No. _____

IN THE

Supreme Court of the United States

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,

Petitioners,

—v.—

SECRETARY OF THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a New Jersey statute mandating that otherwise qualified voters join one of two particular political parties as a condition of voting at an integral stage of the State's election process violates the First and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

Petitioners 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 Independent Voting.org) were Plaintiffs and Appellants below.

Respondent Kim Guadagno, Secretary of State of New Jersey, was the Defendant and Appellee below.

CORPORATE DISCLOSURE STATEMENT

Independent Voter Project and Committee for a Unified Independent Party, Inc. (d/b/a Independent Voting.org), pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, hereby submit the following corporate disclosure statement.

Independent Voter Project and Committee for a Unified Independent Party, Inc. do not have any parent corporations, and no publically held company owns 10% or more of either organization's stock.

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INTRODUCTION

The fundamental right to vote is a nonpartisan right. Under its current law, however, the State of New Jersey requires that a voter join either the Republican or Democratic political parties as a condition of participating at an integral stage of its non-presidential elections. Such a system robs the People of the most important liberty asserted in the Declaration of Independence: the right to govern themselves.

Instead, New Jersey's two state-qualified political parties govern by default. And because the two state-qualified political parties have a shared interest in suppressing the voting rights of registered voters who choose not to associate with them, the State of New Jersey incentivizes public officials, by law, to represent the self-interests of two political organizations over the common public interests of the People; including the forty-seven percent (47%) of New Jersey's registered voters who choose not to affiliate with a political party.

The natural consequence of New Jersey's election process is, therefore, the institutionalization of minority rule. Indeed, the interests of the Republican and Democratic political parties are so embedded in the State's establishment that the State of New Jersey finds itself here today defending a system that overtly and unnecessarily protects the private rights of two political organizations at the expense of the voting rights of its own citizens.

The State's true intention in preserving its exclusive system has been made evident in the lower court proceedings. In an era where the President of the United States has suggested mandatory voting as a possible cure to a disaffected electorate, the State, in defending an election system that excludes almost half of its registered voters from full participation, has explicitly declared that "democracy isn't easy" and that "the Democratic and Republican parties I guess through the decades or the centuries or whatever... you know you have to do the hard work…"

The notion that two political organizations have built up some type of special equity that outweighs the individual's fundamental right to vote offends the most basic building block of our democracy. The State's overt assertion of such a corrosive currency and its acceptance by the lower courts in barter for a fundamental right suggests that this matter is of the type that must be decided by this Court.

There is no legitimate reason to give the members of two political parties exclusive access to an integral stage of a public election process. Doing so compromises the stability and health of our democracy and all of its institutions.

The ruling of the lower court comes in direct conflict with several of this Court's longstanding precedents including *United States Term Limits v. Thornton*, 514 U.S. 779, 801 (1995) (holding that a

state may not create an election process that burdens a fundamental right), *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000) (holding that a state may not limit the fundamental right of non-association without meeting strict scrutiny), and *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (holding that voters have a fundamental right to cast an equally meaningful vote at all integral stages of the election process).

The argument repeatedly used against the relief sought by Petitioners has been intentionally, yet improperly, framed as a protection of the two state-qualified political parties' right of private association, a right never contested in this matter by Petitioners. Petitioners do not want, nor legally seek, the right to participate in the private Democratic or Republican Party primaries. Indeed, they seek just the opposite, an end to their exclusion from an integral stage of the public election process.

To be clear, Petitioners are merely seeking an injunction against the current closed primary election process. In its place, Petitioners simply request this Court mandate, not dissimilar to its decisions in *Gray v. Sanders* and *Reynolds v. Sims*, that New Jersey implement a system that gives every voter, regardless of their party affiliation, an equally meaningful vote at every integral stage of the process.

There are many ways to achieve this goal without compromising the private rights of political

parties and their members. As with women's suffrage, racial equality, and malapportionment, the equal rights of all voters were not always a part of our national experience. Though now axiomatic, there were those who viewed the elimination of their excluded status as foreign, unwanted, and even scary. Nevertheless, this Court has recognized that the fundamental right to vote derives from citizenship and nothing else. It has also required that changes be made when infringements on that right are not tolerable to our American concepts of individual liberty, equality, and self-government.

Such a large number of voters must not be denied an equal right to the voting franchise just because it is inconvenient to the existing major parties or because the State of New Jersey has a historical interest in doing so, especially in light of the State's eight percent (8%) average voter turnout in its most recent primary elections.

Without conceding that a direct initiative process is a remedy for this constitutional infirmity, it is important to note that the Petitioners have no other forum available to them in New Jersey due to the State's lack of a public initiative process. If this Court decides not to intervene to protect the rights of all voters to participate in an integral stage of the State election process, then the disenfranchised have no other reasonable path to seek enforcement of their rights. Put simply, the two major political parties have complete control over the initial, and often most important, stage of the election process in New

Jersey. Unless this Court is willing to consider whether this system is constitutionally permissible, these two major political parties will maintain control over the People of the State forever.

This is a matter of the type and timing that historically must be decided only by this Court.

Finally, despite its import, both lower courts have dismissed this case without discovery, with prejudice, and without publication.

Therefore, the Petition for Writ of Certiorari should be granted.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is not reported in the Federal Reporter, but it can be found at 2015 U.S. App. LEXIS 5641 (3d Cir. April 8, 2015), and is reprinted in the appendix hereto, App. 1a-14a, *infra*.

The judgment of the United States District Court for the District of New Jersey (Chesler, S.) has not been reported, but it can be found at 2014 U.S. Dist. LEXIS 112709 (D.N.J. Aug. 14, 2014). It is reprinted in the appendix hereto, App. 15a-30a, *infra*.

STATEMENT OF JURISDICTION

On April 8, 2015, the Court of Appeals for the Third Circuit entered its judgment upholding the United States District Court for the District of New

Jersey's dismissal of the Petitioners' case with prejudice. Therefore, the jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUIONAL PROVISIONS AND STATUTES AT ISSUE

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.J. Stat. Ann. § 19:23-5:

> Candidates to be voted for at the primary election for the general election shall be nominated exclusively by the members of

> the same political party by petition in the manner herein provided.

N.J. Stat. Ann. § 19:23-45 (in relevant part):

> No voter, except a newly registered voter at the first primary at which he is eligible to vote, or a voter who has not previously voted in a primary election, may vote in a primary election of a political party unless he was deemed to be a member of that party on the 55th day next preceding such primary election.

STATEMENT OF THE CASE

1. Facts of the Case

Petitioners Mark Balsam, Charles Donahue, Hans Henkes, Rebecca Feldman, Jaime Martinez, William Conger, and Tia Williams are taxpayers and registered voters residing in the State of New Jersey. Petitioners Mark Balsam, Charles Donahue, Hans Henkes, and Rebecca Feldman were unable to cast a vote in the 2013 New Jersey primary election because they exercised their First Amendment right to not affiliate with a political party. N.J. Stat. Ann. §§ 19:23-45, 19:23-5. These Petitioners will continue to be entirely excluded from the first stage of the State's election process unless they join a political party. In the aggregate, unaffiliated voters represent over forty-seven percent (47%) of the New Jersey electorate.

Petitioners William Conger and Tia Williams are registered Republicans. Petitioner Jaime

Martinez is a registered Democrat. These Petitioners made the difficult choice to forfeit their First Amendment right of non-association in order to participate in the State's primary elections. These Petitioners did not take this decision lightly and were forced to associate with a political party in order to fully exercise their constitutionally guaranteed voting rights.

Petitioners Independent Voter Project and Committee for a Unified Independent Party (d/b/a IndependentVoting.Org) seek to protect the rights of all voters to cast a meaningful vote.

Although, according to the New Jersey Department of State, turnout has averaged around eight percent (8%) in the New Jersey primary elections between 2010 and 2015, this primary stage of the electoral process determined the majority of New Jersey representatives due to the lack of competitiveness in New Jersey's elections.[1]

Non-competitive elections are defined as any race that results in a margin of victory greater than ten percent.[2] In New Jersey, eleven out of twelve

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[1] *See, e.g.*, *Unofficial 2015 Primary Results*, New Jersey Department of State (2015), http://www.state.nj.us/state/elections/2015-results/unofficial-2015-primary-results-nj-general-assembly-0609.pdf

[2] 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).

(11/12) U.S. House Districts and thirty-three out of forty (33/40) State Senate Districts have been non-competitive since their districts were redrawn in 2011.[3]

2. District Court Proceedings

On March 5, 2014, Petitioners filed a Complaint for Violation of Civil Rights Under 42 U.S.C. § 1983 and the United States Constitution (hereinafter "Complaint"). As the Complaint addressed violations of federal law, the District Court had jurisdiction under 28 U.S.C. § 1331.

The Complaint's grievances concerned the State's violation of the fundamental rights of individual Petitioners, including the right to vote, the right of association, and the right to equal protection of the laws. U.S. Const. amend. I; U.S. Const. amend. XIV, § 1.

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[3] *Official 2014 General Election Results U.S. House*, New Jersey Department of State (2014), http://nj.gov/state/elections/2014-results/2014-official-general-results-us-house.pdf ; *Official 2012 General Election Results U.S. House*, New Jersey Department of State (2012), http://nj.gov/state/elections/2012-results/2012-official-general-results-house-of-representatives.pdf; *Official 2013 General Election Results State Senate*, New Jersey Department of State (2013), http://nj.gov/state/elections/2013-results/2013-official-general-election-results-state-senate.pdf; *Official 2011 General Election Results State Senate*, New Jersey Department of State (2011), http://www.nj.gov/state/elections/election-results/2011-official-gen-elect-state-senate-results-121411.pdf

On May 9, 2014, Respondent filed a Motion to Dismiss Pursuant to 12(b)(6) and a Brief in Support of that motion (hereinafter together the "Motion to Dismiss"). The Motion to Dismiss asserted that Petitioners failed to state a claim upon which relief could be granted, alleging that the issues involved in this matter have been decided in previous cases and that there is no fundamental right to vote in primary elections.

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

On August 14, 2014, District Judge Stanley R. Chesler entered an opinion and order granting Respondent's motion to dismiss with prejudice. Petitioners' federal claims were dismissed for failure to state a claim. Judge Chesler held that *Jones*, 530 U.S. at 583, applied to the case, asserting that Petitioners sought to participate in the closed primaries of political parties.

3. Appellate court proceedings

On September 9, 2014, Petitioners timely filed a notice of appeal from the District Court's order dismissing the Complaint. Oral arguments were heard on March 17, 2015. The Third Circuit issued its judgment affirming the District Court's holding on April 8, 2015.

The Third Circuit agreed with the lower court insofar as the court held there is no fundamental right to participate at an integral stage of the public election process. However, the Third Circuit did recognize that voters have a fundamental right to have their votes counted at all integral stages of the election process.

In making this distinction between the right to have one's vote counted and the right to participate in the first instance, the court relied on *Nader v. Schaffer*, a summarily affirmed case balancing the right of an unaffiliated voter to vote in the Republican presidential primary nomination proceedings against the right of a political party not to associate with non-members. 417 F. Supp. 837, 847 (D. Conn. 1976), *summarily aff'd*, 429 U.S. 989 (1976).

In applying that precedent to this case, the Third Circuit held that only "qualified" voters have a fundamental right to cast a vote at all integral stages of the public election process. The Third Circuit held that association with a political party is an

appropriate state qualification on that federally protected fundamental right.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Plenary review in this case is appropriate for two reasons. First, this case raises an issue of growing national importance regarding the fundamental right to vote – an issue that is crucial for this Court to resolve before the next national elections in 2016. The question of the appropriate standard for reviewing a voter qualification requirement was addressed in *Thornton*, 514 U.S. at 833-34, and is properly before the Court now. Second, the Third Circuit's decision conflicts with decisions of this Court regarding the appropriate standard of review to be applied to cases involving severe burdens on the right to vote. By ruling on the right of political parties to control their nomination proceedings, a right not being challenged in this case, rather than the right at stake in this case – the individual citizen's right to vote – the Third Circuit improperly applied a minimal standard of review.

I. Given significant ongoing litigation concerning the conflict between the rights of individual voters to participate in primary elections and the rights of political parties to conduct their private nomination proceedings, the question presented by this case should be decided now.

This case is of great importance for several reasons, the most prominent of which concerns state-

created conflicts between the rights of political parties and the rights of voters. This has led to a growing confusion over the way in which this conflict is resolved in courts throughout this country. As a consequence, the constitutionality of both open and closed primaries is being challenged and resolved inconsistently across the United States.

For example, there has been significant litigation in Idaho, South Carolina, Hawaii, Montana, and Utah,[4] as well as an increasing number of voter initiative efforts concerning the way

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[4] The Idaho Republican Party commenced litigation that overturned the State's open primary, which allowed all voters to vote in the party primary of their choice without a requirement for prior registration into that party. *Idaho Republican Party v. Ysursa*, 765 F. Supp. 2d 1266, 1268 (D. Idaho 2011), *Idaho Republican Party v. Ysursa*, 2011 U.S. App. LEXIS 26646 (9th Cir. Idaho Sept. 19, 2011) *vacating as moot*. Similar challenges were rejected in South Carolina and Hawaii. *Democratic Party v. Nago*, 982 F. Supp. 2d 1166, 1183 (D. Haw. 2013); *Greenville County Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 672 (D.S.C. 2011), *aff'd Greenville County Republican Party Exec. Comm. v. Greenville County Election Comm'n*, 2015 U.S. App. LEXIS 4210 (4th Cir. S.C. Mar. 17, 2015). In Hawaii, the State Democratic Party has appealed. In Montana, the State's open primary is being challenged in ongoing litigation. *See Rapavalli County Republican Central Comm., et al. v. McCulloch, et al.*, 6:14-cv-0058, U.S.D.C. Montana. In Utah, primary reforms were recently passed via initiative process in Senate Bill 54. There is an ongoing legal challenge to the new nominating methods, which will use convention and direct primaries instead of caucuses, and will allow unaffiliated voters to participate in primary elections. *See Utah Republican Party v. Herbert et al.*, 2:14-cv-00876, D. Utah.

our electoral process is conducted. [5] Despite recognition by this Court that the right to a meaningful vote includes the right to vote at all integral stages of the election process, courts throughout the nation are struggling with the application of this precedent within the constructs of partisan primary election systems, which are often the most meaningful, if not the only meaningful, stage of the election process. *See United States v. Classic*, 313 U.S. 299, 318 (1941).

In fact, the obfuscation of the conflict between the private right of political parties to control their nomination proceedings and the right of individual voters to participate at integral stages of the election is so embedded in Court precedents that the State of New Jersey has relied on precedent concerning the rights of political parties that are not even at stake in this case. The only rights at stake in this case are: the right of individual voters to participate equally and meaningfully with other voters, the right of individual voters not to associate with ideological

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[5] In Oregon and Arizona, initiative efforts to enact a top-two nonpartisan election system like that adopted by voters in California and Washington have failed. Evan Wyloge, *Failed Top-Two Primary Measure Had Most Support Among Independent Voters*, Arizona Center for Investigative Reporting (2014) http://azcir.org/failed-top-two-primary-measure-had-most-support-among-independent-voters/; Richard A. Clucas, *The Oregon Constitution and the Quest for Party Reform*, 87 Or. L. Rev. 1061 (2008), available at http://law.uoregon.edu/org/olrold/archives/87/Clucas.pdf.

political organizations, and the right of a state to regulate its election process.[6]

As noted by Justice Scalia in this Court's opinion in *Jones*, there is no inherent conflict between the rights of voters and the associational rights of political parties. Any conflict between the rights of these two stakeholders only exists by a state having created the conflict.[7] In *Jones*, the State of California created a primary election that forced political parties to associate with non-members. And, in that case, this Court applied strict scrutiny in considering the Democratic Party's defense of its right not to associate.[8]

In this case, the State of New Jersey created the conflict between the rights of voters and the rights of political parties by establishing a primary

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[6] The current state of legal uncertainty additionally compromises a state's ability and right to administer a stable election process. This is because any traditional partisan election process can be, and has been, challenged by costly and time-consuming litigation by the various stakeholders.

[7] In holding California's blanket partisan open primary unconstitutional, this Court held that, "[r]espondents' legitimate state interests and petitioners' First Amendment rights are not inherently incompatible. To the extent they are in this case, the State of California has made them so by forcing political parties to associate with those who do not share their beliefs." *Jones*, 530 U.S. at 586.

[8] "We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest." *Id.* at 582.

election system that forces voters to associate with one of two political parties as a condition of full participation. The lower court, however, applied a rational basis standard of scrutiny to a claim concerning the same fundamental right that was at stake in *Jones*. In doing so, ironically, the lower court actually compromises the rights of political parties for two reasons: (1) because a party's right of association itself derives from the individual rights of its members;[9] and, (2) because there is a logical inconsistency in holding that forced association is unconstitutional in California but constitutionally required in New Jersey.[10]

As more and more cases concerning the right of individual voters to participate in the election process are brought to courts throughout the country - particularly those cases concerning the constitutionality of open and closed primaries - the need for this Court to clearly articulate standards of scrutiny that should be applied to each particular right at stake in these cases becomes increasingly

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[9] *See infra*, notes 11, 13.

[10] "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties." *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957), *see also*, *infra* Note 12.

important. Otherwise, this great conflict between fundamental rights cannot be resolved consistently.

Therefore, this Petition for Writ of Certiorari should be granted.

II. The Third Circuit's decision conflicts with decisions of this Court requiring strict scrutiny review of laws that burden fundamental rights.

Fundamental rights, by their very nature, are nonpartisan rights.[11] Yet, in the present case, the State of New Jersey and the Third Circuit have advanced a line of reasoning which has never been accepted by this Court or any other: that a citizen of the United States of America must join a political party to qualify for the fundamental right to vote at an integral stage of the election process. In doing so, the Third Circuit cited to cases out of context and created a new precedent that is in direct conflict with this Court's longstanding jurisprudence.

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[11] *See AZ State Legis. v. AZ Indep. Redistricting Comm'n, et al.*, 576 U.S. ___ (2015), slip op at p. 35 ("Both parts of the Elections Clause are in line with the fundamental premise that all political power flows from the people.") (citing *McCulloch v. Maryland*, 17 U.S. 316, 404-405 (1819) ("The government of the Union, then (whatever may be the influence of this fact on the case), is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.")); *cf. Thornton*, 514 U.S. at 844 (1995) (Concurring, Kennedy) ("[T]he federal right to vote…do[es] not derive from the state power in the first instance but that belong to the voter in his or her capacity as a citizen of the United States.")

The Third Circuit improperly applied rational basis review to a case that concerns the federally protected fundamental right to vote at an integral stage of the public election process as well as an individual's fundamental right of non-association, a case that demands strict scrutiny. The court did so by misapplying summarily affirmed case law concerning the rights of political parties to control their nomination proceedings. In doing so, the Third Circuit has, perhaps inadvertently, held that forced association with a political party is an acceptable qualification on a citizen's right to vote. To avoid this outcome, the United States Supreme Court needs to reconsider this case within its proper context.

Should the case stand, nearly half of New Jersey's otherwise qualified voters will be forced to affiliate with a political party in order to participate equally in the public election process. Such a holding would suggest that voters must choose between their fundamental right to vote and their fundamental right to not associate with an ideological organization.[12] It also effectively dilutes the voting power of individual voters relative to the voting power of political parties and their members, in conflict with this Court's "one person, one vote" standard.

Of note, no political party is a defendant in this case. Further, Petitioners have never challenged

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[12] *Cf. Jones*, 530 U.S. at 574 ("[A] corollary of the right to associate is the right not to associate.")

a political party's private right to determine whether or not the party allows nonmembers to participate in its nomination proceedings. In fact, Petitioners have not even challenged the partisan nature of New Jersey's primary election process. Yet, the Third Circuit holding relies on precedent related to the protection of the private rights of political parties.

Therefore, the Third Circuit has sanctioned the privatization of the public election process by misappropriating the private interests of political parties as legitimate public interests of the State of New Jersey. Such a transposition creates a serious conflict with several longstanding precedents of this Court.

A. The decision below conflicts with *Classic* and its progeny, which have held that all citizens of the United States have a fundamental right to cast a vote and have it counted at all integral stages of the election process.

This Court in *Classic,* 313 U.S. at 318-19, held that, when a state law makes the primary an integral part of the election process, or when the primary effectively controls the choice, the right to vote "is protected just as is the right to vote at the election." The lower court decision, however, holds that the right to vote in a primary may be qualified by a state in a manner that would be unacceptable if applied during the general election.

The Third Circuit distinguishes the holding in *Classic* from this case by dividing the right to vote into two parts: (1) the right to cast a vote, and (2) the right to have one's vote counted. In doing so, the lower court held that:

> *Classic* did not expound on who was 'qualified,' and instead left that distinction up to Louisiana law… Fairly read, *Classic* speaks to the constitutional protections that inure to qualified primary voters, but it is completely silent as to who is qualified. It is, therefore, of no help to the Appellants' argument.

App. 9a.

Such a holding, which cites to no authority other than the district court's decision below, is absurd. No court would suggest that a state could require party affiliation as a legitimate qualification of a voter's right to participate in the general election. Yet, the lower court goes so far as to suggest that some voters have a fundamental right to cast a vote that other voters don't have at all. In effect, the ruling catapults a state-granted right of political parties and their members to control their nomination proceedings ahead of the fundamental right of individual voters to choose their representatives.[13] Accepting this interpretation of

[13] This is an ironic holding considering this Court has recognized that political parties only have rights because they

Classic would deprive this seminal case of its constitutional significance.

In its proper context, *Classic* concerned whether congressional authority to regulate the election process extends to primary elections. In that case, this Court held:

> 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…
>
> Unless the constitutional protection of the integrity of 'elections' extends to primary elections, Congress is left powerless to effect the constitutional purpose, and the popular choice of representatives is stripped of its constitutional protection.

Classic, 313 U.S. at 319.

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are composed of individuals with said rights. *See*, *e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997) ("The First Amendment protects the rights of citizens to associate and to form political parties…[a]s a result, political parties' government, structure, and activities enjoy constitutional protection.")

Granted, the specific injury asserted in *Classic* concerned the right to have one's vote counted rather than the right to put a ballot in the box. But this Court has rejected the notion that judicial inquiries should make a distinction between the two. In fact, this Court has continuously recognized that *Classic* itself stands for the protection of the right to voter participation generally, not merely to have one's vote counted. *See, e.g.*, *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969) ("All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgment of the right to vote." (citing *Classic*, 313 U.S. at 314-18)); *Oregon v. Mitchell*, 400 U.S. 112, 149 (1970) ("The right to vote for national officers is a privilege and immunity of national citizenship." (citing *Classic*, 313 U.S. at 315)).

More fairly read, therefore, *Classic* stands for the proposition that all voters, regardless of party affiliation, have a fundamental right to vote *and* have that vote counted at integral stages of a state's election process.[14] Without such a right, the popular choice of representatives would be stripped of its constitutional protection. This Court in *Gray*, 372 U.S. at 380 articulated this understanding specifically:

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[14] "The right to participate in the choice of representatives for Congress includes, as we have said, the right to cast a ballot and to have it counted[.] 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[.]" *Classic*, 323 U.S. at 318.

> As stated in *United States v. Mosley*, 238 U.S. 383, 386, 'the right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.' It can be protected from the diluting effect of illegal ballots. And these rights must be recognized in any preliminary election that in fact determines the true weight a vote will have.

(citing *Ex parte Siebold*, 100 U.S. 371 (1880); *United States v. Saylor*, 322 U.S. 385 (1944); *Classic*, 313 U.S. at 299; *Smith v. Allwright*, 321 U.S. 649 (1944)).

In suggesting that the right to vote be treated differently in this case, the lower court is silent to the fact that the "one person, one vote" standard itself was first articulated in a case that concerned a state's primary election process. *See Gray*, 372 U.S. at 381. [15] In *Gray*, this Court held that mal-apportionment, though practiced in every state, affecting voters of every class, and relating to the weight of each individual voter's vote in a primary election, was unconstitutional under the Equal Protection Clause. *Id*. at 370. In doing so, this Court recognized the individual nature of the fundamental right to vote at all integral stages of the election process. To suggest that a state can impose a qualification on that right (especially one that

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[15] Importantly, *Gray* demonstrates further *Classic*'s importance in understanding the right to vote. *See id*. at 382 (Stewart, concurring) ("[T]here can be room for but a single constitutional rule – one voter, one vote." (citing *Classic*, 313 U.S. at 299)).

requires a voter to give up his or her right to not associate with a political organization he or she does not agree with) is, therefore, to deny the federally protected right altogether.

Not only has this Court consistently guaranteed the right to participate at all integral stages of the public election process, it has gone so far as to guarantee the right of participation in a particular party's nomination proceedings when such a proceeding is the only meaningful avenue of participation.[16] Petitioners, however, do not ask this Court to go that far. Rather, Petitioners ask this Court to simply reassert that "[t]he concept of political equality in the voting booth… extends to all phases of state elections… The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote." *Gray*, 372 U.S. at 380-381.[17]

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[16] In *Allwright*, 321 U.S. at 661-62, for example, the Court held that a state could not allow the Democratic Party to exclude black voters from its nomination proceedings because "[t]he right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution."(citations omitted).

[17] Further, this Court recognized that "one person, one vote" requires "each citizen have an *equally effective* voice in…election[s]." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (emphasis added).

The State of New Jersey, however, has created an election process that treats major party members differently than unaffiliated voters. Therefore, New Jersey's voter qualification should be held to the same standard of scrutiny that would apply to a general election because, "[w]hen, as here, primaries become a part of the machinery for choosing officials, state and federal, the same tests to determine the character of discrimination or abridgment should be applied to the primary as are applied to the general election." *Allwright*, 321 U.S. at 650.

Because the State of New Jersey has "qualified" the federally protected fundamental right to vote by a imposing a burdensome requirement on its voters – mandatory association with one of two particular political parties – the lower court's decision is in direct conflict with longstanding precedent and this Petition for Writ of Certiorari should be granted.

B. The lower court, in its reliance on *Nader*, applied the wrong standard of scrutiny, and, as a consequence, creates an unnecessarily irreconcilable conflict between the rights of voters, the rights of political parties, and this Court's precedent.

Petitioners assert their fundamental right to participate in all integral stages of the State's public election process. Petitioners do not claim any "right" to vote in a party's candidate nomination proceedings nor have Petitioners even suggested that the partisan nature of primary elections is inherently unconstitutional.

However, in relying on *Nader,* the lower court held that, "[w]hile 'a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction,' no court has ever held that that right guarantees participation in primary elections." App. 8a (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). Therefore, New Jersey could "'legislat[e] to protect the party from intrusion by those with adverse political principles,' during the candidate selection process." App. 11a (citing *Nader*, 417 F. Supp. at 837).

The lower court erred in its reliance on *Nader* because, unlike the voter in *Nader* who sought to intrude upon the Republican Party's nomination proceedings, the Petitioners in this case merely assert their right to vote at an integral stage of the state's election process. That New Jersey has created an integral stage of the election process for the exclusive benefit of two particular political parties does not make its impact on federally protected fundamental rights any less burdensome, nor does it make the election process constitutional.

In *Nader*, the Plaintiff claimed that he had a "right" to vote in a particular party's primary nomination proceedings. [18] Because of the claim

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[18] "[T]he statute's constitutionality was upheld by a three-judge District Court against a challenge by an independent voter who sought a declaration of *his right to vote in the Republican primary*." *Tashjian v. Republican Party*, 479

asserted by the Plaintiff in that case, the political party's private right of non-association came into conflict with the Plaintiff's asserted interests. But, Petitioners have not asserted a right to vote in a party nomination proceeding, and, as a consequence, the political parties are not litigants in this case.

Instead, the State of New Jersey has cited to *Nader* out of context, and, in doing so, has attempted to represent the political parties' interests in its party nomination proceedings as justification for its exclusionary public election process. In accepting the State's position, the lower court mistakenly suggested that, "[Petitioners] argue instead that, in order to protect their fundamental right to meaningfully participate at all stages of an election, we force New Jersey to abolish the closed primary election scheme altogether." App. 5a. Moreover, the litigation since *Nader* has sharpened the distinction between the right of parties to exclude non-members from their nominating process and the right of voters to full and equal participation.[19] It is necessary, therefore, to clarify the reach of the *Nader* decision.

U.S. 208, 212 (1986) (emphasis added) (citing *Nader*, 417 F. Supp. at 837)).

[19] *See, e.g.*, *Jones,* 530 U.S. at 582, (2000) (holding that a state cannot limit the right of non-association during its primary election process without meeting strict scrutiny), *Clingman v. Beaver,* 544 U.S. 581, 591-92 (2005) (holding that a political party does not have a fundamental right to affiliate with non-members), and *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 452-53 (2008) (holding that a primary election need not provide political parties with a private forum to select their nominees).

Most simply, Petitioners have never asserted a right to vote in either the Democratic or Republican Party primaries. Rather, Petitioners challenge a state election process that conditions full and equal participation on party affiliation. In fact, Petitioners specifically suggested that if New Jersey simply conducts an "other" primary in which a voter not affiliated with a political party may participate, the State's election process might pass constitutional muster. Appellant Br. at 12. Petitioners have further suggested that the State of New Jersey may implement any number of election systems[20] that do not unconstitutionally infringe on the fundamental right to vote.[21] Therefore, this Court should consider the fundamental right that is actually at stake: the

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[20] Election systems such as "Top-Two," "Ranked Choice," "Instant Runoff," "Approval Voting," and "Proportional Representation," have been offered as potential alternatives. *Id.*; *see also*, Stina Larserud, *Electoral Systems Index,* Ace Project (March 19, 2014) http://aceproject.org/ace-en/topics/es/topic_index

[21] States including California and Washington have implemented nonpartisan "Top-Two" primary elections. These nonpartisan primaries have not obstructed the ability of those states to hold orderly elections, have not resulted in voter confusion, and have not violated the associational rights of political parties and their members. This Court has upheld their constitutionality: "The [Washington nonpartisan primary] law never refers to the candidates as nominees of any party, nor does it treat them as such. To the contrary, the election regulations specifically provide that the primary does not serve to determine the nominees of a political party but serves to winnow the number of candidates to a final list of two for the general election." *Wash. State Grange*, 552 U.S. at 453 (internal quotations omitted).

right of an individual citizen to have an equally meaningful vote in the State's election process.

When read in this context, *Jones* holds that when the fundamental right to associate is burdened by a state's regulation of its election process, the state regulation must meet strict constitutional scrutiny. Notably, the State of New Jersey cited extensively to *Jones* for the proposition that political parties have a fundamental right to not associate with nonmembers. However, the case is absent from the Third Circuit's opinion altogether. Perhaps this is because the lower court could not resolve the conflict between *Jones*, a case that prohibited a state from creating an election process that infringes on a political party's fundamental right of non-association, and its decision that the State of New Jersey can force otherwise qualified voters to associate with a political party as a condition of full meaningful participation in the election process.

Further, the Third Circuit opinion mistakenly suggested that, "[Petitioners] identify no other precedent [than *Classic*] that even arguably suggest[s] that voters have a constitutional right to unqualified participation in primary elections." App. 10a. However, Petitioners cited to several cases in their appellate briefs[22] and even discussed *Gray v.*

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[22] *See, e.g.*, Appellant Br. at 20-22, 28, 35 (citing *Reynolds*, 377 U.S. at 568; *Thornton*, 514 U.S. at 844; *Terry v. Adams*, 345 U.S. 461, 466 (1944); *Allwright*, 321 U.S. at 663-64; *Gray*, 372 U.S. at 380)

Sanders specifically in oral argument.[23] Perhaps the Third Circuit avoided addressing *Gray*, for example, because it could not resolve the conflict between a precedent that prohibits a state from diluting the power of one voter's vote relative to another, and its holding in this case that suggests that members of two particular political parties have a fundamental right to vote that other voters do not.

Most simply, the case at bar concerns the State of New Jersey's regulation of its electoral process in a manner that severely burdens the fundamental right of every voter to have the power of his or her vote equal to every other voter, unqualified by forced association with a political party.

Because the Third Circuit relied on *Nader* out of context, the court applied a lower standard to a case that demands strict scrutiny. As a result, the decision comes into conflict with longstanding precedent of this Court. Therefore, this Petition for Writ of Certiorari should be granted.

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[23] "What we want is a declaration that the closed primary does not follow the 'one person, one vote' standard that was first articulated in a case about primary elections. That 'one person, one vote' standard came from *Gray v. Sanders*." Oral Argument at 25:37 *Balsam v. Guadagno*, available at http://www2.ca3.uscourts.gov/oralargument/audio/14-3882BalsamvSecretaryofStateofNJ.wma.

C. The Third Circuit decision conflicts with decisions of this Court that prevent a state from imposing arbitrary or capricious voter qualifications.

The lower court failed to consider whether party affiliation was related to voter qualification. Rather, the lower court accepted the notion that, because party affiliation was sufficiently related to the state's purported interest in preventing nonmembers from participating in a particular party's nomination proceedings, the voter qualification requirement was constitutionally permissible as applied to the State's entire primary election process:

> [I]n keeping with *Nader*, that the burden, if any, imposed on the Appellants' First Amendment and Fourteenth Amendment rights is outweighed and constitutionally justified by the interests identified by New Jersey in this case. See *Answering Br. at 15*. ('[T]he State has a legitimate interest in protecting the overall integrity of the … electoral process as well as the associational rights of political associations, maintaining ballot integrity, avoiding voter confusion, and ensuring electoral fairness.').

App. 12a (emphasis added).

Nader, however, should not be cited for its precedential value in a case that concerns voter qualifications generally. In *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), for example, this Court articulated a balancing test whereby, "[a] court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

In that regard, the State of New Jersey has not offered a single argument as to its state interest in defending its voter qualification requirement. Instead, the State merely asserts that it has state interests without any further discussion of how those interests would be compromised by a ruling in Petitioner's favor. For example, Respondent invoked "preserving the parties as viable and identifiable interest groups"; the right of a state to "favor the traditional two party system"; "assuring intra party competition is resolved in a democratic fashion"; and, "protecting the overall integrity of the historic election process". Appellee Br. at 8, 12. The State's assertion of these interests has been either comatose or Machiavellian.

Not once has Appellee explained how the current system assists the state in protecting these interests, or how Appellants' challenge would compromise them. Instead, the State suggested in oral argument that "democracy isn't easy" and that "the Democratic and Republican parties I guess through the decades or the centuries or whatever... you know you have to do the hard work…" [24] In other words, the State has overtly asserted that two particular political parties have earned a privileged status with the State and, therefore, the State has an interest in making it harder for other voters to participate.

This Court has already rejected such an argument. As this Court held in *Williams v. Rhodes* when it struck down Ohio's restrictive ballot access requirements on the grounds that they violated the equal protection rights of third parties:

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

[24] Oral Argument, *Balsam v. Guadagno.* at 23:18

> our electoral process and of the First Amendment freedoms.

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

Similarly, in this case, the State cannot favor two particular parties in the competition of ideas and governmental policies at the core of our electoral process. As a practical matter, at a time when the President of the United States has suggested that the increasingly disaffected voters be forced to vote, it is ironic that the State of New Jersey suggests that it has a legitimate interest in making democracy more difficult. As a legal matter, whatever the State of New Jersey's interest is in protecting the state-granted private rights of political parties over that federally protected public rights of its voters, that interest cannot meet proper constitutional scrutiny.

In *Thornton*, 514 U.S. at 834, the Supreme Court addressed the limitations of state-imposed voter qualifications:

> The Elections Clause gives States authority 'to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.' However, 'the power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights.' States are thus entitled to adopt 'generally applicable and evenhanded

> restrictions that protect the integrity and reliability of the electoral process itself.'

(quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *Tashjian.*, 479 U.S. at 217; *Anderson*, 460 U.S. at 788, n. 9)

In this case, however, the State of New Jersey defends a qualification process that provides two particular parties and their members exclusive access to an integral stage of the election process. This rationale can hardly be considered an evenhanded restriction on the electoral process itself. Further, the rights of political parties and the rights of voters are not necessarily conflicted.

When the individual right to vote is considered, this Court has traditionally given great weight to a citizen's right to a vote free of arbitrary impairment by a state. *See Baker v. Carr*, 369 U.S 186, 208 (1962). For example, qualifications which infringe or hinder fundamental rights still cannot stand without proper scrutiny. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). "[E]ven rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications." *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008). When poll taxes were prevalent, for example, the Supreme Court recognized that, "the right to vote is too precious, too fundamental to be so burdened or conditioned." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

The Court in *Harper* reasoned that, "[t]o introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of discrimination is irrelevant." *Id*. at 668. Yet the State of New Jersey has made no attempt to explain the connection between its voter qualification requirement and a voter's capacity to vote. This is because, perhaps, membership with a major political party is a capricious and irrelevant factor in measuring a voter's qualification.

Moreover, this Court has supposed that, "[n]o one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote." *Wesberry v. Sanders*, 376 U.S. 1, 19 (1964). Unfortunately, the State of New Jersey would prove this Court wrong. In defending an election process that gives two political parties and their members exclusive access to an integral stage of its election process on a motion to dismiss, the State of New Jersey denies that the Equal Protection Clause even applies.

This case is critical to the very foundation of our system of representation because, "[c]onstitutional rights would be of little value if they could be indirectly denied." *Dunn*, 405 U.S. at 341 (quoting *Harman v. Forssenius*, 380 U.S. 528, 540 (1965)). "Essential to the survival and to the growth of our national government is its power to fill its elective offices and to insure that the officials who fill

those offices are as responsive as possible to the will of the people whom they represent." *Mitchell*, 400 U.S. at 134.

Today, however, the State of New Jersey affords some citizens (major party members) a right to vote at an integral stage of the election that is not afforded to other citizens (non-major party members). In effect, acceptance of the lower court's decision would accept the notion that the officials who fill our government offices represent political parties and not people. This is an un-American notion and one that "We the People" have flatly rejected since the time this country was founded.

No right could be of more value than the individual and fundamental right to vote. As recognized by early Supreme Court precedent, "[voting] is regarded as a fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Therefore, the Supreme Court must weigh the great character and magnitude of the injury asserted by Petitioner against the precise interests the State of New Jersey has in the qualification requirement it defends.

Because the lower court did not properly consider the great weight and magnitude of the fundamental right asserted by Petitioners, the Petition for Writ of Certiorari should be granted.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari be granted.

Dated: July 7, 2015

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-3882
MARK BALSAM, et al,
PLAINTIFFS-APPELLANTS

v.

SECRETARY OF THE STATE OF NEW JERSEY,
DEFENDANT-APPELLEE

Filed: Sep. 9, 2014

OPINION[*]

Before: SMITH, JORDAN, and VAN ANTWERPEN, Circuit Judges.

JORDAN, Circuit Judge.

The Appellants challenge an order of the United States District Court for the District of New Jersey dismissing their complaint. We will affirm.

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[*] This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

I. Background
A. New Jersey's Closed Primary Election System

New Jersey has created a comprehensive statutory scheme to govern elections in the state. See N.J. Stat. Ann. §§ 19:1-1 to 19:63-28. A "general" election is held on the first Tuesday after the first Monday in November, at which time voters "elect persons to fill public office." *Id*. at§ 19:1-1. There are two ways in which a candidate can secure a place on the ballot for a general election. The first is to be nominated by a political party in a primary election; the second is to submit a petition with the requisite number of signatures.

Under the first option, "members of a political party ... nominate candidates" in the month of June "to be voted for at general elections." *Id*. at §§ 19:1-1 and 19:2-1. New Jersey law defines a "political party" as any party that garners at least ten percent of the votes cast in the last general election for the office of a member of the General Assembly. *Id*. at § 19:1-1. To appear on a primary election ballot, a candidate must file a nominating petition accompanied by the requisite number of signatures at least sixty-four days before the primary election. *Id*. at §§ 19:23-8 and 19:23-14. To be eligible to vote in a political party's primary election, a voter must be deemed a member of that party at least fifty-five days before the election, unless the voter is newly registered or the voter has not previously voted in a primary

election. *Id*. at § 19:23-45. The state bears the cost of conducting primary elections. *Id*. at § 19:45-1.

Under the second option, candidates unaffiliated with a political party may "bypass the primary election and proceed directly to the general election" upon submission of a petition bearing the necessary number of signatures. *Council of Alt. Political Parties v. Hooks*, 179 F.3d 64, 69 (3d Cir. 1999); see also N.J. Stat. Ann. §§ 19:13-3 to 19:13-13.

B. The Appellants' Complaint

Appellants Mark Balsam, Charles Donahue, Hans Henkes, and Rebecca Feldman are registered as unaffiliated voters, which means that they were not permitted to vote in New Jersey's 2013 primary election because they "exercis[ed] their right not to affiliate with either the Democratic or Republican parties." (Opening Br. at 10.) Appellant Jaime Martinez is a registered Democrat, and Appellants William Conger and Tia Williams are registered Republicans; each of whom was, as the Appellants put it, "required to forfeit their right of non-association in order to exercise their right to vote in the 2013 Primary Election." (Opening Br. at 11.) Appellants Independent Voter Project and Committee for a Unified Independent Party, Inc., "seek to protect the rights of all voters to cast a meaningful vote." (Opening Br. at 11.)

Appellants filed this lawsuit against Kim Guadagno in her official capacity as New Jersey's

Secretary of State, alleging violations of (1) 42 U.S.C. § 1983; (2) the New Jersey Civil Rights Act, N.J. Stat. Ann. § 10:6-2(c); (3) the First and Fourteenth Amendments of the United States Constitution; and (4) Article II, Section I and Article VIII, Section III of the New Jersey Constitution. In their complaint, the Appellants sought three forms of relief: (1) an order declaring the state's primary election scheme unconstitutional on its face and as applied; (2) an injunction restraining the state from funding and administering its current primary election scheme; and (3) an order directing the state legislature or Secretary of State to implement a different primary election scheme, in keeping with the Appellants' views of the United States Constitution.

C. Procedural History

Guadagno filed a motion to dismiss, which the District Court granted. The Court held that "[a]ny attempt to use the Constitution to pry open a state-sanctioned closed primary system is precluded by current Supreme Court doctrine." (App. at 6.) In addition, the Court reasoned that the Appellants' state law claims had to be dismissed as being barred by the Eleventh Amendment. This timely appeal followed.

II. Discussion[25]

As acknowledged by the Appellants at oral argument, their main argument boils down to the following syllogism: (1) all voters in New Jersey, regardless of party affiliation, have a constitutional right to participate at each stage of the electoral process that materially impacts the outcome of non-presidential elections in the state; (2) New Jersey's closed primary elections materially impact the outcome of non-presidential elections in the state; therefore, (3) all voters in New Jersey, regardless of party affiliation, have a constitutional right to participate in New Jersey's closed primary elections — i.e., the primaries may not be closed. But it appears that the Appellants are aware that controlling precedents preclude us from ordering New Jersey to force political parties to open their primary elections to non-party members. Therefore, the Appellants argue instead that, in order to protect their fundamental right to meaningfully participate at all stages of an election, we force New Jersey to abolish the closed primary election scheme altogether.

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[25] The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review of the District Court's order granting the motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. *United States ex rel. Schumann v. AstraZeneca Pharms. L.P.*, 769 F.3d 837, 845 (3d Cir. 2014); *Rea v. Federated Investors*, 627 F.3d 937, 940 (3d Cir. 2010).

A. Federal Claims

The Appellants rely on First Amendment and Fourteenth Amendment theories to support their federal claims. They contend that New Jersey's primary election system violates the First Amendment because it burdens their associational rights by "requir[ing] that a voter 'qualify' for the right to vote in the Primary Election by joining a political party." (Opening Br. at 36.) They further argue that it violates their Fourteenth Amendment right to equal protection of the law because it is inconsistent with the "one person, one vote" standard articulated in *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). See id. at 566 ("[T]he Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."). According to the Appellants, the state's system creates two classes of voters: "(1) major party members who enjoy full participation in both the Primary Election and the general election; and (2) voters who, by reason of choosing not to associate with one of the dominant political parties, are allowed only limited participation in the general election." (Opening Br. at 35.) As a result, they say, the latter class's Fourteenth Amendment rights are violated because, "[w]ithout equality of the right to vote within all integral stages of the process, there is essential[ly] no meaningful right to vote at all." (Opening Br. at 34-35.) Their position, however, is untenable.

States possess a "'broad power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," [U.S. Const.] Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices.'" *Clingman v. Beaver*, 544 U.S. 581, 586, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005) (quoting *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986)). That power is not absolute, but is "subject to the limitation that [it] may not be exercised in a way that violates ... specific provisions of the Constitution." *Williams v. Rhodes*, 393 U.S. 23, 29, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968). In particular, New Jersey has a "'responsibility to observe the limits established by the First Amendment rights of [its] citizens,'" including the freedom of political association or, in this case, non-association. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) (quoting *Tashjian*, 479 U.S. at 217). Election regulations that impose a severe burden on associational rights are subject to strict scrutiny and may be upheld only if they are "narrowly tailored to serve a compelling state interest." *Clingman*, 544 U.S. at 586. If a statute imposes only modest burdens, however, then "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions" on election procedures. *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983). Accordingly, the Supreme Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity

at the polls." *Burdick v. Takushi*, 504 U.S. 428, 438, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

While "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972), no court has ever held that that right guarantees participation in primary elections. The Appellants nevertheless rely on *United States v. Classic*, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941), as authority for their argument that voters have a constitutional right to participate in primary elections. Their reliance is misplaced. In Classic, the federal government prosecuted certain Louisiana state elections commissioners for allegedly falsifying ballots in a Democratic primary election for the House of Representatives. The Supreme Court held that the Constitution gives Congress the power to regulate intraparty primaries through the criminal code and secures the right to have one's "vote counted in both the general election and in the primary election, where the latter is a part of the election machinery." *Id.* at 322.

In answering the question presented to it, the Court in *Classic* presupposed that the right it recognized only applied to voters who were "qualified" to cast votes in Louisiana's Democratic primary. *Id.* at 307 (stating that one of the "questions for decision [is] whether the right of qualified voters to vote in the Louisiana primary and to have their ballots counted is a right 'secured ... by

the Constitution' within the meaning of ... the Criminal Code" (second alteration in original)). But *Classic* did not expound on who was "qualified," and instead left that distinction up to Louisiana law. *See id*. at 311 ("Pursuant to the authority given by [§] 2 of Article I of the Constitution ... the states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress."). Fairly read, *Classic* speaks to the constitutional protections that inure to qualified primary voters, but it is completely silent as to who is qualified. It is, therefore, of no help to the Appellants' argument.

The Appellants also quote *Friedland v. State*, 149 N.J. Super. 483, 374 A.2d 60, 63 (N.J. Super. Ct. Law Div. 1977), for the proposition that "courts have held that the right to vote in the Primary Election is 'as protected as voting in a general election.'" (Opening Br. at 20.) As noted by the District Court, however, the Appellants' citation to *Friedland* is "puzzling." (App. at 10.) *Friedland* rejected an attack on New Jersey's primary election system that is similar to the one mounted by the Appellants in this case. See *Friedland*, 374 A.2d at 63-67 (dismissing complaint that contended New Jersey's primary election law violates the First and Fourteenth Amendments, "in that it deprives [plaintiffs] of their right to vote and to affiliate with political parties of their own choice and denies them equal protection"). When read in context, the language that the Appellants have lifted from *Friedland* does not advance their argument.

The Appellants identify no other precedent even arguably suggesting that voters have a constitutional right to unqualified participation in primary elections. There is, however, relevant precedent that cogently rebuts their position. In *Nader v. Schaffer*, the Supreme Court summarily affirmed a decision upholding Connecticut's closed primary election system, a system which, in broad strokes, looks like New Jersey's. 417 F. Supp. 837 (D. Conn.) (three-judge panel), *aff'd*, 429 U.S. 989, 97 S. Ct. 516, 50 L. Ed. 2d 602 (1976) (mem.). The *Nader* plaintiffs were registered voters who refused to enroll in a political party. *Id*. at 840. As a result of that choice, they were prohibited from voting in Connecticut's closed primary elections. *Id*. They argued that Connecticut's closed primary election system violated their constitutional rights in the following ways: (1) it violated their Fourteenth Amendment right to equal protection by denying them the right to participate in primary elections while extending that right to enrolled party members; (2) it violated their First Amendment associational rights by compelling them to either enroll in a political party or forgo the right to vote in a primary; and (3) it violated their right to vote, as guaranteed by Article I, Section 2, cl. 1 and the Fourteenth and Seventeenth Amendments, by preventing them from participating in an "'integral part'" — namely the primary elections — "'of the process by which their United States Senators and Representatives are chosen.'" *Id*. The *Nader* plaintiffs argued that participation in a primary election was an exercise of their constitutionally

protected rights to vote and associate (or not associate) with others in support of a candidate. *Id.* at 842. They further asserted that they wished to exercise both of those rights but that Connecticut's closed primary election scheme limited them to one or the other; that is, in order to vote in a party's primary election, they were wrongly forced to enroll in a party. *Id.*

Nader rejected those arguments and struck a balance of competing First Amendment associational rights and Fourteenth Amendment rights that undermines the Appellants' position here. The court in *Nader* concluded that, in order to safeguard the constitutional rights of party members, Connecticut could "legislat[e] to protect the party from intrusion by those with adverse political principles," during the candidate selection process. *Id.* at 845 (internal quotation marks omitted). *Nader* also reasoned that "a state has a more general, but equally legitimate, interest in protecting the overall integrity of [primary elections]," which "includes preserving parties as viable and identifiable interest groups[, and] insuring that the results of primary elections ... accurately reflect the voting of party members." *Id.* Thus, "in order to protect party members from intrusion by those with adverse political principles, and to preserve the integrity of the electoral process, a state legitimately may condition one's participation in a party's nominating process on some showing of loyalty to that party," including party membership. *Id.* at 847 (internal quotation marks omitted).

The reasoning of *Nader* is directly applicable here. The Appellants claim that Nader recognized political parties' associational rights without considering the countervailing rights of individuals who are not members of a political party to not have their vote unconstitutionally diluted. (Opening Br. at 39, 42.) But that is simply incorrect. The court in *Nader* did consider the countervailing rights of individuals who were not members of a political party, and it found that the associational rights of party members and the regulatory interests of the state outweighed those rights. *See* 417 F. Supp. at 844, 845 ("Because the political party is formed for the purpose of engaging in political activities, constitutionally protected associational rights of its members are vitally essential to the candidate selection process. ... The rights of party members may to some extent offset the importance of claimed conflicting rights asserted by persons challenging some aspect of the candidate selection process.").

We conclude, in keeping with *Nader*, that the burden, if any, imposed on the Appellants' First Amendment and Fourteenth Amendment rights is outweighed and constitutionally justified by the interests identified by New Jersey in this case. See Answering Br. at 15 ("[T]he State has a legitimate interest in protecting the overall integrity of the ... electoral process as well as the associational rights of political associations, maintaining ballot integrity, avoiding voter confusion, and ensuring electoral fairness.").

B. State Law Claims

Under the Eleventh Amendment, state officials acting in their official capacity cannot be sued unless Congress specifically abrogates the state's immunity or the state waives its own immunity. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66, 70-71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). The Appellants assert that, because their state law claims are premised on violations of the federal Constitution and seek prospective injunctive relief, the principles of *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), are implicated and the action against Guadagno strips her of her official or representative character and subjects her to the consequences of her individual conduct. Thus, the Appellants argue, this suit is "not really a suit against the state itself" and Eleventh Amendment immunity does not apply. (Opening Br. at 44-45.)

We disagree. Although *Ex Parte Young* held that the Eleventh Amendment does not bar a party from bringing suit for prospective injunctive relief on the basis of federal law, the Supreme Court held in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984), that state officials are immune from suits in federal court based on violations of state law, including suits for prospective injunctive relief under state law, unless the state waives sovereign immunity. *Id.* at 106 ("We conclude that *Young* ... [is] inapplicable in a suit against state officials on the basis of state law."). Moreover, the supplemental jurisdiction statute, 28

U.S.C. § 1367, does not authorize district courts to exercise jurisdiction over claims against non-consenting States. See *Raygor v. Regents of the Univ. of Minnesota*, 534 U.S. 533, 541-42, 122 S. Ct. 999, 152 L. Ed. 2d 27 (2002) ("[W]e hold that § 1367(a)'s grant of jurisdiction does not extend to claims against nonconsenting state defendants.").

The Appellants' attempt to tie their state law claims into their federal claims is unpersuasive. Even assuming that they are correct that violation of the federal Constitution could be used to establish a violation of the state law on which they rely, it is state law that provides the cause of action, if any, and the attendant relief they seek. Therefore, *Ex Parte Young*'s exception to Eleventh Amendment immunity does not apply. In short, because Congress has not abrogated and New Jersey has not waived its sovereign immunity, the Appellants cannot invoke federal jurisdiction over their state law challenge to New Jersey's closed primary election system.

III. Conclusion

For the foregoing reasons, we will affirm the District Court's dismissal of the Appellants' federal and state law claims.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 14-CV-01388-SRC-CLW
MARK BALSAM, et al,
PLAINTIFFS

v.

SECRETARY OF THE STATE OF NEW JERSEY,
DEFENDANT

Filed: March 5, 2014

OPINION AND ORDER

STANLEY R. CHESLER, District Judge.

The Complaint filed in this case challenges the manner in which New Jersey conducts its primary elections, the process by which political parties as defined by New Jersey law choose candidates for a general election. The Complaint raises a number of claims under the federal Constitution and its New Jersey counterpart. Plaintiffs are a collection of individual voters and not-for-profit entities who ask this Court to enter judgment (1) declaring unconstitutional certain laws governing New Jersey's primary elections and the way those

elections are funded, and (2) ordering Defendant Kim Guadagno ("Defendant") to "implement a constitutional . . . primary election system." (Compl. at 20.) Defendant now moves to dismiss the Complaint, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). [Docket Entry 11.] For the foregoing reasons, the motion will be granted, and the Complaint dismissed with prejudice.

BACKGROUND

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

New Jersey, similar to at least a dozen other states, limits participation in primary elections to members of the political party conducting the

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

Candidates who are unaffiliated with a "political party" — read, those who are not Republicans or Democrats — and who seek placement on the general election ballot do so by way of a statutorily prescribed "petition" process. See N.J. Stat. Ann. §§ 19:13-3 to -13. As the Third Circuit describes this process, unaffiliated candidates "bypass the primary election and proceed directly to the general election" upon submission of a petition that comports with New Jersey law and which contains the requisite amount of signatures. *See Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 68-69 (3d Cir. 1999). In many ways, the

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

direct nomination by petition process presents lower ballot access hurdles to a candidate for public office than does the primary process. *See id*. at 79. For instance, unaffiliated gubernatorial candidates need to collect fewer signatures than their political party counterparts; unaffiliated candidates also receive nearly two months more time to gather signatures for a general election nominating petition than do those candidates seeking access to a primary election ballot. *See id*. at 68.

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

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

Jersey Civil Rights Act, N.J. Stat. Ann. § 10:6-2(c) and the right to vote secured by Article II, Section I of the New Jersey Constitution — mimic Plaintiffs' federal claims. The third state law claim alleges that because primary elections are "conducted at the expense of the state," N.J. Stat. Ann. § 19:45-1, those elections unconstitutionally appropriate public funds for a private purpose in violation of Article VIII, Section III of the New Jersey Constitution. (Compl. ¶ 72.)[3]

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

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

DISCUSSION
A. Federal Constitutional Claims

Any attempt to use the Constitution to pry open a state-sanctioned closed primary system is precluded by current Supreme Court doctrine, and Plaintiffs' federal claims must therefore be dismissed. Specifically, "[t]he Supreme Court has emphasized — with increasing firmness — that the First Amendment Guarantees a political party great leeway in governing its own affairs." *Maslow v. Bd. of Elections of City of New York*, 658 F.3d 291, 296 (2d Cir. 2011) (citing, *inter alia*, *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 128 S. Ct. 791, 169 L. Ed. 2d 665 (2008), *Cal. Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, 147 L. Ed. 2d 502 (2000), and *Tashjian v. Republic Party of Conn.*, 479 U.S. 208, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986)). This power reaches its apex in the primary context. *Tashjian*, 479 U.S. at 216 ("selecting the Party's candidates" is the "critical juncture at which the appeal to common principles may be translated into concerted action, and hence political power in the community"). Indeed, "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee . . . ." *See Jones*, 530 U.S. at 575.

For example, to help prevent "party raiding,"[4] the Supreme Court has upheld against a

[4] Party raiding occurs where voters "in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's

constitutional challenge a New York law that required voters wishing to vote in New York's "closed" primary elections to have enrolled in the party of their choice at least thirty days prior to the previous general election. *See Rosario v. Rockefeller*, 410 U.S. 752, 760-62, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973)). More recently, in *California Democratic Party v. Jones*, the Court invalidated California's "blanket" primary, "reasoning that it [unconstitutionally] permitted non-party-members to determine the candidate bearing the party's standard in the general election." *See Lopez Torres*, 552 U.S. at 203 (citing *Jones*, 530 U.S. at 575).[5] *Jones*, in no uncertain terms, held that a political party's interest in excluding non-members trumps a non-member's interest in sharing in the party's nominating process. See 530 U.S. at 583 ("a 'nonmember's desire to participate in the party's

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primary." *Rosario v. Rockefeller*, 410 U.S. 752, 760, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973).

[5] As the Supreme Court explains, "blanket" and "open" primaries are fundamentally different. In the former, "each voter's primary ballot . . . lists every candidate regardless of party affiliation and allows the voter to choose freely among them." *Jones*, 530 U.S. at 570. In the latter, "any registered voter can vote in the primary of either party." *Democratic Party of U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 111 n.4, 101 S. Ct. 1010, 67 L. Ed. 2d 82 (1981) (internal quotation omitted). In other words, the choice of candidate in an "open" primary is more circumscribed, in that the voter's "choice is limited to [one] party's nominees *for all* offices. [An open primary voter] may not, for example, support a Republican nominee for Governor and a Democratic nominee for attorney general." *Jones*, 530 U.S. at 576 n.6 (emphasis in original).

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

Plaintiffs in this case believe otherwise. Indeed, their entire lawsuit — at least the federal portion of it — proceeds from the premise that all registered voters have a fundamental right to vote in the primary elections conducted by political parties they are not members of. (See Opp. Br. at 18.) This is, however, not the law. The Supreme Court has drawn an important distinction between casting a ballot in a general election, which implicates the "fundamental" right to vote, and nominating a candidate for general election, which does not. According to the Court in *Jones*, "[s]electing a candidate is quite different from voting for the candidate of one's choice. If the 'fundamental right' to cast a meaningful vote were really at issue in this context [i.e., the primary election], Proposition 198 [California's blanket primary law] would not only be constitutionally permissible but constitutionally required, which no one believes." *See* 530 U.S. at 573 n.5. Plaintiffs do not cogently explain how their

claim that a closed primary abridges the "right to a meaningful vote" survives this pronouncement. *See also Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn.) (three-judge panel) (rejecting non-party member's challenge to Connecticut's closed primary system and drawing distinction between participating in primary nomination process and voting in general election), *aff'd*, 429 U.S. 989, 97 S. Ct. 516, 50 L. Ed. 2d 602 (1976); *Ziskis v. Symington*, 47 F.3d 1004, 1006 (9th Cir. 1995) (citing *Nader* to reject similar challenge to Arizona's "closed party primary system")

Plaintiffs instead cite to the Supreme Court's decision in *United States v. Classic*, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941), in which the federal government prosecuted certain Louisiana state elections commissioners for allegedly falsifying ballots in the Democratic House of Representatives primary. *Classic* held that the Constitution gives Congress the power to regulate intraparty primaries through the Criminal Code and secures the right to have one's "vote counted in both the general election and in the primary election, where the latter is a part of the election machinery . . . ." *See id.* at 322. Seizing on language used in that case, Plaintiffs here contend that "[t]he right to a meaningful vote includes voting at the primary stage, where the primary is an integral part of the electoral process." (Opp. Br. at 18.)

And this statement is true, as far as it goes. Indeed, the proposition that all primary votes cast should count equally, be undiluted, etc. is

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

Also puzzling is Plaintiffs' citation to *Friedland v. State*, 149 N.J. Super. 483, 374 A.2d 60, 63 (N.J. Sup. Ct. App. Div. 1977), for the proposition that the right to cast a primary vote is "as protected as voting in the general election." (See Opp. Br. at 18.) *Friedland* in fact rejected the exact same challenge to N.J. Stat. Ann. § 19:23-45 Plaintiffs advance here, and after applying rational basis review held that the Constitution allows New Jersey to require voters to affiliate with a political party before participating in a primary election. *See* 374

A.2d at 63-64 (citing *Rosario*, 410 U.S. 752, 93 S. Ct. 1245, 36 L. Ed. 2d 1, and *Nader*, 417 F. Supp. 837). More puzzling is that Plaintiffs would cite to any New Jersey law on this topic at all; the New Jersey Supreme Court has held that New Jersey's closed partisan primary system passes both federal and state constitutional muster. *Smith v. Penta*, 81 N.J. 65, 405 A.2d 350, 353 (N.J.) ("*Rosario* and *Nader* make it abundantly clear that the New Jersey statute under attack [N.J. Stat. Ann. § 19:23-45] suffers from no federal constitutional infirmity."), appeal dismissed, 444 U.S. 986, 100 S. Ct. 515, 62 L. Ed. 2d 416 (1979); *Lesniak v. Budzash*, 133 N.J. 1, 626 A.2d 1073, 1080-81 (N.J. 1993).

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

Thus, whatever guise the Plaintiffs' federal constitutional claims take — right to vote, right to associate or not associate, or right to equal protection — there is no reason here to impose any level of heightened scrutiny to N.J. Stat. Ann. § 19:23-45. *See Clingman v. Beaver*, 544 U.S. 581, 592, 125 S. Ct.

2029, 161 L. Ed. 2d 920 (2005) ("There must be more than a minimal infringement on the rights to vote and of association . . . before strict judicial review is warranted." (quoting *Nader*, 417 F. Supp. at 849)). The Supreme Court has made it clear that elections laws that impose only minimal burdens on individual rights logically "trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992)); see also *Hooks*, 179 F.3d at 71 ("When the election regulation imposes a lesser burden . . . it need only be justified by important state regulatory interests."). The regulatory interests implicated in this case are no different than those which have been cited to uphold elections laws in earlier cases — including the prevention of "party raiding" so as to preserve "the integrity of the electoral process," *Rosario*, 410 U.S. at 760-61, and "preserv[ing] [political] parties as viable and identifiable interest groups," *Clingman*, 544 U.S. at 594 (quoting *Nader*, 417 F. Supp. at 845). Plaintiffs fail to suggest a reason in law or logic why these considerations do not govern this case, considering the *de minimis* effect that N.J. Stat. Ann. § 19:23-45 has on their constitutional rights.

Consequently, New Jersey's closed partisan primary system passes muster under the Constitution, and because Plaintiffs cannot state

viable claims on the theories presented, the federal causes of action must be dismissed.[6] Fed. R. Civ. P. 12(b)(6).

B. State Law Claims

Defendants are correct that the Eleventh Amendment operates to bar Plaintiffs' state law official capacity claims against Defendant.[7] The

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[6] The Court recognizes that two of the named Plaintiffs are registered Republicans, and one is a registered Democrat. Those Plaintiffs, however, do not in this case assert the associational rights of their respective political parties; because these Plaintiffs allege they chose to register with the two parties strictly to vote in those parties' primaries, they are effectively asserting their own rights as independent voters with this lawsuit. (Compl. ¶ 26 ("These plaintiffs were required to forfeit their First Amendment right to not affiliate with a private organization in order to vote in the State's primary elections.").) This case is therefore dissimilar to *Tashjian*, in which the Supreme Court sustained the Republican Party's as-applied challenge to Connecticut's closed-primary law on the grounds that the law limited "the group of registered voters whom the Party may invite to participate in the basic function of selecting the Party's candidates." *See* 479 U.S. at 215-16. In other words, *Tashjian* is an "analytically distinct" case where there was "no conflict between the associational interest of members and nonmembers" — the conflict in that case being between Connecticut's closed primary law and the Republican Party's associational interest in welcoming unaffiliated voters into the fold. *Ziskis*, 47 F.3d at 1005 (quoting *Tashjian*, 479 U.S. at 215 n.6). Here, Plaintiffs' attempt to inject outsiders into otherwise closed party primaries conflicts directly with the right not to associate (and therefore exclude) held by members of those parties.

[7] Because the Court disposes of the state law claims on sovereign immunity grounds, it need not reach Defendant's standing argument — both are effectively determinations that

Court is therefore without subject matter jurisdiction to hear those claims.

None of the three limited exceptions to state sovereign immunity — "congressional abrogation," "waiver by the state," and "the doctrine of *Ex parte Young*" — are present here. *See Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 323 (3d Cir. 2002). Plaintiffs do not invoke congressional abrogation, nor do they argue that New Jersey has expressly waived its federal immunity to suit under the New Jersey Constitution or the New Jersey Civil Rights Act. Insofar as Plaintiffs opposition brief can be read to invoke an argument that the *Ex parte Young* doctrine applies, such an argument would be misguided— "[t]he theory behind *Young* is that a suit to halt the enforcement of a state law in conflict with the federal constitution is an action against the individual officer charged with that enforcement," and is thus not really a suit against the state itself. *MCI Telecomm. Corp. v. Bell Atlantic Pa.*, 271 F.3d 491, 506 (3d Cir. 2001) (citing 209 U.S. 123, 159-60, 28 S. Ct. 441, 52 L. Ed. 714 (1908)). Claims premised upon New Jersey's state constitution and its civil rights statute, even if they are for prospective injunctive relief, could not by definition fit under the *Young* exception. *See Hess*, 297 F.3d at 325 ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state

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the Court lacks subject matter jurisdiction over the claims, and thus one need not be considered before the other.

law." (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984))).

It is unclear why in this context Plaintiffs principally rely on *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997), a case that has nothing to do with sovereign immunity. Plaintiffs assert that *City of Chicago* stands for the proposition that a "state law claim can be considered to 'arise under'" federal law when the state law "right to relief . . . requires resolution of a substantial question of federal law." (Opp. Br. at 32 (citing 522 U.S. at 164).) But this rule of federal question jurisdiction — most recently refined in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005), and *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 126 S. Ct. 2121, 165 L. Ed. 2d 131 (2006) — has nothing to do with whether or not New Jersey can be sued in federal court for violations of state law. If Plaintiffs cite to City of Chicago to argue their state law claims are of the "special and small category" which present "an important issue of federal law that sensibly belongs in federal court," see *Empire Healthchoice*, 547 U.S. at 699-700, Plaintiffs are belied by their own Complaint — Plaintiffs have affirmatively pleaded their state law claims are supplemental or pendent, and only before the Court pursuant to 28 U.S.C. § 1367. (Compl. ¶ 9; Opp. Br. at 28 ("Count VII deals with the violations of the New Jersey state constitution brought under

supplemental jurisdiction").) And, if Plaintiffs mean to argue that their federal claims are somehow intertwined with their entirely distinct state constitutional claims, such that *Ex parte Young* is implicated, Plaintiffs cite no legal authority for this novel proposition.

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

CONCLUSION

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

/s/ Stanley R. Chesler
STANLEY R. CHESLER
United States District Judge
Dated: August 14th, 2014

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

ORDER

CHESLER, District Judge.

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

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

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

ORDERED that the Complaint be and hereby is

DISMISSED WITH PREJUDICE; and it is further

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

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