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April 12, 2024

VIA ECOURTS
Honorable John E. Harrington, J.S.C.
New Jersey Superior Court
Burlington County Administration Building
49 Rancocas Road, Third Floor
Mount Holly, NJ 08060

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Re: Burlington County Regular Republican Organization v. Schwartz, BUR-L-684-24

Dear Judge Harrington,

Please accept this letter in opposition to the procedural deficient and substantively meritless application filed by Plaintiffs Shirley Maia-Cusick, Albert Harshaw, Gregg Mele, and Hector Castillo (collectively, "Unendorsed Republican Candidates").[1] The current Complaint, dropped in at the 11th hour, is nothing more than a political stunt intended to generate press releases and

[1] New Jersey Court Rule 4:67-2 governs the filing of an Order to Show Cause when a party seeks emergent relief in a summary manner. That rule requires that the complaint must be "verified by affidavit." Further no relief shall be provided unless facts show by "affidavit or verified complaint" shall be provided. Rule 4:67-5 requires that in contested matters "briefs shall be submitted."

Here, Plaintiffs' brief is only verified by one party, Ms. Maia-Cusick. As such, this Court should immediately deem the other candidates dismissed without prejudice and should not consider any claims raised by those candidates. As the claims raised by the other candidates are not even properly plead, they should be dismissed from the current hearing.

headlines in a desperate hope of breathing some oxygen into Plaintiffs' floundering campaigns. Unfortunately, this effort does nothing other than create more confusion to the voters, the candidates, and the entire electoral system, risking taxpayer dollars and substantive impacts on the Republican Party's primary, even jeopardizing the ability to timely select delegates to the National Convention. To the extent that the Unendorsed Republican Candidates seek emergent relief, it should be immediately denied so that the election process can, finally get underway in New Jersey.

FACTUAL AND PROCEDURAL HISTORY

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Plaintiffs Albert Harshaw and Gregg Mele are candidates for U.S. Senate. They are statewide candidates and at least as to Albert Harshaw, sought the party endorsement of at least some of the Republican County organizations. Shirley Maia-Cusick is a candidate for U.S. Congress in the Third Congressional District and Hector Castillo is a candidate for U.S. Congress in the Ninth Congressional District. Both Plaintiffs participated in at least some county screenings seeking the endorsement of the county parties. Despite the desire of Plaintiffs to bracket with various county candidates under organization slogans, none of the counties chose to bracket with these plaintiffs.

On March 29, 2024, the Honorable Zahid N. Quraishi, U.S.D.J., entered a preliminary injunction in the matter of Kim v. Hanlon, 24-1098, barring county clerks from issuing ballots in the June 4, 2024 democratic primary using the bracketing and ballot placement process contained in New Jersey state statutes, finding that the candidates were likely to succeed on the merits that the current system violates their constitutional rights. This was a preliminary finding, not a final judgment, and the decision was specifically limited to the only election for which parties in the case were seeking relief – the June 4, 2024 Democratic primary.

On March 30, 2024, the District Court issued an Order confirming that the Preliminary Injunction only applied to the Democratic Primary, and that Republican Primary ballots were not impacted at this time.

On April 1, 2024, Mr. Harshaw attempted to appeal the District Court's ruling. The court denied the request stating that "Mr. Harshaw is a non-party to the lawsuit and therefore has no standing to pursue an appeal of this matter. Moreover, **the deadline to move to intervene as to the motion for preliminary injunction has passed**. Therefore, the arguments presented will not be considered by this Court…." (See Order, dated April 1, 2024).

Later in the day on April 1, 2024, Mr. Harshaw, now joined by the same plaintiffs in this suit, represented by Mr. Kovic, filed a motion to Intervene. On April 3, 2024, the District Court denied the motion to intervene in a letter order. In denying their motion, as well as a motion by the Republican Chairs Association, the District Court held that the motions for all parties were "too little and too late. They are too late insofar as the Court set a deadline of March 6, 2024 for would-be litigants to seek to intervene for the purposes of the Motion for Preliminary Injunction." (See Moench Cert., Ex. B). The Court did, however, indicate that these plaintiffs, along with Republican Committees, could move to intervene in the future, but that they were too late for purposes of seeking to argue the merits of the preliminary injunction.

To date, the Unendorsed Republican Candidates have not moved to intervene in the District Court action and apparently were content to wait for future developments on these issues, either through a determination by the Third Circuit, which has an expedited merits panel hearing oral argument on Friday, April 12, 2024, or through future litigation in the Kim v. Hanlon or Conforti v. Hanlon case, which has been pending since 2020.

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However, not wanting to miss an opportunity to get a headline, the Unendorsed Republican Candidates waited until after the ballot position drawings were completed on April 4, and then waited another four days to file the instant action in Mercer County Superior Court. This Verified Complaint seeks to do in a matter of days, what the District Court did over several weeks, including an evidentiary hearing, and ask this Court to rule in several days on the underlying constitutional merits of their case. The District Court would not let them intervene in the current Kim case, they did not file in Federal Court to join with the other matters pending there on this topic, and instead seek to by-pass the normal process to ask this Court to do what the District Court would not – let them jump in at the last minute to disrupt the Republican primary election.

The Unendorsed Republican Candidates' request for injunctive relief should be immediately denied. To the extent there are any valid claims sufficient to sustain a motion to dismiss, the matter should proceed in the normal course of litigation, which will give the Court and all the parties plenty of time to litigate these issues before next year's primary election.

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LEGAL ARGUMENT

I. THE EMERGENT RELIEF SHOULD BE BARRED BY THE DOCTRINE OF LACHES

The New Jersey Supreme Court in Knorr v. Smeal, 178 N.J. 169 (2003), outlined the doctrine of laches, stating:

> [The doctrine of laches] is invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party. Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing that the right had been abandoned. The time constraints for the application of laches are not fixed but are characteristically flexible. The key factors to be considered in deciding whether to apply the doctrine are the length of the delay, the reasons for the delay, and the

> changing conditions of either or both parties during the delay. The core equitable concern in applying laches is whether a party has been harmed by the delay.

Id. at 180-81 (internal citations omitted).

While there may be a dispute as to when the Court should consider the first time that the Unendorsed Republican Candidates knew they may have an obligation to go to court to assert their legal rights related to bracketing for the June 2024 Primary – Judge Quraishi appears to be of the opinion that the time started in February and expired on March 6 – there is no question that as of March 29, 2024, the Plaintiffs were aware of the Court's Preliminary Injunction and on March 30, 2024, they received confirmation that it did not apply to them.

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On April 3, 2024, the District Court rejected Plaintiffs attempt to intervene and after that time, Plaintiffs did not re-file to intervene in federal court, file a new Federal Court action, or immediately file in state court. Instead, they allowed all of the Clerks to conduct their ballot draws and to design their ballots. They allowed all of the parties to believe that they were no longer pursing any legal claims related to this election, and then after the ballots were designed, the draws were completed, they file this action, now seeking to disrupt everything that had occurred over that time frame.

While the number of days may not be extensive, this Court is aware, as are Plaintiffs, that the time periods related to elections are fast, and that legal matters need to be quicky and timely brought to the Court's attention. By way of example, in the time period that Plaintiffs sat around between April 3 and April 5 this firm filed a motion on the Third Circuit, and Amicus Brief in the Third Circuit, and an Order to Show Cause in the consolidated Burlington County matter, as well as an unrelated petition challenge.

The reality is that Plaintiffs sat back doing nothing to advocate for their own rights during a critical time period for election matters, and now seek to delay the entire election process to the detriment of the candidates, the parties, the election officials, and the voters. The doctrine of laches should bar any injunctive relief.

II. THE PURCELL DOCTRINE BARS THE RELIEF SOUGHT BY PLAINTIFFS

Before even getting to the merits, or lack thereof, of the Unendorsed Republican Candidates, the United States Supreme Court in Purcell v. Gonzalez, 549 U.S. 1 (2006) has cautioned and advised lower courts against last minute orders impacting elections. The Supreme Court stated that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer that risk will increase." Id. at 4-5.

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Purcell was cited by the appellate division in Singh v. Murphy, 2020 N.J. Super. Unpub. LEXIS 2013 (App. Div. Oct. 21, 2020), which denied plaintiff's challenges related to the 2020 Covid election on a variety of grounds. The court noted that in addition to the claims being meritless, it would have been improper to grant the relief anyway under Purcell. "[T]here is a wealth of federal precedent that weighs heavily against entertaining on-the-brink challenges to the voting procedures of upcoming elections." Id. at *40-41 (citing Purcell v. Gonzalez; Nader v. Keith, 385 F.3d 729, 736 (7th Cir. 2004) ("disallowing third-party presidential candidate's suit challenging constitutionality of state election doe that was not filed until June of an election year, which was four months after his candidacy was announced, and 'created a situation in which any remedial order would throw the state's preparations for the election into turmoil.'"); Kay v. Austin, 621 F.2d 809, 813 (6th Cir. 1980) ("As time passes, the state's interest in proceeding with the

election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on this rights.")

Here, granting Plaintiffs' requested relief, seeking a statewide injunction completely redoing the ballots for the Republican primary, when ballots are supposed to be mailed out in 10 days, is exactly the type of situation which the Supreme Court in Purcell and the appellate division in Singh were referring to that would undermine the election system to the determine of voters and candidates alike.

This is enough reason for this Court to immediately deny the injunctive relief sought by Plaintiffs.

III. PLAINTIFFS ARE UNABLE TO MEET THE BURDEN UNDER THE CROWE FACTORS

In order to demonstrate that they are entitled to injunctive relief, plaintiffs must show by clear and convincing evidence that their claims are based upon well settled legal rights. They are unable to do so with each of the counts that they raise. The Unendorsed Republican Candidates have failed to articulate how they meet the criteria warranting injunctive relief under the Crowe factors. In fact, their papers do not even mention Crowe, let alone submit facts and legal arguments to demonstrate that they meet the criteria. Nevertheless, their claims are meritless on their face and should be denied.

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A. Count One Involving N.J.S.A. 19:14-12 is Inapplicable to The Primary Election

Count One alleges a violation of N.J.S.A. 19:14-12, which is the statute that sets forth the process for selecting ballot positions in a general election. It has no applicability to a primary election. This count is not only meritless, it is frivolous.[2]

B. Count Two Alleging a Violation of the Equal Protection Clause is Not Supported by Law or the District Court's Kim v. Hanlon Preliminary Injunction Decision

Count Two of Plaintiffs' Complaint alleges an equal protection clause violation. While the claims are a little hard to decipher, it appears as if the Plaintiffs are conflating to two separate – equally meritless – claims. First, the Unendorsed Republican Candidates alleged a violation of the equal protection clause alleging that they are each entitled to an equal right to obtain the preferential ballot position. And as a result, they allege that by not being treated equally it violates their constitutional rights. Second, Plaintiffs are seemingly trying to rely upon the preliminary injunction decision in Kim v. Hanlon to support that premise. However, Kim does not support the claims as presented in the Complaint.

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First, the Senate Candidates, Harshaw and Mele, do have an equal opportunity to obtain the first ballot position. Under N.J.S.A. 19:23-26.1, conspicuously missing from Plaintiffs' complaint, the ballot positions are chosen based upon Senate candidates, whether they are bracketed or not. In fact, these candidates have obtained favorable ballot positions in some counties (for instance Harshaw is the first position in Somerset County). Therefore, on that ground alone their relief is meritless as to the Senate candidates, who should be immediately dismissed from the case.

[2] For what it is worth, the N.J.S.A. 19:14-12 has been upheld as constitutional in Democratic-Republican Org. v. Guadagno, 900 F. Supp. 2d 447, aff'd, 700 F.3d 130 (3d Cir. 2012).

Count Two, as pled, is based upon the alleged unequal treatment, although the Count itself does not articulate the exact basis for the unequal treatment and who is being treated different. To the extent that Plaintiffs seek to rely upon Kim v. Hanlon, that decision, even if this Court were to consider it as instructive, does not provide relief based on the "separate but equal" language contained in Court Two of the Complaint. Instead, Kim v. Hanlon was predicated on First Amendment claims, which are not plead anywhere in the Plaintiffs' current action and the Elections Clause, which is also not plead in the current action. While Plaintiffs, perhaps intentionally, perhaps negligently, appear to attribute a quote to the District Judge in the Kim case, that quote, which is not cited, is not contained in the District Court's opinion. (See Complaint, Paragraph 21).

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Finally, to the extent Plaintiffs are trying to argue that they harmed because it is unequal for most counties to use the traditional bracketing system while two counties, while some counties – Sussex and Salem – will use an office-block system, that is not a "new" issue. The parties in those counties have chosen not to bracket and have not submitted bracketing requests (although there is nothing in the law that would have stopped any of these candidates from bracketing with candidates of their own choosing in those counties). Furthermore, no Court, including the District Court in Kim, has stated that each county's ballot must be identical.

C. Count Three Fails as A Matter of Law As Plaintiffs Have Failed to Articulate a Right Which Was Violated

A New Jersey Civil Rights Act Claim requires at a minimum that the Plaintiffs Articulate a Substantive right which has been violated by Plaintiffs. The pleadings have failed to do so at all, let alone in a manner sufficient to warrant injunctive relief (or even to sustain the Complaint on a motion to dismiss). The is no articulated rights such have been recognized or upheld by the courts,

including Kim v. Hanlon, which are contained in the pleadings before the Court. There are no indications that the clerks have done anything than comply with the Federal Court's orders, which specifically did not extend to the Republican primary (or any other election beside the June 4 Democratic primary). Instead, it appears that the clerks (with the exception of the Burlington Clerk who violated the bracketing statute), have all complied with the bracketing and ballot positioning statutes, which have been upheld in New Jersey time and again by the courts. Given that no one, including Judge Quraishi, has actually found that the statutes at issue are in fact unconstitutional, and no court has actually struck them, it is impossible for Plaintiffs to sustain their current cause of action. To the contrary, New Jersey court have affirmatively found that Clerks who violated the bracketing rules violated the candidates' constitutional rights.

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IV. EVEN IF CONSTITUTIONAL ISSUES WERE PROPERLY PLEAD, THIS COURT SHOULD DECLINE TO CONSIDER THEM

A. This Court Remains Bound by the New Jersey Supreme Court's Decisions Upholding the Constitutionality of New Jersey's Bracketing and Ballot Placement Statutes

Even if the Plaintiffs in this matter had properly challenged the proper statutes on constitutional grounds, relying upon the decision in Kim v. Hanlon, that decision, which is only a preliminary injunction, provides no basis for this Court to disregard the binding decisions in cases like Quaremba v. Allan, 67 N.J. 1 (1975) and Schundler v. Donovan, 377 N.J. Super. 339, 346 (App. Div. 2005), aff'd, 183 N.J. 383 (2005).

Those cases, along with a slew of decisions at the trial court and appellate levels have not only rejected challenges to New Jersey bracketing law but have affirmatively upheld that constitutional rights of candidates *to* bracket, and have found that disregarding those rights and not honoring bracketing is a violation of the First Amendment.

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This court is bound by the Quaremba and Schundler and unless a federal court issues a final decision on the merits adjudicating a constitutional issue, the Kim decision provides no basis for this Court to ignore the New Jersey Supreme Court decisions upholding the constitutionality of the bracketing and ballot placement statutes and upholding the candidates' First Amendment right to bracket.

B. The Court Should Decline to Consider the Matter While the Federal Action Remains Pending

While is not an absolute bar to this Court considering a topic which is also pending in federal court, the court in Kaselaan & D'Angelo Assocs. v. Soffian, 290 N.J. Super. 293 (App. Div. 1996) provided guidance against it. The court held:

> Although efficient judicial management may be more complex when a related case is pending in a federal court or in the court of another state, our courts also have appropriate means to address those situations. For example, 'the New Jersey action may, as a matter of sound discretion, be stayed by our courts until the prior action has been adjudicated. In fact, where it would be inappropriate for both cases to proceed simultaneously, the general rule is that the court which first acquires jurisdiction has precedence in the absence of special equities. In addition, in appropriate circumstances our courts may retrain a litigation from prosecuting an action in a foreign jurisdiction. There may also be a circumstance in which related actions should be allowed to proceed simultaneously. Thus, the determination whether to stay an action that is related to an action pending in another jurisdiction involves a careful weighing of the interests of the parties as well as the court's interest in conserving its resources.

Id. at 300-01 (internal citations omitted).

Here, the issue over the constitutionality of New Jersey's bracketing and ballot placement laws has been pending in federal court since 2020 in the Conforti v. Hanlon matter. The federal court has also heard an issued a preliminary determination in the Kim v. Hanlon case, which is now on appeal in the Third Circuit. Plaintiffs in this case could have their claims adjudicated in federal court by intervening in one or both of the cases currently pending. They chose not to

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because they are forum shopping to get relief they could not get in the District Court when the court denied their attempt to intervene to get the injunction extended to the Republican primary.

If this Court has not already denied the relief sought by Plaintiffs for one of the reasons already articulated, the Court should exercise its discretion and refrain from separately litigating the same issues pending in Federal Court. Doing so risks inconsistent rulings, potential further confusion related to the 2024 Primary election, and does not conserve judicial resources.

C. Necessary Parties Are Not Joined And the Court Should Decline to Consider the Case

Finally, Plaintiffs have not joined necessarily parties, including their own opponents in the primary election. Nor have Plaintiffs provided notice to the County Republican Parties. And finally, there is no time for Republican candidates who are unknowingly potentially impacted by the relief sought to learn about this case, which is not as highly publicized as the Kim v. Hanlon case, which also proceed for several weeks providing sufficient time for word to spread about the issues in the case. This Court cannot and should not proceed without the time to join all of those necessary parties or provide them meaningful opportunity to participate.

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CONCLUSION

For the foregoing reasons, the Court should deny the Plaintiffs' request for injunctive relief and grant the BCRRO's motion to dismiss the Plaintiffs' Complaint for Failure to State a Claim. If this court is inclined to entertain these claims, it should stay this matter until after the Third Circuit panel issues its opinion in Kim, where oral argument is less than 48 hours away.

Respectfully submitted,

/s/Matthew C. Moench
Matthew C. Moench, Esq.