

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY  
VICINAGE OF NEWARK

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MARK BALSAM, et al.,

Plaintiffs,

v.

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

Defendant.

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

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**PLAINTIFFS' SURREPLY TO DEFENDANT'S MOTION TO DISMISS**

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## I. SUMMARY OF THE SURREPLY

Defendant argues, without citation, that “[no courts] 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.” Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Motion to Dismiss, hereinafter “Reply,” at 2. Defendant suggests that, “a voter who feels disenfranchised because of a regulation that conditions participation in primary elections on party membership should simply join the party.” Reply at 4-5 (internal quotations omitted).

Defendant’s blunt assertion, that it is acceptable to condition the individual right to cast a meaningful vote on the individual joining one of the two major private political parties, relies on an incorrect deduction to arrive at a conclusion for which there is no precedent. Contrary to Defendant’s position on the voting rights of persons who have not affiliated with the Democratic or Republican private political parties, the Supreme Court of the United States has not found that the fundamental right to vote applies to some, but not all voters. In fact, the latest position put forward by Defendant in her Reply attempts to escape from the fundamental principle she has already conceded: that if the fundamental right to participate in New Jersey’s primary elections applies to some voters, the State’s

actions require strict constitutional scrutiny. Plaintiff's Opposition to the Motion to Dismiss at page 34 citing Defendant's Motion to Dismiss at 17.

Defendant's citation to *Nader* fails to salvage her position for two reasons. First, Plaintiff did not "fail to address" *Nader* because *Nader*'s final judgment was summarily affirmed. *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn.), *summarily aff'd*, 429 U.S. 989 (1976). In doing so, the Supreme Court limited the binding authority of *Nader* to the particular facts of that case. Second, a proper analysis of the district court's decision in *Nader* actually supports Plaintiff's position because the *Nader* case concerned facts and issues similar to *California Democratic Party v. Jones*. 530 U.S. 567, 570-571 (2000). When read carefully, these cases, along with their predecessors and progeny, only reinforce the State's obligation to provide all voters, regardless of their party affiliation, an opportunity to cast an equally meaningful vote. *Id.*

## **II. ALTHOUGH THE *NADER* CASE IS NOT AUTHORITATIVE, ITS PERSUASIVE AUTHORITY SUPPORTS PLAINTIFFS' POSITION**

The *Nader* decision by the Supreme Court was a summary affirmance of the district court's holding. A summary affirmance is to be assessed in light of all of the facts of the case affirmed, and not viewed as anything but applying established legal principles to the particular facts involved. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). The decision, therefore, is only binding precedent as to the judgment

of the lower court, not that court's reasoning. *Id.* Therefore, the Defendant's assertion that Plaintiffs "fail[ed] to address this clearly applicable precedent" (Reply at 6) is flatly mistaken.

Even so, a proper reading of *Nader* supports Plaintiffs' position. The issue in *Nader* was whether voters who have chosen not to affiliate with a major political party have a constitutional right to participate in the partisan primary election of that private political party. 417 F. Supp. at 840. In that case, Plaintiffs asked the court to require that the private political parties in Connecticut allow unaffiliated voters to participate in their partisan primaries if any such unaffiliated voter so desired. Brief of Petitioner-Appellant at 7, *Nader v. Schaffer*, No. 76-504 (Oct. 8, 1976). As in *Jones*, the remedy requested in *Nader* presented the Court with the following political issue: does an unaffiliated voter have the right to participate in the private nomination proceedings of a political party? 417 F. Supp. at 840. The district court in *Nader* held that they do not. *Id.* at 849. The Plaintiffs have not asked the Court to answer this question.

The distinction between the question answered in *Nader* and in *Jones* on which Defendant's discussions to date have been fixated, and the actual issue Plaintiffs have put forward becomes clearer when the district court's rationale in *Nader* is considered:

Because the political party is formed for the purpose of engaging in political activities, constitutionally protected associational right of its members are

vitaly essential to the candidate selection process ... A party, were it a completely private organization with no government regulation, could limit participation in its nominating process to party members. In the regulated situation, the state has a legitimate interest in protecting party members' associational rights by legislating to protect the party from intrusion by those with adverse political principles ...

*Id.* at 845.

Unlike *Nader* and *Jones*, which concerned the issue of whether private political parties must allow non-members to participate in their partisan elections, the issue in this case is: does the State have an obligation to provide each voter an equally meaningful opportunity to participate in every integral stage of the election process? It is Plaintiffs' position in this case that the State does have this obligation, just as the State had an obligation to protect the private rights of political parties in *Nader* and *Jones*.

Plaintiffs have not asked the Court to issue a decision that would require private political parties to allow non-party members to access their partisan primary elections. A ruling in Plaintiff's favor would create no new obligations for political parties. Rather, the New Jersey legislature would simply have to honor its pre-existing Constitutional obligation to protect the rights of individual voters by reforming the State's primary election system in a manner that ensures all voters an opportunity to cast a meaningful vote; which has been accomplished in other jurisdictions.

In short, it is Plaintiffs' opinion that the State can protect the rights of individual voters without infringing on the private rights of political parties to limit access to their partisan primaries.

### III. CONCLUSION

This case has distinctly different facts from those in *Nader*. Even if *Nader's* reasoning and opinion were binding authority, it would not be dispositive of this case because the issues presented are substantively different.

Defendant has confused the real issue by suggesting that there is an irreconcilable conflict between the individual right to cast a meaningful vote and the right of the Democratic and Republican parties to operate as private organizations.

Fundamental rights are, by nature, nonpartisan. More plainly, Defendant's position on the fundamental nature of our electoral system is one that this Court, the State of New Jersey, and every voter in New Jersey should flatly reject: that our rights within the democratic process may be conditioned on membership in one of two private organizations which almost half of all voters have chosen not to associate with.

Respectfully Submitted,

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