

14-3882

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IN THE  
**United States Court of Appeals**  
FOR THE THIRD CIRCUIT

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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.*

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

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**REPLY BRIEF FOR PLAINTIFFS-APPELLANTS**

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## INTRODUCTION

The fundamental right to vote, by its very nature, is a nonpartisan right.

In the first breath of its brief, Appellee admits that, “It is beyond cavil that ‘voting is of the most fundamental significance under our constitutional structure.’” Appellee’s Brief in Opposition to the Appeal (hereinafter “OB”) 7 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

Yet, Appellee spends the balance of its Opposition justifying a state funded, administered, and sanctioned election process that conditions participation at an integral stage of the election on membership in one of two political parties. Appellee’s attempt to justify the exclusion of nearly half of New Jersey’s electorate from this integral stage rests wholly on several mischaracterizations of Appellants’ argument and citation to, and use of, case law out of context, while failing to articulate a legitimate state interest in defending this case.

Appellants made a considerable effort in their opening brief to distinguish between the state’s overall public primary election and the party nomination proceedings that are a component of it. Appellee’s blurring of that distinction and its resonance in the lower court’s decision is understandable in the historical context of the primary election system. The state’s creation of the direct primary election was an effort to democratize the process through which the major parties chose their nominees by empowering voters and disempowering the parties’

bosses.<sup>1</sup>

But the consequence of the state's primary election has dramatically changed since it was implemented in the late nineteenth and early twentieth century. Today, more than forty-seven (47) percent of the state's voters self-identify as independent,<sup>2</sup> even as more and more districts are made "safe" for one of the two major parties in the general election as a direct result of the primary election. BA 19. The state's primary election, therefore, confers power to political parties at the expense and exclusion of individual voters.

It is not surprising therefore, that Appellants and Appellee differ in the context through which certain key precedents are understood. This is because Appellants are asking a different question than the one Appellee has asked. Appellee is either confused or chooses to ignore Appellants' basic question. In fact, Appellants believe that their question is answered in their favor by the very precedents to which the Appellee cites. *California Democratic Party v. Jones*, in particular, rests on upholding a derivative right of private association. 530 U.S. 567, 586 (2000). When considered in context, this derivative right cannot even exist

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<sup>1</sup> Adam Winkler, *Symposium: Voters' Rights and Parties' Wrongs: Early Political Party Regulation in the State Courts, 1886-1915*, 100 *Columbia L. Rev.* 873, 874-76 (2000).

<sup>2</sup> *Statewide Voter Registration Statistics*, New Jersey Department of State (November 3, 2014), <http://www.state.nj.us/state/elections/2014-results/2014-1031-voter-registration-by-congressional-district.pdf>

unless the court upholds the fundamental right of individuals that Appellants are seeking to protect in this case.

An example of a citation taken out of context is Appellee's assertion that "there is, in fact, no constitutional right to participate in primary elections." This statement is a clear attempt to take precedent decided in favor of a political party's right to exclude nonmembers from participating in its party nomination proceedings to justify the state's exclusion of non-party members from an integral stage of the election, altogether. OB 24 (citing *Jones*, 530 U.S. at 573 n.5, *Duke v. Smith*, 784 F. Supp. 865, 872 (S.D. Fla. 1992), *aff'd* 15 F.3d 1096 (11th Cir. 1994)).

An example of Appellee's mischaracterization of Appellants' argument is Appellee's assertion that, "appellants dispute that the State may legitimately insist on the use of partisan primaries." OB 7. Not only have Appellants never made such a blanket statement, Appellants specifically described how a partisan-based system could serve as one of many potential remedies. *See* Opening Brief for Plaintiffs-Appellants (hereinafter "BA") 12.

Appellee has attempted to recast Appellants' challenge to the constitutionality of New Jersey's public election process as a whole, as a challenge to the right of individual political parties to control access to their party nomination proceedings, which are a subcomponent of the state's public primary election. An illustration of the distinction has been attached as an Addendum. This distinction is

fundamental to the question before this court, and Appellee's attempts to obfuscate this critical distinction should be met with a firm demand that Appellee represent only the interests of the state in this matter and that she clearly articulate those interests. Notably, Appellee defends, vigorously, the private interests in its election process against Appellants' public concern, except however, when Appellee seeks to assert sovereign immunity against the claim brought under state law.

Appellee contends that the fundamental right to vote may be enjoyed only after a voter has first "simply join[ed] the party." OB 14 (quoting *Jones*, 530 U.S. at 584). This argument serves to unconstitutionally misappropriate our public election system for the private enjoyment of two political parties. Affording Appellee the veil of state sovereignty as she guards the state's "privatized" primary election system from public scrutiny 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.

## ARGUMENT

### **I. Voters Have A Fundamental Right To Participate In The State's Primary Election Because It Is An Integral Stage Of The State's Election Machinery**

Appellee does not contest the integral nature of the state's primary election to its overall election process. *See* OB 5.



Appellants include Republican, Democrat, and unaffiliated voters (as well as organizational plaintiffs), representing the full range of New Jersey’s electorate. Therefore, Appellee’s attempt to classify Appellants simply as “unaffiliated voters” and to thereby extend precedent related to the right of unaffiliated voters to participate in a political party’s nomination proceedings without that party’s permission, is inappropriate. *See e.g.* OB 11.

For example, Appellee inaccurately suggests that the Supreme Court has rejected the notion that unaffiliated voters have a fundamental right to vote in primary elections, even when those elections are an integral part of the electoral process. OB 6. In citing to *Jones* for this proposition, Appellee attempts to extend precedent decided in favor of a private political party’s right to exclude non-members from participation in their party nomination proceedings to suggest that a state can require party membership as a condition to voting at an integral stage of the election. *Id.*; *Jones*, 530 U.S. at 586. Specifically, Appellee refers to footnote 5 of *Jones*, which, in relevant part, reads: “Selecting 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, Proposition 198<sup>3</sup> would be not

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<sup>3</sup> Proposition 198 adopted a partisan blanket primary system in California. A partisan blanket primary places all party nomination proceedings on a single ballot and allows every voter, regardless of party, the ability to vote for any candidate of any party.

only constitutionally permissible, but constitutionally required, which no one believes.” *Id.* at 573 n.5 (footnote added).<sup>4</sup> Therefore, Appellee’s citation to *Jones*, in this respect, is taken completely out of context.

As the court recognized in *Jones*, the context in which the right to cast a meaningful vote is at issue must be considered before precedent can be applied appropriately. *Id.* In *Jones*, the issue was whether the State of California could require political parties to allow unaffiliated voters to participate in a particular party’s nomination proceedings. *Id.* at 569-70. In that context, the political parties sought to protect their private right of association, which includes the right to not associate, against a state election process that required the political parties to let non-members (including members of other parties) vote in their individual party nomination proceedings. *Id.* at 571.

In this case, however, Appellants are not seeking to participate in the nomination of a political party’s candidates. Rather, Appellants are asking the state to respect their right to participate in the state’s election process on an equal footing as political parties and their members.<sup>5</sup> When considered in this context, Appellee’s attempt to extend *Jones* to the issues in this case is inappropriate and

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<sup>4</sup> This assertion does not withstand scrutiny. Proposition 198 is not the only way to vindicate this right. Subsequent to *Jones*, Washington State and California adopted a top two system that was upheld by the Supreme Court in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008).

<sup>5</sup> For remedial considerations, see BA 11-14.

relevant only to the extent that *Jones* also held that party nomination proceedings serve private interests over public concern:

In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views.

*Id.* at 575.<sup>6</sup>

Appellee then continues to obscure the issues in this case by citation to *Duke*.

OB 17. The issue in *Duke* was whether a candidate had a fundamental right to be placed on the primary election ballot of the Republican and Democratic parties.

784 F. Supp. At 866. When the court held that, “nor is there any constitutional right to primary participation,” it was referring to a *candidate’s* right to participate in a political party’s nomination proceedings, not a voter’s right to participate in an integral stage of the state’s election process. *Id.* at 871. Therefore, Appellee’s

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<sup>6</sup> As Justice Stevens pointed out in his dissent, this is a private function: “When a political party defines the organization and composition of its governing units, when it decides what candidates to endorse, and when it decides whether and how to communicate those endorsements to the public, it is engaged in the kind of private associational activity that the First Amendment protects.” *Jones*, 530 U.S. at 592 (Stevens, dissenting).

citation to *Duke*<sup>7</sup> is wholly irrelevant and damaging to the cause of achieving a clear and honest assessment of Appellants' constitutional claims.

Appellee then attempts to justify the state's position as consistent with the constitutional standards set forth in *United States v. Classic*. In *Classic*, the court held that "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." 313 U.S. 299, 318 (1941) Yet, Appellee suggests it may give two particular political parties and their members exclusive access to an integral stage of its election process because, "the *Classic* decision ... only 'speaks to the constitutional protections that obtain once a primary vote is cast, [and] is silent as to who under state law has the right to cast one.'" OB 13. Notably, the only authority Appellee cites for this curious construction of the right to vote is the lower court decision being challenged in this case.

Appellee goes on to justify this narrow reading of *Classic* by suggesting that, "a voter who feels disenfranchised because of a regulation that conditions participation in primary elections on party membership should 'simply join the party'." OB 14 (citing *Jones*, 530 U.S. at 584). As stated above, what are referred

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<sup>7</sup> As appellee points out, *Duke* cites to *Consumer Party v. Davis*, 633 F. Supp. 877, 888 (E.D. Pa. 1986). *Davis* is another case concerning candidate rights to appear on primary ballots, not an individuals' right to participate in the primary election process. This is explicitly clear in the case, as the sentence preceding the citation Appellee refers to discusses *candidates'* rights to general election ballot access. *Id.*

to as “primary elections” in *Jones* are the party’s nomination proceedings and, therefore, this reasoning does not apply within the context of this case; a case that concerns the state’s interest in its election machinery and Appellants’ right to meaningful participation therein.

Appellee then suggests that requiring a voter to join a political party as a condition of exercising his or her fundamental right to vote is a minimal burden by citation to case law concerning the right to participate in a particular political party’s nomination proceedings. OB 15 (citing *Clingman v. Beaver*, 544 U.S. 581, 581 (2005)). *Clingman*, however, concerned a constitutional challenge brought against an Oklahoma state law that prevented voters of one party from voting in the candidate nomination proceedings of another party. 544 U.S. at 584-85. In that case, the Libertarian Party of Oklahoma wanted to open its primary election to non-members, regardless of their party affiliation. *Id.* In short, the context of the *Clingman* decision concerned the rights of voters who were members of one particular party to participate in another political party’s nomination proceedings. *Id.* at 594. The court in that case held that voters had no fundamental right to do so because the party registration requirement, in that context, was a minimal burden. *Id.* at 593-94.

Here, however, the issue concerns the right of all individual voters, regardless of party affiliation, to participate at an integral stage of the state’s

election machinery. Therefore, Appellee's citation to *Clingman* is out of context and irrelevant. It is one thing to restrict a voter from jumping from one party primary to another without changing his or her enrollment; it is another thing to bar almost half of a State's voters from participation in the crucial first round of voting altogether unless they join one of the two major political parties.

What is at issue in this case is the public purpose of the state's election process. As the court recognized in *Classic*, the public purpose of elections cannot be protected at all if the fundamental right to vote does not extend to all integral stages of the election. 313 U.S. at 318-19. No one would suggest that a state could constitutionally require voters to join a political party to participate in the general election. It follows, therefore, that just as the right is protected in the general election, the state may not condition the fundamental right in such a way at the primary election when the primary is made an integral stage of the election machinery. *See Id.*

Appellee is unable to articulate a legitimate public interest that justifies its position in this regard. On page 15 of her brief, Appellee suggests the state does not need to make any "particularized showing" of its interests because the party registration burden on Appellants is minimal. However, if voting is of such fundamental significance (OB 7), as well as the right to not associate (OB 10), how

can the exercise of one fundamental right be conditioned on the forfeiture of another, yet be characterized as a minimal burden? <sup>8</sup>

Appellee's only acknowledgement of its state interest is offered in a wholly conclusory and generalized fashion. For example, Appellee invokes "preserving the parties as viable and identifiable interest groups" (OB 12); the right of a state to "favor the traditional two party system" (OB 8); "assuring intra party competition is resolved in a democratic fashion" (OB 8); and, "protecting the overall integrity of the historic election process" (OB 12). Not once, however, does Appellee explain how the current system assists the state in protecting these interests, or how Appellants' challenge would compromise them.

The state does not, for example, explain how the exclusion of over forty-seven (47) percent of its electorate from full participation at an integral stage of an election creates stability. In fact, it would be more rational to conclude that requiring forty-seven (47) percent of voters to register into a major political party as a condition of participation, and then re-registering to remove themselves from

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<sup>8</sup> Moreover, even a minimal burden requires the State to articulate the interests which justify it. *Clingman*, 544 U.S. at 593-94. *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 78 (3d Cir. 1999), relied on by Appellee, does not hold that the State can avoid putting forth the interests it asserts. This Court held only that the State need not always offer empirical evidence in support of its asserted and particularized interests. *Id.*

that same party to exercise their fundamental right of non-association, creates less stability and less confidence in the democratic process, not more.

With respect to its historical context, the direct primary was an attempt to give the public a more democratic system of selecting candidates for public office than the then existing process controlled by party bosses. At the present time in New Jersey's history, when nearly half of its electorate has chosen to disassociate with either major political party even though they are disenfranchised from an integral stage of the election process by doing so, the current system can hardly be characterized as promoting a more democratic process.<sup>9</sup> Importantly, as noted in Appellants' Opening Brief, there are alternatives to the state's current primary election system that would confer to the public a more democratic system, without taking from the political parties' their private associational rights. BA 12.

In short, New Jersey's primary election is an integral stage of its election machinery. Appellee's defense, and the citations thereto, reference claims concerning either voters' or candidates' rights to participate in party nomination proceedings and not the state's public election machinery. OB 6-12, 14-15, 17-18. Because the current election machinery gives two particular political parties and

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<sup>9</sup> Nor can "preserving the parties as viable and identifiable interest groups" or preserving the "traditional two party system" be legitimate state interests if the system also disenfranchises almost one half of the State's population. It is incumbent on the State to find ways of promoting these goals that do not involve wholesale disenfranchisement.



their members a gratuitous advantage at an integral stage of the election, Appellants' fundamental right to vote must be adjudicated within that context.

**II. The Eleventh Amendment Does Not Apply In This Case Because The State Official Has Applied State Law In Conflict With The Federal Constitution And Is Therefore Stripped Of Her Official Capacity.**

Appellants have brought the state law claims under 42 U.S.C. § 1983, in addition to N.J.S.A. § 10:6-2(c), under supplemental jurisdiction. Therefore, even if the Eleventh Amendment bars supplemental jurisdiction, the state law claim is properly before this court as it directly relates to claims brought under § 1983.

Appellants agree with Appellee that primary elections, as a whole, are of a public concern. OB 11 (citing *Wene v. Meyner*, 98 A.2d 573, 576 (N.J. 1953)). Appellants also agree with Appellee that voters have no constitutional right to vote in a political party's primary nomination proceedings. OB 14. In fact, it is in recognition of these very observations that the state law claim is brought before this court.

Appellee has failed to demonstrate how New Jersey's current primary election process, which excludes nearly half of its electorate, is serving the public interest. OB 15 (quoting *Hooks*, 179 F.3d at 78). Instead, Appellee's entire defense rests on misapplying case law decided in favor of the private rights of political parties. When an officer of the state defends laws that insulate private rights from public concern, the officer should be stripped of his or her official or representative

public character and become subject to the consequences of his or her private conduct. *Ex Parte Young*, 209 U.S. 123, 159-160 (1908).

Therefore, the shield of state sovereignty does not apply.

### CONCLUSION

For the foregoing reasons, along with the reasons set forth in Appellants' Opening Brief, the lower court's order dismissing this action should be reversed.

Dated: December 17, 2014

Respectfully Submitted,

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## 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 3,217 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: December 17, 2014

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**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 December 17, 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: December 17, 2014

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## ADDENDUM

