012-election/results/senate/new-jersey/>. These facts were not set forth in the Complaint.

442, 458 (2008). Further, these alternative systems 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 the private political parties and their members. *Id.* at 458.

In New Jersey, a voter is permitted to vote in a private political 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, (2) he/she is a newly registered voter at his/her first primary where he/she is eligible to vote, or (3) he/she 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 private political party for whom the primary election in which they choose to vote is conducted, or they are automatically registered with that political party when they cast a ballot in the party's primary election. To later disassociate with the political party, the voter must re-register with the State as an unaffiliated voter. N.J. Stat. Ann. § 19:23-45.

This opt-in/opt-out mechanism was developed in an environment where substantially all voters identified and affiliated with one of the dominant private political parties. However, today, nearly half of all New Jersey voters have chosen to exercise their First Amendment right not to associate with a private political party.

Individual Plaintiffs Mark Balsam, Charles Donahue, Hans Henkes, and

Rebecca Feldman are registered as unaffiliated voters, and were not allowed to vote in the State's 2013 primary election unless they associated with the Democratic or Republican political parties. They will be likewise excluded from future primary elections because of their choice not to affiliate with a private political party qualified to participate in State-sponsored primary elections. These Plaintiffs have been disenfranchised by the State.

Individual Plaintiff Jaime Martinez is a registered Democrat, and Plaintiffs William Conger and Tia Williams are registered Republicans. These Plaintiffs wanted to register as unaffiliated voters in New Jersey, but were required to forfeit their right not to associate with a private organization in order to exercise their right to vote in the State's 2013 primary election. These Plaintiffs have been coerced, by law, to affiliate with a private political party as a condition to casting a meaningful vote in New Jersey's election process.

Organizational Plaintiffs, Independent Voter Project and Committee for a Unified Independent Party, seek to protect of the rights of all voters to cast a meaningful vote.

II. SUMMARIES

A. Motion to Dismiss – 12(b)(6)

Defendant rests its 12(b)(6) motion on the proposition that voters never have a fundamental right to participate in primary elections, citing *California*

Democratic Party v. Jones. Motion to Dismiss at 6-19. As demonstrated herein, the holding of the Supreme Court of the United States was much narrower in *Jones* than the Defendant represents and, more importantly, dealt with a set of facts and questions that are materially different than the facts and questions presented in this case.

The holding in *Jones* concerned the question of whether a state could require a private political party to allow any voter, irrespective of his or her political party affiliation, to cast a vote in that political party's partisan primary election. *Jones*, 530 U.S. at 586; Motion to Dismiss at 17. That holding is not dispositive on the present case.

Contrary to Defendant's assertion, Plaintiffs do not seek to cast a vote in the partisan primary elections of private political parties. Motion to Dismiss at 14. Rather, Plaintiffs ask the Court to invalidate an election system that confers an exclusive advantage to certain private parties and their members without protecting the right of all other New Jersey voters to cast a meaningful vote.

Jones held that voters do not have the fundamental right to vote in a private political party's elections, including its partisan primary elections. *Jones*, 530 U.S. at 582. The Supreme Court of the United States reasoned that political parties and their members have a right of private association, which includes the right of

non-association that allows those private political parties to exclude voters who choose not to associate with them. *Id.* at 574.

Plaintiffs do not disagree with the holding in *Jones*. Nor do Plaintiffs disagree with Defendant's assertion that, "to be sure, unaffiliated voters are *not* interested in nominating the candidate who presents the best chance of winning the general election while remaining most faithful to party policies and philosophies." Motion to Dismiss at 17 (internal quotations omitted).

However, Plaintiffs maintain that the State's interest in conducting orderly elections does not require that the State maintain a primary election system that excludes, and therefore penalizes, voters who have exercised their right not to associate with a specific private political party.

Further, Plaintiffs maintain that voters, just like the political parties in *Jones*, have a fundamental right of non-association. This right is violated when a state conditions the right to an equally meaningful vote on joining a private political party.

The establishment of a primary election system for the sole benefit of private political parties and their members, to the exclusion of everyone else, violates important and judicially recognized rights of the Plaintiffs. The Plaintiffs' claims are supported by the case law and by undeniable facts, including the fact that nearly half of New Jersey's registered voters, or more than 2.6 million law abiding

citizens, are denied the right to cast a meaningful vote at an integral stage of the election process.

Long-standing precedent supports Plaintiffs' contention. For example, the Supreme Court of the United States has concluded that, when a state makes the primary election an integral part of the election process, the fundamental right to vote extends to the primary election. *United States v. Classic*, 313 U.S. 299, 318 (1941). Because New Jersey's primary election is an integral part of the State's election process, the fundamental right to vote attaches at the primary election stage; and to exclude a class of voters from participation based solely on whether they affiliate with a specific political party therefore impermissibly dilutes their voting power.

Put plainly, the State's current primary election system results in fewer registered voters being able to cast a meaningful vote than would otherwise be the case under an alternative system. The public does not benefit from limiting voter participation and the State does not have an interest in perpetuating this growing imbalance.

Therefore, Defendant's Motion to Dismiss should be denied. These arguments will be developed more fully in the main body of this brief.

B. Motion to Dismiss – 12(b)(1)

Defendant appeals to state sovereignty for dismissal of the State law claims under Rule 12(b)(1). This is inconsistent with New Jersey policy, demonstrated by its express waiver of state sovereignty under contract and tort law due to the “inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity.” N.J. Stat. Ann. § 59:1-2; N.J. Stat. Ann. § 59:13-3.

Further, a state cannot confer the benefits of state sovereignty to private interests. The State has failed to put forward arguments in defense of its existing primary election system that are not wholly concerned with the interests of certain private political parties. For example, the State has failed to assert that it cannot continue to carry out its regulatory function over the electoral process if the existing primary system were deemed unconstitutional on the grounds put forward by Plaintiffs. In short, the State is asserting sovereignty without having asserted a legitimate State interest in denying the Plaintiffs relief.

Even if the State had a legitimate state interest in asserting state sovereignty in this matter, when State law claims are so intertwined with federal questions, the claims are *de facto* brought under federal law. *See City of Chi. v. Int’l College of Surgeons*, 522 U.S. 156, 164 (1997) (quoting *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 13 (1983)).

In one hand, Defendant holds up the shield of state sovereignty without making a single argument as to the State's interest in asserting sovereignty in this case. In the other, Defendant misapplies Court precedent, by extending holdings decided in favor of private political parties, to questions not at issue in this case. This is done while ignoring conflicting precedents decided in favor of the fundamental right to vote in primary elections – the federally protected public interest at issue.

The state law at issue in this case is New Jersey's constitutional prohibition against the use of public monies for a private purpose. The State's defense of private, state-granted, rights and simultaneous disregard for the constitutional rights of over 2.6 million of its registered voters, highlights the interdependent nature of a ruling as to the federally protected right to vote and New Jersey's own constitutional prohibition against using public monies for private purposes.

The Court should deny Defendant's 12(b)(1) motion because (1) it is the policy of New Jersey to waive state sovereignty to avoid unfair and inequitable results, (2) state sovereignty cannot be used to shield claims made against private interests, and (3) the state law claims are intertwined with the federal questions presented in the case. *See generally, City of Chi.*, 522 U.S. at 164.

C. Argument Summary

When the State makes the primary election an integral part of the overall election process, all voters have a fundamental right to participate. *See Classic*, 313 U.S. at 318; *Friedland v. State*, 374 A.2d 60 (N.J. Super. Ct. Law Div. 1977).

In New Jersey, 47% of all registered voters have chosen not to affiliate with a private political party. Less than 8% of New Jersey's registered voters participated in the state-funded primary elections in 2013 and 2014. Over 2.6 million voters were prohibited by law from participating in the State's primary election as a direct consequence of exercising their right not to affiliate with either the Democratic or Republican parties. Yet, all voters are required to pay the cost of these private primary elections. In 2012, that cost amounted to over \$12 million dollars.⁸

In its Motion to Dismiss, Defendant admits: (1) New Jersey's laws must survive Constitutional muster, and (2) in considering the 12(b)(6) motion, facts must be accepted as true, and reasonable inferences must be drawn in a light most favorable to the Plaintiff. Motion to Dismiss at 7-8, 13.

⁸ National Journal, *New Jersey's Special Elections Will Cost a Whopping \$24 Million* (June 5, 2013), <http://www.nationaljournal.com/politics/new-jersey-s-special-elections-will-cost-a-whopping-24-million-20130605>. These facts were not set forth in the Complaint.

Plaintiffs assert the fundamental right to a meaningful vote. This fundamental right extends to the primary election system in New Jersey. Plaintiffs assert the necessity of an electoral system that provides all voters an equally meaningful opportunity to participate at all integral stages of the election process, including the primary. The curtailment of this fundamental right to an equally meaningful vote as to a single voter warrants constitutional scrutiny. At a time when unaffiliated voters make up 47 percent of the State's electorate (with all signs pointing to that number increasing), the need for judicial intervention is compelling.

For the following reasons, Defendant's motion should be denied in its entirety.

III. ARGUMENT

A. Standard Of Review

A 12(b)(1) motion asserts that a case is in a court that lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1); *Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997). A 12(b)(1) motion can be either a facial attack or a factual attack. *Gould Elecs. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000). A facial attack challenges the adequacy of the pleadings in regard to subject matter jurisdiction, whereas a factual attack challenges the actual existence of subject matter jurisdiction. *Mortensen v. First Fed. Sav. Loan Ass'n*, 549 F.2d 884, 891 (3d Cir.

1977). If the motion is a facial attack, the Court must take all allegations in the complaint and interpret them most favorably for the non-moving party, but a factual attack allows the Court to consider extrinsic evidence and weigh it to its satisfaction. *Id.*

Under a factual attack, the plaintiff has the burden of persuasion to convince the Court of subject matter jurisdiction. *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007). Where a motion to dismiss is brought due to immunity of the moving party, immunity is properly considered under the 12(b)(1) motion. *Gould*, 220 F.3d at 178. As Defendant admits, the 12(b)(1) motion only applies to the state law causes of action. Motion to Dismiss at 6-7.

A 12(b)(6) motion asserts that the plaintiff failed to state a claim upon which relief can be granted in their complaint. Fed. R. Civ. P. 12(b)(6); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 305 (3d Cir. 2007). All factual allegations of the complaint must be taken as true, but courts are not bound to accept legal conclusions. *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted). Additionally, the Court must draw any reasonable inferences in the plaintiff's favor. *Semerenko v. Cendant Corp.*, 223 F.3d 165, 180 (3d Cir. 2000). However, the factual allegations must be sufficient to rise above mere speculation. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The claim

must also be plausible, as determined by judicial discretion and common sense, to survive a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

A 12(b)(6) motion to dismiss may only be granted where, after all well-pleaded allegations in the complaint are accepted as true and all reasonable factual inferences are drawn in the plaintiff's favor, it is beyond doubt that the plaintiff cannot prove a set of facts in support of the claim that would warrant relief. *Cal. Pub. Emples'. Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004). A 12(b)(6) motion is properly granted where the asserted claim lacks a required element or there is an "insuperable barrier" to a claim. *Flight Sys. v. Electronic Data Sys. Corp.*, 112 F.3d 124, 127-28 (3d Cir. 1997). The Defendant's claim of immunity may constitute an insuperable barrier if applicable, but immunity is properly addressed only by a 12(b)(1), not a 12(b)(6), motion. Motion to Dismiss at 7; *Gould*, 220 F.3d at 178.

B. No Court Has Held That Voters Do Not Have a Fundamental Right To Vote In Primary Elections

1. Voters Have A Fundamental Right To Vote In The Primary When The Primary Election Is Made An Integral Part of the Electoral Process

The fundamental right to vote includes the right to exercise a meaningful vote. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). A meaningful vote is a vote that is counted, undiluted, and without discrimination. *Baker v. Carr*, 369 U.S. 186, 247-48 (1962); *Regalado v. Curling*, 64 A.3d 589, 593 (N.J. Super. Ct. App.

Div. 2013) (ballots printed with candidates no longer running deprive voters from casting a vote for a viable candidate, infringing upon their meaningful votes). The right to a meaningful vote includes voting at the primary stage, where the primary is an integral part of the electoral process. *Classic*, 313 U.S. at 318. In fact, in New Jersey, courts have held that the right to vote in the primary election is “as protected as voting in a general election.” *Friedland*, 374 A.2d at 63.

The following language from *Classic* speaks directly to the issues in this case:

Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, § 2. And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative. Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative. 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.

Classic, 313 U.S. at 318-19.

Defendant rests its case, against these long established principles, on the holding of the Supreme Court of the United States in *Jones*. Motion to Dismiss at 17; *Jones*, 530 U.S. at 573 n. 5. However, a careful reading of the Court's decision in *Jones* demonstrates that it is not determinative of this case.⁹

Defendant's strategy is apparent. If it can preserve the contention that there is no right to vote in a primary election, then Plaintiffs cannot maintain this action on either First Amendment (abridgment of their right to vote and right of association) or Fourteenth Amendment (equal protection) grounds. For the reasons set forth below, this strategy rests on an unsustainable legal foundation.

Jones did not hold that there is no fundamental right to vote in primary elections, as asserted by Defendant. Motion to Dismiss at 17. Rather, it held that the State of California could not compel a political party to allow persons who have not affiliated with that party to vote in the partisan primary elections where that party's nominees are chosen. *Jones*, 530 U.S. at 586. In *Jones*, the Supreme Court of the United States was concerned with the parameters of a private political party's right to freedom of association in the context of a primary election system

⁹ Defendants reliance on *Duke v. Smith*, 784 F. Supp. 865, 872 (S.D. Fla. 1992) is likewise misplaced. This case addressed a candidate's right to run for office, not the right of citizens to full and equal participation in the electoral process.

designed to grant private political parties the right to hold a partisan primary election.

Defendant seeks to extend that holding by arguing that voters have no fundamental right to participate in the primary stage of an electoral process, ever. Defendant does so despite the fact that the decision and analysis in *Jones* did not address the question of the legality of the primary election system itself as it relates to the individual's right to vote.

Plaintiffs do not question the holding of *Jones*, and do not seek to participate in the private partisan primary elections of either the Democratic or Republican parties.¹⁰ Plaintiffs contend that the State's primary election system, taken as a whole, confers a special benefit to the dominant private political parties and their members to the complete exclusion of nearly half of all registered voters. Plaintiffs' claim gains added weight from the fact that the majority of elections to public office are decided at the primary stage of voting because most general elections are not competitive.¹¹

¹⁰ The Supreme Court's decision in *California Democratic Party v. Jones*, relied on precedents which upheld the right of private associations such as the South Boston Allied War Veterans Council to bar gay and lesbian people from marching in the organization's annual St. Patrick's Day parade. 530 U.S. at 572-73, 582-83. In other words, the *Jones* decision rested on the right of private entities to determine with whom they must associate.

¹¹ See footnotes 5 and 6 above.

Defendant would have this Court accept the legitimacy and necessity of a system that forces more than two and a half million registered voters to choose between two constitutionally protected rights (the right to a meaningful vote and the right not to associate with a private organization), without any further consideration or inquiry. Specifically, Defendant offers no analysis of the State's regulatory interests in the matters at hand: conducting an orderly election. Constrained only by this regulatory interest, if the State's preference must then be to broaden voter participation, then Plaintiffs contend that the State can do better than its outdated primary election system.

2. Plaintiffs Seek Judicial Scrutiny of New Jersey's Existing Primary Election System, Not the Judicial Implementation of a Remedial System.

Defendant misleads the Court by suggesting that, "it would certainly be a peculiar result if plaintiffs could accomplish by judicial fiat what the citizens of California could not achieve by popular initiative – namely, to cause the State to adopt a blanket or open primary system." Motion to Dismiss at 15. It is worth noting that, subsequent to the decision in *Jones*, the citizens of California did accomplish, by popular initiative, the adoption of a nonpartisan primary system where every voter is given an equally meaningful vote.¹²

¹² California's new system is known as the "top-two" nonpartisan primary method and modeled after Washington State's system, which has been upheld by the

However, Plaintiffs do not ask this Court to accomplish by judicial fiat what voters in California and Washington have accomplished. Rather, they merely ask for judicial scrutiny over New Jersey's current election system. California and Washington simply serve as two examples where a State has instituted a primary election system that comports with the dynamics of its electorate, and more importantly, has passed constitutional muster on both critical fronts: the associational rights of private political parties and the right of individuals to cast a meaningful vote through participation in the primary election. *See Wash. State Grange*, 552 U.S. at 458.

Whereas California's blanket partisan open primary system, successfully challenged in *Jones*, unconstitutionally infringed on the associational rights of private political parties; New Jersey's primary election system has gone too far the other way in infringing upon the rights of individuals to cast a meaningful vote. As proven in other jurisdictions, including in California through subsequent calibration of its primary election system, an appropriate constitutional balance can

Supreme Court. *See Wash. State Grange*, 552 U.S. at 459. The purpose of the primary is to winnow the candidate field, not to nominate party representatives. "In *Jones* we noted that a nonpartisan blanket primary, where the top two vote getters proceed to the general election regardless of their party, was a less restrictive alternative to California's [old] system because such a primary does not nominate candidates. 530 U.S., at 585–586, 120 S.Ct. 2402 (The nonpartisan blanket primary 'has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee')." *Id.* at 452.

be achieved. See footnote 12 above. The State has put forward no argument to the contrary. More specifically, the State has not suggested that it would be unable to carry out an orderly election if it had to achieve this balance through calibrating its own primary election system.

Moreover, Defendant erroneously cites the Complaint by stating that, “plaintiffs allege that a blanket primary is the only way to guarantee that disenfranchised voters enjoy the right to an effective vote.” Motion to Dismiss at 14. Yet, nothing in the Complaint, including the collection of citations provided by Defendant, supports this curious assertion. In fact, the Complaint specifically does not ask the Court to institute California’s old partisan blanket primary, new nonpartisan system, nor any other particular system. Pl. Comp., ¶ 78. Plaintiffs simply emphasize that other alternative systems exist, where the individual and fundamental rights of all voters and the state-granted rights of private political parties and their members are all respected and appropriately balanced, such as the top-two system referenced in footnote 12 above.

In short, Plaintiffs simply contend that the State can do better than its more than century old system; and strongly believe that only the Court can force the State to consider and implement an alternative system because of the inherent conflict in this matter; evidenced by the Defendant’s passionate defense of the rights of the dominant political parties to exclude over two and a half million

(2,621,197) registered voters from participating, in any manner, in a primary election expensed to all taxpayers. This is striking, because the Plaintiffs have made no attack on the Democratic and Republican parties nor their partisan primary elections, and neither the Democratic nor Republican parties are party to this matter. Plaintiffs have merely asked the State to ensure that the publicly funded primary election system not function as a private enterprise that deprives Plaintiffs of their ability to cast a meaningful vote, and in doing so, confers on those private political parties a gratuitous advantage.

“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. Because the Court is the proper venue to vindicate rights secured by the Constitution, including the fundamental right to vote in all integral stages of the election process, Plaintiffs ask this Court exercise its proper authority and deny Defendant’s motion.

C. Because No Court Has Held That Voters Have No Right To Vote In Primary Elections, The Equal Protections Claims Should Be Heard

The right to vote requires the ability to fully and effectively participate in the political process. *Reynolds*, 377 U.S. at 555. As demonstrated above, there is a fundamental right to vote in primary elections when the primary is made an integral part of the election process. *See Classic*, 313 U.S. at 318; *Friedland*, 374 A.2d at 63. Political equality extends to all phases of elections. *Gray v. Sanders*,

372 U.S. 368, 380 (1963). Equal protection requires each vote must be “undiluted.” *Baker*, 369 U.S. at 247-48. Therefore, Plaintiffs are entitled to equal protection of their right to vote in primary elections when these elections are made an integral part of the election process.

New Jersey’s primary system creates two classes of voters: party members who enjoy full participation in the electoral process, and voters who, by reason of not having joined one of the dominant private political parties, are allowed only limited participation. Defendant attempts to dispose of this case by misconstruing the holding in *Jones*. Motion to Dismiss at 17.

Defendant has offered no argument beyond the flat assertion that *Jones* decided this case. The holding in *Classic* clearly contradicts this assertion; therefore, Plaintiffs ask this Court to employ strict scrutiny with regard to the equal protection claim. Plaintiffs respectfully submit that this claim to equal protection is well understood by reference to the Supreme Court’s seminal reapportionment holdings. *See Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964).

These cases stand for the proposition that regardless of whether voters are members of a suspect class, a state cannot create a system in which the votes of one class are diluted. In *Reynolds*, it was held that an electoral system that gave the vote of a resident of a rural area more weight than the vote of an urban dweller

could not survive constitutional scrutiny. 377 U.S. at 555. Chief Justice Warren, writing for the majority, stated:

To the extent that a citizen's right to vote is debased, he is that much less a citizen ... The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated.

Id. at 567.

Likewise, in the present case the “facts on the ground” have changed dramatically since the turn of the century. A partisan primary system that was designed when almost all voters belonged to one of the major parties, is not acceptable when 47% of the State’s electorate has opted not to join a party and when, by all indications, that number is growing.

Electoral systems which result in vote dilution have been subjected to the same measure of strict scrutiny as employed in *Reynolds*, even though the issue of reapportionment is not directly implicated. *See e.g. Board of Estimate v. Morris*, 489 U.S. 688 (1989) (the Supreme Court invalidated New York City’s Board of Estimate on the grounds that allowing two representatives from each of the five boroughs that make up the city diluted the votes of those residing in the more densely populated ones.).

Additionally, if a general election is not competitive, voters who were excluded from voting in the primary election never have a meaningful opportunity to participate at all. The evidence shows that often, the primary election is the only competitive stage of the election. As noted above, in New Jersey, 91% of the New Jersey's House of Representatives races and 76% of New Jersey's Senate races were noncompetitive.¹³ In those races, the primary election was the only meaningful stage of the election.

For Plaintiffs' votes to be undiluted, they must have a right to participate in the primary election because of its integral role in the ultimate determination of their representatives. That right cannot be conditioned on joining a private political party any more than a person living in New York City can be expected to move to a rural county in order to cast an undiluted vote. *See Reynolds*, 377 U.S. at 557.

Therefore, Plaintiffs are entitled to equal protection under the Fourteenth Amendment under a strict scrutiny standard.

¹³ Politico, 2012 New Jersey House Results (Nov. 19, 2012, 2:48 PM), <http://www.politico.com/2012-election/results/house/new-jersey/>; Politico, 2012 New Jersey Senate Results (Nov. 19, 2012, 2:48 PM), <http://www.politico.com/2012-election/results/senate/new-jersey/>.

D. This Court Has Proper Subject Matter Jurisdiction Over This Case

1. Plaintiffs Meet The Requirements Of Taxpayer Standing Under State And Federal Standards Because Plaintiffs Seek To Protect Their Fundamental Rights And A Favorable Ruling Would Redress the Ongoing Injury.

Defendant attacks Plaintiffs' standing as taxpayers to challenge New Jersey's primary election funding scheme under the State Constitution. Standing is only being challenged as to Count VII of the Complaint, which concerns the misuse of state funds for a private purpose. Motion to Dismiss at 21. Notably, Defendant argues this contention on federal grounds, although Count VII deals with the violations of the New Jersey state constitution brought under supplemental jurisdiction. It would more logically follow from Defendant's plea for sovereign immunity that the Court apply New Jersey's more lenient state standards for taxpayer standing.

Admittedly, the Court may consider the claim as *de facto* arising under federal law because the claims under state law in this case are completely intertwined with federal constitutional questions. *City of Chi.*, 522 U.S. at 164. Even applying the more rigorous federal-standing criteria, Defendant's argument fails.

Federal taxpayer standing requires: (1) an "injury in fact;" an invasion of a legally protected interest, which is (a) concrete and particularized, and (b) actual or imminent; (2) a causal connection between the injury and the conduct complained

of; and, (3) sufficient likelihood that the injury will be redressed by a favorable decision. *United States v. Hays*, 515 U.S. 737, 742-43 (1995).

First, Plaintiffs have standing even when applying the more limited federal taxpayer-standing requirements. The Attorney General, on behalf of the State, argues that Plaintiffs' claim is a "generalized grievance" simply because it affects too many people, over 2.6 million, to be a "particularized claim." Motion to Dismiss at 21. This contention has been flatly rejected by the United States Supreme Court. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 (1973) ("Standing is not to be denied simply because many people suffer the same injury.").

Second, there exists an actual injury, as Plaintiffs have suffered violations of their constitutional rights to vote, to non-association, and to be equally protected under the law. These violations are actualized and have already impacted them, as shown by some of the Plaintiffs' affiliation with parties they would prefer not to join, and by the inability to participate in primaries by others. Plaintiffs suffer this harm because the application of New Jersey state law is done in violation of these federal constitutional guarantees. The injury to Plaintiffs is not speculative. It is causally connected to New Jersey's statute that allocates state funds to private partisan primaries, as this system is what prevents Plaintiffs from expressing their

First Amendment rights, and what codifies the infringement of their Fourteenth Amendment rights.

Third, it is apparent that, were New Jersey's electoral scheme changed to comport with constitutional guarantees, the rights of Plaintiffs would no longer be infringed.

If this issue were decided under state-standing grounds, New Jersey's Supreme Court has noted that there is no "case or controversy" requirement. *Salorio v. Glaser*, 414 A.2d 943, 947 (N.J. 1980). In cases of great public interest, any slight additional private interest will be sufficient to afford standing. *Id.* This case clearly presents a matter of great public interest, as it addresses the voting rights of nearly half of New Jersey voters. Further, Plaintiffs have a private interest in preventing infringements upon their rights. Therefore, Plaintiffs' private interests should easily satisfy the less stringent standing requirements of New Jersey.

Therefore, Defendant's challenge to standing fails whether state or federal rules are applied.

2. Sovereign Immunity May Not Be Used As A Shield In This Case Because Federal Questions And Federally Recognized Public Interests Are Inextricably Embedded In The State Law Claim.

Defendant, under Rule 12(b)(1) and by reference to the Eleventh Amendment, asks this Court to bar Plaintiffs' State claims challenging the use of

public funds for a private purpose. Motion to Dismiss at 21. State sovereignty is protected by the principles of federalism. *Alden v. Maine*, 527 U.S. 706, 728 (1999). Private interests do not enjoy this protection. *See generally Hafer v. Melo*, 502 U.S. 21, 30-31 (1991) (citation omitted) (explaining that State officials sued for personal and individual liability cannot enjoy Eleventh Amendment protections.).

The application of state sovereignty is guided by state policy, as states may choose to waive the right as they see fit. *College Sav. Bank v. Fla. Prepaidpostsecondary Ed. Expense Bd.*, 527 U.S. 666, 670 (1999) (citing *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883)). New Jersey has expressed unequivocal statutory waivers under both tort and contract law. N.J. Stat. Ann. § 59:1-2; N.J. Stat. Ann. § 59:13-3. In New Jersey, “the Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity.” N.J. Stat. Ann. § 59:1-2. This policy is not new to the State, as New Jersey never ratified the Eleventh Amendment.¹⁴

Despite New Jersey’s long-held and clearly expressed policy of avoiding the unfair application of the state sovereignty shield, the State’s legal representative asks this Court to deprive Plaintiffs of the opportunity to challenge New Jersey’s

¹⁴ New Jersey Department of State, *Constitutional Amendments: 11th Amendment* (2011), <http://www.nj.gov/state/archives/doc11thamendment.html>.

private election scheme under its own constitutional prohibitions. Motion to Dismiss at 21-23. It does so without making a single argument as to the public interest in using this shield.

Defendant argues that voters have no fundamental right to vote in a primary election by extending the holding in *Jones*. Motion to Dismiss at 17. The holding in *Jones*, however, was more limited, but relevant to the state claim in this case. Voters do not have the fundamental right to participate in primaries that are held for a *private purpose*. See generally *Jones*, 530 U.S. at 586. Plaintiffs bring their state claim under the New Jersey constitutional prohibition against the use of state funds for a *private purpose*. N.J. Const., Art. VIII, Sect. III, Para. 3.

A state law claim can be considered to “arise under” the laws of the United States when the right to relief under state law requires resolution of a substantial question of federal law. *City of Chi.*, 522 U.S. at 164 (quoting *Franchise Tax Bd.*, 463 U.S. at 13). The state law claim cannot be determined without answering the substantial question of whether Plaintiffs’ fundamental rights are being unconstitutionally infringed. A state cannot grant rights to private parties that infringe on the fundamental rights of its citizens without meeting strict scrutiny. See generally *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

A finding that Plaintiffs’ federal constitutional rights are being infringed by the current system would conclusively prove that the system cannot be for a

constitutionally allowable public purpose, and, consequently, that the public funds are being misappropriated under the State prohibition against using public funds for a private purpose. N.J. Const., Art. VIII, Sect. III, Para. 3. Therefore, because the state-law claim is so intertwined with federal questions, sovereign immunity should not apply.

Further, Defendant's arguments rely exclusively on a defense of private rights the State has granted political parties by statute. Defendant connects this defense to the rationally related state interests of preventing voter confusion, maintaining ballot integrity, and promoting electoral fairness. Motion to Dismiss at 13, 16, 19. The Defendant, however, makes no argument in defense of these state interests nor demonstrates how or why an adverse ruling would compromise these interests.

Affording Defendant the veil of state sovereignty would *de facto* immunize private interests from constitutional scrutiny whenever the State, or an actor of the State, is so influenced by those private interests that they become one and the same.

Therefore, the Court should exercise its subject matter jurisdiction over the case.

E. Discovery Should Not Be Stayed And The Case Should Not Be Dismissed With Prejudice Because Defendant Has Not Met Its Burden of Showing Good Cause

Defendant has asked this Court to stay discovery pending resolution of their Motion to Dismiss. Motion to Dismiss at 23. Where a motion to stay discovery is filed, the moving party bears the burden of showing good cause. *Actelion Pharms., Ltd. v. Apotex Inc.*, 2013 U.S. Dist. LEXIS 135524, 8 (D.N.J. 2013).

As it relates to the state law claims, Defendant has not met its burden of showing that the shield of state sovereign immunity should apply in the first place. The Court may, for example, need to consider additional evidence relating to Defendant's state and/or private interests in determining its applicability. Should the Court allow Defendant to proffer such evidence, Plaintiffs should be permitted to seek full disclosure.

And even if immunity does apply, where a motion to dismiss is sought for immunity, discovery should not be suspended for the causes of action not affected. *Lugo v. Alvarado*, 819 F.2d 5,7 (1st Cir. 1987). Plaintiffs' causes of action under federal law are not affected by Defendant's immunity claim.

Finally, Defendant asks the Court to dismiss the case with prejudice. In this regard, Defendant admits an essential principle from which he cannot escape: that if a fundamental right to participate in New Jersey's primary elections is found to exist, their acts require strict constitutional scrutiny. Motion to Dismiss at 17. To

grant Defendant's motions is to conclude that no matter how few voters are benefitted by New Jersey's primary system, no matter how much of their money is spent to administer these private primaries, and no matter how many rights are granted to private interests to ultimately decide who becomes a public official, there is no plausible way the system fails to meet constitutional muster.

This conclusion would contradict prior holdings of the Supreme Court of the United States. *Classic*, 313 U.S. at 318; *Sanders*, 372 U.S. at 380. The right of the people to a meaningful vote is based upon the Constitution, and therefore must be protected in the face of state law that infringes upon that right. See, *Reynolds*, 377 U.S. at 566 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)).

Therefore, the motion to stay discovery should be denied in its entirety.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendant's motion to dismiss the case with prejudice, and allow full discovery.

Respectfully Submitted,

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