



June 17, 2013

Mark Neary
Clerk, Supreme Court of New Jersey
R.J. Hughes Justice Complex
25 Market Street
8th Floor
Trenton, NJ 08625

Re: Grillo v. Christie
Docket No. in App. Div: A-004648-12T2; M-006167-12

Dear Honorable Justices of the Supreme Court and Mr. Neary:

Amicus curiae, New Jersey Appleseed Public Interest Law Center, Inc. ("NJ Appleseed"), respectfully submits this brief in support of its argument that it is neither feasible nor lawful for there to be two statewide elections within 20 days of one another, on October 16, 2013, and November 5, 2013, as the Respondent Governor has directed in his June 4, 2013 Writ of Election. As demonstrated infra and in NJ Appleseed's amicus brief to the Appellate Division, there is ample evidence to show that given the State's existing inventory of voting machines and all the steps that must be taken in advance of an election (including programming the machine, affixing the printed ballot

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to the machine, a battery of testing for each voting machine to ensure it is functioning properly, transporting the machine to and from the polls, and awaiting the lapse of the 15-day, statutory post-election impoundment period), it is literally impossible from a logistical standpoint to conduct two elections in that accelerated time frame.

This impossibility is not simply a question of competing policy preferences; on the contrary, since the statutory impoundment period is required by law, and the preparation and testing of voting machines is likewise required by law, holding two statewide elections within 20 days of one another would violate controlling state statutes.

The Appellate Division twice stated in its opinion that the Respondent's effort to hold two statewide elections within 20 days of one another was a "significant issue" - one that could impact the rights of two different and important classes of people. (Motion Order, pp. 14, 15). The Court explained that if machine reprogramming began before the statutory impoundment period ended, "it could limit the rights of the candidates in the special election." (Id., p. 14). And, if machine reprogramming began after the statutory impoundment period ended, "it could affect the rights of the voters in the November 5 election." (Id.) In essence, the motions panel aptly observed that either altering the statutory impoundment period

or complying with it would risk the rights of some class of State citizens.

By way of further background on this matter, it is important to understand the role of amicus NJ Appleseed in this case and how it has gone about proving its arguments in the accelerated time frame that has governed this matter. NJ Appleseed is a nonpartisan group whose focus includes advocacy for fair and responsible election administration, including the technical steps that must be observed to ensure that every election and vote tally is conducted securely and accurately, as required by law. It also bears noting that while New Jersey has a chief election officer, the Secretary of State, the actual authority and mechanics of conducting elections, preparing the equipment for them, counting the votes, and keeping the machines safe and secure is something that has been devolved to officials in each of the State's 21 counties. Put another way, although generally regulated by the State, the actual administration of elections is something that is delegated to 21 different counties. See N.J.S.A. 19:48-6 (describing the delegation of duties for election machinery).

As such, neither Appleseed nor the other parties or amici in this case are in a position to directly solicit the Division of Elections or county election officials for certifications about their views on how these two statewide elections can be

conducted within 20 days of one another. This would be true even without the pressures of time imposed by the Respondent when he issued the Writ of Election less than 36 hours after Senator Lautenberg's demise, and the prompt judicial intervention that was needed because of the Respondent's precipitous decision.

But what NJ Appleseed can do is present this Court with compelling information adduced by sworn testimony by state and county election officials, and the findings of fact made by Assignment Judge Linda Feinberg in Gusciora v. Christie, No. MER-L-2691-04 (Feb. 1, 2010) (attached pursuant to R. 1:36-3).¹ Gusciora is a case that deals with the safety and security of the voting machines in use in New Jersey. The lead defendant in that case - the Governor of New Jersey - is the exact same party who is the Respondent in this case. After the trial of that matter, which encompassed reams of documentation and multiple days of testimony, Judge Feinberg's findings conclusively lead to, and prove, NJ Appleseed's central thesis in this case: that given the myriad steps required by law, and the manner in which those steps must occur to ensure the election's integrity, it is

¹ At the time the opinion was released, the case was captioned Gusciora v. Corzine. However, pursuant to R. 4:34-4. Governor Christie, the Respondent in this matter, succeeded Governor Corzine as the lead defendant in that matter.

not possible to hold two statewide elections within 20 days of one another.

While the Appellate Division faulted amici and the parties for not presenting certifications to this effect, NJ Appleaseed respectfully submits that given the overwhelming and mostly undisputed evidence adduced before Judge Feinberg, about the nature and timing of pre- and post-election processes, such certifications are not necessary. To the contrary, NJ Appleaseed's arguments herein are premised on the sworn testimony and judicial findings in Gusciora. There is no unfairness or deficiency of proof in using judicial findings in a case where Respondent was himself a party to demonstrate for the Court that it is not possible to have two statewide elections within 20 days of one another. This is especially appropriate when those findings are based on the testimony of local election officials who were originally offered by the State.

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INTEREST OF THE AMICUS

NJ Appleaseed respectfully refers the Court to its Appellate Division letter brief for the interest of the amicus statement.

FACTS AND PROCEDURAL HISTORY

Amicus accepts the facts and procedural history as have been or will be laid out by the parties in their respective submissions. To the extent that other relevant facts are discussed in this brief, those facts are laid out in the appropriate section below.

ARGUMENT

Simply stated, it is NJ Appleseed's position that given the existing array of state laws, practices, and procedures, it is not possible to lawfully have two statewide elections within 20 days of one another, as the Respondent proposes. Indeed, holding elections in such close proximity to one another is a practice that is generally disfavored by the State election laws when the electoral jurisdiction is just one county or municipality, and not the whole State. But when the entire range of election laws and procedures is applied to and considered in the context of a statewide election, it is well-nigh impossible to have elections within 20 days of one another, especially if one is not willing to sacrifice the integrity and security of the second election.

Perhaps a second statewide election could be held in that time frame if the State financed the purchase of thousands of new voting machines, so as to allow different machines to be

used at the proposed Senatorial and the General elections -- a clearly infeasible solution, given that the special election alone is costing millions of taxpayer dollars. Or perhaps these two elections could be held without conducting pre-diagnostic tests, hiring inexperienced people to erase and reprogram the machines and cartridges, eliminating the retesting of the machines before the General Election, and the hiring of new, unknown trucking companies to collect and redistribute the machines to the polling places in record time -- clearly an illegal solution given the requirements to verify that each voting machine has at least rudimentary testing to ensure it is working correctly and securely, and, generally, to ensure the proper handling and security of the machines themselves.

Certainly, there is nothing known to NJ Appleseed that would suggest the Respondent(s) have even considered how these two elections would be carried out in such proximity,² and to NJ Appleseed's knowledge, no serious solution to this problem

² It is telling that the Respondent, despite having access to potentially relevant information about the subject, and Respondent's counsel, despite being counsel for the various counties' board of elections and election superintendents, elected not to submit any certifications on the matter. Indeed, the Appellate Division noted Respondent's failure to submit any certifications on the matter, yet implied that the Respondent had considered such evidence in making his determination "as to whether the date of this special election, dictated by his writ, is 'advisable.'" (Motion Order, p. 15). Whether the Respondent did so or not is sheer speculation, since he submitted no certifications addressing what evidence he considered.

exists. Since Respondent(s) cannot lawfully conduct these two elections within 20 days of one another as they have proposed, the request sought by the Appellants should be granted.

NJ Appleseed focuses here on four important and standard steps that occur in every election process: programming, testing, transport to and from the polling sites, and the statutory impoundment period. (This, of course, is not an exhaustive list of all steps that must be taken, but it is sufficient to prove NJ Appleseed's central thesis that two statewide elections cannot and should not be occurring within 20 days of one another). As we now demonstrate, there is literally no way for all four processes (*i.e.*, programming, testing, transport to and from the polling place, and the statutory impoundment period) to occur within 20 days of one another. In fact, even assuming *arguendo* that the first step - erasing the machines and cartridges and reprogramming them-- would take only one day (certainly a doubtful proposition in at least the larger counties), the evidence shows that approximately 30-plus days would be required for all of the required steps to occur.

1. PROGRAMMING.

First, there are approximately 11,000 voting machines in the State's inventory. See <http://www.nj.gov/state/elections/voting-equipment/voting->

machine-inventory-by%20county-021511.pdf (last visited June 10, 2013). During a statewide election, a substantial majority of those machines are deployed for use throughout the State, with at least one voting machine required in every one of the State's 6,542 electoral districts. See N.J.S.A. 19:4-11 and -12 (requiring at least one voting machine for every electoral district).

Every one of those machines must be properly programmed to tabulate and record the correct votes. See Gusciora, slip op. at p. 26.³ Errors in properly programming those machines can cause -- and has caused -- votes intended for one candidate to be recorded for another, and vice-versa. See, e.g., Zirkle v. Henry, No. CUM-L-567-11 (Law Div. Sept. 11, 2011) (available at <http://www.cs.princeton.edu/~appel/voting/zirkle-transcript-1sep11.pdf>) (last visited June 10, 2013). Thus, some amount of time is necessary for the proper data files, which are unique to each election, and which in many locations must be bilingual

³ Judge Feinberg explained this process relying on testimony from the Union County Clerk:

Before the election, Rajoppi designs the ballot for each town. Once the ballot definition is completed, the printer produces a ballot on a large piece of paper for each voting machine. The programmer at the warehouse then inputs data for candidates that correspond to the switch positions located on the ballot.

[Id. at p. 26].

under state and federal law, to be loaded onto each of the machines that will be used at each election (and presumably, for some amount of backup machines to be kept available should machines fail on Election Day).⁴

2. TESTING.

After each voting machine is programmed, it is tested. Judge Feinberg's opinion in Gusciora, supra, describes a typical battery of tests that is performed on each voting machine before an election. A series of set-up diagnostics is run, hardware is checked, and a "pre-LAT" software check is performed. Id. at pp. 15-17, 186. The pre-LAT testing, at a minimum, must be done at a county's central location or warehouse for storing voting machines. Id. at 16 n. 19. This testing is performed two to three weeks before the election in Ocean County. Id. at 17 & n. 20; see also id. at 21 ("Generally, set-up diagnostics and Pre-LAT occur over a two-week window prior to the election" in Hudson County).

⁴ The more crucial and important steps in programming the voting machine and its cartridges are only done by a small number of highly trusted, highly experienced personnel, and is performed well in advance of each election. See Gusciora, slip op. at 20 (Voting Machine Warehouse Supervisor is the sole person authorized to prepare results cartridges in Hudson County); id. at 23 (in Bergen County, a single individual transfers ballot definition information to laptops and another individual transfers information from laptop to results cartridges, typically a full month prior to the date of the election).

Although the particulars of the manner and means of testing machines prior to each election is not set forth at length in the statutes, and although there is other litigation pending that contests the sufficiency of the testing that is currently being done, there is no doubt that some form of sufficiently rigorous testing is statutorily required. See N.J.S.A. 19:48-1(h) (requiring every voting machine to "correctly register or record and accurately count all votes cast for any and all persons, and for or against any and all questions").⁵

3. TRANSPORTATION.

Following the testing, the machines are transported from their central location to the polling places. As explained by Judge Feinberg, the process in Ocean County takes eight days to get the machines from the warehouse to the polling places, and approximately five days to return the machines from the polling place back to the warehouse. Id. at pp. 18-19. See also id. at p. 21 (in Hudson County, transport occurs up to 7 days before the election); id. at pp. 24, 139 (in Bergen County, transport occurs up to two weeks before the election). There was evidence before Judge Feinberg that this process could not be materially

⁵ As with the programming of the machines, the most important aspects of the pre-election testing of machines are performed by a small team of highly skilled and trusted individuals. See Gusciora, supra, at p. 21 (pre-LAT aspect of testing takes 2 days with 3-4 consultants doing pre-LAT testing alone, in

accelerated. For example, as to Ocean County, the testimony was that their contracted trucking company can transport at most 48 machines per day, with each delivery including both a Democratic and Republican escort, resulting in eight days to deliver the machines for an election involving all municipalities in the county. (Gusciora, supra, p. 17). In Bergen County, the trucking contract has long been held by the same company, whose personnel are presumably familiar with the nature of route and the tasks involved. (Id. at p. 24). Even with this long-established company, an election involving all municipalities in that county required up to two weeks to deliver machines, with presumably a similar or slightly less amount of time to return the machines. Id.

4. IMPOUNDMENT.

For obvious reasons, including protecting the integrity of the votes and data collected at an election, and to preserve the rights of voters or candidates to challenge an election outcome, N.J.S.A. 19:52-6 dictates a 15-day impoundment period of voting machines after an election:

The district election officers shall, as soon as the count is completed and fully ascertained, as by this subtitle required, lock the counter compartment and it shall so remain for a period of 15 days, except it be opened by order of a judge of the Superior Court assigned to the county.

addition to the various pre-election set-up diagnostics other than pre-LAT testing).

[Id.]

While the statute contemplates the possibility of shortening that 15-day period to "open" the machine, it is not clear whether that also extends to erasing, formatting and reprogramming the machines and the results cartridges.⁶ The Appellate Division recognized as much, doubting seriously that the impoundment statute could be read in such a manner. Motion Order, p. 14 ("it is not readily apparent to us that the judicial authority to shorten the fifteen-day impoundment period extends beyond the circumstances mentioned in N.J.S.A. 19:52-6"). Even if it were, the Legislature's default choice, as manifested by the plain language of the statute, dictates that there should be a 15-day impoundment period unless some good cause to the contrary is demonstrated to the Court, upon an application made at the appropriate time, and based upon the proofs presented at such a time. It is arbitrary for the Respondent to have issued his writ based on the assumption that

⁶ In addition, the results cartridges are held by the County Clerk immediately after the election, and are not reunited with their respective voting machines (which are under the Board of Elections' separate authority) "until the election is certified," (Gusciora, supra, at p. 25). Certification occurs no less than six days after Election Day, and can be extended. See generally N.J.S.A. 19:19-1 and -6. That is to say, even setting aside the legal requirement for the impoundment period, the cartridges are not even in the physical possession of the relevant personnel who, as explained above, take several days to

a court in each of the State's counties would grant such an application simply because the Respondent created an emergency by deciding to hold a special election 20 days before the general.

* * *

Based on the foregoing, it is manifest that it is not possible for Respondent(s) to hold a statewide election on October 16, 2013 and another on November 5, 2013. To apply the examples cited in the foregoing authorities, if there were an election held on October 16, 2013, at least five days would be required to return the machines to the central warehouse of each county, and some separate period, at least six days, would elapse before the cartridges are returned. While those days would be concurrent with the impoundment period, the machines could not be worked on until the expiration of impoundment period on the 15th day after the election, or October 31, 2013. N.J.S.A. 19:52-6. At this point in time, it is simply unknown - and indeed, unknowable -- whether a party could convince a judge to reduce the 15-day impoundment period, interpret it to allow for reformatting and reprogramming of the machines and its cartridges and in so doing, necessarily sacrifice the security of the data and its availability for audit. The State's reply

several weeks to reprogram and reformat the cartridges before each election.

brief to the Appellate Division effectively concedes that it is unknowable whether a judge would approve opening the machine early, but ignores the more fundamental problem, which is that even if the machine can be opened early, there is no statutory authority to permit a premature cleaning of the results cartridges and machine, and the subsequent reprogramming of such equipment. This is something the motion panel expressly noted as a concern. See Motion Order at p. 14.

With the impoundment period ended, cleaning of the Special Election ballot and the programming of the machines for the General Election could then begin. Even allowing for the extremely generous proposition that such programming could occur in a single day (on November 1), that would only lead to the next step: testing of the machines. The evidence before Judge Feinberg suggests that the array of testing necessary to ensure a machine's "accuracy and reliability," Gusciora, supra, p. 186, takes time -- there is a reason why counties perform testing two weeks or even a month prior to each separate election. Allowing for even just a week to perform testing (2-3 business days for pre-LAT testing and 2-3 business days for the other testing, such as setup diagnostic testing), we are now at November 8, 2013, already past General Election Day. Add to this the one to two weeks that it takes to transport the machines to the polling place - a timeframe that cannot be materially reduced based on

the evidence before Judge Feinberg, and we are now at some point between November 15 and November 22.

Two words suffice to describe the timetable proffered Respondent(s): infeasible and unlawful. There is a reason why other election statutes exhibit such strong disfavor for running even sub-State elections so close to one another. See, e.g., N.J.S.A. 40:69A-192(a) (special elections for municipal initiative and referendums require at least a 31-day separation from general or municipal elections); N.J.S.A. 40:41A-21 (special elections for county initiative and referendums require at least a 60-day separation from general election); N.J.S.A. 19:27A-13(a)(2) (at least 28 days must separate recall election from general election); N.J.S.A. 19:60-2 (prescribing dates for special school elections, all of which are at least 35 days from other scheduled elections). These provisions each make sense, in that even for a single municipality or county, there must be adequate time separating two elections. When the State votes as a whole, the need for adequate preparation time is even more compelling. The Legislature set up time frames governing elections "to afford the various election officials sufficient time in which to attend to the mechanics of preparing for the general election." N.J. Democratic Party v. Samson, 175 N.J. 178, 194 (2002) (quoting Kilmurray v. Gilfert, 10 N.J. 435, 440 (1952)). The Writ issued by Respondent utterly ignores this

Legislative will for adequate time separating statewide elections.

Respondent's scheduling of the special election here not only defies common sense by imposing unnecessary burdens on voters and taxpayers, but also the general Legislative disfavor of holding elections in such rapid succession. More to the point, there is no logistically plausible way to ensure that all appropriate prerequisites to a fair election can be legally carried out in the time frame established by the Governor's Writ of Election. Thus, the Writ of Election should be set aside and the Senate election scheduled for November 5, 2013.

CONCLUSION

For the foregoing reasons, and for the reasons stated in NJ Appleaseed's letter-brief to the Appellate Division, this Court should grant Plaintiffs' Motion for Emergent Relief, reverse the Appellate Division's Decision rejecting Plaintiffs' request for relief, and modify the Governor's Writ to direct that the special election to fill the vacancy in the United States Senate be filled at the general election scheduled for November 5, 2013, consistent with state law, including the state law governing voting machine impoundment, testing, and security. This Court should set aside the Writ of Election and direct that the special Senate election be held November 5, 2013.

Respectfully submitted,

APPLESEED NEW JERSEY PUBLIC
INTEREST LAW CENTER

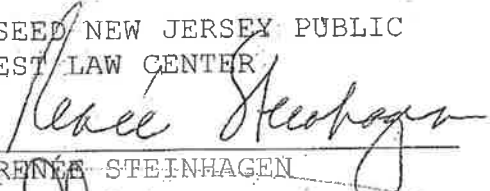
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