JOSHUA BERRY, TOM CRONE, ELIZABETH HOLZMAN, DON CHOYCE, and ROBBIE TRAYLOR ("COMMITTEE OF PETITIONERS"),	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-- Motion No.
Plaintiffs/Appellants,	Action in Lieu of Prerogative Writ
-vs.-	
ROSEMARY DiJOSIE, in her capacity as the Township Clerk of the Township of Gloucester,	Sat Below: Louis R. Meloni, J.S.C.
Defendant/Respondent,	Docket No. L-1876-12
JOANN STALLWORTH-HOLMES, ROBERT HOLMES, CRYSTAL COOPER, RAYMOND LOWE, and ANN MARIE LASH,	
Intervenors/Third Party Complainants/Respondents.	

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR EMERGENT RELIEF AND APPEAL

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PRELIMINARY STATEMENT

This is a case of municipal abuse of power in the context of voters' initiative rights under the Faulkner Act. It presents a clear picture of a group of persons, who control key positions in Gloucester Township, to thwart the efforts of a highly motivated group of community activists, South Jersey Citizens ("SJC") to end and/or limit the practice of "pay to play" in the Township, a phrase that refers to the practice of awarding government contracts to campaign donors.

At this juncture, Gloucester's Township Clerk, Rosemary DiJosie, (the "Clerk" or "DiJosie"), on the advice of the Township's counsel, and now with the approval of the trial judge, has deprived these citizens of one of their most valued civil rights: the ability to petition government for redress of their grievances through the initiative process. By rejecting SJC's "Public Contracting Reform Ordinance Petition" (Pa18-Pa20) on erroneous legal grounds, DiJosie has violated Plaintiffs' statutory rights to a public vote on their proposed ordinance. The merits of SJC's anti-"pay to play" ordinance is not at issue; rather the issue is the right of the voters of Gloucester Township to have a say on these matters at the ballot box.

Ten years ago, in New Jersey Democratic Party, Inc. v. Sampson, 175 N.J. 178, 190 (2002), the New Jersey Supreme Court reaffirmed the principle that this State's election law "will be

interpreted to allow the greatest scope for public participation in the electoral process . . . and most importantly to allow the voters a choice on Election Day." More recently, the Supreme Court reiterated this enforcement principle in the context of citizens' initiative and referendum rights. In re Referendum Petition to Repeal Ordinance 04-75, 192 N.J. 446, 459 (2007)(announcing that "the referendum statute should be liberally construed . . . to promote the `beneficial effect' of voter participation."). The Clerk's conduct, which was found to be "reasonable" by the trial judge, ignores this principle.

Specifically, DiJosie rejected over 500 valid signatures by ignoring the language and intent of the Legislature, and by misconstruing the law regarding the qualifications of persons serving as petition circulators and the obligation of a notary public. The trial court reversed her decision to reject 299 signatures because they appeared on petitions that were circulated by persons "other than a member of the Committee of Petitioners." (Pa214). However, it affirmed her rejection of 205 signatures because they appeared on "petitions associated with circulator affidavits that were not corrected pursuant to the procedure she prescribed." Id.

The record indicates that DiJosie instructed Plaintiffs to "have the notary contact my office . . . where the relevant petitions will be available to be properly notarized." (Pa33).

She did not direct the relevant circulators to appear with the notary, nor did she imply that correcting the affidavits in her office would be the only acceptable procedure. In any event, DiJosie's determination that the replacement affidavits were "improper" because they "were signed separate and apart from any petition and presented void of any attached petition, thereby being without any possible verification by the Notary" (Pa39), is not based in law or customary practice in the State, and unduly burdens Plaintiffs' statutory right to initiative.

As a factual matter, each affidavit was signed in the presence of copies of the original petition papers, and each corrected circulator affidavit had a number that corresponded to each petition paper that remained in the custody of the Clerk. (Pa38). As a matter of law, the notary does not have an obligation to verify or observe "the document the oath [is] intended for," (Pa39); rather, the notary must satisfy herself that the affiant is aware of the document or matters to which she is swearing the truth, and that the affiant is the person she purports to be.

Because the affidavits were properly signed and affirmed by the appropriate circulator in the presence of an authorized notary, the Clerk's conduct, in thwarting the people's right to a vote on this ordinance and depriving Plaintiffs of their

statutory right of initiative, should be enjoined and Plaintiffs' petition deemed sufficient.

STATEMENT OF FACTS[1]

In the Spring of 2011, South Jersey Citizens started a campaign to end the practice of "pay to play" in Gloucester Township, a phrase that refers to the practice of awarding government contracts to campaign donors. (Pa7). In May of that year, members of the organization, including Plaintiffs, proposed an ordinance to the Gloucester Township Council that would limit such practice. (Pa100) The ordinance was a model ordinance propounded by a statewide advocacy group, New Jersey Citizens' Campaign, which has been adopted by approximately 100 New Jersey towns, including Cherry Hill. (Pa7). Despite the prevalence of this type of ordinance, SJC was met by sustained resistance from some persons identified with the political status quo in the Township. (Pa9).

Starting in July, 2011, the Committee of Petitioners, with the assistance of five (5) other persons, started circulating an initiative petition while at all times continued to request that the Township Council place the pay-to-play reform on its agenda. (Pa8). The Committee of Petitioners conducted its campaign in a

[1] "1T" refers to the Transcript of the summary hearing held on June 8, 2012; and "2T" refers to the continuation of that hearing held on July 10, 2012. Upon receipt of either transcript, Plaintiff will supply the Court with a proper citation, including page and line.

very open and public manner. Plaintiffs and other circulators solicited signatures for their initiative petition at public events, such as a municipal park campaign launching event held in July, 2011, the Blackwood Kiwanis Baseball all-star game, multiple Saturday mornings at the local farmer's market, and the annual Blackwood Pumpkin Festival held in October, 2011. Plaintiffs and other circulators also conducted door-to-door solicitations in certain neighborhoods and manned stationary posts at the town library and drug stores located in the municipality. See generally Certifications of Committee of Petitioners (Pa99-119; Pa124-128; Pa169-172). During its campaign, the Committee of Petitioners continued to try to have its ordinance heard by the Township Council and notified council of the progress of the signature drive. (Pa9)

There is little doubt that the initiative petition campaign generated political controversy. There is also little doubt that the Committee of Petitioners was the subject of hostile comments on several electronic blogs and was falsely accused of partisanship. Id. For example, in an article dated July 19, 2011, appearing in The Inquirer, entitled "Gloucester Township says pay-to-play proposal would end transparency," by James Osborne, Mayor David Mayer, identified as a Democrat and former assemblyman, said that SJC's campaign is "politically motivated." Id. He is quoted as saying "I hope when they're

collecting signatures, they explain they have endorsed a Republican candidate." This is not correct. SJC has members of both political parties. Id. During the municipal election of 2011, SJC did not endorse any candidate of any political party for any elected office. Id.

Notwithstanding this hostility, Plaintiffs continued to cooperate with the Gloucester Township Council and the Township Clerk. For example, when the election results from the November 2011 election were certified in December, the Committee of Petitioners decided not to proceed with their petition until after the New Year so the Township Clerk would not have to work over the holidays. Id. In addition, the Committee notified the Township Council that it would not submit its petitions until mid-February in order to accommodate a request by the Township Clerk to wait until she had finished processing the Township's dog licenses. Id.

On February 13, 2012, Plaintiff Berry and three other members of the Committee of Petitioners filed an initiative petition with Ms. DiJosie, as authorized by N.J.S.A. 40:69A-184, initiating a "pay-to-play" reform ordinance. On the face of the petition, they requested that the City Council adopt that ordinance, and if it should fail to do so, calling on the Gloucester Township Clerk to submit the ordinance to the voters, as authorized by N.J.S.A. 40:69A-191. (Pa22)

On February 28, 2012, all five members of the Committee of Petitioners received a certified letter from the Clerk's office dated February 28, 2012. In the letter, Ms. DiJosie informed the Plaintiffs that she had reviewed the petitions, and in consultation with the Township attorney, David Carlamere, Esq., had determined that the referendum had an insufficient number of qualified signatures. (Pa23) DiJosie specifically stated that she had reviewed the Township voter registration rolls and had determined that 262 of the 1,236 signatures submitted were not signatures of qualified Township voters. Id. She disqualified an additional 147 signatures because they appeared on petitions that were affirmed by a person who was not qualified to administer oaths in New Jersey; 250 signatures because they appeared on petition papers circulated by a person other than a member of the Committee of Petitioners; and 38 signatures because they appeared on petition papers where the notary had printed her name where the circulator's name should have been printed. Id. (Note that the signatures attached to Petition No. 24 were eliminated under two categories). In addition to her letter dated February 28, 2012, DiJosie provided Plaintiffs with a memorandum prepared for her by Mr. Carlamere justifying her determination.(Pa26).

On February 29, 2012, Plaintiff Joshua Berry wrote to the clerk notifying her of clerical errors in her initial

certification. (Pa11). She revised her February 28th certification, and stated that 991 signatures of the 1,279 signatures submitted were qualified, thus rendering the petition 56 signatures short of the 10% of qualified voters needed to further process the petition. (Pa31). On March 6, 2012, Joshua Berry wrote her again to notify her that she had erroneously disqualified the signatures of additional qualified voters. (Pa11). In a letter dated March 7, 2012, she again amended her initial certification. This time, she certified that 1,014 signatures of the 1,279 signatures submitted were qualified. Neither amendment repeated her previous objections based on the Township Solicitor's memorandum. (Pa31-32).

In an e-mail dated March 1, 2012, Ms. DiJosie wrote Plaintiff Tom Crone with respect to the Committee of Petitioners need to correct the two types of circulator affidavits that were deficient in form. She specifically stated that because she was directed not to release the original petition papers, a notary should "contact her office . . . where the relevant petitions will be available to be properly notarized." (Pa33). Ms. DiJosie's offer to accommodate the notary did not state that preparation of corrected circulator affidavits had to occur in the presence of the original petitions. Id.

Relying on Defendant DiJosie's notice of insufficiency dated February 28, 2011, as amended on February 29 and March 7,

April 1, 2011, the Committee of Petitioners submitted a supplemental petition to the City Clerk on March 9, 2012, that including 83 additional signatures and 13 corrected circulator affidavits. (Pa34) When the 13 circulator affidavits were notarized -- two more (*i.e.* petition Nos. 55 & 56) than the eleven (11) petitions that had been identified by DiJosie and Carlamere as deficient -- they were signed by the circulator and the notary in the presence of copies of the original petition papers to ensure that the affidavit was marked with the corresponding petition number. (Pa104). Compare Pa23 with Pa39. Mr. Berry had been told that this method for correcting initiative petitions had been accepted by the municipal clerk "in Hoboken." (Pa34).

Upon submitting the supplemental filing, DiJosie, on the advice of Mr. Carlamere, and in the presence of Plaintiffs Joshua Berry and Tom Crone attached each corrected affidavit to its associated original petition. (Pa104-105). Each of the corrected circulator affidavits was marked with the number of the petition to which it corresponded. (Pa38). If Plaintiffs had not had copies of the initial petition papers in their possession when the new affidavits were prepared, they would not have been able to identify the circulators needed to correct the deficient affidavits. (Pa104).

After receiving Plaintiffs supplemental filing, Ms. DiJosie gave Mr. Berry copies of four (4) affidavits that had been submitted to her by Ms. Amy Tarves, a person who is employed by one of Gloucester Township's Fire Districts where Mr. Carlamere is also the solicitor. (Pa105). Three of the affiants admitted signing Plaintiffs' Public Contracting Reform Ordinance Petition, though denied that that the name appearing on the circulator affidavit attached to the petition bearing their name, was the person who solicited their signature, Certifications of Lowe (Pa68); Lash (Pa72)and Jones (Pa76); while the fourth person denied printing her name on such petition. Certification of Cooper (Pa80).[2]

On March 14, 2012, the Committee of Petitioners received a letter, dated that same day, from the Clerk certifying its Public Contracting Reform Ordinance Petition as insufficient as

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[2] The record indicates that Mr. Lowe was approached by his friend Mr. Kevin Piccolo regarding his signature on the initiative petition, which accords with the "K.P." appearing next to his name. (Pa71). Mr. Piccolo is the chair of the Gloucester Township Democratic Party. (Pa118). Ms. Cooper, whose name appeared on Petition No. 1, but not her signature, was approached to prepare an affidavit by her father, Mr. Lowe (2T); and Ann Marie Lash, whose husband Jim Lash served on the Township Rent Stabilization Board before it was dissolved (Pa127) testified that she had been approached to prepare her affidavit by Marianne Coyle, who is an assistant to Mr. Carlamere in his capacity as Township Attorney, and Cynthia Carlamere.(2T) Ms. Carlamere is married to Mr. Carlamere and serves as the Chair of the Township Housing Authority. The fourth affiant, Ms. Kimberly Jones, is married to Michael Jones, who currently serves on the Township Planning Board. (Pa127)

a matter of law for two reasons. (Pa39). Ms. DiJosie repeated her legal opinion that N.J.S.A. 40:69A-186 restricts circulators to members of the Committee of Petitioners and additionally opined that the corrected circulator affidavits were improper because they were allegedly notarized without reference to any specific petition. Id. Both opinions made reference to a memorandum dated, March 14, 2012, prepared by Mr. Carlamere that was provided to Plaintiffs with her certification of insufficiency. (Pa41-Pa46).

Specifically, in her letter dated March 14, 2012, Di Josie noted that with the supplemental filing, the Committee of Petitioners had submitted 1,091 signatures of qualified Gloucester Township voters, 44 signatures more than the 1,047 needed to be sufficient. (Pa39). Notwithstanding this fact, Defendant DiJosie disqualified 299 signatures because they appeared on petitions circulated by persons who were not members of the Committee of Petitioners, and an additional 205 signatures because she did not accept any of the corrected circulator affidavits. Id. It remains unclear whether DiJosie erroneously used the absolute number of signatures appearing on such petitions when declaring 205 additional signatures as invalid, rather than the number of qualified voters appearing on such petitions. In any event, Ms. DiJosie did not disqualify any signatures based on the four affidavits that she had received

five days earlier, and that were discussed in Mr. Carlamere's memorandum to her. (Pa45-46; Pa52-53).

On April 3, 2012, Plaintiff Berry submitted, on behalf of the Committee of Petitioners, a request to DiJosie to reconsider her determination that the Public Contracting Reform Ordinance Petition was insufficient. The Committee of Petitioners set forth the basis for its assertion that her decision did not accord with New Jersey law. (Pa47-Pa53). Ms. DiJosie verbally communicated with Plaintiff Berry her refusal to reconsider her previous determination. (Pa15).

On April 25, 2012, Mr. Berry was informed by Gloucester Township Internal Affairs Detective Jim Dougherty that Mr. Carlamere had initiated an investigation of Plaintiffs' petition, and due to the "political nature" of the petition, Gloucester Township Police had referred it to the Camden County Prosecutor. (Pa107). On April 26th, Joshua Berry sent an Open Public Records Act request to Ms. DiJosie asking for any additional affidavits submitted following the initial four, and a copy of the Gloucester Township Police investigation report. She refused this request, directing him to the Prosecutor's Office. (Pa108).

On May 17, 2012, Carol Comengo, a reporter with the Courier-Post, contacted both Tom Crone and Mr. Berry about the County Prosecutor's investigation and a fifth affidavit, which

had been submitted by Ms. Stallworth-Holmes. At that time, Mr. Berry did not have a copy of that affidavit since the Clerk had refused to provide it. (Pa108). In her affidavit, Ms. Stallworth-Holmes claimed that she was the circulator of Petition No. 1, but that the petition had been substantially altered. (Pa193-Pa194). Tom Crone acknowledged that he was not the circulator of Petition No. 1, and accordingly, the eleven qualified signatures on that petition were rejected by the Court. (Pa214). In their written and oral testimony, Plaintiffs denied altering the content and form of the petition in question. Certifications of Crone (Pa112); Berry (Pa101-102) and Holzman(Pa117);(2T). Former Councilwomen Chrystal Evans, who testified at the July 10th hearing, also stated that she had given Plaintiffs' initiative petition to Ms. Stallworth-Holmes, and that Ms. Stallworth-Holmes knew that it was a "pay to play" reform petition. (2T)

At no time prior to the plenary hearing held on July 10, 2012, did Ms. DiJosie, Mr. Carlamere, or any other investigator from Gloucester Township or Camden County contact or question any member of the Committee of Petitioners or SJC about the issues raised in the five affidavits. (Pa108). On July 5, 2012, Mr. Long, counsel for four of the five affiants, who intervened in this matter, submitted an additional affidavit to the Court. (Pa235-238). The affidavit reflected the sworn testimony of Mr.

Robert Holmes, husband of Ms. JoAnn Stallworth-Holmes, who also claimed that his signature appeared on one of Plaintiffs' petition papers, but that he had signed an initiative petition concerning a fruit tax. Id. Mr. Holmes did not appear at the July 10th hearing, although his written testimony directly conflicted with the oral testimony of Mr. Raymond Lowe, who stated that Mr. Holmes signed Plaintiffs' petition in his presence, while Mr. Lowe mowed the lawn in his daughter's backyard. (2T).

PROCEDURAL HISTORY

On April 25, 2012, Plaintiffs filed an Order to Show Cause and Verified Complaint, with exhibits, with the Law Division of the Superior Court, Camden County. (Pa1-Pa54). Judge Fernandez-Vina, A.J.S.C., signed the Order and scheduled a summary hearing for June, 8, 2012. The papers were served on the Gloucester Township Clerk, with a courtesy copy for the Township Attorney, the day that the Order to Show Cause was signed. (Pa55)

The Township Clerk, Ms. DiJosie answered the complaint, (Pa56-61), and filed a cross-motion to take the additional testimony of five persons, who alleged that they had signed petitions circulated by someone else, and, in one case, petition switching. (Pa66-98). On June 8, 2012, four of those persons sought to intervene alleging fraud and misrepresentation against the Committee of Petitioners. (PaPa180) Mr. Howard Long filed

the Third-Party Complaint with the Court the previous day, on June 7, 2012, although Plaintiffs' counsel did not receive a copy of that filing prior to the hearing. (1T)

The trial court granted the Motion to Intervene of JoAnn Stallwoth-Holmes, Raymond Lowe, Ann Marie Lash, and Crystal Cooper, reversed and affirmed, in part, the Township Clerk's rejection of signatures, dismissed Plaintiffs' claim under the New Jersey Civil Rights statute, and scheduled an evidentiary hearing for July 10, 2012. The Court issued an opinion from the bench, (1T), and its decision was reflected in its Order dated June 20, 2012. (Pa213-215).

On July 3, 2012, Plaintiffs' counsel served a Notice in Lieu of Supoena on Mr. Howard Long requesting that Ms. Lash, Mr. Lowe and Ms. Cooper appear at the hearing. (Pa219-220). On July 5, 2012, Plaintiff received copies of a Notice in Lieu of Subpoena, requesting the appearance of Plaintiffs Berry, Crone, Traylor and Holzman, (Pa219-221); and three Subpoenas Ad Testificandum, requesting the appearance of Kimberly Jones, former Councilwomen Evans, and Nancy Saunders, a notary public, respectively. These documents were sent by Mr. Carlamere, and were dated July 2, 2012. (Pa216-218).

That same day, Plaintiffs' counsel received an electronic copy of an Amended Third-Party Complaint, dated July 3, 2012. (Pa223). In that Complaint, Intervenors added a fifth third-

party plaintiff, Mr. Robert Holmes. (Pa236). On Friday, July 6, Mr. Carlamere notified Plaintiffs' counsel via e-mail that he had issued a Notice in Lieu of Subpoena to Mr. Howard Long requesting that Mr. Holmes appear at the July 10, 2012, hearing.

On Monday, June 9, 2012, Mr. Carlamere sought permission of the court to postpone the hearing. Nonetheless, the hearing was held on July 10, at which time the trial court denied Mr. Carlamere's request to reschedule the hearing, and declined to reject any further signatures. Plaintiffs' Verified Complaint was dismissed in its entirety and Intervenors' complaint was dismissed as to the three Intervenors who testified at the hearing. (2T). On July 11, 2012, counsel for Plaintiffs submitted an Order to Judge Meloni pursuant to the 5-day court rule, and on July 12, 2012, all Intervenors submitted a voluntary dismissal of their Third-Party Complaint against Plaintiffs. (Pa224-225).

On July 13, 2012, Plaintiffs filed an Application for Emergent Relief. (Steinhagen Certification in Support of Motion, Ex. A). Later that day, the Hon. Jack Sabatino granted permission to file a motion for emergent relief, and issued a scheduling Order. (Id., Ex. B). On July 16, 2012, the Hon. Louis R. Meloni, J.S.C. entered an Order reflecting his opinion issued from the bench on July 10, 2012, (Pa242-243); and Plaintiffs' counsel received notice from the Attorney General

that he declined to participate in the appeal. (Steinhagen Cert., Ex. C).

On July 16, 2012, Plaintiffs filed and served a Notice of Appeal and Case Information Sheet in the manner ordered by this Court. (Pa246; Pa250). Simultaneously, she also filed a Notice of Motion for Emergent Relief, and the Certification of Renée Steinhagen, with exhibits, in support thereof.

STATUTORY FRAMEWORK

Substantive Right of Initiative

By way of background, the Township of Gloucester is governed by the Optional Municipal Charter Law, N.J.S.A. 40:69A-1 *et seq.*, commonly known as the Faulkner Act. Registered voters in such a municipality enjoy broad rights to propose ordinances (a right known as the "initiative") and to oppose ordinances passed by the council (a right that is denominated the "referendum"). N.J.S.A. 40:69A-185; In re Referendum Petition to Repeal Ordinance 04-75, 192 N.J. at 459 (hereinafter, "In re Ordinance 04-75 "). Both powers are "a check on the exercise of local legislative power, fostering citizen involvement in the political affairs of the community." Id. 192 N.J. at 459. As such, the New Jersey Supreme Court announced in this recent case that "the referendum statute should be liberally construed . . . to promote the 'beneficial effects' of voter participation." Id.; see also Sparta Tp. v.

Spillane, 125 N.J. Super. 519, 523 (App. Div. 1973), cert. denied, 64 N.J. 493 (1974)(both the initiative and referendum process "encourage public participation in municipal affairs in the face of normal apathy and lethargy in such affairs.)

The Supreme Court, in the In re Ordinance 04-75 case, recognized that virtually every kind of municipal ordinance is subject to the referendum right unless the Legislature has specifically excluded it. Id. 192 N.J. at 466-67 (listing exceptions to the referendum power). In so doing, the Court noted that the Legislature had used the term "any ordinance" in defining which matters were the proper subject of a referendum or initiative. Unless such an exception exists, "any ordinance" is also subject to initiative, which is the power of "the voters of any municipality [to] propose any ordinance and . . . adopt or reject the same at the polls." N.J.S.A. 40:69A-184. The Township Clerk does not appear to quarrel that public contract legislation like the one at issue here, which seeks to reform the terms on which public service contracts may be awarded, is somehow exempt from the initiative power.

Procedural Requirements

The mechanics of citizens' initiative and referendum efforts in Faulkner Act municipalities like Gloucester Township are carefully laid out in the applicable statutes, which also

clearly define the role that the municipal clerk plays in these efforts.

Basically, any five registered voters of the jurisdiction can organize themselves into a Committee of Petitioners. N.J.S.A. 40:69A-186. They then are responsible for circulating a petition, the format of which is regulated by that same statute, among registered voters of the municipality, and cause signatures to be collected from these voters. The statute does not require the actual circulators of the petition to be registered voters.

The statute then sets forth what must be done with the circulated petitions: simply put, they are filed with the municipal clerk. See N.J.S.A. 40:69A-187 ("All petition papers comprising an initiative or referendum petition shall be assembled and filed with the municipal clerk as one instrument."); see also N.J.S.A. 40:69A-189 (referring to the "filing of a referendum petition with the municipal clerk"); N.J.S.A. 40:69A-190 (". . . any petition or amended petition filed with him . . ."). Once the petition is submitted to and received by the municipal clerk, the clerk has the mandatory duty to inquire into whether "each paper of the petition has a proper statement of the circulator and whether the petition is signed by a sufficient number of qualified voters." N.J.S.A. 40:69A-187. This "examination of

the petition," id., itself involves sifting through dozens of signature pages and hundreds, even thousands of individual signatures, to determine the sufficiency of each.[3]

Even before that process begins, the clerk must also familiarize him or herself with other applicable information, such as the turnout in the last relevant election (which determines how many petition signatures are needed) and in the case of a referendum, a review of records to determine the exact date on which the council passed, or the mayor approved, the ordinance at issue. The clerk's examination of the sufficiency of a petition is a complex task and the method used to arrive at his determination is discretionary, not prescribed by statute. D'Ascensio v. Benjamin, 142 N.J. Super. 52, 55 (App. Div. 1976), certif. denied, 71 N.J. 526 (1976).

For these reasons, the clerk has up to twenty days to make this examination. N.J.S.A. 40:69A-187. The clerk need not take all 20 days, but as soon as a determination of insufficiency is made, the clerk must "at once notify at least two members of the Committee of the Petitioners of his findings." N.J.S.A. 40:69A-

[3] See D'Ascensio v. Benjamin, 137 N.J. Super. 155, 159 (Law Div. 1975), aff'd, 142 N.J. Super. 52 (App. Div. 1976), certif. denied, 71 N.J. 526 (1976) (describing the process of signature review which at the time was delegated by municipal clerks to county officials). Since 2005, however, municipal clerks do not need to delegate the signature review process to county officials because they have access to the relevant election information through the Statewide Voter Registration System (SVRS). See N.J.S.A. 19:31-31(b)(5).

187; likewise, if the finding is that the petition is sufficient, the clerk must submit it to the municipal council "without delay." N.J.S.A. 40:69A-190. In either case, the clerk must "certify the result thereof [i.e. of her examination] to the council at its next regular meeting." N.J.S.A. 40:69A-187.

Once the examination of the petition is complete, the clerk has two and only two options, which are:

(1) to declare the initial submission sufficient and submit the same to the municipal council for further action, N.J.S.A. 40:69A-191; or

(2) to declare the initial submission insufficient, and await further action by the Committee of Petitioners. This is laid out in N.J.S.A. 40:69A-187 and -188. Specifically, the statute grants the Committee of Petitioners ten days to cure the deficiency. If the declaration is that the petition is insufficient, it is undisputed that "the petitioners have . . . an opportunity to cure the deficiency." Hudson Cty. Ch. of Commerce v. Jersey City, 310 N.J. Super. 208 (App. Div. 1997), aff'd, 153 N.J. 254 (1998).

In curing a deficiency, it is undisputed that in the initiative or referendum context, a committee of petitioners is permitted to correct defects of substance or form, but also to solicit and file additional signatures beyond what was

originally submitted. Unlike statutes governing nominations for public office, which "may be amended in matters of substance or of form but not to add signatures," cf. N.J.S.A. 19:13-13 (emphasis added), the Legislature imposed no restrictions on the power of a committee of petitioners to add signatures as part of correcting a deficiency. See, e.g., Citizens for Charter Change in Essex Co. v. Caputo, 136 N.J. Super. 424, 431 (App. Div.), certif. denied, 74 N.J. 268 (1975) (acknowledging the right of petitioners to add signatures beyond their original submissions).

If the petitioners choose to avail themselves of their rights to amend or supplement an insufficient petition, they must make the amended or supplemental filing within ten days after the clerk has served the notice of insufficiency. N.J.S.A. 40:69A-188. The clerk then has five days from the filing of these "additional papers" to make a ruling on the sufficiency of the amendments. Id. If the Clerk finds that the new papers are also insufficient, the clerk shall "notify the Committee of the Petitioners of his findings," id., whereas if the clerk finds the new filing to be sufficient, he shall submit the petition to the municipal council "without delay" as in the case of an original sufficient petition. N.J.S.A. 40:69A-190. The clerk's certification of sufficiency/insufficiency is a

final action subject to judicial review via an action in lieu of prerogative writ.

Formal Requirements

In order for an initiative petition to be valid, there are six formal requirements that must be satisfied under N.J.S.A. 40:69A-184 through 186. These requirements are the following:

a. The "petition" must be signed by voters equaling "in number to at least 10% but less than 15% of the total votes cast in the municipality at the last election at which members of the General Assembly were elected. In this case that figure is 1,047; and Plaintiffs secured 1,091 signatures of qualified voters. (Pa40);

b. "All petition papers" must be uniform in size and style. The petition here complies in that all sheets comprising the petition are on 8 ½ x 14 paper, are of uniform color and all text on the petition is in Times New Roman font. See (Pa18-21);

c. The "petition papers" must contain the full text of the proposed ordinance. The petition here complies in that the proposed ordinance appearing on two sides of one sheet of paper was stapled with each sheet of signatures comprising each petition paper. See (Pa18-19);

d. "Each separate petition paper" must have attached thereto an affidavit and a statement of the circulator in the manner and form prescribed by N.J.S.A. 40:69A-186. The initial

petition and supplemental petition here complies with this requirement insofar as each individual petition paper has the circulator's affidavit contained therein. See (Pa21);

e. "Each signer" of the petition must sign in ink or indelible pencil and list his place of residence by street and number or other description sufficient to identify the place. There is no question that Plaintiffs' petition satisfies this requirement; and

f. "Each petition paper" must contain the name and addresses of five voters listed as the Committee of Petitioners; otherwise the signatures appearing on the petition paper are disqualified. The petition here also complies with this requirement in that each separate petition paper includes the names and addresses of each of the Committee of Petitioners. (Pa20-21). See e.g., Hamilton Twp. Taxpayers' Ass'n v. Warwick, 180 N.J. Super. 243 (App. Div.), certif. denied, 88 N.J. 490 (1981) (denying the sufficiency of the petition because the names and addresses of the five-member Committee of Petitioners were omitted at the time the voters affixed their signatures to the petition, although they were added on each separate sheet at the time of filing with the Township Clerk).

Defendant DiJosie has been a municipal clerk for at least three decades, and knows --- or at least ought to know --- the parameters of these formal requirements. However, based on her

rewrite of N.J.S.A. 40:69A-186 (to require the Committee of Petitioners to circulate the petition themselves), and the trial judge's approval of her rejection of 205 signatures because circulator affidavits were not corrected in the presence of the original petitions in her office, DiJosie and the trial court obviously failed to take to heart the instructions of the Supreme Court in In re Ordinance 04-75; that is, the Court's instructions about the "inestimable value" of participatory democracy, as exercised through initiative and referendum petitions, and the need to liberally construe the laws governing those petitions in favor of the petitioners.

LEGAL ARGUMENT

I

AN EMERGENT APPEAL IS JUSTIFIED TO THE EXTENT THAT THE TRIAL COURT'S DECISION BARS A PUBLIC VOTE ON PLAINTIFFS' PROPOSED PUBLIC CONTRACTING REFORM ORDINANCE AT THE NOVEMBER 2012 GENERAL ELECTION.

The outcome of Plaintiffs' Motion for Emergent Relief is dictated in substantial part by the Court's ruling in Sampson. In a situation where a court has the option of giving voters a choice or depriving them of a choice, enforcing this "right of choice . . . grounded in the core values of the democratic system established by the [F]ramers" is the preferred option. Id., 175 N.J. at 187. As such, election laws "should not be construed as to deprive voters of their franchise or so as to

render an election void for technical reasons." Id. 175 N.J. at 186 (citation omitted). "The concept is simple. At its center is the voters, whose fundamental right to exercise the franchise infuses our election statutes with purpose and meaning." Id. Thus, "[w]hen this Court has before it a case concerning the New Jersey election laws, we are directed by principle and precedent to construe those laws so as to preserve the paramount right of the voters to exercise the franchise." Id. 175 N.J. at 190.

This right of the voters to exercise the franchise is equally applicable to the voters' right to initiate a municipal ordinance through the petition process and the ballot. The importance of the voter's right to participate in government and to express their views at the ballot box infuses this Court's interpretation of the initiative and referendum laws liberally and expansively. See, e.g., In re Petition for Referendum on City of Trenton Ordinance 09-02, 201 N.J. 349, 353 (2010)(reversing lower court rulings to allow citizens to have their say on a referendum about the sale of water works): In re Ordinance 04-75, 192 N.J. 446 (reversing lower court rulings to allow citizens to have their say on a referendum about the organization of a municipal police department).

The trial court's June 20th Order finding Plaintiffs' petition as "insufficient" (because circulator affidavits were not corrected in the presence of the original petitions

remaining in the Clerk's office) is not faithful to the requirements of Sampson and In re Ordinance 04-75, if it is understood to mean that voters of Gloucester Township should be deprived of a choice on whether to affirm or repudiate Plaintiffs' proposed Public Contracting Reform Ordinance at the polls. The Order, permitting voting rights to be denied on a highly restricted reading of the initiative laws rather than enforcing those rights, ignores Sampson and its progeny and should be vacated on that basis alone. As the Supreme Court recently observed,

> The referendum power is one of the key provisions of the Faulkner Act. It is an exercise in democracy that profoundly affects the relationship between the citizens and their government by affording the people the last word if they choose to take a stand against the wisdom of an ordinance that government has enacted

In re Trenton Ordinance 09-02, 201 N.J. at 353. Similar logic applies to the power of initiative, where the people are given the last word if they choose to take a stand in favor of an ordinance that government refuses to enact.

II

THE TRIAL COURT'S DECISION TO DISMISS PLAINTIFFS' COMPLAINT BECAUSE THEIR PETITION WAS INSUFFICIENT AS A MATTER OF LAW IS SUBJECT TO DE NOVO REVIEW.

Pursuant to R. 4:69-2, governing prerogative writ actions, a plaintiff may at any time after the filing of a complaint that demands performance of a duty apply for summary judgment.

Notwithstanding R. 4:69-2, courts do not require plaintiffs involved in election disputes to file motions for summary judgment. Instead, election disputes such as this one are routinely handled by the New Jersey courts as summary proceedings akin to the proceedings set forth in R. 4:67 (summary actions) and R. 4:71 (review of local officer actions when not an action in lieu of prerogative writ). Under these rules, and under the customary practice and procedure used by the courts in election cases, disputes relating to the sufficiency of an election petition are tried and disposed of in a summary way. See Murray v. Murray, 7 N.J. Super. 549 (Law Div. 1950)(William J. Brennan, Jr., J.S.C.); see also, In re Ocean County Com'r of Registration for a Recheck of the Voting Machines for the May 11, 2004, Mun. Elections, 379 N.J. Super. 461 478-79 (App. Div. 2005)(finding that an election dispute was to be treated as a "fast track proceeding" and treating the complaint as "implicitly initiating a summary proceeding pursuant to Rule 4:67")

Given the fact that Plaintiffs' claims were effectively resolved on the basis of the documents attached to their Verified Complaint, and the certifications they submitted in further support of that pleading, there were no material facts in dispute with respect to whether their petition was sufficient as a matter of law under the Faulkner Act, and whether they were

thus entitled to relief and attorney's fees pursuant to the New Jersey Civil Rights Act. Accordingly, it was appropriate for the trial court, (but for defendant's Cross-Motion to Take Additional Testimony)[4], to "try this action on the return date" of the Order to Show Cause, June 8, 2012, utilizing the "pleadings and affidavits," and to "render final judgment thereon." R. 4:67-5.[5]

Furthermore, since the only questions for the court on June 8, 2001, were legal ones, namely, the legal propriety of the Township Clerk's action – to reject 504 signatures of qualified voters, --- her final certification of insufficiency was subject

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[4] There was a factual dispute as to whether the signatures of Kimberly Jones, Raymond Lowe and Ann Marie Lash should be rejected, which was raised by DiJosie's Cross-Motion to Take Additional Testimony. Because the trial court granted that cross-motion, Plaintiffs' Verified Complaint was not dismissed until after the court held an evidentiary hearing on July 10, 2012. It should be noted that because defendant DiJosie had not conducted an investigation of the five affidavits that she had received during the review process, she had made no factual findings as to whether signatures should have been rejected to which the court could defer. Accordingly, the trial court's decision with respect to those affidavits, which Plaintiffs are not appealing, was based on *a de novo* review.

[5] Summary actions, such as the matter herein, are decided pursuant to different standards than a motion for summary judgment. "A summary action is, of course, not a summary judgment proceeding. In a summary action, findings of fact must be made, and a party is not entitled to the favorable inferences that are afforded to the respondent on a summary judgment motion for purposes of defeating the motion." Pressler, Current N.J. Court Rules, comment 1 on R. 4:67-5 (2010). See Courier News v. Hunterdon County Prosecutor, 358 N.J. Super. 373, 378-79 (App.Div. 2003); O'Connell v. New Jersey Manufacturers Ins. Co., 306 N.J. Super. 166, 172 (App. Div. 1997), appeal dism., 157 N.J. 537 (1998).

to *de novo* review, and was given no deference. Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 191 N.J. 344, 372 (2007) ("issues of law are subject to *de novo* review"). Similarly, the trial court's finding that the Clerk's rejection of 205 signatures of qualified voters was "reasonable," (1T), based on her understanding of the legal obligations of a notary public, is also subject to *de novo* review. See Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan, 140 N.J. 366 (1985)(appellate tribunal neither bound by trial court's interpretation of statute nor its determination of strictly legal issues); Toll Bros., Inc. v. Twp. Of Windsor, 173 N.J. 502, 549 (2002)(issues on appeal that present questions of law are reviewed *de novo*); Balsamides v. Protameen Chemical, Inc. 160 N.J. 352, 372 (1999)(same).[6]

III

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT APPROVED THE CLERK'S REJECTION OF CIRCULATOR AFFIDAVITS THAT WERE PROPERLY PREPARED, SIGNED AND AFFIRMED BY THE APPROPRIATE CIRCULATOR IN THE PRESENCE OF AN AUTHORIZED NOTARY PUBLIC.

The heart of this appeal is Plaintiffs' challenge to the trial court's approval of DiJosie's rejection of 205 signatures based on her legal conclusion that the amended circulator

[6] The Court's decision to reverse the Clerk's legal decision to reject 299 signatures that appeared on petitions circulated by persons other than members of the Committee of Petitioners would also be subject to *de novo* review, if appealed.

affidavits, which were submitted by the Committee of Petitioners to her office on March 9, 2012, were "improper and deemed not acceptable to amend or correct the deficiency found with the original petition." (Pa39). Specifically, the court found that DiJosie acted "reasonably" (1T) when she concluded that the amended affidavits "were signed separate and apart from any petition . . ., thereby being without any possible verification by the Notary as to what was being acknowledged," id., but would have been acceptable if they had been corrected at her office; that is, "corrected pursuant to the procedure she prescribed." (Pa214).

This conclusion, adopted by the trial court, is not based in law or customary practice in the State, unduly burdens Plaintiffs' statutory right to initiative, and must be overturned. The record indicates that at the time the circulator affidavits were acknowledged and filed, the affidavits had numbers on them that corresponded to numbers appearing on the already filed petition papers, and copies of such filed petitions were present at the time the circulators and the notary affixed their respective signatures to the affidavits. (Pa38;Pa104). The corrected affidavits were thus properly prepared, signed and notarized, and should have been accepted pursuant to a liberal construction of Plaintiffs' statutory right to correct. N.J.S.A. 40:69A-188.

Pursuant to N.J.S.A. 40:69A-186,

> All petition papers circulated for the purposes of an initiative or referendum shall be uniform in size and style. . . . Attached to each separate petition paper there shall be an affidavit of the circulator thereof that he, and he only, personally circulated the foregoing paper, that all the signatures appended thereto were made in his presence, and that he believes them to be the genuine signatures of the persons whose names they purport to be.

After the initial review period, Ms. DiJosie disqualified the signatures of 147 otherwise qualified voters, because the affidavits affixed to several petitions failed to be acknowledged by a person authorized to administer oaths in the state. (Pa24;Pa95). Thirty-eight (38) additional signatures were eliminated, because the name of the notary appeared on the line on which the circulator's name should have been printed in the affidavit attached to the petition on which they appeared. (Pa24;Pa97). This resulted in the rejection of 185 signatures because of deficient circulator affidavits.

In her letter dated February 28, 2012, the Clerk correctly noted that a Pennsylvania notary public is not a person authorized to administer oaths in the State of New Jersey.[7]

[7] However, it should be noted that if the venue on the affidavits had been properly designated to be in the State of Pennsylvania, the employment of a Pennsylvania notary public would have rendered the affidavit sufficient. See N.J.S.A. 41:2-17(permitting out-of state notaries to administer "any oath, affirmation or affidavit required or authorized to be

(Pa24). Because an affidavit must accurately state the place where it was taken, no venue or an inaccurate venue renders the affidavit insufficient. Notary Public Handbook: A Guide for New Jersey Handbook (East Coast Publishing, 1991) at 88. This notification thus complied with N.J.S.A. 40:69A-187.

The following day, Ms. DiJosie sent Plaintiff Crone an additional e-mail regarding Plaintiffs' initiative petition. Consistent with the Committee's statutory right to supplement its petition papers by submitting additional signatures and correcting errors in form found with the circulator affidavits, she stated the following:

> Tom,
>
> I have been instructed by the solicitor not to release the petitions already in my custody and control.
>
> Please have the notary contact my office, and we will then direct her to the library conference room where the relevant petitions will be available to be properly notarized.
>
> The only inconvenient time will be between the hours of 1:00 pm and 2:00 pm.
>
> Thank you,
>
> Roe

(Pa33).

On the face of this correspondence, Ms. DiJosie did not direct the Committee of Petitioners to produce the relevant

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taken in any suit or legal proceeding in this state, or for any lawful purpose whatever").

circulators with the notary at her office, nor did she state or imply that correcting the affidavits in her office would be the only acceptable correction procedure. No additional evidence was presented as to any other communication between DiJosie and a member of the Committee regarding this matter.[8]

In any case, Plaintiffs read this e-mail as an offer to permit the Pennsylvania notary to come to the library and correct the eleven (11) deficient affidavits she had notarized (*i.e.*, change the venue on those affidavits to reflect that they were signed in Pennsylvania), and for the relevant New Jersey notary to change the printed name on the two affidavits she had notarized. It would simply have been impractical and burdensome to get all the circulators involved and a New Jersey notary to come to the Clerk's office at one time during business hours (with lunch hour excluded). It must be assumed that almost all circulators and notaries involved in this matter are employed and would not have been able to leave their place of employment

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[8] Mr. Carlamere's description of this document in his memorandum to Ms. DiJosie is thus inaccurate. He states:

> As I recall, you advised the Committee of Petitioners that to correct the several petitions deficient by reason of improper notary, they were to appear at the Township Clerk's Office with a New Jersey Notary Public for proper signing and acknowledgement. You did provide this amending instruction, which was acknowledged by a member of the Committee of Petitioners.

(Pa42).

during the time designated. Moreover, Ms. DiJosie never stated or suggested that someone employed by the Township would notarize the corrected circulator affidavits, if all the relevant circulators appeared in her office. See (Pa89-93).

On the other hand, based on information the Committee received from persons who sponsored initiative petitions elsewhere in the State, the Committee of Petitioners decided to use a correction process other than that anticipated by the Clerk. See Letter from Berry to DiJosie, dated March 9, 2012, noting that "this [correction] process was followed in Hoboken during an ordinance petition." (Pa34). Therefore, although the process employed by Plaintiffs did not entail correcting the circulator affidavits in the presence of the original petitions, it did entail correcting those affidavits in the presence of copies of those petitions. (Pa12;Pa104).

Specifically, the record indicates that certain members of the Committee of Petitioners, who were the relevant circulators, met with a New Jersey notary public with copies of the petition papers that had been filed on February 13, 2012, and the originals of the supplemental petition papers that the Committee intended to file on March 9, 2012. Id. Each petition paper was numbered, and each corrected circulator affidavit had a corresponding petition number noted on the top of the page. Id.

See also (Pa38)(example of corrected affidavit submitted to clerk).

Under such circumstances, the notary public was able to satisfy her duty to the public to use reasonable care to satisfy herself that the signers of the circulator affidavits were the persons they purported to be and that those affiants had knowledge of the statements to which they were swearing the truth. Cf. Immerman v. Ostertag, 83 N.J.Super. 364, 370-74 (Law Div. 1964)(where signers of the affidavit did not swear to the truth of the contents of the mortgage documents, notary public nonetheless did not satisfy his duty to "use reasonable care to see that the proposed affiants had knowledge and understanding" of such documents).

It is established law that "[i]t is not the duty of the notary public to examine or investigate the statements of the affiant. However, it must be emphasized that a notary should not notarize any affidavit if he knows it contains false statements." Notary Public Handbook: A Guide for New Jersey, supra. at p. 89. See also Commercial Union Ins. Co. v. Thomas-Aitken Constr. Co., 54 N.J. 76, 81 (1969)(While a notarial officer is not an insurer of the truth of what is sworn to or of the identity of the persons swearing, he must exercise due care in performing his functions and may be held civilly liable for failure to exercise such care). A notary must simply make

certain that the affiant is aware of the statements given and to which the affiant is swearing the truth. Notary Public Handbook: A Guide for New Jersey, supra. at 91. In light of the limited duties of the notary public, and the factual circumstances under which the corrected circulator affidavits were sworn to and affirmed by the circulators, the Clerk's finding that the amended affidavits were "improper" is without merit.

Specifically, the Clerk found in her March 14, 2012 letter that,

> [t]he submitted affidavits were signed separate and apart from any petition and presented void of any attached petition, thereby being without any possible verification by the Notary as to what was being acknowledged and to what document the oath was intended for, and to which document the administered oath and signed notary statement would be attached to.

(Pa39). First, the documentary record indicates that the submitted affidavits were not signed separate and apart from any petition. Each affidavit was signed in the presence of copies of the original petition papers, and each circulator affidavit had a number on it that corresponded to each petition paper. Id. at ¶23. Second, the notary does not have an obligation to verify what is "being acknowledged and to what document the oath was intended for, and to which document the administered oath and signed notary statement would be attached." The notary must just satisfy herself that the affiant is aware of the document

and matters to which he/she is swearing the truth, and that the affiant is the person he/she purports to be.

In any event, both the notary public and the circulators were aware of which petition paper the circulator affidavit corresponded and to which it would be affixed (when delivered to the Clerk) by virtue of the matching numbers appearing on both, respectively. Most importantly, the notary was able to satisfy herself that the circulators were certain of the truth of the statements to which they were affirming.

Moreover, the reasoning of the Township Clerk is undermined by her own actions in this case. The Clerk, on the advice of Mr. Carlamere, would not permit Plaintiffs to attach the corrected circulator affidavit to the petition paper to which it belonged; and thus she was the very reason that the affidavits were "presented [to her] void of any attached petition." Rather than letting Plaintiffs attach the corrected affidavits to the original petition papers, Ms. DiJosie, herself, attached the corresponding corrected circulator affidavit to the original petition paper (based on the corresponding numbers appearing on both the petition papers and the corrected affidavits (Pa12)).

However, by doing so, DiJosie revealed that she was aware that the Committee had copies of the original petition papers filed, since otherwise they would not have known which circulator was responsible for which petition. Moreover, on

closer inspection, she should have realized that Plaintiffs had submitted corrected circulator affidavits for Petition Nos. 55 and 56, two petitions that she had not previously noted as deficient. Compare Pa24 with Pa39. If Plaintiffs had not had copies of the initial petition papers they had submitted, they would not have been able to know that those circulator affidavits were similarly defective, and would not have been able to correct them.

DiJosie's interpretation of N.J.S.A. 40:69A-186's circulator affidavit requirement and the trial court's implicit approval thereof, are therefore not only inconsistent with the law governing the legal obligations of a notary public, but also create an impermissible restriction on Plaintiffs' right to correct pursuant to N.J.S.A. 40:69A-188.

Section 188 of the Faulkner Act permits a Committee to amend its petition papers and to correct a circulator affidavit that is deficient in form. Nothing in that provision or the statute as a whole permits the Township Clerk to impose any substantive or procedural requirement that is not explicitly set forth in the statute. To do so, would contravene the accepted principle that the initiative statute in the Faulkner Act should be liberally construed to promote the "beneficial effects" of voter participation. Ordinance 04-75, supra, 192 N.J. at 459 (citing Retz v. Mayor & Council of Saddle Brook, 69 N.J. 563,

571 (1976)); Borough of Eatontown v. Danskin, 121 N.J. Super. 68 (Law Div. 1972)(statutory scheme is specifically aimed at increasing public participation).

Mindful that the initiative and referendum provisions of the Faulkner Act are specifically aimed at increasing public participation in civic affairs, New Jersey courts consistently understand that such liberal construction is appropriate and often necessary to secure the beneficial effects of voter participation.[9] A municipality, such as Gloucester Township, is therefore prohibited from attempting to evade the effect of a citizen's initiative petition by imposing unduly restrictive or technical requirements upon that petition that have no basis in law. All Peoples Congress of Jersey City and Council of the City of Jersey City, 195 N.J. Super. 532 (Law Div. 1984)(prohibiting a municipality from enacting, after the referendum process was abandoned, the same ordinance it had repealed while the referendum process was pending). DiJosie's

[9] As a matter of statutory interpretation, under New Jersey law "[t]he initiative and referendum processes. . . comprise two useful instruments of plebiscite power and provide a means of arousing public interest in an age of normal apathy and lethargy among voters. As a result, such provisions should be liberally construed." Sparta Tp. v. Spillane, supra., 125 N.J. Super. at 523; Tumpson v. Farina, 240 N.J.Super. 346, 350(App. Div.), aff'd, 120 N.J. 55 (1990)("The legislative grant of the referendum power should be liberally construed in order to encourage public participation in municipal affairs in the face of normal apathy in such matters."(quoting Narcisco v. Worrick, 176 N.J. Super. 315, 319 (App. Div. 1980).

highly restrictive implementation of a committee's right to correct deficient circulator affidavits does just that.

By permitting the Township Clerk to require that all circulators implicated by deficient affidavits come to the clerk's office with a notary and, seemingly to also require that blank affidavit forms be attached to the relevant petitions before the circulator and notary may sign them, the lower court has imposed a restrictive and onerous requirement on the Plaintiffs that is not based in law, statute or customary practice in the State.

Furthermore, as Plaintiffs pointed out to the trial court, many petitioner committees around the State use a petition form where the circulator affidavit is attached to each signature page, as required by the statute, rather than appearing on the petition page, as the form that was used by Plaintiffs does. (Pa174-175; Pa176-177). Accordingly, if the Clerk's requirement is permitted by the statute and deemed required by law, then it is likely that many initiative or referendum petitions, which are now deemed sufficient, will be found insufficient in the future. This is the case, because a municipal clerk, when reviewing a petition with an attached circulator affidavit, (in contrast to one that is incorporated in the petition) will never be able to decipher on the face of the submission whether the circulator affidavit was attached to the petition page prior to or after it

was signed by the circulator and notarized. Therefore, the impact of permitting Ms. DiJosie's interpretation of the N.J.S.A. 40:69A-186, N.J.S.A. 40:69A-188, and the law governing notaries to stand cannot be underestimated.

In short, given the limited legal responsibilities of the notary public with respect to the petition process, as set forth herein, and the valid correction process employed by Plaintiffs described in the record, this Court must reverse the lower court's approval of Ms. DiJosie's interpretation of the circulator affidavit requirement, and reinstate the 205 additional signatures that were wrongfully rejected. If reinstated, Plaintiffs will have satisfied their burden of submitting a petition with at least 1,047 signatures of qualified voters, and their petition must proceed to the ballot.

IV

PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THEIR CLAIMS OF LIABILITY UNDER THE NEW JERSEY CIVIL RIGHTS ACT.

This is a classic case where Township officials, supported by special interests, seek to deprive citizens of their substantive right of initiative, as established by N.J.S.A. 40:69A-184, when faced with the potential enactment by the voters of a controversial ordinance. As outlined above, defendant DiJosie, on the advice of the Township Council, clearly violated the Faulkner Act provisions regarding

initiative petitions; thus justifying an order reversing the lower court's determination, and directing her to treat Plaintiffs' initiative petition as valid, proper and sufficient, N.J.S.A. 40:69A-188, and to submit that petition to the Township Council for further action. N.J.S.A. 40:69A 189. "But for" such an order, DiJosie and Township Attorney, David Carlamere, would successfully deprive Plaintiffs, and all Gloucester Township voters, of their right of initiative. Because the rights of initiative and referendum found in N.J.S.A. 40:69A-184 and 185, respectively, are the quintessential substantive "rights-creating" statutes, Plaintiffs are also entitled to injunctive relief under the New Jersey Civil Rights Act,("NJCRA"), N.J.S.A. 10:6-2(c).

The lower court did not disagree with this proposition. In fact, Judge Meloni stated that the only reason he was dismissing Plaintiffs claim under the New Jersey Civil Rights Act was because "a finding of insufficiency of the petition means that there was no deprivation of Plaintiffs' statutory right to initiative under the laws of the State of New Jersey, N.J.S.A. 40:69A-184." (Pa214)

A. The Legislature Enacted the New Jersey Civil Rights Act To Create a State Law Claim Analogous to 42 U.S.C. §1983.

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

> 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. (emphasis added)

In interpreting a statute, courts are directed to look first to the plain language of the statute in order to derive the Legislature's intent based up "the words that it has chosen." Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 533 (2009)(internal citations omitted); DiProspero v. Penn, 183 N.J. 477, 492 (2005)(the "ordinary meaning and significance" of a statute's terms is the best indicator of legislative intent): Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 181 N.J. 70, 82 (2004)(same). Also, words are construed in a series consistent with the words surrounding them. Gilhooley v. County of Union, 164 N.J. 533 (2000). Accordingly, New Jersey courts have found, based on the plain language of the statute, that a person may bring a civil action under the NJCRA in two circumstances: (1) when she is deprived of a substantive right, or (2) when her substantive rights are interfered with by threats, intimidation, coercion or force. Felicioni v. Administrative Office of the

Courts, 404 N.J. Super. 382, 400 (App. Div. 2008), quoted in Hurdleston v. New Century Financial Services, 629 F.Supp. 2d 434 (D.N.J. 2009).

Similarly, the statute's employment of the phrase "substantive rights . . . secured by the Constitution or laws of this State" indicates that a statutory provision may provide a claim for relief under the NJCRA. Felicioni, 404 N.J. Super. at 401. See also Owens v. Feigen, 194 N.J. 607, 612 (2008) (finding that whatever procedural requirements previously applied to statutory and constitutional claims applies to the vindication of such claims through the NJCRA); Office of the Governor, Press Release, dated September 10, 2004 (stating that the NJCRA "does not create any new substantive rights, override existing statute of limitations, waivers, immunities, or alter jurisdictional or procedural requirements . . .that are otherwise applicable to the assertion of constitutional or statutory rights."). Notwithstanding the fact that that state laws may provide a claim for relief under the NJCRA, the language of the statute does not indicate whether any state law may serve as such predicate. For that answer, one must look to the legislative history of the Act.

Governor McGreevey signed the NJCRA into law on September 10, 2004. See Office of the Governor, Press Release, dated September 10, 2004. At the time, Assemblyman Neil Cohen, the

primary sponsor of the Act, stated to the press that the new law would "decrease[] the state's reliance on the federal government for safeguarding the civil rights of New Jersey citizens." Jason Martucci, "When Should The Victor Receive the Spoils: Determining the Proper Threshold for Attorney Fee Awards and The Prevailing Standard Under the New Jersey Civil Rights Act's Fee-Shifting Provision," 30 Seton Hall Leg. J. 163, 165 ((2005) (hereinafter "Seton Hall Leg. J."). Similarly, Senator Nia Gill, the primary sponsor of the Act in the Senate, stated that the NJCRA would "fill in gaps that exist under current law" and "deter civil rights violations." Id.

A review of the respective Assembly and Senate Judiciary Committee Statements to Assembly No. 2073 indicate the Legislature's intent to create a state law analogue to 42 U.S.C. § 1983.[10] Both statements specifically state: "This bill is

[10] Section 1983 authorizes a civil action by a person whose rights under the U.S. Constitution or federal laws have been violated by a governmental defendant:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

modeled on the Federal civil rights law, which provides for a civil action of deprivation of civil rights (42 U.S.C.A. § 1983)." Assembly Judiciary Comm., Statement to the Assembly No. 2073, 211th Legis., February 19, 2004, at 2; Senate Judiciary Comm., Statement to Assembly, No 2073 with committee amendments, 211th Legisl, May 6, 2004 at 2. Furthermore, like the federal civil rights statute, NJCRA gives persons a private cause of action against actors, who "under the color of law" deprive them of their substantive rights under the U.S. Constitution and federal law, and extends that cause of action to reach rights arising under either the New Jersey Constitution or state law. N.J.S.A. 10:6-2(c). See also Owens, 194 N.J. at 166 (stating that the Legislature passed the NJCRA to create a state law claim analogous to 42 U.S.C. § 1983).

It therefore follows that New Jersey courts should heed case law developed under § 1983 when interpreting analogous provisions under the NJCRA.

B. New Jersey Initiative Laws Create Judicially Enforceable "Rights" in the Voters of Faulkner Act Municipalities That May Be Vindicated Under the New Jersey Civil Rights Act.

As outlined above, the private right of action in the NJCRA, N.J.S.A. 10:6-2(c) was derived from the language of 42 U.S.C. § 1983. Both N.J.S.A. 10:6-2(c) and 42 U.S.C. § 1983

grant a private cause of action to a person whose constitutional or statutory rights have been abridged by a defendant; it is not by its terms limited to constitutional rights. See N.J.S.A. 10:6-2(c) ("substantive rights, privileges or immunities secured by the Constitution or laws of this State")(emphasis added); 42 U.S.C. § 1983 ("the deprivation of any rights, privileges, or immunities secured by the Constitution and laws") (emphasis added).

The Legislature's use of the phrase "or laws" like Congress' use of the phrase "and laws" is not mere surplus: the use of this phrase confers a clear and unambiguous right to proceed under N.J.S.A. 10:6-2(c) as under § 1983 when statutory rights are issue. See Felicioni v. Administrative Office the Courts, 404 N.J. Super. 382, 401 (App. Div. 2008) (acknowledging that a "statutory provision" may provide "a claim for relief under the Civil Rights Act."). In Maine v. Thiboutout, 448 U.S. 1 (1980), the leading Supreme Court case on this matter with respect to the Federal Civil Rights Act, Justice Brennan, speaking for a six-justice majority, held that this language "means what it says," and that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law. Id. at 4. In addition, because violations of statutory rights can be vindicated in a § 1983 suit, attorneys' fees are also available to prevailing plaintiffs in such cases.

Id. at 9 ("Since we hold that this statutory action is properly brought under § 1983, and since § 1988 makes no exception for statutory § 1983 actions, § 1988 plainly applies to this suit").

Accordingly, in the Third Circuit alone, courts have upheld § 1983 lawsuits to vindicate the statutory rights of nursing home residents, see, e.g., Grammer v. John J. Kane Reg'l Centers-Glen Hazel, 570 F.3d 520 (3d Cir. 2009) cert. denied, 130 S. Ct. 1524 (2010), and the statutory rights of public housing residents, see, e.g., Farley v. Philadelphia Hous. Auth., 102 F.3d 697, 704 (3d Cir. 1996).

In a series of cases originating with Blessing v. Firestone, 520 U.S. 309 (1997), the Supreme Court has emphasized that for a plaintiff to prevail under a statutory claim under §1983, the identified statute relied upon by a plaintiff cannot be just any statute, but one that affirmatively vests rights in the plaintiff. As the court explained, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*." *Id. at 340.* If a statute was "intended to confer individual rights upon a class of beneficiaries," Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002), then a lawsuit under § 1983 to vindicate those rights will lie.

Conversely, in the absence of this kind of "rights-creating language," id. at 287, a claim under § 1983 will not lie. For example, such "rights-creating language" has been found absent

from laws that generally tell federally-funded institutions how to organize their internal recordkeeping procedures, id. at 288-89; or from laws that direct different state agencies to enter into agreements with one another about voting rights, Brunner v. Ohio Republican Party, 555 U.S. 5 (2008).

In this case, the Faulkner Act's initiative and referendum statutes are couched in rights-creating language. The operative statute, N.J.S.A. 40:69A-184 establishes the right of initiative and sets forth who possesses that right (*i.e.*, the voters), stating "The voters of any municipality may propose any ordinance and may adopt or reject the same at the polls, such power being known as the initiative."

Decades of case law affirm that initiative, like referendum, is a substantive "right." As early as 1979, the Law Division acknowledged that the referendum laws were rights-creating:

> Also, it is well recognized that the right to referendum is a democratic ideal. Moreover, provisions relating to a referendum should be liberally construed so as to effectuate, facilitate and encourage voters to participate in government. It is not the policy of our law to frustrate the right of voters to seek democratic redress, as provided for through referendum.

Stop the Pay Hikes Comm. v. Town Council of Town of Irvington, 166 N.J. Super. 197, 207 (Law Div. 1979) aff'd sub nom. Stop the Pay Hikes Com. v. Town Council, 170 N.J. Super. 393 (App. Div.

1979) (citing D'Ascensio v. Benjamin, 137 N.J. Super. 155, 163 (Law. Div. 1975) and Sparte Tp. v. Spillane, 125 N.J. Super. 519, 523 (App. Div. 1973)).

More recently, in City of Ocean City v. Somerville, 403 N.J. Super. 345 (App. Div. 2008), the appeals court declared that "[v]oters also have the right of referendum to seek the repeal of any ordinance that must be held in abeyance for twenty days after adoption"), id. at 358 (emphasis added); and that "the right of initiative and referendum is to "be liberally construed .... to promote, where appropriate, its beneficial effects," id. (emphasis added) (citing Retz v. Mayor & Council of Saddle Brook, 69 N.J. 563 (1976)).

There is also no doubt that DiJosie's actions, based on the advice and direction of the Township Attorney, have deprived Plaintiffs of that statutory right of initiative. There can be no dispute that by imposing a requirement that the Committee of Petitioners be the only persons permitted to circulate the petition that they sponsor (which was reversed by the trial court), and declaring their corrected circulator affidavits as defective (in face of no impropriety as a matter of law and fact), the Township Clerk has violated Plaintiffs' statutory rights. Such a finding therefore justifies judgment under the

New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c), in Plaintiffs' favor.[11]

C. Plaintiffs Are Entitled to Counsel Fees As the Prevailing Parties.

It is Plaintiffs' position that if they had prevailed on their Order To Show Cause and the injunctive relief sought had been granted, they would have been entitled to legal fees. See Order, dated October 24, 2011, in Tumpson v. Farina, L-HUD-2375-11 (S.C.J. Lourdes I. Santiago)(Pa178-179) granting Committee of Petitioners attorneys fees under NJCA with respect to a referendum petition.

N.J.S.A. 10:6-2(f) provides for counsel fees to be awarded to plaintiffs who prevail in a New Jersey civil rights claim. The statute provides:

> In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection c. of this section, the court may award the prevailing party reasonable attorney's fees and costs.

[11] Plaintiffs note that claims under the NJCRA are typically not heard in a summary proceeding. However, the inherent connection between Plaintiffs' claim pursuant to the Faulkner Act, and their claim under the NJCRA renders any requirement to bring a separate summary judgment motion after the summary hearing redundant. No new facts must be presented or proved, and thus, there are no disputed material facts that must be resolved in yet another hearing.

See also Statement to Assembly No. 2073 with Senate Floor Amendments, adopted June 10, 2004 (noting that "[t]hese floor amendments would also amend subsection f of the bill to clarify that when a person brings an action, under this provision of the bill, the court may award the prevailing party reasonable attorney's fees and costs.").

As N.J.S.A. 10:6-2(c) was rooted in the federal civil rights statute, the fee-shifting provision of N.J.S.A. 10:6-2(f) was also based on 42 U.S.C. § 1988, which provides for an award of counsel fees to the prevailing party in a suit brought under § 1983:

> In any action or proceeding to enforce a provision of section[] . . . 1983. . . of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

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

Litigants that prevail within meaning of § 1988 are entitled to receive fees "as a matter of course in the absence of special circumstances." Dunn v. N.J. Department of Human

Services, 312 N.J. Super. 321, 333 (App. Div. 1998). The discretionary authority to deny fees outright is extremely limited and should be sparingly exercised. Gregg v. Hazlet Township Comm., 232 N.J. Super. 34, 37-38 (App. Div. 1989); The African Council v. Hadge, 255 N.J. Super. 4, 12 (App. Div. 1992) (reiterating that "counsel fees should be liberally granted").

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

While a prevailing party will ordinarily receive fees, the amount of any fee award is subject to scrutiny. Such scrutiny awaits a separate hearing, on remand, if this Court reverses the lower court's rejection of Plaintiffs' initiative petition.

CONCLUSION

For these reasons, the decision of the Township Clerk, found reasonable by the trial judge, should be reversed, and the

Court should order that the Plaintiffs' Public Contracting Reform Ordinance Petition, as amended, constitutes a valid and sufficient initiative petition under N.J.S.A. 40A:69-184; that the Clerk shall submit that initiative petition to the Township Council for further action; and, if the Council fails to enact on the proposed ordinance, that DiJosie should thereafter submit the Ordinance to the County Clerk for placement on the November General Election ballot. N.J.S.A. 40:69A-190 to 192. Furthermore, this Court should remand this matter to the lower court for a hearing to determine the actual amount of attorneys fees to which Plaintiffs are entitled as the prevailing parties in this litigation (including attorneys fees incurred during this appellate procedure).

Respectfully submitted,

NEW JERSEY APPLESEED PUBLIC
INTEREST LAW CENTER, INC.

By: Renée Steinhagen, Esq.

Dated: July 19, 2012