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August 19, 2021

The Hon. Bonnie J. Mizdol, A.J.S.C.
Bergen County Justice Center
10 Main Street
Hackensack, NJ 07601

Re: Theodora Lacey, et al. v. Doug Ruccione, et al.
Docket No: BER-L-_____-21

Dear Judge Mizdol:

Plaintiffs, Theodora Lacey, Reshma Khan, Jeremy Lentz, Teji Vega, and Loretta Weinberg (collectively, "Plaintiffs" or the "Committee"), submit this letter brief in support of their application for an Order to Show Cause with Temporary Restraints in connection with the unlawful rejection of their direct petition[1] by Doug Ruccione, the Acting Township Clerk (the "Township Clerk") for the Township of Teaneck.[2]

What we have in this case is a municipal clerk who made up his mind at the very beginning of the petitioning process that he did not support the contents of the petition, and then sought every available means to defeat the overwhelming number of people that supported the petition being placed on the ballot. As a result, there was a concerted effort to stonewall the Committee and find whatever possible reason, legitimate or not, to reject the petition. Make no mistake, this is an abuse of power and cannot be permitted to stand.

By virtue of his actions—and inactions—Teaneck's Township Clerk has deprived these citizens of one of their most valued civil rights: the ability to petition the government for a redress of their grievances through the initiative process. As a result of his improper rejection of Plaintiffs' direct petition, Ruccione has violated Plaintiffs' statutory rights to a public vote on their proposed amendment to Teaneck's municipal charter.

As such, the merit of the Committee's petition is not at issue in this case; rather, the issue is the right of the people of Teaneck to have a say in these matters at the ballot box.

1. A "direct petition" is one where individuals can put a question directly to the voters without governing body review. See, e.g., Empower Our Neighborhoods, et al. v. Torrisi, et al., MID-L-10613-08, at pg. 18, a copy of which is attached to the Certification of Counsel as Exhibit J ("N.J.S.A. 40:69A-25.1 reflect[s] the direct petition method, utilizing referenda to submit questions to voters."). This can be compared with an initiative petition under N.J.S.A. 40:69A-186, which may be reviewed by the governing body first, thus making it an *indirect* petition.

2. Unless otherwise defined herein, all capitalized terms shall have the meanings assigned to them in Plaintiffs' concurrently filed Verified Complaint.

Ruccione's efforts and conduct thwart the peoples' rights can and should be enjoined by the Court, with the end result being that the question is placed on the ballot for the voters, and not an unelected municipal clerk, to decide.

Statement of Facts

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

Statutory Framework

A. The Faulkner Act and Modifying the Municipal Charter

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. Under N.J.S.A. 40:69A-34.1, the Legislature decreed that a municipality subject to its provisions, "shall provide in its charter" that the mayor and council be elected:

> a. At a regular municipal election held on the second Tuesday in May in the years in which municipal officers are to be elected, in which case the term of office of the mayor and council members shall begin on July 1 next following their election; or
> b. At the general election held on the first Tuesday after the first Monday in November or at such other time as may be provided by law for holding general elections, in which case the term of office of the mayor and council members shall begin on January 1 next following their election.

N.J.S.A. 40:69A-34.1.

In other words, municipalities governed by the Faulkner Act are required to hold their municipal elections either in May or in November, and, just as critically, that requirement must be codified in their municipal charter. In the case of Teaneck, the municipal charter currently states that municipal elections are to be held in May as non-partisan elections.

Moreover, the Faulkner Act sets forth a procedure for modifying the charter, which includes modifying N.J.S.A. 40:69-34.1 to provide for an alternative election day. See N.J.S.A. 40:69A-25.1. Under this section, any Faulkner Act municipality may amend its charter to provide for an alternative date for elections by using one of two methods: (1) it can be initiated by the people themselves through a petition initiating a "question of adopting an alternative;" or (2) it may be "submitted to the voters by ordinance adopted by the governing body." Id. If the people bring the issue forth through the first option, it is done through a question placed directly on the ballot, whereas if the governing body brings it forth, it must pass an ordinance to put a question on the ballot. Id. Finally, the statute

provides clear guidance for the proposed text of the question. Id.[3]

This distinction of including just a question—as opposed to an ordinance—when the voters bring forth a petition was discussed in significant depth in an opinion by Judge Hurley in Empower Our Neighborhoods, et al. v. Torrisi, et al., MID-L-10613-08. See Certification of Counsel, Exhibit I. In Torrisi, Judge Hurley specifically ruled that, when applying N.J.S.A. 40:69A-25.1 to make a change to the municipal charter, only a question, and not an ordinance, is required when the petition is initiated by the voters. Id. at pgs. 17-18.[4] Specifically, Judge Hurley ruled that failure to include an ordinance is **not** a terminal defect to a petition. Id.

Regardless of the method used to effectuate a change via N.J.S.A. 40:69A-25.1, the ultimate question of whether to change the municipal charter must be presented to the voters for a vote, because, under the Faulkner Act,[5] an ordinance cannot change the municipal charter; it can only amend or supplement the municipal code. This process—whereby the voters initiate a question to change the charter **or** and the governing body submits the same question to the voters via ordinance—is not unique to the Faulkner Act and is found throughout New Jersey's statutes. See, e.g., N.J.S.A. 40:71-1 (direct petition by voters to adopt commission form of government); N.J.S.A. 40:41A-20 (direct petition by voters to adopt an optional county charter); N.J.S.A. 40:81-1 (direct voters petition to adopt municipal-manager form of government); N.J.S.A. 40:43-66.41 (direct voter petition to request a joint municipal consolidation study); N.J.S.A. 40:54-21 (direct voter petition to submit question of whether to hold run-off elections); and N.J.S.A. 40:69A-19 (direct

3. It is worth noting that the specific language used in the question must be "substantially" like the proposed text in the statute. N.J.S.A. 40:69A-25.1(b). However, it need not be identical, and in fact, is typically not identical as additional information is often needed to provide clarity to the voters. See DeSanctis v. Borough of Belmar, 455 N.J. Super. 316 (App. Div. 2018); see also Jersey City Civic Comm. v. Netchert, 2016 N.J. Super. Unpub. LEXIS 2089, *14.

4. N.J.S.A. 40:69A-25.1 refers to the "pertinent provisions" of N.J.S.A. 40:69A-184, et seq., which contains an ordinance requirement for indirect initiative petitions, to provide certain requirements of **form** to the petition, but not requirements of **substance**. See Pappas v. Malone, 36 N.J. 1, 4-5 (1961) (interpreting N.J.S.A. 40:69-25 applicability to petitions seeking to become a Faulkner municipality or reverting from a Faulkner municipality and explicitly incorporating the procedural requirements of N.J.S.A. 40:69A-186 to 188). In Pappas, the Supreme Court made clear that a direct petition initiating a question did not involve an ordinance, as it is a substantive requirement, not one of form, such as the circulator's affidavit and the uniformity of petition page size.

   It is our position that the Legislature had no intention of completely changing the direct petition process, otherwise used by voters when initiating a change in government question, when it enhanced the threshold number of signatures needed to put a question on the ballot using Alternate Plan A. We consider the insertion of the language "by ordinance" in N.J.S.A. 40:69A-25.1(a)(2)(a) to be a drafting error that is inconsistent with the rest of N.J.S.A. 40:69A-25.1 and N.J.S.A. 40:69A-19 and is not reflected in the Committee Statements explaining the purpose of the 2019 Amendment. See Sponsor's Statement to A. 5404 18-19 (L. 2019, c. 161).

5. This is not necessarily the case under other forms of government, such as one formed under the Walsh Act, which permits changes to the date of election, as well as charter, by ordinance.

petition by voters to submit question whether to adopt optional municipal charter).

This distinction is best explained by way of example. In 2016, the governing body for the City of Jersey City, a Faulkner municipality, passed an ordinance to place an identical question on the ballot. See Exhibit J. The ordinance was passed under N.J.S.A. 40:69A-25.1 to modify the date of their **non-partisan** elections from May to November. As illustrated by this example, all the ordinance does is to serve as a vessel to provide the wording of the question and the ability of elected officials to vote on whether to place the question on the ballot. See also Exhibit K for a similar example from the City of Trenton.

Given this text, there is no functional purpose of requiring the voters to do this same thing when they have already provided the question. That is why N.J.S.A. 40:69A-25.1(b) specifies the language of the various **questions** that must be placed on the ballot, and not an **ordinance** seeking to put that question on the ballot. The question is the singular most important aspect of this process and the only thing seen by the voters. Everything else, petition or ordinance, is simply the means of putting the question on the ballot.

B. The Uniform Nonpartisan Elections Law

Teaneck, which conducts non-partisan municipal elections, is also subject to the Uniform Nonpartisan Elections Law, N.J.S.A. 40:45-5, et seq., in addition to the previously described Faulkner Act. The Uniform Nonpartisan Elections Law also applies to some non-Falkner municipalities as well. Although the Township Clerk argued in his Initial Notice that N.J.S.A. 40:69A-25.1 applies—and therefore required an elevated signature requirement of 25% of the total number of votes cast in the General Assembly election from 2019—he subsequently argued in his Second Notice that N.J.S.A. 40:45-7.1 is the governing statute here.[6] This statute states, in pertinent part:

> Any municipality governed by the provisions of the "Uniform Nonpartisan Elections Law," P.L.1981, c.379 (C.40:45-5 et seq.) may, by ordinance, choose to hold regular municipal elections on the day of the general election, the Tuesday after the first Monday in November.

N.J.S.A. 40:45-7.1.

The Township Clerk uses this statutory provision to argue that N.J.S.A. 40:69A-25.1 only applies when there is a change being sought that would turn non-partisan elections into partisan ones, or vice versa. As such, the Township Clerk argues, the Committee cited the wrong section of the law and must provide an ordinance, and since they did not do so,

6. As will be discussed *infra*, this is a tacit admission by the Township Clerk that only 10% of signatures are required, not 25%, since he acknowledges in the Second Notice that a petition containing an ordinance may be submitted with only 10% of total number of signatures. See Exhibit H, pg. 6 (stating that N.J.S.A. 40:69A-184, et seq., governs the submission this type of petition, which only requires 10% of the total number of votes cast in 2019).

the Amended Petition is deficient and must be rejected.

This analysis is incorrect, both by the context of the rest of the Uniform Nonpartisan Elections Law as well as the established precedent in the State of New Jersey, which has already litigated this exact issue. First and foremost, N.J.S.A. 40:45-7 states that the Uniform Nonpartisan Elections Law provides for May municipal nonpartisan elections, "[e]xcept as may otherwise be provided by law . . . [by] a charter or an amendment thereto." Id. As such, by the express language of the Uniform Nonpartisan Elections Law, municipalities may elect to have nonpartisan elections in November and may convey such desire by and through their municipal charter.

This position is supported by precedent. In 2016, as stated, Jersey City moved its nonpartisan elections from May to November, while keeping them nonpartisan, through a public question placed on the ballot by an ordinance passed by its governing body under N.J.S.A. 40:69A-25.1. In the ordinance, the governing body noted:

> **WHEREAS,** pursuant to N.J.S.A. 40:69A-34.1(a), the City of Jersey City previously opted to hold its regular municipal elections on the second Tuesday in May, rather than the first Tuesday in November; and
>
> **WHEREAS,** pursuant to the Faulkner Act, N.J.S.A. 40:69A-25.1, a municipality may amend its Charter to change the time of its regular municipal elections from May to November as an alternative permitted under the Mayor-Council Form C of Government;
>
> * * *
>
> **WHEREAS,** it is well within the Municipal Council's powers to simply adopt an ordinance to change the date pursuant to the Uniform Non Partisan Elections Law, N.J.S.A. 40:45-7.1; and
>
> **WHEREAS,** the Mayor and Municipal Council would like to be absolutely certain of the voters' will, the Municipal Council has chosen to effectuate the change in the election date if the voters approve a binding referendum to amend the Charter of the City of Jersey City pursuant to the Faulkner Act, N.J.S.A. 40:69A-25.1 . . . .

See Exhibit J.

In the lawsuit that followed, the ordinance was challenged over whether Jersey City's governing body had the authority under the Faulkner Act and the Uniform Nonpartisan Elections Law to move regular municipal non-partisan elections from May to November via a question submitted to the voters under N.J.S.A. 40:69A-25.1. See Jersey City Civic Comm. v. Netchert, 2016 N.J. Super. Unpub. LEXIS 2089. Contending that N.J.S.A. 40:69A-34.1 distinguishes between "regular" municipal elections in May versus "general" elections in November, the plaintiffs argued that if a municipal election is to be held in May,

it must be non-partisan, and if it is to be held in November, it must be partisan. Id. at *5-6. As such, the difference between the two is "the partisan nature" of the election. Id. at *6. Rejecting that contention, Judge Bariso noted that there is no authority that "defines a general election as being a partisan one," and the distinction between the two is simply a matter of timing, not related to their partisan nature. Id. at *8-9.

Judge Bariso further held that by reading both statutes *in pari materia*, there are effectively three options to change the date of an election for a non-partisan Faulkner municipality, such as Jersey City or, in this case, Teaneck. Either the voters can do it through a petition bearing a question under N.J.S.A. 40:69A-25.1; the municipality can put the question on the ballot by ordinance under N.J.S.A. 40:69A-25.1; or the municipality can simply make the change itself under N.J.S.A. 40:45-7.1. Id. at *10-11. Judge Bariso did not contemplate the voters being able to initiate an ordinance to change the date of the election under N.J.S.A. 40:45-7.1 or N.J.S.A. 40:69A-184, which permits voters to initiate "any" ordinance. As a result, notwithstanding the Township Clerk's erroneous assertions that the Committee has improperly "conflated" the Faulkner Act with the Uniform Nonpartisan Elections Law, courts have held that the two statutes are not in conflict, and that, read together, they create this tripartite solution.

It is worth repeating that N.J.S.A. 40:45-7 recognizes the authority granted by law to amend a municipal charter to address the timing of municipal elections, as does N.J.S.A. 40:69A-25.1. While the 2009 Amendment to N.J.S.A. 40:45-7, which explicitly encouraged municipalities to change their elections,[7] did not simultaneously amend N.J.S.A. 40:69A-25.1, the intent of the Legislature is clear.

Consistent with the statutes discussed above, N.J.S.A. 40:69A-34.1 addresses the timing of municipal elections and does not categorize them into partisan or non-partisan elections.[8] The Uniform Nonpartisan Elections Law cannot be read in a vacuum given the provisions of the Faulkner Act, particularly since N.J.S.A. 40:45-7 recognizes that applicable law may provide for the timing of municipal elections by charter amendment, as that enactment does. Instead, these statutes are to be read holistically, as working in harmony with one another and in providing municipalities and their constituencies multiple

7. N.J.S.A. 40:45-1 states that it is "the intention [of the Legislature] to consolidate the municipal or charter elections in municipalities with the general or state elections" held in November.

8. The Township Clerk discusses in his Second Notice the 2019 Amendments made to N.J.S.A. 40:69A-25.1, which raises the number of signatures required for election date changes, by citing to the Assembly Comment that accompanied the bill. See Exhibit H, pg. 5. However, that text reflects the fact that while the modification was made to specifically raise the number of signatures required when the change sought is from a non-partisan-to-partisan or partisan-to-non-partisan election, it does not have any other effect on the statute. If it did, the Legislature would have specifically stated in the text of the statute itself, and not in a comment, that a charter amendment changing an election date under N.J.S.A. 40:69A-25.1 only applies to partisan or non-partisan switches. The Township Clerk is, in effect, pointing to the absence of language to state that the additional language, if written, would change its meaning. That point is obvious. Yet, the Legislature chose not to actually write that type of restriction in the statute.

avenues for choosing when to host their elections.

Both the Faulkner Act and the Uniform Nonpartisan Elections Law are enactments that appear in Title 40 of the statutes governing municipalities and counties. These two statutes, as well as their respective subtitles and chapters, center around municipal government election timing and procedure. Each of these provisions complements an expansive legislative scheme that governs municipal government, including recognition that the timing of nonpartisan municipal elections may be changed by charter amendment, as provided for in the Faulkner Act.

The Township Clerk cannot reasonably expect to bar this question, or this method of obtaining this type of charter amendment, when his argument is based on a misinterpretation of the law. His attempt at drawing distinctions between the Faulkner Act and the Uniform Nonpartisan Elections Law, when both are so clearly intertwined in explicit language, subject matter, and policy, fails to pass legal and logical muster.

C. Number of Signatures Required

Although the Township Clerk has primarily rejected the Amended Petition in its entirety due to his mistaken belief that a different section of law applies and that an ordinance is required, he also rejected the Initial Petition due to lack of signatures.

In the Initial Notice, the Township Clerk stated that N.J.S.A. 40:69A-25.1, not N.J.S.A. 40:69A-184, applied when it comes to determining the correct number of signatures. Under N.J.S.A. 40:69A-25.1(a)(2)(a), the Committee is required to provide signatures of registered voters in excess of 25% of the total number of votes cast in the last election for the General Assembly. Under N.J.S.A. 40:69A-184, the Committee is required to provide 10% of that same total. The Committee initially calculated that number to be 7,908, which meant that 791 signatures are required if the 10% standard is used and 1,977 if the 25% standard is used.

Although the Township Clerk initially acknowledged multiple times that 791 signatures were required, he later changed his position to require 1,977. The Committee initially submitted a total of 1,350 signatures, comprising of 225 electronic signatures and 1,125 handwritten signatures. After review, the Township Clerk rejected all 225 electronic signatures and 472 handwritten signatures, leaving a total of 653 remaining valid signatures. The Committee submitted an additional 2,066 handwritten signatures, far more than required, which the Township Clerk states he was unable to completely review during the statutorily allotted time. However, the Township Clerk did state that he was able to review 655 signatures from this second submission and verified 482 of them, bringing the total number of valid signatures to 1,135.[9]

9. It can be reasonably expected that the number of valid signatures will rise as the Township Clerk continues to review the remaining 1,411 signatures.

As such, the Committee has already exceeded the 10% minimum and will likely exceed the 25% minimum as well by the time the review is concluded, even excluding the (improperly rejected) electronic signatures.[10]

Although the Township Clerk argued in his Initial Notice that N.J.S.A. 40:69A-25.1 applies and therefore the Committee must reach the 25% minimum, he later revised that position in his Second Notice to say that N.J.S.A. 40:45-7.1 is the governing statute. That statute would otherwise require the Committee to have submitted an ordinance with its petition.[11] But the Township Clerk is wrong again: N.J.S.A. 40:45-7.1 does not actually describe a process for voters to initiate a change in date of non-partisan elections; it just authorizes a municipality to make changes by ordinance.

The Committee was only required to submit 791 signatures because, while N.J.S.A. 40:69A-25.1 governs the submission as a whole, the relevant subsection in (a)(2)(a) only applies to changes from partisan to non-partisan, or non-partisan to partisan, forms of government, and not simply changes to the date of the election. In fact, N.J.S.A. 40:69A-25.1(a)(1) refers to the "pertinent provisions of N.J.S.A. 40:69A-184, et seq.," for two reasons. First, N.J.S.A. 40:69A-19, passed in 1950, indicates that 20% of all registered voters, need to sign a petition seeking a charter amendment such as this one. See L. 1950, c. 210, p. 467, s. 1-19. However, in 1981, the Legislature enacted N.J.S.A. 40:69A-25.1 to enable voters who sought to change only one or two aspects of their Faulkner charter to be able to do so employing a lower number of signatures than that required under N.J.S.A. 40:69A-19. Legislative history and judicial decisions interpreting N.J.S.A. 40:69A-25.1 state that the reference to 40:69A-184 was specifically intended to lower the number of signatures required to the 10% number listed in that provision. See L. 1981, c. 465, s. 7

Finally, in 2019, the Legislature amended the section again to raise the participation rate threshold for a direct petition to 25% of the total votes cast in the last election at which members of the General Assembly were elected, but only if a question regarding Group A was placed on the ballot. See L. 2019, c. 161, s. 1. Though the language of the amendment made the change for all petitions initiating the Group A question, the Legislature explicitly intended the change for **signature requirements** to only capture petitions initiating the question of whether to hold non-partisan or partisan elections. See Sponsor's Statement to A. 5404 18-19 (L. 2019, c. 161) (discussing proposed amendments to a municipal charter "to change from partisan to nonpartisan elections, or nonpartisan to partisan elections").

The Township Clerk appears to be trying to have it both ways: he wants the higher signature requirement provided by N.J.S.A. 40:69A-25.1, but he also wants the ordinance

10. As the Committee has met the 25% threshold using handwritten signatures alone, Plaintiffs do not raise the issue of the Township Clerk's improper rejection of the electronic signatures the Committee initially submitted. Plaintiffs reserve, and do not waive, their right to contest the Township Clerk's rejection of the electronic signatures.

11. If so, then N.J.S.A. 40:69A-184 would apply, which governs the submission of ordinances via petition and which only requires the 10% minimum.

requirement of N.J.S.A. 40:45-7.1 that would require the voters to initiate such ordinance under N.J.S.A. 40:69A-184. But because the requirements for each section are inapposite, the Township Clerk cannot have both. Since the Township Clerk's does not appear to be holding to his position that N.J.S.A. 40:69A-25.1 is the relevant statute, he is faced with the reality that only 10% is required, a number the Committee has already far exceeded.

LEGAL ARGUMENT

A. Mandamus Is Appropriate Where the Law Requires the Performance of Ministerial Acts.

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 our Supreme Court stated in Switz v. Middletown Twp., "Mandamus lies to compel but not control the exercise of discretion… 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 . . . ." 23 N.J. 580, 587 (1957). (internal citations omitted).

As stated, Plaintiffs' Amended Petition must be certified and ultimately placed on the ballot because it satisfies all the substantive requirements mandated by N.J.S.A. 40:69A-25.1. Because Plaintiffs have satisfied these statutory requirements, Ruccione has no further discretion. Rather, he must proceed to perform his ministerial duties of certifying the valid petition as sufficient and further processing it to have it placed on the ballot.

B. The Township Clerk Acted Arbitrarily and Capriciously by Refusing to Approve Plaintiffs' Petition on Legally Erroneous Grounds.

The Legislature has set forth a clear statutory scheme for processing initiative and referendum petitions governing Falkner Act municipalities. A group of registered voters, known as a Committee of Petitioners, initiates the process by submitting an initiative or referendum petition to the municipal clerk, who must receive and accept such petition (otherwise known as filing) prior to undertaking an examination of such petition to determine whether it is sufficient to permit certification and to be placed on the ballot for submission to the voters. There is nothing in the statute that contemplates the municipal clerk imposing any substantive or procedural requirements not explicitly set forth in the statute, since to do so would contravene the accepted principle that the initiative statute in the Faulkner Act should be liberally construed to promote the "beneficial effects" of voter participation. Ordinance 04-75, 192 N.J. at 459 (citing Retz v. Mayor & Council of Saddle Brook, 69 N.J. 563, 571 (1976)); Borough of Eatontown v. Danskin, 121 N.J. Super. 68 (Law Div. 1972) (holding that the statutory scheme is specifically aimed at increasing public participation); Tumpson v. Farina, 240 N.J. Super. 346, 350 (App. Div.), aff'd, 120 N.J. 55 (1990) ("The legislative grant of the referendum power should be liberally construed in

order to encourage public participation in municipal affairs in the face of normal apathy.").

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 understand that such liberal construction is appropriate and often necessary to secure the beneficial effects of voter participation.[12] A municipality, such as Teaneck, 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.

In the context of an initiative petition, the applicable standard of review is whether Ruccione's rejection of the petition and the corrective affidavits was arbitrary, capricious, or clearly erroneous under the law. See D'Ascensio v. Benjamin, 137 N.J. Super. 155, 163 (Ch. Div. 1975), aff'd, 142 N.J. Super. 52 (App. Div. 1976), certif. den., 71 N.J. 526 (1976).

As the factual history of this matter shows, Ruccione not only acted in an arbitrary and capricious manner but did so in bad faith and with the express desire to defeat the petition, no matter the reason, legitimate or not. "If the petition is insufficient, **all** the defective particulars must be reported to the council and two members of the committee." Tumpson, 431 N.J. Super. at 350 (emphasis added). After reviewing the Initial Petition, Ruccione indicated that he "need not resolve which Statute the Petition operates under at this time," but that N.J.S.A. 40:69A-25.1 required the Committee to meet an elevated signature requirement. However, in Ruccione's Second Notice, he stated that N.J.S.A. 40:45-7.1 was the governing provision, not N.J.S.A. 40:69A-25.1, and that because the Amended Petition was brought under the incorrect statute, it is therefore invalid, regardless of the signature or ordinance issues.

However, the governing provision was not an issue that Ruccione was entitled to "punt" to the Committee's second attempt, because at that point, it would not have an opportunity to correct any additional deficiencies. Ruccione was required to specify the governing provision—or the Committee's reliance on an inapposite statute as a rationale for rejecting the petition—in the Initial Notice. If a municipal clerk can simply change the reason for rejection after the revised petitions are submitted (rather than simply determining whether petitioners cured the initial deficiencies), he can effectively prevent anyone from ever getting on the ballot. There is no additional cure period and the process starts over. With a twenty-day period for the initial review, plus the additional time for

12. Since "the sufficiency of [a] petition cannot be measured except in its entirety," courts will often look to see if "[i]t is apparent that any voter reading the entire petition was adequately informed [as to] the basic thrust of the petition." Stop the Pay Hike Committee, 166 N.J. Super. at 207. If so, the court should seek to "effectuate, facilitate and encourage voters to participate in government." Id. If this Court were to allow Ruccione's refusal to certify the petition to stand, it would frustrate the right of voters to seek democratic redress, which is expressly antithetical to State public policy. See Hernandez-Turner v. Adams, No. A-6668-05T5, 2007 N.J. Super. Unpub. LEXIS 503 (App. Div. Aug. 2, 2007).

rejections, a municipal clerk can simply keep changing the reason and run the clock out. See Fuhrman v. Mailander, 466 N.J. Super. 572, 595 (App. Div. 2021). That was a fundamental holding of Fuhrman, the municipal clerk cannot withhold information; he is required to provide his reasons for rejection from the very beginning. Id. If he fails to do so, he may be equitably estopped from providing new reasons later on.

Given Ruccione's prior conduct in adding additional reasons for rejection, rejecting signatures that are clearly valid,[13] and, to this day, failing to provide the correct number of signatures required, it appears as though Ruccione is attempting to make it impossible for the Committee to get their question on the ballot no matter what and he should be estopped from doing so by this Court.

C. The State of New Jersey Has Made It Abundantly Clear That Elections Are to Be Consolidated Wherever Possible and That the Right of the Initiative Should Be Construed as Broadly as Possible.

Citizens' power to propose amendments to charters, as well as initiatives and referendums as they relate to ordinances, are "a check on the exercise of local legislative power, fostering citizen involvement in the political affairs of the community." In re Ordinance 04-75, 192 N.J. 446, 459 (2007). As such, Courts have repeatedly stated that each power should be "liberally construed" because of the "salutary objective of popular participation in local government." Concerned Citizens of Wildwood Crest v. Pantalone, 185 N.J. Super. 37, 43 (App. Div. 1982); see also Sparta Tp. v. Spillane, 125 N.J. Super. 519, 523 (App. Div. 1973) (holding that these processes "encourage public participation in municipal affairs in the face of normal apathy and lethargy in such affairs").

In Faulkner Act municipalities, there is a "strong public policy favoring the right of the voters to exercise their power of initiative." In re Jackson Twp. Admin. Code, 437 N.J. Super. 203, 215 (App. Div. 2014) (quoting Clean Cap. Cnty. Comm. v. Driver, 228 N.J. Super. 506, 510 (App. Div. 1988)). Thus, statutory provisions for matters such as this "are generally to be liberally construed to effect the salutary objective of popular participation in local government." Concerned Citizens of Wildwood Crest v. Pantalone, 185 N.J. Super. 37, 43 (App. Div. 1982) (citing In re Certain Petitions for a Binding Referendum, 154 N.J. Super. 482, 484 (App. Div. 1977)). And, indeed, "[t]he law in this State . . . is well established on the point that initiative and referendum statutes should be liberally construed in order to encourage public participation in municipal affairs in the face of normal apathy and lethargy in such matters." Fuhrman, 466 N.J. Super. at 572 (quoting Margate Tavern Owners' Ass'n v. Brown, 144 N.J. Super. 435, 441 (App. Div. 1976)).

There is a long history in New Jersey of enfranchising citizens through the power of putting questions on the ballot. In that regard, our courts have shown a commitment to the policy reasoning and good governing sense behind these rights and have interpreted the

13. Even rejecting signatures after the signatory themselves contacted the Township Clerk and noticed him that they had actually signed the petition. See Exhibits D and E.

statutes conferring the right broadly upon the voters. In cases of confusion or ambiguity respecting that right, courts have determined that power ultimately rests with the people.

As noted above, N.J.S.A. 40:45-7 recognizes the ability of applicable law to provide for charter amendments governing the timing of municipal elections in non-partisan municipalities. That is a clear recognition of the Faulkner Act, which by its terms not only provides for charter amendments to determine the timing of municipal elections but also provides for the broad power of referendum. It is appropriate to let Teaneck voters determine whether to move the timing of the Teaneck's non-partisan elections.

In essence, these rights are about enfranchisement, self-government, and giving citizens the right to vote on matters of importance to their community. Tumpson, 120 N.J. at 55. As the Supreme Court noted in that case, these powers took root in an era when citizens protested the outsized influence of special interests in the legislative process. Id. The ability to go over the heads of elected representatives is one of the safeguards of politics; it enables the people to express their view directly on important issues, rather than through their representatives. Accordingly, the Faulkner Act confers a substantive right to amend one's own municipal charter.

In In re Referendum Petition to Repeal Ordinance 04-75, 388 N.J. Super. 405 (App. Div. 2006), aff'd as modified, 192 N.J. 446 (2007), the Appellate Division was clear that it suffices that the default rule in deciding where the ultimate decision-making authority on the municipal level lies is to be found in the Legislature's declaration of policy that that power rests with the people. If it is difficult to determine on which side of the dividing line a certain governmental exercise falls, the legislatively declared policy preference for public participation must apply to favor the referendum mechanism. Id. at 417-18.

Finally, it is worth repeating that given these clear mandates from the Legislature and our courts, perceived technical defects—including, for instance, the lack of an ordinance that voters will not see anyway—should not defeat a petition.[14] "Our courts have long upheld the expression of the popular will even when there was not full compliance with statutory details." Fuhrman, 466 N.J. Super. at 590. Indeed, technical ballot errors should not override the clear intent to save taxpayer dollars and increase voter participation by consolidating elections with the November general election. Id. at 591.

D. Plaintiffs are Entitled to Summary Judgment on their Claims of Liability Under the New Jersey Civil Rights Act.

This is a classic case where unelected municipal officials seek to deprive citizens of their substantive rights without due process of law. As outlined above, Ruccione's conduct has clearly violated the Faulkner Act provisions regarding direct petitions, thus justifying an

14. By way of example, Exhibit L is a sample ballot from the 2016 election in which the Jersey City question was adopted. As shown at the bottom of the page, only the question, and not the ordinance, appears on the ballot.

order directing him to treat Plaintiffs' Amended Petition as sufficient and placing the question on the ballot. But for such an order, Ruccione would successfully deprive Plaintiffs, and all Teaneck voters, of their right to choose to consolidate elections. Because N.J.S.A. 40:69A-25.1 is a quintessential substantive "rights-creating" statute, Plaintiffs are also entitled to injunctive relief under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c).

In this case, the Faulkner Act is couched in rights-creating language. Decades of case law affirm that ballot initiatives and referendums are a substantive "right." As early as 1979, the Law Division acknowledged that the referendum laws were rights-creating, stating that "provisions related to a referendum should be liberally construed so as to…encourage voters to participate in government . . . It is not the policy of our law to frustrate the right of voters to seek democratic redress, as provided for through referendum." Stop the Pay Hikes Comm. v. Town Council of Irvington, 166 N.J. Super. 197 (Super. Ct. 1979) (internal citations omitted).

Nor is there any doubt that the Township Clerk's actions have deprived Plaintiffs of that statutory right of initiative. 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."). The New Jersey Supreme Court has since further clarified Tumpson:

> 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 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 478.

> 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)

This was most recently affirmed in the Fuhrman case, which not only confirmed the right of the voters to move non-partisan municipal elections from May to November while retaining their non-partisan nature, but also that the denial of the voters' right to move their non-partisan elections constitutes a violation of the New Jersey Civil Rights Act. See Fuhrman, 466 N.J. Super. at 598. There can be no dispute that by rejecting a petition for a legally incorrect reason, Ruccione has violated the Committee'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 the Committee's favor.

E. Plaintiffs Are Entitled to Counsel Fees as the Prevailing Parties

If the Committee prevails on its Order to Show Cause and the injunctive relief sought is granted, the Committee would be entitled to legal fees. See Fuhrman, 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.; see also Statement to Assembly No. 2073 with Senate Floor Amendments, adopted June 10, 2004 (noting that "[t]hese floor amendments would also amend subsection f of the bill to clarify that when a person brings an action, under this provision of the bill, the court may award the prevailing party reasonable attorney's fees and costs.").

As N.J.S.A. 10:6-2(c) was rooted in the federal civil rights statute, the fee-shifting provision of N.J.S.A. 10:6-2(f) was also based on 42 U.S.C. § 1988, which provides for an award of counsel fees to the prevailing party in a suit brought under § 1983: In any action or proceeding to enforce a provision of section . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the

costs." 42 U.S.C. § 1988. In fact, at the time of Senator Gill's floor amendments, Assemblyman Neil Cohen noted to the press that the Act now "mirrored the language of the fee-shifting provision applicable to the federal Civil Rights Act," (SETON HALL LEG. J. at 175, n.81) thus implying relevance of case law developed under that statute.

Litigants who prevail under § 1988 are entitled to receive fees "as a matter of course in the absence of special circumstances." Dunn v. N.J. Department of Human Services, 312 N.J. Super. 321, 333 (App. Div. 1998). The discretionary authority to deny fees outright is limited and should be sparingly exercised. See Gregg v. Hazlet Township Comm., 232 N.J. Super. 34, 37-38 (App. Div. 1989); The African Council v. Hadge, 255 N.J. Super. 4, 12 (App. Div. 1992) (reiterating that "counsel fees should be liberally granted").

An overly vigorous or unconstrained use of the power to deny fees would frustrate and potentially defeat the legislative purpose underlying § 1988, which exists to promote the vindication of constitutional values by creating a financial incentive for competent counsel to undertake civil rights cases. See Student PIRG v. AT&T Bell Labs, 842 F.2d 1436 (3d Cir. 1988); New Jerseyans for Death Penalty Moratorium v. New Jersey Dept. of Corr., 185 N.J. 137, 153 (2005) (stating that absent fee shifting to vindicate public rights, "the ordinary citizen would be waging a quixotic battle against a public entity vested with almost inexhaustible resources").

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 the Committee's injunctive relief has been granted.

CONCLUSION

For these reasons, Ruccione's Second Notice should be reversed, and the Court should order that: (1) Plaintiffs' Direct Petition, as amended, constitutes a valid and sufficient petition under N.J.S.A. 40:69A-25.1; and (2) Plaintiffs' Direct Petition be placed upon the November 2, 2021 ballot. Moreover, the Court should schedule a hearing to determine the actual amount of attorney's fees to which Plaintiffs are entitled as the prevailing parties.

Dated: August 19, 2021

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