New Jersey
Appleseed

August 20, 2012

Hon. Bonnie J. Mizdol, A.J.S.C.
New Jersey Superior Court
Bergen County Justice Center
10 Main Street
Hackensack, N.J. 087601

Re: Food & Water Watch et al. v. Doug Ruccione, Township Clerk, et al.
Docket No. BER-L- (Action in Lieu of Prerogative Writ)

Dear Judge Mizdol:

Plaintiffs Food & Water Watch ("FWW"), and Elissa Schwartz, Bettina Hempel, Paula Rogovin, Lisa Rose and Laurie Ludmer (the "COP" or the "Petitioners") respectfully submit this letter-brief in support of their application for an Order to Show Cause with temporary restraints in connection with the Township of Teaneck's ("Township" or "Teaneck") unlawful rejection of their Community Energy Aggregation Initiative Petition. Simply stated, this is a case of municipal abuse of power; an attempt by the Township to thwart the efforts of a highly motivated group of citizens who care about the environment, affiliated with Food & Water Watch ("FWW"), to propose an ordinance to create a community energy aggregation program under which the Township will purchase renewable electricity at discounted bulk rates and provide customers within its jurisdiction an opportunity to select a 100% renewable electricity alternative by 2030.

At this juncture, Teaneck's Township Clerk, Doug Ruccione (the "Clerk" or "Ruccione")

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has deprived these citizens of one of their most valued civil rights: the ability to petition government for redress of their grievances through the initiative process. By rejecting Plaintiffs' Community Energy Aggregation Initiative Petition on erroneous grounds, Riccione has violated Plaintiffs' statutory rights to a public vote on their proposed ordinance. The merit of Plaintiffs' Community Energy Aggregation Ordinance is not at issue in this case; rather, the issue is the right of the people of Teaneck Township to have a say on these matters at the ballot box. The Clerk's conduct in thwarting the people's right to a say on this matter can and should be enjoined by the Court; and the Deputy County Clerk, Steven Chong, should be temporarily restrained from printing any sample, military, regular, mail-in, provisional or emergency ballot prior to resolution of this dispute.

Specifically, this is a summary proceeding seeking judicial review of the Township Clerk's decision to disqualify all signatures the Committee of Petitioners collected electronically during the Public Health Emergency (declared in Executive Order No. 103, "EO 103"), but submitted in-person to the Clerk in paper form after the Governor terminated that emergency in Executive Order No. 244 ("EO 244"). By ignoring the clear language and intent of several Gubernatorial Executive Orders (primarily, Executive Order No. 132 ("EO 132") and Executive Order No. 216 ("EO 216")) and the Legislature's intent when incorporating those Orders, which was to facilitate New Jerseyans' statutory rights of initiative and referendum by permitting them to circulate and submit electronic petitions during the COVID pandemic, the Clerk has abused his authority and has failed to perform a mandatory duty to process Plaintiffs' Initiative Petition in accordance with N.J.S.A. 40:69A-184 et seq., as modified by those Executive Orders. Defendant Ruccione's position that the petition is insufficient because it lacked a sufficient number of valid signatures of qualified voters is wrong and lacks any basis in law and practice

around the State. Accordingly, Plaintiffs' petition is proper, valid and sufficient in all respects, and, pursuant to N.J.S.A. 40:69A-190, it must be submitted to the Township Council for consideration "without delay," or immediately to the Deputy County Clerk to be put on the November 2, 2021 ballot.

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STATEMENT OF FACTS

Plaintiffs repeat and reassert the allegations set forth in the Verified Complaint, with exhibits, which has been filed with this letter brief, as if they are fully stated herein.

STATUTORY FRAMEWORK

Substantive Right of Initiative

By way of background, the Township of Teaneck is governed by the Optional Municipal Charter Law, N.J.S.A. 40:69A-1 et seq., commonly known as the Faulkner Act. Registered voters in such a municipality enjoy broad rights to propose ordinances (a right known as the "initiative") and to oppose ordinances passed by the council (a right that is denominated "referendum"). N.J.S.A. 40:69A-185; In re Referendum Petition to Repeal Ordinance 04-75, 192 N.J. 446, 459 (2007) ("Ordinance 04-75"). Both powers are "a check on the exercise of local legislative power, fostering citizen involvement in the political affairs of the community." Id. at 459. As such, the Supreme Court announced in this pivotal case that "the referendum statute should be liberally construed . . . to promote the 'beneficial effects' of voter participation." Id.; see also Sparta Tp. v. Spillane, 125 N.J. Super. 519, 523 (App. Div. 1973), certif. denied, 64 N.J. 493 (1974) (both the initiative and referendum process "encourage public participation in municipal affairs in the face of normal apathy and lethargy in such affairs.")

The Supreme Court, in the Ordinance 04-75 case, recognized that virtually every kind of municipal ordinance is subject to the referendum right unless the Legislature has specifically excluded it. Id. at 466-67 (listing exceptions to the referendum power). In so doing, the Court noted that the Legislature had used the term "any ordinance" in defining which matters were the proper subject of a referendum or initiative. Unless such an exception exists, "any ordinance" is also subject to initiative, which is the power of "the voters of any municipality [to] propose any ordinance and . . . adopt or reject the same at the polls." N.J.S.A. 40:69A-184. Defendants do not appear to quarrel that legislation like the one at issue here, which seeks to create a community energy aggregation program, is somehow exempt from initiative.

Procedural Requirements

The mechanics of citizens' initiative and referendum efforts in Faulkner Act

municipalities like Teaneck Township are carefully laid out in the applicable statute, which also clearly defines the role that the municipal clerk plays in these efforts. Basically, any five registered voters of the jurisdiction can organize themselves into a Committee of Petitioners. N.J.S.A. 40:69A-186. They then are responsible for circulating a petition, the format of which is regulated by that same statute, among registered voters of the municipality, and cause signatures to be collected from these voters.

The statute then sets forth what must be done with the circulated petitions: simply put, they are filed with the municipal clerk. See N.J.S.A. 40:69A-187 ("All petition papers comprising an initiative or referendum petition shall be assembled and filed with the municipal clerk as one instrument."); see also N.J.S.A. 40:69A-189 (referring to the "filing of a referendum petition with the municipal clerk"); N.J.S.A. 40:69A-190 (". . . any petition or amended petition filed with him . . .") Once the petition is submitted to and received by the municipal clerk, the clerk has the mandatory duty to inquire into whether "each paper of the petition has a proper statement of the circulator and whether the petition is signed by a sufficient number of qualified voters." N.J.S.A. 40:69A-187. (EO 132 and EO 216 made clear that signatures secured electronically during the Public Health Emergency did not need to be accompanied by a circulator statement since the audit trail generated by software programs employed provided equivalent protection from fraud). This "examination of the petition," itself involves sifting through dozens of signature pages and hundreds of individual signatures to determine whether they each represent the signature of a qualified voter.[1] The clerk's examination of the sufficiency

[1] See D'Ascensio v.Benjamin, 137 N.J. Super.155, 159 (Law Div. 1975), aff'd,142 N.J. Super.52 (App. Div. 1976), certif. denied, 71 N.J. 526 (1976) (describing the process of signature review which at the time was delegated by municipal clerks to county officials). Since 2005, however, municipal clerks do not need to delegate the signature review process to county officials because

of a petition may be complicated, though the task has been made easier by the use of the SVRS and the method used to arrive at his determination is not prescribed by statute. D'Ascensio v. Benjamin, supra, 142 N.J. Super. at 55 (App. Div. 1976).

For these reasons, the clerk has up to twenty days to make this examination. N.J.S.A. 40:69A-187. The clerk need not take all 20 days, but as soon as a determination of insufficiency is made, the clerk must "at once notify at least two members of the Committee of the Petitioners of his findings." N.J.S.A. 40:69A-187; likewise, if the finding is that the petition is sufficient, the clerk must submit it to the municipal council "without delay." N.J.S.A. 40:69A-190. In either case, the clerk must "certify the result thereof [i.e. of her examination] to the council at its next regular meeting." N.J.S.A. 40:69A-187. Once the examination of the petition is complete, the clerk has two and only two options, which are: (1) to declare the initial submission sufficient and submit the same to the municipal council for further action, N.J.S.Au 40:69A-190; or

(2) to declare the initial submission insufficient and await further action by the Committee of Petitioners. This is laid out in N.J.S.A. 40:69A-187 and -188. Specifically, the statute grants the Committee of Petitioners ten days to cure the deficiency. If the declaration is that the petition is insufficient, it is undisputed that "the petitioners have . . . an opportunity to cure the deficiency." Hudson Cty. Ch. of Commerce v. Jersey City, 310 N.J. Super. 208 (App. Div. 1997), aff'd, 153 N.J. 254 (1998).

In curing a deficiency, it is undisputed that in the initiative or referendum context, a committee of petitioners is permitted to correct defects of substance or form, but also to solicit and file additional signatures beyond what was originally submitted. Unlike statutes governing nominations for public office, which "may be amended in matters of substance or of form but not

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they have access to the relevant election information through the Statewide Voter Registration

to add signatures," cf. N.J.S.A. 19:13-13, the Legislature imposed no restrictions on the power of a committee of petitioners to add signatures as part of correcting a deficiency. See, e.g., Citizens for Charter Change in Essex Co. v. Caputo, 136 N.J. Super. 424, 431 (App. Div.), certif. denied, 74 N.J. 268 (1975) (acknowledging the right of petitioners to add signatures beyond their original submissions).

If the petitioners choose to avail themselves of their rights to amend or supplement an insufficient petition, they must make the amended or supplemental filing within ten days after the clerk has served the notice of insufficiency. N.J.S.A. 40:69A-188. The clerk then has five days from the filing of these "additional papers" to make a ruling on the sufficiency of the amendments. Id. If the Clerk finds that the new papers are also insufficient, the clerk shall "notify the Committee of the Petitioners of his findings," id., whereas if the clerk finds the new filing to be sufficient, he shall submit the petition to the municipal council "without delay" as in the case of an original sufficient petition. N.J.S.A. 40:69A-190. The clerk's certification of sufficiency/insufficiency is a final action subject to judicial review via an action in lieu of prerogative writ; the review we seek in this complaint.

Formal Requirements

In order for an initiative petition to be valid, there are six formal requirements that must be satisfied under N.J.S.A. 40:69A-184 and -186. These requirements are the following:

a. The "petition" must be signed by voters equaling "in number to at least 10% but less than 15% of the total votes cast in the municipality at the last election at which members of the General Assembly were elected. In this case that figure is 791; and Plaintiffs secured 937 signatures of qualified voters, see Verified Complaint, Exh. K (562 valid electronic signatures and 187 valid

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System. N.J.S.A. 19:31-31(b)(5)("SVRS").

handwritten signatures); Exh, O (188 valid handwritten signatures). However, since the Clerk rejected all electronically signed petitions, he found "only 375 valid signatures." Id.

b. "All petition papers" must be uniform in size and style. The petitions here comply in that all sheets comprising the petition are on 8 ½ x 11 paper, are of uniform color and all text on the petition is in Times New Roman font. See Verified Complaint, Exhs. J and L.

c. The "petition papers" must contain the full text of the proposed ordinance. The petitions here comply in that the proposed ordinance appeared on three sides of two sheets of paper and were stapled with each sheet of signatures comprising each petition package. See Verified Complaint, Exhs. J and L;

d. "Each separate petition paper" must have attached thereto an affidavit and a statement of the circulator in the manner and form prescribed by N.J.S.A. 40:69A-186. This requirement was eliminated during the Public Health Emergency by EO 132 (April 29, 2020), Verified Complaint, Exh. B; EO 216 (January 25, 2021), Exh. C; and P.L.2020, Ch. 5 (July 1, 2020). Because the Initiative Petition was being circulated through the internet and not by an individual circulator during the Public Health Emergency, the audit trail produced by the document-signing programs employed by the COP served as an adequate substitute to attest to the genuineness of the signatures.

e. "Each signer" of the petition must sign in ink or indelible pencil and list his place of residence by street and number or other description sufficient to identify the place. The need to use ink or indelible pencil was implicitly eliminated by the above Executive Orders insofar as signatures were permitted to be digitally produced. The need to list one's place of resident remained intact. Both Plaintiffs' electronic and paper petitions satisfy this requirement; and

f. "Each petition paper" must contain the name and addresses of five voters listed as the Committee of Petitioners; otherwise, the signatures appearing on the petition paper are disqualified. The Initiative Petition here also complies with this requirement in that each separate petition paper includes the names and addresses of each of the Committee of Petitioners. Hamilton Twp. Taxpayers' Ass'n v. Warwick, 180 N.J. Super. 243 (App. Div.), certif. denied, 88 N.J. 490 (1981) (denying the sufficiency of the petition because the names and addresses of the five-member Committee of Petitioners were omitted at the time the voters affixed their signatures to the petition, although they were added on each separate sheet at the time of filing with the Township Clerk).

Defendant Ruccione has been a municipal clerk for several years and knows—or at least ought to know—the parameters of these formal requirements. However, based on his failure to understand the impact of EO 132, EO 216 and P.L. 2020, Ch. 55 on the implementation of N.J.S.A. 40:69A-186, defendant Ruccione obviously failed to take to heart the instructions of the N.J. Supreme Court in In re Ordinance 04-75; that is, the Court's instructions about the "inestimable value" of participatory democracy, as exercised through initiative and referendum petitions, and the need to liberally construe the laws governing those petitions in favor of the petitioners. See also Redd v. Bowman, 233 N.J. 87 (2015) (applying a liberal construction and flexibility to promote purpose).

LEGAL ARGUMENT

I. THE *CROWE* FACTORS REQUIRE GRANT OF RESTRAINTS.

In accordance with N.J.S.A. 19:14-1, defendant Steven Chong, in his official capacity as Deputy County Clerk, has a duty to have ready for the printer on or before 50 days prior to the election—i.e., September 13, 2021— a copy of the contents of the official ballot that will be used

in the November 2, 2021 General Election. It therefore follows that Plaintiffs are seeking temporary restraints under R. 4:52 prohibiting and enjoining him or any employee of the Bergen County Clerk's office from printing any ballot for the Township of Teaneck prior to resolution of this dispute, thus suspending any informal deadlines for such printing.

Because Plaintiffs meet all four of the standards set out in Crowe v. De Gioia, 90 N.J. 126 (1982), temporary restraints enjoining the Deputy County Clerk from sending Teaneck ballots to the printer should be granted. The four generally accepted factors under Crowe for allowing injunctive relief are (1) preventing irreparable harm, (2) whether the request relies on settled legal principles, (3) whether the moving party has a likelihood of success on the merits, and (4) a balancing of harms.

First, it must be noted that the "object of an interlocutory injunction" such as that which Plaintiffs are requesting herein, "is to prevent some threatening irreparable mischief which should be averted until the opportunity is offered for a full and deliberate investigation of the case." Outdoor Sports Corp. v. Amer. Fed. of Labor, Local 23132, 6 N.J. 217, 230 (1951). Second, "as in federal courts, harm is generally considered irreparable if it cannot be redressed with monetary damages, which may be inadequate because of the nature of the injury and the right affected." Crowe v. De Gioia, supra, 90 N.J. at 132-133. Third, it is generally understood that courts do not necessarily require all factors to weigh in favor of granting an injunction when it is designed to merely preserve the status quo, McKenzie v. Corzine, 396 N.J. Super 405, 414 (App. Div. 2007); and, finally, loss of constitutional rights, for even minimal periods of time constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347, 373 (1976); Davis v. Dep't of Law & Public Safety, 327 N.J. Super. 59, 68-69 (Law Div. 1999).

If ballots go to the printer without Plaintiffs' public question before this matter is resolved, Plaintiffs and the voters they represent will effectively be disenfranchised resulting in a violation of their civil rights. Tumpson v. Farina, 218 N.J. 450, 486 (2014) (holding that deprivation of voters' statutory right of initiative and referendum constitutes a violation of New Jersey's Civil Rights statute). Violation of such civil right constitutes quintessential irreparable harm.

Second, this matter involves the legal question of what constitutes a valid signature for purposes of meeting the 10% signature threshold set forth in N.J.S.A. 40:69A-184. And though it is occurring for the first time in the context of electronic petitions, which were specifically authorized by executive orders and special COVID-related legislation, Plaintiffs' position rests on 'settled legal principles" of participatory democracy and liberal construction that govern the interpretation of Faulkner Act initiative and referendum provisions. See e.g., Ordinance 04-75, supra, 192 N.J. at 459 (citing Retz v. Mayor & Council of Saddle Brook, 69 N.J. 563, 571 (1976) (it is an accepted principle that the initiative statute in the Faulkner Act should be liberally construed to promote the "beneficial effects" of voter participation); In re Petition for Referendum on Trenton Ordinance 09-02, 201 N.J. 349, 353 (2010) (stating that referendum power is an exercise in democracy that profoundly affects the relationship between the citizens and their government).

Third, there is little doubt that potential harm to the public interest far outweighs any potential harm to Defendants. On one side of the scale, we have the potential disenfranchisement of the Plaintiffs, the 937 qualified Teaneck voters who signed the Energy Aggregation Initiative Petition, and the broader public who would like to have their voices heard on the climate-related, renewable-energy public question presented in the Initiative Petition. On the other hand, Plaintiffs are simply seeking to ensure that the Deputy County Clerk does not

start printing Teaneck ballots prior to September 13, 2021—the statutory deadline; they are thus asking for the status quo be maintained and at this time, there is no potential harm to candidates who will be appearing on the November ballot, or additional costs to the Office of County Clerk.

And finally, Plaintiffs' stand an excellent chance of success on the merits for reasons discussed *infra*.

II. MANDAMUS IS APPROPRIATE WHERE THE LAW REQUIRES THE PERFORMANCE OF MINISTERIAL ACT.

When government officials refuse to perform ministerial duties (such as refusing to certify a valid petition as sufficient and process it in accordance with the Faulkner Act governing the right of initiative and referendum) mandamus is the appropriate remedy. As the New Jersey Supreme Court stated in Switz v. Middletown Tp., 23 N.J. 580, 587 (1957):

> The generally accepted limitations upon the exercise of the ancient extraordinary remedy of Mandamus obtain in New Jersey. It is a coercive process that commands the performance of a specific ministerial act or duty, or compels the exercise of a discretionary function, but does not seek to interfere with or control the mode and manner of its exercise or to influence or direct a particular result. Mandamus lies to compel but not control the exercise of discretion. Roberts v.Holsworth, 10 N.J.L. 57 (Sup. Ct. 1828); Benedict v. Howell, 39 N.J.L. 221 (Sup. Ct. 1877). Unless the particular duty be peremptory, the fair use of judgment and discretion is the province of the functioning authority. The right of the relator and the public duty sought to be enforced must be both clear and certain. Uszkay v. Dill, 92 N.J.L. 327. 327, 106 A. 17 (Sup. Ct. 1919); Edward C. Jones Co. v. Township of Guttenberg, 66 N.J.L. 58, 48 A. 537 (Sup. Ct. 1901), aff'd, 66 N.J.L. 659, 51 A. 274 (E. & A. 1901); Clark v. City of Elizabeth, 61 N.J.L. 565, 40 A. 616, 737 (E. & A. 1898). Mandamus issues `to compel performance, in a specified manner, of ministerial duties so plain in point of law and so clear in matter of fact that no element of discretion is left as to the precise mode of their performance. . .'

See also Loigman v. Tp. Com. Of Middletown, 297 N.J. Super. 287, 299 (App. Div. 1997).

As is more fully developed in the following points of this letter brief, Plaintiffs' Energy Aggregation Initiative Petition must be certified, sent to the Township Council and ultimately placed on the ballot (unless adopted by the Township Council), because it satisfies all of the

substantive requirements mandated by the relevant statute, as modified by EO 132, EO 216 and P.L. 2020, Ch. 55. Most importantly, the Clerk himself has concluded that the Initiative Petition contained a sufficient number of signatures of qualified voters in order to satisfy the signature threshold set forth in N.J.S.A. 40:69A-184. See Verified Complaint, Exhs. K and O. Despite such finding, Ruccione decided to disqualify 562 electronic signatures of otherwise qualified voters simply because EO 244 terminated the right of voters to sign initiative petitions electronically on or after July 4. This position is wrong as a matter of law and is inconsistent with the form requirements set forth in N.J.S.A. 40:69A-186, as modified by the Governor and the intent of the several executive orders he issued during the Public Health Emergency. Contrary to his interpretation of the law, Ruccione had the authority to accept the electronic signatures of qualified voters submitted without a circulator affidavit as valid (if signed when EO 216 was still in effect), even though the COP submitted those signatures in paper form after EO 216 expired. Accordingly, this Court must direct him to proceed to perform his ministerial duties of certifying the Energy Aggregation Initiative Petition as sufficient and further processing it in accord with N.J.S.A. 40:69A-190 to 192.

III. A SUMMARY PROCEEDING IS APPROPRIATE FOR RESOLUTION OF PLAINTIFFS' CLAIMS AS A MATTER OF LAW.

Pursuant to R. 4:69-2, governing prerogative writ actions, a plaintiffs may at any time after filing of a complaint that demands performance of a ministerial duty apply for summary judgment. On a motion for summary judgment, the Court must inquire "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill v. The Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995). Where a party opposing the motion only points to disputed issues that are

of an insubstantial or irrelevant nature, the proper disposition of the motion is to grant summary judgment. Id., 142 N.J. at 529.

Notwithstanding R. 4:69-2, courts do not require plaintiffs involved in election disputes to file motions for summary judgment. Instead, election disputes such as this one are routinely handled by the New Jersey courts as summary proceedings akin to the proceedings set forth in R. 4:67 (summary actions) and R. 4:71 (review of local officer actions when not an action in lieu of prerogative writ). Under these rules and under the customary practice and procedure used by the courts in election cases, disputes relating to the sufficiency of an election petition are tried and disposed of in a summary way. See Murray v. Murray, 7 N.J. Super. 549 (Law Div. 1950) (William J. Brennan, Jr., J.S.C.); see also, In re Ocean County Com'r of Registration for a Recheck of the Voting Machines for the May 11, 2004, Mun. Elections, 379 N.J. Super. 461 478-79 (App. Div. 2005) (finding that an election dispute was to be treated as a "fast track proceeding" and treating the complaint as "implicitly initiating a summary proceeding pursuant to Rule 4:67")

Given the fact that Plaintiffs' claims may be resolved on the basis of the documents attached to their Verified Complaint, there are no material facts in dispute. Accordingly, it is appropriate to "try this action on the return date" of the Order to Show Cause utilizing the "pleadings and affidavits," and proceed to "render final judgment thereon." R. 4:67-5. Furthermore, since the only questions for this court are legal ones, namely, the legal propriety of the Township Clerk's interpretation of several Governor's Executive Order as they applied to his review of the Initiative Petition in accordance with N.J.S.A. 40:69A-187 and -188, and the appropriate remedies, the Clerk's actions are subject to *de novo* review. Gallenthin Realty Dev.,

Inc. v. Borough of Paulsboro, 191 N.J. 344, 372 (2007) ("issues of law are subject to de novo review").

IV. THE TOWNSHIP CLERK ACTED ARBITRARILY AND CAPRICIOUSLY BY REFUSING TO APPROVE PLAINTIFFS' PETITION ON LEGALLY ERRONEOUS GROUNDS.

In his initial letter of insufficiency, Mr. Ruccione stated that "as of July 4, 2021, the relaxation of petition requirements, which permitted my office to accept electronic signatures, ended. Since the Committee did not submit any electronic petitions until July 15, 2021, my office is unable to accept them, and they are all deemed invalid." Exh. K. This reasoning was further elaborated in a letter sent to FWW's and the COP's counsel by Municipal Counsel that stated:

> After July 4, 2021, however, the only type of signature a clerk can accept and which are legally permissible are physical signatures, typically called "wet pen" signatures. Indeed, post July 4, 2021, the ability of a clerk to accept any other type of signature or petition was extinguished.

Verified Complaint, Exh. N. This narrow, constricted interpretation of EO 244 and P.L. 2021, Ch. 103 (that terminated the Public Health Emergency), and the refusal to acknowledge that neither the Governor nor the Legislature intended to disenfranchise voters by requiring clerks to reject digital signatures of qualified voters that were deemed valid at the time of signature cannot be sustained. It flies in the face of the principles of statutory construction governing initiative and referendum statutes and the position taken by several other municipal clerks throughout the State.

On the face of the relevant statutory scheme concerning initiative and referendum petitions governing Faulkner Act municipalities, the Legislature has set forth a clear statutory scheme for processing such petitions. This scheme, however, was modified during the Public Health Emergency by the Governor and the Legislature. Pursuant to EO 132, EO 216 and P.L. 2020, Ch.55, the requirement that petitioners had to have person-to-person contact with

signatories was eliminated; accordingly, digital signatures were deemed valid and the circulator affidavit requirement was eliminated. Digital signatures replaced the "ink or indelible pencil" requirement and an audit trail replaced the circulator affidavit requirement, both found in N.J.S.A. 40:69A-186. These modifications were implemented to ensure that voters could exercise their right of initiative safely and to promote the beneficial effects of voter participation.[2] Defendant Ruccione's interpretation of such executive orders does the exact opposite.

In order to permit the petitioning process to continue safely, the Governor issued EO 132 on April 29, 2020.[3] (Verified Complaint, Exh. B). He issued this executive order after declaring that the COVID-19 pandemic was not just an un-precedented threat to the lives and health of New Jersey citizens, but also presented "the reality that exercising their statutory right to engage in direct democracy through collecting or filling out petitions may endanger their health and safety." In order to facilitate the signature process and "help limit unnecessary person to-person contact[,]" EO 132 allowed voters to fill out and submit initiative and referendum petitions electronically, employing a template form suggested by the state. EO 132 at ¶¶ 1-2. The EO also suspended all other Faulkner Act requirements for the collection, verification and notarization of signatures submitted during the pendency of the emergency. Id. ¶ 4.

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[2] Mindful that the initiative and referendum provisions of the Faulkner Act are specifically aimed at increasing public participation in civic affairs, New Jersey courts consistently emphasize that liberal construction of the Faulkner Act and other provisions dealing with such electoral rights is appropriate and often necessary to secure the beneficial effects of voter participation. A municipality, such as Teaneck Township, is therefore prohibited from attempting to evade the effect of a citizen's initiative or referendum petition by imposing unduly restrictive or technical requirements upon that petition that have no basis in law. All Peoples Congress of Jersey City and Council of the City of Jersey City, 195 N.J. Super. 532 (Law Div. 1984) (prohibiting a municipality from enacting, after the referendum process was abandoned, the same ordinance it had repealed while the referendum process was pending).

[3] See Verified Complaint, ¶12, Exh. A (Letter sent to Governor on behalf of FWW requesting the

Effective July 1, 2020, the Legislature codified EO 132, but also made some important changes. It expressly extended EO 132 so that it would "be implemented to include any pending petition . . . for any other election taking place thereafter for the duration of the COVID-19 Public Health Emergency and State of Emergency declared by the Governor under Executive Order No. 103 (2020)." P.L. 2020, Ch. 55 §1(a). Likewise, instead of simply suspending the Faulkner Act's requirements for the collection, verification and notarization of signatures submitted during the Public Health Emergency, as EO 132 had, the law imposed a duty upon clerks to develop "electronic procedures for signature verification, petition notarization, and submission of oaths to meet the requirements of current law." Id. at §1(c). Furthermore, in order to ensure that clerks did not disqualify signatures that were collected prior to EO 132 simply because they were secured under different rules, §1(b)(3) of P.L. 2020, Ch. 50 directed clerks to accept paper petitions with handwritten signatures that were collected prior to the effective date of EO 132, either electronically (i.e., scanned copies submitted by a committee of petitioners to the clerk via e-mail) or in person. In this way, the Legislature made clear that changing the rules during the pandemic did not invalidate the signatures of qualified voters that were collected under the Faulkner rules found in N.J.S.A. 40:69A-186 and -187.

Six months later, on January 25, 2021, the Governor followed suit on the passage of this law by extending and expanding upon EO 132 with EO 216. (Verified Complaint, Exh. E). It pointedly directed clerks, in no uncertain terms, that they must still allow electronic petition submissions and "shall accept petitions . . . collected via an online form created by the Secretary of State." EO 216, ¶ 2. It also imposed a duty upon clerks to develop electronic procedures for signature verification, petition notarization and submission of oaths, in accord with P.L. 2020,

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ability to circulate initiative petitions electronically).

Ch. 55. at §1(c). Finally, it declared that the order "shall take effect immediately and shall apply to any petition that is due or may be submitted during the Public Health Emergency, first declared in Executive Order No. 103 (2020)." What was important about EO 216 is that it permitted petitions to be circulated in person with handwritten signatures that could be submitted in person—something explicitly prohibited by EO 132. And the implication for FWW and the COP was that they now had a choice: they could circulate paper petitions in person that would again require a notarized statement from the person interacting with voters or circulate their Initiative Petition through the internet, and the audit trail would replace the circulator affidavit. And, as the record indicates, at all times during the Spring, defendant Ruccione was aware that FWW and the COP intended to rely primarily on electronic petitions in order to limit the public health risk that they felt was present. Verified Complaint, ¶39, Exh. D ("Hi Doug, Yes I am fairly certain they will all be digital signatures. And if there are paper petitions circulated, which I think unlikely, . . . 3/17/2021 1:49PM)

On June 4, 2021, the Governor signed P.L. 2021, Ch. 103 (C. 26:13-32 et. seq.) and then signed EO 244 that terminated the Public Health Emergency but maintained the State of Emergency. (Verified Complaint, Exh. E). Pursuant to P.L. 2021, Ch. 103, all previous executive orders, with few exceptions, were set to "expire 30 days from the effective date of this act." As a result, EO 216 remained in effect until July 4, 2021. That is, petitioners could collect electronic signatures (without attaching a circulator affidavit to the petition package) and could submit petitions to the clerk electronically until that date. Conversely, on or after July 4, 2021, petitioners could no longer collect digital signatures without a circulator affidavit, and clerks could no longer accept petitions transmitted to them electronically.

There is no indication that termination of EO 216 was intended to disenfranchise qualified voters who signed the Initiative Petition in good faith during the Public Health Emergency by precluding clerks from accepting digital signatures after July 4, as defendant Ruccione asserts, if those signatures were properly executed at the time the signatures were secured. Indeed, the language of the EO 216 indicates that it applies to any petition that "may be submitted" during the Public Health Emergency, which indicates that it is applicable whether or not the petition was actually submitted during the Public Health Emergency. This language is a distinct change from the prior EO 132's provisions that relaxed the Faulkner Act's requirements for petitions "submitted during the pendency of the emergency." EO 132 ¶ 3

Further, it would simply be absurd to believe that the Governor, who enacted EO 132 and EO 216 in order to facilitate the right of initiative and petition, intended to terminate the "relaxation of petition requirements" so as to prevent municipal clerks from accepting digital signatures that were gathered during the Public Health Emergency simply because the petition on which they appeared was not submitted to a clerk prior to July 4th. Rather, EO 244 simply implied that collection of electronic signatures would no longer be valid going forward and clerks would no longer have the authority to accept any petition electronically after 30 days from June 4th. Clerks, however, would have the authority to determine whether the digital signature was that of a qualified voter, and was accompanied by an audit trail that established that the signature was made prior to July 4, 2021, obviating the need for a circulator affidavit to be attached to such petition package.

Indeed, this interpretation of EO 244, has been the prevailing one throughout the State. FWW submitted, after July 4, 2021, three initiative petitions identical to the one herein, all of which contained numerous digital signatures collected prior to July 4, 2021 to the municipal

clerks in North Brunswick, Long Branch and Woodbridge; and, all three petitions were deemed sufficient. See Verified Complaint, ¶25, Exh. G. Similarly, with respect to two initiative petitions filed during the second and third weeks of July, counsel for the Township of Piscataway wrote the petitioners' counsel that all electronic signatures collected prior to July 4, 2021 would be accepted and counted toward the number of signatures required to satisfy the statutory threshold. Rajvir S. Goomer specifically wrote:

> The Township is accepting font signatures up to July 3rd, 2021 as part of these petitions as long as the voter is an eligible voter in Piscataway and the audit trail is provided, which seems to have been provided for both petition packages submitted. So I think that resolves the issue that we talked about.

Verified Complaint, Exh. H.

Emphatically, EO 216 remained in full force and effect until July 4th, thus allowing FWW and the COP to collect digital signatures until that date. Nothing in EO 216 indicates that electronic signatures had to be submitted during the Public Health Emergency in order to be deemed valid, nor does EO 216 have any cut-off date for the clerk's acceptance of such signatures. It merely stated in ¶ 2 that electronically collected signatures and handwritten petitions must be accepted by all clerks.

Defendant Ruccione's interpretation of the relevant executive orders and laws to the contrary thus makes little sense. It allows for the valid collection of electronic signatures before July 4th, only to have those signatures become invalid immediately upon submission at a later date. In essence, the interpretation establishes an arbitrary due date for the submission of signatures at the end of the Public Health Emergency, when there is no connection between the end of the emergency and the required submission of electronically collected signatures. Why, pray tell, would it matter for public health or for any other reason that electronically collected signatures had to be submitted before the end of the emergency? What's more, his interpretation

undermines the Faulkner Act, which itself has no due date for petition signatures collected pursuant to an initiative effort, as courts have allowed the submission as late as 18 months after the collection "in the absence of an express legislative direction and in view of the liberality to be accorded" the Falkner Act. D'Ascensio v. Benjamin, 137 N.J. Super. 155 (Ch. Div. 1975), *aff'd*, 142 N.J. Super. 52 (App. Div. 1976). Accordingly, it makes no sense why P.L. 2020, Ch. 55 and EO 216 would require clerks to establish procedures for signature verification, petition notarization and submission of oaths for electronic signatures, only to immediately render such procedures invalid, *sub silencio*, by lifting the Public Health Emergency. Simply put, the digital signatures of qualified voters that Plaintiffs secured prior to July 4th were authorized at the time the signature was made, and the validity of those signatures did not expire when EO 216 expired. They are all valid signatures of qualified voters that must be counted toward the statutory threshold of 10% of the votes cast at the last General Assembly election.

There is little doubt that defendant Ruccione's interpretation of the Governor's Executive Orders creates an obstacle out of whole cloth to prevent the collection and submission of signatures under the Faulkner Act. This undermines the spirit and intent of EO 216, ¶ 8 that declared that "no municipality… shall enact or enforce any order, rule, regulation, ordinance, or resolution that will or might in any way conflict with any of the provisions of this Order, or that will or might in any way interfere with or impede its achievement." As noted above, statutes and executive orders that govern the statutory right of initiative must be liberally construed to facilitate the petition process and encourage voter participation in local government. See e.g., Redd v. Bowman, supra, 223 N.J. at 87 (liberal construction and flexibility to promote public purpose); D'Ercole v. Mayor and Council of Norwood, supra, 198 N.J. Super. at 531 (construed to promote "beneficial effects"). It therefore follows that Ruccione's decision to disqualify 562

validly collected digital signatures of qualified voters, based on his constricted interpretation of the form requirements found in N.J.S.A. 40:69A-186 and -187, as modified by EO 132, EO 216, and P.L. 2020, Ch. 55, is legally erroneous and must be voided by this Court.

V. DEFENDANTS ARE ESTOPPED FROM REFUSING TO ACCEPT AS VALID ELECTRONIC SIGNATURES COLLECTED PRIOR TO JULY 4, 2021.

Throughout the spring, FWW was in communication with defendant Ruccione seeking to make sure that their Energy Aggregation Initiative Petition would be acceptable under Teaneck's procedures for electronic signatures. Once it received a definitive "yes' answer it proceeded to collect electronic signatures using its electronic petition up until July 4, 2021, the date at which time EO 216 expired. Verified Complaint, ¶38, Exh. D. At all times, during this period, defendant Ruccione was aware that FWW and the COP intended to rely primarily on electronic petitions (even though person-to-person circulation was permitted) in order to limit the public health risk that they felt was still present. Id., at ¶39.

On June 22, 2021, plaintiff Paula Rogovin contacted defendant Ruccione to schedule a time on June 30, 2021, at which time the COP would submit its completed petitions. On June 29, 2021, she again contacted Mr. Ruccione to inform him that the COP was switching its delivery date to July 9, 2021. Mr. Ruccione did not respond and did not inform Ms. Rogovin that his office was not accepting any electronic petitions, even if printed out, after July 4, 2021. Id., at ¶40, Exh. I. There is little doubt that had he told her, Ms. Rogovin would have arranged to submit FWW's and the COP's Energy Aggregation Initiative to the Township Clerk on Friday, July 3, 2021.

On July 8, 2021, Ms. Rogovin contacted Mr. Ruccione a second time to reschedule the COP's delivery date an additional week due to her personal health problems. Although Mr. Ruccione did reply to her message this time, he again did not inform her of his position that none

of Plaintiffs' electronic petitions would be accepted as valid, even if delivered in paper form. Id., at ¶41, Exh. I.

FWW and the COP relied in good faith on Mr. Ruccione's representations that their electronic Energy Aggregation Initiative Petition would be acceptable under Teaneck's procedures for electronic signatures and on his silence when they specifically informed him that they intended to switch their delivery date from June 30 to July 8, 2021. Id., at ¶42. By failing to inform Plaintiffs of the Township's decision not to accept any electronic petitions after July 4, 2021 at any time after the Governor issued EO 244 and, specifically, when Ms. Rogovin informed Mr. Ruccione of the COP's decision to postpone submission of their electronic petitions from June 30 to July 8, 2021, defendant Ruccione acted in bad faith and undermined government's responsibility to deal fairly with its constituents. See W.V. Pangborne & Co. v. N.J. Dep't of Transp., 116 N.J. 543, 562 (1989) (seeking unfair advantage in litigation through various means seems inconsistent with the notion that government must act fairly and "with compunction and integrity."). And, because Plaintiffs relied in good faith on defendant Ruccione's representation that the signatures on their electronic petitions would be accepted as valid and satisfied Teaneck's procedures for electronic petitions, defendant Ruccione is precluded from rejecting the 562 electronic signatures contained in Plaintiffs' Initiative Petition filed on July 15, 2021—signatures that he determined to represent qualified voters.[4]

[4] See, e.g., Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 189 (2013) (Estoppel "is designed to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience."); In re Johnson, 215 N.J. 366, 379-80 (2013) ("Equitable estoppel is designed to prevent disavowal of prior conduct if a change of course would be unjust."); and Vogt v. Belmar, 14 N.J. 195, 205 (1954) ("While not applied as freely against the public as in the case of private individuals, the doctrine of estoppel may be invoked against a municipality to prevent manifest wrong and injustice."). Cf. Fuhrman v. Mailander, 466 N.J. Super. 572, 595 (App. Div. 2021) (applying the principle of equitable

VI. PLAINTIFFS' ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR CLAIMS OF LIABILITY UNDER THE NEW JERSEY CIVIL RIGHTS ACT.

This is a classic case where Township officials, supported by special interests, seek to deprive citizens of their substantive right of initiative, as established by N.J.S.A. 40:69A-184, when faced with the potential enactment by the voters of a far-reaching reform ordinance. As outlined above, defendant Ruccione has clearly violated the Faulkner Act provisions regarding initiative petitions; thus, justifying an order directing him to treat Plaintiffs' Energy Aggregation Initiative Petition as sufficient, N.J.S.A. 40:69A-188, and directing him to submit that petition to the Township Council for further actions. N.J.S.A. 40:69A-189. "But for" such an order, Ruccione would successfully deprive Plaintiffs, and all Teaneck voters, of their right to consider the proposed ordinance to create a community energy aggregation program. Because the rights of initiative and referendum found in N.J.S.A. 40:69A-184 and -185, respectively, are the quintessential substantive "rights-creating" statutes, Plaintiffs are also entitled to injunctive relief under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c). See Tumpson v. Farina, 218 N.J. 450, 486 (2014) ("In summary, [in the context of a petition,] plaintiffs are deprived of a substantive right protected by the New Jersey Civil Rights Act when a defendant acting under color of law completely prevents them from exercising that right.").

Since 2014, the New Jersey Supreme Court has further clarified Tumpson to state:

> In Tumpson, we applied the three-part Blessing test, albeit without the Gonzaga refinement, and found that the Faulkner Act conferred on the plaintiffs the substantive right of Petition—the right to place a recently enacted rent control ordinance before the voters for their approval or disapproval. Tumpson, 218 N.J. at 477-78. In that case, the Clerk of the City of Hoboken violated provisions of the Faulkner Act by refusing to accept the plaintiffs' petition and place the challenged ordinance on the ballot. Id. 218 N.J. at 471-72. Having exhausted their

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estoppel when the municipal clerk withheld information on which petitioners relied and subsequently, revealed new reasons to justify rejection of their petition).

> efforts with the City Clerk, the plaintiffs filed an action in lieu of prerogative writs seeking suspension of the effective date of the ordinance until the holding of a Petition. Id. 218 N.J. at 459. They also sought relief under the New Jersey Civil Rights Act. Id.
>
> In applying the Blessing test, we held: first, the Legislature, through the Faulkner Act, clearly intended to confer the right of Petition on the plaintiffs and voters of Hoboken; second, the right as enunciated in the statute was neither "vague" nor "amorphous," and its application was straightforward; and third, the Clerk was unambiguously required to accept and file the petition. Id. 218 N.J. at 477-78. Moreover, because the Clerk's failure to file the petition gave rise to a cause of action, we determined that "by definition, the right of Petition is substantive in nature." Id. 218 N.J. at 47.
>
> The Clerk's refusal to accept the petition essentially represented a dead end for the plaintiffs. Id. 218 N.J. at 486, 95 A.3d 210. Although the filing of a petition with the Clerk in Tumpson may at first glance appear to be merely procedural, the filing of the petition was inextricably intertwined with the vindication of the plaintiffs' right of Petition. Id. 218 N.J. at 468-71. Given that the Clerk had barred plaintiffs' efforts to realize that substantive right, the only remedy then available was through the court system. Id¨ 218 N.J. at 478. Therefore, under the Civil Rights Act, the plaintiffs were entitled to vindicate the right of Petition by securing a judicial order placing the ordinance on the ballot for a vote by the residents of Hoboken and to obtain the statutory relief of attorney's fees. Id.

Harz v. Borough of Spring Lake, 234 N.J. 317, 333-34 (2018); see also DeSanctis v. Borough of Belmar, 455 N.J. Super. 316, 333-334 (App. Div. 2018) (quoting Harz).

The Tumpson v. Farina holding was most recently affirmed in the Fuhrman v. Mailander, supra, 466 N.J. Super. at 598 (finding that denial of the right of initiative constitutes a violation of the New Jersey Civil Rights Act). There can be no dispute that by rejecting a petition for a legally incorrect reason, Ruccione has violated the Plaintiff's statutory rights. Such a finding, therefore, justifies an award of summary judgment under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c) in favor of FWW and the COP.

It is Plaintiffs' position that if they prevail on this Order to Show Cause and the injunctive relief sought is granted, they would be entitled to legal fees. See Fuhrman v.

Mailander, supra, 466 N.J. Super. at 600. N.J.S.A.10:6-2(f) provides for counsel fees to be awarded to plaintiffs who prevail in a New Jersey civil rights claim. The statute provides:

> In addition to any damages, civil penalty, injunction, or other appropriate relief awarded in an action brought pursuant to subsection c. of this section, the court may award the prevailing party reasonable attorney's fees and costs.

Id. While a prevailing party will ordinarily receive fees, the amount of any fee award is subject to scrutiny. Such scrutiny awaits a separate hearing after Plaintiffs' requested injunctive relief has been granted.

CONCLUSION

For these reasons, the decision of defendant Ruccione should be reversed, and the Court should declare that the Plaintiffs' Energy Aggregation Initiative Petition, as amended, constitutes a valid and sufficient initiative petition under N.J.S.A. 40A:69-184; that the Clerk shall submit that Initiative Petition to the Township Council for further action; and, if the Council fails to enact promptly, the Petition should be submitted to the Deputy County Clerk to appear on the November ballot. Furthermore, the Court should schedule a hearing to determine the actual amount of attorneys fees to which Plaintiffs are entitled as the prevailing parties in this litigation.

Respectfully submitted,

NEW JERSEY APPLESEED PUBLIC
INTEREST LAW CENTER, INC.

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