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July 28, 2014

The Honorable Stanley R. Chesler, U.S.D.J.
Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07101

Re: *Mark Balsam, et al. v. Kim Guadagno*
Civil Action No. 14-1388 (SRC-CLW)
Defendant's Reply to Plaintiffs' Opposition to Defendant's Motion to Dismiss

Dear Judge Chesler:

Please accept this Letter Brief in reply to the Brief filed by plaintiffs in opposition to the Motion to Dismiss filed by defendant Secretary of State Kim Guadagno.

LEGAL ARGUMENT

POINT I

N.J. STAT. ANN. § 19:23-45 FULLY COMPORTS WITH THE GUARANTEES OF THE FIRST AMENDMENT BECAUSE PLAINTIFFS DO NOT HAVE A FUNDAMENTAL RIGHT TO PARTICIPATE IN PRIMARY ELECTIONS.

Plaintiffs suggest the State's closed primary election scheme deprives them

of their fundamental right to cast a meaningful vote. (Pfs. Br., at 14, 21, 25, 27). However, neither this Court, the Third Circuit, nor the Supreme Court have recognized that unaffiliated voters have a fundamental right to participate in primary elections even when those elections are an integral part of the electoral process. In fact, the Supreme Court rejected this very argument in *California Democratic Party v. Jones*, 530 U.S. 567. 573 n.5 (2000). And the Supreme Court has likewise found that a closed primary system, much like the one at issue here, was constitutional in *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn.), *summarily aff'd*, 429 U.S. 989 (1976). *See also Ziskis v. Symington*, 47 F.3d 1004, 1006 (9th Cir. 1995) (finding that a requirement that primary voters affirmatively join a party before being allowed to vote in its primary is constitutional). Thus, the relief plaintiffs seek here -- i.e., the invalidation of the State's closed primary system -- would, if granted, contravene these precedents and uproot one of the hallmarks of our electoral system, the partisan primary, contrary to the judgment of the Legislature that N.J. Stat. Ann. § 19:23-45 advances the State's legitimate interests.[1] *See United States v. Classic*, 313 U.S. 299, 311 (1941) (recognizing that

[1] Just as the Supreme Court recognized in *Clingman v. Beaver*, 544 U.S. 581, 586 n.1 (2005), a decision here invalidating the State's primary system would implicate the laws of numerous states that feature similar schemes. *See* Ariz. Rev. Stat. Ann. § 16-241(a); Colo. Rev. Stat. Ann. § 1-3-101; Conn. Gen. Stat. Ann. § 9-431; Del. Code Ann., Tit. 15 § 3110; D.C. Code Ann. § 1-1001.09(g)(1); Del. Code Ann., Tit. 15, § 3161; Fla. Stat. § 101.021; Iowa Code Ann. §§ 43.38, 43.42; Kan. Stat. Ann. § 25-3301; Ky. Rev. Stat. Ann. § 116.055; La. Rev. Stat. Ann. §

the Constitution gives the states "wide discretion in the formulation of a system" for electing representatives).

In *California Democratic Party*, the Supreme Court struck down a law establishing a blanket primary system, which required all political parties to allow unaffiliated voters to participate in their primaries. *Id.* at 570, 582-86. In a dissenting opinion, Justice Stevens posited that unaffiliated voters may have a fundamental right "to cast a meaningful vote for the candidate of their choice." *Id.* at 601 (Stevens, J., dissenting). The majority, in response, explained that "selecting a candidate is quite different from voting for the candidate of one's choice. If the 'fundamental right' to cast a meaningful vote were really at issue in this context, Proposition 198 would not only be constitutionally permissible but constitutionally required, which no one believes." *Id.* at 573 n.5. This language would thus appear to dispel any suggestion that a closed primary system invades a fundamental right to vote.[2]

Moreover, plaintiffs misplace their reliance on *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Sims*, 377 U.S. 533 (1964). (Pfs. Br., pp. 25-26). In *Baker*,

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18:521; N.M. Stat. Ann. § 1-12-7.2; N.Y. Elec. Law Ann. § 5-304; Okla. Stat., Tit. 26, § 1-104; Pa. Stat. Ann., Tit. 25, § 292; R.I. Gen. Laws §§ 17-9.1-24, 17-15-24; S.D. Codified Laws § 12-6-26; Wyo. Stat. Ann. § 22-5-212. *See also* Charles E. Borden, *Primary Elections*, 38 Harv. J. on Legis. 263, 274 (2001) (recognizing the closed primary as the most common form of primary).

[2] As one commentator has explained, the "closed primary most clearly survives the Court's decision" in *California Democratic Party*. Charles E. Borden, *Primary Elections*, 38 Harv. J. on Legis. 263, 274 (2001).

the Supreme Court held that a justiciable cause of action existed where it was alleged that a Tennessee law arbitrarily and capriciously apportioned representatives "without reference . . . to any logical or reasonable formula . . . ." *Baker* 369 U.S. at 192, 200. Following the decision in *Baker*, the Supreme Court again addressed the issue of apportionment in *Reynolds*. In that case, the Supreme Court found an apportionment scheme that created a significant disparity between the numbers of voters in different legislative districts unconstitutional. *Reynolds* 377 U.S. at 554-6, 568. To reach this conclusion, the Court reasoned that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens living in other parts of the State." *Id.* at 568.

Based on these decisions, and their progeny, plaintiffs argue that the State "cannot create a system in which the votes of one class are diluted." (Pfs. Br., at 25). Although the State agrees with this basic proposition, plaintiffs err in applying it to the present context. In contrast to *Baker* and *Reynolds*, where voters were effectively disenfranchised by virtue of their states' apportionment schemes, unaffiliated voters in New Jersey possess the same opportunity to participate in the electoral process as party-members. Indeed, as the Supreme Court explained in *California Democratic Party*, a voter who feels disenfranchised because of a regulation that conditions participation in primary elections on party membership

"should simply join the party." *Cal. Democratic Party*, 530 U.S. at 58. That may put an unaffiliated voter "to a hard choice," *id.*, but it is not a state-imposed dilution of their voting power as was seen in *Baker* and *Reynolds*. As such, the State's electoral scheme does not disenfranchise plaintiffs and their attempt to extend the holdings of *Baker* and *Reynolds* to the present context strains any reasonable interpretation of those decisions.

Plaintiffs also argue that N.J. Stat. Ann. § 19:23-45 impermissibly draws a distinction between party members and unaffiliated voters. (Pfs. Br., at 25). However, absent "invidious discrimination," statutes may create many classifications, which do not offend constitutional principles. *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974) (citing *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963)). In *Nader*, the Supreme Court considered a Connecticut law that precluded unaffiliated voters for voting in a party's primary election. *Nader*, 417 F. Supp. at 841-42. The plaintiffs there, much like those here, argued (1) that the rights to vote and of association guarantee them the right to participate in a primary election; (2) that there is a right to not participate and to be free from coerced associations; and (3) that there is a constitutionally protected right of privacy from association. *Id.* at 842. The Supreme Court rejected these arguments and found that because "a state might reasonably classify voters or candidates according to party affiliations[,]" a closed primary does not result in "invidious discrimination" that would offend the

Constitution. *Id.* at 845-46. Thus, plaintiffs' argument is without merit due to their failure to address this clearly applicable precedent or provide any legal authority to the contrary.

Finally, plaintiffs maintain that the time is now appropriate for this Court "force the State to consider and implement an alternative [primary election] system." (Pfs. Br., at 20-21, 23-24). What plaintiffs fail to consider is that the "relative merits of closed and open primaries have been the subject of substantial debate since the beginning of" the twentieth century. *Tashjian*, 479 U.S. at 222-23. And that, just as the Supreme Court recognized in *Tashjian*, it is not the role of this court to decide whether the State Legislature acted wisely in creating a closed primary system. *Tashjian*, 479 U.S. at 223. It is enough that N.J. Stat. Ann. § 19:23-45 is supported by the State's legitimate interests in protecting the stability of the political system as well as the associational rights of political associations, maintaining ballot integrity, avoiding voter confusion, and ensuring electoral fairness. *Timmons v. Twin Cites Area New Party*, 520 U.S. 351, 367-68 (1997); *Nader*, 417 F. Supp. at 848; *Storer v. Brown*, 415 U.S. 724, 736 (1974); *Ray v. Blair*, 343 U.S. 214, 221, 222 (1952); *Lesniak v. Budzash*, 626 A.2d 1073, 1080-81 (N.J. 1993); *Council of Alternative Political Parties v. Div. of Elections*, 781 A.2d 1041, 1052 (N.J. App. Div. 2001).

Accordingly, the State's partisan primary system fully comports with the

guarantees of the First Amendment and plaintiffs' Complaint should be dismissed.

POINT II

THE ELEVENTH AMENDMENT PROHIBITS PLAINTIFFS' STATE LAW CLAIMS IN THEIR ENTIRETY.

Plaintiffs argue that their state law claims brought pursuant to the New Jersey Civil Rights Act ("NJCRA"), N.J. Stat. Ann. §§ 10:6-1 to -2, are not barred by the Eleventh Amendment because the State is not entitled to sovereign immunity. (Pfs. Br., at 30-33). However, until the Supreme Court reverses itself in *Will*, *Alden*, *Pennhurst*, and *Raygor*, plaintiffs' arguments must be rejected because the law is well-established that the State, its agencies, and its officers are entitled to sovereign immunity. *See Raygor v. Regents of the University of Minnesota*, 534 U.S. 533, 541 (2002) (holding that the supplemental jurisdiction statute, 28 U.S.C. § 1367, does not authorize district courts to exercise jurisdiction over claims against non-consenting states); *Alden v. Maine*, 527 U.S. 706, 712-13 (1999) ("[T]he states' immunity from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today."); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989) (explaining that Eleventh Amendment bars recovery against state agencies and officers); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) ("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.").

To be sure, plaintiffs argument that Eleventh Amendment immunity does not apply here because its application would run counter to the public interest is without basis under the law. (Pfs. Br., at 31-32). There are only three exceptions to Eleventh Amendment immunity, none of which apply here.

First, a state can consent to suit by making an unequivocal waiver. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). The State has, however, never waived its sovereign immunity in federal court. *Hyatt v. County of Passaic*, 340 Fed. Appx. 833, 837 (3d Cir. 2009) (holding that the New Jersey Tort Claims Act, which allows suits against public entities and their employees in state courts, does not expressly consent to suit in federal courts and thus is not an Eleventh Amendment waiver."). *See* N.J. Stat. Ann. § 59:2-2(a).

Second, Congress can abrogate sovereign immunity for suits brought pursuant to federal statutes if it "authorize[s] such a suit in the exercise of its power to enforce the Fourteenth Amendment . . . ." *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 669-70 (1999). However, the Supreme Court has specifically held that Congress has not abrogated the immunity for actions under the Civil Rights Act of 1871, of which § 1983 is a part. *Quern v. Jordan*, 440 U.S. 332, 341 (1979).

Third, and finally, suits against individual state officials for prospective injunctive relief or to remedy ongoing violations of federal law are not barred. *MCI Telecomm. Corp v. Bell Atlantic Pennsylvania*, 271 F.3d at 503. *See also M.A. Ex rel E.S. v. State Operated Sch. Dist.*, 344 F.3d 335, 345 (3d Cir. 2003). Plaintiffs argue that this exception applies because their state law claims "arise under" federal law. (Pfs. Br., at 32). However, this argument rests on a misreading of *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 164 (1997).

In that case, the Supreme Court considered "whether a lawsuit filed in the Circuit Court of Cook County seeking judicial review of decisions of the Chicago Landmarks Commission may be removed to federal district court, where the case contains both federal constitutional and state administrative challenges to the Commission's decisions." *Id.* at 159. Though the Court found that removal was appropriate because the complaint contained both federal and state claims, the Court did not, as plaintiffs suggest, find that the state law claims arose under federal law. *Id.* at 163-65. Rather, the Court found that the state law claims were distinct from the federal claims, and that as a result, the district court's jurisdiction over the state law claims depended upon the supplemental jurisdiction statute, 28 U.S.C. § 1367. *City of Chi.*, 522 U.S. at 164-65.

Plaintiffs thus err by conflating their state and federal law claims especially as they acknowledge that "Count VII deals with the violation[] of the New Jersey

state constitution brought under supplemental jurisdiction." (Pls. Br., at 28). That claim remains distinct from their federal claims, and consequently, the third exception to Eleventh Amendment immunity does not apply to Count VII.

Accordingly, this Court cannot exercise supplemental jurisdiction over any of plaintiff's state law claims brought under the NJCRA because the defendant is entitled to Eleventh Amendment immunity.

POINT III

PLAINTIFFS CANNOT ESTABLISH TAXPAYER STANDING TO CHALLENGE N.J. STAT. ANN. § 19:45-1 BECAUSE THEY ONLY CLAIM A GENERALLY AVAILABLE GRIEVANCE ABOUT GOVERNMENT.

Although plaintiffs suggest that they need not meet the exacting prerequisites of Article III standing, (Pls. Br., at 28), they are wrong. "[A] party seeking to invoke the judicial power of the federal courts is subject to the standing requirements of Article III." *Goode v. City of Philadelphia*, 539 F.3d 311, 321 (3d Cir. 2008) (citing *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989)). *See also Cantrell v. City of Long Beach*, 241 F.3d 674, 683 (9th Cir. 2001) (holding that the taxpayers must meet federal standing requirements even though California law permitted standing because "California's lenient taxpayer standing requirements do not relieve the [plaintiffs] of the obligation to establish a direct injury under the more stringent federal requirements for state and municipal taxpayer standing").

Therefore, even if New Jersey law would afford plaintiffs standing had they brought this action in state court, they must still meet the federal standing requirements as well by asserting "an actual, concrete injury" that is not "an abstract grievance shared by a large number of similarly situated people." *Goode*, 539 F.3d at 321; *Common Cause v. Pennsylvania*, 558 F.3d 249, 258 (3d Cir. 2009).

"Whether styled as a constitutional or prudential limit on standing, the [Supreme] Court has sometimes determined that where large numbers of Americans suffer alike, the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance." *Common Cause*, 558 F.3d at 259 (quoting *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23 (1988)). "Based on this reason, the Supreme 'Court repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law.'" *Id.* (quoting *Valley Forge Christian Coll. V. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-83 (1982)). *See also Pa. Prison Soc'y v. Cortes*, 508 F.3d 156 (3d Cir. 2007) (holding voters and taxpayers lacked standing to assert a "generalized grievance[] of concerned citizens"). As such, the "'assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining

those requirements of meaning.'" *Common Cause*, 558 F.3d at 259-60 (quoting *Valley Forge Christian Coll.*, 454 U.S. at 483)).

Here, plaintiffs assert that they have standing to challenge the public financing of primary elections because "[s]tanding is not to be denied simply because many people suffer the same injury." (Pls. Br., at 29). However, plaintiffs do not assert in Count VII that they have suffered a deprivation of their "personal rights" under the law. *Cf. Common Cause*, 558 F.3d at 260 ("Plaintiffs argue that they are not asserting generalized grievances, but are instead alleging the deprivation of 'personal rights' under the First, Fifth and Fourteenth Amendments."). Instead, plaintiffs only assert an "interest in seeing that the law is obeyed" that is "abstract and indefinite in nature." *Id.* Thus, Count VII presents only a "generalized injury" that all voters in New Jersey allegedly suffer.

Moreover, even now, plaintiffs fail to identify the requisite injury to confer Article III standing on this Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). As plaintiffs explain, they "have suffered violations of their constitutional rights to vote, to non-association, and to be equally treated under the law," which is "causally connected to New Jersey's statute that allocates state funds to private partisan primaries, as this system is what prevents plaintiffs from expressing their First Amendment rights, and what codifies the infringement of their Fourteenth Amendment rights." (Pls. Br., at 29-30). However, this argument

fails because plaintiffs must establish standing for each claim they seek to press. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006). Therefore, Plaintiffs must establish that they have suffered an actual and concrete injury due to the implementation of the public financing statute, N.J. Stat. Ann. § 19:45-1, that is separate and apart from their challenge to the N.J. Stat. Ann. § 19:23-45. *See Common Cause*, 558 F.3d at 257 (observing that the party invoking the federal court's jurisdiction bears the burden of establishing standing). That plaintiffs have not done so, even now, confirms that they do not have a personal stake in the outcome of their claim that the public financing of elections violates the New Jersey Constitution.

Accordingly, Count VII must be dismissed for lack of standing.

CONCLUSION

For the foregoing reasons, defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6) should be granted, all claims against the defendant dismissed with prejudice, and discovery stayed pending this Court's determination in the matter.

Respectfully submitted,

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Dated: July 28, 2014