

## **Central Jersey Progressive Democrats End Gender Discrimination Rules In Middlesex County Political Parties; Court Orders Gender-Neutral Ballots for Democratic, Republican Committees**

New Brunswick, NJ – The Clerk of Middlesex County and political parties in Middlesex can no longer force voters and candidates to choose only one man and one woman as party committee members, according to an order by The Honorable Mary C. Jacobson, A.J.S.C.. The ruling grants permanent relief sought by Central Jersey Progressive Democrats (CJPD). Nine CJPD candidates won preliminary relief allowing them to run free from gender discrimination for County Committee in the 2019 Middlesex County Democratic primary, in which three of them won.

“Middlesex County has now joined several counties in the state which elect two committee-members for office, rather than one committee-man and one committee-woman. What was once a floor became a ceiling, and the Plaintiffs in this case prove the point – they are women, and women of color, who want to serve their communities without limitation. This decision is a victory for the Plaintiffs, the voters of Middlesex County, and other New Jersey residents who expect democracy to be available to all free of sex and gender discrimination,” said Yael Bromberg of Bromberg Law LLC, who argued the case before the Court.

Judge Jacobson, in discussing N.J.S.A. 19:5-3 the statute governing the election of County Committee members, found: “One effect of the statute is that, should two women receive the first and second highest number of votes out of all candidates, while a male candidate receives the third highest number of votes, the male candidate in third place would be elected over the female candidate in second place, despite having received fewer votes. The statute also effectively bars gender non-binary candidates from county committee positions.”

In finding for the Plaintiffs, Jacobson relied in part on *Hartman*, a 1997 Burlington County decision and other legal precedents, writing: “Clearly, taking N.J.S.A. 19:5-3, the Supreme Court’s pronouncement in *Eu* and the policy in this State against discrimination together, N.J.S.A. 19:5-3 is rendered unconstitutional and invalid. The statute burdens the freedom of association by preventing candidates of the same sex from running on the same slate or from obtaining office within the same election district. Furthermore, N.J.S.A. 19:5-3 discriminates on the basis of sex or gender. Under the statute, some candidates will lose to those who received fewer votes, solely because of the genders of the candidates. The text of the statute also effectively bars non-binary candidates from running for or obtaining office.”

Plaintiff Kamuela “Nikki” Tillman, a 2019 CJPD candidate who also won her County Committee seat alongside another female candidate due to the preliminary restraint initially gained, said on the final ruling, “One of my many She-Roes, Shirley Chisolm, once said, ‘If they don't give you a seat at the table, bring a folding chair.’ She knew then the difficulties of access to civic and political opportunities for Blacks and women. When I filed my petition to run for Middlesex County Democratic Committeewoman for Piscataway Ward 3, District 2, alongside my running mate and friend, Staci Berger, I did so with the expectation we had successfully satisfied the requirements to run. Imagine how disappointed I was to find that I could be denied the right to exercise our civic duty because neither Staci nor I was a man. Neither of us were willing to give up our right to run or to have our seats at the table. Along with the other plaintiffs, we took our folding chairs right to court.”

Judge Jacobson's order also denied a motion for summary judgement sought by retiring Middlesex County Clerk Elaine M. Flynn, and denied a motion to dismiss sought by the Middlesex County Democratic Organization. MCDO had been included in the case as an interested party, and recently changed its own rules to end the one-man, one-woman rule in response to being included in the CJPD's amended filing earlier this year. The opinion notes that none of the Defendants so much as offered a compelling state interest to justify the discriminatory rule. What's more, the State participated in the case as an interested party, and articulated early on the need for uniformity through invalidation of the statute. Despite this, the County pressed on to challenge the law, and the MCDO sought to dismiss the action.

Judge Jacobson wrote, "Defendant has not demonstrated how the statute furthers a compelling state interest, whether that interest be to ensure a fair and orderly election process, or to remedy gender discrimination. The State itself has offered no defense of the discriminatory provisions of N.J.S.A. 19:5-3. Indeed, the State has taken the position that following *Hartman* will further a state interest in uniformity of elections throughout the state. Therefore, because neither the State nor the Defendant have demonstrated that the statute is narrowly tailored to advance a compelling state interest, N.J.S.A. 19:5-3 is rendered unconstitutional and invalid. Accordingly, the court holds that future ballots must be prepared and drawn by the Middlesex County Clerk in a non-discriminatory manner, without regard to the sex or gender of candidates."

Laura Jill Leibowitz, a plaintiff who won her seat and, due to the preliminary relief initially gained, is serving with another woman who ran on an opposing ticket to represent the Possumtown neighborhood in Piscataway, said, "I am excited to know that candidates around the County – and hopefully, soon around the whole State – can now support their neighbors based on their interest and community engagement, regardless of gender. I am grateful to my fellow candidates and the hard work of our amazing legal team."

As a result of this decision, Middlesex joins a growing list of counties where party members can run for office without facing sex or gender discrimination. Clerks in Mercer, Hunterdon, Passaic, Cumberland and Cape May counties allow candidates to run as "committee members;" in Essex County, the rule is not enforced uniformly by the Party chairs.

"It is especially gratifying to receive this decision as we celebrate the 100<sup>th</sup> Anniversary of the 19<sup>th</sup> Amendment. Women and LGBTQ individuals have so much at stake in the upcoming election and beyond. This ruling breaks the glass ceiling so everyone can fully participate in our democracy," said Bromberg.

CJPD is a grassroots, volunteer organization launched immediately after the November 2016 election, to fight Trumpism and restore the values of the Democratic Party. CJPD has run candidates in the 2017 and 2019 Democratic Primaries, causing the MCDO to cancel its 2021 elections unjustly and extend its members' terms of offices retroactively. CJPD is building an alternative to business as usual in the Democratic Party, mobilizing residents around the values of democracy, inclusion and transparency.

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**PREPARED BY THE COURT**

CENTRAL JERSEY PROGRESSIVE  
DEMOCRATS, EM PHIPPS, DOREEN  
BAILEY, MARGARET D. BALL, STACI  
BERGER, QUIYANA BUTLER, REMI  
CHRISTOFFERSON, LAURA JILL  
LEIBOWITZ, ROSHANNA MALONE,  
KAMUELA N. TILLMAN,

Plaintiffs,

v.

ELAINE M. FLYNN, in her capacity as Clerk of  
the County of Middlesex, MIDDLESEX  
COUNTY BOARD OF ELECTIONS,

Defendant,

MIDDLESEX COUNTY DEMOCRATIC  
ORGANIZATION and MIDDLESEX  
COUNTY REPUBLICAN  
ORGANIZATION,

Interested Parties.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
MERCER COUNTY

DOCKET NO.: L-732-19

CIVIL ACTION

**ORDER GRANTING SUMMARY  
JUDGMENT TO PLAINTIFFS,  
DENYING SUMMARY JUDGMENT  
TO DEFENDANT MIDDLESEX  
COUNTY CLERK, DENYING THE  
MOTION TO DISMISS BROUGHT BY  
THE MIDDLESEX COUNTY  
DEMOCRATIC ORGANIZATION,  
AND ESTABLISHING A SCHEDULE  
FOR CONSIDERATION OF AN  
APPLICATION FOR COUNSEL FEES**

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**On Notice To: Attorney for Tahesha Way,  
Secretary of State and the Middlesex County  
Board of Elections:**

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**THIS MATTER** having come before the court by way of a motion for summary judgment filed by Thomas F. Kelso, Esq., attorney for Defendant Elaine M. Flynn, and a cross-motion for summary judgment filed by Yael Bromberg, counsel for Plaintiffs; and this Court having reviewed the submissions of the parties on the papers after Plaintiffs withdrew their request for oral argument; and Interested Party Middlesex County Democratic Organization having filed a motion to dismiss the complaint against it; and for good cause shown, for the reasons set forth in the court's written decision of September 2, 2020:

**IT IS ON THIS** 2nd day of September, 2020, hereby **ORDERED that**:

1. The motion for summary judgment filed by Defendant Middlesex County Clerk Elaine Flynn is denied.
2. Plaintiffs' cross-motion for summary judgment is granted.
3. The court hereby declares that N.J.S.A. 19:5-3 is unconstitutional and that the Middlesex County Clerk henceforth shall prepare all nominating petitions and ballots for County Committee elections so that all candidates are listed irrespective of sex or gender and that the ballot draw shall be conducted so as not to distinguish between the

- election of one committeeman and one committeewoman, but rather for the election of two committeepersons, independent of sex or gender.
4. The motion to dismiss the complaint filed by the Middlesex County Democratic Organization is denied since the Organization was named only as an interested party to put it on notice of the lawsuit, with no relief being sought against the Middlesex County Democratic Organization, making the motion to dismiss the complaint as to that entity unnecessary.
  5. If plaintiffs wish to seek counsel fees and costs of suit under the New Jersey Civil Rights Act, they shall first seek to negotiate the fees and costs with Defendant Middlesex County Clerk. If resolution of fees and costs is not achieved, Plaintiffs shall file an application for counsel fees and costs by October 16, 2020. Defendant Middlesex County Clerk shall file opposition by October 30, 2020. Plaintiffs shall file a reply brief by November 6, 2020. Oral argument, if requested, shall be conducted by video conference or telephone on November 16, 2020 at 2:00 p.m.

/s/ Mary C. Jacobson, A.J.S.C.  
MARY C. JACOBSON, A.J.S.C.

**NOT FOR PUBLICATION WITHOUT APPROVAL OF THE COMMITTEE ON OPINIONS**

CENTRAL JERSEY PROGRESSIVE  
DEMOCRATS, DOREEN BAILEY,  
MARGARET D. BALL, STACI BERGER,  
QUIYANA BUTLER, LAURA JILL  
LEIBOWITZ, ROSHANNA MALONE, and  
KAMUELA N. TILLMAN,

Plaintiffs,

v.

ELAINE M. FLYNN, in her capacity as Clerk  
of the County of Middlesex,

Defendant,

and

MIDDLESEX COUNTY  
DEMOCRATIC ORGANIZATION and  
MIDDLESEX COUNTY  
REPUBLICAN ORGANIZATION,

Interested Parties.

**SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION --  
MERCER COUNTY**

DOCKET NO. MER-L-732-19

CIVIL ACTION

**OPINION**

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Decided: September 2, 2020

*Yael Bromberg, Esq.*, for Plaintiffs Central Jersey Progressive Democrats, Doreen Bailey, Margaret D. Ball, Staci Berger, Quiyana Butler, Laura Jill Leibowitz, Roshanna Malone, and Kamuela N. Tillman.

*Niki Athanasopoulos, Esq.*, for Defendant Elaine M. Flynn, in her capacity as Clerk of the County of Middlesex.

*William M. Northgrave, Esq.*, for Interested Party Middlesex County Democratic Organization.

Jacobson, A.J.S.C.

## **BACKGROUND**

This matter first came before the court by way of a Verified Complaint and Order to Show Cause filed on April 11, 2019, by Plaintiff Central Jersey Progressive Democrats (“CJPD”) and nine directly impacted individuals who ran for Middlesex County Democratic Committee in June of 2019, seven of whom—Doreen Bailey, Margaret D. Ball, Staci Berger, Quiyana Butler, Laura Jill Leibowitz, Roshanna Malone, and Kamuela N. Tillman—remain Plaintiffs in this action and intend to run on the CJPD slate in the future. The thrust of Plaintiffs’ claims was, and is, that a New Jersey statute providing that county committees “shall consist of one male and one female member from each unit of representation in the county[.]” N.J.S.A. 19:5-3, violated federal and state constitutional rights to equal protection, the right to vote, and freedom of association.

Plaintiffs initially sought a temporary injunction compelling the Middlesex County Clerk to prepare ballots with respect to the June 4, 2019, primary election that listed candidates irrespective of gender, such that the ballot draw would not distinguish between the election of one committeeman and one committeewoman, but rather would provide for the election of two committeepersons. Those ballots were also to allow two candidates of the same gender to run under the CJPD slogan. The court granted Plaintiffs’ request for temporary relief in an order of April 15, 2019.

With leave of the court, Plaintiffs filed an Amended Complaint on February 21, 2020. Plaintiffs now seek permanent relief for all county committee-person elections in Middlesex County moving forward. On March 17, 2020, interested party Middlesex County Democratic Organization (“MCDO”) moved to dismiss the Amended Complaint for failure to state a cause of action, arguing that because MCDO’s bylaws do not require gender diversity, no relief could be granted as to the MCDO. However, MCDO was only named in the Amended Complaint as an

interested party, not a defendant, because “the statutory prescription of a sex and gender binary for party committee races affects county party affairs independent of applicable self-governing party by-laws.” Am. Compl., ¶11. Indeed, the Amended Complaint only seeks relief against the main party Defendant, the County Clerk, in the form of a permanent injunction compelling the Middlesex County Clerk to provide nominating petitions and prepare ballots for county committee elections that list candidates irrespective of sex or gender and permit candidates to run on the same slogan as another person of the same gender, such that ballot draws do not distinguish between candidates on the basis of sex or gender.

On April 23, 2020, Defendant Elaine M. Flynn filed a Motion for Summary Judgment. Defendant takes the position that the constitutionality of N.J.S.A. 19:5-3 is not settled, and that without binding authority holding the statute unconstitutional, she was constrained to follow the statute. Def.’s Br. Supp. Summ. J., at 1. Thus, Defendant does not argue that the statute must be upheld. As both parties note, county clerks in several counties, including Mercer County, have chosen not to enforce the statute following the decision of then Burlington County Assignment Judge Harold B. Wells III, in Hartman v. Covert, 303 N.J. Super. 326 (Law Div. 1997), finding N.J.S.A. 19:5-3 to be unconstitutional and invalid. Defendant simply takes the position that the Hartman decision is not binding in Middlesex County or on this court. Notably, the State has concluded that Hartman is binding on the Office of the Secretary of State and suggests that holding the statute unconstitutional would serve a need “for uniformity on an important constitutional issue for elections conducted throughout the state . . . .” April 12, 2019, Letter, at 2.

Plaintiffs filed a Cross-Motion for Summary Judgment on May 20, 2020, and subsequently waived oral argument.



### DISCUSSION

N.J.S.A. 19:5-3, which governs the election of county committee members, provides in relevant part:

The county committee shall consist of one male and one female member from each unit of representation in the county. The male receiving the highest number of votes among the male candidates and the female receiving the highest number of votes among the female candidates shall be declared elected.

[N.J.S.A. 19:5-3.]

One effect of the statute is that, should two women receive the first and second highest number of votes out of all candidates, while a male candidate receives the third highest number of votes, the male candidate in third place would be elected over the female candidate in second place, despite having received fewer votes. The statute also effectively bars gender non-binary candidates from county committee positions.

In determining the constitutionality of a state election law, the court must first examine whether the law burdens rights protected by the First and Fourteenth Amendments to the Constitution. Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 222 (1989) (citing Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 217 (1986)). If the law burdens those rights, “it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest, and is narrowly tailored to serve that interest . . . .” Ibid. (citations omitted).

In Eu, the United States Supreme Court struck down a California statute that prohibited political parties from endorsing candidates in primary elections, reasoning that the law burdened party officials’ freedom of speech, as well as their freedom of association rights to “identify the

people who constitute the association’ and to select a ‘standard bearer who best represents the party’s ideologies and preferences.’” Id. at 224 (citations omitted). Although the Court acknowledged that states may enact laws that interfere with internal party affairs to ensure the fairness of the election process, the Court concluded that California had not demonstrated that the law was narrowly tailored to advance that interest. Id. at 227-29.

Relying on Eu, the court in the Burlington County case of Hartman v. Covert held N.J.S.A. 19:5-3 unconstitutional. In Hartman, a candidate for the Chair position of the Burlington County Democratic Committee challenged the election of two women as Chair and Vice-Chair of the committee, claiming the election of women to both seats violated N.J.S.A. 19:5-3. The court held that the election was valid, concluding that the statute was “unconstitutional insofar as it mandates the election of officers of a county committee based on gender.” Hartman, 303 N.J. Super. at 330. The court noted that, “[a]s in the Eu case, this statute limits New Jersey political parties’ discretion in how to organize themselves and select their leaders, thus burdening the associational rights of the parties and their members.” Id. at 334. Having concluded that the statute burdened associational rights, the court proceeded to address whether the law served a compelling state interest and determined that it did not. The court reasoned:

[W]hile N.J.S.A. 19:5-3 was once enacted to protect women, it can now be argued that it serves to bar them from at least 50 percent of the seats available for top leadership. So while at one time the law may have been viewed as salutary to equalize opportunity between the genders in the political forum and to encourage women’s involvement in politics, such a law now has an effect opposite to that of its original design. In addition, and even more compelling, the plaintiff in this matter has made no showing that the law or the intent behind the law is presently necessary to ensure an orderly and fair electoral process, as required by Eu.  
[Id. at 335.]

Defendant notes that the court in Hartman “did not address the design of ballots and only discussed the impact on an intra-party dispute and the party’s rights of association.” Def. Br. Supp. Summ.

J., at 5. It is true that ballot designs were not at issue in Hartman. However, ballot designs are only at issue *here* insofar as Plaintiffs want ballot designs that do not effectuate the statute found unconstitutional in Hartman.

Defendant also argues that the Hartman decision “did not address whether the statute could be sustained as a remedial statute to cure prior discrimination . . . .” Def. Br. Supp. Summ. J., at 6. However, the Hartman court adequately addressed the topic when it determined that N.J.S.A. 19:5-3 “now has an effect opposite to that of its original” intent to “protect women” and “equalize opportunity between the genders . . . .” 303 N.J. Super. at 335. This court agrees that the purpose of N.J.S.A. 19:5-3 has largely been subsumed by federal and state laws against gender discrimination, *see, e.g., Frank v. Ivy Club*, 120 N.J. 73 (1990); *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988); New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 to -42, as well as by dramatic cultural change and a broad acceptance of women in politics that has occurred since gender references were first inserted into N.J.S.A. 19:5-3 in 1955.

While not binding on this court, the court agrees with and adopts the Hartman court’s reasoning. “Clearly, taking N.J.S.A. 19:5-3, the Supreme Court’s pronouncement in Eu and the policy in this State against discrimination together, N.J.S.A. 19:5-3 is rendered unconstitutional and invalid.” *Ibid.* The statute burdens the freedom of association by preventing candidates of the same sex from running on the same slate or from obtaining office within the same election district. Furthermore, N.J.S.A. 19:5-3 discriminates on the basis of sex or gender. Under the statute, some candidates will lose to those who received fewer votes, solely because of the genders of the candidates. The text of the statute also effectively bars non-binary candidates from running for or obtaining office.

Defendant has not demonstrated how the statute furthers a compelling state interest, whether that interest be to ensure a fair and orderly election process, or to remedy gender discrimination. The State itself has offered no defense of the discriminatory provisions of N.J.S.A. 19:5-3. Indeed, the State has taken the position that following Hartman will further a state interest in uniformity of elections throughout the state. Therefore, because neither the State nor the Defendant have demonstrated that the statute is narrowly tailored to advance a compelling state interest, N.J.S.A. 19:5-3 is rendered unconstitutional and invalid. Accordingly, the court holds that future ballots must be prepared and drawn by the Middlesex County Clerk in a non-discriminatory manner, without regard to the sex or gender of candidates.

### **CONCLUSION**

Insofar as the court finds that N.J.S.A. 19:5-3 violates the freedom of association and impermissibly discriminates on the basis of gender, and that the Middlesex County Clerk must therefore prepare all future ballots without regard to sex or gender, the court grants Plaintiffs' Cross-Motion for Summary Judgment and denies the motions to dismiss and for summary judgment filed by MCDO and Defendant, respectively. Plaintiffs state that they will file a motion for counsel fees pursuant to the New Jersey Civil Rights Act, and argue in their brief in support of summary judgment that Defendants are liable for counsel fees. Defendant Flynn did not file opposition to Plaintiff's cross-motion, nor did she directly address the issue in her own motion for summary judgment. Accordingly, the issue of liability under the New Jersey Civil Rights Act, and thus the question of whether Plaintiffs are entitled to counsel fees, will be addressed if and when Plaintiffs file a motion for counsel fees.