



## **NEW JERSEY LAW REVISION COMMISSION**

### **Revised Draft Final Report Regarding Membership and Organization of County Committees N.J.S. 19:5-3**

**April 05, 2021**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes to determine the law of the State.

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## Executive Summary

New Jersey’s election statute contains requirements that the election of county committee members, and the selection of the committee chair and vice-chair, be based on gender.<sup>1</sup> These requirements were added to the statute to “equalize opportunity between the genders in the political forum and to encourage women’s involvement in politics.”<sup>2</sup> In recent years, however, these provisions have been called into question by those seeking political office.

In *Hartman v. Covert*, a candidate for the position of political party committee chair challenged an election that resulted in women filling both the chair and vice-chair positions.<sup>3</sup> The trial court determined that N.J.S. 19:5-3, which restricts the chair and vice-chair positions of the political party committee to persons of opposite genders, is unconstitutional because it burdens the associational rights of political parties and their members.<sup>4</sup>

Twenty-three years after the *Hartman* decision, the constitutionality of N.J.S. 19:5-3 was questioned again in *Central Jersey Progressive Democrats v. Flynn*. In that case, the Plaintiffs sought to compel the Middlesex County Clerk to prepare primary ballots that called for the election of two “committeepersons,” rather than distinguishing candidates based upon their gender.<sup>5</sup> The Court found that the statute violates the freedom of association and impermissibly discriminates on the basis of gender, and determined that, in Middlesex County, all future ballots are to be prepared without regard to gender.<sup>6</sup>

In the absence of a binding precedential decision, or an amendment of the statute, each County Clerk must continue to comply with the statute even if the results are contrary to the statute’s intent. Further, the statute may unconstitutionally preclude individuals who identify as gender non-binary from appearing on a ballot for county committee or its leadership.

## Relevant Statute

The membership and organization of county committees is set forth in N.J.S. 19:5-3, and 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...

...The members shall also elect a vice-chairperson of the opposite sex of the chairperson to hold office for 1 year or until a successor is elected and the vice-

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<sup>1</sup> N.J. STAT. ANN. § 19:5-3 (West 2020).

<sup>2</sup> *Hartman v. Covert*, 303 N.J. Super. 326 (Law. Div. 1997).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Central Jersey Progressive Democrats v. Flynn*, MER L 000732-19, slip op. at 2 (Law Div. Sep. 02, 2020).

<sup>6</sup> *Id.* at 7.

chairperson shall perform all duties required by law and the constitution and bylaws of such committee...

## Background

As originally enacted in 1930, the statute required that each county committee consist of one male and one female member from each unit of representation in the county.<sup>7</sup> This requirement remained unchanged for almost 100 years.<sup>8</sup> The 1930 statute, did not, however, contain a reference to the gender of the committee chair or vice-chair.<sup>9</sup> Instead, the statute made reference to a “chairman” who would preside over the meetings of the committee.<sup>10</sup> The title “chairman” ostensibly required a man to fill this role.

In 1955, N.J.S. 19:5-3 was amended to provide for the election of women to leadership roles within each county committee.<sup>11</sup> Although women were not statutorily eligible to serve as the leader of the committee, the members were required to elect a “vice-chairlady” to hold office for a period of one year.<sup>12</sup> The vice-chairlady was required to “perform all duties required of her by law and the constitution and by-laws of such committee.”<sup>13</sup>

The statute was amended in 1964 to remove the reference to a male chair and a female vice-chair.<sup>14</sup> After revision, the statute requires that the chair and vice-chair positions be filled by individuals of the opposite gender.<sup>15</sup> In the years that followed, the county committee statute were modified twelve times.<sup>16</sup> The gender requirements regarding the chair and the vice-chair, however, remained unchanged.

## Analysis

### *Hartman v. Covert*

In 1997, Francis Hartman (“Hartman”) ran as a candidate for the position of Chair of the Burlington County Democratic Committee (“Committee”).<sup>17</sup> Lee O’Toole and Alice Furia, both women, won the election and were named Chair and Vice-Chair of the Committee.<sup>18</sup> Hartman questioned whether the Chair-elect could be elected along with a Vice-Chair who was also a

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<sup>7</sup> L. 1930, c. 187, ¶46, p. 690.

<sup>8</sup> See N.J. STAT. ANN. § 19:5-3 (West 2020).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> N.J.S. 19:5-3, L.1955, c.236, p. 904, sec. 1.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> N.J.S. 19:5-3, L.1964, c.23, sec. 1.

<sup>15</sup> *Id.*

<sup>16</sup> See L.1965, c. 4, § 3; L.1966, c. 19, § 2; L.1967, c. 7, § 2; L.1967, c. 26, § 2, eff. April 21, 1967; L.1968, c. 292, § 2, eff. Sept. 6, 1968; L.1978, c. 29, § 1, eff. June 7, 1978; L.1979, c. 458, § 2, eff. Feb. 27, 1980; L.1980, c. 105, § 3, eff. Sept. 11, 1980; L.2009, c. 135, § 2, eff. Oct. 2, 2009; L.2011, c. 180, § 1, eff. Jan. 17, 2012.

<sup>17</sup> *Hartman v. Covert*, 303 N.J. Super. 326, 328-329 (Law Div. 1997).

<sup>18</sup> *Id.* at 329.

woman, contending that such a result was “...in derogation of the apparent dictate of N.J.S. 19:5-3.”<sup>19</sup> The *Hartman* Court considered the constitutionality of the statute.<sup>20</sup>

The *Hartman* Court determined that the statute was “in conflict with the mandates of the United States Supreme Court based on its holding in” *Eu v. San Francisco Cnty. Democratic Cent. Comm.*<sup>21</sup> At issue in *Eu* was a California law restricting local governing bodies by limiting the term of office for the central committee chair, and requiring that the position of chair rotate between residents of northern and southern California.<sup>22</sup> The United States Supreme Court, in *Eu*, determined that these laws “prevent political parties from governing themselves with the structure that they think is best.”<sup>23</sup> The Supreme Court concluded that “a State cannot justify regulating a party’s internal affairs without showing that such regulation is necessary to ensure an election is orderly and fair.”<sup>24</sup>

In the *Hartman* case, the Court noted that a “political party’s ‘determination... of the structure which best allows it to pursue its political goals, is protected by the Constitution’... and that freedom of association ‘encompasses a political party’s decision... [about] the identity of, and the process for, electing its leaders.’”<sup>25</sup> The positions of chair and vice-chair, pursuant to N.J.S. 19:5-3, are restricted to individuals of opposite genders. As a result, the 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.”<sup>26</sup> “In addition, as in *Eu* the associational rights at stake are particularly strong as they implicate the right of an entirely voluntary group of persons who are seeking to associate with one another for specific political goals and objectives central to the democratic process.”<sup>27</sup>

A state may, under limited circumstances, enact a statute that interferes with internal party affairs “when necessary to ensure the fairness of the election process.”<sup>28</sup> The requirement that one man and one woman serve as chair or vice chair does not ensure an “orderly and fair” election process and was therefore deemed unconstitutional and invalid.<sup>29</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 331. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989). Also, at issue in *Eu* was a California statute that prohibited political parties from endorsing candidates in primary elections. *Id.* at 224 (citations omitted). This statute was struck down by the *Eu* court because it burdened party officials’ freedom of speech, as well as their freedom of association rights to identify people who constitute the association and to select a standard bearer who best represents the party’s ideologies and preferences. *Id.*

<sup>22</sup> *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, at 230.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 233.

<sup>25</sup> *Hartman*, 303 N.J. Super. at 332 quoting *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989) (internal citations omitted).

<sup>26</sup> *Hartman*, 303 N.J. Super. at 334.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 333 quoting *Eu*, 489 U.S. at 233.

<sup>29</sup> *Id.* at 335.

*Central Jersey Progressive Democrats v. Flynn*

In April of 2019, Doreen Bailey, Margaret D. Ball, Staci Berger, Quiyana Butler, Laura Jill Leibowitz, Roshanna Malone, and Kamuela N. Tilman (the “Plaintiffs”), each of whom ran for Middlesex County Democratic Committee, filed a Verified Complaint and Order to Show Cause in the Superior Court of Mercer County.<sup>30</sup>

The Plaintiffs in the *CJPD* case alleged that N.J.S. 19:5-3 violated their federal and state constitutional rights to equal protection, the right to vote, and their freedom of association, because it mandates that county committees “consist of one male and one female member from each unit of representation in the county”<sup>31</sup> The Plaintiffs sought to compel the 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.”<sup>32</sup>

Although ballot design was not at issue in *Hartman*, the *CJPD* Court noted that the Plaintiffs’ request was for ballots that did not effectuate a statute that had been found to be unconstitutional in *Hartman*.<sup>33</sup> Although it acknowledged that the trial court decision in *Hartman* was not binding, the *CJPD* Court chose to adopt the decision in *Hartman*. The Court opined that, “...the purpose of N.J.S. 19:5-3 has largely been subsumed by federal and state laws against gender discrimination<sup>34</sup>, [the] New Jersey Law Against Discrimination<sup>35</sup>, as well as the 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.”<sup>36</sup>

The *CJPD* Court determined that N.J.S. 19:5-3 was unconstitutional and invalid for several reasons. First, the statute burdens the freedom of association by preventing candidates of the same sex from running on the same slate or obtaining office within the same election district.<sup>37</sup> The Court also found that the statute “discriminates on the basis of sex or gender” reasoning that “under the statute, some candidates will lose to those who received fewer votes, solely because of the genders of the candidates.”<sup>38</sup> Finally, the Court held that “[t]he text of the statute also effectively bars non-binary candidates from running for or obtaining office.”<sup>39</sup> The Court directed that all

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<sup>30</sup> *Central Jersey Progressive Democrats v. Flynn*, MER L 000732-19, slip op. at 2 (Law Div. Sep. 02, 2020). By June of 2019, only seven of the plaintiff’s remained in the action each of whom intended to run on the Central Jersey Progressive Democrats slate in the future.

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 6.

<sup>34</sup> See *Frank v. Ivy Club*, 120 N.J. 73 (1990); *Fuchilla v. Layman*, 109, N.J. 319, 334 (1988).

<sup>35</sup> N.J. STAT. ANN. §10:5-1 to -42 (West, 2020).

<sup>36</sup> *Central Jersey Progressive Democrats*, slip op. at 6.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

“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.”<sup>40</sup>

## **Constitutional Considerations**

### Equal Protection

The United States Supreme Court and New Jersey courts have recognized that the Equal Protection Clause of the Fourteenth Amendment provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws”<sup>41</sup> and means that “all persons similarly situated should be treated alike”.<sup>42</sup>

A statute is generally presumed to be valid if its classification of individuals is “rationally related to a legitimate state interest.”<sup>43</sup> However, when a statute classifies individuals by “race, alienage, national origin, or imposes upon a fundamental right, the law is subject to strict scrutiny review, and will be sustained under the Equal Protection Clause only if it is narrowly tailored to serve a compelling state interest.”<sup>44</sup>

Similarly, a statute that employs a classification based on gender also calls for a heightened standard of review.<sup>45</sup> The United States Supreme Court has determined that an individual’s gender “generally provides no sensible ground for differential treatment”<sup>46</sup> and that a statute that “distribut[es] benefits and burdens between sexes in different ways very likely reflect[s] outmoded notions of the relative capabilities of men and women.”<sup>47</sup> Unless the gender classification is substantially related to a sufficiently important governmental interest, the classification will not pass constitutional muster.<sup>48</sup>

In *United States v. Virginia*, the United States Supreme Court held that “[p]arties who seek to defend gender-based government action must demonstrate *an exceedingly pervasive justification* for that action.”<sup>49</sup> Moreover, the “justification must not rely on overbroad generalization about the different talents, capacities, or preferences for males and females.”<sup>50</sup> Under this heightened scrutiny “a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.”<sup>51</sup>

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<sup>40</sup> *Id.* at 7.

<sup>41</sup> U.S. Const. amend. XIV.

<sup>42</sup> *State v. Pimentel*, 461 N.J. Super. 468, 489 (App. Div. 2019) citing *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* See *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 441.

<sup>48</sup> *Id.*

<sup>49</sup> *United States v. Virginia*, 518 U.S. 515, 531 (1996) (emphasis added).

<sup>50</sup> *Id.* See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

<sup>51</sup> *Id.* at 535-536.

It may be that the gender classification contained in N.J.S. 19:5-3 remains necessary to ensure that women have a pathway to political leadership at the local and state level. Alternatively, the limitation contained in the statute may no longer be necessary and might now inhibit opportunities for women in elections in which women are the top two preferred choices for county committees. If the gender classification continues to further an important state interest, there may be a more precise means by which the Legislature can achieve the goal without raising constitutional concerns.

### Impact of the Evaluation of a Statute

In the context of the Voting Rights Act of 1965,<sup>52</sup> the United States Supreme Court held that the failure of a legislature to re-evaluate a statute over a lengthy period of time, when the circumstances leading to its enactment are changed, fails to satisfy even the lowest level of constitutional scrutiny – the rational basis test.<sup>53</sup> A court is less likely to accept justifications for a statute that are based on the circumstances of a bygone era, and more inclined to accept justifications based on contemporary conditions.

The gender classification in N.J.S. 19:5-3 has not been modified by the Legislature since 1964.<sup>54</sup> As the *Hartman* Court noted, the opportunities for political leadership for women, and the success of female candidates, is different today than it was in the early 1960’s. A failure to reconsider the statute after its provisions have been deemed by courts to be unconstitutional may make its classifications particularly challenging to defend.

### Updating of Statutory Language

The United States Supreme Court has not yet explicitly addressed whether classifications based upon gender identity, other than male or female, is subject to heightened scrutiny. The available case law suggests, however, that a classification that limits political leadership to those who identify as either male or female may well be viewed as invidious given its exclusion of individuals who identify as gender non-binary.<sup>55</sup>

The denial of access to individuals who do not identify as either male or female, may also mean that N.J.S. 19:5-3, violates the Equal Protection Clause of the New Jersey Constitution.<sup>56</sup> That concern could be easily remedied by replacing the phrase “the opposite sex” with the phrase

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<sup>52</sup> Voting Rights Act of 1965, 42 U.S.C. § 1973(a).

<sup>53</sup> *Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013) (invalidating sections of the Voting Rights Act of 1965 because the coverage formula had not been revised for over forty years).

<sup>54</sup> N.J.S. 19:5-3, L.1964, c.23, sec. 1. See note 14 *supra* and “Background” at page 3. Note that the provision at issue pre-dates the U.S. Supreme Court caselaw raising gender classifications from “rational basis” scrutiny to heightened scrutiny. Compare *Hoyt v. Florida*, 364 U.S. 930 (1961) (upholding gender classification on a rational basis analysis), with *Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny in invalidating gender classification).

<sup>55</sup> Cf. *Adams v. Governor of Del.*, 922 F. 3d 166, 183 (2019), *vacated and remanded on other grounds*, 141 S.Ct. 493 (2020) *vacated on standing* (invalidating a partisan balance requirement for jurists on several Delaware state courts because the political party “binary” completely excluded from judgeships those who were members of neither major party).

<sup>56</sup> N.J. Const. art. I, ¶ 1.

“a different gender identity,” but doing so could impact the opportunities of women to obtain political leadership roles.

The Legislature is in the best position to consider and address issues concerning the language of N.J.S. 19:5-3.

### **Conclusion**

The Commission has long considered its responsibilities to include bringing statutory issues to the attention of the Legislature if the Legislature has not yet addressed those issues. The statute concerning the election of county committee members, and the selection of the committee chair and vice-chair, based on the gender of the candidate has been deemed by two New Jersey courts to be unconstitutional. The statute could also be interpreted as discriminating against a class of individuals consisting of those who identify as gender non-binary.

Since any modification of the law in this area requires policy determinations best suited to the Legislature, the Commission is not making a recommendation about whether or how N.J.S. 19:5-3 should be changed. Instead, the Commission is bringing this matter to the attention of the Legislature so that it may be considered, and action taken as appropriate.

The Commission will take no further action in this area at this time unless requested to do so by the Legislature.