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## PRELIMINARY STATEMENT

Under the doctrine of sovereign immunity, the Mercer County Board of Elections, along with the Commissioners in their official capacity and the Superintendent of Elections (“SOE”)<sup>1</sup> are immune from suit under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2 (“NJCRCA”) and its federal companion, the Civil Rights Act, 42 U.S.C. § 1983. In accordance with both of those statutes, claims may only be brought against persons who are acting under color of law. Claims against the State, as an entity, or a state official in their official capacity are not cognizable. The reason is this: the State is not a person under the NJCRCA. Case law establishes that county officials overseeing an election are considered to be arms of the State. Even if this court concludes that the Moving Defendants are not state agencies under Section 1983 or NJCRCA, liability under the NJCRCA and Section 1983 can only arise if there is a defined showing that the employees acted under a policy or custom of the agency (i.e., the Mercer County Board of Elections) to violate an individual’s rights, which is absent here. The Complaint is bereft of any allegation that the Board of Elections or SOE had adopted any policy to disenfranchise residents of Mercer County. Accordingly, the Moving Defendants are immune from suit under the doctrine of sovereign immunity.

For similar grounds, the doctrine of qualified immunity bars Plaintiffs’ causes of action. The doctrine of qualified immunity operates to shield government officials performing discretionary functions generally. They are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable

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<sup>1</sup> As used herein, the term “Moving Defendants” refers collectively to Defendants Mercer County Board of Elections, Mary Corrigan, Martin J. Jennings, Jill Moyer, Charles Farina, Nathaniel Walker, and Superintendent of Elections Walker Worthy, who have filed this motion to dismiss, pursuant to R. 4:6-2(e).

person would have known. Again, all of the alleged violations of the NJCRA, Section 1983 and the New Jersey and U.S. Constitutions were the result of unforeseen circumstances, which were corrected within two hours. Indeed, even construing the Complaint to give all reasonable inferences in favor of Plaintiffs, it is abundantly clear that the Moving Defendants did their job and there are no allegations that amount to a violation of a clearly established Constitutional right.

Finally, the substance of Plaintiffs' causes of action arise out of the General Election, which occurred almost a year and a half ago, in November 2022. Under N.J.S.A. 19:29-1 to 14, Plaintiffs had 32 days to file a petition to challenge the ballots counted as part of the General Election. The ballots for the General Election were certified by November 23, 2022, in compliance with State law. Plaintiffs do not allege, nor can they, that they filed any petition to challenge the actions taken by Mercer County. Rather, the only action that was taken was the filing of the instant Complaint on February 14, 2024. Clearly, Plaintiffs' claims are time barred and far exceed the time periods the Legislature contemplated when it adopted N.J.S.A. 19:29-1 to -14.

For these reasons, the Moving Defendants submit that Plaintiffs' causes of action should be dismissed, with prejudice.

## STATEMENT OF FACTS<sup>2</sup>

### A. Background

This action arises out of the November 8, 2022 General Election in Mercer County, New Jersey (the “General Election”). The General Election presented residents of Mercer County with opportunities to vote for candidates running for U.S. Congress in New Jersey’s 3<sup>rd</sup> and 12<sup>th</sup> Congressional Districts, for positions in Mercer County government, and for positions in several municipal governments. See Troublefield Cert., Exs. 3 and 4. The General Election was conducted using paper ballots, vote-by mail ballots, provisional ballots, and emergency ballots. See Troublefield Cert., Ex. 1, Complaint, ¶¶ 47, 53, 165, and 180.

Paper ballots were to be completed by residents, in the ordinary course. See Troublefield Cert., Ex. 1, Complaint ¶¶ 47, 50 & 53. Completed paper ballots were to be scanned using optical scan tabulators supplied to Mercer County by Dominion Voting Systems Corp. (“Dominion”). See Troublefield Cert., Ex.2. The paper ballots were printed by Royal Printing, after working with the Mercer County Clerk to design the layout. See Troublefield Cert., Ex 1, Complaint, ¶¶ 35-40. After the layout was approved, Dominion’s staff verified the timing marks, the target areas, and the ovals where the vote will be cast for scanning by the tabulators. See Troublefield Cert., Ex.2, Excerpts of the Transcript of the November 21, 2022 Mercer County Board of Commissioners Formal Meeting (“Prosecutor’s Report”) at T11-3 to 18.<sup>3</sup> After Dominion verifies that the timing marks,

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<sup>2</sup> The Statement of Facts are based on the allegations asserted in the Complaint, as filed in the above-captioned action, a true and accurate copy of which is annexed to the Certification of G. Glennon Troublefield, Esq, (“Troublefield Cert.”), filed herewith. References to the Exhibits attached to the Complaint, which were reproduced and attached to the Troublefield Cert., will be cited as “Ex. \_\_\_.”

<sup>3</sup>“T” refers to the Transcript of the Mercer County Board of Commissioners November 21, 2022 formal meeting, excerpts of which at attached to the Troublefield Cert., at Ex. 2.



the target areas, and the ovals where a vote will be cast are correct, Royal Printing assigned unique ballot IDs that represent each election district. Id. at T11-8 to 12-10.

Plaintiffs allege that on the day of the General Election, after the polls opened, the tabulators supplied by Dominion were unable to read the paper ballots provided by the Mercer County Clerk. See Troublefield Cert., Ex. 1, at ¶¶19-20. Plaintiffs allege that the Mercer County Board of Elections (“BOE”) did not test every tabulator that was expected to be used as part of the General Election, but instead only tested five tabulators. See Troublefield Cert., Ex. 1, Complaint, ¶ 43. On the day of the election, according to Plaintiffs, the paper ballots had a different ballot ID number than what the tabulators were programmed to recognize. Id., at ¶¶ 41-42. The tabulators read the barcode and identified them as an invalid ballot because the tabulators were not programmed for that barcode. Therefore, the tabulator would not scan or tabulate the ballots. See Troublefield Cert., Ex. 1, Complaint, ¶ 44; Ex. 2, T11-15 to 23.

Plaintiffs allege that for the period covering 6:00 a.m. to 8:00 a.m., as a result of the tabulators rejecting the paper ballot, Defendant Nathaniel Walker and the BOE instructed district board workers (a.k.a. poll workers) to provide voters with provisional ballots. See Troublefield Cert., Ex. 1, Complaint, ¶¶ 24, 25 and 26. It is alleged that poll workers should have been instructed to give emergency ballots. See Troublefield Cert., Ex. 1, Complaint ¶ 57.

Plaintiffs allege that 759 of those voters, which includes the Plaintiffs named in the Complaint, had their provisional ballots rejected because they apparently were listed in the electronic poll book as having voted by machine, despite the fact that the BOE knew it was impossible for these voters to have voted by machine. Id. ¶¶ 25, 61, 166-67. From 6:00-7:00 am 1420 people checked in to vote, 1091 of those people were checked into the electronic poll book (and were thus qualified to vote), but only 518 of those individuals had their provisional ballots

(which they were improperly given in the first place) not counted because they had “voted by machine.” Id. ¶¶ 163-167. Additionally, Plaintiffs allege that 2416 people were told to vote provisionally because they had requested a mail-in ballot, however at least 83 of those people were never sent a mail-in ballot. Id. ¶ 168.

Plaintiffs further allege that by 8:00 a.m. on the day of the General Election, Mercer County changed course and instructed poll workers to use regular pre-printed Election Day Paper Ballots, and place the ballots into the open slot in the ballot box under the tabulator. See Troublefield Cert., Ex. 1, Complaint, ¶ 53. Plaintiffs allege that the BOE did not have protocols in place on how to handle paper ballots, thus resulting in a chain of custody of paper ballots not being maintained; there was confusion at the polling places, including what the poll workers were being told; that hundreds of ballots were spoiled because poll workers refused to accept properly completed ballots because the tabulators scanned them as invalid; improperly used provisional ballots which caused a shortage of provisional ballots and caused some voters to not be able to cast a ballot, and entire bags of paper ballots were misplaced. Id., at ¶¶ 27, 28, and 64 to 72.

Plaintiffs allege that the manner of counting ballots was not continuous or public, thus in violation of Title 19. Id. at 120. They also assert that unsecured and unaccounted ballots were found after Election Day; members of the public were not provided with meaningful opportunities to witness the counting of the ballots; ballots were counted haphazardly; there was a discrepancy between the number of votes Mercer County reported to the public and the number of Election Day votes that were reported to the State; there was a 2,000 vote discrepancy between the number mail-in ballots in Mercer County scanned versus the number of reported to the State. Id. ¶¶ 120, 132, 139-140, 143, 160, and 194.

As to the paper ballots from Robbinsville and Princeton that were scanned by the tabulators and identified as invalid, those ballots were placed into the secured tabulator compartment without going through the scanner. See Troublefield Cert., Ex. 1, Complaint; Ex. 2, Prosecutor's Report, T15-11 to 16-9. The Mercer County Clerk confirmed that the count of all ballots were timely completed. See Troublefield Cert., at Ex. 2.

On November 20, 2022, the BOE reported the total number of mail-in and provisional ballots that were counted for the General Election. See Troublefield Cert., Ex. 5. On November 23, 2022, Mercer County Board of Canvassers certified the results of the votes from the General Election. See Troublefield Cert, Exs. 3-5, Complaint, Ex. R, pp. 1-26. The Mercer County Board of Canvassers also certified the votes cast for the General Election for the U.S. House of Representatives – 3<sup>rd</sup> and 12<sup>th</sup> Congressional Districts, the County Offices, and offices in several municipalities. Troublefield Cert., Exs. 3 and 4.

Plaintiffs allege that the Mercer County Clerk and the BOE certified the election results without resolving the discrepancy in the votes cast for the General Election. See Troublefield Cert., Ex. 1, Complaint, ¶¶ 143-188. Plaintiffs also alleged that the 2023 General Election was allegedly plagued by the same problems as the 2022 General Election. See Troublefield Cert., Ex. 1, ¶ 223.

#### **B. Plaintiff's Causes of Action**

On February 14, 2024, Plaintiffs filed a three-count complaint. First, Plaintiffs allege a violation of the NJCRA by all defendants, pursuant N.J.S.A. 10:6-2, by violating Plaintiffs right to vote, .as set forth in both the New Jersey Constitution and the United States Constitution, citing N.J. Const. art. II, § 1, ¶3. Troublefield Cert., Ex. 1, at ¶ 223. Plaintiffs alleged this violation occurred due to defendants alleged failure to act in accordance with Title 19 (N.J.S.A. 19:52-2.1 and 6-10) by improperly rejecting provisional ballots; failing to continually conduct public counting of ballots by the BOE, which allegedly interfered with their ability to observe the vote;

and diluting their vote because Mercer County failed to properly administer the election. See Troublefield Cert., Ex. 1, at ¶¶ 224 to 264. Plaintiffs allege that they suffered damages due to defendants' actions and inactions, which deprived them of the right to vote, interfered with their right to vote, and deprived them of the right to fair elections.

In Count Two, Plaintiffs allege that defendants violated 42 U.S.C. § 1983, because their actions and inactions deprived Plaintiffs of their constitutional rights, and unconstitutionally diluted their votes because qualified voters were prevented from voting and because proper chain of custody was not maintained. Id. at ¶ 268. Plaintiffs further allege that their equal protection rights were violated by the Mercer County BOE because a class of plaintiffs, who were required to vote provisionally, were subject to unequal treatment in the exercise of the constitutional right to vote, and a class of plaintiffs whose ballots were not counted despite being qualified to vote, were disenfranchised.

In Count Three, Plaintiffs seek a declaratory judgment on each violation of Title 19 described in the Complaint, including improper use of provisional ballots, improper location of the tabulation of ballots (which should have taken place at district board level), failure to return ballots to municipal clerks to be preserved, and the adoption of policies contrary to Title 19. Id., at ¶ 271.

### **STANDARD OF REVIEW**

A court should never hesitate to dismiss a complaint where, as here, it fails to state cognizable claims.

R. 4:6-2(e) grants this court the authority to dismiss a complaint that fails to state a claim. When considering a R. 4:6-2(e) motion, the court will evaluate the adequacy of the pleading by determining “whether a cause of action is suggested by the facts.” Printing Mart-Morristown v. Sharp Electronics, Corporation, 116 N.J. 739, 746 (1989) (citing Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). Under, R. 4:6-2(e), the court will consider “[t]he legal sufficiency of the facts alleged on the face “of the Complaint and whether it “reveals the elements of a legal claim.” Id. (citing Rieder v. Department of Transportation, 221 N.J. Super. 547, 552 (App. Div. 1987)). In evaluating the facts, a court will also consider financial risks of forcing defendants to defend against claims for which no reasonable likelihood exists that they can construct a claim beyond speculation. See Bell Atlantic v. Twombly, 550 U.S. 544, 558 (2007).

The Appellate Division encourages courts to dismiss a complaint where the facts plead do not provide a foundation for a valid cause of action. See Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005); Darakjian v. Hanna, 366 N.J. Super. 238 (App. Div. 2004); Camden County Energy Recovery Assoc., L.P. v. New Jersey Dep't of Env'tl. Prot., 320 N.J. Super. 59 (App. Div. 1999). In Darakjian, the Appellate Division held that, “when the allegations ... are limited to ... a bare conclusory assertion ... with no other factual reference to lend support to the contention, the court may not simply take the facial assertion as a given ...” Darakjian, 366 N.J. Super. at 248.

The Moving Defendants recognize that Plaintiffs, as the non-moving parties, are entitled to the benefit of all reasonable factual inferences set forth in their complaint. That inference is not

absolute. See Sickles, 379 N.J. Super. at 106. The court must probe the complaint to determine whether or not it will “nonetheless fairly apprise an adverse party of the claims and issues to be raised at trial”. Delbridge v. Office of the Public Defender, 238 N.J. Super. 288, 312 (Law Div. 1989), aff’d, o.b., A.D. v. Franco, 297 N.J. Super. 1 (App. Div. 1993) (quoting Miltz v. Borroughs-Shelving, a Div. of Lear, 203 N.J. Super. 451, 458 (App. Div. 1985)). Pleadings that recite mere conclusions without facts or that attempt to rely on subsequent discovery do not justify a lawsuit. See Glass v. Suburban Restoration Co., Inc., 317 N.J. Super. 574, 582 (App. Div. 1998). “It is not enough for [a] plaintiff to assert ... that any essential facts that the court may find lacking can be dredged up in discovery. Darakjian, 366 N.J. Super. at 248-49. Said another way, “[a] pleading should be dismissed if it states no basis for relief and discovery would not provide one.” Rezem Fam. Assocs., 423 N.J. Super. at 113. That is precisely the state of affairs before this court.

The gist of Plaintiffs’ theory is that their constitutional and statutory (Title 19) rights were violated by County Officials. Plaintiffs seek to impose personal liability on the Moving Defendants’ exercise of their discretionary actions taken in the course of their public responsibilities. Plaintiffs complain about the manner in which they were allowed to vote; the alleged ability to observe vote counting; the manner in which District Board Members were trained and deviations of the procedures they were required to follow; and seek the award of compensatory and punitive damages, along with attorneys’ fees for the alleged violation of their constitutional rights. But, glaringly absent from Plaintiff’s allegations that span across a Complaint are any specific facts, with details, as to what each individually named defendant did that caused Plaintiffs’ rights to be allegedly violated.

For the reasons below, the dismissal of Plaintiffs’ Complaint is required. See Buteas v. Raritan Lodge #61 F. & A. N., 248 N.J. Super. 351, 363 (App. Div. 1991). While the Supreme

Court has recognized R. 4:6-2(e) motions are to be handled with great caution, where pleadings fail to satisfy pleading rules, they are subject to dismissal. Printing Mart-Morristown, 116 N.J. at 746, 771-72. “Dismissals under Rule 4:6-2(e) are ordinarily without prejudice.” Mac Prop. Grp. LLC & The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 17 (App. Div. 2022). “Yet, a dismissal with prejudice is ‘mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted,’ or if ‘discovery will not give rise to such a claim.’” Ibid. (first quoting Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987)).

Here, as a matter of law, Plaintiffs’ claims against the Moving Defendants are not cognizable either in this Court, or any other court, and should be dismissed with prejudice.

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## ARGUMENT

### POINT I

#### **THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE MOVING DEFENDANTS ARE IMMUNE FROM SUIT BASED ON SOVEREIGN IMMUNITY**

Plaintiffs' causes of action are directed to alleged violations of the NJCRA, N.J.S.A. 10:6-1 to -2. Tethered to the alleged violations of NJCRA are allegations that Moving Defendants violated Section 1983 of the Civil Rights Act, 42 U.S.C.A § 1983. All alleged facts supporting Plaintiffs' claims arise from the General Election that occurred in Mercer County in 2022. Plaintiffs' argue that they are entitled to declaratory relief and an extra judicious award of compensatory and monetary (punitive) damages, due to the manner in which voting occurred during the General Election, how ballots were counted, and the voting process.

Plaintiffs' cast a wide net and try to place blame on the Moving Defendants, who were simply doing their job in overseeing and facilitating the General Election in Mercer County. As arms of the State performing a State function, the Moving Defendants are immune from suit, particularly so given that the New Jersey Legislature has never consented to the State being sued either for violations under the NJCRA or under Section 1983 regarding elections.

The NJCRA provides in relevant part, that:

Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.

[N.J.S.A. 10:6-2(c).]



The New Jersey Legislature enacted N.J.S.A. 10:6–2(c) as a means of vindicating substantive rights, but not a source of rights itself. It was modeled off of the analogous Federal Civil Rights Act (i.e., Section 1983), and is intended to provide what Section 1983 does not, namely a remedy for the violation of substantive rights found in our State Constitution.

Fundamentally, the United States Supreme Court has determined that Section 1983 does not apply to the states. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 67, 71, 109 S.Ct. 2304, 2310, 2312, 105 L.Ed. 2d 45, 55, 58 (1989) (“[N]either a State nor its officials acting in their official capacities are ‘persons’ under § 1983”). Moreover, New Jersey courts “have long recognized that an essential and fundamental aspect of sovereignty is freedom from suit by private citizens for money judgments absent the State's consent.” Allen v. Fauver, 167 N.J. 69, 73–74 (2001). Under NJCRA and Section 1983, claims “may only be brought against persons who are acting ‘under color of law.’” Perez v. Zagami, 218 N.J. 202, 215-16 (2014). For purposes of Section 1983, the United States Supreme Court has explained, “[o]bviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.” Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (citing Brandon v. Holt, 469 U.S. 464, 471 (1985)).

Our New Jersey Supreme Court has ruled similarly to the U.S. Supreme Court in reaffirming sovereign immunity. Our Court has held that, claims directly against the State, a state entity, or a state official in their official capacity, are not cognizable. See Brown v. State, 442 N.J. Super. 406, 425 (App. Div. 2015) (noting that under 42 U.S.C. § 1983, which the NJCRA is modeled after, “neither the State nor its officials acting in their official capacities are persons” amenable to suit), rev'd in part on other grounds, 230 N.J. 84 (2017). New Jersey courts “have

long recognized that an essential and fundamental aspect of sovereignty is freedom from suit by private citizens for money judgments absent the State's consent.” Allen v. Fauver, 167 N.J. 69, 73–74 (2001). When it had occasion to address the potential liability of the State, the Supreme Court has reminded us that for alleged violations of state or federal statutes, that there must be evidence that the Legislature has voluntarily consented to be sued on the alleged violation. See Royster v. New Jersey State Police, 227 N.J. 482, 495 (2017) (upholding the State’s sovereign immunity against claims under the ADA, absent consent by the New Jersey Legislature to be sued under the act.). The consent to be sued must be a “clear and unambiguous legislative expression.” Id. at 74. See also Taylor v. New Jersey Highway Auth., 22 N.J. 454, 466–67 (1956) (stating that “[t]he doctrine that the State may not be sued in our courts without its consent is firmly established in our jurisprudence”).

Here, Plaintiffs will be unable to point to any language in the NJCRA which evidence consent by the New Jersey Legislature to permit a suit against the State. “[T]he State is not a ‘person’ under the [NJCRA], [and] is equally immune from suits for damages as it is for suits seeking injunctions and other equitable relief.” Brown v. State, 442 N.J. Super. at 426. While the BOE is a County entity, there is no question that its duties are of considerable magnitude and state-wide in scope.

The office of County SOE has repeatedly been held to be a state rather than a county office. See Meredith v. Mercer Cty. Bd. of Chosen Freeholders, 117 N.J. Super. 379, 385 (Law Div.1970)(Noting that the superintendent of elections is empowered, by statute to obtain the use of State Police troopers on election day to aid him ‘in the enforcement of the election laws of this state.’ N.J.S.A. 53:2—1). The status of the superintendent as a state officer also has been recognized in Keenan v. Essex Cty. Bd. of Chosen Freeholders, 101 N.J. Super. 495 (Law

Div.1968) (concluding that the Essex County Superintendent of Elections was “an officer of the State Government within the meaning of N.J.S.A. 52:17A-4(e), (g) and N.J.S.A. 52:17A-11 through 13”), aff’d, 106 N.J. Super. 312 (App. Div. 1969) and in McDonald v. Bd. of Chosen Freeholders, 99 N.J.L. 393 (E. & A.1924). See also County of Mercer v. Mercer County of Superintendents of Elections, 172 N.J. Super. 406, 408 (App. Div. 1980) (“The office of County Superintendent of Election has repeatedly been held to be a state rather than a county office.” (citing Meredith, 117 N.J. Super. at 385)). Moreover, the employees of the SOE's office have been generally regarded as state employees. MacPhail v. Hudson Cty. Bd. of Chosen Freeholders, 6 N.J. Super. 613 (Law Div.1950). While these cases review conduct of the SOE, given the commonality of purposes and functions of the SOE and the BOE, the holdings of the aforementioned cases are both analogous and applicable to the BOE.

As the BOE similarly enforces the election laws of this state, the BOE as an entity and its Commissioners in their official capacities, for purposes of enforcement of election laws, must be considered arms of the state government under the analysis utilized in Meredith, Keenan, and McDonald. Indeed, in the twelve counties that do not have a superintendent of elections, the duties attributed to that position are assumed by the board of elections. See N.J.S.A. 19:32-54. Thus, without question, the BOE, the SOE, and the individual Commissioners in their official capacities enforcing the state’s election laws (namely, the Moving Defendants here), are the “State”, are not persons for purposes of the NJCRA, and are immune from suit.

Even if the BOE is not considered a state entity for purposes of NJCRA and 1983, it can only be liable for the actions of its employees, if those employees acted pursuant to a policy or custom of the BOE. See Besler v. Bd. of Educ., 201 N.J. 544, 565 (“In Monell, the United States Supreme Court determined that, under 42 U.S.C. § 1983, a municipality or school board can be

held liable for acts committed by one of its employees or agents, pursuant to a government policy or custom, that violate the Constitution.” (citing Monell v. Dept. of Social Servs., 436 U.S. 658, 690-92 (1978))). However, even under a generous reading of the Complaint, the actions complained of by Plaintiffs do not rise to the level of any policy, custom, or practice by the BOE Commissioners. The facts demonstrate that what occurred during the early morning of the General Election was the result of necessary emergent steps to ensure that all ballots were counted. This was unanticipated and created a need for the on the spot decision making so that residents could vote. The events that transpired were not part of a policy or custom in violation of constitutional rights, but were the result of an emergent situation. In fact, outside of the brief period where the BOE evaluated real time information, made informed decisions, communicated solutions to all poll stations and solved the issue, Plaintiffs cannot cite to any other instance of ballots not being counted.

For these reasons, the Moving Defendants submit that they are immune from suit in their official capacities and Plaintiffs’ complaint should be dismissed.

## POINT II

### **THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE MOVING DEFENDANTS ARE IMMUNE FROM SUIT IN THEIR INDIVIDUAL CAPACITIES BASED ON THE DOCTRINE OF QUALIFIED IMMUNITY**

The doctrine of qualified immunity protects government officials such as the individual Moving Defendants from personal liability for discretionary actions taken in the course of their public responsibilities. Morillo v. Torres, 222 N.J. 104, 116 (2015) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Qualified immunity shields government officials from a suit for civil damages when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Fitzgerald, 457 U.S. at 818. “This exacting standard gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.” City & Cnty. of S.F. v. Sheehan, 575 U.S. 600, 611 (2015). See also N.J.S.A. 59:3-3 (“A public employee is not liable if he acts in good faith in the execution or enforcement of any law.”).

Qualified immunity “is an immunity from suit,” the right to avoid the rigors and costs of trial. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis omitted). Whether an official is covered by qualified immunity is a matter of law to be decided by a court, “preferably on a properly supported motion for summary judgment or dismissal.” Wildoner v. Borough of Ramsey, 162 N.J. 375, 387 (2000); see also Pearson v. Callahan, 555 U.S. 223, 232 (2009). “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” Pearson, 555 U.S. at 231.

The qualified immunity defense “extends to suits brought under both the NJCRA and Section 1983. The NJCRA has been interpreted by our Supreme Court to be analogous to § 1983.

Courts apply federal law's immunity doctrines to claims arising under the NJCRA.” Perez v. Zagami, LLC, 218 N.J. 202, 213-15 (2014); Gormley v. Wood-El, 218 N.J. 72, 113-15 (2014). This state's qualified immunity doctrine tracks the federal standard, shielding from liability all public officials except those who are “plainly incompetent or those who knowingly violate the law.” Id. at 118 (quoting Connor v. Powell, 162 N.J. 397, 409, cert. denied, Badgley v. Connor, 530 U.S. 1216 (2000)). Qualified immunity is broadly supported by objectively reasonable government agent conduct and only denied where the government agent is incompetent. See City & Cnty. Of S.F. v. Sheehan, 575 U.S. 600, 611 (2015); N.J.S.A. 59:3-3 (no liability where public employee acts in good faith).

Moreover, civil claims for a violation of the New Jersey Constitution may only be asserted by way of the NJCRA, which is interpreted analogously to Section 1983. Brown v. State, 230 N.J. at 97–98; Martin v. Unknown U.S. Marshals, 965 F. Supp. 2d 502, 548 (D.N.J. 2013). In Brown, our Supreme Court confirmed that the State and its officials acting in their official capacities are entitled to qualified immunity against NJCRA claims. 230 N.J. at 98. Accordingly, because the defendants are immune from suit under the NJCRA, plaintiff's claims against them are not and never will be viable.

To ascertain whether a governmental official are entitled to qualified immunity requires inquiries into whether: (1) the facts, “[t]aken in the light most favorable to the party asserting the injury[ ] ... show the officer's conduct violated a constitutional right”; and (2) that constitutional “right was clearly established” at the time that defendant acted. Saucier v. Katz, 533 U.S. 194, 201 (2001); see Schneider v. Simonini, 163 N.J. 336, 354–55, 749 A.2d 336 (2000) (“The ‘clearly established law’ requirement ... obligates a court to judge an official's conduct based on the state

of the law and facts that existed at the time of the alleged statutory or constitutional violation.” (citing Anderson v. Creighton, 483 U.S. 635, 639 (1987)).

In this case, the alleged violation of the NJCRA and the Constitution were the result of an unforeseen, emergent situation. That tabulators would read the paper ballots and identify them as invalid was unforeseen. The paper ballots from the impacted voters were placed into the slots of the bins on which the tabulators were mounted so that they could be counted. By Plaintiffs’ admission, the entire sequence took about 2 hours. All ballots were counted by the BOE. The aforementioned actions by BOE and the SOE establish a good faith effort to count all ballots while the issue was being investigated and resolved. Quick thinking and effective problem solving is in no way equivalent to “plainly incompetent” work of a public official. See e.g. Graham v. Connor, 490 U.S. 386, 407-414 (1989) (police wrongfully charged a citizen, on an arrest warrant, for assault with a deadly weapon, i.e., a plastic fork, at bingo game, based solely on the word of a mutual combatant). That there was an unforeseen circumstance in the voting process, does not rise to the level of a constitutional violation. In addition, there is no plainly incompetent conduct that would void the good faith qualified immunity of all public officials, at the BOE and SOE.

Furthermore, completely absent in the body of the Complaint is any specific allegation or details of how the individual commissioners acted in violation of Plaintiffs’ rights. All that is alleged is that the individuals named acted in their capacity as Commissioners for the purposes of the General Election for Mercer County. Nothing more is alleged, nor could it be. On that ground alone, claims against the individual Commissioners must be dismissed for lacking any basis in fact or law that they specifically violated Plaintiffs’ Constitutional rights.

### POINT III

#### THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT WAS UNTIMELY

The election laws of our State provide a procedural framework to challenge an election, an election contest. Specifically, under N.J.S.A. 19:29-1 to -14, individuals are informed of the ground on which an election may be contested and the manner in which the contest must proceed. Among those grounds, N.J.S.A. 19:29-1(e) provides for an election contest “[w]hen illegal votes have been received, or legal votes rejected at the polls sufficient to change the result.” N.J.S.A. 19:29-2 provides that “the contest shall be commenced by the filing of a petition” and “[t]he petition shall be verified by the oath of at least 2 of the petitioners, or by the candidate filing the same, as the case may be, which verification may be made on information and belief.”

Once those procedural hurdles are cleared, along with other requirements in Section 2, the critical point is when the election contest must be filed. The timing is answered by N.J.S.A. 19:29-3, which provides:

The petition contesting any nomination to public office, election to party office or position or the proposal of any proposition shall be filed not later than 12 days after the primary election.

The petition contesting any election to public office or approval or disapproval of any proposition shall be filed not later than 32 days after such election, unless the ground of action is discovered from the statements, deposit slips or vouchers filed under this Title, subsequent to such primary or other election, in which event such petition may be filed 12 or 32 days respectively after such statements, deposit slips or vouchers are filed.

Any petition of contest may be filed within 12 days after the result of any recount has been determined or announced.



Pursuant to the statute, Plaintiffs had a narrow window of 32 days after the election to file an election contest. That date was December 24, 2022. However, the Complaint was filed more than a year later (February 2024) and there is no indication or allegation that any election contest was filed. The Legislature did not express any intent to permit litigants to do an end-run around Title 19 to file a Complaint, instead of an election contest. The intent of the Legislature was to require a certain procedure for the challenging of actions taken in an election to allow for finality in the election results. To allow Plaintiffs to get around Title 19 will open the flood gates to any party to wait as long as they want to challenge the actions taken during an election and after said election is certified and complete. That would keep elections open ended for far too long, which is contrary to the procedure set by the Legislature.

For these reasons, the Moving Defendants submit that Plaintiffs failed to comply with N.J.S.A. 19:29-1, and their Complaint should be dismissed as untimely.

**CONCLUSION**

For all of the foregoing reasons, the Moving Defendants respectfully asserts that the Court should, respectfully, grant its R. 4:6-2(e) Motion to Dismiss and should dismiss the Complaint in its entirety with prejudice.

Dated: June 17, 2024

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