New Jersey
Appleseed

February 24, 2020

Hon. Julio L. Mendez, A.J.S.C.
1201 Bacharach Blvd.
Atlantic City, N.J. 08401

Re: Atlantic City Democratic Committee v. Atlantic City Residents for Good Government, Inc., Docket No. ATL-L-496-20

Dear Judge Mendez:

The undersigned represents New Jersey Appleseed Public Interest Law Center ("NJ Appleseed"), which has filed a motion for leave to appear in this action as *amicus curiae*. This letter-brief sets forth the reasons why amicus status should be granted, along with the reasons why many, indeed most, of the legal theories set forth by Plaintiff are either (i) deficient as a matter of law; (ii) improperly pled; or (iii) not justiciable unless and until the voters of Atlantic City approve the referendum at issue.

TABLE OF CONTENTS

New Jersey Appleseed
Public Interest Law Center of New Jersey
50 Park Place, Suite 1025
Newark, New Jersey 07102

Phone: 973.735.0523 Fax: 973-710-4653
Email: renee@njappleseed.org
Website: www.njappleseed.org

INTEREST OF THE AMICUS

New Jersey Appleseed Public Interest Law Center ("NJ Appleseed") is a non-profit, non-partisan organization whose mission includes advocacy for election process reform and governmental accountability. To that end, NJ Appleseed has engaged in litigation, legislative, and policy activity in support of fair election procedures, and liberal implementation of New Jersey's local initiative and referendum laws.

Specifically, over the years, NJ Appleseed has worked with several community organizations who have decided to hold their local governments accountable by circulating an

initiative or referendum petition. Ordinances have varied from initiatives to support anti pay-to-play reforms (*i.e.*, limitations on the award of government contracts to certain political contributors), maintain rent control, change the form of municipal government, change their local board of education from elected to appointed, establish a municipal legal department, re-name a street, return municipal water treatment and supply functions to Newark back from a nonprofit corporation that the citizens determined had gone rogue, and most recently prevent the privatization of the Edison Water and Sewer Department. In addition, specifically, two years ago, New Jersey Appleseed worked with residents in Atlantic City to initiate an ordinance that would preserve their right to participate in any decision to sell or transfer their municipal water utility, despite the governance of the Municipal Stabilization and Recovery Act, N.J.S.A. 52:27BBBB-1 et seq. (2016).

NJ Appleseed has also represented some of those community groups in defending their petitions when faced with court challenges attempting to prevent the citizens from exercising their legislative role by keeping the relevant referendum questions off the ballot. Specifically, it was counsel to the Committee of Petitioners in Tumpson v. Farina, 218 N.J. 450 (2014), where NJ Appleseed raised the question of whether the municipality wrongfully rejected the petition by refusing to process the petition as filed and whether this conduct was a civil rights violation. In POG v. Roberts, 397 N.J. Super. 502 (App. Div. 2008), NJ Appleseed represented the plaintiffs, who were denied standing to enforce the very anti-pay to play ordinance that they had initiated, and had fought to get on the ballot in POG v. Javier Inclan and Hoboken City Council, Docket No. HUD-L-4812-04 (August 2004). Other cases involving initiative petitions where NJ Appleseed was counsel include Empower Our Neighborhood v. Torrisi, Docket No. MID-L-7460-09, aff'd on emergent appeal (change of government petition); Berry v. DiJosie, A-5569-12

(App. Div. August 7, 2012) (anti pay-to-play ordinance where manner in which the committee collected signatures and corrected circulator affidavits was challenged); In re Save Our Water Initiative Ordinance, Docket No. ESX-L-006649-12, interlocutory appeal granted on other issue, A-004258-14 (where trial court found proposed ordinance invalid because it "restrained" future legislative action); and City of Orange Township Bd. Of Education vs. City of Orange Township, Essex County Clerk and Committee for an Elected School Board, ESX-L-6652-17 (where Board of Education tried to prevent Committee's petition from appearing on the ballot). Based on N.J. Appleseed's relatively extensive representation of petitioners with respect to various types of initiative or referendum petitions, the New Jersey Supreme Court granted it amicus status to represent its own organizational interests in Redd v. Bowman, 223 N.J. 87 (2015). This organizational record is explained in further detail in the Certification of Renée Steinhagen, submitted herewith.

In short, NJ Appleseed has the requisite interest, involvement, and expertise on the law of petitions and referendums; it has promoted and defended citizens' right to use petitions to nominate candidates, pursue and oppose changes to local legislation, and change their form of government. We intend to address here which of the allegations in Plaintiffs' complaint are insufficient as a matter of law to permit the petition to proceed; which have other procedural deficiencies in them, such as being pled without the requisite particularity, and which are valid, but premature.

NJ Appleseed has previously assisted Atlantic City groups that have opposed the proposed referendum at issue in this case on policy grounds. Despite NJ Appleseed's role on the policy merits of this specific change of government proposal, NJ Appleseed has an institutional interest in opposing costly, pre-vote challenges to petition validity, on marginal or deficient

grounds, as is the case here. To that end, NJ Appleseed has received the express permission of the citizen groups it is assisting in opposing the referendum, to take the positions articulated in this amicus brief on its own behalf.

THE VARYING STATUTORY SCHEMES FOR PETITIONS UNDER NEW JERSEY LAW

As background for the positions it takes in this brief, NJ Appleseed will begin by providing the Court with a description of some of the myriad of statutory schemes regarding citizen petitions, each with their own unique requirements, especially with regard to circulators. This Court should focus on the specific requirements that apply to the petition at issue, which proposes a change of government from the Faulkner Act to the Council-Manager Act of 1923 ("CM '23"). The requirements of the petition to change to a CM '23 form of government are located in N.J.S.A. 40:80-1. This Court should not readily import requirements found in other petition statutes in a way that invalidates or frustrates the efforts of the proponents of the petition at issue. That is, if petition proponents comply with the requirements of the statute they are petitioning under, their efforts should not be invalidated because they didn't comply with requirements from other statutes that are inapplicable to them, and therefore irrelevant. Yet, that is precisely what Plaintiffs ask this Court to do.

Before going into an analysis of this Plaintiffs' claims, it is necessary to demonstrate the substantial differences that exist under state law among petitioning schemes.

Petitions for candidates in a partisan election. When a candidate seeks to run in a partisan election as a Democrat or Republican, they must submit timely petitions to get onto the primary ballot. These petitions must comply with the requirements of N.J.S.A. 19:23-7 to -11. Of particular note, N.J.S.A. 19:23-11 provides that:

> Such petitions shall be verified by the oath or affirmation by affidavit of the person who circulates each petition, including a candidate who signs or circulates, or both signs and circulates, such a petition, taken and subscribed before a person qualified under the laws of New Jersey to administer an oath, to the effect that the affiant personally circulated the petition; that the petition is signed by each of the signers thereof in his proper handwriting; that the signers are to the best knowledge and belief of the affiant legal voters of the State or political subdivision thereof, as the case may be, as stated in the petition, belong to the political party named in the petition; and that the petition is prepared and filed in absolute good faith for the sole purpose of indorsing the person or persons therein named, in order to secure his or their nomination or selection as stated in such petition. The person who circulates the petition shall be a registered voter in this State whose party affiliation is of the same political party named in the petition.

N.J.S.A. 19:23-11 (emphasis added). This statute, in particular, expressly states the qualifications for the circulator: a registered voter of the State, of the same political party as the candidate. Implicit in this is a minimum age requirement, and a stipulation that the circulator must be registered to vote somewhere in New Jersey (not just in the jurisdiction of the petition). Furthermore, it sets forth in detail what the circulator must swear to.

Independent candidates in a partisan general election. In contrast, when a candidate is running for a partisan office, but chooses to run as the representative of a smaller political party (e.g., Green Party, Reform Party) or as an independent, such candidate's petition must comply with N.J.S.A. 19:13-4 to -9. Circulators and their affidavits for such petitions are governed by 19:13-7, which reads:

> Before any petition shall be filed as hereinafter provided, the person who circulates the petition, or a candidate who signs or circulates, or both signs and circulates, such a petition, shall make oath by affidavit before a duly qualified officer that the petition is made in good faith, that the affiant personally circulated the petition and saw all the signatures made thereto and verily believes that the signers are duly qualified voters. The person who circulates the petition shall not be required to be a registered voter, but shall be voter eligible, which means at least 18 years of age, a resident of this State, a citizen of the United States, and not otherwise disqualified under the New Jersey Constitution.

N.J.S.A. 19:13-7 (emphasis added). That is to say, circulators for these kinds candidates must only be voter-eligible, not actually registered to vote, and there is no partisan requirement. This affords independent or third-party candidates a more expansive pool of circulators than what Democratic or Republican primary candidates are allowed. This law also details what the circulators must swear to.

Recall election petitions. The statutory scheme governing recalls has still more differences. Under N.J.S.A. 19:27A-5 to -9, there are detailed requirements for the petitions. Under N.J.S.A. 19:27A-9(a), recall circulators must be voter-eligible, but need not be actually registered to vote, nor must they be from the jurisdiction at issue; these requirements that are effectively identical to those for third-party/independent candidates in N.J.S.A. 19:13-7. However, in N.J.S.A. 19:27A-8(*i*), the recall statute adds a detailed identification requirement for sponsors of paid (vs. volunteer), circulators, a requirement wholly absent from the other petitioning schemes discussed here.

Initiative, referendum, and altering the form of government in Faulkner and Walsh Act municipalities. Because it is something that Plaintiffs heavily rely on, we would further direct the Court's attention to the petitioning scheme for Faulkner Act initiatives and referendum, found at N.J.S.A. 40:69A-184 to -188. On the question of circulators, the statute sets forth what the circulator must attest to:

> 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.

N.J.S.A. 40:69A-186. However, there are no statutory qualifications for circulators of such petitions, meaning that there is no age, voter-registration, voter-eligibility, citizenship,

identification, or other requirement for circulators. The absence of these requirements has been judicially recognized to mean that such requirements do not exist. Empower Our Neighborhoods v. Guadagno, 2014 WL 1315198, at *18 (Law Div. Mar. 31, 2014) (hereinafter, "EON"), [1] ("a circulator need not sign a recall or initiative petition in a Faulkner Act district, and must—with no age, residency, or citizenship limitations—provide an affidavit authenticating the signatures of the petition"), aff'd, 453 N.J. Super. 565 (App. Div. 2018). Thus, the circulator must simply have the capability of making an oath and attesting to matters like having personally circulated the petition paper and personally witnessed all the signatures thereon.

Another requirement of Faulkner Act initiative and referendum requirements is an express requirement that the petition forms be identical. 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."). That identicality requirement is also implied in the recall election statutes, see N.J.S.A. 19:27A-8(f), but is not found in any of the other petition schemes discussed here.

Another strict requirement of certain petitions in Faulkner Act municipalities is that they have printed on them the names and addresses of a sponsoring committee of petitioners consisting of five voters of the municipality. The requirement, found in N.J.S.A. 40:69A-186, states that when petitions are circulated, "[t]here shall appear on each petition paper the names and addresses of five voters, designated as the Committee of the Petitioners, who shall be regarded as responsible for the circulation and filing of the petition . . ." In Faulkner Act initiative and referendum cases, the requirement is mandatory. Hamilton Twp. Taxpayers' Ass'n v. Warwick, 180 N.J. Super. 243, 246 (App. Div. 1981). However, in Faulkner Act change-of government petitions, the requirement is not applicable. Pappas v. Malone, 36 N.J. 1, 5 (1961).

[1] The trial court's decision in EON case is appended hereto pursuant to R. 1:36-3. No contrary

The Committee of Petitioners requirement is also found for initiative and referendum petitions circulated in municipalities governed by the Walsh Act. N.J.S.A. 40:74-10.

Nonpartisan election petitions. The EON court, which delved deeply into petition schemes in the State, also discusses the requirements of N.J.S.A. 40:45-8(b), which deals with nominating petitions of candidates in municipalities that run nonpartisan local elections. That statutory scheme has no requirements for who may circulate petitions. It also has no express requirement that the circulator of a petition attest to anything. EON, 2014 WL 1315198, at *18 ("Uniform Nonpartisan Elections Law[ ] contain[s] no requirements for circulators of nomination petitions in these districts, instead requiring only that the candidate and campaign manager make an oath certifying the petition").

Boards of education petitions – elected vs. appointed. Lastly, we would direct the Court's attention to petitions seeking to make an elected local board of education a mayoral-appointed one, and vice-versa. The statutory authorization for these procedures is found in N.J.S.A. 18A:9-4 and -6. Under N.J.S.A. 18A:9-4, the requirement is for "a petition, signed by not less than 15% of the number of legally qualified voters who voted in such district at the last preceding general election held for the election of all of the members of the general assembly, [to] be filed with the clerk of such municipality." The requirement under N.J.S.A. 18A:9-6 is the same, except the petition is to be filed with the board of education. Much like the nominating petitions for nonpartisan municipalities, this statutory scheme has no requirements for who may circulate petitions and has no express requirement that the circulator of a petition attest to anything.

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unpublished decisions are known to counsel.

LEGAL ARGUMENT

I. THE RIGHT TO PETITION ENJOYS A HIGH DEGREE OF LEGAL PROTECTION.

The right to vote is a fundamental constitutional right. Rutgers Univ. Student Assembly v. Middlesex Co. Bd. of Elections, 454 N.J. Super. 221, 229-30 (App. Div. 2016). The right to a plebiscite on matters for which such a vote has been statutorily allowed is intimately tied to that fundamental right to vote. Save Camden Pub. Sch. v. Camden City Bd. of Educ., 454 N.J. Super. 478, 494 (App. Div. 2018). Because of the sanctity of the right to vote, election statutes, including those dealing with referendums, are construed "to allow the greatest scope for public participation in the electoral process[.]" N.J. Democratic Party, Inc. v. Samson, 175 N.J. 178, 190 (2002).

In Tumpson v. Farina, 218 N.J. 450 (2014), the Supreme Court defined the right to referendum as a "civil right," violations of which may be vindicated under the New Jersey Civil Rights Act, N.J.S.A. 10:6-2. While the referendum right per se is statutory, not constitutional, In re Referendum Petition to Repeal Ordinance 04-75, 388 N.J. Super. 405, 412 (App. Div. 2006), aff'd as modified sub nom. In re Ordinance 04-75, 192 N.J. 446 (2007), once granted, "the right of referendum is . . . to be liberally construed 'to promote, where appropriate, its beneficial effects.'" Id. (quoting D'Ercole v. Mayor and Council of the Borough of Norwood, 198 N.J. Super. 531, 543 (App. Div. 1984)) (other citations omitted).

In substantially affirming the Appellate Division's holding in Ordinance 04-75, the Supreme Court reaffirmed that referendum provisions in the Faulkner Act and the Home Rule Act "should be liberally construed . . . to promote the 'beneficial effects' of voter participation." In re Ordinance 04-75, 192 N.J. 446, 459 (2007). At the same time, however, the Court emphasized that because of the statutory construction rules discussed above, it was inappropriate

for a court to effectively create additional burdens on the referendum right that the Legislature had not expressly authorized. For example, if the Legislature grants referendum rights in Faulkner Act municipalities regarding "any ordinance," it would be inappropriate to construe it to mean "some ordinances" or "legislative ordinances." If the Legislature adopts such restrictions, they might be enforceable, but when the Legislature does not, such restrictions may not be judicially created. Id. at 460.

II. NONE OF THE CLAIMED PETITION DEFICIENCIES IN COUNT I STATE A VALID CLAIM FOR INVALIDATION OF THE PETITION AT ISSUE

With the foregoing principles in mind, NJ Appleseed now turns to why the complaints of the Plaintiffs about the petitions lack merit as a matter of law.

In paragraphs 12 and 23-25 of the Complaint, Plaintiffs object to the fact that there were two different forms of petitions circulated for signatures. However, identicality in petition forms is not required under the CM '23 statutory scheme. There is, as set forth above, an identicality requirement in recall and Faulkner Act initiative and referendum statutes. This demonstrates that the Legislature knew how to craft an identicality requirement if it wanted to do so. But since the CM '23 statute is missing such a requirement, one cannot be inferred or imported from other statutes in a way that frustrates petition rights. Thus, the complaint of varying petition forms must be dismissed.

In Paragraphs 13 and 21 of the Complaint, Plaintiffs object to the absence of "Committee members, any sponsors [or] the ARGCC committee" from the petitions. However, that is not a requirement of the CM '23 statute. The Legislature has imposed such a requirement in Faulkner and Walsh Act initiative and referendum statutes, but has not done so in the CM '23 scheme.

Thus, the petition at issue cannot be invalid for omitting a committee of petitioners or sponsors, when the statute requires none.

Expanding on this objection, in Paragraph 14 of the Complaint, Plaintiffs object to the petition design because it omits not only sponsor or committee name(s), but also the identity of the circulator. There is no requirement in the CM '23 statute that the names of circulators be present on the petition at the time signatures are collected. Indeed, the amicus is unaware of such a requirement in any other petition statute under State law. Even in the context of paid circulators for recall initiatives, see N.J.S.A. 19:27A-8(*i*), it is not the circulator's identity that has to be disclosed, but rather, the sponsor who is paying him or her. Once again, if the Legislature wanted to impose a circulator identity requirement, it might be able to do so. But the operative point is that it did not do so here, so the complaint about missing circulator, sponsor, or committee names being on the petition at the time of circulation fails to state a claim as a matter of law.

Plaintiffs' Complaint also makes a variety of complaints about the notarization of the circulators' affidavits. (See, e.g., ¶¶ 29-34). However, under the CM '23 statute, there is no requirement of either a circulator affidavit or the notarization thereof. The Legislature has imposed such requirements in a variety of other circumstances, e.g., candidates in partisan elections and Faulkner Act initiative and referendum petitions. It has also pointedly omitted this requirement in other circumstances, including nonpartisan candidate petitions and elected vs. appointed board of education petitions. The Legislature could have imposed such a requirement for CM '23 petitions. But it did not. The petition cannot be stricken because it did not comply with a completely inapplicable requirement.

Plaintiffs also object to the fact that in some cases the circulators were not registered voters. (Complaint, ¶¶ 30, 33). However, like the petitioning schemes under Faulkner Act and for nonpartisan elections, the Legislature has not imposed such a requirement in the CM '23 petition scheme. Even if it had imposed such a requirement (which it did not), it would likely be unconstitutional under the court's ruling in EON, which held that other than for candidates running in a primary election, a requirement that a registered voter be the circulator of a petition is unconstitutional.

Plaintiffs complain that "minors" were among the circulators. (Complaint, ¶¶ 31, 33). The answer to this objection is also found in the EON ruling. There, the court held that the legislature could probably impose age requirements on circulators under a given statutory scheme, but noted that the Legislature was inconsistent in doing so, requiring a minimum age for circulators in some statutes, but not in others. Id. at *18. And in CM '23 petitions, no such requirement exists, and the Plaintiffs cannot demand enforcement of a nonexistent requirement. Nor can such a restriction be found in the state labor laws, which allow minors as young as 14 to be paid to engage in activity that is very analogous to petition circulating, if done outside of school hours. See N.J.S.A. 34:2-21.2 and -21.15. And if they are volunteering their time, the labor law says nothing about allowing the abridgement of youths' First Amendment rights, which are implicated here by advocating for a change of government.

Moreover, even if there were a requirement in the CM '23 statute for an affidavit from a circulator (which there isn't), minors are not incompetent to make such an affidavit. N.J.R.E. 601 provides that "[e]very person is competent to be a witness unless (a) the judge finds that the proposed witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or through interpretation, or (b) the proposed witness is incapable

of understanding the duty of a witness to tell the truth, or (c) except as otherwise provided by these rules or by law." Accordingly, "any claim of witness disqualification must be strictly construed against exclusion." State v. Bueso, 225 N.J. 193, 204 (2016). Children are presumed to be competent witnesses in court, and there is no legal basis from that stops them from giving a sworn statement regarding petitions, any more than there is a basis to stop them from being trial witnesses. State v. G.C., 188 N.J. 118, 133 (2006)

Plaintiffs also say that some circulators were "paid" in some cases by the signature or based on a minimum number of signatures, or that they had to sign a nondisclosure agreement ("NDA") to be employed as petition circulators. (See Complaint, ¶¶ 36, 36A, 37). NJ Appleseed is unaware of any state law that forbids payment by the signature in any petition scheme, or forbids the use of NDAs in a political employment context.[2] Only a few states have bans against payment by the signature, and constitutional challenges have been successfully mounted against some of them. See National Conference of State Legislatures, *Laws Governing Petition Circulators*, https://www.ncsl.org/research/elections-and-campaigns/laws-governing-petition-circulators.aspx. What is certain, however is that there is no such ban in the CM '23 law, and therefore, the petition cannot be invalidated on the basis of noncompliance with requirements (either about pay by the signature or NDAs) that don't exist.

Further, Plaintiffs' contention that the Municipal Recovery and Stabilization Act ("MRSA") renders the petition advisory is without merit. The MRSA makes initiatives and referendums concerning the adoption or repeal of ordinances pursuant to the Faulkner Act subject to review and veto by the Local Finance Board. Nothing in the Act, however, strips

[2] NJ Appleseed is not suggesting that NDAs in this or other contexts are necessarily good policy; we simply point out that in this context, they have not been forbidden. Nor is there any basis for concluding that if they were forbidden (even though they aren't), the remedy should be

citizens of their rights to change government, even if that change constitutes an amendment to a Faulkner Act charter pursuant to N.J.S.A. 40:69A-1 to 25.5.

N.J.S.A. 52:27BBBB-8 (Initiative, referendum approved by voters deemed advisory; exceptions) provides as follows:

> In a municipality in need of stabilization and recovery, any initiative approved by the voters of the municipality pursuant to section 17-35 of P.L.1950, c.210 (C.40:69A-184) and any referendum approved pursuant to section 17-36 of P.L.1950, c.210 (C.40:69A-185) shall be advisory only and may be followed, or disregarded, by the Local Finance Board and the director in their discretion. The provisions of this section shall not apply to a referendum approved pursuant to section 11 of P.L.2016, c.4 (C.52:27BBBB-9).

This provision makes specific reference to the legislative authority of the people to initiate or repeal ordinances under the Faulkner Act, N.J.S.A. 40:69A-184 and 185, and incorporates the N.J. Supreme Court decision in Redd v. Bowman, 223 N.J. 87 (2015), which dealt with an earlier municipal recovery and stabilization act that governed the City of Camden. Specifically, the Court sought to reconcile the rights of Camden voters to initiate an ordinance with the authority of the Local Finance Board to veto municipal ordinances enacted by the Municipal Council under such act, and found that the outcome of such referendum election would be advisory, with the Local Finance Board permitted to follow or disregard the will of the voters. Because the statute is limited to the legislative authority of the people to initiate or repeal an ordinance, not their authority to change their form of government, the outcome of the CM-23 election is not simply advisory.

Notwithstanding the above, NJ Appleseed does agree with Plaintiffs that they were entitled to immediate production of copies of the petitions upon filing, along with an articulation of the specific reason(s) why each signature was invalidated. This is because just-filed petitions

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invalidation of a citizens' petition.

and just-made administrative determinations on the validity of signatures should be available to the public as well as to the petition proponents, in the event their petition is invalidated. OPRA requires "immediate" access to certain kinds of documents and "as soon as possible" access to other kinds of documents. N.J.S.A. 47:1A-5(e) and (*i*). Because of the intense public interest in petitions and administrative determinations thereon, these are precisely the type of records for which immediate or nearly-immediate access should be provided under OPRA. However, it does not follow that the failure to provide public access to such records means a petition should be invalidated. Noncompliance with records requests is dealt with by other ways, including orders to produce, fee shifting, and possible monetary sanctions against records custodians. N.J.S.A. 47:1A-6 and -11. Visiting the consequences of records nonproduction on the proponents or signers of a petition is not an authorized or appropriate remedy.

III. COUNT II IS NOT PLED WITH SUFFICIENT PARTICULARITY, DOES NOT ADEQUATELY ALLEGE A SUFFICIENT NUMBER OF INVALIDITIES, AND IN MOST CASES, FAILS TO STATE A CLAIM WITH REGARD TO PARTICULAR ALLEGATIONS.

Turning now to Plaintiffs' second count, NJ Appleseed posits that this count should be dismissed in its entirety. This is for three reasons. First, the Rules of Court require that fraud be pleaded with particularity, including specifics about persons involved, dates, times, places, and the manner and means of the fraud. Plaintiffs' Complaint doesn't comply with that requirement. Second, and closely related to the first requirement, 3,033 signatures were filed, of which at least 935 needed to be valid. See Complaint, ¶ 7 & Exhibit D. Even if fraud had been properly pled, and even if the fraud were proven, a petition cannot be rejected unless the fraud was of such degree that it put the signatures below the minimum threshold required. While Plaintiffs make vague allegations that "[i]n certain cases," there was inappropriate conduct, they do not even allege that the conduct occurred so pervasively that it would invalidate over 2,098 signatures so

as to put the number of valid signatures below the statutory minimum. Finally, NJ Applesed urges that because in the CM '23 petitioning scheme, there is no requirement for a circulator to be identified or to make an affidavit, any defects in the circulators' identity or affidavit are as a matter of law not material to the petition's validity. Thus, to the extent that the fraud claims embrace matters relating to circulator identity, the truth of a circulator's statement, or the notarization of the circulators' statements, they cannot form the basis of a claim to invalidate the petition. **Such conduct can be addressed by criminal laws relating to false swearing and falsification of governmental records, but the remedy for such violations cannot include the invalidation of a citizens' change of government petition.**

A. Count III is not pleaded with adequate particularity.

"In all allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable." R. 4:5-8. This includes election litigation sounding in fraud. See In re Contest of November 8, 2005 Gen. Election for Office of Mayor of Twp. of Parsippany-Troy Hills, 192 N.J. 546, 570 (2007) ("[t]o be sure, an election contest petition that rests on an assertion of malconduct, fraud or corruption . . . would be subject to our ordinary requirements for pleading any similar fraud-based cause of action" (citing Shebar v. Sanyo Bus. Sys. Corp., 218 N.J. Super. 111, aff'd, 111 N.J. 276 (1988)).

Statements that merely assert bald legal conclusions of fraud, without "specific facts that would allow a fact-finder to draw that conclusion" simply do not satisfy that requirement. Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 114 (App. Div. 2009). The fraud allegations of the Complaint, ¶¶ 44-63, which omit names, places, dates and times, and most

particularly, the number of allegedly tainted petitions (which will be discussed in the next section) do not meet the enhanced pleading standard of R. 4:5-8.

B. Fraud claims in petition-gathering that do not allege problems with a sufficient number of signatures to affect certifications are not justiciable.

When, as here, a court is asked to intervene and strike a citizens' petition, whether it be for change of government, initiative, or referendum, on the grounds of fraud, the Court should not adjudicate the claim, much less invalidate the petition, where the challenge does not call into question a sufficient number of signatures to disqualify the petition.

This principle is drawn from the election contest statute, N.J.S.A. 19:29-1. That statute contains nine grounds for contesting the outcome of an election, only two of which are directly relevant to contests directed against public questions (as opposed to an election to office). These two are N.J.S.A. 19:29-1(e) and (f), which specify as contest grounds:

> e. When illegal votes have been received, or legal votes rejected at the polls sufficient to change the result;
>
> f. For any error by any board of canvassers in counting the votes or declaring the result of the election, if such error would change the result;

The cardinal rule in both of these subsections is that without an allegation, much less proof, that there have been wrongful acts "sufficient to change the result" or "error that woud change the result," the election contest cannot proceed and must be dismissed.

Here, some 3,033 signatures were filed, of which 699 needed to be valid to result in the petition being deemed valid. If there was cognizable fraud here, there is no allegation, much less proof, that there are over 2,300 tainted signatures, which would be the minimum necessary to change the result: the clerk's certification of the petition.

Accordingly, applying the principles of N.J.S.A. 19:29-1 by analogy, because there is no allegation of a number of defective signatures "sufficient to change the result," the Court should dismiss the fraud allegations of Count Two.

C. Most of the assertions of fraud are subject to dismissal for failure to state a claim, since the governing statute does not require circulator identification, a circulator affidavit, or notarization thereof.

As outlined above in the discussion of the different statutory schemes for petitions, the statute applicable to a citizen-initiated petition to change the form of government to one under the CM '23 does not require circulator identification, a circulator affidavit, or notarization thereof. Thus, those claims of fraud are insufficient as a matter of law.

Complaint ¶ 45, for example, says that there was misrepresentation of the "contents of the petition," but that this misrepresentation was carried out by "concealing and omitting their names as sponsors or their roles in obtaining signatures." Since there is no requirement for a circulator to disclose his/her name or that of his sponsor, any misrepresentation of those facts cannot, as a matter of law be fraud. It is even doubtful that some misstatement about "petition contents" by circulators would even suffice, as a party signing a document "is presumed to understand and assent to its terms." Stelluti v. Casapenn Enterprises, LLC, 203 N.J. 286, 305 (2010). Such an allegation would have to be intentional fraud about some material aspect of the petition. Circulator or sponsor identity would not be such a material term.

Complaint, ¶ 46 appears to make allegations about notary misconduct. If proven, that might be a matter for the criminal authorities, but it cannot be used to invalidate a petition that has no notarization requirement. The same could be said of the allegations in ¶¶ 47, 48, 51, 53, 54, and 55 about circulator identity, verification, or notarization. The law on CM '23 petitions does not require circulators to identify themselves to signers, or identify their address, or even to

sign an affidavit before a notary about their conduct in circulating the petitions. Even if it did, there is no sufficiently substantiated allegation that the alleged misrepresentation of identity led a signer to sign the petition when he or she would not have otherwise signed, had they known the actual circulator's identity or address.

Complaint ¶ 49 alleges misrepresentations about the "contents of the petition." While actionable, the court must first ask: What was misrepresented? Was it material? Did it cause signers to sign the petition when they wouldn't have done so otherwise? If this is so (see Complaint ¶ 59), where are the affidavits from signers so stating? If there was a material misrepresentation, was it in sufficient numbers to invalidate enough signatures so as to put it below the threshold? These threshold jurisdictional questions are not addressed.

Complaint ¶ 50 alleges the use of minors or "ineligible persons" to circulate petitions. As briefed above, the CM '23 statute has no eligibility requirements for circulators, including age, so by definition, even if true, this cannot be fraud.

Complaint ¶ 52 makes allegations about forged or invalid signatures and addresses. NJ Appleseed agrees with Plaintiffs that if proven, this is actionable, but it must be in sufficient numbers to put the number of valid signatures below the legal threshold. That is not alleged here.

Complaint ¶ 57 discusses NDAs, but as discussed earlier NDAs are not barred by law or public policy in political employment. Thus, it cannot be used as a basis for fraud.

IV. THE CLAIMS IN COUNT III ABOUT POSSIBLE VOTE DILUTION ARE PREMATURE

Count III of the Complaint alleges that assuming the voters adopt the CM '23 plan for Atlantic City, the result would be at-large elections that would be a violation of both the federal Voting Rights Act , the Law Against Discrimination, and 42 U.S.C. § 1983 (Complaint, ¶¶ 76,

77), and would also be "unconstitutional" (whether under the federal or state constitution is not stated) (Complaint ¶ 65).

NJ Appleseed enthusiastically agrees with the Plaintiffs that in many instances, using at-large voting for governance of a political jurisdiction, in place of districts of wards, will often be shown, as a matter of fact, to be a violation of the Voting Rights Act. See, e.g., United States v. Charleston Cty., S.C., 365 F.3d 341 (4th Cir. 2004); Terrebonne Par. Branch NAACP v. Jindal, 274 F. Supp. 3d 395 (M.D. La. 2017); United States v. Vill. of Port Chester, 704 F. Supp. 2d 411 (S.D.N.Y. 2010); Cofield v. City of LaGrange, Ga., 969 F. Supp. 749 (N.D. Ga. 1997).

Nevertheless, that does not change the fact that in this case, the claims are premature. Each of the foregoing cases found a violation of the Voting Rights Act arising from the retention or adoption of at-large elections, in place of elections based on smaller wards or districts, after a trial.

Here, the claim is premature because the voters may very well reject the public question and opt to retain their current form of Faulkner Act government, which includes ward-based elections as well as broad rights of initiative and referendum. The voters would be giving up both those rights if they adopt the plan of government proposed by the petition.

If the voters reject the public question, there will be no reason for the Court to have a full trial and render an advisory opinion on the question of whether, assuming Atlantic City adopted at-large elections, that would be a violation of the Voting Rights Act. Even with New Jersey's liberal views of standing and justiciability, state courts do not and should not issue advisory opinions. Loigman v. Twp. Comm. of the Twp. of Middletown, 297 N.J. Super. 287, 295 (App. Div. 1997) ("[W]e will not render advisory opinions or function in the abstract").

In a similar vein, if the voters reject the public question, the Court will not have to render an opinion interpreting the constitutional claims made by Plaintiffs. The constraint on rendering advisory opinions is even stronger when the plaintiffs' claim is constitutional. Randolph Town Ctr., L.P. v. County of Morris, 186 N.J. 78, 80 (2006) ("Courts should not reach a constitutional question unless its resolution is imperative to the disposition of litigation." (citations omitted)). Given that there may be no case at all, should the voters reject the question, or the opportunity to resolve in on statutory grounds, under the Voting Rights Act, there is no reason for the Court to pass on the constitutional claims in Count III.

To the extent there is authority for a court to consider a post-petition, but pre-vote challenge to the substantive validity of a matter submitted by petition, that rule has been limited to instances where: (1) the petition is for initiative or referendum over an ordinance (rather than change of government); (2) the question is resolvable as a matter of law (rather than one that would require a factual hearing); (3) the challenge is framed as an inconsistency with state law (rather than a violation of federal law, or a challenge under the state or federal constitutions). See In re Jackson Twp. Admin. Code, 437 N.J. Super. 203 (App. Div. 2014). Those criteria are not met here.

For these reasons, the Court should defer consideration of Count III claims until after the result of the election is known.

CONCLUSION

For these reasons, the Court should dismiss Count I for failure to state a claim and Count II for failure to state a claim and failure to plead with particularity; and should withhold any interim relief on Count III unless and until the voters decide whether to change their form of government.

Respectfully submitted,

NEW JERSEY APPLESEED PUBLIC
INTEREST LAW CENTER

By: _____
Renée Steinhagen