BETHANY MURRANKO, MARK MURRANKO, MICHAEL MCKITISH, JOANNE MCKITISH, JEREMY WHALEY, DAVID MATTICOLI, JOHN MUKA, LISA WERDEL, PATRICIA JOHNSON, and GRACE ASAGRA STANLEY, Plaintiffs, v. MERCER COUNTY BOARD OF ELECTIONS, MARY CORRIGAN, MARTIN J. JENNINGS, JILL MOYER, CHARGES FARINA, NATHANIEL WALKER, SUPERINTENDENT OF ELECTIONS WALKER WORTHY, and PAULA SOLLAMI COVELLO, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MERCER COUNTY DOCKET NO. MER-L-324-24 Civil Action

REPLY BRIEF IN SUPPORT OF THE MOVING DEFENDANTS' MOTION TO DISMISS THE COMPLAINT WITH PREJUDICE, FOR FAILURE TO STATE A CLAIM, PURSAUNT TO RULE 4:6-2(E)

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PRELIMINARY STATEMENT

Dismissal of Plaintiffs' Complaint under Rule 4:6-2(e) is clearly appropriate. Neither the Mercer County Board of Elections ("BOE"), the Superintendent of Elections ("SOE"), nor the individually named Commissioners are liable to Plaintiffs.[1] The Moving Defendants performed their duties, followed applicable law, and counted all ballots. Plaintiffs' decision to sue them, particularly the Commissioners in their personal capacity, remains without merit.

Addressing Plaintiffs' evolving theories of liability in seriatim, dismissal of the Complaint is inevitable. Plaintiffs concede, as they must, that the doctrines of sovereign immunity and qualified immunity are applicable in this case and shield the Moving Defendants from liability for an award of damages. Under the doctrine of sovereign immunity, the Moving Defendants are shielded from liability because they are arms of the State and are not "persons" subject to suit under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2 ("NJCRA") and its federal companion, the Civil Rights Act, 42 U.S.C. § 1983. The doctrine of qualified immunity operates similarly. That doctrine shields the Moving Defendants from civil liability for damages because they were performing official and discretionary functions as part of the 2022 Mercer County General Election. Their work for Mercer County did not violate statutory or constitutional rights of any Mercer County resident.

Plaintiffs use their opposition to abandon their original theories of the case, in favor of a new focus. After digesting the strength of the Moving Defendants' sovereign and qualified immunity defenses, Plaintiffs respond by narrowing their prayers for relief to

[1] 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).

prospective/injunctive relief. However, the narrowing of the prayers of relief cannot shield Plaintiffs from the facts: the tabulators did not fail, the voting records are accurate, the District Board workers properly performed all duties, and all ballots were counted. No factual or legal basis exist for this court to grant the extraordinary relief requested by Plaintiffs, particularly the appointment of an independent monitor for the 2024 or 2025 primary or general elections to be held Mercer County.

Finally, Plaintiffs' attempt to hold the Commissioners and the SOE personally liable lacks merit. The Commissioners and the SOE did not adopt or put into motion any policy or practice under color of law to disenfranchise voters. Rather, the Commissioners and the SOE, when presented with the exigent circumstance concerning the ballots not being scanned by the tabulators, developed a fair solution in less than two hours. The goal was to collect and count all ballots. They were successful in that venture and the final tabulation of the ballots was certified timely.

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

REPLY STATEMENT OF FACTS

A. The Scope of the Facts

Absent from Plaintiffs' Statement of Facts in their Opposition Brief is any discussion directed to how and why the 2022 General Election Day issue arose. See Plaintiffs' Combined Brief In Opposition to All Defendants' Motion To Dismiss ("Opposition Brief"), at p. 2. Plaintiffs' opposition brief avoids those particular facts, opting instead to offer general allegations of facts limited to support by paragraphs 243 to 265 of the Complaint, with little relevance to the core of this case. Ibid. In order to fill in the gaps in Plaintiffs' recitation of the facts, additional pertinent facts are set forth below:

1. The 2022 General Election Investigation

After the 2022 General Election, the Mercer County Prosecutor's Office ("Prosecutor's Office") commenced an investigation to determine how and why the Election Day issue arose. Ex. 2.[2] The Prosecutor's Office's investigation included a presentation to the BOE, together with explanations by Dominion Voting Systems ("Dominion") and Royal Printing. Ex. 2.

In connection with the 2022 General Election, the Prosecutor's Office explained to the BOE that based on its investigation, Royal Printing creates the design of the ballots incorporating the content from the Mercer County Clerk ("County Clerk"), which also include assigning unique ballot IDs that represent each town and election district electronic and timing marks which enable Dominion's tabulators to read the ballots. Id., T11-3 to 7 and T24-19 to T25-3. Dominion then creates a program to enable the tabulators to scan and read the ballots. Id., at T11-8 to 14. Next, Royal Printing will receive final approval from the County Clerk to proceed with the printing of

[2] Reference to Exhibits cited in this Reply Brief as "Ex__" are based on the exhibits attached to the Certification of G. Glennon Troublefield, Esq., dated June 17, 2024 ("Troublefield Cert."), which was previously filed in support of the Moving Defendants' motion to dismiss. Ex. 2 is a copy of the transcript, which was attached to the Complaint as Exhibit D.

the ballots. Id. at T11-24 to 12-10. After the final approval is received, Royal Printing prints the ballots to be used during the election and Dominion programs the tabulators to read the final approved ballots. See Ex. 2, T10-22 to 11-3.

2. The Issue Experienced that Occurred during the 2022 General Election

The Prosecutor's Office and Dominion agreed that the issue "was entirely a process error that relates to individual ballot ID as a result of a change to provisional ballots". Id., at T23-16 to 25. The sequence of the events appears to have arose as follows[3]:

- The County Clerk worked with Royal Printing to design the layout of the ballots for each town and district within Mercer County.
- Dominion's staff worked with Royal Printing to verify the timing marks, the ballot IDs and the target areas to be scanned by the tabulators.
- Royal Printing assigned unique ballot IDs that represent each election district, which tells the tabulators where to assign the votes cast on the ballot.
- On or about October 5, 2022, at 11:33 a.m., Dominion received files directed to the ballot IDs and then created an Election Day database directed to individual files for vote by mail ballots, provisional ballots, Election Day ballots, and early voting ballots. There was a total of 974 individual ballot IDs.
- There are 243 voting districts in Mercer County.
- On October 5, 2022, a decision was made not to produce provisional ballots based by town and district, but rather just by town. This reduced the number of provisional ballot style IDs by 225 from 243 to 18.
- Dominion received from Royal Printing an updated set of files containing the changes to numbering of the provisional ballot IDs, which had been reduced by 225, and then updated the Election Day

[3] For purposes of this motion to dismiss under R. 4:6-2(e), the Moving Defendants have summarized the facts based on the allegations in the Complaint, which Plaintiffs claim are supported by the documents attached to the Complaint. Plaintiffs rely on the transcript of the hearing before the BOE.

database with new ballot IDs for the provisional ballots only. The updated database was used to program the tabulators to be used during the election.

- On Election Day, the ballots at the polling sites were run through the tabulators that were programmed for the ballot styles before the changes.

- The tabulators did not recognize the ballot IDs that had been changed, and thus, did not recognize the ballots.

[Id., at T24-1 to 26-9]

Royal Printing explained to the BOE that based on the change to the individual provisional ballot styles, instead of 243 provisional ballot styles, there were only going to be 18 provisional ballot styles. Id., at T34-10 to 35-20 and T37-15 to 18.

As a result, Royal Printing recoded/renumbered the ballots, sent the recoded information to Dominion. Id., T25-23 to T26-4. Dominion then reprogramed the tabulators based on the provisional ballot IDs being changed, but in fact the Election Day and early voting ballot IDs had also changed. Id., T25-23 to 26-4. As a result, Dominion staff updated the database with the new ballot ID numbers for the provisional ballots only. Id., T26-2 to 4 and T30-21 to T31-3.

B. Plaintiffs' New Focus of their Complaint

Plaintiffs no longer seek to recover damages from the Moving Defendants. Plaintiffs have also abandoned their attempt to challenge how the ballots were counted and the mechanism of voting in the 2022 General Election under the procedures articulated by Title 19. Opposition Brief, at pp. 3-4.

On page 3 of their Opposition Brief, Plaintiffs sharpen their pencil to rewrite the focus of the Complaint. Opposition Brief, at p. 3. Plaintiffs write that they "are seeking prospective relief to bring the Moving Defendants' actions and policies in line with what Title 19 requires to avoid future deprivations of the right to vote and to rectify notations in affected voters' records so that it

does not appear that they tried to vote two times." Ibid. Plaintiffs request the court order the Moving Defendants to: (1) undergo training concerning Title 19; (2) train District Board workers on how to count paper ballots in accordance with Title 19; (3) train District Board workers to properly perform all of their other duties under Title 19; (4) reconcile the ballots from the 2022 by ballot type; (5) correct the improper designation of "voted by machine" for voters who did not, and could have, voted by machine in the 2022 general election; (6) publish a public reconciliation of all ballots types for the 2023, 2024, and 2025 primary and general election; (7) identify the cause of errors in the electronic polling books and adopt measures to prevent such errors in the future; (8) develop a plan in the event of machine failure and train all District Board workers accordingly; and (9) appoint an independent monitor for the 2024 election to ensure compliance with Title 19.

Plaintiffs Complaint, as amended by the foregoing changes in their Opposition Brief, still fail to state a claim under R. 4:6-2(e).

ARGUMENT

POINT I

THE SCOPE OF PLAINTIFFS' CLAIMS AGAINST THE MOVING DEFENDANTS

Abandoning their claims for monetary damages, Plaintiffs argue that 11th Amendment sovereign immunity does not apply to their claims against the Moving Defendants for prospective injunctive relief nor to the Commissioners sued in their personal capacity. Opposition Brief, at pp 3-4. The Moving Defendants are not asserting defenses that are reserved for cases pending in federal court, but have raised defenses applicable in State court.

Plaintiffs' claims are separated into two sets: allegations against the Moving Defendants in their official capacity and allegations against the Moving Defendants in their personal capacity. The official capacity claims, against the BOE, SOE and the Commissioners in their official capacity, are to be treated as a suit against the entities themselves, i.e., the BOE and the SOE, not against the individual officials. Kentucky v. Graham, 473 U.S. 159, 165-166 (1985). In an official capacity suit, such as this one, Plaintiffs must demonstrate that the entities' policy or custom played a part in the violation of federal law. 473 U.S. at 166. The viability of Plaintiffs official capacity claims remain subject to several immunity defenses, such as sovereign immunity. Here, Plaintiffs' have alleged no set of facts to suggest a "policy or custom" deployed in Mercer County; what occurred in Mercer County was unanticipated and called for a quick resolution which is far from a policy or custom.

For the personal capacity claims, Plaintiffs seek to impose personal liability on the Commissioners and the SOE for actions they allegedly took under color of state law, though no such action of that type was taken. When it comes to defenses to liability, an official in a personal capacity action may, depending on his/her position, be able to assert personal immunity defenses,

such as objectively reasonable reliance on existing law, qualified immunity, and absolute immunity. Kentucky v. Graham, 473 U.S. at 166-167.

As detailed below, both sets of Plaintiffs' claims should be dismissed under R. 4:6-2(e), for failure to state a claim because sovereign and qualified immunity bars their damages claims; the BOE and the SOE are not "persons" under Section 1983 and the NJCRA; and there is no basis to grant equitable relief in favor of Plaintiffs against the Moving Defendants

POINT II

THIS COURT SHOULD ENTER AN ORDER DISMISSING, WITH PREJUDICE, ALL OF PLAINTIFFS' MONETARY CLAIMS AGAINST THE MOVING DEFENDANTS

Based on their Opposition Brief, Plaintiffs acknowledge that their claims seeking monetary claims for relief against the BOE, the SOE and the Commissioners are barred by the doctrines of sovereign immunity and qualified immunity. See Opposition Brief, at pp. 3-4 and p. 11. Thus, Plaintiffs have abandoned these particular claims, opting instead to focus on seeking prospective/injunctive relieve. Ibid.

Therefore, this court should enter an order dismissing, with prejudice, all of Plaintiffs' claims against Defendants seeking monetary recovery.

POINT III

THE BOE AND THE SOE ARE NOT "PERSONS" WITHIN THE MEANING OF § 1983 AND THE NJCRA

The BOE, the SOE and the Commissioners in their official capacity are all arms of the State in an official capacity suit, and thus are not persons under § 1983. Although Plaintiffs allege that the Office of the Superintendent of Elections is not named in the Complaint, their filing speaks otherwise. The caption of the Complaint identifies "Nathaniel Walker, Superintendent of Elections Walker Worthy." Notwithstanding Plaintiffs drafting strategy, the import is clear: The SOE was sued in this their official capacity as being the Superintendent of Elections in Mercer County.

The BOE and the SOE are not "persons" within the NJCRA and § 1983. Contrary to Plaintiffs' arguments on page 7 of their brief, this case does not present the question of analyzing the conduct of "local municipal government." To the contrary, in this action, based on Plaintiffs' allegations in the Complaint, the conduct in question focuses on how the BOE, the SOE, and the Commissioners counted the ballots cast during the 2022 General Election. The 2022 General Election concerned individuals running for municipal, State and Federal Offices. Clearly, the BOE and the Commissions are charged with overseeing the 2022 General Election.

Moreover, Plaintiffs' arguments on page 7 of their opposition brief that the SOE is not an "arm" of the State is unsupported. Opposition Brief, at pp. 7 to 8. The question as to whether or not the SOE is an arm of the State was answered more than fifty (50) years ago in Keenan v. Bd. of Chosen Freeholders of Essex Cty., 106 N.J. Super. 312, 315 (App. Div. 1969). There, the court clearly stated that "the status of the superintendent [of elections] as a state officer has been recognized" since 1948. Id., at 315 (citing Allan v. Durand, 137 N.L. Law 30, 33 (Sup. Ct. 1948)). Plaintiffs cannot dispute this controlling authority.

As such, Plaintiffs' arguments must be rejected.

Plaintiffs' arguments on page 8 of their opposition brief are also wide of the mark. Any suggestion that the BOE is a local government unit and not an arm of the state is unsupported. The BOE is an entity created by statute, consists of resident voters of Mercer County along with 2 members of the two political parties that garnered the most and second most votes in the last general assembly election, and its Commissioners are nominated by the local political parties, pursuant to Title 19. Likewise, the BOE, with the SOE, enforces the election laws of this state under Title 19. That is precisely why the BOE is an arm of the State, as concluded by Meredith and Keenan, supra.

Plaintiffs attempt to shield themselves from the inevitable conclusion that the BOE and the SOE are arms of the state by inviting this court to follow the thinking of Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655, 659 (3d Cir. 1989). Plaintiffs' reliance on Fitchik is misplaced. Fitchik concerned whether or not New Jersey Transit Rail Operations, Inc. ("NJRO"), which is a wholly owned subsidiary of New Jersey Transit Corporation, is the alter ego of New Jersey. Fitchik is distinguishable because NJTRO was found not to be an arm of the state based on prior cases in New Jersey which concluded that New Jersey Transit is a public entity, as opposed to being a state agency.

Here, the BOE and the SOE are entities created by statute charged with administering the elections across all municipalities within Mercer County on behalf of the State. Based on case law such as Meredith and Keenan, coupled with the fact that the BOE and the SOE are not separately incorporated, and perform the function of overseeing elections within Mercer County on behalf of the State, they are clearly arms of the State. Any suggestion to the contrary is unsupported.

POINT IV

QUALIFIED IMMUNITY SHIELDS THE COMMISSIONERS AND THE SOE FROM LIABILITY TO PLAINTIFFS

Qualified immunity shields government officials from suit for civil damages. The Complaint, as filed, lacks any facts to suggest that each of the individual Commissioners engaged in conduct that sought to violate any if the voting rights of any of the Plaintiffs in a manner of which a reasonable person would have known. The Commissioners acted responsibly and sought to ensure that all ballots were counted constituent with Title 19. Plaintiffs' suggestion that any of the Commissioners operated in a manner to disenfranchise them, is unsupported. There remains a gap in any facts to establish that any of the Commissioners or the SOEs engaged in conduct that targeted or imposed a policy to violate any of the voting rights of the named Plaintiffs, let alone any other resident within Mercer County. Those facts do not exist and certainly are not contained in the Complaint. The absence of those critical facts equates to more than a sound basis to dismiss

Plaintiffs' claims relief against the Commissioners and the SOE should be barred by the doctrine of qualified immunity.

POINT V

THIS COURT SHOULD DISMISS PLAINTIFFS' PROSPECTIVE/INJUNCTIVE RELIEF CLAIMS AGAINST THE MOVING DEFENDANTS FOR FAILURE TO STATE A CLAIM, UNDER 4:6-(9E)

Starting on page 11 of Plaintiffs' brief, Plaintiffs argue why this court should grant to them prospective/injunctive relief. Opposition Brief, at p. 11. However, Plaintiffs ignores the facts directed to what caused the issues on election-day (and thus the harm they allegedly suffered) in favor of conclusory statements about their right to vote. Id., at 12. As a remedy for the alleged violations of their right to vote, of which no violations occurred, Plaintiffs argue that this court should enter a series of declaratory and equitable relief against the Moving Defendants, who played no part in the issues experienced during the 2022 General Election as investigated by the Prosecutor's Office. Plaintiffs' argument to avoid dismissal of the Complaint should be rejected.

Plaintiffs argue that there is no evidence as to what happened to how voters were instructed to vote and how the ballots were counted. Opposition Brief, at p. 13. That is not true. Based on Exhibit D attached to the Complaint, Dominion explained to the BOE during the formal hearing that after it was determined why the ballots were not recognized by the tabulators, Dominion and Royal Printing worked together to update the central tabulators so that they would be able to read the Election Day ballots at the BOE's offices. Ex. 2, at T26-10 to 15. After the central tabulators were reprogrammed, by roughly 4:00 p.m. the next day, about 94% of the ballots were counted. Ibid. The BOE timely reported to the State the number of ballots counted and rejected for the 2022 General Election, as evidenced by the reports attached as Exhibit R to the Complaint. Exs. 4 and 5.

With the tabulation of the ballots timely reported, it is difficult to imagine any ground to order prospective/injunctive relief against the Moving Defendants. The investigation by the Prosecutors' Office, together with the explanations provided to the BOE by Dominion and Royal

Printing, confirmed that the issues experience during Election Day for the 2022 General Election occurred due to decision made in advance of Election Day. As reported to the BOE, the issues experienced during the election comes down to what the Prosecutor's Office called a "communication error" on the part of Dominion and Royal Printing as a result of a change to the provisional ballots. Ex. 2, T11-19 to 23; T16-10 to 11; and T23-16 to 25.

Hence, there are no facts alleged in the Complaint to attach that error to any conduct by the Moving Defendants. Where, as here, there is no harm present, equitable relief should not be granted. This case does not call for any wholesale, or sweeping changes to voting in Mercer County, based on what occurred almost two years ago. The issues that were encountered during the 2022 General Election occurred due to a communication or process error, when the numbering of the provisional ballot IDs changed. That communications error impacted the voting on Election Day of the 2022 General Election. As Royal Printing explained to the BOE, "the early voting ballots worked okay. There wasn't an issue with those because the early voting was conducted with the ballot marking devices." Ex. 2, T30-21 to 31-6. The early voting ballots were scanned without an issue because the tabulators were set up by Dominion using the original database. Id., T31-4 to 8; T31-10 to 13; T31-25 to T32-5.

Based on the foregoing, there is no basis to grant any prospective and/or injunctive relief against the Moving Defendants, as the cause of the issues experienced during the 2022 General Election were caused by third parties, not the Moving Defendants. The Moving Defendants were not part of the decision to renumber the provisional ballot styles. Dominion worked with Royal Printing to re-code all of the tabulators. The tabulators did not fail, but worked as they should have. Ex. 2, T14-9 to 16. The ballots that remained to be scanned were scanned at the BOE's offices and all votes were counted on time. Id., T22-4 to 25.

For these reasons, where any harm complained of did not occur at the hands of the Moving Defendants, any request for this court to order prospective/injunctive relief against them is unsupported.

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: August 12, 2024

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