NEW JERSEY CITIZEN ACTION, MAURA COLLINSGRU, in her capacity as Healthcare Program Director, AMERICAN FEDERATION OF TEACHERS, NEW JERSEY, DONNA CHIERA, in her capacity as President of AFTNJ, and. MARK and KATHERINE SMITH,	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MERCER COUNTY DOCKET NO. MER-L-0001968-21 Civil Action
Plaintiffs,	:	
-vs.-	:	
PHILIP D. MURPHY, in his official capacity as Governor of New Jersey, and the STATE OF NEW JERSEY,	:	
Defendants.	:	

BRIEF IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE STATE'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

This matter, challenging the validity and/or construction of a state tax statute, N.J.S.A. 54:3-21, involves the Legislature's attempt to prohibit property taxpayers from filing property tax appeals with respect to the property of others. Such legislation, if understood to extend to a taxpayer's right to appeal such local actions in the Superior Court, would be in violation of constitutional norms: the fundamental fairness in the distribution of the tax burden that is required under N.J. Const. (1947), Art. VIII, Sec. 1, ¶1, and the right to challenge judicially the decisions or actions of local tax officials as guaranteed by N.J. Const. (1947), Art. VI, Sec. 5, ¶4.

P.L. 2021, c. 17, which amended N.J.S.A. 54:3-21, on its face eliminates third party taxpayers' right to appeal the assessment or exempt status of others to the county board of taxation or the Tax Court; it does not disturb the ability of local governments to appeal the assessment or exempt status of any property in the applicable county, including in other taxing districts in the county.[1]

[1] The amendment was apparently adopted by the Legislature in response to lobbying efforts by *Amicus* Independent Colleges and Universities of New Jersey (following a challenge to Princeton University's exempt status in the New Jersey Tax Court that resulted in a substantial settlement in favor of disadvantaged local homeowners), by *Amicus* New Jersey Hospital Association (following the Morristown decision in which a prominent hospital

Plaintiffs brought Count IV of this action because the language of the amendment, eliminating the right of third parties to make appeals of assessment or exemption decisions as to other taxpayers, appeared to reflect a legislative intent to foreclose such rights altogether, giving rise to the need for declaratory relief to protect the right of taxpayers to bring such claims via the common law prerogative writ -- a right protected in Art. VI, Sec. 5, ¶4 of the 1947 Constitution that cannot be eliminated by legislation.

Faced with Plaintiffs' challenge in Count IV of this action, Defendants, Governor Murphy and the State of New Jersey, now concede that the Legislature simply cannot do what it desired to do without violating the New Jersey Constitution. Although the Legislature has the authority to alter, modify or eliminate taxpayers' *administrative* rights of appeal, it cannot eliminate taxpayers' constitutionally protected right to challenge any discriminatory tax assessment or exemption via a writ of *certiorari* in the Superior Court.

Simply put, the statutory right of appeal contained in N.J.S.A. 54:3-21, and all its predecessors, does not create a "statutory cause of action," as the State suggests (Db2,35), which

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lost its exempt status) and by the League of Municipalities, who sought to protect local tax assessors from taxpayer challenges to their assessment decisions.

may be eliminated. Instead, N.J.S.A. 54:3-21 sets forth an administrative right of appeal to the county board of taxation or (post-1979) to the Tax Court that if eliminated, triggers taxpayers' guaranteed right to bring their grievances directly to the Superior Court through the traditional prerogative writ process, as modified by the 1947 Constitution and R. 4:69-5.

Prior to the amendment in P.L. 2021, c. 17, New Jersey courts consistently found that taxpayers challenging individual tax assessments and tax-exemptions must first (except in extreme cases where they could use the direct prerogative writ format) comply with the administrative process as set forth in N.J.S.A. 54:3-21. Following the amendment in P.L. 2021, c. 17, those rights of administrative appeal are now gone for a certain class of taxpayers. As a result, declaratory relief is necessary to eliminate doubt as to the right of any taxpayer to challenge the assessment or tax exemption of another taxpayer via the prerogative writ format preserved in the 1947 Constitution and R. 4:69-5.

Furthermore, due to the uncertainty created by P.L. 2021, c. 17, Defendants must be prohibited, under the New Jersey Civil Rights Act (NJCRA), from enforcing N.J.S.A. 54:3-21 so as to deprive New Jersey taxpayers of their constitutionally protected right to hold local tax authorities accountable directly in the Superior Court via an action in lieu of prerogative writ. As the relief sought herein is made necessary because of the Legislature's

apparent attempt to eliminate such constitutional right (though it cannot), injunctive relief, including attorneys' fees under the NJCRA, is appropriate.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This action essentially addresses legal issues but, to the extent necessary, Plaintiffs repeat and reassert the factual allegations set forth in Plaintiffs' Statement of Undisputed Material Facts, with exhibits, submitted with this Brief In Support of Summary Judgment and in Opposition to the State's Motion to Dismiss.

On September 28, 2021, Plaintiffs filed a Verified Complaint against Defendants, the Governor, in his official capacity, and the State, stating four counts. This filing came in a direct response to this Court's decision to deny their Motion to Intervene in Colacitti, et al. v. Murphy, et al., Docket No. MER-L-000738-21. However, because Plaintiffs were permitted to appear as *amici curiae* in that matter and argue as to Counts I-III of their Verified Complaint, Plaintiffs agreed to withdraw Counts I-III from this present action upon resolution of the Colacitti action. Accordingly, Counts I-III are in suspense and Count IV of the Verified Complaint is effectively the only count remaining in this action. Comp. ¶¶39-41.

On January 10, 2022, the State moved to dismiss the Verified Complaint in its entirety. (In its brief supporting its motion to

dismiss, the State includes its argument as to Counts I-III of the Complaint; however, because Plaintiffs have agreed such issues are to be resolved solely in the Colacitti action, Plaintiffs do not respond to the State's argument as to Counts I-III.)

On February 2, 2022, the Independent Colleges and Universities of New Jersey ("ICUNJ"), and the Center for Non-Profit Corporations, Inc. (the "Center"), moved to participate as *amici curiae* pursuant to R. 1:13-9. Plaintiffs consented, and the Court granted that motion on February 7, 2022.

On February 19, 2022, the New Jersey Hospital Association ("NJHA") also moved to participate in this matter as *amicus curiae.* Again, Plaintiffs consented to NJHA's participation, and the Court granted that motion on February 24, 2022. *Amici* ICUNJ and the Center filed their brief on February 22, 2022, and *Amicus* NJHA filed its brief on February 28, 2022.

Plaintiffs now respond to the State's Motion to Dismiss Count IV of their Verified Complaint and will respond to the arguments of *Amici* on or by April 26, 2022, as set forth in the scheduling order.

CONSTITUTIONAL AND STATUTORY FRAMEWORK

This matter involves the statutory scheme set forth in Title 54 regarding taxation, and in particular, the administrative appeal procedure set forth in N.J.S.A. 54:3-21; as well as the constitutional requirements barring the Legislature from

eliminating the taxpayer's right to challenge taxation decisions of local officials, i.e., local tax assessors. Although the State ultimately comes to the correct conclusion and recognizes that third parties retain their right to challenge the assessment of another taxpayer via the complaint in lieu of prerogative writ, its discussion of the nature of N.J.S.A. 54:3-21, and the 2021 Amendment thereto, is often confusing and underscores the need for Plaintiffs' request for declaratory relief.

First, the State asserts: "While a taxpayer has a constitutional right to challenge their own assessment or exemption status, the ability to challenge another taxpayer's assessment or exemption status is governed solely by legislation." (Db18). This is fundamentally wrong. As Judge Pressler wrote in Atrium Dev. Corp, v. Continental Plaza Corp., 214 N.J. Super. 639, 642 (App. Div. 1987), appeal dismissed, 108 N.J. 590 (1987), a taxpayer retains a *constitutional* right to challenge the assessment or exemption of another taxpayer:

> While it may well be that the taxpayer will obtain considerably less immediate financial benefit from causing another's assessment to be raised than he would by achieving a reduction in his own assessment, we are satisfied that conceptually he is no less discriminated against when another's assessment is below the common level range than he is when his own is above that range. **In either case, there is to that taxpayer a fundamental and indeed unconstitutional unfairness in the distribution of the tax burden. See N.J. Const. (1947), Art. VIII, §1, ¶1.** (Emphasis added.)

As shown by the highlighted text from Judge Pressler's opinion, the ability to appeal an assessor's assessment of *another* taxpayer's property shares the same constitutional basis as the right to appeal the assessment of one's own property. As Judge Pressler held, the discrimination latent in an unfair exemption or assessment gives rise to a "fundamental [and] unconstitutional unfairness", id., recognizing that the injury is constitutional in origin.

Second, declaratory relief is necessary, in part, because of the contradictory position taken by the State in its brief that discusses N.J.S.A. 54:3-21 as creating "a statutory cause of action" that may be "amended, altered or limited" by the Legislature (Db2, 35)[2], while, at the same time conceding that "the enactment of N.J.S.A. 54:3-21 was simply a formal statutory procedure for actions in lieu of prerogative writ against an assessor," (Db38-39), that this Court "must construe . . . so that it 'conforms to the Constitution.'" (Db43)(citation omitted).

In other words, the State argues both opposites: that the statutory process of appeal by a third party can be amended by the Legislature and, at the same time, agrees that N.J.S.A. 54:3-21 was merely a procedural device that did not and could not eliminate

[2] It should be noted that the State is careful to never assert that this "statutory cause of action" may be eliminated, as the Legislature explicitly has done.

the right of a taxpayer to make a third-party challenge by means of a prerogative writ-type action. This seeming inconsistency in the State's position in itself demonstrates sufficient confusion following the amendment to N.J.S.A. 54:3-21 to require declaratory relief to clarify the rights of third-party taxpayers challenging the assessment or exemption of other taxpayers.

Third, the Legislative Statement indicates that the amendment was intended to "prohibit" taxpayers from filing "property tax appeals with respect to the property of others" (*i.e.*, the Amendment "would eliminate this option")(SUMF, Ex. B). Such expression by the Legislature that P.L. 2021, c. 17, was intended to eliminate a right of challenge by a third-party taxpayer, also necessitates declaratory relief to clarify that a taxpayer retains the constitutional right via the action in lieu of prerogative writ to challenge an assessment or exemption of another property owner.

As the State's brief makes clear, it ultimately agrees that third-party taxpayers retain this right, Db38-44, but the resulting confusion requires declaratory relief to clarify such rights of third-party taxpayers.

Taxpayers' Substantive Constitutional Rights

A. N.J. Const. (1947), Art. VIII, Sec. 1, ¶1 (Uniformity)

For almost a century and a half, New Jersey's tax statutes have implemented the constitutional requirement of uniformity in

local property tax and fairness in the distribution of the tax burden and avoidance of discrimination. This is a constitutional requirement, not one created by statute. The Constitution of 1844, as amended in 1875, provided that "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value." N.J. Const. (1875), Art. IV, Sec. VII, ¶12. This constitutional provision was changed in 1947 (*i.e*, deleting the "true value" requirement), although the gist of the uniformity clause that exists today remains the same. Article VIII, Sec. I, ¶1 states:

> Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value; and such real property shall be taxed at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district.

The dominant principle of the new constitutional mandate is equality of treatment and tax burden, which "was the essence and spirit of the old Constitution as well." Baldwin Constr. Co. v. Essex County Bd. of Tax, 16 N.J. 329, 338-340 (1954). Ultimately, it is a fundamental principle that an aggrieved taxpayers' right to relief from discrimination in assessments is a *constitutional* right that cannot be eliminated by statute, as Judge Pressler observed in Atrium Dev. Corp, supra, 214 N.J. Super. at 642.

B. N.J. Const. (1947), Art. VI, Sec. 5, ¶4 (Prerogative Writs)

In New Jersey, under the 1947 Constitution, the remedy of challenging governmental acts by means of the great common law writs, i.e., the "prerogative writs", is fully protected and preserved as a matter of constitutional right as to all governmental actions. No exception appears in the Constitution as to property tax matters. Article VI, Section V, paragraph 4, of the New Jersey Constitution reads as follows:

> Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, ***as of right***, except in criminal causes where such review shall be discretionary.

Thus, the 1947 Constitution preserves as a matter "of right" a citizen's power and ability to challenge governmental actions under the traditional common law writs of *mandamus, certiorari*, *prohibition* and *quo warrranto*. These writs constituted a series of remedies "by which officials and bodies in the executive branch of government at local and higher levels were kept within their respective spheres and were held to methods prescribed by law." Ward v. Keenan, 3 N.J. 298, 302 (1949).[3] The 1947 Constitution

[3] Prerogative writs have never been eliminated in New Jersey. Instead, they were superseded in the 1947 Constitution and replaced with the right of a complaint "in lieu of prerogative writ" in which "the review, hearing and relief" associated with such writs "shall be afforded in the Superior Court," but "on terms and in the manner provided by rules of the Supreme Court, *as of right*." Ibid. [emphasis added]. As caselaw makes clear, this change was made because of "widespread dissatisfaction" with certain aspects

preserves such actions as an absolute matter of constitutional right and they apply with equal force to assessment decisions as to any other governmental decision-making, as the State now accepts in its motion to dismiss. Db38-43.

New Jersey courts have taken special care to preserve and foster the use of the prerogative writ to challenge governmental actions, taking "in almost every respect a more liberal view of the province of the writ [of certiorari] than the courts of other commonwealths." Id. at 305-306 (citation omitted). Our courts have given special significance to the broad scope of such writs in protecting an aggrieved citizen from almost every form of improper official action. Id. at 306. As early as 1856, the variety of uses to which the writ of *certiorari* was put in civil matters was summarized by Chief Justice Green in Treasurer of Camden v. Mulford, 26 N.J.L. 49, 54 (Sup. Ct. 1856):

> . . . in this state the remedy of [certiorari] has been extended to wrongs inflicted upon individuals, whether by judicial decision, by corporate acts, or by the acts of special jurisdictions created by statute. Thus, it is habitually used as a remedy against unlawful taxation, either for state, county, township, or city

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of the implementation of the writs, namely the risk that a litigant would accidentally choose the wrong writ and have to start all over again. Ward v. Keenan, supra, 3 N.J. at 303-308. As the Supreme Court has said in Ward, "all difficulties with respect to a choice of the proper prerogative writ have been resolved by providing for a single proceeding in lieu of all prerogative writs". Id. at 305. Ward makes clear that the Constitutional goal was to continue to safeguard individual rights against public officials and governing bodies via the right of action under the writs, while avoiding such procedural defects.

> purposes; and while the remedy has been denied in other states, as dangerous or prejudicial to the public welfare, no such evil has been experienced from the use of the remedy, while it has been found eminently salutary and efficacious as a protection to private rights against oppressive and illegal taxation.

Ward v. Keenan, supra, 3 N.J. at 306 (quoting Treasurer of Camden v. Mulford). See also Switz v. Middletown, 23 N.J. 580, 587-590 (1957)(concerning a challenge to the municipal assessment decisions and holding that the right to be heard to challenge government action via the common law writs is constitutionally assured by Art. VI, Sec. 5, ¶4).

Today, R. 4:69 governs Actions In Lieu of Prerogative Writs and, consistent with the common law, R. 4:69-5 requires:

> Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted.

In addition, R. 4:69-6(a), provides that "No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule."

Accordingly, R. 4:69: (i) implements a person's constitutionally protected right of access to the Superior Court to challenge all government action and secure declaratory and injunctive relief; (ii) places jurisdictional time limitations on that right; and (iii) conditions it on the exhaustion of

administrative remedies. This right is substantive in nature and, read together with the Uniformity Clause, effectively establishes a private right of action for all New Jersey taxpayers to hold local and state officials accountable for unfair treatment or discrimination in assessments in the Superior Court -- a right of any taxpayer to appeal any assessment or tax-exemption that is a constitutionally protected civil right.

Taxpayers' Statutory Process of Administrative Appeal

Since 1906, when N.J.S.A. 54:3-21 and its predecessors were first enacted, the constitutional right as to tax assessment or exemption challenges has been channeled into a particular administrative framework, i.e., the appeal process to the County Board or the Tax Court under N.J.S.A. 54:3-21. As the State concedes, prior to the enactment of the law in 1906, such actions were brought by citizens as prerogative writ actions. (Db38-39). Thus, the statutory procedure in N.J.S.A. 54:3-21 is merely a formalistic means of resolving administratively what has always been a remedy available through the prerogative writ format.[4]

[4] Although the statute did not explicitly authorize a taxpayer or taxing district to appeal the "exempt" status of any property, the authority to file a third-party appeal of another's exempt status has long been recognized as a feature of New Jersey taxation law. See e.g. Atrium, supra, at 642 (noting that as to a third party claiming an improper assessment as to another property owner "there is to that taxpayer a fundamental and indeed unconstitutional unfairness in the distribution of the tax burden". Atrium, supra, at 642); Ewing Twp. v. Mercer Paper Tube Corp., supra, 8 N.J. Tax

N.J.S.A. 54:3-21(a), as amended by P.L. 2021, c. 17, deleted language that allowed an appeal through the administrative process by third parties. The statute, as amended, reads in relevant part as follows:

> a. (1) Except as provided in subsection b. of this section a taxpayer feeling aggrieved by the assessed valuation or exempt status of the taxpayer's property [,or feeling discriminated against by the assessed valuation of other property in the county] or a taxing district which may feel discriminated against by the assessed valuation or exempt status of property in the taxing district, or by the assessed valuation or exempt status of property in another taxing district in the county, may on or before April 1, or 45 days from the date the bulk mailing of notification of assessment is completed in the taxing district, whichever is later, appeal to the county board of taxation by filing with it a petition of appeal; provided, however, that any such taxpayer or taxing district may on or before April 1, or 45 days from the date the bulk mailing of notification of assessment is completed in the taxing district, whichever is later, file a complaint directly with the Tax Court, if the assessed valuation of the property subject to the appeal exceeds $1,000,000.

P.L. 2021, c. 17., §6 [underlined language was added and bracketed language was deleted].

Prior to this amendment, there is little doubt that taxpayers have always had the ability to appeal a local determination of tax-exempt status or assessed valuation of any property to either (i) an administrative body tasked with hearing appeals per the

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84, 91 (Tax 1985)(noting that the "purpose" of such appeals was "to afford the right to appeal essentially to any person whose tax payments are adversely affected by an improper assessment and not only an owner in fee of the assessed property appealed")(Emphasis added.)

relevant statute or (ii) a court, via the common law writ of *certiorari* if an administrative remedy did not exist or was inappropriate.[5] The 1906 language, which explicitly authorizes third-party appeals, remained virtually unchanged, in all amendments and supplements to this appeal statute prior to the enactment of P.L. 2021, c. 17.[6]

The "either/or" assertion stated above, however, does not mean that a taxpayer, in the ordinary course, has had a choice between the two procedures: file an appeal with the county board of taxation or submit a complaint in lieu of prerogative writ with

[5] P.L. 1862, c. 194 (March 28, 1962) (supplementing an Act concerning taxes approved April 14, 1846, requires that for tax purposes, property shall be assessed at "full and actual value" and notes that "any person" who refused to be "sworn or "examined" by an assessor or commissioners of appeal "shall be deprived of any right to appeal from any tax for which he may be assessed.") Many years later, this act was amended to permit "any change in the valuation of any assessment" "on application by any individual or representative of any taxing district." P.L. 1900, c. 74, §6 (An act creating a county board of commissioners to equalize assessments or taxes and defining their powers and duties). It was again changed in 1903, by directing "The commissioners of appeal . . .[to] examine all aspects presented to them in writing by taxpayers . . .and [to] reduce or set aside any assessment as may be lawful." P.L. 1903, c. 208 (emphasis added).

[6] See P.L. 1945, c. 125; P.L. 1978, c. 102; P.L. 1979, c. 113 (adding ability to file appeal directly with the Tax Court if satisfy $750,000 minimum); P.L. 1981, c. 568; P.L. 1983, c. 36; P.L. 1987, c. 185; P.L. 1991, c. 75 (changing August 15 deadline to file petition to April 1, and introducing concept that taxpayer has 45 days to file an appeal upon issuance of notification of change or assessment); P.L. 1999, c. 208 (permits filing within 45 days from bulk mailing of tax assessments); P.L. 2003, c. 125; P.L. 2007, c. 256; P.L. 2009, c. 252; P.L. 2013, c. 15; P.L. 2017, c. 306; and P.L. 2018, c. 94.

the Superior Court. As a practical matter, the courts generally recognize the need to first exhaust administrative remedies as provided in N.J.S.A. 54:3-21, but allow a direct right of action through a prerogative writ "if that course be in the interest of essential justice." Baldwin Constr. Co. v. Essex County Bd. of Taxation, 16 N.J. 329, 342 (1954).[7] In general, however, as long as the administrative process in N.J.S.A. 54:3-21 was available, it is clear from the language of R. 4:69-5, requiring an exhaustion of administrative remedies, that any taxpayer aggrieved by an assessment or exemption, whether their own or that of another, must comply with such administrative processes, prior to seeking judicial review.

Following the amendment in P.L. 2021, c. 17, taxpayers no longer have the administrative route under N.J.S.A. 54:3-21 to exhaust as to third party claims and their remedy now adverts to the prerogative writ process as per R. 4:69-5. It follows that the administrative procedure provided for in the pre-amendment N.J.S.A. 54:3-21 is not a cause of action but was a procedural means of enabling administrative review of the tax challenge.

[7] See Atrium Dev. Corp. v. Continental Plaza Corp., supra, 214 N.J. Super. at 641, for a discussion of Royal Mfg. Co. v. Bd. of Equal Taxes, 76 N.J.L. 402 (Sup. Ct. 1908), aff'd 78 N.J.L. 337 (E & A 1908), and the New Jersey Supreme Court cases rejecting that court's holding that the statutory appeal process is the exclusive method by which a taxpayer claiming discrimination in his assessment could seek redress." See also Defendants' Brief at Db37.

McCleod v. City of Hoboken, 330 N.J. Super. 502, 506-507 (App. Div. 2000)(recognizing availability of the prerogative writ option so long as taxpayer adhered to 45-day statute of limitation in R. 4:69-5); see also, Murnick v. Asbury Park, 95 N.J. 452 (1984) (where court concluded that except in "egregious cases of discrimination where a taxpayer claims a constitutional right to relief," "which we expect will be rare," the tax statute, provides the exclusive form of relief). Now that the administrative route via the statute for such third-party relief is eliminated, the taxpayer returns to the prerogative writ process in N.J. Const., Art. VI, Sec. 5, ¶4, as implemented by R. 4:69, to implement their cause of action in challenging a discriminatory assessment or exemption of another taxpayer.

In this way, the State is correct when it asserts that the Legislature's elimination of the third-party taxpayer's right to appeal to the county board of taxation or the Tax Court did not eliminate those taxpayers' right to seek review in the Superior Court via the prerogative writ. However, because taxpayers have not enjoyed the right to lodge a direct challenge to a specific tax assessment or tax-exemption in the Superior Court for well over 100 years due to the existence of the administrative remedy (except in extreme cases; see Murnick, McCleod, Baldwin, supra), the availability of the writ of *certiorari* following the 2021 Amendment is not apparent on the current face of N.J.S.A. 54:3-21

and, as set forth below, requires clarification by means of declaratory relief.

LEGAL ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRIATE WHEN THERE ARE NO MATERIAL FACTS IN DISPUTE AND THIS MATTER INVOLVES ONLY QUESTIONS OF LAW.

A moving party is entitled to summary judgment as a matter of law if the pleadings, depositions, and answers to interrogatories and admissions on file show that there is no genuine issue as to any material fact challenged. R. 4:46-2. Blum v. Prudential Insurance Co. of America, 125 N.J. Super. 195, aff'd, 132 N.J. Super. 204 (App. Div. 1975). By its plain language, R. 4:46-2 dictates that a court should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill v. Guardian Life Ins. Co., 142 N.J. 520, 529 (1995). Furthermore, the court must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. Id. at 540.

The present matter is ripe for summary judgment because there is no genuine issue as to any material fact. The only facts in front of the Court are: (1) that the Amendment to N.J.S.A. 54:3-21 was passed; (2) what the Amendment says; and (3) what the

Legislature said before passing the Amendment. See Statement of Undisputed Material Facts.

Defendants agree that this case "does not involve any factual questions" (Db23). Accordingly, they have moved to dismiss for failure to state a claim pursuant to R. 4:6-2. In deciding such motion, the Court accepts the Plaintiffs' version of the facts as true. Rumbauskas v. Cantor, 138 N.J. 173, 175 (1994). Of course, summary judgment is granted if the filings show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law R. 4:46-2(c). In this way, Defendants' motion to dismiss can be understood as a motion for summary judgment because what they essentially seek is a holding that the Amendment is constitutional based upon the undisputed facts. Plaintiffs, on the other hand, seek a determination that the Amendment renders N.J.S.A. 54:21-3 unconstitutional, or must be interpreted so as to avoid constitutional problems, based upon the same set of facts. As a result, this matter is ripe for summary judgment. See e.g. Mack-Cali Realty Corp. v. State, 466 N.J. Super. 402 (App. Div. 2021) (summary judgement appropriate where State filed motion to dismiss and plaintiff cross-moved for summary judgment and there was no factual dispute); D'Anastasio Corp. v. Twp. of Pilesgrove, 387 N.J. Super. 241, 245, (App. Div. 2006)(prerogative writ complaints involving purely legal issues can be decided by summary judgment).

II. DECLARATORY RELIEF IS SOUGHT THAT DESPITE THE AMENDMENT TO N.J.S.A. 54:3-21, A TAXPAYER HAS A CONSTITUTIONALLY PROTECTED RIGHT VIA AN ACTION IN LIEU OF PREROGATIVE WRIT TO APPEAL THE DETERMINATION OF ANOTHER TAXPAYER'S ASSESSMENT OR TAX-EXEMPT STATUS.

The Legislature was quite clear as to the import of its actions when it adopted the 2021 Amendment, *i.e.*, that it was seeking to eliminate the appeal route via the County Board and the Tax Court that had been available under N.J.S.A. 54:3-21, as shown by the Legislative Statement accompanying the bill:

> The bill also prohibits property taxpayers from filing property tax appeals with respect to the property of others. Under current law, property taxpayers may challenge the assessment or exempt status of their own property as well as that of any other property in their county. The bill would eliminate this option, but not disturb the ability of local governments to appeal the assessment or exempt status of any property in the applicable county.

Assembly Appropriations Comm. Statement, A.1135 (September 17, 2020)(SUMF, Ex. B)(emphasis added).

It thus appears that the Legislature intended via P.L. 2021, c. 17 to do away with a taxpayer's ability to challenge another's assessment or exemption but, when confronted with Plaintiffs' legal challenge in this litigation, the State now concedes that the Legislature could not do so.[8] In fact, the Legislature does

[8] All parties agree that N.J.S.A. 54:3-21 no longer permits taxpayers seeking to appeal the assessment of another from filing property tax appeals pursuant to the process set forth in the statute itself. In this way, an explicit right of appeal, which had existed since at least 1906, and probably as early as 1862

not have the authority to eliminate the right of a taxpayer to challenge another taxpayer's assessment or exemption because such right continues to exist via the prerogative writ action now that the Legislature has eliminated the administrative route that was formerly available. This concession by the State is inevitable since R. 4:69, a court rule, promulgated by the New Jersey Supreme Court pursuant to N.J. Const. (1947) Art. VI, Sec. 5, ¶4, implements the guarantee of the prerogative writ right of action in the 1947 Constitution that the Legislature cannot change, let alone eliminate.[9]

As a result of uncertainty surrounding the scope of the 2021 Amendment, Plaintiffs initiated this action seeking declaratory and injunctive relief that such rights of third-party taxpayers cannot be eliminated by the Legislature and continue to be vested in taxpayers pursuant to the prerogative writ form of action provided for in N.J. Const. (1947) Art. VI, Sec. 5, ¶4.

A. The NJ Constitution Protects All Challenges to Government Action in The Form of an Action in Lieu of Prerogative Writ to be Filed in the Superior Court.

Throughout its brief, the State concedes that the Prerogative

(where challenges to assessments were filed with "commissioners of appeal) P.L. 1862, c. 194, has been eliminated.

[9] In its brief, the State states "that if it were the Legislature's intent to amend R. 4:69, they would have done so" (Db40). But R. 4:69 is a court rule promulgated by the New Jersey Supreme Court pursuant to Art. VI, Sec. 5, ¶4, that the Legislature simply cannot change.

Writ Clause of the New Jersey Constitution restricts the Legislature's authority to eliminate a taxpayer's right to appeal the assessment or tax exemption granted by a local tax assessor to another taxpayer. So, to avoid the constitutional problems raised by the 2021 Amendment to N.J.S.A. 54:3-21, it 1) ignores the Legislature's stated intent to eliminate such right; 2) delimits the right of appeal the Legislature intended to prohibit to mean the right to appeal to the county board of taxation; and (3) through a sleight of hand, concludes that because the Legislature cannot eliminate the right of a taxpayer to challenge an assessor's decision or action, it did not do so.

Given the uncertainty of this matter, it is important that this Court declare that the (1) 2021 Amendment did not, in fact, eliminate taxpayers' rights to appeal the assessments of third parties, as the Legislative Committee Statements state; and (2) taxpayers are still permitted to file such appeals directly in the Superior Court via an action in lieu of prerogative writ.

Traditionally, prerogative writ actions had been used by citizens to challenge government decisions or actions at all levels of government. As carefully described in the Constitutional and Statutory Framework section of this Brief, infra at pp. 6-14, New Jersey courts have taken a very liberal view of the scope of the writ of certiorari, in particular, and had used it routinely as a remedy to safeguard individual rights against public officials and

governing bodies. See Treasurer of Camden v. Mulford, supra, 26 N.J.L. at 54 ("while the remedy has been denied in other states, as dangerous or prejudicial to the public welfare, no such evil has been experienced [in New Jersey]"). Indeed, already in 1856, the Court in Treasurer of Camden v. Mulford noted that the writ of *certiorari* "is habitually used as a remedy against unlawful taxation, either for state, county, township or city purposes." Ibid.

Such broad use of the writ of *certiorari* still prevails today, although the formality of seeking issuance of a "prerogative writ" was superseded in the 1947 Constitution by a simplified and modernized procedure consisting of a direct action in the Law Division through a complaint in lieu of first securing a court writ. See also n. 3, supra.

By means of Art. VI, Sec. 5, ¶4, the framers of the 1947 Constitution worked to "streamline and strengthen the traditional prerogative writs" by consolidating the four writs of *certiorari*, *quo warranto*, *prohibition*, and *mandamus* into one single form of action "as of right." In re LiVolsi, 85 N.J. 576, 593-594 (1981). Today, to bring an action in lieu of prerogative writ, a plaintiff need only show that the appeal could have been brought under one of the common law prerogative writs, id. at 594, something any third-party taxpayer seeking to challenge an tax assessor's determination of another's exemption status is able to do.

As a result of the inclusion of the Prerogative Writ Clause in the 1947 Constitution, any New Jersey taxpayer has a protected private right of action to appeal official government action in the Superior Court (subject to the conditions imposed by the court rules set forth in R. 4:69, such as time limitations or the availability of administrative remedies that must first be exhausted). Seen in this light, the Legislature may have intended via P.L. 2021, c.17 to eliminate taxpayers' rights to challenge third-party assessments or exemptions, but in actuality the Legislature could only modify the administrative processes it had previously established while the substantive right to challenge the assessor's decision remains available through the prerogative writs.[10]

It, therefore, follows that, because all actions challenging government decisions and acts were preserved in the 1947 Constitution as actions in lieu of prerogative writs, N.J.S.A. 54:3-21, as amended, cannot be construed to eliminate the right of

[10] The State's reference to Millenium Towers Urban Renewal LLC v. Municipal Council of Jersey City, 343 N.J. Super. 367 (Law Div. 2001), to support its point that the Legislature was entitled to eliminate the "third party appeal provision," is not persuasive (Db36). Millenium Towers involved the citizens' right of referendum under the Faulkner Act; such right of referendum is a creation solely of statute, with no restrictions or limitations imposed on such right by the Constitution. Unlike the situation here, Title 54 is restrained by several constitutional provisions: the Uniformity, the Tax Exemption and the Prerogative Writ Clauses, none of which can be eliminated by legislative action.

a taxpayer to challenge the assessment or tax exemption of another taxpayer, and declaratory relief should be entered to such effect.

B. In the Absence of a Statute Permitting Administrative Review of a Third Party Challenge, the Tax Appeal May Be Made By Action in Lieu of Prerogative Writ.

Where a statute deprives a citizen of the right of administrative remedy, the claim simply adverts to the former prerogative writ action now cognizable as a direct complaint in the Superior Court. This very point was made by the New Jersey Supreme Court in In re Glen Rock, 25 N.J. 241 (1957), a matter concerning a challenge to a municipal utility's rates that the court had found was not within the jurisdiction of the Board of Public Utilities (BPU). The Court in Glen Rock rejected the claim that a consumer could bring administrative remedies in the BPU against the municipal utility, but expressly held that the consumer did not lose their right of action but could simply bring their claims in the Superior Court under the prerogative writ rule:

> At any rate, individual consumers can call upon the courts to review allegedly arbitrary rates by bringing an action in lieu of the former prerogative writ of *certiorari. P.J. Ritter Co. v. Bridgeton*, 135 *N.J.L.* 22 (*Sup. Ct.* 1946), affirmed *o.b.* 137 *N.J.L.* 279 (*E. & A.* 1948). This is now available as of right in the Superior Court. 1947 *Constitution, Art.* VI, *Sec.* V, *par.* 4.

In re Glen Rock, supra, 25 N.J. at 251.

The Court went on to expressly and decisively hold that the right of action could not be precluded simply because the statute

creating the BPU did not include rights of action against municipal utilities:

> Since the Board of Public Utility Commissioners has no jurisdiction under the Public Utility Act, the courts are not precluded from exercising their traditional powers under the principle of *certiorari*. Id.

Similarly, in Vas v. Roberts, 418 N.J. Super. 509 (App. Div. 2011), the Appellate Division held that any action that could have been brought as a prerogative writ action prior to the 1947 Constitution can still be brought in the Law Division as long as it is "not an appeal of a state administrative agency decision *or under the jurisdiction of the Tax Court*." Id. at 521 [emphasis added]. Following the amendment to N.J.S.A. 54:3-21, which removed third-party claims from the tax appeal procedure, a claim by a third-party challenger is no longer "under the jurisdiction of the Tax Court, and, it follows under the reasoning of the Appellate Division in Vas v. Roberts that the plaintiff may now bring an action in the Superior Court under the constitutionally protected prerogative writ rule.

Hence, declaratory relief should be entered that following the amendment to N.J.S.A. 54:3-21, third-party claims as to improper exemptions or assessments are now cognizable as actions in lieu of prerogative writ.

C. The Right to Challenge an Assessment Decision as to Another Taxpayer is Constitutional and is Not Governed Solely by Legislation.

No authority is offered for the State's alternate claim that "the ability to challenge another taxpayer's assessment or exemption status is governed solely by legislation." Db18. In fact, the cases cited by the State allegedly to support such conclusion, Db18-19, relate only to a property owner's challenge to their own assessment, and they do not address in any manner a taxpayer's right to challenge another's assessment or exemption. Simply, put the State offers no support for the claim that a third-party challenge is created only by statute.

Indeed, the State's argument is directly contradicted by Judge Pressler's holding in Atrium, that where a taxpayer contends *another* taxpayer is under assessed, "there is to that taxpayer a fundamental and indeed unconstitutional unfairness in the distribution of the tax burden". Atrium, supra, 214 N.J. at 642 [emphasis added]. As Judge Pressler observed, and no decision since has contradicted, the injury to the third-party taxpayer from an improper assessment of another is "an unconstitutional unfairness. . .", id., directly invoking a *constitutional* right of a taxpayer to make the third-party challenge. As Atrium makes clear, this is a right that arises under the Constitution itself, not by statute, despite the state's claims. See also Inwood Owners v. Little Falls, 216 N.J. Super. 485, 493 (App. Div. 1987)("We also note that as a general principle, equality of treatment in

sharing the duty to pay real estate taxes is a constitutional right")(emphasis added).

The New Jersey Supreme Court has also recognized that a taxpayer has a "judicial or "quasi-judicial remedy" or relief in a case of discrimination. Tri-Terminal Corp. v. Edgewater, 68 N.J. 405, 409 (1975)("It is fundamental that a taxpayer is entitled to "treatment commensurate with that given his fellow taxpayers within the municipality" and that if it is not accorded, he is entitled to a judicial or quasi-judicial remedy). A "judicial or quasi-judicial remedy" is obviously one that arises as a matter of right, *i.e.*, from the great common law writs that are now preserved in the 1947 Constitution through complaints in lieu of prerogative writ.

For the state to argue that such claims are to be remedied only under a statutory right is to disregard this long train of case law and the Constitution itself.

In any event, the State has conceded, Db38-43, that the taxpayer retains their rights under the prerogative writ process so that declaratory relief as to such rights of action should be granted.

D. Since the State has Conceded That the Court Must Construe the Statute to Find it Constitutional, Declaratory Relief is Necessary to Eliminate Any Doubt as to the Right of Third-Party Appellants to Challenge the Assessment or Tax-Exemption of Another Taxpayer.

The State agrees that the doctrine of constitutional avoidance applies herein and that P.L. 2021, c. 17 cannot be interpreted to bar the right of taxpayers to make third party challenges via an action in lieu of prerogative writ. As the State explains, the doctrine of constitutional avoidance "comes into play when a statute is susceptible of two reasonable interpretations, one constitutional and one not." (Db43)(quoting State v. Pomianek, 221 N.J. 66, 91 (2015)). In other words, the State argues that since P.L. 2021, c. 17 would be unconstitutional if it barred outright any right of challenge by a taxpayer of another's assessment or exemption, the statute must be saved by interpreting it to leave intact the pre-existing right of action by a taxpayer using the prerogative writ process set out in Art. VI, Sec. 5, ¶4 of the 1947 Constitution.

Although plaintiffs agree with the State's use of constitutional avoidance to save the statute, the Legislature's amendment deleting from N.J.S.A. 54:3-21 of "[a taxpayer] feeling discriminated against by the assessed valuation of other property in the county" gives rise to uncertainty as to the rights of third-party challengers going forward. To eliminate doubt as to the import of the 2021 Amendment concerning the right of third parties to challenge the assessment or exemption of another taxpayer, this Court should issue declaratory relief limiting the 2021 Amendment

to the elimination of an administrative right of appeal only, not of a challenge that can be brought directly in the Superior Court.

In addition, it follows that the State should be prohibited from enforcing the 2021 Amendment in any manner that deprives taxpayers of their guaranteed right to seek judicial review pursuant to the right to commence action in lieu of prerogative writ.

III. THE AMENDMENT TO N.J.S.A. 54:3-21 VIOLATES EQUAL PROTECTION BY GIVING TAXING DISTRICTS THE RIGHT TO CHALLENGE A PROPERTY OWNER'S ASSESSMENT OR EXEMPTION WHILE DEPRIVING TAXPAYER'S OF SUCH RIGHT.

The amendment to N.J.S.A. 54:3-21 is unconstitutional for yet another reason: it violates equal protection by permitting a taxing district (i.e., a municipality) to challenge an assessor's grant of exemption to a taxpayer but deprives a private taxpayer of the ability to do so. Equal protection concerns apply to claims of discrimination in the law between the rights of a taxpayer and the taxing district. Cf. 1959 Highway 34, L.L.C. v. Twp. of Wall, 29 N.J. Tax 506 (Tax 2016)(holding that equal protection was not violated where taxpayer received the same 45-day notice to make challenge as the taxing district: "There is no equal protection violation since the deadline applies to both taxpayers and the taxing district").

Unlike the decision in 1959 Highway 34, L.L.C. v. Twp. Of Wall, where the court found no equal protection violation because

the taxpayer and the taxing district were treated equally under the statute, here the taxpayer is affirmatively deprived of a right granted to the taxing district, i.e. the right to make a third-party challenge to another's exemption. As Judge Bianco observed in a published decision, such an action by a third-party taxpayer will inure to the benefit of all of the taxpayers in the taxing district in the same way as if the municipality had brought the action. Fields v. Trs. of Princeton Univ., 28 N.J. Tax 574, 585-86 (Tax 2015)(recognizing that a third party seeking such relief against Princeton University will bring to the taxpayers the same benefit as if the taxing district itself had brought the action).

It follows that since the benefit to the public from a third-party taxpayer action challenging an improper assessment or exemption is the same for the taxpayers as the identical action brought by the municipality, the third-party taxpayer is in an identical position as the taxing district and should be treated the same under the statute. In fact, no basis is asserted to justify why such an action can be brought by the taxing district but not by the taxpayer nor is any showing made of any historical and substantial abuse of such rights.

The amended statute also allows a property owner to bring an action seeking an exemption that will burden all other taxpayers while depriving the taxpayers who will bear the resulting increase

in their own taxes of the privilege of challenging such exemption, further violating equal protection.

Accordingly, the amendment, by depriving third-party taxpayers of such power also violates equal protection.

IV. PLAINTIFFS ARE ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF, INCLUDING LEGAL FEES, UNDER THE NEW JERSEY CIVIL RIGHTS ACT.

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, one looks to the "ordinary and well understood meaning" of the words therein. Tarr v. Bob Ciasulli's Mack Auto Mall, Inc., 181 N.J. 70, 82 (2004). 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). "Substantive rights . . . [may be] secured by the Constitution or laws of this State," Felicioni v. Administrative Office of the Courts, 404 N.J. Super. at 401; and, whatever procedural requirements previously applied to statutory and constitutional claims applies to the vindication of such claims through the NJCRA. Owens v. Feigen, 194 N.J. 607, 612 (2008); see also Office of the Governor, Press Release, dated September 10, 2004 ("Press Release") (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").

Right to Injunctive Relief

It is clear from a review of the legislative history of the NJCRA that the Legislature enacted the NJCRA to create a state law claim analogous to 42 U.S.C. § 1983. Governor McGreevey signed the NJCRA into law on September 10, 2004. See Press Release. 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.[11] Both statements specifically state: "This bill is modeled

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

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 Legis., May 6, 2004 at 2. Furthermore, like the federal civil rights statute, NJCRA gives a private cause of action to persons 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 v. Feigen, 194 N.J. Super. at 166 (stating that the Legislature passed the NJCRA to create a state law claim analogous to 42 U.S.C. § 1983).

In this matter, it is certain that the amendment to N.J.S.A. 54:3-21, has created uncertainty as to whether the Legislature has deprived Plaintiffs and all the taxpayers they represent of their constitutionally protected right to challenge the tax assessment

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> 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.

or exemption of other taxpayers. As set forth at length in this brief, this uncertainty gives rise to the need for declaratory and injunctive relief to clarify that such "right of action" still exists, and to enjoin the State from enforcing the 2021 Amendment to deprive taxpayers of such substantive right.[12]

Right to Counsel Fees

In addition to securing injunctive or other equitable relief, plaintiffs who prevail in a civil rights claim are able to receive counsel fees. N.J.S.A. 10:6-2(f) 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.

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

[12] Those substantive rights include the right of access to the Courts: "[T]he right of access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government." Borough of Duryea v. Guarnieri, 564 U.S. 379, 387 (2011), quoting Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 896-897, 104 S. Ct. 2803, 81 L. Ed. 2d 732 (1984); see also BE&K Constr. Co. v. NLRB, 536 U.S. 516, 525, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972).

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 again implying the relevance of case law developed under that statute.

It is well established that litigants who prevail within the 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").

Accordingly, if Plaintiffs prevail in this litigation and secure the declaratory and/or injunctive relief suggested, this Court should permit counsel to apply for legal fees prior to entering final judgment in this matter. See Jones v. Hayman, 418 N.J. Super. 291, 305 (App. Div. 2011)(citing Mason v. City of Hoboken, 196 N.J. 51, 76 (2008)(one "unequivocal way" in which a litigant is deemed prevailing is to obtain a judgment on the merits); Inst. Juveniles v. Secy. Of Public Welfare, 758 F.2d 897, 911 (3d Cir. 1985); P.G. v. Brick Twp. Bd. of Ed, 124 F. Supp. 2d 251, 259 (D.N.J. 2000); Singer v. State, 95 N.J. 487, 495 (1984) (requiring a "factual causal nexus between plaintiff's litigation

and the relief ultimately achieved"). See also D. Russo, Inc. v. Township of Union, 417 N.J. Super. 384, 386 (App. Div. 2010)("We conclude that a party who brings an action that is shown to have been a catalyst for the cessation of conduct alleged to violate the CRA may qualify as a prevailing party entitled to an award of attorneys' fees").

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Summary Judgment and deny State's Motion to Dismiss, with prejudice, along with such other relief as to the court may seem just and proper, including permission to make an application to this Court for reasonable attorney's fees pursuant to the NJCRA.

Respectfully submitted,

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