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**LEAGUE OF WOMEN VOTERS
OF NEW JERSEY and
AMERICAN CIVIL LIBERTIES
UNION OF NEW JERSEY,**

Plaintiffs,

v.

**TAHESHA WAY, in her official
capacity as Secretary of State of
New Jersey, and ROBERT GILES,
in his official capacity as Director of
the Division of Elections,**

Defendants.

) SUPERIOR COURT OF NEW
) JERSEY
) MERCER COUNTY
) LAW DIVISION
)
) Docket No.
)
) CIVIL ACTION
)
)
) **BRIEF IN SUPPORT OF
ORDER TO SHOW CAUSE
WITH TEMPORARY
RESTRAINTS**



TABLE OF CONTENTS

Table of Authorities ii

Preliminary Statement.....1

Statement of Facts.....3

Argument6

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS REQUIRING THE ELECTRONIC DELIVERY OF VOTE BY MAIL BALLOTS.....7

A. Defendants’ Failure to Allow Displaced New Jerseyans to Vote Violates the New Jersey Constitution.....7

B. New Jersey Courts are Empowered to Ensure that Voters who Make Good-Faith Efforts to Vote are not Disenfranchised.9

C. The Memorandum of Understanding in *Gusciora, et al. v. Corzine, et al.* Creates No Barrier to the Relief Sought.11

D. Plaintiffs Have Standing.13

II. PLAINTIFFS EASILY MEET THE REMAINING STANDARDS FOR GRANTING TEMPORARY RESTRAINTS.....15

A. Absent Interim Relief, Plaintiffs Will Continue to Suffer Harm Because Many Voters Will be Disenfranchised.15

B. The Balance of the Equities, Including the Public Interest, Favors the Issuance of an Immediate Injunction..... 16

C. The Restraint Does Not Alter the *Status Quo Ante* Beyond that Which is Necessary to Protect the Fundamental Right to Vote20

Conclusion.....21

TABLE OF AUTHORITIES

CASES

<i>Afran v. Cnty. of Somerset</i> , 244 N.J. Super. 229 (App. Div. 1990).....	8, 10
<i>Asbury Park Press, Inc. v. Woolley</i> , 33 N.J. 1 (1960)	7-8
<i>Bliss v. Woolley</i> , 68 N.J.L. 51 (1902)	9
<i>Childs v. McGettigan</i> , 444 N.J. Super. 409 (Law. Div. 2015)	9-10
<i>Crescent Park Tenants Ass’n v. Realty Equities Corp. of N.Y.</i> , 58 N.J. 98 (1971)	13-14
<i>Crowe v. De Gioia</i> , 90 N.J. 126 (1982)	6-7, 15, 20
<i>Friedland v. State</i> , 149 N.J. Super. 483 (Law. Div. 1977).....	7
<i>Gangemi v. Berry</i> , 25 N.J. 1 (1957).....	8
<i>Gusciora v. Corzine</i> , Docket No. MER-L-2691-04	11-13, 19
<i>In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp.</i> , 331 N.J. Super. 31 (App. Div. 2000).....	8, 9
<i>In re Gray-Sadler</i> , 164 N.J. 468 (2000).....	18, 19
<i>In re Mallon</i> , 232 N.J. Super. 249 (App. Div. 1989).....	18
<i>In re Quinlan</i> , 70 N.J. 10 (1976).....	13
<i>Kilmurray v. Gilfert</i> , 10 N.J. 435 (1952)	10-11
<i>Matthews v. City of Atl. City</i> , 84 N.J. 153 (1980).....	7
<i>N.J. Citizen Action v. Riviera Motel Corp.</i> , 296 N.J. Super. 402 (App. Div. 1997)	13
<i>People For Open Gov’t v. Roberts</i> , 397 N.J. Super. 502 (App. Div. 2008).....	14
<i>Peters v. Pub. Serv. Corp. of N.J.</i> , 132 N.J. Eq. 500 (Ch.1942), aff’d o.b., 133 N.J. Eq. 283 (E. & A. 1943)	20
<i>Salorio v. Glaser</i> , 82 N.J. 482 (1980).....	14
<i>Stelluti v. Casapenn Enterprises, LLC</i> , 203 N.J. 286 (2010)	12

Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth., 399 N.J. Super. 508
 (App. Div. 2008).....18

Wene v. Meyner, 13 N.J. 185 (1953).....10

Yakus v. United States, 321 U.S. 414 (1944).....18

CONSTITUTIONS, RULES, AND STATUTES

Exec. Order No. 177 (Aug. 14, 2020), 52 N.J.R. 1701(b) (Sept. 21, 2020).....9, 18

N.J. Const. art. II, § 17, 8

N.J. Const. art. VI, § 113

N.J.S.A. 19:59-1-1621

N.J.S.A. 19:63-31.....9, 16

U.S. Const. art. III, § 2.....6, 13

OTHER AUTHORITIES

Letter from Brennan Center, *et al.* to Gov. Murphy, *et al.* (May 14, 2020),
<https://www.brennancenter.org/our-work/research-reports/brennan-center-sends-letter-new-jersey-state-officials-internet-voting>19

PRELIMINARY STATEMENT

Confronted with the reality that many New Jersey voters would be unwilling or unable to access the polls as a result of COVID-19, Governor Murphy took dramatic action to ensure that voters need not choose between exercising their right to vote and protecting their health. As a result of this action, the 2020 general election will be conducted largely by use of vote-by-mail ballots. To achieve this transformation of the election, the Governor ordered – and later the Legislature codified a requirement – that all active voters receive a vote-by-mail ballot at the address where they are registered to vote. But, especially during the pandemic, not every voter resides at the address where they are registered to vote.

Recognizing that, New Jersey statutes allow voters to contact their county Board of Elections and request that the Board send a vote-by-mail ballot to an alternate address. Voters are required to make such requests on or before October 23, 2020. Such alterations in our voting system appear well-calculated to maximize safe participation in the election. But, because they rely on overwhelmed Boards of Elections and the troubled United States Postal Service, they are not fool proof. Indeed, based on the experience utilizing similar procedures during the primary election, in which there is typically far less voter participation, it appears likely that some voters will not receive their ballots in time to participate in this election.

During the primary, many displaced voters – those living far from home in New Jersey or having relocated out of state – were unable to vote because they did not receive their ballots on time. Fortunately, should such a situation recur, there exists a remedy. New Jersey law already allows overseas and military voters to receive ballots through electronic means, and the State has acknowledged electronic delivery is appropriate for voters with disabilities. Plaintiffs seek a similar remedy for displaced voters who have properly requested ballots sent to alternate addresses but who, one week after the deadline to request a ballot and just four days prior to Election Day, have not received their ballots. Plaintiffs do not seek the ability to vote electronically; instead they only seek to receive their ballots – if necessary – by electronic means.

Plaintiffs are two non-partisan, non-profit organizations whose mission includes ensuring that all voters can exercise their fundamental right to vote. Absent intervention by this Court, their mission and their members would be harmed; as a result, both organizations have standing. (Point I, D). The New Jersey Constitution protects eligible voters' right to exercise their franchise whenever they make good-faith efforts to comply with the requirements proscribed for voting. Defendants' unwillingness to provide options such as electronic delivery of blank ballots to displaced voters violates that constitutional guarantee. (Point I, A). This Court can remedy that violation (Point I, B) and on-going litigation brought

by parties concerned about election security provides no barrier to the relief. Indeed, the relief sought is exactly the sort of relief the other lawsuit contemplated being provided to other groups of similarly situated voters, who faced disenfranchisement despite having done all that they were required to do in order to vote. (Point I, C). The other factors needed for a court to grant interim relief – a need to prevent irreparable harm (Point II, A), the balancing of the equities (Point II, B) and that the restraint does not alter the status quo ante (Point II, C) – all also favor the Court’s immediate action.

STATEMENT OF FACTS

The ongoing COVID-19 pandemic has taken the lives of more than 16,000 New Jerseyans. Compl. ¶ 10. Hundreds of thousands more have become sick with the virus and had their lives upended. *Id.* An unknown number – potentially in the tens of thousands – have had to leave their homes because of changes to their income, employment, education, health, family care arrangements, and many other reasons. These New Jerseyans have been displaced by COVID-19. *Id.* ¶ 11.

Their displacement occurs as an election of enormous consequence approaches. *Id.* ¶ 10. Defendants and the State of New Jersey are prepared to conduct the November 3 general election primarily through vote-by-mail ballots. Weiss Cert. ¶ 10; Compl. ¶ 13. Pursuant to Executive Order and statute, ballots should have already been sent to all “active” voters by October 5. Weiss Cert. ¶ 10;

Compl. ¶ 17. Even though they are supposed to receive ballots automatically, voters may also request mail-in ballots if they do so by October 23. Compl. ¶¶ 20, 40. As a general rule, voters must mark and return those ballots by mail with a postmark by November 3 in order for their votes to count. *Id.* ¶ 17. Except for some accommodations for people with disabilities, anyone who votes at a polling place will cast only a provisional ballot. Weiss Cert. ¶ 10; Compl. ¶ 18.

Defendants recognize that some exceptions to this rule must exist. Since 2008, New Jersey has allowed voters who are overseas and members of the military to receive and return their ballots by electronic means, including by email. Compl. ¶ 46. Earlier this year, Defendants also acknowledged that it was feasible and appropriate to provide electronic delivery (but not return) of ballots to voters with disabilities. Compl. ¶ 45; Weiss Cert. ¶ 16. Yet Defendants have failed to provide a remedy for voters who have been displaced from their homes due to COVID-19, have requested a vote-by-mail ballot at their temporary address, and yet never receive that ballot. Compl. ¶¶ 41–43. Weiss Cert. ¶ 16. Instead, the current system requires such voters to wait at their mailbox in the hopes a ballot will arrive. If it does not, they will be denied the right to vote. *Id.*

Defendants' failure to provide a remedy to displaced voters will result in disenfranchisement of enormous scale. Weiss Cert. ¶ 16; Compl. ¶ 37. This is clear from the experience of the July 7, 2020, primary election, which had a 26 percent

voter turnout (as had the 2016 primary election), as compared to 68 percent in the 2016 general election. Weiss Cert. ¶ 15. In the July 2020 primary, as with past election cycles, the national, nonpartisan coalition Election Protection ran a voter-assistance hotline in New Jersey, through which volunteers with legal training provide answers to callers seeking information about how to exercise their right to vote. *Id.* ¶ 3.

The Election Protection call center operated in New Jersey the day before and the day of the primary election, July 6 and 7. *Id.* ¶ 11. During those two days, it received 138 complaints from New Jersey voters, forty-one of whom – totaling 30 percent – reported not having received vote-by-mail ballots at all, even though volunteers confirmed the registration of each of them. *Id.* ¶ 11. A significant number of these callers had been displaced by the pandemic, relocating either within New Jersey or out-of-state to live with family members or friends. *Id.* ¶ 12. Some were students who had registered at their New Jersey college addresses but had been sent home when their colleges closed because of the pandemic. *Id.* ¶ 13. The great majority of these displaced voters had completed vote-by-mail applications to notify election officials of the temporary address at which they sought to receive their ballots. *Id.* ¶ 12.

Without any other remedy in place, call center volunteers advised the people to head to their polling place and vote provisionally if they were able. *Id.* ¶ 14. Health

risks notwithstanding, this was not possible if someone was unable to get to the polling place because of geography or other reasons. *Id.* ¶ 13. Callers who could not get to their polling places to vote provisionally were disenfranchised. *Id.*

Given the higher turnout anticipated in the 2020 general election, as compared with the 2020 primary, the risk of mass disenfranchisement is significant if this issue arises again. *Id.* ¶ 16. And it is certain to: Defendants have taken no apparent action to ensure it does not, as the vote-by-mail system established for the general election is substantially similar to that for the primary. Compl. ¶¶ 33–34; Weiss Cert. ¶ 10. Moreover, Defendants acknowledge that the remedy Plaintiffs seek – electronic delivery (but not return) of blank ballots to voters who timely request them – is appropriate to protect against disenfranchisement of voters with disabilities. Compl. ¶ 45. Yet Defendants appear to believe that they are unable to provide displaced voters this remedy absent executive, legislative, or judicial order. *Id.* ¶ 43. Accordingly, Plaintiffs seek the instant emergency order from this Court.

ARGUMENT

To be entitled to interim relief pursuant to *R.* 4:52-1, a party must show (a) that the restraint is necessary to prevent irreparable harm, *i.e.*, that the injury suffered cannot be adequately addressed by money damages, which may be inadequate because of the nature of the right affected; (b) that the party seeking the injunction has a likelihood of success on the merits; (c) that the equities favor the

party seeking the restraint; and (d) that the restraint does not alter the *status quo ante*. *Crowe v. De Gioia*, 90 N.J. 126, 132-136 (1982). Plaintiffs easily satisfy these requirements.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIM REQUIRING THE ELECTRONIC DELIVERY OF VOTE BY MAIL BALLOTS.

A. Defendants’ Failure to Allow Displaced New Jerseyans to Vote Violates the New Jersey Constitution.

Article II, Section I, Paragraph 3 of the New Jersey Constitution guarantees that all residents of New Jersey who are U.S. Citizens and age 18 or older “shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people.” N.J. Const. art. II, § 1, ¶ 3(a).¹ It is beyond peradventure that “the right to vote is a basic constitutional right,” *Friedland v. State*, 149 N.J. Super. 483, 489 (Law. Div. 1977), which the Supreme Court has time and again called “fundamental.”

Matthews v. City of Atl. City, 84 N.J. 153 (1980). Indeed, the Court has noted:

No man can boast of a higher privilege than the right granted to the citizens of our State and Nation of equal suffrage and thereby to equal representation in the making of the laws of the land. Under our Constitution that right is absolute. It is one of which he cannot be deprived, either

¹ Plaintiffs allege additional violations of the New Jersey Constitution, namely the rights to equal protection of the law and substantive due process, which derive from displaced New Jerseyans’ deprivation of the right to vote. For efficiency, Plaintiffs focus the instant brief of the right to vote as described in Count I.

deliberately or by inaction on the part of a Legislature.

[*Asbury Park Press, Inc. v. Woolley*, 33 N.J. 1, 11 (1960).]

Of course, just as the eligible New Jersey resident has a fundamental right to vote, the State has a concomitant duty to ensure suffrage for all eligible voters. *See generally* N.J. Const. art. II, § 1, ¶¶ 2–3 (describing “elections shall be held” and “questions submitted to the people”). New Jersey courts have long held that an eligible voter who makes a good faith effort to vote should not be disenfranchised.

More than sixty years ago, the Supreme Court considered a challenge to a statute allowing civilians to vote by absentee ballot, where the Constitution contemplated absentee voting only by members of the military. In upholding the constitutionality of the statute, the Court opined that the “basic right of suffrage [is] a civil and political franchise—of the very essence of our democratic process. . . [which must] be liberally and not strictly construed.” *Gangemi v. Berry*, 25 N.J. 1, 12 (1957); *see also Afran v. Cnty. of Somerset*, 244 N.J. Super. 229, 232 (App. Div. 1990) (collecting cases regarding liberal construction). Similarly, courts have warned that “the overriding public policy in favor of enfranchisement” means that “all challenges to an individual’s right to vote [must] be carefully scrutinized.” *In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp.*, 331 N.J. Super. 31, 36 (App. Div. 2000).

Here, the State is prepared to deprive hundreds of New Jerseyans displaced from their homes by the COVID-19 pandemic, who have timely sought ballots by mail according to the process laid out by Executive Order 177 and P.L. 2020, c.72. If, because of issues with the County Boards of Election and/or U.S. Postal Service, they do not receive ballots by mail at their new address, they will be denied the right to vote through no fault of their own. In an election conducted primarily by vote-by-mail ballots, N.J.S.A. 19:63-31, Defendants' failure to ensure that displaced voters receive ballots in the mail violates their fundamental right to vote.

B. New Jersey Courts are Empowered to Ensure that Voters who Make Good-Faith Efforts to Vote are not Disenfranchised.

New Jersey law could not be clearer: “the right to vote is quintessential to our democratic process.” *In re Absentee Ballots*, 331 N.J. Super. at 36. For more than a century, our courts have recognized that “[t]he sacred right of suffrage is too dear to be defeated by an act for which the voter is not responsible[.]” *Bliss v. Woolley*, 68 N.J.L. 51, 56 (1902). Indeed, there exists a robust jurisprudence that demonstrates that New Jersey courts liberally construe election laws where voters have violated them, but nonetheless evinced a good-faith effort to vote. *See, e.g., Childs v. McGettigan*, 444 N.J. Super. 409, 417–18 (Law. Div. 2015) (explaining that “it is the tradition of New Jersey courts to effectuate the purpose and intent of

a statute in spite of a voter’s technical noncompliance with the election laws”); *Wene v. Meyner*, 13 N.J. 185, 197 (1953) (permitting votes to be counted in gubernatorial primary election despite voters’ technical noncompliance with governing statute). But, in this case, voters have done *nothing* wrong: they have met deadlines, they have filled out all forms, they have fulfilled all the obligations imposed on voters. Yet they risk disfranchisement because of errors by the County Board of Elections, the United State Postal Service, or others.

If courts are empowered to empower voters to exercise their franchise even when they have violated technical election laws or regulations, it follows that they can also ensure that voters who have do nothing wrong are not denied the right to vote, which serves as “the bedrock upon which the entire structure of our system of government rests[.]” *Afran*, 244 N.J. Super. at 232. As discussed below in Point II, A, the only way to ensure that displaced New Jerseyans will be able to participate in the democratic process in this election is for the Court to mandate that Boards of Elections electronically deliver blank ballots – that is, the same ballot that should have been mailed to their address – to voters who have timely requested them. Such an order would be thoroughly consistent with New Jersey election jurisprudence, which commands that “[e]lection laws are to be liberally construed so as to effectuate their purpose” and that “[t]hey should not be construed so as to

deprive voters of their franchise. . . .” *Kilmurray v. Gilfert*, 10 N.J. 435, 440 (1952).

C. The Memorandum of Understanding in *Gusciora, et al. v. Corzine, et al.* Creates No Barrier to the Relief Sought.

New Jersey is no stranger to litigation around electronic voting systems, with courts overseeing a challenge to such systems since 2005. By that suit, then-Assemblyman Reed Gusciora and others sought and obtained an order prohibiting internet voting in New Jersey. *Gusciora v. Corzine*, Docket No. MER-L-2691-04. In 2020, in response to the State’s efforts to expand opportunities for voting in the wake of COVID-19, plaintiffs in the *Gusciora* case filed an order to show cause to enforce the decade-old order. After filing the order to show cause, those plaintiffs and the Attorney General reached a memorandum of understanding (“MOU”). That MOU addressed both “electronic ballot return system[s]” – the process by which voters can cast their ballots by electronic means – and “electronic ballot access or delivery system[s,]” where voters obtain ballots electronically. MOU ¶¶ 3-9. This litigation seeks no alterations on the limitations imposed on electronic ballot return systems. That is, Plaintiffs in this action do not seek permission for displaced voters to cast ballots electronically.

Under the MOU, the Attorney General agreed that it would only seek to use an electronic ballot access or delivery system in the primary and, if necessary, general elections and would only do so for military and overseas voters and for

voters with disabilities. *Id.* at ¶4. But, critically, the MOU does not – and, indeed, cannot – preclude *the Court* from ordering Defendants to comply with the Constitution’s protection of voters’ franchise. The MOU represents a private agreement between litigants, where the rights of voters – other than, arguably, voters with disabilities who were represented by *amicus curiae* Disability Rights New Jersey² – were not represented. Such an agreement cannot bind all New Jerseyans, nor can it require the State to disenfranchise them. Put otherwise, the State cannot contract away its constitutional duty to protect the right to vote of all eligible New Jerseyans, and the MOU does not provide a shield against the enforcement of those rights. *Cf. Stelluti v. Casapenn Enterprises, LLC*, 203 N.J. 286, 298 (2010) (recognizing unenforceability of exculpatory agreements that “adversely affect the public interest[,]” “grow out of unequal bargaining power” or are “otherwise unconscionable.”)

Implicit in the MOU is a recognition that when unforeseen circumstances will result in the disenfranchisement of a category of voters, emergency measures such as the delivery of ballots by electronic means – so that those ballots can be printed, marked, and returned by United States mail – serve as an appropriate balance of the right to vote against valid election security concerns. The remedy

² Disability Rights New Jersey (“DRNJ”) filed a brief opposing the *Gusciora* plaintiffs’ order to show cause. DRNJ was not a party to the subsequent MOU.

contemplated for military and overseas voters and for voters with disabilities poses no greater threat to election security than would expanding that remedy to displaced voters (*see also* Point II, B below). In each case, the voter risks total disfranchisement despite diligent efforts to obtain a ballot unless Defendants mandate the County Boards of Elections deliver ballots electronically to voters.

D. Plaintiffs Have Standing.

The League of Women Voters of New Jersey (“LWVNJ”) and the American Civil Liberties Union of New Jersey (“ACLU-NJ”) have standing to bring this action as organizational plaintiffs. “New Jersey courts take a broad and liberal approach to standing.” *N.J. Citizen Action v. Riviera Motel Cor.*, 296 N.J. Super. 402, 415 (App. Div. 1997). As a result, “where the plaintiff is not simply an interloper and the proceeding serves the public interest, standing will be found.” *In re Quinlan*, 70 N.J. 10, 35 (1976).³ An organization will have standing if it can show both “sufficient stake [in the outcome] and real adverseness.” *Crescent Park Tenants Ass’n v. Realty Equities Corp. of N.Y.*, 58 N.J. 98, 107 (1971). Courts

³ New Jersey’s standing requirements are significantly broader than Article III standing under the U.S. Constitution, in part because our state Constitution does not expressly confine the exercise of judicial power to actual cases and controversies. *Crescent Park Tenants Ass’n v. Realty Equities Corp.*, 58 N.J. 98, 107 (1971) (citing *U.S. Const.*, art. III, § 2; *N.J. Const.* art. VI, § 1). Thus, “New Jersey cases have historically taken a much more liberal approach on the issue of standing than have the federal cases.” *Id.* at 101.

“have given due weight to the interests of individual justice, along with the public interest, always bearing in mind that throughout our law we have been sweepingly rejecting procedural frustrations in favor of just and expeditious determinations on the ultimate merits.” *Id.* at 107–08 (quotations omitted). In matters of great public interest, the Supreme Court has “consistently held [that] any slight additional private interest will be sufficient to afford standing.” *Salorio v. Glaser*, 82 N.J. 482, 491 (1980) (quotations omitted). Additionally, an organization has standing where its individual members would have standing. *People For Open Gov’t v. Roberts*, 397 N.J. Super. 502, 514 (App. Div. 2008) (citing *Crescent Park Tenants Ass’n*, 58 N.J. at 109–11).

Since their founding, LWVNJ and the ACLU-NJ have each been committed to protecting the right to vote for all eligible New Jerseyans. Compl. ¶¶ 6–7, 49–50. They clearly have a stake in voting rights, an issue of great public interest and constitutional magnitude, which is core to the instant action. Each organization undertakes significant work in voter education year-round, through public-facing work such as presentations and communications, as well as in individual outreach and assistance. They also undertake emergent, responsive efforts during elections, including answering individual voters’ questions and even seeking immediate judicial relief on Election Day. *Id.* ¶¶ 49–51. LWVNJ and the ACLU-NJ can also show adverseness to Defendants in this matter, as Defendants have failed to take

action to ensure the constitutional rights that LWVNJ and the ACLU-NJ work to protect. Moreover, the organizational Plaintiffs are adverse to Defendants because Defendants' continued failure to ensure displaced voters can cast their ballots will cause additional work for LWVNJ and the ACLU-NJ preceding and on Election Day, resulting in harm to the organizations in the form of expenditure of resources and staff time. *Id.* ¶¶ 49–50. Finally, Plaintiffs submit that discovery would show that at least one and likely many of LWVNJ's 1,450 members and the ACLU-NJ's 35,000 members are displaced voters who have real cause to believe they will not receive their ballot in time to vote in the general election. *Id.* ¶ 51. Accordingly, LWVNJ and the ACLU-NJ, separately and together, have standing as organizations to bring the instant suit.

II. PLAINTIFFS EASILY MEET THE REMAINING STANDARDS FOR GRANTING TEMPORARY RESTRAINTS.

A. Absent Interim Relief, Plaintiffs Will Continue to Suffer Harm Because Many Voters Will be Disenfranchised.

The harm the organizational Plaintiffs and their members will suffer is irreparable absent interim relief. New Jersey courts consider harm to be irreparable if monetary damages are insufficient for redress. *Crowe*, 90 N.J. at 132-33. That is the case here.

Although Defendants have agreed that the remedy Plaintiffs seek is appropriate for voters with disabilities, they maintain that they are unable to

provide it to displaced voters absent executive, legislative, or judicial order. Compl. ¶¶ 43, 45. Accordingly, absent relief in time for displaced voters to print, mark, and postmark return their ballots by November 3, they will be disenfranchised. *See* N.J.S.A. 19:63-31 (requiring ballots to be post-marked or received by the post office on or before November 3, and received no later than by 8:00 pm on November 10, in order to be counted). Given the experience during the primary election, the scale of disenfranchisement would likely be enormous. Weiss Cert. ¶ 16; Compl. ¶ 37.

Plaintiffs will be harmed by such wide-scale disenfranchisement, given their longstanding work to secure voting rights. *See* Point I, D. Absent this Court's order, they will also be harmed by having to expend substantial resources and staff time responding to individual complaints of displaced voters who do not receive their ballots in time and who contact the Election Protection hotline or Plaintiffs directly. Such responses may take the form of piecemeal litigation on Election Day, which will burden Plaintiffs, Defendants, and the courts and fail adequately to ensure all displaced voters obtain relief.

B. The Balance of the Equities, Including the Public Interest, Favors the Issuance of an Immediate Injunction.

Defendants will not suffer any significant harm if the Court grants the remedy Plaintiffs seek. Defendants are already equipped to electronically deliver ballots to voters overseas or in the military, as well as to voters with disabilities,

which they have acknowledged is the appropriate method for preventing their disenfranchisement. *See* Point I, C. Although the remedy Plaintiffs seek will certainly expand the work Defendants and County Boards of Election must do in this area, it does so no more than necessary to ensure displaced voters may still vote. Indeed, the remedy is narrowly crafted to require voters to affirmatively request an electronically delivered ballot from their County Board, such that Defendants will not have to undertake any systemic review of voting registration records. Additionally, it will not be particularly burdensome for Defendants to share information about the availability of such a remedy. Plaintiffs and their partners at the Election Protection call center are prepared to assist in public education, lessening any strain on Defendants in that regard. *See, e.g.,* Weiss Cert. ¶ 17 (stating that, if the Court were to order a remedy, the Election Protection command center for New Jersey “would do everything we can to inform voters” of this means of casting their ballot, including sharing information on the Election Protection website and with volunteers who answer questions from hotline callers).

By contrast, Plaintiffs will be substantially harmed if an injunction does not issue. Their mission of ensuring access to the vote for all eligible New Jerseyans will be hindered, and they will be required to expend significant resources and staff time assisting, and potentially challenging in court, individual cases of disenfranchisement on Election Day. *See* Point II, A.

Even more, issuing an immediate injunction will further the public interest. When the public interest is implicated, “courts, in the exercise of their equitable powers, ‘may, and frequently do, go much farther both to give and withhold relief . . . than they are accustomed to go when only private interests are involved.’” *Waste Mgmt. of N.J., Inc. v. Union Cnty. Utils. Auth.*, 399 N.J. Super. 508, 520-21 (App. Div. 2008) (quoting *Yakus v. United States*, 321 U.S. 414, 441 (1944)). Certainly, the public has an extraordinary interest in ensuring that eligible New Jerseyans are able to cast their ballot and have that ballot count: “A citizen’s constitutional right to vote for the candidate of his or her choice necessarily includes the corollary right to have that vote counted[.]” *In re Gray-Sadler*, 164 N.J. 468, 474 (2000). Governor Murphy has recognized that “failing to take proactive actions to mitigate the adverse impacts of the current health crisis on the upcoming November General Election carries the risk of disenfranchising citizens[.]” Exec. Order No. 177 (Aug. 14, 2020), 52 N.J.R. 1701(b) (Sept. 21, 2020). Because of this crisis, hundreds, potentially thousands, of New Jersey voters have had to leave the address where they are registered to vote. Allowing their displacement to result in their disenfranchisement, when they have done everything within their power to obtain a ballot in time, would undermine “the integrity of the elective process.” See *In re Mallon*, 232 N.J. Super. 249, 265 (App. Div. 1989) (recalling that “maintenance of the integrity of the elective process is a primary concern.”).

Of course, there is also a public interest in safe and secure elections. *See In re Gray-Sadler*, 164 N.J. at 474–75 (noting “our state election laws are designed to deter fraud, safeguard the secrecy of the ballot, and prevent disenfranchisement of qualified voters.”). But the remedy Plaintiffs seek does not threaten election security. As addressed more fully in Point I, C above, the Attorney General has agreed that absent electronic delivery of ballots, voters with disabilities would be disenfranchised and that, in that case, any potential risk⁴ to election security was outweighed by the right to vote. In signing the MOU, even the *Gusciora* plaintiffs appear to acknowledge that this is the balance that must be struck for voters with disabilities. This is the same conclusion that should be reached for any voter who, through no fault of their own, will be unable otherwise to cast a ballot. Because the remedy Plaintiffs seek does not create substantial risks to the integrity of the elective process and instead ensures voters’ franchise, the public interest weighs in favor of Plaintiffs’ requested relief.

⁴ Plaintiffs note that the potential risk to security of electronically delivered *blank* ballots to voters, as compared to the transmittal of marked ballots back to the State, appears minimal. For example, in a recent letter to state officials regarding *Gusciora*, Brennan Center for Justice at NYU School of Law, Common Cause, and Verified Voting supported the provision of remote accessible vote by mail (RAVBM), a system allowing voters with disabilities to electronically receive and download their ballots. Remote Accessible Vote-by-Mail (RAVBM). Letter from Brennan Center, et al. to Gov. Murphy, et al (May 14, 2020), <https://www.brennancenter.org/our-work/research-reports/brennan-center-sends-letter-new-jersey-state-officials-internet-voting>.

For these reasons, the balance of the equities, including the public interest, clearly supports immediate injunctive relief for Plaintiffs.

C. The Restraint Does Not Alter the *Status Quo Ante* Beyond that Which is Necessary to Protect the Fundamental Right to Vote.

The Supreme Court has explained, “the point of temporary relief is to maintain the parties in substantially the same condition ‘when the final decree is entered as they were when the litigation began.’” *Crowe*, 90 N.J. at 134 (quoting *Peters v. Pub. Serv. Corp. of N.J.*, 132 N.J. Eq. 500 (Ch.1942), *aff’d o.b.*, 133 N.J. Eq. 283 (E. & A. 1943)). Delivering blank ballots to displaced voters electronically will not substantially alter the *status quo ante*. The November 3 general election will still be conducted primarily by vote-by-mail ballot, and the process for returning marked ballots will continue to be by mail. With the exception of overseas and military voters, as provided by N.J.S.A. 19:59-1 to -16, no marked ballot will be returned by electronic means. Moreover, if Plaintiffs are granted the remedy they seek, the *status quo* in which Defendants can electronically deliver, upon request, some blank ballots will remain: the eligible recipients will merely expand to include not only overseas and military voters and voters with disabilities, but also displaced New Jerseyans who can show they timely requested a ballot at the proper address.

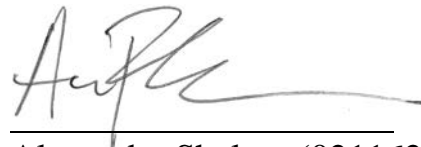
If this expansion is considered a substantial change, it is caused by Defendants’ failure to abide the *status quo* set by Executive Order 177 and P.L.

20202, c.72, by which all registered voters should have automatically received a ballot by mail by October 5, or soon after they requested one by the October 23 deadline. To the extent the remedy Plaintiffs seek alters the *status quo ante*, it is therefore no greater alteration than is required to protect the fundamental right to vote and correct for Defendants' constitutional failures.

CONCLUSION

For the reasons set forth above, Plaintiffs requests that their Order to Show Cause be granted, enjoining Defendants from disenfranchising displaced voters and ordering them to provide a meaningful process by which displaced voters can receive a blank ballot electronically upon request, as outlined in Plaintiffs' Verified Complaint and the accompanying Proposed Order.

Dated: October 14, 2020



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