

TESTA HECK TESTA & WHITE, P.A.

By: Michael L. Testa, Jr. (Atty. ID# 032092001)
mtestajr@testalawyers.com

424 Landis Avenue

Vineland, New Jersey 08360

Phone: (856) 691-2300

Fax: (856) 691-5655

Attorneys for Plaintiffs, New Jersey Republican State Committee
a/k/a the NJGOP; Declan O'Scanlon; Hal Wirths; Lisa Natale-
Contessa; and Ileana Schirmer

NEW JERSEY REPUBLICAN STATE	:	SUPREME COURT OF NEW JERSEY
COMMITTEE a/k/a the NJGOP;	:	DOCKET NO.:
DECLAN O'SCANLON; HAL	:	M-1291
WIRTHS; LISA NATALE-	:	September Term, 2019
CONTESSA; and ILEANA	:	084731
SCHIRMER	:	
	:	
Plaintiffs	:	CIVIL ACTION
	:	
v.	:	
	:	ON CERTIFICATION FROM:
	:	
Philip D. Murphy, in his	:	SUPERIOR COURT OF NEW JERSEY
official capacity as	:	MERCER COUNTY - LAW DIVISION
Governor of New Jersey	:	DOCKET NO.: MER-L-1263-20
	:	
Defendant	:	
	:	

**PLAINTIFFS' BRIEF AS TO THE UNCONSTITUTIONALITY OF
"THE NEW JERSEY COVID-19 EMERGENCY BOND ACT," P.L. 2020, C. 60**

ON THE BRIEF:

MICHAEL L. TESTA, JR.

JUSTIN R. WHITE (Atty. ID# 041792005)

ANTHONY M. IMBESI (Atty. ID# 085782013)

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	i
TABLE OF CITATIONS.....	ii
PROCEDURAL HISTORY.....	1
STATEMENT OF FACTS.....	2
LEGAL ARGUMENT.....	9
I. The Court has the Power to Review the Constitutionality of the New Jersey COVID-19 Emergency Bond Act.....	10
II. The New Jersey COVID-19 Emergency Bond Act is Unconstitutional under Article VIII, § 2, ¶ 2 of the Constitution	10
III. The New Jersey COVID-19 Emergency Bond Act is Unconstitutional Because the Debt it Authorizes is not limited to a "Single Object.".....	20
IV. THE "Emergency" Provision of Art. VIII, § 2, ¶ 3 does not Obviate the Appropriations Clause of Art. VIII, § 2, ¶ 2.....	26
CONCLUSION.....	28

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>Behnke v. N.J. Hwy. Auth.</u> , 13 <u>N.J.</u> 14 (1953).....	21, 22
<u>Burgos v. State</u> , 222 <u>N.J.</u> 175 (2015).....	10, 12
<u>Cabell v. Markham</u> , 148 <u>F.2d</u> 737 (2d Cir. 1945).....	15
<u>City of Camden v. Byrne</u> , 82 <u>N.J.</u> 133 (1980).....	12
<u>Gellert v. State</u> , 522 <u>P.2d</u> 1120 (Alaska 1953).....	22
<u>Grover v. Trustees of Ocn. Grove</u> , 45 <u>N.J.L.</u> 399 (Sup. Ct. 1833).....	22
<u>Howard Sav. Inst. v. Kielb</u> , 38 <u>N.J.</u> 186 (1976).....	22
<u>In re P.L. 2001, Chapter 362</u> , 186 <u>N.J.</u> 368 (2006).....	10
<u>Jersey City v. Martin</u> , 126 <u>N.J.L.</u> 353 (E. & A. 1941).....	19, 22
<u>Johnson v. Harrison</u> , 50 <u>N.W.</u> 923 (Minn. 1894).....	22
<u>Lance v. McGreevey</u> , 180 <u>N.J.</u> 590 (2004).....	<i>passim</i>
<u>Lonegan v. State (Lonegan I)</u> , 174 <u>N.J.</u> 435 (2002).....	12, 15, 16
<u>Lonegan v. State (Lonegan II)</u> , 176 <u>N.J.</u> 2 (2003).....	15, 16, 17
<u>Newark v. Mt. Pleasant Cemetery Co.</u> , 58 <u>N.J.L.</u> 168 (E. & A. 1895).....	20, 22

<u>N.J. Assoc. on Correction v. Lan,</u> 164 <u>N.J. Super.</u> 115 (App. Div. 1978).....	21
<u>N.J. Assoc. on Correction v. Lan,</u> 80 <u>N.J.</u> 199 (1979).....	20, 22
<u>Phoenix v. Ariz. Sash, Door & Glass Co.,</u> 293 <u>P.2d</u> 438 (Ariz. 1956).....	13
<u>Pub. Mkt. Co. of Portland v. City of Portland,</u> 130 <u>P.2d</u> 624 (Ore. 1942).....	13
<u>PSE&G v. Camden,</u> 118 <u>N.J.L.</u> 245 (Sup. Ct. 1937).....	22
<u>Rumana v. County of Passaic,</u> 397 <u>N.J. Super.</u> 157 (App. Div. 2007).....	12
<u>Schwab v. Ariyoshi,</u> 564 <u>P.2d</u> 135 (Haw. 1977).....	22
<u>Spadoro v. Whitman,</u> 150 <u>N.J.</u> 2 (1997).....	25
<u>State v. Czarnicki,</u> 124 <u>N.J.L.</u> 43 (Sup. Ct. 1940).....	22
<u>State v. Trump Hotels & Casino Resorts, Inc.,</u> 160 <u>N.J.</u> 505 (1999).....	13
<u>New Jersey State Constitution of 1947</u>	
<u>N.J. Const.,</u> art. VIII, § 2, ¶ 2.....	<i>passim</i>
<u>N.J. Const.,</u> art. VIII, § 2, ¶ 3.....	<i>passim</i>
<u>Chapter Laws</u>	
“New Jersey COVID-19 Emergency Bond Act,” P.L. 2020, c.60.....	<i>passim</i>

PROCEDURAL HISTORY

This case arises out of Governor Philip Murphy's (the "Governor") enactment of the "New Jersey COVID-19 Emergency Bond Act," P.L. 2020, c.60. (the "Act"). (Pa1-29) The Act was enacted into law on July 16, 2020. (Pa18).

Earlier on July 16, 2020, the Plaintiffs, the New Jersey Republican State Committee a/k/a the NJGOP, Declan O'Scanlon, Hal Wirths, Lisa Natale-Contessa and Ileana Schirmer (collectively, "Plaintiffs") filed a Verified Complaint in the Law Division of the Superior Court of New Jersey, Mercer County, seeking preliminary injunctive relief in anticipation of the Governor's formal enactment of the Act. (Pa1). The Plaintiffs, taxpayers of this State, also demanded as relief a declaration that the Act violated various provisions of Article VIII of the New Jersey State Constitution of 1947 (the "Constitution"). (Pa20-21).

The Verified Complaint was assigned docket number MER-L-1263-20. (Pa1). On July 17, 2020, the Plaintiffs filed a First Amended Verified Complaint (the "FAVC") to reflect the fact that the Governor had formally enacted the Act the day prior. The FAVC also modified the requested injunctive relief in light of the enactment of the Act no longer being a prospective event. (Pa15, 18).

On July 17, 2020, the Supreme Court of New Jersey granted direct certification pursuant to R. 2:12-1. (Pa30).

STATEMENT OF FACTS

On March 11, 2020, the World Health Organization declared the novel coronavirus (hereinafter "COVID-19") outbreak a pandemic.¹ On March 13, 2020, the President of the United States proclaimed the COVID-19 pandemic a national emergency. (Pa32).

On March 21, 2020, the Governor issued Executive Order No. 107, whereby it was ordered that for the most part all State residents remain home or at their place of residence except for certain very limited exceptions. (Pa35-47). Through this order all non-essential retail businesses were to be closed to the public. (Pa40).

The Governor renewed the stay-at-home orders, as well as ordered all non-essential retail business remain closed, with Executive Order 119 on April 7, 2020, Executive Order 138 on May 6, 2020, Executive Order 151 on June 4, 2020, and Executive Order 162 on July 2, 2020. (Pa48, 53, 59, 65).

The State of New Jersey's finances have been negatively financially impacted by COVID-19. (See generally Pa71, 74). Among other actions to address the negative financial impact, on April 14, 2020 the State enacted the "COVID-19 Fiscal Management Act,"

¹ The World Health Organization made this declaration via "tweet" of March 11, 2020 and later that day at a press briefing. Plaintiffs respectfully submit that this and other general background information as to the COVID-19 pandemic is subject to judicial notice pursuant to N.J.R.E. 201.

L. 2020, c. 19 (the "Fiscal Management Act"). (Pa71). The Fiscal Management Act extended the end of the State's 2020 fiscal year from June 30, 2020 to September 30, 2020. (Pa71). The Fiscal Management Act also set an abbreviated 2021 fiscal year, to begin on October 1, 2020 and ending June 30, 2021. (Pa71). The Fiscal Management Act also extended the personal and corporate income tax filing deadline from April 15 to July 15. (Pa71).

The Fiscal Management Act required the State Treasurer to prepare a report on the financial condition of the State budget for Fiscal Years 2020 and 2021 (the "Report"). (Pa71-72). The Report was published on May 22, 2020. (Pa74-75). The Report finds that the State is "potentially facing" a combined revenue shortfall of nearly ten billion dollars (\$10,000,000,000.00) for the remaining months of Fiscal Year 2020 and through the end of Fiscal Year 2021. (Pa75). The Report concludes that "[t]he impact of the economic damage on New Jersey revenues will last well into Fiscal Year 2021 and beyond." (Pa79). The negative revenue scenario described by the Report assumes that the "stay-at-home" order encapsulated in the aforesaid Executive Orders would last through June of 2020. (Pa79).

The Report projects that FY 2020 "budget revenues" will be \$2.732 billion lower than previously forecasted. (Pa80-81). The Report projects that FY 2021 "budget collections" will be \$7.207 billion lower than previously forecasted. (Pa80-81). The Report

notes that if there is a resurgence of COVID-19 cases in the fall and winter of 2020-21, the FY 2021 revenues could decline by an additional \$1.065 billion. (Pa81, n1).

As a response to the anticipated shortfall as set forth in the Report, and in an attempt to restart the State economy and recover from the financial problems resulting from the COVID-19 Pandemic, on May 28, 2020 the New Jersey State Assembly introduced A. 4175 (2020), the legislative precursor to the Act. (Pa122-123). The Assembly passed A. 4175 on June 4, 2020. On July 16, 2020, the New Jersey State Senate passed their chamber's version of the bill, S. 2697 (2020), and such version then immediately adopted by the Assembly. (Pa102-103). Having passed both chambers of the Legislature, the Governor effectuated A. 4175/S. 2697 (2020) into law on July 16, 2020.

The Act and/or the borrowing contemplated under the Act was not submitted to the people at a general election and approved by a majority of the legally qualified voters of the State voting in such an election. (See Pa110, 130).

The Act recognizes that the State expects "precipitous declines in revenues in Fiscal Year 2020 and Fiscal Year 2021."² (Pa109, 129). The Act authorizes the issuance of general obligations bond, and borrowing from the federal government "in

²L. 2020, c. 60, § 2(ii)(1).

accordance with Article VIII, Section II, paragraph 3 and subparagraph e.”³ of the Constitution.⁴ (Pa110, 130).

Bonds under the Act are authorized to be issued “to address the State’s financial problems that have arisen as a consequence of the COVID-19 Pandemic.”⁵ (Pa111, 132). The Act authorizes bond issues to the federal government or at a public or private sale.⁶ (Pa111, 132). The principal amount of bonds that may be so issued is \$2.7 billion for the period beginning July 1, 2019 and ending September 30, 2020.⁷ (Pa111, 132). The principal amount of bonds that may be so issued is \$7.2 billion for the period that begins October 1, 2020 and ending June 30, 2020.⁸ (Pa111, 132). Thus, the Act authorizes a total issuance of \$9.9 billion in bond principal.⁹ (Pa111, 132).

Bonds issued under the Act shall be a direct obligation of the State, with principal and interest payments secured by the

³ L. 2020, c. 60, § 2(11).

⁴ A portion of the Debt Limitation Clause.

⁵ L. 2020, c. 60, § 4.

⁶ L. 2020, c. 60, § 4.

⁷ That is, Fiscal Year 2020 as extended by the Fiscal Management Act.

⁸ That is, Fiscal Year 2021 as abbreviated by the Fiscal Management Act.

⁹ L. 2020, c. 60, § 4.

faith and credit of the State, and further secured by the State's taxation authority.¹⁰ (Pa113, 120, 135, 142).

The Act is not self-executing.¹¹ (See Pa112-13, 134-35). The principal amount of the bonds to be issued under the Act is a "cap." (See Ibid.). The issuance of bonds authorized by the Act is subject to the majority agreement of "issuing officials," defined by the Act as including and consisting of the Governor, the State Treasurer and the Director of the Division of Budget and Accounting in the Department of the Treasury.¹² (Pa112-13, 134-35). Upon a decision of the issuing officials to borrow, the issue is then forwarded to a "Select Commission on Emergency COVID-19 Borrowing"¹³ (the "Commission"). (Ibid.). The Commission will consist of two members of the Assembly and two members of the Senate. (Ibid.). The issuance of the bonds as may be requested by the issuing officials shall be authorized upon the approval by any three (3) members of the Commission.¹⁴ (Ibid.).

The Act does not provide that proceeds received from the subject bonds be committed to a particular purpose, such as the

¹⁰ L. 2020, c. 60, §§ 7, 22, 23.

¹¹ L. 2020, c. 60, § 6.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

purchase of personal protective equipment, ventilators, or healthcare related products and services. (See Pa111, 115, 132, 137). Proceeds from the sale of bonds under the Act shall be paid to the State Treasurer.¹⁵ (Pa115, 136-37). Proceeds shall be held in a separate fund known as the "New Jersey COVID-19 State Emergency Fund." (Ibid.). From there, the proceeds shall be withdrawn by the Treasurer for deposit into the General Fund or the Property Tax Relief Fund as needed to support appropriations made by the Legislature for Fiscal Year 2021.¹⁶ (Pa115, 137).

The Act states that such amounts so deposited into the General Fund or the Property Tax Relief Fund "shall constitute State revenues."¹⁷ (Pa115, 137). The balance of any amounts on deposit in the New Jersey COVID-19 State Emergency Fund shall be subject to appropriation by the Legislature, as authorized by the Act.¹⁸ (Ibid.).

The Act does not explicitly authorize that bond proceeds be deposited into the General Fund or Property Tax Relief Fund to support appropriations made by the Legislature for (extended) Fiscal Year 2020. (See Ibid.). However, the Act provides that the

¹⁵ L. 2020, c. 60, § 13.

¹⁶ L. 2020, c. 60, § 14.

¹⁷ Ibid.

¹⁸ Ibid.

anticipated bond proceeds may be borrowed against “[a]t any time prior” to their issuance and sale,¹⁹ effectively allowing the State to tap a line of credit in Fiscal Year 2020. (Pa115, 138).

The Legislature’s general appropriation law for Fiscal Year 2020²⁰ appropriated \$38,700,110,000.00 in State funds. (Pa145-46). One percent (1%) of this appropriated amount is approximately \$387 million. The principal amount of bonds authorized under the Act for Fiscal Year 2020 exceeds this 1% amount by approximately \$1,812,998,900.00.

The Legislature’s general appropriation law for Fiscal Year 2021 is not due until September 30, 2020 pursuant to the Fiscal Management Act. (Pa71). The budget proposed by the Governor²¹ for Fiscal Year 2021 estimates revenues of \$41,162,000,000.00. The proposed budget differentiates this “revenue” figure from total financial “resources.” (Pa150-51). The proposed budget defines “revenues” as “[f]unds received from taxes, fees and other sources that are treated as State income and used to finance expenditures.” (Pa148).

In the budget proposed for Fiscal year 2021, the Governor requests an appropriation of \$41,110,818,000.00. (Pa152). One

¹⁹ L. 2020, c. 60, § 15.

²⁰ L. 2019, c. 50

²¹ Plaintiffs recognize that the budget was proposed prior to the pandemic.

percent (1%) of this amount is approximately \$410 million. The principal amount of bonds authorized under the Act for Fiscal Year 2021 will exceed 1% of the Fiscal Year 2021 appropriation.

LEGAL ARGUMENT

The New Jersey COVID-19 Emergency Bond Act is unconstitutional under the New Jersey State Constitution of 1947 (the "Constitution"). The Act violates the Appropriations Clause of the Constitution, Art. VIII, § 2, ¶ 2. The Act further violates the Debt Limitation Clause of the Constitution, Art. VIII, § 2, ¶ 3.

In short, the Act, for apparently the first time since the adoption of the Constitution, would allow the State to pay its *general operational expenses* through deficit financing. Worse, this unprecedented act would be without the approval of the voters of this State that will ultimately be saddled with this millstone of debt for as long as the next thirty-five (35) years. (See Pa116, 139).

Plaintiffs do not disagree that the COVID-19 pandemic has caused immense pain to the people of New Jersey, and by extension, to the finances of the State. However, this inherently temporary problem cannot be addressed through unlawful act of government, however well-intended.

**POINT I: THE COURT HAS THE POWER TO
REVIEW THE CONSTITUTIONALITY OF THE
New Jersey COVID-19 Emergency Bond Act.**

This Court has the authority and duty to review the constitutionality of the Act. It is this honorable Court's solemn responsibility to strike down a statute that runs afoul of our State's Constitution. In re P.L. 2001, Chapter 362. (Williams), 186 N.J. 368, 393 (2006).

As this Court observed in Williams, supra, judges, to the extent humanly possible, interpret the Constitution fairly, fearlessly, and independently, even when the issue touches on the judiciary's institutional concerns. Id. at 393-94.

Although this Court has found that it is "plain" that the State must get its financial house in order, Burgos v. State, 222 N.J. 175, 218 (2015), in this case the Court is not being asked to insert itself into the political debate as to how best to finance the general operations of the State. Instead, the Plaintiffs seek the declaration that the Act is unconstitutional under Article VIII, § 2, ¶ 2 and Article VIII, § 2, ¶ 3.

**POINT II: THE NEW JERSEY COVID-19 EMERGENCY BOND ACT
IS UNCONSTITUTIONAL UNDER
ARTICLE VIII, § 2, ¶ 2 OF THE CONSTITUTION.**

The Act is unconstitutional in that it seeks to fund the general operating expenses of the State via debt. Pursuant to the Act, the State is authorized to set appropriations for FY 2021 that exceed revenues. Also pursuant to the Act, the State has

authorized itself a line of credit to pay general operating expenses in FY 2020. Both authorizations are constitutionally repugnant.

The State is constitutionally mandated to maintain a balanced budget pursuant to the Constitution's Appropriations Clause. The Constitution, at Article VIII, § 2, ¶ 2 provides:

No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year; except that when a change in the fiscal year is made, necessary provision may be made to effect the transition. No general appropriation law or other law appropriating money for any State purpose shall be enacted if the appropriation contained therein, together with all prior appropriations made for the same fiscal period, shall exceed the total amount of revenue on hand and anticipated which will be available to meet such appropriations during such fiscal period, as certified by the Governor.

Under the Appropriations Clause, the power and authority to appropriate funds is vested in the Legislature. The Clause has three requirements. One, all withdrawals of money from the State Treasury must be accomplished through legislative appropriation. Two, the Legislature must provide for that appropriation in one general appropriation law covering one and the same fiscal year. And three, the budget created by the appropriations law must be balanced; the State cannot adopt an annual budget in which

expenditures exceed revenues. Burgos v. State, 222 N.J. 175, 205-06 (2015) (citations omitted).

Thus, the annual general appropriation law may not spend in excess of the State's revenues. The budget must be balanced. More particularly, it is the Plaintiffs' position that the budget's expenditures may not be "balanced" by debt, as that would render the budget inherently unbalanced. "Form should not be honored over substance." Rumana v. County of Passaic, 397 N.J. Super. 157, 179 (App. Div. 2007) (holding that Passaic County could not recognize as revenue the proceeds from the sale of a county golf course to a county improvement authority when the County guaranteed the bonds issued by the improvement authority and used to purchase the golf course).

The Appropriations Clause reflects a "constitutional command that the State's finances be conducted on the basis of a single fiscal year covered by a single balanced budget." Lance v. McGreevey, 180 N.J. 590, 596 (2004) (citing City of Camden v. Byrne, 82 N.J. 133, 151 (1980)). The constitutional requirement that the State enact a balanced budget is not mere window dressing. Rather, the Appropriations Clause must be given full and complete effect in accordance with its *clear and obvious* intent. Ibid.

General obligation bonds are enforceable state debts backed by the full faith and credit of the State. Lonegan v. State (Lonegan I), 174 N.J. 435, 439 n.1 (2002) (citing John Downs &

Jordon Elliott Goodman, *Barron's Dictionary of Finance and Investment Terms* 171 (1991)). Bond proceeds "scarcely resemble 'State revenue.'" Lance, supra, 180 N.J. at 597 (citing State v. Trump Hotels & Casino Resorts, Inc., 160 N.J. 505, 536 (1999)); see also Pub. Mkt. Co. of Portland v. City of Portland, 130 P.2d 624, 644 (Ore. 1942) (the term "revenue" does not encompass borrowed monies); Phoenix v. Ariz. Sash, Door & Glass Co., 293 P.2d 438, 440 (Ariz. 1956) (in the context of governmental finance the term "revenue" is synonymous with "taxes").

As the Lance court found "most relevant," former Governor McGreevey's own definition of "revenue," as set forth in the Proposed Budget for 2004-05 did not encompass bond proceeds / debt. Lance, supra, 180 N.J. at 598. The definition of "revenue" in Governor Murphy's Proposed Budget for FY 2021 is *exactly the same* as the definition in Governor McGreevey's 2004-05 proposed budget. "Revenue" is defined as "[f]unds received from taxes, fees and other sources that are treated as State income and used to finance expenditures." (Pa147-48).

The Court in Lance posed the question of whether relying on \$1.9 billion in borrowed monies to fund general expenses²² would be consistent with a "balanced budget." The Court answered

²² The Lance court defined "general expenses" as the ordinary, operating and day-to-day costs of government. Id. at 596.

succinctly -- "no." Lance, supra, 180 N.J. at 596. Debt financing of general state expenses defeats the very purpose behind the Appropriations Clause. Ibid. (citation omitted).

Debt financing of the State's general expenses is thus unconstitutional. Id. at 598. However, the New Jersey COVID-19 Emergency Bond Act does exactly that. Under the Act, bond proceeds will be deposited into the State's General Fund or the Property Tax Relief Fund to support appropriations made by the Legislature for Fiscal Year 2021.²³ (Pa115, 137). Such borrowed monies are declared "State revenues" by fiat.²⁴ (Pa115, 137). The borrowed monies are not earmarked for a particular purpose, other than to plug an anticipated gap in the State's collection of taxes and other non-debt financial resources.²⁵ (See Pa111, 115, 132, 137).

Further, the State does not even have to wait until the bond proceeds are received before spending them. Under the Act, the State is authorized to borrow from "any fund of the treasury of the State" against bond proceeds that the State hopes to realize.²⁶ (Pa115, 138).

²³ L. 2020, c. 60, § 4.

²⁴ L. 2020, c. 60, § 14.

²⁵ L. 2020, c. 60, §§ 4, 14, 15.

²⁶ L. 2020, c. 60, § 15.

It is anticipated that the State will argue that the holding of Lance, supra, can be distinguished from the matter at hand because Lance dealt with appropriations bonds, and in this situation the subject is general obligation bonds. While the Lance case dealt with appropriations bonds, rather than general obligation bonds, the principles enunciated in Lance should ring true regardless of the structure of the attempt to finance the State's general expenses through debt.²⁷

The Constitution of 1947 was written to be understood by the voters that approved it, rather than those that would "make a fortress out of the dictionary." Lance, supra, 180 N.J. at 598 (quoting with approval Learned Hand's observation in Cabell v. Markham, 148 F.2d 737 (2d Cir. 1945). Words and phrases were used in the Constitution in their normal and ordinary sense, rather than a technical meaning. Ibid.

The Constitution was presented to and ratified by regular people that sought to secure liberty and prosperity for themselves

²⁷ "Appropriations bonds" are not backed by the full faith and credit of the State, are typically issued by independent creatures of state law, and are not subject to the various limitations of Article VIII of the Constitution. "General obligation bonds," on the other hand, are backed by the full faith and credit of the State (and ultimately the resident taxpayers of this State), and are subject to the various limitations of Article VIII. See generally, Lonegan v. State (Lonegan I), 174 N.J. 43 (2002); Lonegan v. State (Lonegan II), 176 N.J. 2 (2003).

and future generations. The Constitution was not presented to corporate financiers as a problem in need of a workaround.

As held by this Court in Lance, it is a straightforward notion that borrowed monies, which themselves are a form of expenditure when repaid, are not income (i.e. revenues) and cannot be used for purposes of funding or balancing any portion of the budget pertaining to general costs without violating the Appropriations Clause. Ibid.

Though hypothetical in light of the holding of Lance, supra, if "wiggle room" is going to be found in the Constitution to allow debt-financing of the State's general expenses, appropriations bonds would seemingly be the vehicle for doing so, as opposed to general obligation bonds. As the State recognized in Lonegan v. State (Lonegan II), 176 N.J. 2 (2003), appropriations bonds at least lend flexibility, as more favorable repayment terms can be negotiated as the need arises. Id. at 13. Principal and interest on appropriations bonds are typically paid by a state entity with a funding source (other than taxes). Lonegan I, supra, 174 N.J. at 446. And of course, appropriations bonds are unsecured in that they may be reneged with the creditor left without meaningful recourse against the State -- and never with recourse against the State's taxpayers.

General obligation bonds, on the other hand, do not offer such flexibility. G.O. Bonds are backed by the State's full faith

and credit. In the case of the Act, this is explicitly recognized.²⁸ (Pa113, 120, 135, 142). The repayment of bonds issued under the Act is secured by tax collections under the Sales and Use Tax Act.²⁹ (Pa120-21, 142-43). More terrifying for New Jerseyans is that if sales tax revenue cannot cover the payment of bonds issued under the Act, a statewide tax on real property is levied.³⁰ (Ibid.).

The Plaintiffs recognize the issues raised in the dissenting opinion in Lance v. McGreevey. However, the dissent in Lance did not reach a conclusion as to whether the State can finance its general expenses with debt. See Lance, supra, 180 N.J. at 603-04. And importantly, the dissent in Lance questioned whether voter approved G.O. debt might constitute "revenue" for purposes of financing the State's general expenses. Id. at 602.

This is important because the Debt Limitation Clause of the Constitution was adopted because of concerns about binding obligations imposed on future generations of taxpayers and because of unchecked speculation by the state. Lonegan II, supra, 176 N.J. at 14. Historically, states that were allowed to borrow

²⁸ L. 2020, c. 60, § 7.

²⁹ L. 2020, c. 60, § 22.

³⁰ L. 2020, c. 60, §§ 22, 23.

without the permission of their citizens experienced "financial debacle." Ibid.

In sum, if New Jerseyans are to mortgage their future, whatever the wisdom of such a decision, they at least should give their consent. See N.J. Const., art. VIII, § 3, ¶ 3.

Here, on the other hand, the bonds authorized by the Act have not been approved by the people at a general election.³¹ Current and future generations will be bound to this debt, without their consent. It is respectfully submitted that if the Court is ever inclined to adopt a sweeping definition of the term "revenue," and one that would be at odds with the Lance decision, this is not the situation to do so.

Further indicative that this is not the situation to part from the Lance decision is the byzantine manner that the debt under the Act will be incurred, and then spent on general expenses. Up to \$2.7 billion may be borrowed in Fiscal Year 2020, then banked in a special account, to be transferred into the General Fund or Property Tax Relief Fund and spent in Fiscal Year 2021 on general operating expenses.³² (Pa115, 136). In Fiscal Year 2021, up to an additional \$7.2 billion may be borrowed to fund general operating

³¹ Each tranche of debt under the Act far exceeds the one percent (1%) of appropriations threshold of the Debt Limitation Clause, N.J. Const., art. VIII, § 2, ¶ 3.

³² L. 2020, c. 60, §§ 4, 14.

expenses.³³ (Ibid.). And before any bonds are even issued, the expected borrowing may itself be borrowed against "at any time."³⁴ (Pa115, 138).

That all of this debt would be incurred on behalf of the 9,000,000 residents of New Jersey at the discretion of a seven (7) member "debt cabal"³⁵ (Pa112-113, 134-35) may raise additional issues of constitutional concern.

Thus, the proposed billions in debt, even under the broadest definition of "revenue," does not "balance" the general appropriation of Fiscal Year 2020 or 2021. Rather, this is "spend now, borrow later" for FY 2020 and "borrow now, spend later" for FY 2021. It is inconceivable that the framers of the Constitution and its Article VIII, who went to great lengths to curb the State's ability to incur indebtedness, would approve of the State incurring debt so as to have pocket-money for use at a later date.

All that said, it is respectfully submitted that Lance was correctly decided. Its general holding that the Appropriations Clause of the Constitution prohibits the debt financing of the State's general expenses should apply to any and all bonds,

³³ L. 2020, c. 60, §§ 4, 14.

³⁴ L. 2020, c. 60, § 15.

³⁵ L. 2020, c. 60, § 6.

including the general obligation bond authorized under the New Jersey COVID-19 Emergency Bond Act.

The Act is unconstitutional and must be stricken as such.

**POINT III: THE NEW JERSEY COVID-19 EMERGENCY BOND ACT
IS UNCONSTITUTIONAL BECAUSE THE DEBT IT
AUTHORIZES IS NOT LIMITED
TO A "SINGLE OBJECT."**

The Constitution requires that the proceeds of any general obligation debt created by the State are confined to a "single object or work." N.J. Const. art. VIII, § 2, ¶ 3(a).

In violation of this constitutional requirement, the Act would allow the State to use the new debt for *any* financial problem faced during the 2020 and 2021 Fiscal Years.³⁶ For FY 2020, the State may borrow from other funds in anticipation of the bond proceeds.³⁷ For FY 2021, the State may outright spend the bond proceeds via the anticipated Appropriations Act.³⁸

While the single object rule has been interpreted broadly by the courts, it is still a meaningful constitutional provision that commands the State's adherence. The Constitution's single object requirement does not restrict debt legislation to granular single matters. New Jersey Association on Correction v. Lan, 80 N.J. 199, 206 (1979) (quoting Newark v. Mount Pleasant Cemetery Co., 58

³⁶ L. 2020, c. 60, §§ 4, 14, 15.

³⁷ L. 2020, c. 60, § 15.

³⁸ L. 2020, c. 60, § 14.

N.J.L. 168, 121 (E. & A. 1895)). Rather, it asks whether the matters are properly related to each other such that they effectuate only one general object. Ibid.

The single object rule serves several important purposes. The first such purpose is to provide adequate information to voters as to enable "'an understanding appraisalment of the project.'" Lan, supra, 80 N.J. at 208 (quoting Behnke v. New Jersey Highway Authority, 13 N.J. 14, 32 (1953)). It conserves and protects the State's finances and credit. Behnke, supra, 13 N.J. at 32. It prevents money from being "expended for one purpose under the guise of another." Ibid. This transparency is necessary for the citizenry to adequately understand and appraise the performance of elected officials.

Another critical purpose of the single object rule is to prevent manipulation though the practice of "log rolling."

[T]he pernicious legislative practice commonly known as "logrolling" whereby a weak or unpopular measure is coupled with an unrelated popular one in order to facilitate its passage. If permitted, the practice confronts the voter, be he legislator or citizen, with a difficult and unfair choice; he must either forfeit the benefits of the desired legislation in order to vote his conscience on the measure he rejects, or he must accept the provision to which he has objection in order to obtain the benefits of the measure he favors. Independent appraisal of each measure, on its own merits, is frustrated and no one can be certain as to whether each of such improvidently combined provisions would have obtained voter approval had it been presented to the voter on an independent basis. When, however, the single object rule is complied

with, the voter is enabled to voice his reaction to the merits of the provision submitted.

Lan, supra, 80 N.J. at 209 (quoting New Jersey Association on Correction v. Lan, 164 N.J. Super. 115, 122 (App. Div. 1978)).

A number of other states' constitutions have similar requirements to prevent government overreach and abuse. They too found that "[t]he constitutional purpose is to protect against the extreme, the "pernicious," the incongruous, Johnson v. Harrison, 50 N.W. 923, 924 (Minn. 1894); Newark v. Mount Pleasant Cemetery Co., 58 N.J.L. 168, 171 (E. & A. 1895); the manifestly repugnant, Behnke, supra, 13 N.J. at 25; the palpable contravention of the constitutional command, Jersey City v. Martin, 126 N.J.L. 353, 363 (E. & A. 1941); Public Serv. Elec. & Gas Co. v. Camden, 118 N.J.L. 245, 250 (Sup. Ct. 1937); fraud or overreaching or misleading of the people, Howard Sav. Inst. v. Kielb, 38 N.J. 186, 201 (1976); the inadvertent, Gellert v. State, 522 P.2d 1120, 1122 (Alaska 1974); the "discordant," Schwab v. Ariyoshi, 564 P.2d 135, 140 (Hawaii 1977); or "the intermixing in one and the same act [of] such things as have no proper relation to each other," Grover v. Trustees of Ocean Grove Camp-Meeting Association, 45 N.J.L. 399, 402 (Sup. Ct. 1833); or matters which are "uncertain, misleading or deceptive," State v. Czarnicki, 124 N.J.L. 43, 45 (Sup. Ct. 1940)." Lan, supra, 80 N.J. at 212.

It is anticipated that the State may argue that the single object rule is inapplicable to "emergency" debt incurred pursuant

to Article VIII, § 2, ¶ 3(e) of the Constitution. That subparagraph reads:

This paragraph shall not be construed to refer to any money that has been or may be deposited with this State by the government of the United States. Nor shall anything in this paragraph contained apply to the creation of any debts or liabilities for purposes of war, or to repel invasion, or to suppress insurrection or to meet an emergency caused by disaster or act of God.

The structure of subparagraph (e) makes it evident that the farmers of the Constitution did not intend to give the State a blank check whenever an unspecified emergency arises. The numerous examples present in the clause instruct that the emergency debt is limited in use to combat the particular threat. For instance, such debt could certainly be used to repel a hypothetical invasion. But the State could not capitalize upon the emergency situation (the invasion) to borrow additional funds to renovate Drumthwacket.

Moreover, the proceedings of the 1947 Constitutional Convention explicitly elucidate the intention that the single object rule apply to Article VIII, § 2, ¶ 3(e). The final clause, "or to meet an emergency caused by disaster or act of God," was not found in the previous 1844 State Constitution. It was added with little controversy to the 1947 Constitution.

During the 1947 Constitutional Convention, State Treasurer Robert C. Hendrickson addressed the Committee on Taxation and Finance about certain modifications to the Constitution. (Pa153).

On July 8, 1947, Treasurer Hendrickson provided the most extensive discussion of emergency spending contemplated by the framers of the Constitution. Treasurer Hendrickson stated:

We recognized, of course, that there would be emergencies and unforeseeable contingencies in certain fiscal years. These possibilities we dealt with by allowing for supplemental appropriations, but only upon two-thirds vote of each house. The bill, in any instance, carrying a supplemental appropriation would direct its attention to any given item for some single object or purpose, and this seemed to us to provide a fair medium against "log-rolling" to raise the necessary votes. Again, we did not overlook the fact that funds should be available in any case, for we had all seen too much of appropriations without regard to the source from which the funds were to be derived. On the whole, we felt that the provisions I have just mentioned would ultimately lead to greater economy as well as to a higher degree of efficiency.

(Pa154-55).

This passage makes plain that the framers of the Constitution intended the single object rule to apply *especially* in emergency situations, where the potential for "log rolling" is high.

Here, the Act was passed with the nebulous authorization to use the newly created debt for any "financial problems that have arisen as consequence of the COVID-19 pandemic."³⁹ (Pa111, 132). There are no limits as to how the State can spend this unprecedented debt. If the Legislature wants an appropriation, it can fund it with debt issued under the Act.

³⁹ L. 2020, c. 60, § 4.

This type of unfettered borrowing and spending turns the single object relatedness test on its head. When everything is related, nothing is related.

As observed by Justice Handler, in evaluating a bond issued under the Debt Limitation Clause, the Court is enjoined to accord that provision the status that it deserves, "namely, that of an important structural provision in our Constitution." Spodoro v. Whitman, 150 N.J. 2, 12-13 (1997) (Handler, J., dissenting).

Justice Handler continued:

[the Debt Limitation Clause's] broad and fundamentally important purposes of not binding future majorities for the financial policies of current majorities must be construed with that overwhelming theme in mind. Under no circumstances should it be deflated or read out of the Constitution as a mere nuisance provision that serves no purpose except to define an administrative procedure for selling debt.

Ibid.

While the COVID-19 pandemic is concerning for all, this Act will create a dangerous precedent that will be felt for generations. If plugging gaps in the State's general budget is passes muster under the single object requirement of the Constitution, then the State could issue new binding debt without the approval of the electorate anytime the State projects a revenue shortfall. For example, a drop in sales and motor fuel tax revenue caused by people staying home during a winter-storm "emergency"

would become a boot-strap for the State to finance general expenses through the issuance of debt.

Taxpayers would be left with substantially less control over how taxpayer dollars are spent. This is exactly the type of situation foreseen by the framers of the Constitution when they enacted the single object rule of the Debt Limitation Clause, Article VIII, § 2, ¶ 3.

The Act is unconstitutional and must be stricken as such.

POINT IV: THE "EMERGENCY" PROVISION OF ART. VIII, § 2, ¶ 3 DOES NOT OBTIATE THE APPROPRIATIONS CLAUSE OF ART. VIII, § 2, ¶ 2.

As noted above, the Appropriations Clause of the Constitution provides that all spending as far as can be ascertained or reasonably foreseen must be provided in a single appropriation law. Further, the Appropriations Clause requires that no appropriations law be enacted if the appropriations exceed the revenue on hand and anticipated during the relevant fiscal period. N.J. Const. art. VIII, § 2, ¶ 2.

The language and structure of the Appropriations Clause indicate that exceptions to the Debt Limitation Clause are intended only to allow the State to address a specific, unforeseen spending need that arises notwithstanding the Legislature's and Governor's previous compliance with the anticipated revenue certification, and balanced budget provisions of the Appropriations Clause.

In this case, the emergency was the COVID-19 pandemic that struck New Jersey in the first-quarter of 2020 (i.e. during FY 2020). Now, the pandemic and its effect are no longer a surprise or unforeseen. In fact, the State recognizes that “[t]he impact of the economic damage on New Jersey revenues will last well into Fiscal Year 2021 *and beyond*.” (Pa79) (emphasis added). The “and beyond” is noteworthy. Does the State take the position that it can finance its general expenses via debt for however long New Jersey experiences the lingering effects of COVID-19?

When a Fiscal Year 2021 budget is adopted, normal constitutional procedures, including revenue certification and balanced budget requirements should apply. An *anticipated* decline in tax collection and income -- whether caused by a pandemic, an ongoing recession, or simply a trend of people buying fewer taxable items -- is not an “emergency” that allows circumventing the Appropriations Clause.

For this additional reason, the Act is unconstitutional and must be stricken.

CONCLUSION

In light of the above, the New Jersey COVID-19 Emergency Bond Act, P.L. 2020, c. 60 is unconstitutional under Article VIII, §, 2, ¶ 2 and Article VIII, § 2, ¶ 3 of the New Jersey State Constitution of the 1947. The Act must be stricken as such.

TESTA HECK TESTA & WHITE, P.A.
Attorneys for Plaintiffs

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By: s/ Michael L. Testa, Jr.
MICHAEL L. TESTA, Jr.