

June 11, 2013

Hon. Jane Grall
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 977
Trenton, NJ 08625-0977

Hon. Ellen L. Koblitz
Jst. W.J. Brennan Courthouse
583 Newark Avenue
Jersey City, NJ 07306-2395

Hon. Allison E. Accurso
Middlesex Co. Courthouse
The Tower, 4th Floor
56 Paterson Street
P.O. Box 112
New Brunswick, NJ 08903-0112

Re: Christodoulou v. Christie
Docket No.: A-

Dear Judges Grall, Koblitz and Accurso:

Proposed amicus curiae, New Jersey Appleseed Public Interest Law Center ("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 below, 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 (*i.e.*, programming the machine, testing the machine, transporting the machine, and awaiting the lapse of the

statutory post-election impoundment period), it is literally impossible from a logistical standpoint to conduct two elections in that accelerated time frame. The best available evidence shows that over 30 days would be the minimum amount of time required between statewide elections to ensure the integrity of the later election -- and that is even an optimistic estimate.

Given existing protocols for programming, testing, transportation, and impoundment, this statement is demonstrably true even if the Senate election's outcome is not close enough to warrant a recheck and recount of the votes according to the law. If that election is close enough to warrant a recount, even more than those 30-plus days would be necessary.

For the reasons set forth below, NJ Appleseed concurs in the relief requested by the Appellants that the Writ of Election be voided and that the Court order the United States Senate seat filled at the November 2013 general election. See Application for Emergent Relief, ¶ 14.

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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. To that end, NJ Appleseed has engaged in litigation, legislative, and policy activity in support of fair election procedures meant to ensure that all eligible voters are able to cast a ballot, and that all legally cast ballots are properly counted.

Among other things, NJ Appleseed has published, with the Brennan Center at NYU Law School a 20-page booklet on the implementation of the federal Help America Vote Act ("HAVA") in New Jersey, entitled Making New Jersey's Votes Count, a report on the development of New Jersey's State-wide Voter Registration System, and a report on the status of poll worker training in the state. NJ Appleseed has also served as co-counsel in litigation supporting ballot access for alternative political parties and challenging New Jersey's discriminatory campaign finance scheme (i.e., Council of Alternative Political Parties vs. State of New Jersey, Div. of Elections, 344 N.J. Super. 225 (App. Div. 2001), and Green Party vs. State of New Jersey, No. MER-C-125-06 (Ch. Div. Oct. 17, 2007); and has been involved as counsel in litigation on ballot access in the context of initiative and referendum (see, e.g., Tumpson v. Farina, ___ N.J. Super. ___ (decided & approved for publication May 29, 2013)). Most recently, it is actively involved as counsel in

another appeal about the accuracy of the ballot count for another initiative and referendum matter, In re Contest of the November 6, 2012 Election Results for the City of Hoboken, Public Question No. 2, Docket No. A-3218-12T3 (presently pending before the Appellate Division); and is defending a students' constitutional right to vote in Marchick v. Middlesex County Bd. of Elections et al, No. MID-L-000038-13, and in support of same-day registration in Rutgers University Student Association v. Middlesex County Bd. of Elections et al, No. MID-C-85-11. NJ Appleaseed was also involved as counsel in another recount and election dispute. In re Primary Election Held June 6, 2006 for the Office of Councilperson in the Borough of Roselle, No. A-1020-06T5 (App. Div. Jan. 8, 2008).

NJ Appleaseed, as such, has acquired special interest, involvement or expertise in regard to election law and the administration of elections, within the meaning of R. 1:13-9, entitling it to be heard as amicus in this matter.

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(s) propose. 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 an additional twenty-four million taxpayer dollars. Or perhaps these two elections could be held without reprogramming and retesting the machines before the General Election -- clearly an illegal and ill-advised solution given the requirements to verify before each election that each voting

machine has at least rudimentary testing to ensure it is working correctly and securely.

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, and to NJ Appleseed's knowledge, no serious solution to this problem 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 -- programming -- 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 approximately 6,400 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 v. Corzine, No. MER-L-2691-04 (Law Div. Feb. 1, 2010), slip op. at p. 27. 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-1sept11.pdf>) (last visited June 10, 2013). Thus, some amount of time is necessary for the proper data files -- which are unique to each election -- 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).

2. TESTING.

After each voting machine is programmed, it is tested. The opinion of Assignment Judge Linda Feinberg in Gusciora v. Corzine, 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. Id. at 17 & n. 20.

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").

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).

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.

[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 formatting and reprogramming the machine. 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.

* * *

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, five days would be required to return the machines to the central warehouse of each county. While those five 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 in so doing, necessarily sacrifice the security of the data and its availability for audit.

With the impoundment period ended, 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 to three weeks before an election. Allowing for even just a week to perform testing, we are now at November 8, 2013, already past General Election Day. Add to this the eight days to two weeks that it takes to transport the machines to the polling place, and we are now at some point between November 16 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.

Respondents' 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, the 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

By: _____
 RENÉE STEINHAGEN

By: _____
 FLAVIO L. KOMUVES

Dated: June 11, 2013