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April 11, 2024

Honorable John E. Harrington, J.S.C.
Burlington County Administration Building
49 Rancocas Road
Mount Holly, New Jersey 08060

Re: Maia Cusick, et al v. Sollami-Covello
Docket No. BUR-L-684-24

Dear Judge Harrington:

This office represents Defendants Joseph Gerolo, in his official capacity as Atlantic County Clerk; Rita M. Rothberg, in her official capacity as Cape May County Clerk; Celeste M. Riley, in her official capacity as Cumberland County Clerk; James N. Hogan, in his official capacity as Gloucester County Clerk; Mary H. Melfi, in her official capacity as Hunterdon County Clerk; and, Dale Cross, in his official capacity of Salem County Clerk.

Precis

This application before the Court is neither written, ready, ripe, nor right for hearing and disposition.

The Defendant New Jersy County Clerks are not statutory officers but serve and derive their powers as Constitutional Officers, under the New Jersey Constitution, and serve for terms of five years. In their administration of the election laws, a County Clerk serves and functions as an umpire and not a player in the political process.

Long before the "day of the election" election officials and specifically the actions of the Clerks are to conduct, coordinate, communicate, and collaborate in actions and activities which become a confluence culminating in the election. Election officials and addressing specifically the

County Clerks address and receive nominating petitions, bracketing requests, ballot slogan designations, lists of party county committee persons, drawing for party and candidate ballot positions. Simultaneously they design, designate, print, and distribute the "ballots" for use in Vote By Mail, Emergency ballots, Sample ballots, etc. The Clerks solicit specific types and sizes of paper for the machines and ballots, and. engage specialized printers to print the paper ballots. These are but some but not all actions in which the Clerk engages for an election.

The most demanding and detailed actions the Clerk is charged with the layout, design, candidate placement, public questions placement, candidate lines and bracketing to fit into the face and limited ballot geography of the various voting machines.

As we have previously advised this Court and parties in our letter of April 10, 2024, at this late date in the process, any actions sought by the Plaintiffs through this Court or orders entered will have cascading and rippling effects on the election, officials, candidates and voters. Thus, raise concerns about timing of actions, disruption of the ongoing election process and ultimately effect and impact on the voters.

It is the unrepresented and interested party "The Voters" for whom the ballot is offered and laid out to assist the voters first and foremost, and not afford advantage or preference to candidates or political parties. New Jersey Courts have repeatedly identified the legislative policy in ballot design, layout and candidate bracketing and affiliation is centered on the voter: "…to permit voters to record their will, the ballot being so arranged that all voters may find their candidates with the least difficulty the total content of the ballot will permit." Farrington v. Falcey, 96 N.J. Super. 409, 414 (App. Div. 1967). Thus this Court here ultimately must balance the relief sought against the rights and protections afforded the voters and potential confusion, injury and disenfranchisement that granting this relief would place in motion at this late date by the grant of injunctive relief.

POINT I RELIEF CANNOT BE GRANTED SINCE THE PLAINTIFFS FAILED TO NAME ARE ALL THE NECESSARY AND INDISPENSABLE PARTIES TO BE AWARE OF THIS PROCEEDING AND NAMED TO PROTECT THEIR INTERESTS

Plaintiffs have arrived very late at the courtroom door to seek this relief. Moreover, neither Plaintiffs nor their counsel in this long-delayed application have still not served, named, brought in, or noticed, all those persons and entities who have an interest effected and who have a right to be heard on this relief. Whether the election officials, political parties, other similarly situated

candidates for this office. candidates up and down the ballot, or voter interest groups Plaintiffs have but singularly and solely sought their own political concerns and benefits.

Plaintiffs and their counsel never reached out to the Defendant Clerks for communication or discussion on this issue. Doubtfully it would appear they did not engage with any other candidate, persons, or political entities, More disturbing is that neither Plaintiffs nor their counsel offer any excuse or basis for their long delay and dalliance in bringing this application.

The long applied judicial maxim "Vigilantibus Et Non Dormientibus Jura Subveniunt Definition" (Equity aids the vigilant and not those who slumber on their rights), has been adopted and embodied into the election cases and should bar relief here. Apparently unheard of by Plaintiffs and their counsel or just openly ignored.

Such an untimely application bars relief under the doctrine of laches. Equity aids the vigilant and does not reward those who slumber on their rights. In Fox v. Millman, 210 N.J. 401, 417–19, (2012), the court well described the doctrine and application of laches:

> As we have explained, laches is "invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party." Knorr, supra, 178 N.J. at 180–81, 836 discretion of the trial court." Mancini, supra, 179 N.J. at 436.

As with the delay here and under this circumstance, their slumber impacts the ongoing election, candidates, political parties and voters with unanticipated and yet unknown costs to the county governments which impacts the real unrepresented party, the voters and taxpayers.

But where are the unnamed yet needed indispensable and interested parties? Plaintiffs do not want them before this court. This is not a case a mere civil litigation, contracts, or torts. This is a case which touches upon and impacts our democratic process and the ability of the voters to "confer the consent of the governed"

Rule 4:28-1. Joinder of Persons Needed for Just Adjudication deals with the major defect in Plaintiffs' application: those persons and entities whose rights are affected and are not in this Court. A party is indispensable to a lawsuit if that party "claims an interest in the subject of the action and is so situated that the disposition of the action in the [party's] absence may . . . (i) as a practical matter impair or impede the [party's] ability to protect that interest . . . ." R. 4:28-1(a).

Whether a party is indispensable to a proceeding depends upon the circumstances of the particular case. Jennings v. M & M Transp. Co., 104 N.J. Super. 265, 272 (Ch. Div. 1969). As a general rule, "a party is not truly indispensable unless he has an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest." Id. (citing DuMont Labs, Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959)

The party-joinder rule is concerned with the completeness, soundness, and finality of the ultimate determination of a legal controversy. It has long been recognized that joinder is designed "to make perfectly certain that no injustice is done, either to the parties before it, or to others, which might otherwise be grounded upon a partial view only of the real merits." J. Story, Commentaries on Equity Proceedings 74 (19th ed. 1892), quoted in Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 17-20 (1989).

Ultimately, in order to determine whether a party is indispensable to a case, a court must examine "the circumstances of the particular case," including whether that party has an interest inevitably involved in the subject matter before the court" and where "and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest." Allen B. DuMont Laboratories, Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959).

Whether an oversight, ignorance, haste, or slick practice, everyone knows who the needed, necessary and proper parties are but they are still not before the Court, even after the Court warned Plaintiffs' counsel.

POINT II JUDICIAL INTERVENTION AND DISRUPTION OF THE ONGOING ELECTORAL PROCESS IS TO BE AVOIDED CLOSE TO AN ELECTION AND INVOCATION OF A JUDICIAL RELUCTANCE THEORY BELYING JUDICIAL INTERVENTION

A. Federal "Purcell" Principle

The focus of the law in elections and this Court should be "[P]reserving the integrity" of elections is "indisputably . . . a compelling interest." Eu v. San Francisco Cty. Dem. Cent. Comm., 489 U.S. 214, 231 (1989). Maintaining "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." Purcell v. Gonzalez, 549 U.S. 1, 4

(2006).

Judicial intervention into this election process so close to and the closing days of the election is not encouraged and is eschewed. This is ensured by courts denying disruptive and untimely applications for judicial intervention into an election process which is well underway and long known to the delaying and dallying Plaintiffs and their counsel.

As enunciated by the U.S. Supreme Court, the "Purcell Principle" holds that courts should not change election rules during the period of time just prior to an election because doing so could confuse voters and create problems for officials administering the election. The principle takes its name from Purcell v. Gonzalez, in which the Supreme Court reversed an October 2006 decision of the U.S. Court of Appeals for the 9th Circuit blocking an Arizona voter ID law during that year's midterm election, seeking to protect the public and their expectations enshrined in what they have done or been told previously. ("Court orders affecting elections ... can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.") Purcell, supra. pp. 4-5 The dangers and disruption of judicial intervention have been well identified by the Court.

Thereafter the U.S. Supreme Court in Republican National Committee, et al. v. Democratic National Committee, et al. , 140 S. Ct. 1205, 1207 (2020)) re-asserted and re-affirmed the "Purcell Principle." The "Purcell Principle" which looks to protect the rights of the voter, where there is held to be a presumption against last-minute changes to election procedures. The issue was that one day prior to Wisconsin's April primary election, the Supreme Court blocked a district court ruling issued five days before the election that extended the deadline for submitting absentee ballots. The district court based its decision on an immense backlog of absentee ballot requests due to concerns about voting in person during the coronavirus pandemic. Local election officials were unable to process the unprecedented volume of requests that were timely under state law. Citing Purcell, the Supreme Court found that the district court should not have changed the election rules in the specific way that it did so close to the election. see also Democratic Nat'l Comm. v. Wis. State Legislature, 141 S. Ct. 28, 28 (2020) (mem.) (Roberts, C.J., concurring) (staying judicial intervention "in the thick of election season").

In a recent U.S. Supreme Court case , at 142 S.Ct. 879 (2022) Merrill, Alabama Secretary of State, et al. v Evan Milligan, et al., the Court delved deeper into the "Purcell Doctrine" and the

reasons for avoiding judicial intervention in the process and close to the date of the election. (see also U.S. Supreme Court Justice Kavanaugh in Allen v. Milligan, 599 U. S. 1, 4 (2023))

> That principle—known as the Purcell principle—reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others. P. 880

As held in Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006) ("Court orders affecting elections ... can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."); see also Democratic Nat'l Comm. v. Wis. State Legislature, No. 20A66, 2020 WL 6275871, at *3 (U.S. Oct. 26, 2020) Thus granting relief in this matter would be a prescription for chaos for candidates, campaign organizations, independent groups, political parties, and voters, among others. (see comments of Judge Wolfson in Mazo v. Way, 551 F. Supp. 3d 478, 498 n.6 (D.N.J. 2021)

And as found by our federal court in this district in Democratic-Republican Org. of N.J. v. Guadagno, 900 F. Supp. 2d 447, 461 n.8 (D.N.J. 2012) "As in many elections related cases, timing is critical.... At this late state in the election process, any injunctive remedy ordered by this Court would dramatically upset ongoing ballot printing and distribution." (see also Tex. Democratic Party v. Abbott, 961 F.3d 389 (5th Cir. 2020); Public Interest Legal Foundation v. Boockvar, 495 F. Supp. 3d. 354, 356 (M.D. Pa. 2020) denying relief sought two- and one-half weeks before a national election "…because Plaintiff waited until the eleventh hour to file this suit."

Similarly a case from our Third Circuit which should be the "pole star" guidance for the Count in this matter for this late and delayed application. The Honorable Gerald John Pappert, USDC E.D. Pa characterized a similar disruptive judicial application for last minute changes to the election process. As found by Judge Pappert, "Here the Plaintiff elected to file its suit on the eve of the national election. There was no need for this judicial fire drill and Plaintiffs offer no reasonable explanation or justification for the harried process they created." Republican Party of Pa. v. Cortes , 218 F.Supp. 3d 396, 405 (E.D. Pa. 2016)p. 405.

B. New Jersey Judicial Reluctance

As the late Judge Martin Haines, A.C.J.C. in this vicinage held a Judge of the Superior Court in election ,matters are circumscribed in the actions he or she may take, the procedures, and the relief that may be given. Courts are always mindful of the fact that a Judge is thus "involved in political issues." In re 1984 Maple Shade General Election, 203 N.J. Super. 563 (Law Div. 1985).

Our New Jersey Courts two decades ago and well before the federal "Purcell" principle. found that when the Courts are asked to intervene and thus perceived to be involved, as here, in an intra-party dispute there is but a narrow gate for such actions. In Batko v. Sayreville Democratic Org., 373 N.J. Super. 93, 100 (App. Div. 2004), the Court acknowledged the judicial reluctance theory long embraced by our courts in involvement of political matters:

> We begin our analysis by emphasizing that there is no fundamental right to run for office or to be a party's candidate in an election. See, e.g., McCann v. Clerk of City of Jersey City, 167 N.J. 311, 325, 771 A.2d 1123 (2001). In the absence of a violation of a controlling statute or the infringement of a clear legal right, courts have historically been reluctant to interfere in intra-party controversies. Deamer v. Jones, 42 N.J. 516, 520, 201 A.2d 712 (1964). Accord O'Neill v. Lerner, 154 N.J. Super. 317, 325, 381 A.2d 383 (App. Div. 1977), certif. denied, 75 N.J. 610, 384 A.2d 840 (1978).

CONCLUSION

This application is procedurally defective, not compliant with the Rules of Court, long delayed, late, and lacks an appropriate factual basis to grant relief, and should be dismissed.

We would ask that if the Court considers this relief, Plaintiffs should step forward and offer to pay all those costs and if not the Court should condition relief upon Plaintiffs posting a bond and paying for all the costs of re-printing ballots, their mailing, re-programing of the voting machines and ballot scanners, etc. See State Democratic Party v. Samson, 175 N.J. 178,196, 814 A.2d 1028 (N.J. 2002) (There the Supreme Court conditioned relief for replacement of the withdrawing candidate Toricelli and a replacement by having the New Jersey State Democratic Party to post a bond to cover and pay all costs involved.)

We have noticed Plaintiffs' Counsel that we will seek an award of counsel fees and costs against his clients and himself as their attorney under N.J.S.A. 2A:15–59.1 as Frivolous Litigation unless these claims are voluntarily and immediately dismissed since it engendered a needless and costly expenditure of precious taxpayer monies. [1]

John M. Carbone

CC: Defendant County Clerk Clients
All Counsel of record

[1] In Savona v. DiGiorgio Corp., 360 N.J. Super. 55, 63 (App. Div. 2003. if the client "was genuinely unaware or uninformed of the frivolous nature of [his or] her claim and it was being pursued by [his or] her lawyer, liability may be posited under Rule 1:4-8 against [his or] her attorney." See also LoBiondo v. Schwartz, 199 N.J. 62, 98 (2009), Rule 1:4-8 was "designed to ensure that attorneys do not initiate or pursue litigation that is frivolous."