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October 23, 2019

The Honorable John A. Sweeney, A.J.S.C. (Ret.), Chairman  
New Jersey Council on Local Mandates  
140 East Front Street, 8<sup>th</sup> Floor  
Trenton, New Jersey 08625-0627

Re: In the Matter of a Complaint Filed by  
the New Jersey Association of Counties  
Complaint No. 1-19

Dear Judge Sweeney and Council Members:

Please accept this summation on behalf of Respondent, State of New Jersey ("State") in the above-captioned matter. Claimant, the New Jersey Association of Counties ("NJAC") challenges L. 2018, c. 72 and L. 2019, c. 265, the 2018 and 2019 Amendments to the Vote By Mail Law, N.J.S.A. 19:63-1 to -28 (the "Amendments") as imposing an unfunded mandate upon the counties and county clerks of New Jersey, or in the alternative, underfunding alleged costs incurred by the county clerks. Based upon the evidence in the record, NJAC fails to set forth a viable claim that the Amendments impose additional costs related to an unfunded mandate.

Even if NJAC had entered evidence into the record of actual costs incurred due to implementation of the Amendments, such costs



are immaterial where the Amendments are found to meet the criteria of one of the five constitutional exemptions from finding a statute to constitute an unfunded mandate. The Amendments do not constitute an unfunded mandate, even where there are costs incurred by the county clerks, because the Amendments meet two of the constitutional exemptions provided at N.J. Const. art. VIII, §2, ¶5(c): 1) where the statute implements a provision of the New Jersey Constitution, in this case by enforcing and promoting the right to vote set forth at N.J. Const. art. II, §1, ¶3; and 2) where the statute revises or eases an existing requirement or mandate, in this case the existing Vote By Mail Act that requires county clerks to provide mail-in ballots to all eligible voters when requested, regardless of any cost incurred.

The undisputed purpose of these exemptions is to prohibit the finding of an unfunded mandate when there are costs incurred, if the criteria of the exemption(s) are met. Here, the Amendments require county clerks to continue to implement the right to vote by providing voters with mail-in ballots without any need to submit an application for a mail-in ballot. The Amendments ease the burden on voters seeking to vote by mail and ease the cost burden on county clerks by reducing the number of mail-in ballot applications they are required to review and process.

For these reasons, the record before the Council fails to prove by a preponderance of the evidence that an unfunded mandate has been enacted by the Legislature.

Unfunded Mandate

An unfunded mandate is a law, rule, or regulation that "does not authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law or rule or regulation. . . ." N.J. Const. art. VIII, §2, ¶5(a). The New Jersey Constitution and the Local Mandates Act ("LMA"), N.J.S.A. 52:13H-1 to -22, grant the Council exclusive authority to determine whether any provision of a law enacted on or after January 17, 1996, or any part of a rule or regulation originally adopted after July 1, 1996, is an unfunded State mandate. N.J. Const. art. VIII, §2, ¶5(b). Any statute or regulation that is deemed to be an unfunded mandate "shall, upon such determination cease to be mandatory in its effect and expire." N.J. Const. art. VIII, §2, ¶5(a); see also N.J.S.A. 52:13H-2, -12(a).

The Council may deem any provision of a statute or regulation an unfunded mandate where the statute or regulation "does not authorize resources to offset the additional direct expenditures required for the implementation of the statute or the rule or regulation." N.J.S.A. 52:13H-12(a). To make out a claim of

unconstitutionality under N.J. Const. art. VIII, §2, ¶5 and the LMA, a claimant must demonstrate that: (1) the statute, rule, or regulation imposes a "mandate" on a unit of local government; (2) additional direct expenditures are required for the implementation of the statute, rule, or regulation; and (3) the statute, rule, or regulation fails to "authorize resources, other than the property tax, to offset the additional direct expenditures." In re a Complaint Filed by the Borough of Jamesburg (October 28, 2014) at page 5. Where a statute does not require direct expenditures to be incurred in order to implement the language of the statute, there cannot be an unfunded mandate. In re Complaint filed by the Twp. of Blairstown (July 8, 2011) at page 3.

In each of the rulings where the Council has invalidated a statute, rule, or regulation, "clear and convincing evidence was presented that counties, municipalities or boards of education would incur expenditures in order to implement the challenged provisions." In re a Complaint Filed by the Twp. of Medford (June 1, 2009) at page 12 (concurring opinion). The same cannot be said of the evidence in the record in this case as to actual costs associated with the Amendments.

#### Amendments Legislative History

On August 10, 2018, Governor Murphy signed into law L. 2018, c. 72. The Vote By Mail Act, N.J.S.A. 19:63-1 to -28, as amended,

provides that all voters who received a mail-in ballot for the November 2016 General Election, will automatically receive mail-in ballots for all future elections, unless they chose not to receive a mail-in ballot. Prior to enactment of the 2018 Amendment, the Vote By Mail Act limited a voter's ability to automatically receive a mail-in ballot to either applying for a mail-in ballot for a specific election; applying for a mail-in ballot to be sent for each November General Election; or applying for mail-in ballots for all elections within a calendar year. N.J.S.A. 19:63-3e. Therefore, if a voter wished to receive mail-in ballots beyond one year or for elections beyond the November General Elections, the voter was required to file an application with the appropriate county clerk each year and/or for each requested election.

Pursuant to the enacted Amendments, affected voters are no longer required to file mail-in ballot applications for any future election. And county clerks are relieved of the cost and time associated with providing mail-in ballot applications, reviewing mail-in ballot applications and processing mail-in ballot applications for each election or for each year for those voters set forth in the Amendments. Effective August 28, 2019, P.L. 2019, c. 265, expanded the 2018 Amendment to also apply to any voter who had submitted a mail-in ballot for any election in 2017 or 2018.

Claimant's Failure to Prove Incurred Costs

No evidence has been introduced that demonstrates a net increase in costs incurred by the county clerks that are related to the Amendments. NJAC fails to distinguish costs related to Amendments from previously existing costs for mail-in ballots or from new costs associated with voters who applied for mail-in ballots as opposed to those voters automatically receiving mail-in ballots under the Amendments. There is no specific evidence of costs incurred by county clerks that are directly related to the Amendments or the required evidence of the cost savings resulting from the Amendments' elimination of the requirement of the clerks to process tens of thousands of mail-in ballot applications. Without these facts in evidence, NJAC is asking the Council to speculate as to the costs, if any, incurred under the Amendments without the necessary evidence of what costs are incurred from implementing the Amendments.

In addition, pursuant to the 2019 Amendment, the Legislature appropriated \$2 million to be distributed among the counties "as reimbursement for the costs of implementing the provisions of this act." P.L. 2019, c. 265. The 2019 Amendment states that the Department of State shall reimburse each county "for the actual costs incurred by the county in implementing the provisions of this act." Ibid. Determining actual costs requires eliminating

costs related to mail-in ballots applied for independently from the implementation of the Amendments, as well as subtracting cost savings resulting from the Amendments.

\$2 Million Appropriation by the Legislature for Costs Incurred by Counties Requires a Finding by the Council of No Unfunded Mandate.

As a result of the \$2 million appropriated by the Legislature to offset the costs of implementing the Amendments, no unfunded mandate exists. The evidence in the record does not support a claim that the appropriated \$2 million is insufficient to meet the actual costs incurred from implementing the Amendments. There is no evidence in the record of how many mail-in ballots sent out by the counties are a result of the Amendments as opposed to mail-in ballots independently requested by voters. As the Council stated in IMO of Highland Park Board of Education, decided May 11, 2000 (Highland Park II),

To prove that a regulation imposes an 'additional direct expenditure' and is an unfunded mandate within the meaning of the Amendment and the LMA, a claimant must show an identifiable expense that results from the regulation that is the subject of the complaint. [Emphasis added].

Id. at page 1.

The Council found Highland Park's challenge to a regulation was premature inasmuch as the evidence proffered was "essentially speculative" and thus "provides an insufficient basis on the record

as it now exists to find an unfunded mandate." Id. at page 15. Such is the case in the instant matter.

#### Alleged Cost Increases

NJAC's complaint alleges total costs of \$1,530,603 associated with the Amendments as applied to the November 2018 General Election. Notwithstanding that the alleged increase in costs are not limited to the implementation of the Amendments, even if one were to accept NJAC's cost figures, there still would remain a \$469,397 surplus from the \$2 million appropriated by the Legislature. If any doubt remained as to the speculative nature of NJAC's alleged costs, the testimony of Hunterdon County Clerk Mary Melfi demonstrates that even NJAC does not know what, if any, actual costs have been incurred by the counties in implementing the Amendments. While NJAC alleges costs of \$1,530,603 incurred from the 2018 November General Election, Melfi testified that she "feel[s] comfortable giving you a cost estimate of 2 million dollars for last year's law [2018] and comfortable giving you 1.5 million dollars for every year moving on to continue to comply with this law." September 23, 2019 transcript at page 85-5 to 11. Melfi provides the Council with an "estimate" that is far greater than the alleged costs set forth by NJAC.

Respectfully, Melfi's comfort with giving estimates as to what she believes are and will be the costs incurred in

implementing the Amendments, is not evidence of the actual costs incurred by the counties from implementation of the Amendments. Both her estimates and those of NJAC are unsupported and are inaccurate. Neither estimate takes into account the real cost savings from the number of mail-in ballot applications that no longer are reviewed and processed by county clerks under the Amendments. In addition, nowhere in the record is there evidence as to how many mail-in ballots would have been provided to voters, regardless of the Amendments. Without either of these essential sets of fact, the Council cannot reach a determination as to the actual costs to the counties, if any, from implementing the Amendments.

It is also necessary to take into account that, to the extent any cost increases are demonstrated, such costs are one-time costs incurred in placing voters into the Statewide Voter Registration System ("SVRS") as either permanent mail-in ballot voters or voters who opted out from receiving the offered mail-in ballots. Thereafter, these voters will be sent a mail-in ballot (or not) the same as any other voters who are sent mail-in ballots pursuant to the previously unamended Vote By Mail Act. Thereafter, there are no additional costs but instead there are cost savings that the counties will recoup each year as the clerks will no longer incur the annual cost of reviewing and processing mail-in ballot

applications for these voters. NJAC has also failed to take into account these cost savings. On the contrary, they have incorrectly assumed added costs each year from the Amendments instead of applying the cost savings.

In the Council's decisions in IMO Shiloh, December 12, 2008 (State police patrol of rural municipalities), and IMO Deptford, April 20, 2016 (body cameras and police vehicle cameras), the Council was provided with factual evidence in the record that there were insufficient appropriations for the new legislative requirements. Here, no such specific factual evidence has been presented. As noted, determining the costs associated with implementing the Amendments based upon the present record before the Council would be nothing more than speculation. Because the Legislature has appropriated \$2 million dollars for "actual" costs associated with implementing the Amendments, there is no unfunded mandate.

It is also important to note that prior to the enactment of the Amendments, there was a consistent increase in the number of new mail-in ballots requested by voters throughout the State. The number of mail-in ballots that were cast increased from 2004 to 2016 increased from 170,637 to 355,771, while overall voter turnout increased from 3,638,153 to 3,957,303, or an increase of 319,150 votes. NJAC Appendix B. Of the 319,150 additional votes cast

from 2004 to 2016, 185,134 or 58% of the total increase was from mail-in ballots. Ibid. This increase in mail-in ballots was prior to enactment of the 2018 and 2019 Amendments. Further, the number of mail-in ballots received from the November 2016 General Election to November 2018 General Election increased from 355,771 to 400,136 or 11%. Ibid. This figure is also consistent with the rate of increase in mail-in ballots from previous federal General Elections. Ibid. There is nothing in the record that supports a finding that this increase is related to the implementation of the Amendments as opposed to the myriad of other causes for increases in voter turnout, which run the gamut from voter interest in a particular election to the efforts of the counties to promote voting by mail.

It is noteworthy that the percentage increase in mail-in ballots far exceeded the increase in overall voter turnout prior to enactment of the Amendments. In the 2008 General Election, the total voter turnout was 3,910,221 votes and the number of votes cast by mail was 243,623. Ibid. In the 2016 General Election, the total voter turnout was 3,957,303 votes and the number votes cast by mail was 355,771. Ibid. Thus, while overall voter turnout increased by 47,082 from 2008 to 2016, the number of voters casting mail-in ballots increased by 112,148 or almost 300% greater than the increase in the total number of votes cast. Put another way,

while the overall voter turnout increased only 1.2% from 2008 to 2016, the number of mail-in ballot voters increased by 46%. All of this occurred prior to enactment of the 2018 Amendment. Clearly, an ever increasing percentage of voters have been voting by mail well before the effective date of the Amendments.

NJAC relies on the increase of 44,365 mail-in ballot voters from 2016 to 2018 as evidence of increased costs resulting from the 2018 Amendments. However, the record does not demonstrate how many of the November 2018 mail-in ballots were from voters who had previously applied for mail-in ballots through the "All General Election" mail-in ballot application that existed through the 2018 General Election. There is also no evidence how many voters applied for a mail-in ballot for a specific election or for all elections in 2018 prior to enactment of the Amendments. There is no evidence how many voters applied for a mail-in ballot only for the November 2018 General Election. Ultimately, there is no evidence indicating how many of the additional 44,365 mail-in ballots received in the November 2018 General Election are mail-in ballots that would have been sent in any case, notwithstanding the Amendments.

The exhibits in evidence demonstrate that over the years, the county clerks have properly encouraged voters to vote by mail in an effort to insure that all eligible persons may exercise their

right to vote. Respondent's Exhibit D, from the Cumberland County Clerk's website, states, "NO EXCUSE - Vote By Mail Law," referring to a voter's right to request a mail-in ballot for the June 5, 2018 primary election, prior to enactment of the 2018 Amendment. Respondent's Exhibit E, from the Essex County Clerk, states: "In New Jersey, any voter can now vote by mail. You do not need a reason to vote by mail. Don't feel like going to the polls? Simply vote by mail. Now there is no excuse not to vote." Again, this is a reference to the Vote By Mail Act as it existed prior to enactment of the Amendments. Finally, Respondent's Exhibit H, from the Mercer County Clerk's office, page 4, is a notice from the county clerk in 2017 that states, "Mercer County Clerk Paula Sollami announced that all registered voters will receive a Vote-by-Mail application as part of Mercer County's latest initiative to raise voter participation across all districts." The announcement goes on to state that by the end of August 2017, a vote by mail application will be sent out with return postage, to all registered Mercer County voters who are not already signed up to receive November General Election Vote by Mail ballots. Ibid.

All of this leads to the conclusion that there is no basis for finding the \$2 million appropriation underfunds costs associated with implementing the Amendments, or that an unfunded mandate results from any increase in the number of mail-in ballots

since the enactment of the Amendments.

Enactment of the 2018 and 2019 Amendments are Exempt  
from a Finding of an Unfunded Mandates Pursuant to the  
New Jersey Constitution and the Local Mandates Law

The 2018 and 2019 Amendments do not constitute an unfunded mandate as defined by N.J. Const. art. VIII, §2, ¶5 and the LMA. The Council has explained that its "authority is limited to considering whether a mandate is funded or unfunded, and if it is unfunded, whether certain enumerated exemptions apply." In re Complaints Filed by the Monmouth-Ocean Educ. Servs. Comm'n, the Rumson-Fair Haven Reg'l High Sch. Dist., and the Stafford Twp. Bd. of Educ. (August 20, 2004) at page 8. The Amendments are exempt from being deemed an unfunded mandate because two of the constitutional exemptions that prohibit a finding of an unfunded mandate apply in this case: (1) the Amendments implement a provision of the New Jersey Constitution, N.J. Const. art. VIII, §2, ¶5(c)(5); and (2) the Amendments revise or ease existing requirements of the Vote By Mail Act (N.J.S.A. 19:63-1 to -28), N.J. Const. art. VIII, §2, ¶5(c)(3).

Implementing a Provision of the  
of the New Jersey Constitution

N.J. Const. art. VIII, §2, ¶5(c)(5), and the LMA, provide that laws and rules or regulations that "implement the provisions of the New Jersey Constitution" shall not be unfunded mandates. N.J. Const. art. VIII, §2, ¶5(c)(5); N.J.S.A. 52:13H-3(e). As

such, any law, rule, or regulation that implements the right to vote is not an unfunded mandate. Here, the Amendments act specifically in furtherance of the constitutional right to vote.

N.J. Const. art. II, §1, ¶3(a) states:

Every citizen of the United States, of the age of 18 years, who shall have been a resident of this State and of the county in which he claims his vote 30 days, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people;

This is a provision of the Constitution is specific. In comparison, the language set forth at N.J. Const. art VIII, §4, ¶1, which concerns funding for public education, states,

The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen.

The language of the "thorough and efficient" clause, and a review of its implementation, is quite different from the Constitution's right to vote clause. A determination of whether an Act of the Legislature implements a provision of the New Jersey Constitution is clearly dependent upon what the Legislature requires within the language of the statute.

This Council has found that requirements to test for random gas (Monmouth-Ocean Educational Services Comm., decided 8/20/2004), and instituting anti-bullying requirements in schools

(IMO Allamuchy Twp. Bd. of Ed., decided January 27, 2012), are unfunded mandates because the Council determined the enacted legislation was not specific to implementing a particular provision of the New Jersey Constitution. In the instant case, however, the Amendments specifically address the implementation of the right to vote provision of the Constitution. There are only two methods to vote in New Jersey: in-person at a polling location on the day of an election or by mail. As demonstrated in the record, over the last 17 years, there has been a substantial increase in the number of voters casting mail-in ballots. The Amendments directly implement the constitutional right to vote by easing and eliminating prior procedures that were required to exercise the right to vote by mail.

The right to vote without appearing at a polling location on election day has existed in New Jersey for over 60 years, beginning with the limited use of "absentee ballots" for military voters. N.J.S.A. 19:57-1 to -40. Initially, "absentee" ballots were only provided to military personnel pursuant to the 1947 New Jersey Constitution. N.J. Const. art. II, §1, para. 4. In 1953, the Absentee Voting Law, N.J.S.A. 19:57-1 to -40, L. 1953, c. 211 (repealed), was enacted, entitling civilian voters to vote by absentee ballot where those persons could demonstrate that they could not physically be present at their polling location on

election day. Over the decades, numerous amendments to the Absentee Voting Law expanded the ability of voters to vote by mail, leading to the adoption of the Vote By Mail Act, N.J.S.A. 19:63-1 to -28, effective 2009, which allows any qualified voter to apply to vote by mail without having to demonstrate an inability to appear at the voter's polling location on election day.

The Amendments to the Vote By Mail Law continue the trend to expand voter participation by partially eliminating the need for voters to apply for a mail-in ballot either on an annual basis or for a specific election. In so doing, the Amendments implement and expand New Jersey citizens' constitutional right to vote. In affirming the constitutionality of the 1953 Absentee Voting Law which provided the right of civilian voters to vote by absentee ballot, the New Jersey Supreme Court held the 1947 Constitution's limitation of absentee voting to military personnel "is not in itself a bar to civilian absentee voting by legislative allowance in furtherance of the exercise of the basic right of suffrage, a civil and political franchise--of the very essence of our democratic process-- that is to be liberally and not strictly construed to promote and to defeat or impede the essential design of the organic law." Gangemi v. Berry, 25 N.J. 1, 12 (1957) (emphasis added). The 2018 and 2019 Amendments simply follow previous legislative enactments to promote and ease restrictions

"of the basic right of suffrage,. . .the very essence of our democratic process."

The Amendments seek to further the implementation of the constitutional provision to ensure that no qualified person is denied the right to vote. The Amendments further this provision of the New Jersey Constitution and, therefore, are specifically exempted from a finding of an unfunded mandate, notwithstanding any potential costs incurred by the counties.

#### Revising and Easing an Existing Law

N.J. Const. art. VIII, §2, ¶5(c)(3) and the LMA specifically exempt from the finding of an unfunded mandate, laws, rules, or regulations that "repeal, revise or ease an existing requirement or mandate or [that] reapportion the costs of activities between boards of education, counties, and municipalities." N.J. Const. art. VIII, §2, ¶5(c)(3); N.J.S.A. 52:13H-3(c). Because the Amendments both revise and ease the existing statutory requirements set forth at N.J.S.A. 19:63-1 to -28 for providing mail-in ballots to voters, the Amendments are subject to the constitutional exemption and, therefore, do not constitute an unfunded mandate.

As noted above, the Amendments revise and ease what has long been required by Title 19 for providing voters the ability to vote by mail. The Amendments require county clerks to provide mail-in

ballots for all future elections to voters who requested and received mail-in ballots in the November 2016 General Election or in any election in 2017 or 2018. As a result, these voters no longer are required to apply for mail-in ballots for any future election and the county clerks are no longer required to review and process thousands of mail-in applications on an annual basis for these voters. Additionally, the Amendments also require voter registration forms to now include a mail-in ballot request option. The exercise of this option by voters will also relieve all new registered voters, or those voters who are required to re-register after a move from one county to another, from the requirement of filing mail-in ballot applications with the county clerks. L. 2018, c. 72, section 3. The Amendments thereby streamline and create a uniform procedure for obtaining a mail-in ballot and relieve county clerks from costly and time-consuming work previously required under the Vote By Mail Act.

The county clerks themselves have recognized that the Amendments implement and revise the existing Vote By Mail Act. The Camden County Clerk's office notes on its website that "Voting in New Jersey is easier than ever with the new Vote By Mail Law . . . Apply once and receive a ballot for every election without having to re-apply." Respondent's Exhibit B at page 2. The Clerk goes on to encourage voters to "Vote By Mail," noting "In the last

5 years there have been over 56,000 Camden County residents that have voted by mail at least once. APPROXIMATELY 1 OUT OF EVERY 6 RESIDENTS VOTE BY MAIL!" Id. at page 6. Because N.J. Const. art. VIII, §2, ¶5(c)(3) and the LMA specifically exempt the finding of an unfunded mandate where the legislative action revises or eases an existing requirement, and because the Amendments do so, the Amendments cannot be found to be an unfunded mandate.

Finally, it is important to emphasize that the constitutional exemptions set forth in N.J. Const. art. VIII, §2, ¶5(c)(3) and art. VIII, §2, ¶5(c)(5), apply only when there is an increase in spending incurred by the counties. The very purpose of the exemptions in the Constitution is that the exemptions are applicable when there is a cost incurred by local entity. Obviously, if there is no finding of costs incurred by the counties as a result of the Amendments, there is no need for the Council to consider whether the constitutional exemptions apply because there is no action of the Legislature that has created a cost increase without funding. The essence of the constitutional exemptions is their applicability where costs are incurred. In such a situation, where cost-creating statutes implement a provision of the New Jersey Constitution or revise or ease an existing law, then the cost creating statutes are exempt from being found to be an unfunded mandate. Here, the Amendments both implement a provision

of the New Jersey Constitution and revise and ease an existing law. Therefore, both constitutional exemptions apply and the 2018 and 2019 Amendments cannot be found to be an unfunded mandate.

CONCLUSION

For the foregoing reasons, NJAC's Complaint should be dismissed.

Respectfully submitted,

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