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Democratic-Republican Organization of New Jersey, *an unincorporated association, et als.,*	**Superior Court of New Jersey Appellate Division Docket No. A-0206-14**
Plaintiffs-Appellants / Petitioners,	**On Appeal from an Order of Transfer from the Law Division of September 10, 2014**
vs.	
Kimberly Guadagno, *N.J. Lt. Governor / Sec. of State, et als.,*	**and / or alternatively**
Defendants-Appellees / Respondents,	**On Appeal of Final Agency Action of August 8, 2014**
and	***Civil Action***:
Hank Schroeder, *candidate for U.S. Senate, et als.,*	
Interested Parties.	
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Joint Merits Brief of Plaintiffs-Appellants / Petitioners

Richard T. Luzzi, Esq.
Oler, Luzzi & Breslin
6 Apple Tree Lane – Suite 2A
Sparta, New Jersey 07871
Telephone: (973) 983-7020
Telefax: (973) 983-7030
Attorney for Plaintiffs-Appellants / Petitioners Democratic-Republican Organization of New Jersey; Leonard P. Marshall; Donald Letton; Alexander H. Spano; Frederick John LaVergne; Scott Neuman; Pablo Olivera; Allen J. Cannon; Traci Caprioni; Melissa Tomlinson; Gary C. Frazier; and Fernando Powers

Eugene Martin LaVergne
Democratic-Republican for U.S. Senate
543 Cedar Avenue
West Long Branch, New Jersey 07764
Telephone: (732) 272-1776
Plaintiff-Appellant / Petitioner *Pro Se*

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STATEMENT OF FACTS AND PROCEDUREAL HISTORY:

This matter was initially filed as an emergent election case brought against uncontested facts that squarely raised a specific and clearly defined legal question as to whether the 21 County Clerks and the New Jersey Secretary of State, the New Jersey statutory election officials who configure election ballots in accordance with State law and otherwise administer elections, were lawfully administering the November 4, 2014 Regular and Special Federal General Elections and the contemporaneously held elections for various New Jersey State statutory county and local municipal offices in accordance with certain mandatory election laws enacted by the State Legislature. More specifically, this case is the latest direct legal challenge to the initial correctness, the sustaining legal correctness and validity over time, and alternatively to the Constitutionality of, the August 27, 1999 Emergent Appellate Order of the 2 Judge Appellate Court Panel (Honorable Stephen Kleiner, J.A.D. and Honorable Marvin Braithwaite, J.A.D.) (Pa-99 to Pa-100) and the subsequently issued written Opinion of Appellate Judges Kleiner and Braithwaite (reported at 324 *N.J.Super.* 451 (App. Div. 1999)) wherein Judges Kleiner and Braithwaite heard emergent telephonic oral argument and then summarily overruled the August 23, 1999 Order and August 23, 1999 written Opinion (unpublished)[1] of the Honorable Clarkson

[1] For reasons not clear, back in 1999 the New Jersey Supreme Court Committee on Opinions did not approve Judge Fisher's August 23, 1999 written Opinion for publication, but did then in fact approve the written

Fisher, Jr., P.J.Ch. (Pa-73 to Pa-97) where Judge Fisher interpreted the plain and clear statutory language in *N.J.S.A.* 19:5-1 as mandating that only the votes cast at a political party's primary election for candidates ruining for the office of General Assembly (to the exclusion of all other votes cast for other offices on the political party primary election ballot) may lawfully be counted by State election officials when calculating the 10% threshold in *N.J.S.A.* 19:5-1, the meeting of which is an express and mandatory precondition that must be met by a "political party" for a "political party's" candidates to be statutorily entitled to the ballot location benefit and preference otherwise provided to the candidates of a "political party" by application of *N.J.S.A.* 19:14-12. The facts were – and to this day are not – in dispute.

Opinion of Appellate Judges Kleiner and Braithwaite (which written Opinion was actually issued approximately a week after their August 27, 1999 Emergent Appellate Order), now reported at 324 *N.J.Super.* 451 (App. Div. 1999). After the New Jersey Supreme Court declined to grant leave to appeal (with only Associate Justice Virginia Long, her first day on the Supreme Court, voting to grant leave to appeal), and later with the case on remand to Judge Fisher from the Appellate Division, Judge Fisher issued a subsequent written Opinion on an unrelated legal issue which written Opinion ***was*** approved for publication by the New Jersey Supreme Court Committee on Opinions. *See* 332 *N.J.Super.* 278 (Ch. Div. 1999). The Committee's failure to approve for publication and the Committee's failure to publish Judge Fisher's October 23, 1999 written Opinion leaves an incomplete – and largely distorted and inaccurate – public history of the 1999 New Jersey Conservative Party case in the official published Court record. Since Appellants are specifically relying upon Judge Fisher's *unpublished* opinion, a copy of same is being provided to this Appellate Court with this Joint Merits Brief as required by *Court Rules*, and is found in VOLUME I of the Appendix at (Pa-73 to Pa-97).

Plaintiffs-Appellants / Petitioners (hereinafter referred to in this Brief simply as "Appellants"), a political organization, its Federal and State candidates, and voters who support such political organization and the political organization's candidates, initially filed this emergent election action on August 14, 2014 in the Law Division under the authority of *N.J.S.A.* 2A:16-51 *et seq.* (the *New Jersey Declaratory Judgments Act*) and 42 *U.S.C. sec.* 1983 by way of Verified Complaint and Order to Show Cause seeking to proceed in a summary manner to ***final declaration*** and ***final judgment*** on the return date of the Order to Show Cause. (*See* Verified Complaint with Exhibits at Pa-4 through Pa-110). At no time did Appellants ever apply for or *temporary* relief.[2] Notwithstanding the fact that this time sensitive election case was first filed on August 14, 2014, there was an initial delay of a week before the Order to Show Cause was even signed because the case was originally assigned to the Honorable Mark J. Flemming, J.S.C. As circumstances are, in 1999 Judge Flemming was employed as an Assistant Attorney General in the Office of the New Jersey Attorney

[2] In the Law Division Appellants' specifically moved for FINAL Declaratory Judgment by way of requesting permission to proceed in a summary manner and contemporaneously moving for FINAL Judgment by way of a motion for Summary Judgment. After permission was granted for the filing of Emergent Appellate Motions, Appellants' again specifically moved for FINAL Declaratory Judgment by way of requesting permission to proceed in a summary manner and contemporaneously moving for FINAL Judgment by way of a motion for Summary Judgment. This was done intentionally by Appellants specifically because of the differing standards of review that are required to be applied by a Court (Trial or Appellate) at the preliminary versus the final stage of litigation.

General's Office, and was counsel of record with several other attorneys in the *New Jersey Conservative Party v. Farmer* case which is being directly challenged in this action. It was assumed that the initial assignment of this case to Judge Flemming was inadvertent, but nevertheless, upon being advised that the matter had been assigned to Judge Flemming, and based on Judge Flemming's prior appearance as one of the counsel of record for the State in the 1999 *New Jersey Conservative Party v. Farmer* case, on August 15, 2104 a formal written request was made that Judge Flemming voluntarily *sua sponte recuse* himself from hearing this case without necessity of a formal motion being filed. (Pa-111 to Pa-125) Judge Flemming in fact voluntarily *sua sponte recused* himself from hearing this case, confirming same in a letter dated August 19, 2014. (Pa-126).

Finally, a week after the emergent election case was first filed, the Honorable Mary C. Jacobson, A.J.S.C. entered an Order to Show Cause in the form as requested, fixed a service and briefing schedule, and made the matter returnable September 10, 2014. (Pa-127 to Pa-141). Thereafter the named Defendants and Interested Parties were all served forthwith, and the necessary proofs of service were filed with the Clerk in the Law Division.

On August 21, 2014 the New Jersey Attorney General, representing Secretary of State Kim Guadagon, responded to the Order to Show Cause by filing a formal Notice of Motion to Transfer the Verified Complaint to the Appellate Division under *R.* 1:13-4 or alternatively to dismiss the Verified

Complaint for claimed lack of jurisdiction in the Law Division. (Pa-142 to Pa-145). Specifically, the Attorney General's contention was that the 21 County Clerks had acted on August 11, 2014 and conferred political party columns and held a "drawing" for the "statutory political parties" under *N.J.S.A.* 19:14-12 in furtherance of the "Department of State – Certification of Party Column" (Pa-3) that has been issued by the Secretary of State – ostensibly – under the authority of *N.J.S.A.* 19:5-1. The Attorney General Claimed that this case was really a challenge to final agency action, the August 8, 2014 "Department of State – Certification of Party Column", and that as such the proper jurisdiction in the first instance was with the Appellate Division under *R.* 2:2-3. This position was taken despite the undisputed historical fact – stipulated to by Assistant Attorney General Donna Kelly on the record on September 10, 2014 - that the August 8, 2014 "Department of State – Certification of Party Column" issued by Secretary of State Guadagno which was claimed to be final agency action, ***was as a matter of history the first ever such "certification" ever issued by the Secretary of State or by any other State Election Officer in the 84 years since N.J.S.A. 19:5-1 was first enacted in 1930.***[3]

[3] Appellant Eugene Martin LaVergne believed that this "Department of State – Certification of Party Column" was the first time ever that the Secretary of State had issued such a "certification" and that this document was in fact created and issued in contemplation of this expected legal challenge, so as to manufacture a legal argument for transfer to the Appellate Division, and to delay a court of competent jurisdiction from timely deciding the substantive merits of the true legal meaning and application of *N.J.S.A.*

The matter was fully briefed and ready for substantive argument in the Law Division on September 10, 2010 on the pivotal issue of exactly what votes are counted when determining whether a "statutory political party" has met the 10% caveat of *N.J.S.A.* 19:5-1, and whether the "statutory political parties" had met such threshold at the June 3, 2014 Political Party Primary Elections. It was and is undisputed as a matter of historical fact that not a single vote was cast for any candidate seeking the public elective office of Member of the New Jersey General Assembly at the June 3, 2014 Political Party Primary Elections.

The Appellants all contend that the State and County Election Officials had (once again) misapplied the 10% caveat in *N.J.S.A.* 19:5-1 and illegally allowed the Republican and Democratic candidates statutory ballot preference location under *N.J.S.A.* 19:14-12. The Election Officials did so purportedly relying upon the 1999 2 Judge Appellate Court (Brathwaite and Kleiner) Emergent Telephonic Ruling in *New Jersey Conservative Party v.*

19:5-1. As such, on September 5, 2014 a Notice in Lieu of *Subpoena Ad Testificandum and Duces Tecum* was served on Secretary of State Guadagno through the Attorney General's Office demanding production of any other "Department of State – Certification of Party Column" that had been issued in the last 84 years. (Pa-145 to Pa-146). The Attorney General moved to *quash* the Notice in Lieu of *Subpoena Ad Testificandum and Duces Tecum* (Pa-147-148) which was opposed by Appellant *Pro Se* Eugene Martin LaVergne. On September 10, 2014 the Notice in Lieu of *Subpoena Ad Testificandum and Duces Tecum* was voluntarily withdrawn on the record after Donna Kelly, Assistant Attorney General, was forced to concede as fact that there were no such other documents, and that the August 8, 2014 "Department of State – Certification of Party Column" was indeed the first such a document ever issued.

Farmer, 324 *N.J.Super.* 451 (App. Div. 1999) which decision summarily overruled the 4 day earlier decision of the Trial Court, the Honorable Clarkson Fisher, P.J.Ch. (who is now sitting in the Appellate Division) where, in 1999, Judge Fisher considered the entire statutory scheme and the 10% caveat in *N.J.S.A.* 19:5-1 and – Appellants contend correctly - ruled as follows:

> A fair reading of our election laws, for the reasons expressed above, leads to the interpretation urged by plaintiffs. That is, ***the court finds that the threshold of N.J.S.A. 19:5-1 is met by the number of primary votes cast for candidates for the General Assembly only.*** (Emphasis added).

[*See* August 23, 1999 unpublished Trial Court opinion at Pa-73 through Pa-97, quoted passage found at Pa-91].

The Emergent telephonic decision by the 2 Judge Appellate Court in *New Jersey Conservative Party v. Farmer* summarily reversing Judge Fisher regarding what Primary Election votes are counted by Election Officials when calculating the *N.J.S.A.* 19:5-1 10% caveat was and is incorrect and directly counter to the clear directives of the statutory scheme generally and counter to the clear directives of *N.J.S.A.* 19:5-1 specifically, and was directly counter to (what is now, and has been since 2004) the unambiguous and controlling Supreme Court *dictum* in *Richardson v. Caputo,* 46 *N.J.* 3, 10 (1965), which – just like Judge Fisher did on August 23, 1999 – interprets *N.J.S.A.* 19:5-1 ***as only including the votes cast for the office of General Assembly at the Political Party Primary Elections*** , and was directly

counter to the interpretation of the 1978 Legislature which, in the Official Legislative Commentary to a new proposed "Title 19A" to replace the (still) existing "Title 19", said the following with regard to the new proposed *N.J.S.A.* 19A:5-1 which would replace the existing *N.J.S.A.* 19:5-1:

> * * *
> 19A:5-1. This section reduces the percentage of ***the General Assembly Vote necessary*** for party columns on the official ballot from 10 percent to five percent. It also substitutes "no political group or organization" for "no political party."

[*See Commentary on Proposed Title 19A, Assembly Bill Number 744, 1978: A Report to the Assembly State Government, and Federal and State Interstate Relations and Veterans Affairs Committee, Prepared by the Staff of the New Jersey Division of Legislative Information and Research, November 21, 1978* (original on file at the New Jersey State Library under call number: 974.90, E38, 1978c), copy of relevant pages found at Pa-107 though 108].

Appellants contend that, just as Judge Fisher found to be the case on August 23, 1999, that under the statutory scheme, ***only*** votes cast for candidates seeking the Office of General Assembly at the June 3, 2014 Political Party Primary Elections may be counted toward a "statutory political party" meeting the 10% conditional caveat threshold in *N.J.S.A.* 19:5-1, and since as a matter of undisputed historical fact not a single such vote was cast, neither the Democratic nor Republican parties met the 10% conditional caveat threshold. The law is clear as to what election officials are required to do when a "statutory political party" fails to meet the 10%

conditional caveat threshold in *N.J.S.A.* 19:5-1, because the statute itself states in relevant part as follows:

> * * * … In such case the names of the candidates nominated at the primary election ***shall be printed in the column or columns designated "Nomination by Petition" on the official ballot under the respective titles of office for which the nominations have been made***, followed by the designation of the political party of which the candidates are members.

[*N.J.S.A.* 19:5-1].

Statutory use of the word "*shall*" in *N.J.S.A.* 19:5-1 as noted denotes the imperative and mandatory, whereas the use of the word "may" in a statute (not used in *N.J.S.A.* 19:5-1) denotes the permissive and directory. *Animal Rights, Inc. v. Mahwah Township,* 138 *N.J.Super.* (Law Div. 1995), *aff'd* 148 *N.J.Super.* 249 (App. Div. 1977), *certif. denied* 75 *N.J.* 25 (1977). Appellants contend – and the plain wording of *N.J.S.A.* 19:5-1 certainly bear out – that what is at issue in this case is a violation a specific *mandatory* New Jersey State election statute – *N.J.S.A.* 19:5-1 - which governs and mandates certain substantive actions that are specifically required to be followed by the referenced election officials when administering the November 4, 2014 Regular and Special General Elections in the event that the 10% conditional caveat in *N.J.S.A.* 19:5-1 is not met. In this regard, the fact that what is at issue is a ***mandatory*** New Jersey State Election statute made this case particularly time sensitive because the legal remedy that any

Court of competent jurisdiction ***is required to Order***, in the event that Appellants are ultimately ruled to be correct after the November 4, 2014 Regular and Special General Elections have occurred, will be mandatory judicial invalidation of such elections and an Order that completely new and lawful elections be administered in compliance with the existing and plainly worded *mandatory* New Jersey State election statutes forthwith. *See In re: Smock,* 5 *N.J.Super.* 495, 501 (Law Div. 1949) ("… Obviously not every infraction of the election laws will invalidate the contest. There is a settled distinction between violations of directory, as distinguished from mandatory, provisions of the law."); *In re: Matter of Petition of Byron,* 165 *N.J.Super.* 468, 474 (Law. Div. 1978), *aff'd* 170 *N.J.Super.* 410 (App. Div. 1979), *certif. denied* 82 *N.J.* 280 (1979) ("… ***If the section is characterized as one that is mandatory in nature, the ballot or election will be overturned***; if the section is characterized as one that is directory in nature, the ballot or election will be upheld." (Emphasis added)). Otherwise stated, the holding of the Regular and Special General Elections before deciding the substantive merits of the challenge of Appellants / Petitioners as brought herein will not in any way moot this case, and inevitably could – and Appellants' contend should – result in a mandatory Court Order invalidating the entirety of the November 4, 2014 elections and requiring the holding of new elections.

Against this factual and legal and time sensitive background the parties appeared on the return date of the Order to Show Cause on

September 10, 2014, a month after the case was first filed.[4] Nevertheless, Judge Jacobson ruled that the action should – under the totality of all of the circumstances - be heard in the first instance by the Appellate Division, and the Court transferred the case to the Appellate Division pursuant to *R.* 1:13-4 by Order dated September 10, 2014 which Order also directed the Law Division Clerk to immediately transmit the file to the Appellate Clerk's Office. (Pa-149 through Pa-150).

With the case and Appellants' legal challenge now formally transferred from the Law Division to the Appellate Division, on September 12, 2014 Appellants filed a Joint Application for Permission to file Emergent Motions with the Appellate Clerk's Office. (Pa-151 through Pa-162).

Five days later on September 17, 2014 the Honorable Jerome St. John, J.A.D. entered a "Disposition Order" on the Joint Application for Permission to file Emergent Motions. (Pa-163) The "Disposition Order" permitted the filing of Emergent Motions as requested, directed that a Notice of Appeal and Case Information be filed (notwithstanding the Order of Transfer),

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[4] While each case is fact sensitive, it is worth noting that like here, *New Jersey Democratic Party, Inc. v. Samson*, 175 *N.J.* 172 (2002) (October 3, 2002 interim Order) and 175 *N.J.* 178 (2002) (October 8, 2002 written opinion) was a time sensitive election case where the office of United States Senate was on the ballot. That case was not filed until September 30, 2002, and yet was heard and decided by the New Jersey Supreme Court directly on October 3, 2002 within 3 days.

directed that briefs be filed on the issue of jurisdiction only, and effectively extended the emergent review time frame until at least September 26, 2014 for all papers to be filed by all parties. Appellants filed their papers as directed, including a Joint Notice of Emergent Motions (Pa-164), Joint Notice of Appeal (Pa-175 through 193) and Joint Case Information Statement (Pa-194 through Pa-210).

Five days later, Judge St. John issued a further Emergent Order denying the request of Appellants to be allowed to proceed on the briefs as filed below in the Law Division and directing that formal Appellate briefs be filed by Appellants by October 3, 2014, with any opposition due on October 6, 2014. (Pa-211 through Pa-212). In pursuance of the October 3, 2014 Emergent Appellate Order, the matter was thereafter fully "Appellate" briefed by the Appellants and the briefs were timely served on all parties.

There was – and is – no issue of this Appellate Court's Jurisdiction, and Judges St. John and Rothstadt and this Appellate Court are not required to follow the incorrect decision of *New Jersey Conservative Party v. Farmer*, 324 *N.J.Super*. 451 (App. Div. 1999). Appellants contend that *New Jersey Conservative Party v. Farmer* is not good law, and that this Court must say so and enforce the law as written and enacted and as intended by the Legislature in 1930, and must do so in time for the General Election Ballots to be brought in conformance with law, because the failure to do so – if Appellants were correct – would require invalidating the

entirety of the November 4, 2014 Elections as having been administered and conducted in violation of New Jersey State Election Law, and the results will therefore be invalid as a violation of the United State's Constitution's Article I "Elections Clause", and the First, Fourteenth and Seventeenth Amendments to the United States Constitution.

On October 10, 2014, without hearing oral argument, Judges St. John and Rothstadt treated Appellants' Emergent Application for FINAL injunctive relief as an Emergent Application for TEMPORARY injunctive relief (a motion that Appellants' intentionally never actually filed, *see* footnote 2, *supra.* and footnote 16, *infra.*), and applied the legal standards applicable at the PRELIMINARY stage for TEMPORARY injunctive relief and therefore denied the Appellants' Emergent motions,[5] thereby allowing the appeal and Appellants' legal challenge to otherwise proceed in due course to FINAL review, whenever that may occur. (Pa-213 to Pa-214)

[5] In this regard, it is important to note that on August 12, 1999 Judge Fisher – applying the well known legal standards applicable to a request for a Temporary Preliminary Injunction – denied the New Jersey Conservative Party's application for a TRO. Then, eleven days later, applying the appropriate standard at the Final Injunction phase, Judge Fisher ruled in favor of the New Jersey Conservative Party and entered a Final Injunction. The results in this case should mirror such earlier procedure.

LEGAL ARGUMENT:

POINT I:

The Ballot Preference Statute, *N.J.S.A.* 19:14-2, does not apply to the November 4, 2014 Regular General Election Because neither of the "statutory political parties" have satisfied the 10% Threshold in *N.J.S.A.* 19:5-1, or alternatively *N.J.S.A.* 19:5-1 is Unconstitutional, and as such defendant Guadagno's August 8, 2014 "Certification" is invalid and illegal and any drawing conducted by the defendant Clerks, and the results of any election, are both void *ab initio*:

A. The Plain Language and Simple Application of the Ballot Preference Statutory Scheme:

In New Jersey, ballot location of a candidate's name is governed by *N.J.S.A.* 19:14-12, which provides in relevant part as follows:

> The county clerk shall draw lots in his county to determine which columns the political parties which made nominations at the next preceding primary election shall occupy on the ballot in the county. The name of the party first drawn shall occupy in the first column at the left of the ballot, and the name of the party next drawn shall occupy the second column, and so forth.
>
> The position which the names of candidates, and bracketed groups of names of candidates nominated by petitions for all offices, shall have upon the general election ballot, shall be determined by the county clerks in the respective counties. * * *

[*N.J.S.A.* 19:14-12].

Each of the 21 County Clerks all draw first for the best and most preferred and most advantageous top two Ballot positions between the separate "party columns" allocated to the statutory political party candidates – as long as the statutory political party has met the 10% threshold of

N.J.S.A. 19:5-1 at the Primary Election held to chose the candidate or candidates for the General Election. All other candidates who have obtained access to the General Election Ballot through the "Nomination by Petition" process are then placed in the same identical column as to the office sought, with slogan printed below the candidate's name, with location within the "Nomination by Petition" column determined by a separate drawing.

However, *N.J.S.A.* 19:5-1 reads as follows:

> A political party may nominate candidates for public office at primary elections provided for in this Title, elect committees for the party within the State, County or Municipality, as the case may be, and in every other respect may exercise the rights and shall be subject to the restrictions herein provided for political parties; ***except that no political party which fails to poll at any primary election for a general election at least ten per centum (10%) of the votes cast in the State for members of the General Assembly at the next preceding general election, held for the election of all the members of the General Assembly, shall be entitled to have a party column on the official ballot at the general election for which the primary election has been held.*** In such case the names of the candidates so nominated at the primary election shall be printed in the column or columns noted "Nomination by Petition" on the official ballot under the respective titles of office for which the nominations have been made, followed by the designation of the political part of which the candidates are members. (Emphasis added).

[*N.J.S.A.* 19:5-1].

It is undisputed that the base 10% conditional caveat threshold "number" at issue in *N.J.S.A.* 19:5-1 is the "number" as certified to by

defendant Guadagno on December 3, 2013 in her "Certification of Political Parties", which number is "372,197". (Pa-1).

As long as each statutory political party did not "… ***fail to poll*** *at any primary election for a general election at least ten per centum (10%) of the votes cast in the State* ***for members of the General Assembly*** *at the next preceding general election …*" (emphasis added), or in this case at least "372,197", at their respective June 3, 2014 Regular Primary Elections, then there can be no dispute that, at least facially, that each statutory political party is entitled to the preferential ballot location position treatment afforded to them to the exclusion of all other candidates by application of *N.J.S.A.* 19:14-12.

The question becomes what does it mean, in the negative, as written in the statute, to "… *fail to poll fail to poll at any primary election for a general election at least ten per centum (10%) of the votes cast in the State for members of the General Assembly at the next preceding general election …*"? Conversely, what does it mean positively "… ***to poll*** *at any primary election for a general election at least ten per centum (10%) of the votes cast in the State for members of the General Assembly at the next preceding general election …*" for *N.J.S.A.* 19:5-1 purposes? ***How*** does one count, and ***what*** does one count, to determine whether a statutory political party has met the *N.J.S.A.* 19:5-1 10% threshold of "372,197"? This is where the parties part company on their interpretation of the statutory scheme. This is because

of the "peculiar" – and what plaintiffs, contend is the "actually not precedential" and otherwise invalid - Appellate Division opinion in *New Jersey Conservative Party v. Farmer,* 324 *N.J.Super*. 451 (App. Div. 1999), which has unnecessarily muddied the waters, so to speak, for 15 years.

The Earlier Cases and the Precedent that this Court Must Follow:

There have been three cases brought since 1999, all in most respects by the same litigants though under somewhat different circumstances each time, yet each on the applicability and interpretation of *N.J.S.A.* 19:5-1. Each time the specific issue of the proper interpretation of ***how*** one counts, and ***what*** one counts, to determine whether a statutory political party has met the *N.J.S.A.* 19:5-1 10% threshold was specifically and directly at issue in the case. As will be shown, the ironic legal truth is that of the two New Jersey State Trial Court Judges, the Honorable Clarkson Fisher, P.J.Ch.[6] (who issued his written unpublished opinion on August 23, 1999) and the Honorable Mary C. Jacobson, A.J.S.C. (who issued her oral opinion on October 3, 2013) who have actually reviewed and considered the substance of the question, and of the two New Jersey Appellate Judges, specifically the two Judge Emergent Panel consisting of The Honorable Marvin Braithwaite, J.A.D., now retired, and the Honorable Steven Kleiner, J.A.D., now deceased (Emergent Appellate Order issued August 27, 1999, and formal

[6] In 1999 Judge Fisher was the Presiding Judge of the Chancery Division, General Equity Part, Monmouth County. Today, Judge Fisher sits in the Appellate Division.

Published Written Opinion issued September 3, 1999) who have actually considered the substance of the question, and the one Federal Trial Court Judge, the Honorable Freda Wolfson, U.S.D.J. (Written Opinion issued October 12, 2012) who has actually considered the substance of the question, the only Judge out of this group that was actually legally correct in their ruling on the interpretation of *N.J.S.A.* 19:5-1 was Judge Fisher, the first judge to rule. That this is true will be conclusively demonstrated. Moreover, as circumstances are now today and with what is now known today, and as will be explained, in another odd quirk of procedure and circumstance, another ironic legal truth is that the published Appellate Division opinion of Judges Braithwaite and Kleiner in *New Jersey Conservative Party v. Farmer*, 324 *N.J.Super.* 451 (App. Div. 1999) is not precedent that this Court may follow, as the critical holding in the *New Jersey Conservative Party v. Farmer* Appellate case regarding exactly ***what*** is to be counted when determining whether a statutory political party has met the *N.J.S.A.* 19:5-1 threshold actually directly conflicts with specific and clear language (albeit, arguably *dictim*) in the New Jersey Supreme Court's holding in *Richardson v. Caputo*, 46 *N.J.* 3 (1965) where the Supreme Court noted that only votes cast at the Primary Elections for Members of the General Assembly are to be counted when calculating the 10% threshold, which must be carefully read in context to be understood. The holding in *Richardson v. Caputo*, 46 *N.J.* 3, 10 (1965), is a decision of the State's

highest Court, superior to the Appellate Division's "peculiar" holding in *New Jersey Conservative Party v. Farmer*, 324 *N.J.Super.* 451 (App. Div. 1999), and is therefore binding on this Court to the exclusion of the referenced incorrect Appellate Division case. This remains true even if the language in *Richardson v. Caputo*, 46 *N.J.* 3, 10 (1965) is viewed as *dictum. See State v. Breitweiser*, 373 *N.J.Super.* 271, 282-283 (App. Div. 2004), *certif. denied* 182 *N.J.* 628 (2005); *Nardello v. Township of Vorhees*, 377 *N.J.Super.* 428, 435 (App. Div. 2005) ("Carefully considered" dictum of the New Jersey Supreme Court is binding on lower courts.). In 1999 when Judges Braithwaite and Kleiner reversed Judge Fisher, Supreme Court *dictum* was not binding on the lower Appellate and Trial Courts, where as of 2004 it became so. *See Id.* Lastly, and perhaps in the greatest irony of all, Judges Braithwaite and Kleiner actually cited verbatim to the very language (albeit improperly and completely out of context) in *Richardson v. Caputo* in their written published opinion (which was issued three days after their Emergent Order summarily reversing Judge Fisher's August 23, 1999 decision) that – when properly read – confirms that they were wrong and that Judge Fisher was right!

The true and accurate legislative history of the statutory scheme generally, and *N.J.S.A.* 19:5-1 specifically, when considered in consort with New Jersey State Constitutional and political history, when considered in consort with the Supreme Court's holding in *Richardson v. Caputo*, and

when considered in consort with the statements of the New Jersey Legislature themselves in 1978 as to what votes were to be calculated when determining the 10% caveat condition threshold in *N.J.S.A.* 19:5-1, confirms that the Judge Fisher was indeed right on August 23, 1999, and that by application today: ***The only votes cast at the June 3, 2014 Primary Elections that may lawfully be counted toward the N.J.S.A. 19:5-1 10% caveat condition threshold are votes cast at the June 3, 2014 Primary Elections that were cast for candidates seeking the right to run for the office of New Jersey General Assembly for their political party at the ensuing, or in this case, November 4, 2014, Regular General Election!***

Obviously problematic for the Appellees from a legal standpoint, and more so for the two presently existing statutory political parties from a political standpoint, is the undisputable fact that there were ***no votes cast whatsoever*** for any candidates for General Assembly at the June 3, 2014 Primary Election. Therefore, if Appellants today are (and Judge Fisher in 1999 was) right, then as a matter of law it was impossible for either party to have met the 10% caveat condition threshold in *N.J.S.A.* 19:5-1, and having failed to meet the 10% caveat condition threshold – which since 1947 has been a literally impossibility to meet in even numbered years - neither statutory political party is therefore entitled to the statutory ballot preference otherwise conferred by *N.J.S.A.* 19:14-12 at the November 4, 2014 Regular General Election. Moreover, the true fact of law is that the ballot preference

scheme as a matter of law does not, and can not ever, apply to a Special General Election such as the one in District 1. While at first reading this may sound implausible, it is indeed the factual and legal truth.

Deciding this case should not be problematic for the Court. All the Court has to do is follow the law, and not pretend to be a two or three member unelected Legislature and Executive Branch judicially re-writing a statute so as to extra-constitutionally favor the candidates of the existing "statutory political parties" to the detriment and disadvantage of all other candidates.

The law is the law, and the fact of history is that there are fatal flaws in this law because the law was not revised after the "new" *New Jersey Constitution* (1947) changed the term of office of Member of the General Assembly from 1 year to 2 years. By so doing, the new State Constitution changed what was to that point an annual process into a biannual process, and in so doing unwittingly made the statutory scheme regarding the opportunity for ballot location preference only operational every other calendar year, in odd numbered years, when Members of the New Jersey General Election were up for election, and candidates for such office would appear on the Primary Election Ballot.

Why *Only Votes Cast at the Primary Elections for Candidates for the Office of General Assembly* are Counted When Determining Whether the 10% Threshold in *N.J.S.A.* 19:5-1 is Met:

What today is codified as *N.J.S.A.* 19:5-1 was first enacted in 1930 as *L.* 1930, Chapter 187, Paragraph 44, Section 1[7], which was part of an overall comprehensive legislative scheme for regulating the conduct of elections and political parties. That statutory legislative scheme, despite radical changes in the State Constitutional form of government in 1947 and again in the 1960s, has nevertheless remained essentially unchanged. While the form of

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[7]

Article V

PARTY ORGANIZATIONS

Powers.

Par. 44, Sec. 1. A political party may nominate candidates for public office at primary elections provided for in this act, elect committees for the party within the State, county or municipality, as the case may be, and in every other respect may exercise the rights and shall be subject to the restrictions herein provided for political parties; *provided, however,* that no political party which shall fail to poll at any primary election for a general election at least ten per centum of the votes cast in the State for members of the General Assembly at the next preceding general election shall be entitled to have a party column on the official ballot at the general election for which the primary election had been held, but that the names of the candidates so nominated at the primary election shall be printed in the column or columns designated "Nomination by Petition" on the official ballot under the respective titles of office for which the nominations have been made, followed by the designation of the political party of which the candidates are members.

[*L.* 1930, Chapter 187, Paragraph 44, Section 1].

Constitutional government and term of office of Member of the General Assembly was changed in 1947 from 1 to 2 years, the statutory law then long in effect and as enacted and specifically intended to apply ***annually*** to determine statutory political party status, and intended to apply ***annually*** to determine ballot location preference if the 10% caveat condition in *N.J.S.A.* 19:5-1 was met, all remained the same, and therefore, by their collective own terms, since 1947 could only have been legally operative in odd numbered calendar years, all because of the Constitutional change in the term of office of General Assembly.

In 1930, the State of New Jersey was then operating under the *New Jersey State Constitution* (1844). *See generally Thorpe's Constitutions*, Volume V at pages 2599 to 2614 (hereinafter *"Thorpe*").[8] Under the *New Jersey State Constitution* (1844) the Legislative Branch of New Jersey State Constitutional Government (like today) consisted of a State Senate and a General Assembly. The Executive Branch of New Jersey State Government, consisted of a single Governor (today there is a Governor and a Lt. Governor). However, there were many significant differences between the

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[8] Citation in this Memorandum of Law to the New Jersey Constitution (1844) is to the official text as found in *The Federal and State Constitutions: Colonial Chargers, and Other Organic Laws of the States, Territories, and Colonies, Now or Heretofore Forming the United States of America*, compiled and edited under an Act of Congress dated June 30, 1906, by Francis Newton Thorpe, United States Government Printing Office, Washington: (1909), Volume V at pages 2599 to 2614. This citation is used because this official and accurate government version is readily available in the public domain online for free at www.hathitrust.org .

form of State Constitutional government under the *New Jersey State Constitution* (1844) and the form of State Constitutional government presently in effect under the *New Jersey State Constitution* (1947), as amended.

For example, the single executive Governor's term was for a term of three years, *see New Jersey State Constitution* (1844), Article V, paragraph 3, in *Thorpe* at page 2606, whereas today the term of office for the dual executive Governor and Lt. Governor is 4 years. The Legislative Branch similarly consisted of a State Senate and a General Assembly, with the term of office for State Senate and for General Assembly both being one year, meaning that there were annual Regular Primary Elections in June and Regular General Elections in November each year for candidates running for the office of Member of the General Assembly. *See New Jersey State Constitution* (1844), Article IV, Section I, paragraphs 1 & 3, in *Thorpe* at page 2601-2602. Today, under the *New Jersey State Constitution* (1947), as amended, the term of office for State Senate was increased a term that was more than one year (and today is on a 2 year, 4 year, 4 year tern in a 10 year period) and the term of office for member of the General Assembly was increased to a two year term, where it remains today.

The size of the State Senate under the *New Jersey State Constitution* (1844) was determined by affording one State Senator to each County irrespective of population, meaning that representation in the State Senate

was apportioned regionally by the artificial geographic political boundary of a County's dividing lines, and was not determined in any way by reference to population. *See New Jersey State Constitution* (1844), Article IV, Section II, paragraph 1, in *Thorpe* at page 2602. The General Assembly was to consist of an unspecified number of members "… *and the whole number of members shall never exceed sixty*." *See New Jersey State Constitution* (1844), Article IV, Section III, paragraph 1, in *Thorpe* at page 2602. However, the members of the General Assembly, while actually apportioned to Counties, were nevertheless to be "… *apportioned among the said counties as nearly as may be according to the number of their inhabitants*." *See Id.* This process was similar to the Federal Constitutional system, with the Counties by analogy being treated somewhat similar to how the Federal Constitution treats States, and with each County being afforded 1 State Senator irrespective of population (under the Federal Constitution it is two Senators per State) and, in the Legislative body that was representative of the People themselves, the number of members in the General Assembly to be apportioned to each County was determined based specifically upon population (similar to apportionment of the U.S. House of Representatives among the States under the Federal Constitution). As has evolved with many amendments since 1947, today in 2014 the *New Jersey State Constitution* (1947) has divided the State up into 40 "Legislative Districts", with each District allowed 1 State Senator (on a 2 year term, 4 year term, 4

year term 10 year cycle) and 2 Members of the General Assembly (for 2 year terms). The foregoing was explained in detail here because sometimes historical details matter, and this is one of those case.[9]

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[9] Judges Braithwaite and Kleiner in Appellate Division in the emergently decided case of *New Jersey Conservative Party v. Farmer*, 324 *N.J.Super*. 451 (App. Div. 1999), while advised in painstaking detail of this very same political history outlined herein, inexplicably chose, apparently for no other reason than pure politics and to achieve a desired ***result*** that the actual written law did not allow, chose to completely ignore and never even so much as mentioned the significant – and Appellants' contend determinative – State Constitutional and political history and the associated effect on the 10% statutory scheme. The fact that when the statutory scheme at issue was first enacted in 1930 that the term of office of the New Jersey Assembly was one year; the fact that when the statutory scheme was enacted in 1930 that there were ***annual*** Regular General Elections for all Members of the General Assembly every year each November, and that there were ***annual*** Political Primary Elections for the right to run for the office of Member of the General Assembly every year each June; the fact that after the *Constitutional* change to the term of office for Member of the General Assembly from 1 year to 2 years was effected in 1947 there never was any *statutory* Legislative efforts made that were intended to address the radical change to the uniform 10% scheme caused by the *Constitutional* change, these all were presented to Judges Braithwaite and Kleiner in the Appellate Division. Yet, against this background, all that the Appellate Division had to say on the issue was the following:

> If the plaintiffs' interpretation of the statute is correct, then in the years in which there are no primary elections for the General Assembly, such as the even numbered years, there would be no method to determine whether a given political party was entitled to a party column on the official ballot for the general election. Plaintiff's argue that *N.J.S.A.* 19:5-1 only applies every other year, when there are primary elections for the General Assembly. … Because in the even-numbered years such as 1998 when there are generally no primary elections for the General Assembly, the other primary elections must be

With this knowledge, it should now be understood that in 1930, Members of the General Assembly were elected on an ***annual basis*** with each Member serving a 1 year term, and that the Members of the General Assembly were the only State Constitutional elected officials whose office was in any way related to, and apportioned in direct actual relation to, the population and the people. The Governor was only elected every 3 years, so this election while indeed statewide, was not suited to be linked by law to a Legislative scheme reliant upon an annual election process. While State Senators were indeed elected every year, they represented political boundaries, not people, so Hudson County's State Senator might in practical fact be elected by and represent more than 1 million people, while Cumberland County's State Senator might in practical fact be elected and represent by less than 50,000 people. Therefore, the Legislature decided in 1930 that the best barometer of legitimate statewide support of a political organization, both initial and sustaining over time, was by looking at the number of votes that were cast for Members of the General Assembly, and the Legislature chose, for whatever reason, 10% of the votes cast for the office of Member of the General Assembly statewide as the legislative benchmark in the legislative scheme. Whether or not one views the 1930

> considered to determine party status for a party column on the official ballot.
>
> [*Id.* at 460-461].

Legislature's linking the Election Law scheme to 10% of the statewide General Assembly vote was a "good idea" or "bad idea" is irrelevant: The Legislature is free to enact and pass stupid laws, they just are not free to pass unconstitutional laws.

Immediately after the passage of the 1930 Legislation (*L.* 1930, Chapter 187) the new legislative system was enacted, which system invoked a uniform 10% standard as a barometer of public support for determining "statutory political party" status annually in the first instance, and the continuing necessary showing of public support and viability to be entitled to certain statutory preferences that excluded candidates who were not members of a "statutory political party" in the second instance. The related components of the statutory system, with a few modest and irrelevant amendments over time, still remain in essentially the same form in which they were originally enacted in 1930, and, as are relevant to this case, are now codified at *N.J.S.A.* 19:1-1,[10] *N.J.S.A.* 19:12-1,[11] *N.J.S.A.* 19:2-1[12],

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[10] *N.J.S.A.* 19:1-1 defines "political party" as follows:

> "Political party" means a party which, at the election held for all of the members of the General Assembly next preceding the holding of any primary election held pursuant to this Title, *polled for members of the General Assembly at least 10% of the total vote cast in the State.*
> [*N.J.S.A.* 19:1-1].

[11] *N.J.S.A.* 19:12-1 provides in relevant part as follows:

N.J.S.A. 19:5-1, and *N.J.S.A.* 19:14-12. When taken together, the statutory scheme as enacted in 1930 operated together in a rather clear and easy to understand system of related laws, each specifically related to the same statutory 10% number, with the first requirement being that a political organization's candidates for the office of Member of the General Assembly at the Regular General Election needed to receive combined a number of votes that are equal to or greater than the 10% in *N.J.S.A.* 19:1-1, and then at the June Regular Primary Election, the candidates of that now "statutory

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> The Secretary of State shall within thirty days after completion of the canvass by the board of State canvassers, certify to each county clerk and county board the fact that *at the next preceding election of all of the members of the General Assembly ten per centum (10%) of the total vote cast in the State for members of the General Assembly had been cast for candidates having the same designation, thereby creating, within the meaning of this Title, a political party*, to be known and recognized as such under the same designation as used by the candidates for when the required number of votes were cast. * * * (Emphasis added).
> [*N.J.S.A.* 19:12-1].

[12] *N.J.S.A.* 19:2-1 defines provides as follows:

> Primary elections for delegates and alternatives to national conventions of political parties and for general election shall be held in each year on the Tuesday next after the first Monday in June between the hours of 6:00 A.M. and 8:00 P.M., Standard time. Primary elections for special elections shall be held not earlier than 30 nor later than 20 days prior to the special election.
> [*N.J.S.A.* 19:2-1].

political party" for the office of Member of the General Assembly had to receive combined a number the votes that was equal to or greater than the same 10% number to receive the ballot placement preference treatment in *N.J.S.A.* 19:14-12. And each of these two events occurred annually: First at the November Regular General Election, and once again at the June Regular Primary Election.

This 1930 Legislative scheme and system made perfect sense for its first 17 years of it's existence, during which time it had by all accounts apparently worked fine. However, suddenly in 1947 the statutory scheme was rendered operative only in odd numbered calendar years when the "new" *New Jersey Constitution* (1947) was enacted and changed the Constitutional term of office for Member of the General Assembly from one year to two years. Whether through inadvertence or design, the fact remains that this just described legislative scheme when enacted was clear and was wholly reliant upon an ***annual*** process where political organizations had an opportunity each year to try to achieve "statutory political party", and was reliant on an ***annual*** process where there were candidates for the General Assembly on every Primary Election Ballot each June. Yet, after 1947 and to date no substantive changes were made to the statutory scheme to account for the Constitutional change in the term of office for General Assembly

from 1 year to 2 years,[13] which Constitutional change radically affected the viability of the statutory scheme, at least in even numbered calendar years. Now, without changing the statute, political organizations only had a chance once every two years to attempt to qualify as a "statutory political party", and those who had achieved "statutory political party" status now retained that status for 2 years, not merely for 1 year until the next Regular General Election. But all of that being said, since this is indeed the truth, in 2014, an even numbered calendar year, it is not possible to reconcile granting ***any candidate*** ballot location preference by virtue of *N.J.S.A.* 19:14-12 since as a matter of fact and law it is literally impossible for either of the two "statutory political parties" to have met the 10% threshold in *N.J.S.A.* 19:5-1, because it is undisputed as fact that there were no ballots whatsoever cast for General Assembly at the June 3, 2014 Primary Elections as there were no candidates for such office even on the Regular Primary Election Ballots. Since only votes cast at the June 3, 2014 Primary Election for candidates for the office of Member of the General Assembly can be counted when

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[13] In 1948 the Legislature made certain changes to the statutory scheme when the entirety of the election laws were compiled together and codified for the first time as "Title 19", where the phrase "Title" replaced the word "act" in the law, with a few other non substantive changes. *See L.* 1948, Chapter 438, Section 1. Despite the Attorney General's expected continued attempts to contort the plain meaning of words and the plain application of the English language, the 1948 changes did nothing whatsoever to change or alter the statutory scheme generally – and *N.J.S.A.* 19:5-1 specifically – to in any way mean what Judges Braithwaite and Kleiner ruled it to mean. Judicial "interpretation" is only necessary when the plain meaning of the statutory scheme is somehow ambiguous, which is simply not the case here.

determining whether the 10% threshold in *N.J.S.A.* 19:5-1 has been met, and since no votes were cast for such office at all, there simply is no way either "statutory political party" can meet the 10% threshold.

Judge Fisher was Right:

On August 23, 1999 in the unpublished trial court opinion of *New Jersey Conservative Party et als. v. John J. Farmer, Attorney General of New Jersey, et als.*, Docket No. MON-C-233-99 (*See* opinion attached at "Exhibit E" to this Verified Complaint, Pa-72 to Pa97) the Honorable Clarkson Fisher, then P.J.Ch. in Monmouth County (now serving in the Appellate Division), after exhaustive evaluation of the statutory scheme in New Jersey statutes Title 19 that grants to a "statutory political party" the ballot preference afforded in *N.J.S.A.* 19:14-12 if the 10% condition caveat in *N.J.S.A.* 19:5-1 is met, concluded with the scant legislative history available at that point in time as follows:

> A fair reading of our election laws, for the reasons expressed above, leads to the interpretation urged by plaintiffs. That is, ***the court finds that the threshold of N.J.S.A. 19:5-1 is met by the number of primary votes cast for candidates for the General Assembly only.*** (Emphasis added).
>
> [*See* unpublished Opinion and Order of August 23, 1999 attached at Pa-73 through Pa 97"].

While not realized at the time, there is indeed Supreme Court precedent (today binding on this Court) and additional legislative history that confirms that Judge Fisher was "right" and that that Judges Braithwaite

and Kleiner were "wrong". In *Richardson v. Caputo*, 46 *N.J.* 3 (1965) the New Jersey Supreme Court briefly discussed the statutory scheme in New Jersey statutes Title 19 that grants to a "statutory political party" the ballot preference afforded in *N.J.S.A.* 19:14-12 and the 10% condition caveat in *N.J.S.A.* 19:5-1, stating in relevant part as follows:

> "Political party" is defined to mean "a party which, at the election held for all of the members of the General Assembly next preceding the holding of any primary election … ***polled for members of the General Assembly at least ten per centum (10%) of the total vote cast in this State.***" *N.J.S.A.* 19:1-1. A party which attains that status is entitled to a primary election, *N.J.S.A.* 19:2-1, and such a political party is accorded a party column on the ballot for the general election ***unless the party shall have failed at its primary election to poll the percentage we have just mentioned,*** in which event that party's nominees selected at the primary shall appear on the general election ballot in "the column or columns designated 'Nomination by Petition.'" *N.J.S.A.* 19:5-1.
>
> [*Richardson v. Caputo*, 46 *N.J.* 3, 10 (1965)].

The Supreme Court's statement must be read carefully and slowly and, most importantly, in context. The Supreme Court specifically referred to "… *unless the party shall have failed to poll* ***the percentage we have just mentioned*** …" (Emphasis added) when referencing how the *N.J.S.A.* 19:5-1 caveat condition threshold is met, and the "percentage" that must be "polled" that was "… *just mentioned* …", in the immediately preceding sentence, was where it was specifically discussed that the standard was ***10% of the General Assembly votes***, not merely an unspecified 10% of some

unspecified collection of votes, but rather ***10% of the General Assembly votes***. That is what the Supreme Court stated. And that Supreme Court holding is binding on this Court. *See State v. Breitweiser,* 373 *N.J.Super.* 271, 282-283 (App. Div. 2004), *certif. denied* 182 *N.J.* 628 (2005); *Nardello v. Township of Vorhees,* 377 *N.J.Super.* 428, 435 (App. Div. 2005) ("Carefully considered" dictum of the New Jersey Supreme Court is binding on lower courts.). This means that this Court must disregard the "peculiar" and incorrect Appellate Division opinion of *New Jersey Conservative Party v. Farmer,* 324 *N.J.Super.* 451 (App. Div. 1999) as it is no longer good law. While the opinion is "out there" so to speak[14], and while it is true that the

[14] The fact that there has been a decision by a subsequent Court with authority that effectively operates to change the law so as to effectively overrule an earlier case, doing so without expressly saying so, is a somewhat unique but not unheard of circumstance. For example, in *State v. Breakiron*, 108 *N.J.* 591 (1987) the New Jersey Supreme Court ruled that the New Jersey diminished capacity statute, which as written places the burden of persuasion on a criminal defendant, did not violate the Federal Constitution's requirement that the State prove each and every element of a criminal offense beyond a reasonable doubt. That remained "good law" for the next two years until 1989, when in *Humanik v. Beyer,* 871 *F.2d* 432 (3d. Cir. 1989), *cert. denied* 493 *U.S.* 812 (1989) the United States Court of Appeals for the Third Circuit differed and ruled that the New Jersey diminished capacity statute, which places the burden of persuasion on a criminal defendant, violates the Federal Constitution's requirement that the State prove each and every element of a criminal offense beyond a reasonable doubt. The practical effect of *Humanik* – which is controlling precedent superior to that of the New Jersey Supreme Court on issues of Federal Constitutional interpretation – was to render *State v. Breakiron* invalid, and no longer "good" law. Somewhat similarly, in 2004 when *State v. Breitweiser, supra.* was decided, the *now* binding New Jersey Supreme Court *dictum* in *Richardson v. Caputo* (which was not binding on Judges Kleiner and Braithwaite under the state of the law in 1999) effectively operated to overrule the Appellate Division opinion in *New Jersey*

published Appellate Division opinion has not as yet been expressly overruled, it is equally true that a higher Court decision on the exact issue exists – predated no less – where the Supreme Court interprets the law differently, that being *Richardson v. Caputo*, 46 *N.J.* 3, 10 (1965). But it does not end there.

Least the Court be concerned that the language in *Richardson v. Caputo* is somewhat ambiguous (plaintiffs contend that read in context it certainly is not), Legislative history has been found that directly confirms the interpretation of Judge Fisher and the Supreme Court in *Richardson v. Caputo* that only votes cast for members of the General Assembly at the Primary Election are counted when determining whether the 10% threshold in *N.J.S.A.* 19:5-1 has been met.

There might be a more polite or eloquent ways to say it, but the fact remains that the present state of the entirety of New Jersey's Election Laws codified as "Title 19" since 1948 are a mess of no longer applicable and somewhat ambiguous provisions which also contain a literal tangle of rank contradictions. There was serious Legislative efforts in the mid 1960s to comprehensively revise Title 19, including a formal law revision commission that lasted, with extensions, well over 10 years past the mid 1970s. However, the Legislature refused to act. Again efforts were made in

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Conservative Party v. Farmer, 324 *N.J.Super.* 451 (App. Div. 1999) where the "interpretation" of *N.J.S.A.* 19:5-1 (in addition to being wrong) was and is directly counter to the interpretation of such statute subscribed to by the New Jersey Supreme Court in *dictum* in *Richardson v. Caputo*.

1978 in Assembly Bill 744, which if enacted would have resulting in an entirely new "Title 19A" that would have fixed many of the extant problems, including those pertaining to the 10% threshold in *N.J.S.A.* 19:5-1. During the process a Formal Legislative Report was issued, *Commentary on Proposed Title 19A, Assembly Bill Number 744, 1978: A Report to the Assembly State Government, and Federal and State Interstate Relations and Veterans Affairs Committee, Prepared by the Staff of the New Jersey Division of Legislative Information and Research, November 21, 1978* (original on file at the New Jersey State Library under call number: 974.90, E38, 1978c). In that formal Legislative Report, there was specific discussion in the Commentary as to the presently understood meaning by the Legislature itself of the law that they had themselves previously enacted, and were trying to now revise, and the new version proposed. The commentary specifically discussed new proposed *N.J.S.A.* 19A:5-1 with reference to the existing (and still existing) *N.J.S.A.* 19:5-1:

> * * *
> 19A:5-1 This section reduces the percentage of ***the General Assembly Vote necessary*** for party columns on the official ballot from 10 percent to five percent. It also substitutes "no political group or organization" for "no political party."

[*See* (Pa-106 to Pa 108) "Exhibit I" to Plaintiffs' Verified Complaint, excerpt from *Commentary on Proposed Title 19A, Assembly Bill Number 744, 1978: A Report to the Assembly State Government, and Federal and State Interstate Relations and Veterans Affairs Committee, Prepared by the Staff of the New Jersey Division of Legislative Information and Research, November 21, 1978* (original on file at the New Jersey State Library under

call number: 974.90, E38, 1978c) (hereinafter "The Official 1978 Assembly Report")].

While defendants may try to argue (Appellants contend not successfully) that *Richardson v. Caputo*, 46 *N.J.* 3 (1965) is somehow ambiguous or equivocal and that Judge Fisher was "wrong", and that *New Jersey Conservative Party v. Farmer,* 324 *N.J.Super.* 451 (App. Div. 1999) holding of 2+2 = 22 somehow still governs this case, this argument simply can not be reconciled with the Legislature's own interpretation of what they say their own law says. The new Jersey Legislature's own interpretation of their own long existing law, specifically *N.J.S.A.* 19:5-1, is most certainly not in any way ambiguous or equivocal. The New Jersey Legislature quite clearly stated that it was and is the total votes cast at the June Regular Primary Election for the office of Member of the General Assembly ***only*** (to the exclusion of all other offices that may appear on the Primary Ballot) that are counted and calculated when determining whether the *N.J.S.A.* 19:5-1 10% caveat condition threshold has been met by either of the two statutory political parties.

This Court – indeed no Court – has any legal authority to radically re-write the text and meaning of a law validly enacted by the New Jersey State Legislature when the meaning is clear, when there is binding controlling Supreme Court precedent interpreting the statute, and when there is clear legislative history that confirms the legislature's interpretation of their own law.

In *N.J.S.A.* 1:1-1 – literally the first statute listed in the codified version of New Jersey's statutory laws – the Legislature has directed how Courts are to evaluate and construe the meaning of the statutes they enact, specifically providing as follows:

> *In the construction of the laws and statutes of this state*, both civil and criminal, *words and phrases shall be read and construed with their context*, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language. Technical words and phrases, and words and phrases having a special or accepted meaning in the law, shall be construed in accordance with such technical or special and accepted meaning.

[*N.J.S.A.* 1:1-1].

From the onset, it is rather elementary principle of statutory construction that when a Court is evaluating a statute to determine the statutes meaning, the Court muse read and construe words and phrases in statutes "… with their context". *Id.* Here, the context is the entire related statutory scheme of election laws including *N.J.S.A.* 19:1-1, *N.J.S.A.* 19:12-1, *N.J.S.A.* 19:2-1, *N.J.S.A.* 19:5-1, and *N.J.S.A.* 19:14-12. When a statute is unambiguous, the statute must speak for itself and be construed according to its terms. *Bass v. Allen Home Improvement Company,* 8 *N.J.* 219 (1952). If statutory language is plain and unambiguous, a court's function is to enforce the statute as written, nothing more. *Gatto Design & Development Corporation v. Township of Colts Neck,* 316 *N.J.Super.* 110 (App. Div.

1998). A Court's role is to construe a statute as the Legislature enacted it, not to impose its own policy preferences. *In re: Ordinance 04-75*, 192 *N.J.* 446 (2007). "Because the regulation of elections is exclusively a legislative matter, courts, even when they question the wisdom of legislation, must respect the legislative scheme." *Matter of Municipal Election Held o May 10, 1994*, 139 *N.J.* 553, 558 (1995); *see also Committee to Recall v. Casagrande*, 304 *N.J.Super.* 496, 503 (Law Div. 1997) (same). A clarity of legislative expression makes it improper for a Court an attempt to seek to impose a different meaning under the guise of statutory construction. *Maurice E. Keating, Inc. v. Southampton Township*, 149 *N.J.Super.* 118 (App. Div. 1977). Perhaps most directly applicable to this case is the axiom that a new meaning may not be given by a Court to words of an old statute in consequence of changed conditions that were probably not foreseeable by the enacting legislature. *Fidelity & Deposit Company of Maryland v. Abignale*, 97 *N.J.Super.* 132 (Law Div. 1967). Lastly, when a statute is susceptible to two possible meanings, one meaning which will operate to violate the Federal or State Constitution and one meaning which will not violate the Constitutions, Courts are to chose the latter. *New Jersey State Board of Education v. Board of Directors of Shelton College*, 90 *N.J.* 470 (1982); *State v. Monroe*, 30 *N.J.* 160 (1959).

In this regard, it must also be restated here that the true fact of history is that when the *New Jersey Conservative Party* brought the first court

challenge in 1999, the New Jersey State election officials had to that point simply completely ignored and completely disregarded the 10% conditional caveat requirement in *N.J.S.A.* 19:5-1 for at least the previous 50 years, and the election officials, without thought, question, or challenge, simply year after year conferred the preferred ballot position to the Republican and Democratic parties without any consideration as to whether such action was appropriate or legal.[15] The further fact of history is that in light of

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[15] It is important to note here that in *New Jersey Conservative Party v. Farmer*, 324 *N.J.Super.* 451 (App. Div. 1999), the Appellate Division, in their September 3, 1999 written opinion issued subsequent to their August 27, 1999 Emergent Appellate Order where they Summarily reversed Judge Fisher's August 23, 1999 Opinion and Order, stated the following:

> Moreover, the record is clear that, for the past fifty years, defendant Attorney General, and before him the Secretary of State, have interpreted *N.J.S.A.* 19:5-1 to mean that all primary elections are considered in determining whether a political party has met its target for party column purposes on the official ballot. … Here, appropriate circumstances exist to conclude that the defendants' interpretation of *N.J.S.A.* 19:5-1 is consistent with the intent of the Legislature.
>
> [Id. at 461-462]

This statement in the September 3, 1999 written opinion is nothing but blatant judicial fabrication and fantasy completely invented by the imaginations of Appellate Judges Braithewaite and Kleiner. There was nothing whatsoever in the "record" (Appellate or elsewhere) that demonstrated anything of the sort. In fact, the only information in the "record" was that for the 50 years leading up to 1999 and the *N.J.C.P.* legal challenge, the election officials simply completely ignored and completely disregarded the 10% requirement in *N.J.S.A.* 19:5-1. It is also noted in this regard that the entirety of the remaining Appellate File in the Court's Archives in the *N.J.C.P.* case as of July 2014 now only contains a total of

Richardson v. Caputo and the 1978 Legislative history as now known and understood, Judge Fisher was "right", and the Appellate Division opinion in *New Jersey Conservative Party v. Farmer* is both demonstrably "wrong". The controlling precedent that this Court must follow is the correct legal and historical truth, that being that the only votes that are counted when determining whether a statutory political party has met the 10% caveat condition threshold in *N.J.S.A.* 19:5-1 are the votes cast at the June 3, 2014 Political Primary Elections for candidates seeking the office of Member of the General Assembly. And as there were no such votes (and certainly not 372,197 such votes as required to satisfy *N.J.S.A.* 19:5-1), then *N.J.S.A.* 19:14-12 does not apply to the 2014 Regular and Special General Elections. The law is clear as to what election officials are required to do when a "statutory political party" fails to meet the 10% conditional caveat threshold in *N.J.S.A.* 19:5-1, because the statute itself states in relevant part as follows:

> * * * … In such case the names of the candidates nominated at the primary election ***shall be printed in the column or columns designated***

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two documents: The August 27, 1999 Emergent Appellate Order, and the subsequent September 3, 1999 written opinion. For reasons not clear, even the parties briefs have been "purged", so for reasons that are not clear, there no longer is any Appellate Record. So while there is no Appellate "record" in existence today, the true fact of history is that there never was any "record" in existence before the Appellate Division that supported the contention that ***anyone anywhere ever at any time*** before the *New Jersey Conservative Party v. Farmer* case interpreted *N.J.S.A.* 19:5-1 with the 2 + 2 = 22 method of counting ultimately approved by the Appellate Division. Any statements or claims otherwise are simply historically untrue.

> ***"Nomination by Petition" on the official ballot under the respective titles of office for which the nominations have been made***, followed by the designation of the political party of which the candidates are members.

[*N.J.S.A.* 19:5-1].

In sum, the ballot preference statute, *N.J.S.A.* 19:14-2, does not apply to the November 4, 2014 Regular General Election because neither of the "statutory political parties" have satisfied the 10% threshold in *N.J.S.A.* 19:5-1, and as such defendant Guadagno's August 8, 2014 "Certification" is invalid and illegal and any drawing conducted by the defendant Clerks is void *ab initio* and a violation of the mandatory language of the State Legislature in *N.J.S.A.* 19:5-1.

B. Assuming, *Arguendo*, that Judges Kleiner and Braithwaite were "right" and Judge Fisher was "wrong", then *N.J.S.A.* 19:5-1 is Unconstitutional both "Facially" and "As Applied" to Appellants:

It is Appellants' contention that for the reasons previously stated that the emergent 2 judge Appellate Division published opinion of Judges Braithwaite and Kleiner in *New Jersey Conservative Party v. Farmer*, 324 *N.J.Super.* 451 (App. Div. 1999) is no longer "good law" in the circumstances of this case and in the context of the specific legal claims as framed and advanced. This case should be disposed of on statutory interpretation grounds, which obviates the necessity of even addressing the

Federal Constitutional claims. However, assuming, *arguendo*, that this Court somehow disagrees and finds that the 1999 Appellate Division's statutory interpretation of the statutory scheme generally, and the interpretation of *N.J.S.A.* 19:5-1 specifically, is somehow "correct", then both "facially" and "as applied", the statutory interpretation of the Appellate Division renders the statutory scheme generally, and *N.J.S.A.* 19:5-1 specifically, unconstitutional and invalid.

Specifically, as noted, on August 27, 1999, a 2 judge panel of the Appellate Division in *New Jersey Conservative Party v. Farmer, supra.*, issued the following Emergent Order after hearing telephonic argument on an expedited and emergent basis on the State's appeal:

> We grant leave to appeal and summarily reverse the partial declaratory judgment entered in favor of plaintiff.
>
> The Chancery Division judge erred in interpreting *N.J.S.A.* 19:5-1 when he concluded that the only primary election to be considered in determining eligibility for a party column on the official ballot is the primary election for the general assembly. ***We conclude that the language of N.J.S.A.* 19:5-1 that says "at any primary election for a general election" means that all primary elections are considered in deciding whether a group is a political party for party column purposes on the official ballot.**
>
> We reserve the right to submit a full opinion on this issue.
>
> Plaintiff's (*sic*) request for a stay is denied and plaintiff's (*sic*) subsequent request for a temporary stay until Tuesday, August 31, 1999 is also denied. (Emphasis added).

> [*See* (Pa 98 to Pa 100)), August 27, 1999 Order at "Exhibit F" to Plaintiff's Verified Complaint].

In the September 3, 1999 written opinion, the 2 Judge Emergent Appellate Court held, consistent with their August 27, 1999 Emergent Order in relevant part as follows:

> The question raised by plaintiffs is what primary elections are to be considered in determining whether a political party achieved the ten percent target. * * * The pivotal language here is "at any primary election for a general election." *N.J.S.A.* 19:5-1. We conclude that this language is plain and requires that all primary elections for the general election must be considered and not just those for the General Assembly. * * * Because in the even-numbered years such as 1998 when there are generally no primary elections for the General Assembly, the other primary elections must be considered to determine party status for a party column on the official ballot.
>
> [*New Jersey Conservative Party v. Farmer, supra.*, 324 *N.J.Super.* at 458, 459 and 461].

If this Court is willing to accept the "2 + 2 = 22" logic of Judges Kleiner and Braithwaite, then the New Jersey ballot preference scheme is unconstitutional as the United States Supreme Court has unequivocally held that the United States Constitution's Fourteenth Amendment's Equal Protection Clause constitutionally mandates that a State must count the weight of each vote the same in all aspects and at all stages of State electoral schemes involving elections of Federal Officials. Specifically, one year after the Appellate Divisions holding in *New Jersey Conservative Party v. Farmer, supra.*, the United States Supreme Court unequivocally held that it

is a clear violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution for a State administered election, where Federal Offices are on the ballot, for the State to count one voter's vote differently than an another voter's vote in the same election. *See Bush v. Gore,* 531 *U.S.* 98 (2000); *Bush v. Palm Beach County Canvassing Board,* 531 *U.S.* 20 (2000). Therefore, if *N.J.S.A.* 19:5-1 indeed means and operates in the "peculiar" way as stated by the Appellate Division in *New Jersey Conservative Party v. Farmer, supra.,* then the statutory scheme is unconstitutional and invalid.

The Appropriate Level of Judicial Scrutiny for this Court to Apply when Evaluating Plaintiffs' Constitutional Claims the Summary Judgment Phase is "Strict Constitutional Scrutiny":

One year ago, in *Empower our Neighborhoods v. Guadagno,* Mercer County Docket No. MER-L-3148-11 (March 31, 2014 Decision on Motions and Cross Motions for Summary Judgment, *see* 2014 WL 1315198 (Law. Div., March 31, 2014) the Court evaluated the proper level of judicial scrutiny to apply at the "Summary Judgment" phase of a case when there was a challenge that an New Jersey State Election Law violated the First and Fourteenth Amendments to the United States Constitution. There, the Court correctly stated as follows:

> Generally, courts view First Amendment cases differently depending on whether the government is regulating the content of the speech, the time, place or manner of the speech, or if the government is suppressing political speech. The general rule is that, "[l]aws that burden political

speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. Federal Elections Commission,* 558 *U.S.* 310, 340 (2010) (citing *Federal Elections Commission v. Wisconsin Right to Life, Inc.*, 551 *U.S.* 449, 464 (2007)). Thus, "political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Ibid.*; *see generally Council on Alternative Political Parties v. Division of Elections,* 334 *N.J.Super.* 225, 238 (App. Div. 2001). The proper analysis was set forth in *Timmons v. Twin Cities Area New Party,* 520 *U.S.* 351, 358 (1997):

> When deciding whether a state election law violated First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling State interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interest will usually be enough to justify reasonable, nondiscriminatory restrictions.
>
> [*Ibid.* (citations omitted)].

[*Empower our Neighborhoods v. Guadagno*, Mercer County Docket No. MER-L-3148-11 (2014 WL 1315198 (Law. Div., March 31, 2014), March 31, 2014 Decision on Motions and Cross Motions for Summary Judgment)].

The March 31, 2014 holding in *Empower our Neighborhoods v. Guadagno* is consistent with long standing Third Circuit Precedent on the issue of the application of "strict constitutional scrutiny" ***at the summary judgment phase***[16] - which is where this case now is – which is binding on this Court. Specifically, the United States Court of Appeals for the Third

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[16] It should be noted that two years ago on October 1, 2012 in a similar case brought by many of the same parties here in this case, in *Democratic-Republican Organization of New Jersey v. Guadagno,* 900 *F.Supp.2d* 447 (D.N.J. 2013), the Honorable Freda Wolfson, U.S.D.J., ruled that ***at the early preliminary injunction phase of a ballot location case***, on an applicant's request that a preliminary injunction be issued under Rule 65, that at that early stage of litigation pending final resolution of a case and pending ruling on an application for a ***final*** injunction request, that the correct level of "judicial scrutiny" to apply at that early stage of the litigation was the so called "*Anderson* balancing test" as articulated by the United States Supreme Court in *Anderson v. Celebrezze,* 460 *U.S.* 780 (1983). The law in the Third Circuit was, and is, absolutely clear that ***at the final injunction phase of such a case***, that the proper level of judicial scrutiny to apply is "strict scrutiny". *See e.g. Allegheny County v. Allegheny County Department of Elections,* 174 *F.3d* 305 (3d Cir. 1999) (*en banc*); *Wellford v. Battaglia*, 485 *F.2d* 1151 (3d Cir. 1973). Judge Wolfson ruled that the less exacting "*Anderson* balancing test" was the correct test to apply ***at the preliminary injunction phase.*** While it was clear that the standard of judicial scrutiny was "strict scrutiny" at the ***at the summary judgment phase***, in a case of first impression in the District of New Jersey, Judge Wolfson applied the much less exacting "*Anderson* balancing test" ***at the preliminary injunction phase.*** That decision was affirmed by a three judge panel of the Third Circuit, and request for *en banc* review was denied. *See Democratic-Republican Organization of New Jersey v. Guadagno,* 700 *F.3d* 130 (3d. Cir. 2012). That case has no bearing on this case as here Appellants are moving for ***final judgment*** and ***final*** relief. It is also noted that on an application for a ***preliminary injunction*** in the *New Jersey Conservative Party v. Farmer* case in 1999, Judge Fisher denied the preliminary request on August 12, 1999, *see* "Exhibit D" to Plaintiffs' Verified Complaint at (Pa 52 to Pa 71), but then eleven days later, Judge Fisher ruled ***at the summary judgment stage***, using the correct standard of review at that stage of the litigation, in favor of the New Jersey Conservative Party. (Pa 72 to Pa 100).

Circuit has long and unequivocally held that the correct level of judicial scrutiny for a Court to apply when evaluating a candidate litigant's Fourteenth Amendment Equal Protection Federal Constitutional Claims in a "candidate ballot access case" is the "compelling state interest level of judicial scrutiny". Specifically in *Allegheny County v. Allegheny County Department of Elections,* 174 *F.3d* 305 (3d Cir. 1999) (*en banc,* Becker, C.J., and Sloviter, Stapleton, Mansmann, Greenberg, Scricia, Nygaard, Alito, Roth, Lewis, McKee, Rendell and Rosen), the Third Circuit, sitting *en banc,* unanimously held that the correct level of judicial scrutiny for a Court to apply when evaluating a candidate litigant's Federal Constitutional Fourteenth Amendment Equal Protection claims at the summary judgment phase of a case in a "candidate ballot access case" is the "compelling state interest level of judicial scrutiny", otherwise commonly known as "strict scrutiny". This *en banc* holding was consistent with and mirrored the earlier Third Circuit 3 Judge panel published opinion in *Wellford v. Battaglia*, 485 *F.2d* 1151 (3d Cir. 1973), a case decided more than 25 years before the unanimous *en banc* decision of the full Third Circuit in *Allegheney, supra.*, where an earlier panel of the Third Circuit (Judges Van Dusen, Gibbons and Hunter) also unanimously held that the correct level of judicial scrutiny for a Court to apply when evaluating a candidate litigant's Federal Constitutional Fourteenth Amendment Equal Protection claims at the summary judgment phase of a case in a "candidate ballot access case" is the "compelling state

interest level of judicial scrutiny", otherwise known as "strict scrutiny." As recently as three years ago, in an Order entered September 13, 2011 in *Lewis v. Guadagno,* No. 11-3401 (3d Cir. 2011), another panel of the Third Circuit (Scirica, Ambro and Vanaskie) specifically ruled that the correct level of judicial scrutiny for a Court to apply when evaluating a candidate litigant's Federal Constitutional claims at the summary judgment phase in a "candidate ballot access case" is the "compelling state interest level of judicial scrutiny", otherwise known as "strict scrutiny", and in so doing specifically cited with approval the existing Third Circuit Precedent of *Wellford v. Battaglia, supra.*

The "Election's Clause and the Seventeenth Amendment:

As this case and election involves an Election for United States Senate and Elections for United States House of Representatives there can be no question that this case specifically and directly involves and implicates restrictions on State regulation imposed by the United States Constitution's "Election's Clause" (Article I, section 4, clause 1) and the Seventeenth Amendment.

> Through the Elections Clause, the Constitution delegated to the States the power to regulate the "Times, Places and Manner of holding Elections for Senator and Representatives," subject to a grant of authority to Congress to "make or alter such Regulations." [*United States v.*] *Classic*, 313 *U.S.*

> 299, 315 (1941). No other constitutional provision gives the States authority over congressional elections, and no such authority could be reserved under the Tenth Amendment. By process of elimination, the States may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause.
>
> [*Cook v. Gralike*, 531 *U.S.* 510, 522 (2010); *see also United States Term Limits v. Thorton*, 514 *U.S.* 779 (1995)].

As stated, States such as New Jersey "… may regulate the incidents of such elections, including balloting, only within the exclusive delegation of power under the Elections Clause." *Id.*

Taken together, there is no question that the appropriate level of scrutiny to apply to the Plaintiffs' various constitutional claims in this case at the Summary Judgment Phase is "strict constitutional scrutiny", where the law is *presumed unconstitutional*, and the burden then shifts to the State to come forward and demonstrate that (1) the restriction 'furthers a compelling interest, and (2) that the restriction is narrowly tailored to achieve that interest. *See Citizens United v. Federal Elections Commission, supra.*; *Federal Elections Commission v. Wisconsin Right to Life, Inc., supra.*; *Timmons v. Twin Cities Area New Party, supra.*; *Cook v. Gralike, supra.; United States Term Limits v. Thorton, supra.; Allegheny County v. Allegheny County Department of Elections, supra.*; *Wellford v. Battaglia, supra.*; *Lewis v. Guadagno, supra.*; *Council on Alternative Political Parties*

v. Division of Elections, supra.; and *Empower our Neighborhoods v. Guadagno, supra.*

And against the "strict scrutiny" standard, there is no question that the statutory ballot location preference scheme generally, and *N.J.S.A.* 19:5-1 as applied and interpreted by the Appellate Division in *New Jersey Conservative Party v. Farmer, supra.*, specifically, can not be justified by the State, and that such State statutory scheme operates to violate Appellants' rights as guaranteed and secured by the First, Fourteenth Amendments and Seventeenth Amendments to the United States Constitution and the "Election's Clause" found in Article I, Section 4, Clause 2 of the *United States Constitution.* The burden at this – now FINAL INJUNCTION stage of the litigation – is on the State to come forward with information to somehow overcome a Constitutional presumption that the statutory scheme is unconstitutional, which the State simply can not do as the State now openly concedes that the ballot location statutory scheme at issue confers a "preference" and a "benefit" to the candidates of the two established "political parties" to the specific exclusion of the candidates of all other candidates, something which the United States Constitution clearly prohibits.

POINT II:

_N.J.S.A._ 19:14-12, the Ballot Location Preference Statute, does not apply to the November Special General Election in District 1 by application of _N.J.S.A._ 19:27-1:

The February 18, 2014 "Writ of Election" signed by the the Honorable Chris Christie, New Jersey Governor (Pa-2) fixed November 4, 2014 as the date for the holding of the Special Regular Election in District 1 for the unexpired term of Robert Andrews in the United States House of Representatives.

Certain New Jersey Election Laws in Title 19 are made applicable to Special Regular Elections by virtue of *N.J.S.A.* 19:27-1 which provides as follows:

> ***Except as herein otherwise provided*** candidates for public office to be voted for at any special election shall be nominated and ***the special election shall be conducted*** and the results thereof ascertained and certified ***in the same manner and under the same conditions, restrictions and penalties as herein provided for primary and general elections.*** (Emphasis added).
>
> [*N.J.S.A.* 19:27-1].

As the statute says, "***Except as herein otherwise provided*** *… the special election shall be conducted … in the same manner and under the same conditions, restrictions and penalties as herein provided for primary and general elections."* (Emphasis added) Therefore, unless there is something in Title 19 that indicates that part of the statutory scheme can not apply – that "… herein otherwise provide[s] …", that provision of Title 19 applies to Special Elections.

N.J.S.A. 19:1-1 defines special election as follows: * * * "'Special election' an election which is not provided for by law to be held at stated

intervals". *Id.* *N.J.S.A.* 19:2-1 is applicable to all special elections (of which the November 4, 2014 "Special Election in District 1" is one) and provides in relevant part that "… *Primary elections for special elections shall be held not earlier than 30 nor later than 20 days prior to the special elections*." (emphasis added) *Id.* The stated time table in the February 18, 2014 "Governor's Writ of Election" clearly violates *N.J.S.A.* 19:2-1 as the date for the Primary Election fixed in the Writ was June 3, 2014, is well outside the mandatory statutory time frame of "… *not earlier than 30 nor later than 20 days prior to …*" the November 4, 2014 Special General Election date. However, specifically at issue here, the ballot location preference drawing in *N.J.S.A.* 19:14-12 is required to be held 85 days before the Regular Election, well before the correct legal time frame when the Primary Election for a Special Election may even be held. As such, the 85 day time frame in *N.J.S.A.* 19:14-12 can not be reconciled with the "… *not earlier than 30 nor later than 20 days prior to …*" time frame in *N.J.S.A.* 19:2-1. As such, this is clearly a case where the Legislature has "… *herein otherwise provided* …", *N.J.S.A.* 19:27-1, and as such the ballot location preference in *N.J.S.A.* 19:14-12 can not, as a matter of law, apply to the Special General Election in District 1. By allowing such a preference to Democratic candidate Norcross in the Special General Election in District 1, defendants have violated a *mandatory* election law.

CONCLUSION:

Statutory use of the word "*shall*" in *N.J.S.A.* 19:5-1 as noted denotes the imperative and mandatory, whereas the use of the word "may" in a statute (not used in *N.J.S.A.* 19:5-1) denotes the permissive and directory. *Animal Rights, Inc. v. Mahwah Township,* 138 *N.J.Super.* (Law Div. 1995), *aff'd* 148 *N.J.Super.* 249 (App. Div. 1977), *certif. denied* 75 *N.J.* 25 (1977). Appellants contend – and the plain wording of *N.J.S.A.* 19:5-1 certainly bear out – that what is at issue in this case is a violation a specific ***mandatory*** New Jersey State election statute – *N.J.S.A.* 19:5-1 - which governs and mandates certain substantive actions that are specifically required to be followed by the referenced election officials when administering the November 4, 2014 Regular and Special General Elections in the event that the 10% conditional caveat in *N.J.S.A.* 19:5-1 is not met. In this regard, the fact that what is at issue is a ***mandatory*** New Jersey State Election statute makes this case particularly time sensitive because the legal remedy that any Court of competent jurisdiction is required to Order, in the event that Appellants are ultimately ruled to be correct after the November 4, 2014 Regular and Special General Elections have occurred will be mandatory judicial invalidation of such elections and an Order that completely new and lawful elections be held in compliance with ***mandatory*** New Jersey State election statutes forthwith. *See In re: Smock,* 5 *N.J.Super.* 495, 501 (Law Div. 1949) ("… Obviously not every infraction of the election laws will

invalidate the contest. There is a settled distinction between violations of directory, as distinguished from mandatory, provisions of the law."); *In re: Matter of Petition of Byron,* 165 *N.J.Super.* 468, 474 (App. Div. 1978), *aff'd* 170 *N.J.Super.* 410 (App. Div. 1979), *certif. denied* 82 *N.J.* 280 (1979) ("… ***If the section is characterized as one that is mandatory in nature, the ballot or election will be overturned;*** if the section is characterized as one that is directory in nature, the ballot or election will be upheld." (Emphasis added)).

In this case, for the foregoing reasons, there is no question but that the State Election Officials conducted the November 3, 2014 Regular and Special General Elections in violation of the clear and mandatory directives in the New Jersey Election laws generally, an in violation of *N.J.S.A.* 19:5-1 and *N.J.S.A.* 19:14-12 specifically. As such, this Appellate Court must declare the results of the entirety of all of the November 3, 2014 Federal, State, County and Municipal elections invalid and Order that entirely new elections be held forthwith in compliance with law.

Respectfully submitted,

Richard Luzzi, Esq.
Attorney for Appellants

Dated: March 7, 2015

Respectfully submitted,

Eugene Martin LaVergne
Democratic-Republican for U.S. Senate
Appellant *Pro Se*
Dated: March 7, 2015