THE CITY OF NEWARK, ROBERT MARASCO, CITY CLERK, CITY OF NEWARK, GLENN A. GRANT, In his capacity as Business Administrator of the City of Newark, and THE MUNICIPAL COUNCIL OF THE CITY OF NEWARK, Plaintiffs, -and- DANIEL M. SCHULGASSER, KEVIN JENKINS, MARTHA GAYNOR, GLORIA NEBB, VIRGINIA MORTON, ELEANOR FULLER, CHARLES CANN, PATRICIA CONNORS, and RICHARD CAMMARIERI, Plaintiff-Intervenors, -vs.- THE COUNTY OF ESSEX and PATRICIA MCGARRY DRAKE, In her capacity as Essex County Clerk, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY DOCKET NO. ESX-11470-95 Action In Lieu of Prerogative Writs

PLAINTIFF-INTERVENORS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGEMENT

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The plaintiff-intervenors Daniel M. Schulgasser, Kevin Jenkins, Martha Gaynor, Gloria Nebb, Virginia Morton, Eleanor Fuller, Charles Cann, Patricia Connors, and Richard Cammarieri (collectively "plaintiff-intervenors") hereby move this court for summary judgement pursuant to R. 4:69-2.

STATEMENT OF FACTS

On or about August 15, 1995, the Municipal Council of the City of Newark passed Resolution No. 7RA(S), as amended, authorizing the City of Newark to participate in the CityVote project as part of the General Election to be held on November 7, 1995. Certification of R. Steinhagen, Exh. A (hereinafter "Steinhagen Cer. at ¶__"). Specifically, said resolution requested that the following question be placed on the ballot:

> Which of the following candidates do you feel is most responsive/interested to the needs of urban communities? (Exhibit "A" attached hereto and made part of the resolution hereof)

The Resolution further stated that the following interpretative statement should be included on the ballot:

> The purpose of this non-binding referendum is to ascertain and determine the public's sentiments as it relates to their preference concerning possible candidates who are most responsive/interested to the needs of urban communities for the 1996 Presidential Election.

Under the aegis of CityVote, a large number of cities throughout the country are planning to conduct non-binding presidential balloting in conjunction with their regular elections. Affidavit of D. Schulgasser at Paragraph 5, Exh. B (hereinafter "Schulgasser Aff. at ¶__").

Each of the plaintiff-intervenors are long time residents of the City of Newark and are registered voters who are interested in participating in the CityVote project. Schulgasser Aff. at ¶2. Through the CityVote presidential preference ballot, the plaintiff-intervenors intend to participate in the political process by organizing with other residents of Newark (and residents of other cities throughout the country) to seek to have candidates of their choice ultimately placed on the presidential ballot in 1996, and to influence the platforms of all presidential candidates and the issues debated during the presidential campaign in order to ensure that issues of concern to Newark and other cities are addressed. Schulgasser Aff. at ¶6.

On or about August 24, 1995, the City Clerk forwarded Municipal Resolution No. 7RA(S) to the defendants' office requesting that the CityVote presidential preference ballot be placed as a non-binding referendum on the official ballot in accordance with N.J.S.A. 19:37-1 and 19:37-2.[1] Steinhagen Cer.,

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[1] N.J.S.A. 19:37-1 provides:

> When the governing body of any municipality or any county desires to ascertain the sentiment of the legal voters of the municipality or county upon any question or policy pertaining to the government or internal affairs thereof, and there is no other statute by which the sentiment can be ascertained by the submission of such question to a vote of the electors in the municipality or county at any election to be held therein, the governing body may adopt at any regular meeting an ordinance or a resolution requesting the clerk of the county to print upon the official ballots to be used at the next ensuing general election a certain proposition to be formulated and expressed in the ordinance or resolution in concise form. Such request shall be filed with the clerk of the county no later than

Exh. B. On or about September 7, 1995, defendant Patricia McGarry Drake informed the City Clerk that said Resolution would not be placed on the November 7, 1995, official ballot, because it allegedly "does not fall within the scope" of the statute as defined by the New Jersey Supreme Court. Steinhagen Cer., Exh. C.

On or about September 22, 1995, the City of Newark brought this action in lieu of prerogative writs challenging the refusal of the Essex County Clerk to place this CityVote referendum addressing municipal issues on the ballot for the November 7, 1995, Special and General Elections. On October 3, 1995, this Court permitted the plaintiff-intervenors to file their Verified Complaint, and that same day, the Verified Complaint was served by Lawyers Service on the Attorney General pursuant to R. 4:28-4.

As November 7, 1995, approaches, the cost of printing the CityVote non-binding referendum becomes more expensive; however, such cost is relatively insignificant compared to the approximate $225,000 the City of Newark would have to outlay to implement a private CityVote ballot. Schulgasser Aff. at ¶9.

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74 days previous to the election.

N.J.S.A. 19:37-2 provides, in part:

> If a copy of an ordinance or resolution certified by the clerk or secretary of the governing body of a municipality or county is delivered to the county clerk no less than 60 days before any such election, he shall cause it to be printed on each sample ballot and official ballot to be printed for and used in such municipality...

ARGUMENT

I. RESOLUTION NO. 7RA(S) AUTHORIZING THE CITY OF NEWARK TO PARTICIPATE IN THE CITYVOTE PROJECT FALLS PLAINLY WITHIN THE PARAMETERS OF N.J.S.A. 19:37-1

Pursuant to N.J.S.A. 19:37-1, the state legislature has established a forum through which registered voters of municipalities or counties are able to speak about "any question or policy pertaining to the government or internal affairs" of their respective municipality or county. As a provision in the election laws of New Jersey, this statute should be liberally construed "to effectuate the overriding public policy in favor of public participation" in the electoral process. See e.g., Mayer v. Addison, 265 N.J. Super. 171, 174 (App. Div. 1993); Afran v. County of Somerset, 244 N.J. Super. 229, 232 (App. Div. 1990). See also Atlantic City Housing Action Coalition v. Deane, 181 N.J. Super. 403, 418 (L. 1981)(stating that statutory provisions dealing with power of referendum are to liberally construed in order to encourage public participation in municipal affairs in face of "normal apathy and lethargy in such matters").

A. The Proposed Non-binding Referendum is Sufficiently Related to the "Government or Internal Affairs" of the City of Newark and Does Not Seek to Determine Voters' Views on State Questions.

Resolution 7RA(S) is clearly within the plain language of the statute. Both the question adopted by the Municipal Council of the City of Newark to be placed on the ballot and the accompanying statement explaining the purpose of the non-binding presidential primary indicate the Council's intention to gauge their voters'

opinions regarding the responsiveness of potential presidential candidates to local, urban concerns (such as urban redevelopment, low-income housing, crime prevention, drug treatment, public transportation, educational policy, racial segregation, etc.). As such, the CityVote non-binding referendum constitutes a "question" that is directly related to the government affairs of the City of Newark.[2]

In refusing to place Resolution 7RA(S) on the ballot, defendants rely on the New Jersey Supreme Court's alleged interpretation of N.J.S.A. 19:37-1 in AFL-CIO v. Bergen County Bd. of Chosen Freeholders, 121 N.J.255 (1990) and Mercer County Bd. of Chosen Freeholders v. Szaferman, 117 N.J. 94 (1989). According to defendants, counties and municipalities may only submit non-binding referendum questions to voters on proposed actions "actually within the specific jurisdictional powers of the county or municipality, or something over which the governmental entity can act." (cites omitted). Defendants' Letter Brief dated September 29, 1995, at pp 3-4 (hereinafter "Dfs. Br. at p.__"). A closer look at these decisions, and the lower court decisions to which they refer, reveals that the courts' holdings are much narrower than stated

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[2] It should be noted that unlike most non-binding referendums where the municipality is seeking advise from its constituents on how to act in regard to a particular matter, this referendum itself constitutes a particular course of action adopted by the Municipal Council. By participating in the CityVote non-binding urban presidential primary, the City of Newark has already decided to give its registered voters, such as the plaintiff-intervenors, an opportunity to try to broaden the focus of the presidential primary campaign to include issues that concern Newark and other cities throughout the United States.

above and are tailored to satisfy certain state interests that are not implicated by CityVote.

In Szaferman, the Mercer County Bd. of Freeholders sought a determination of the validity of a non-binding referendum asking voters whether it should adopt a resolution advising the state legislature to take certain action on automobile insurance laws. The New Jersey Supreme Court simply held

> that the statutory requirement that the question pertain to the "government or internal affairs" of the municipality or county is not satisfied merely by the furnishing of unsolicited, non-binding advice to another governmental body about a matter within its jurisdiction...
>
> To allow a local referendum on a subject that is statutorily committed to state government would be inconsistent with the legislative scheme, which authorizes the presentation of such non-binding public questions only with respect to matters of local concern. (emphasis added)

Id. 117 N.J. at 105-106.

Similarly, in AFL-CIO v. Bergen County Bd. of Freeholders, the New Jersey Supreme Court,

> reaffirm[ed] the principal of Szaferman that the local public question law may not be used to seek voter sentiment on issues beyond the competence or jurisdiction of the local unit, here, as in Szaferman, legislative issues of statewide importance. (emphasis added)

Id. 121 N.J. 273. In that case, the plaintiffs sought to prevent various counties from placing on the ballot questions asking the voters whether these counties should take legal or other action to try to effect repeal of recently adopted state legislation concerning taxes and school aid. The court ruled in favor of the plaintiffs, basing its decision on the fact that the referendum

involved issues committed to the jurisdiction of the state legislature, and "the clear potential of misusing the local-issue referendum procedure by converting it into an impermissible statewide non-binding referendum." Id. 121 N.J. at 266.

In AFL-CIO v. Bergen County Bd. of Freeholders, the court was particularly concerned about the dangers inherent in the process of permitting "important State legislative issues" from becoming the subject of municipal or county referenda. Id. 121 N.J. at 266. It noted that posing statewide questions to a limited part of the state would inevitably result in "an unpredictable patchwork of potentially misleading, imprecise questions giving mixed signals about the voters in counties that pose the question and telling nothing about the voters in counties that do not,.." Id. 121 N.J. at 268.

This fear was equally matched by its concern stated in Szaferman: To prevent the "confusion and turmoil" that would accompany the "prohibited intrusion" in state affairs by "a body which has no business intermeddling with them in the slightest degree." Id. 117 N.J. at 117 (quoting Botkin v. Mayor and Borough Council of Westwood, 52 N.J. Super. 416, 431-33 (App. Div.), appeal dismissed, 28 N.J. 218 (1958)). Accord Camden County Bd. of Chosen Freeholders v. Camden County Clerk, 193 N.J.Super. 100 (Law Div.), aff'd, 193 N.J.Super. 111 (App. Div. 1983)(holding that allowing the placement on the ballot of a non-binding referendum question addressing whether the Board should be bound by a budget directive issued by the Chief Justice would "permit county

intrusion into judicial affairs" contrary to the principal of separation of powers).[3] Clearly, neither of these concerns come into play by the placement of CityVote on the ballot used in the City of Newark during the upcoming General and Special Elections.

First and foremost, the proposed question on the ballot does not seek the voters' advise concerning whether to undertake a course of action that is within the jurisdiction of another level or branch of government. Accordingly, there is no danger of the "intrusion" or "intermeddling" noted by the New Jersey Supreme Court in Szaferman. Second, there is no danger of disenfranchising a large portion of the voters residing in New Jersey on issues that concern the whole state--i.e., the main concern of the court in AFL-CIO v. Bergen County Bd. of Chosen Freeholders.

CityVote is explicitly a non-binding urban-based presidential primary that is designed to provide the presidential candidates with the incentive and opportunity to discuss issues that especially concern the City of Newark and other major cities throughout the country. By making their opinions known through CityVote and organizing other residents of Newark to participate in CityVote, the plaintiff-intervenors, individually and as a collective urban voice, seek to have candidates of their choice

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[3] Cf. In re Certain Petitions for Binding Referendum, 154 N.J.Super. 482 (App. Div. 1977)(finding that traffic ordinances were not subject to initiative and binding referendum procedures, because the State Legislature did not intend such interference with local government's comprehensive traffic planning authority); Smith v. Tp. of Livingston, 106 N.J.Super. 44 (Ch. 1969), aff'd, 54 N.J. 525 (1969)(holding zoning powers were within the exclusive grant of legislative power to the municipality, therefore preventing voters from exercising power of initiative on such matters)

ultimately placed on the presidential ballot in 1996, and seek to influence the platforms and agenda of all presidential candidates. In this way, the proposed referendum is not abstract and is sufficiently related to the "government or internal affairs" of the City of Newark to fall within the parameters of the statute.

B. The Court Must Construe the Statute to Avoid Constitutional Questions

It is an established principal of law that courts must construe statutes to avoid constitutional questions. That is, when legislation generally serving a public purpose is found to contain the potential of infringement of constitutional rights, courts should interpret or construct terms of the statute "to narrow or expand the effect of the act so as to erase the unconstitutional aspect." New Jersey State Chamber of Commerce v. N.J. Election Law, 155 N.J. Super. 218 (App. Div. 1977), modified on other grounds and confirmed, 82 N.J. 57 (1979)(citing Collingswood v. Ringgold, 66 N.J. 350, 357-358 (1975), appeal dismissed, 426 U.S. 90 (1976); Smith v. DeSantis, 65 N.J. 462, 472-473 (1974); Comarco v. Orange, 61 N.J. 463 (1972)).

In the case at bar, the State Legislature through N.J.S.A. 19:37-1 established the means for the citizens of the City of Newark, such as the plaintiff-intervenors, to engage in political speech, individually and collectively, about questions or policies pertaining to their municipality. Cf. Meyer v. Grant, 486 U.S. 414 (1988) (circulation of initiative petition involves core political speech insofar as it constitutes an "interactive communication concerning political change").

For this court to limit such questions to only issues upon which the municipality is empowered to take action, regardless of whether it intrudes upon the powers of another level or branch of government, significantly infringes upon plaintiff-intervenors' constitutional rights of speech, association and voting.[4] On the other hand, allowing non-binding referenda to include questions concerning local issues that do not seek the advise of voters about matters within the jurisdiction of another entity clearly accords with the New Jersey Supreme Court's decisions in Szaferman and AFL-CIO v. Bergen County Bd. of Freeholders, and sufficiently secures plaintiff-intervenors' constitutional rights of political participation.

II. N.J.S.A. 19:37-1 VIOLATES PLAINTIFFS' RIGHT OF FREE SPEECH UNDER THE FEDERAL AND STATE CONSTITUTIONS.

The First Amendment of the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or the press; or the right of people peaceably to assemble, and to petition government for a redress of grievances. (emphasis added)

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[4] The fact that N.J.S.A. 19:37-1 leaves open "more burdensome avenues of communication" for the plaintiff-intervenors to employ, does not relieve its infringement on their right of expression and association; the First Amendment protects their right not only to express their political opinions, but also to select the most effective means to do so. Meyer v. Grant, 486 U.S. at 424. See also State of New Jersey v. Miller, 83 N.J. 402, 413 (1980)(finding that because means of political communication are not entirely fungible, plaintiff entitled to select the most effective, least expensive means of expression).

The plaintiff-intervenors' federally protected right of speech, which is protected against state infringement under the Due Process Clause of the Fourteenth Amendment, is also recognized in the New Jersey Constitution, viz:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or the press. [N.J.Const. (1947), Art. I, par. 6]

Moreover, it has been held that this explicit affirmation of individual expressional rights, "more sweeping in scope than the language of the First Amendment," imposes upon the State government an affirmative obligation to protect such rights. State v. Schmid, 84 N.J. 535, 557-559 (1980). See also New Jersey Coalition Against War in Middle East v. J.M.B. Realty Corp., 138 N.J. 326, 353 (1994) (Art. I, par. 6 grants substantive free speech rights and unlike the First Amendment, those rights are not limited to protection from government interference).

Because the First Amendment was particularly intended to protect the free discussion of government affairs, Mills v. Alabama, 384 U.S. 214 (1966) cited in Burson v. Freeman, ___U.S.___, 112 S.Ct. 1846, 1850 (1992), political speech occupies a preferred position in our federal and state systems of constitutionally protected interests. State of New Jersey v. Miller. 83 N.J. 402, 411 (1980). Where political speech is involved, courts have insisted that "government allow the widest room for discussion, the narrowest range for its restriction." Id. 83 N.J. at 412 (citation omitted).

Within this framework, N.J.S.A. 19:37-1, as applied to CityVote, must be found unconstitutional.

A. Participation in a Non-binding Referendum is Considered Engaging in Political Speech.

In order to focus more candidate and media attention on cities in the United States, and to enable persons living in urban areas, such as the plaintiff-intervenors, to make their opinions known about issues of local importance, the CityVote project was organized. Through the CityVote non-binding presidential preference balloting, the plaintiff-intervenors will be given the opportunity "to speak at the polls" in an attempt to broaden the focus of the presidential primary campaign to include the cities and metropolitan areas of the United States, such as the City of Newark. Seligson v. DeBruin, 174 N.J. Super. 60, 72 (L. 1980) (granting plaintiffs opportunity to "speak at the polls" through a municipal referendum). As described herein, the plaintiff-intervenors' participation in the CityVote non-binding balloting constitutes core political speech for purposes of the federal and state constitutions.

Although comments on any matter of public interest, whether it is the subject of or during an election campaign is considered political speech for purposes of the First Amendment, State of New Jersey v. Miller, 83 N.J. at 411, debate on the qualifications of persons running for elective office has always been considered especially integral to the operation of government established by the constitution. Buckley v. Valeo, 424 U. S. 1, 14 (1976); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982). Accordingly,

legislative restrictions on advocacy during a political campaign have typically been seen as being at "odds with the First Amendment." Buckley, 424 U.S. at 14. See also Eu v. San Francisco Democratic Central Committee, 489 U.S. 214, 223 (1989)(finding ban on primary endorsements unconstitutional because free discussion about candidates for public office is no less critical before a primary than before a general election).

Plaintiff-intervenors' participation in CityVote is nothing more and nothing less than engaging in debate about the qualifications of the presidential candidates; as such, it is political speech deserving affirmative protection by the State.

B. Because New Jersey Has Created the Non-binding Referendum Forum, its Content-based Limitation Must be Narrowly Drawn to Effect a Compelling State Interest.

Although the right to a non-binding referendum in municipal affairs is not a constitutional right, Atlantic City Housing Action Coalition v. Deane, 81 N.J. Super. at 418, once the state has established said right, it does not have the unqualified power to limit the issues raised in such referenda. Cf. Meyer v. Grant, 486 U.S. at 425 (power to ban initiatives entirely does not mean power to limit discussion of subjects raised in initiative petitions). In other words, because the State Legislature has opened a forum for direct citizen participation in the political process, by virtue of N.J.S.A. 19:37-1, any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Cf. Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 46 (1983)(finding that the federal constitution forbids a state from

enforcing certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place).

In general, the First Amendment, and its state counterpart, prohibit government from proscribing speech, or expressive conduct, because of the subject expressed. Content-based regulations are presumptively invalid. R.A.V. v. City of St. Paul, Minnesota, ___U.S.___, 112 S.Ct. 2538, 2542 (1992). A cursory reading of N.J.S.A. 19:37-1 reveals, that on its face it is a content-based, in contrast to content-neutral, regulation.[5] As such, it is subject to the strict scrutiny of this court.

In order to survive strict scrutiny, the state must demonstrate that restricting non-binding referenda to questions or policies over which the governmental entity requesting the referendum can act, defendants' interpretation of the statutory terms "pertaining to the government or internal affairs thereof," serves a compelling state interest(s). To meet this aspect of the test, the state must factually establish that its interests are "overwhelming and irresistibly mandated" and that they are "vital to the survival of the state." Amato v. Wilentz, 753 F.Supp. 543, 557 (D.N.J. 1990), vacated on other grounds, 952 F.2d 742 (3d Cir. 1991).

Once the state has presented a compelling state interest, it must prove that its content-bases restriction is narrowly tailored.

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[5] It should be noted that the plaintiff-intervenors are not claiming that N.J.S.A. 19:37-1 is a viewpoint-based provision.

To satisfy this prong of strict scrutiny, the state must factually demonstrate that the distinction drawn "targets and eliminates no more than the exact source of evil it seeks to remedy." Ward et al v. Rock Against Racism, 491 U.S. 781, 804 (1989), rehearing denied, 492 U.S. 937 (1989) (Marshall, J. dissenting).

Plaintiff-intervenors contend that the State of New Jersey cannot meet either element of this test.

C. The State's Interest in Preventing Municipal Referendums on Issues Within the Jurisdiction of Another Branch or Level of Government Does Not Justify Prohibiting the Placement of CityVote on the Ballot.

As presented in Argument I, supra., the Supreme Court of New Jersey is particularly solicitous about preventing the dangers it believes are inherent in permitting "important State issues" from becoming the subject of municipal or county referenda. In Szaferman, and AFL-CIO v. Bergen County Bd. of Chosen Freeholders, it held that the State Legislature was justified in limiting non-binding referenda to "issues and policies pertaining to the government or internal affairs" of municipalities or counties requesting the referendum, in order to avoid 1) the confusion and turmoil that typically accompanies the intrusion in state affairs by an another government entity; and 2) the possible disenfranchisement of voters residing in areas that do not participate the referendum dealing with state policies. See pp.6-8.

In Argument I, supra., it was further explained that CityVote does not implicate either of these concerns, and thus cannot

justify prohibiting its placement on the ballot, (see p.8), let alone satisfy strict scrutiny.

Notwithstanding this conclusion, New Jersey may offer other interests to support the non-binding referendum statute's content-based restriction. Plaintiff-intervenors anticipate these interests and find them neither compelling or narrowly drawn:

Preventing the Preeminence of the New Jersey State Presidential Primary. Although the state has an interest in protecting the associational rights of members of political parties, it may not enforce such interest to the exclusion of the associational and speech rights of registered voters living in urban areas. Clearly, New Jersey may not assert a right to channel all the collective electoral speech of its citizens through the statewide presidential primary without offering registered voters who want to participate in CityVote a similar opportunity. Cf. Anderson v. Celebrezze, 460 U.S. 780, 801-06 (1983)(rejecting Ohio's attempt "to protect existing political parties from competition").

Ensuring Equal Opportunity in the Electoral Process. Although the state has a legitimate interest in ensuring that all of its citizens have an equal opportunity to participate in the political process, it may not do so by restricting the speech of any person or segment of its citizens. In Buckley v. Valeo, the Supreme Court made it clear that "the concept that government may restrict the speech of some elements of our society in order to enhance the

relative voice of others is wholly foreign to the First Amendment." Id. 424 U.S. at 48-49.

Channeling Expressive Activities at the Polls and Preventing Overcrowded Ballots. Although New Jersey is allowed to enforce content-neutral time, place, manner regulations that have the effect of channeling expressive activity at the polls, N.J.S.A. 19:37-1 is not content-neutral. On the other hand, the Supreme Court has repeatedly acknowledged that states have legitimate interests in avoiding overcrowded ballots and guarding against frivolous candidacies or referenda. See e.g., Anderson v. Celebrezze, 460 U.S. at 788 n.9; Bullock v. Carter, 405 U.S. 134, 145 (1972).

While New Jersey may have a legitimate interest in preventing the ballot from being overcrowded with non-binding advisory questions, whether or not frivolous, a prohibition based on subject is extraordinarily ill-fitted to meet this need. Far less restrictive measures are appropriate to achieve the same goals, such as requiring the approval of the local government or requiring supporters of advisory measures to gather a certain number of signatures, see Lubin v. Panish, 415 U.S. 709, 718 (1974)(approving reasonable signature requirements for minor political parties); both of which have already been enacted by the State Legislature in N.J.S.A. 19:37-1 and 37-1.1, respectively.

Voter Confusion Although New Jersey has an interest "in fostering informed and educated expressions of the popular will," Anderson v. Celebrezze, 460 U.S. at 796, the Supreme Court has been

quite skeptical of state efforts to restrict the flow of information under the guise of preventing voter confusion:

> A State's claim that enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism. As we observed in another context, it is often true "that the best means to that end is to open the channels of communication rather than to close them."

Id. 460 U.S. at 798 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976)). See also Eu v.San Francisco Democratic Central Committee, 489 U.S. at 228.

Notwithstanding the state's possible assertion that voters might mistakenly believe that CityVote is a binding presidential primary, it is more likely that CityVote will have the beneficial effect of stimulating voter turnout, educating voters about various steps in the presidential nominating process, and enabling them to express their sentiments at the ballot box during the early stages of the 1995-96 presidential primary. If voter confusion, is in fact a problem, then voter education through projects such as CityVote would be a better solution than a prohibition of such advisory measures.

Administrative Costs Although New Jersey has a legitimate interest in avoiding the additional public costs associated with CityVote balloting, the Supreme Court has not been receptive to this argument when restrictive ballot access laws impair First Amendment Rights. See Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 218 (1986)(possible increases in the cost of

administering the election system found not to be sufficient basis for impairing appellees' First Amendment rights).

Furthermore, because there are General and Special Elections already scheduled for November 7, 1995, the cost of placing CityVote on the ballot will be insignificant compared to what the taxpayer would be required to pay if the City of Newark were required to implement CityVote privately. See Schulgasser Aff. at ¶9.

For all the above reasons, the plaintiff-intervenors contend that the State of New Jersey cannot justify prohibiting the placement of CityVote on the ballot pursuant to the content-based restriction enacted in N.J.S.A. 19:37-1.

III. N.J.S.A. 19:37-1 VIOLATES PLAINTIFFS' RIGHTS OF ASSOCIATION AND ASSEMBLY UNDER THE FEDERAL AND STATE CONSTITUTIONS.

In NAACP v. Alabama ex rel. Paterson, 357 U.S. 449 (1958), a unanimous Supreme Court stated: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas [as embodied in the First Amendment] is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." See also Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973)("...the freedom to associate with others for the common advancement of political beliefs and ideas is a form of orderly group activity protected by the First and Fourteenth Amendments.")

The plaintiff-intervenors' federally protected right to associate for the advancement of one's political beliefs and ideas, is also recognized in the New Jersey Constitution, viz:

> The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances. [N.J.Const. (1947), Art. I, par.18)

See State v. Schmid, 84 N.J. at 557-559 (finding explicit affirmation of associational rights in State Constitution to be a guarantee of said rights and not a restriction on them); Friedland v. State, 149 N.J.Super. 483, 490 (L. 1977)(finding right to associate with others for the common advancement of political beliefs protected in State Constitution).

Because the right to associate is central to our form of government and an indispensable aspect of each person's liberty, these federal and state constitutional mandates must be given the most liberal and comprehensive construction. State v. Butterworth, 104 N.J.L. 579, 583 (1928).

In accordance with this principle of interpretation, N.J.S.A. 19:37-1, as applied to CityVote, must be found unconstitutional.

A. Plaintiffs' Participation in CityVote Implicates Their Right to Associate for Political Purposes.

As noted earlier, the CityVote project was organized in order to focus more candidate and media attention on cities in the United States, and to enable persons living in urban areas, such as the plaintiff-intervenors, to make their views known. By participating in the CityVote non-binding urban presidential primary, and

organizing other residents of Newark to participate in CityVote, the plaintiff-intervenors through a "collective effort" seek to have candidates of their choice ultimately placed on the presidential ballot in 1996, and seek to influence the platforms and agenda of all presidential candidates. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 294-95 (1981)("by collective effort individuals can make their views known, when individually, their voices would be faint or lost...").

It is the shared belief of the plaintiff-intervenors that it is only through an urban-based primary, not a statewide primary, that their concerns as residents of the City of Newark will be considered by the people running for federal office and urban issues generally will be injected into the campaign. As described herein, the plaintiff-intervenors' participation in the CityVote non-binding balloting constitutes associational activity for purposes of the federal and state constitutions.

In Smith v. Penta, 81 N.J. 85 (1978), the New Jersey Supreme Court defined association as a constitutional term of art which describes the "formation and perpetuation of collectivities for purposes of advancing goals and beliefs and expressing attitudes and philosophies." Id. 81 N.J. at 76 (quoting Note, "Primary Elections: The Real Party in Interest," 27 Rutgers L. Rev. 298 (1974)). Similarly, the Supreme Court has found the right of association implicated when "persons sharing common views band together to achieve a common end," Citizens Against Rent Control v. City of Berkeley, 454 U.S. at 295; or "like-minded voters gather in

pursuit of common ends." Norman v. Reed, __U.S.__, 112 S.Ct. 698 (1992).

Plaintiff-intervenors' participation in CityVote is a collective attempt to enhance their advocacy about urban issues through group association with other urban-based voters both in the City of Newark and elsewhere in the United States; as such, it is associational activity deserving affirmative protection by the State of New Jersey.

B. Because N.J.S.A. 19:37-1 Significantly Burdens Plaintiffs Right of Association, it Must Be Narrowly Tailored to Advance a Compelling State Interest.

In the ballot access cases, the Supreme Court has consistently held that a significant state intrusion on an individuals' rights of association requires the application of strict scrutiny--the regulation must be narrowly tailored to advance a compelling state interest. See e.g., Norman v. Reed, 112 S.Ct. at 705; Anderson v. Celebrezze, 460 U. S. at 806; Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184-85 (1979). See also Burdick v. Takushi, __U.S.___, 112 S.Ct. 2059, 2063 (1992) (upholding Hawaii's ban on write-in voting). Under New Jersey law, the cogency of the governmental interest is a paramount consideration in determining the constitutionality of a contested election law. New Jersey State Chamber of Commerce, 155 N.J. Super. at 225.

It is almost commonplace to note that "cumbersome electoral laws can effectively suffocate" the right of association, the promotion of political ideas, and the right to vote. William v.

Rhodes, 393 U.S. 23, 38-40 (1968)(Douglas, J. concurring). In particular, by limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effect as a group, state restrictions often preserve the status quo and reduce the range of issues discussed during electoral campaigns.

Such is the effect of N.J.S.A. 19:37-1 as applied to the facts presented in this case. By prohibiting the placement of the CityVote presidential preference ballot as a non-binding referendum on the November 7, 1995, ballot, the statute significantly impairs plaintiff-intervenors' ability to associate with other urban-based voters in a group attempt to effectively broaden the focus of the presidential primary campaign to include the concerns of people residing in cities and metropolitan areas throughout the country. The burden on plaintiff-intervenors' associational rights is significant for the following reasons:

First, the state presidential primary is only open to members of political parties, and thus forces registered voters into an ideological straightjacket if they desire to participate. Second, requiring the plaintiff-intervenors to use public forums other than the ballot box will effectively reduce the number of people who will be able to participate in the CityVote project due to geographical logistics, cf. Meyer v. Grant, 486 U.S. at 422 (prohibiting payment of compensation to petition circulators unconstitutionally restricts the number of voices that will convey the message). And, finally, allowing the plaintiff-intervenors to

organize privately the CityVote presidential primary is in reality an empty gesture. The cost of printing ballots, renting machines, tallying votes, and hiring poll observors to ensure its integrity are beyond the financial means of the plaintiff-intervenors and the City of Newark. Schulgasser Aff. at ¶9.

Given the magnitude of the burden placed on the plaintiff-intervenors' associational rights, the state must demonstrate that N.J.S.A. 19:37-1 advances compelling state interests and that it is narrowly tailored to serve those interests.

As shown in Argument II, Part C, supra. the State of New Jersey cannot meet either element of this test.

IV. N.J.S.A. 19:37-1 VIOLATES PLAINTIFFS' RIGHT TO AN EQUAL AND MEANINGFUL RIGHT TO VOTE UNDER THE FEDERAL AND STATE CONSTITUTIONS.

Although there is no explicit provision entitling an individual to vote under the federal constitution, it is beyond doubt that voting is fundamentally important to our constitutional structure of government. Illinois Bd. of Elections, Socialist Workers Party, 440 U.S. at 184; Dun v. Blumstein, 405 U.S. 330 (1972); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966). See also Gangemi v Berry, 25 N.J.1, 12 (1957)("the exercise of basic suffrage, a civil and political franchise...[is] of the very essence of our democratic process). Although the Supreme Court has consistently recognized that states retain the power to regulate their own elections, e.g., Burdick v. Takushi, 112 S.Ct. at 2063, they can not exercise such power in a discriminatory way. Reynolds v. Sims, 377 U.S. 533 (1964)(Equal

Protection Clause found to undergird federal right to vote, at least to the extent of assuring an equal voice to all who hold the right).

Unlike the federal constitution, the right to vote is plainly guaranteed by the New Jersey State Constitution, viz:

> (a) Every citizen of the United States, of the age 18, who shall have been a resident of this State and of the county in which he claims his vote 30 days, next before the election, shall be entitled to vote for all officers that now are or hereto may be elective by the people, and upon all questions which may be submitted to a vote of the people;... [N.J. Const. (1947), Art. II, par. 3]

The New Jersey Supreme Court has held that this right to vote is equally applicable to both the general elections and political primaries. Quaremba v. Allan, 67 N.J. 1, 11 (1975); Stevenson v. Gilfert, 13 N.J. 496, 503 (1953). Furthermore, because the right to vote is "the bedrock upon which the entire structure of our system of government rests," New Jersey courts are committed to the principle that election laws must be "liberally construed to effectuate the overriding policy in favor of the enfranchisement of voters." Afran v. County of Somerset, 244 N.J. Super. at 232 (cites omitted).

Within this framework, the content-based restriction found in N.J.S.A. 19:37-1 must be found unconstitutional.

A. Plaintiffs' Right to Vote Includes Their Right to Influence the Choice for Whom to Vote.

Under New Jersey law, it has been established that the right to vote includes the right to choose for whom to vote. Gangemi v. Rosengard, 44 N.J. 166, 170 (1965); Quaremba v. Allan, 67 N.J. at

1. See also Sadloch v. Allan, 25 N.J. 118 (1957)(upholding provision prohibiting defeated primary candidate from being named on ballot, because voters still able to write in candidate's name)

In Gangemi, the New Jersey Supreme Court declared:

> The right to vote would be empty indeed if it did not include the right of choice for whom to vote... The right to vote freely for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

Id. 44 N.J. at 170, quoted in Wurtzel v. Falcey, 69 N.J. at 409.

Similarly, the right to vote would be seriously undermined if one was prohibited from influencing the nomination process--i.e., the selection for whom to vote--through the CityVote urban-based presidential primary, rather than through the traditional state political party primaries. Through CityVote, the plaintiff-intervenors and other registered voters in Newark (and in other cities) are seeking to have candidates of their choice ultimately placed on the presidential ballot in 1996, and are seeking to influence the platforms and agenda of all presidential candidates.

Given their right to a meaningful vote, which includes the right to vote for the candidate of their choice, independent voters, such as the plaintiff-intervenors, should be treated no differently than those voters who are members of political parties. Accordingly, plaintiff-intervenors' ability to participate in the CityVote presidential preference balloting implicates their right to vote and deserves the equal protection of the State.

B. The Placement of CityVote on the Ballot Does Not Implicate the States' Typical Justifications For Franchise Restrictions.

Ordinarily, restrictions on the franchise, must meet a stringent test of justification. Wurtzel v. Falcey, 69 N.J. 401, 403 (1976)(citing Hill v. Stone, 421 U.S. 289 (1975) and Worden v. Mercer County Bd. of Elections, 61 N.J. 325, 346 (1972)). That is, the state must demonstrate that the restriction serves a paramount government interest and that it impinges on the franchise to a lessor extent than any other feasible means. Smith v. Penta 81 N.J.at 82 (Pashman, J. dissenting).

However, when a state election law provision is nondiscriminatory and does not severely impair an individual's right to vote, both federal and state courts have not subjected the regulation to strict scrutiny. Burdick v. Takushi, 112 S.Ct. at 2064-2068; Smith v. Penta, 81 N.J. at 76; rather, they have adopted a balancing test in which the needs the statute were designed to meet, i.e., the statutory objectives, are weighed against the claimed encroachments on the plaintiffs' franchise rights. New Jersey State Chamber of Commerce, 155 N.J. Super. at 228.

In Anderson v. Celebrezze, 460 U.S. at 789, the Supreme Court stated that when considering a challenge to a state election law, a court must weigh the "character and magnitude of the asserted injury" to the right to vote against the "precise interests put forward by the State as justifications for the burden imposed by its rule." In doing so, the Court further noted that, the court must take into consideration "the extent to which those interests make it necessary to burden plaintiffs' rights." Id. quoted in Burdick v. Takushi, 112 S.Ct. at 2063.

Pursuant to this balancing test, N.J.S.A. 19:37-1, as applied to CityVote, is unconstitutional. First and foremost, the placement of CityVote on the ballot does not implicate the objectives that states typically put forward to justify restrictions on the franchise.

Legislatures often invoke measures reasonably appropriate to secure the integrity of the nominating process. Wene v. Meyner, 13 N.J. 185, 192 (1953). For example, in Smith v. Penta, the New Jersey Supreme Court upheld a 50-day party affiliation requirement restricting a citizens' right to vote in the primaries in order to prevent "party raiding" and to "preserve the associational rights of political parties" to "maintain separate and distinct identities and ideologies." Id. 81 N.J. at 77. Another interest often invoked by legislatures is the need to insure the security of the ballot and "to preserve voters from coercion or immoral influences." In re City Clerk of Patterson, 88 A. 694, 696 (1913). Neither of these interests justifies prohibiting the placement of CityVote on the general ballot. See also Argument II, Part C, supra., discussing other possible state interests.

Secondly, the burden imposed by N.J.S.A. 19:37-1 on plaintiffs' right to participate in the political process is severe. As noted by the U.S. Conference of Mayors in a resolution adopted during their 1992 annual meeting, the current calendar of state presidential primaries and caucuses "effectively disenfranchises millions of urban-dwelling Americans, making their views largely irrelevant to the presidential nomination process and

adding to the dissatisfaction that most Americans express toward national politics." Schulgasser Aff., Exh. B. Allowing persons such as the plaintiff-intervenors to participate in CityVote is necessary to ensure such persons an equal right to participate in the electoral process by which candidates are chosen.

Finally, as firmly established in Argument I, it is not necessary to burden plaintiff-intervenors' rights to vote in order to secure the states' interests in limiting non-binding referenda to "any question or policy pertaining to the government or internal affairs" of the municipality or county requesting the placement of the referendum on the ballot.

It therefore follows that the plaintiff-intervenors have established that New Jersey's interests in applying N.J.S.A. 19:37-1 to preclude the placement of CityVote on the ballot are insufficient to warrant upholding such provision.

V. DEFENDANTS' REFUSAL TO PLACE CITYVOTE ON THE OFFICIAL BALLOT CONSTITUTES IRREPARABLE INJURY FOR WHICH THERE IS NO ADEQUATE REMEDY AT LAW.

Many courts have held that when an alleged deprivation of constitutional rights is involved, no further showing of irreparable injury is necessary. Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984)(quoting 11 C. Wright & A. Miller, Federal Practices & Procedures § 2948 at 440 (1973)). In Elrod v. Burns, 427 U.S. 347, 373 (1976), the Supreme Court issued a preliminary injunction prohibiting the discharge of employees in the Sheriff's office who were being threatened with immediate discharge for refusing to change their political affiliations. Finding patronage

dismissals impaired an employee's right to association, the court stated that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." See also O'Brien v. Town of Caledonia, 748 F.2d 403, 409 (7th Cir. 1984)(enjoining discharge of policeman for violating police department manual prohibiting disclosure of confidential information because action presumed inhibitory of speech); Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983)(retaliation by State of Florida against citizen who had petitioned the government in the form of litigation "provides the critical irreparable injury"); Telco Communications, Inc. v. Barry, 731 F. Supp. 670 (D.N.J. 1990)(granting preliminary injunction because statute likely to constitute an unconstitutional restraint on First Amendment rights); Gannett Satellite Information Network, Inc. v. Township of Pennsauken, 709 F. Supp. 530 (D.N.J. 1989)(same). Such presumption applies herein.

Because there is no adequate remedy at law, the plaintiff-intervenors are entitled to injunctive relief against the defendants.

CONCLUSION

For all the foregoing reasons, plaintiff-intervenors request that their Motion for Summary Judgement be granted and that the Clerk of the County of Essex be compelled to place on the ballot for the General Election to be held on November 7, 1995, a non-binding referendum question to ascertain and determine Newark citizens' sentiments relating to their preferences concerning possible candidates for the 1996 Presidential Election who are most responsive to the needs of Newark and other urban communities.

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October 10, 1995

Respectfully submitted,

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