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The Honorable John A. Sweeney, A.J.S.C. (Ret.), Chairman  
New Jersey Council on Local Mandates  
135 West Hanover Street, 4th Floor  
P.O. Box 627  
Trenton, New Jersey 08625-0627

Re: In the Matter of a Complaint Filed by  
the New Jersey Association of Counties  
Complaint No. 1-19

Dear Judge Sweeney:

Please accept this letter in lieu of a formal brief on behalf of Respondent, State of New Jersey, in support of a motion to dismiss the Complaint.

**PLEADING SUMMARY**

Claimant, the New Jersey Association of Counties ("NJAC") challenges the 2018 Amendment to the Vote By Mail Law, N.J.S.A. 19:63-1 to -28 (the "2018 Amendment") as imposing an unfunded mandate upon the counties and county clerks of New Jersey. The Complaint should be dismissed because it fails to set forth a viable claim that the 2018 Amendment imposes any additional costs when balanced against the cost savings to the counties. Under the



provisions of the 2018 Amendment, registered voters who received a vote by mail ballot ("mail-in ballot") for the November 2016 General Election are no longer required to submit new mail-in ballot applications for processing each year. Rather, those individuals automatically receive a mail-in ballot for all future elections, unless they opt out from automatic mail-in ballots.

The costs alleged by Claimant in the Complaint do not demonstrate any net increase in costs related to the 2018 Amendment. The Complaint fails to distinguish costs related to the 2018 Amendment and previously existing costs for mail-in ballots. In fact, the 2018 Amendment saves the county clerks significant time and costs by eliminating the need to process tens of thousands of mail-in ballot applications that no longer are required to be filed by voters due to the "all future elections" provision of the 2018 Amendment. The counties also achieve savings from the elimination of the expense of sending mail-in ballot applications to these voters. The Complaint fails to recognize the cost savings from the 2018 Amendment and the offset of such savings against any alleged increased costs. Because the Complaint fails to provide a basis for asserting increased costs to county clerks associated with the 2018 Amendment, the Complaint fails to state a viable claim that there is any unfunded mandate.

Beyond that, both the Vote By Mail Law and the 2018 Amendment fall within multiple exemptions from the constitutional definition of an unfunded mandate. The 2018 Amendment is not an unfunded mandate because it implements a provision of the New Jersey Constitution by enforcing and promoting the right to vote set forth in Art. II, §1, ¶3 of the New Jersey Constitution. In addition, the 2018 Amendment cannot be considered an unfunded mandate because pursuant to N.J.S.A. 52:13H-3c, it revises and eases an existing requirement or mandate in providing voters with mail-in ballots. Accordingly, the Council should grant the State's motion to dismiss the Complaint.

#### **PROCEDURAL HISTORY AND STATEMENT OF FACTS**

On August 10, 2018, Governor Murphy signed into law the 2018 Amendment. The Vote By Mail law, as amended, provides that for all voters who received a mail-in ballot for the November 2016 General Election, are to receive mail-in ballots for all future elections without any requirement that the voters file an application for such. Prior to the 2018 Amendment, there was a statutory limitation that mail-in ballots be sent to a voter either for each November General Election or for all elections within a calendar year. N.J.S.A. 19:63-3e. Therefore, if a voter wished to receive mail-in ballots beyond one year or for elections beyond the November General Elections, the voter was required to file an application

with the appropriate county clerk each year or for each election other than the November General Election. Under the 2018 Amendment, voters are no longer required to file mail-in ballot applications each year or for each election other than the November General Election. In turn, the county clerks are relieved of the cost and time associated with both providing mail-in ballot applications and reviewing and processing said applications time and time again.

Additionally, the 2018 Amendment relieves the county clerks from the requirement and cost of printing and sending a sample ballot for any election to a voter who has been sent a mail-in ballot for that election whose voted ballot is received by the county board of elections prior to transmission of sample ballots to voters. This results in additional cost savings.

On or about January 24, 2019, Claimant filed the present Complaint with the Council on Local Mandates, seeking a declaration that the 2018 Amendment is an unfunded mandate in violation of N.J. Const. art. VIII, § 2, ¶ 5 and N.J.S.A. 52:13H-2. Claimant asserts that the 2018 Amendment imposes additional direct expenditures on county governments through the county clerks "increased responsibilities to support the act by. . .direct expenditures such as printing, postage, supplies, and personnel costs. . . ." (Complaint, ¶30). Claimant asserts that it must use

local property tax dollars to fulfill these obligations. (Complaint, ¶30).

The State now files this Motion to Dismiss to the Complaint as the challenged statute is not an unfunded mandate.

#### **ARGUMENT**

An unfunded mandate is a law, rule, or regulation that “does not authorize resources, other than the property tax, to offset the additional direct expenditures required for the implementation of the law or rule or regulation. . . .” N.J. Const. art. VIII, § 2, ¶ 5. N.J. Const. art. VIII, § 2, ¶ 5 and its enabling statute, the Local Mandates Act (“LMA”), N.J.S.A. 52:13H-1 to -22, grant the Council on Local Mandates (the “Council”) the exclusive authority to determine whether any provision of a law enacted on or after January 17, 1996, or any part of a rule or regulation originally adopted after July 1, 1996, is an unfunded State mandate. Any statute or regulation that is deemed to be an unfunded mandate “shall, upon such determination cease to be mandatory in its effect and expire.” N.J. Const. art. VIII, § 2, ¶ 5; see also N.J.S.A. 52:13H-2, -12(a).

The 2018 Amendment does not constitute an unfunded mandate as defined by N.J. Const. art. VIII, § 2, ¶ 5 and the LMA. The Council has explained that its “authority is limited to considering whether a mandate is funded or unfunded, and if it is unfunded, whether

certain enumerated exemptions apply.” In re Complaints Filed by the Monmouth-Ocean Educ. Servs. Comm’n, the Rumson-Fair Haven Reg’l High Sch. Dist., and the Stafford Twp. Bd. of Educ. (August 20, 2004) at 8. First, the 2018 Amendment is exempt from being deemed an unfunded mandate because it does not require any additional direct expenditures by Claimant because the counties are relieved of various duties and costs under the amended mail-in ballot requirements of the 2018 Amendment. Second, the 2018 Amendment is not unconstitutional because two additional enumerated exemptions apply: (1) the 2018 Amendment implements a provision of the New Jersey Constitution, see N.J. Const. art. VIII, § 2, ¶ 5(c)(5); and (2) the 2018 Amendment simply revises and eases an existing requirement, see N.J. Const. art. VIII, § 2, ¶ 5(c)(3). For these reasons, the State’s motion to dismiss Claimant’s Complaint should be granted.

**POINT I**

**THE 2018 AMENDMENT IS NOT AN UNFUNDED MANDATE  
BECAUSE IT DOES NOT REQUIRE CLAIMANT TO EXPEND  
ADDITIONAL RESOURCES.**

The Council may deem any provision of a statute or regulation an unfunded mandate where the statute or regulation “does not authorize resources to offset the additional direct expenditures required for the implementation of the statute or the rule or regulation.” N.J.S.A. 52:13H-12(a). The 2018 Amendment is not an

unfunded mandate because it does not require any additional direct expenditures by Claimant.

To make out a claim of unconstitutionality under N.J. Const. art. VIII, § 2, ¶ 5 and the LMA, a claimant must demonstrate that: (1) the statute, rule, or regulation imposes a "mandate" on a unit of local government; (2) additional direct expenditures are required for the implementation of the statute, rule, or regulation; and (3) the statute, rule, or regulation fails to "authorize resources, other than the property tax, to offset the additional direct expenditures." In re a Complaint Filed by the Borough of Jamesburg (October 28, 2014) at 5. Where a statute does not require direct expenditures to be incurred in order to implement the language of the statute, there cannot be an unfunded mandate. In re Complaint filed by the Twp. of Blirstown (July 8, 2011) at 3.

The 2018 Amendment does not require any direct expenditures as it simply requires that counties provide mail-in ballots to voters who previously requested and received mail-in ballots in the November 2016 General Election. As set forth in Point III, providing the opportunity for voters to apply for and receive mail-in ballots (previously known as "absentee ballots") from the county clerks has been an obligation of the counties well before the 2018 Amendment. Thus the 2018 Amendment does not establish a new

obligation upon counties but revises and eases the procedures for both voters and the county clerks for voting by mail-in ballot.

While the implementation of certain provisions of the statute could result in counties expending additional resources, additional costs are by no means certain. This is especially so in light of the fact that counties were already required, under N.J.S.A. 19:63-1 to -28, to provide services to voters seeking to apply for and receive a mail-in ballot. The counties would not incur any new costs as a result of the 2018 Amendment where the law diminishes the costs previously associated with printing, mailing and processing mail-in ballot applications and sample ballot mailings. Thus, there need not be any additional expenditures as a result of the 2018 Amendment beyond what was already required and the 2018 Amendment should not be deemed an unfunded mandate.

In each of the rulings where the Council has invalidated a statute, rule, or regulation, "clear and convincing evidence was presented that counties, municipalities or boards of education would incur expenditures in order to implement the challenged provisions." In re a Complaint Filed by the Twp. of Medford (June 1, 2009) at 12 (concurring opinion). The same cannot be said of the costs associated with the 2018 Amendment. For that reason, the

2018 Amendment is not an unfunded mandate and the State's motion to dismiss should be granted.

**POINT II**

**THE 2018 AMENDMENT IMPLEMENTS A PROVISION OF  
THE NEW JERSEY CONSTITUTION AND THEREFORE IS  
NOT AN UNFUNDED MANDATE.**

N.J. Const. art. VIII, § 2, ¶ 5(c)(5) and the LMA provide that laws and rules or regulations that "implement the provisions of the New Jersey Constitution" shall not be unfunded mandates. N.J. Const. art. VIII, § 2, ¶ 5(c)(5); N.J.S.A. 52:13H-3(e). As such, any law, rule, or regulation that implements the right to vote is not an unfunded mandate. Here, it is evident that the 2018 Amendment is in furtherance of the constitutional right to vote.

The right to vote is a fundamental constitutional right set forth in the New Jersey Constitution. N.J. Const., art. II, §1, ¶3. The right to vote without appearing at a polling location on election day has existed in New Jersey for over 60 years, beginning with the limited use of "absentee ballots" for military voters. N.J.S.A. 19:57-1 to -40. Initially, "absentee" ballots were only provided to military personnel pursuant to the 1947 New Jersey Constitution. N.J. Const. art. II, §1, para. 4. In 1953, the Absentee Voting Law, N.J.S.A. 19:57-1 to -40, L. 1953, c. 211 (repealed), was enacted, entitling civilian voters to vote by absentee ballot where those persons could demonstrate that they

could not physically be present at their polling location on election day.. Over the decades, numerous amendments to the Absentee Voting Law expanded the ability of voters to vote by mail, leading to the adoption of the Vote By Mail Law, N.J.S.A. 19:63-1 to -28, effective 2009, which allows any qualified voter to apply to vote by mail without having to demonstrate any inability to appear at the voter's polling location on election day.

The 2018 Amendment to the Vote By Mail Law, continues this trend to expand voter participation by partially eliminating the need for voters to apply for a mail-in ballot either on an annual basis or for a specific election. In so doing, the 2018 Amendment is no more than an addition to the laws protecting the citizens' constitutional right to vote. In affirming the constitutionality of the 1953 Absentee Voting Law which provided the right of civilian voters to vote by absentee ballot, the New Jersey Supreme Court held the 1947 Constitution's limitation of absentee voting to military personnel "is not in itself a bar to civilian absentee voting by legislative allowance in furtherance of the exercise of the basic right of suffrage, a civil and political franchise--of the very essence of our democratic process-- that is to be liberally and not strictly construed to promote and to defeat or impede the essential design of the organic law." Gangemi v. Berry, 25 N.J. 1, 12 (1957) (emphasis added). The 2018 Amendment simply

adds to a string of legislative enactments to promote and ease restrictions "of the basic right of suffrage, . . . the very essence of our democratic process."

The 2018 Amendment revises and eases existing law to ensure that no qualified person is denied the right to vote. It adds to the existing laws seeking to insure that voters who are unable to vote in person on election day at their designated polling location are still able to exercise their constitutional right to vote. The 2018 Amendment simply furthers a provision of the New Jersey Constitution and is specifically exempted from the constitutional definition of an unfunded mandate.

### POINT III

**THE 2018 AMENDMENT IS NOT AN UNFUNDED MANDATE  
BECAUSE IT REVISES AND CLARIFIES WHAT WAS  
ALREADY REQUIRED BY EXISTING STATE LAW.**

N.J. Const. art. VIII, § 2, ¶ 5(c)(3) and the LMA specifically exempt laws, rules, or regulations that "repeal, revise or ease an existing requirement or mandate or [that] reapportion the costs of activities between boards of education, counties, and municipalities" from the definition of an unfunded mandate. N.J. Const. art. VIII, § 2, ¶ 5(c)(3); N.J.S.A. 52:13H-3(c). Because the 2018 Amendment eases the existing statutory requirement for county clerks to make mail-in ballots available to all voters, the 2018 Law is not an unfunded mandate.

As set forth in Point II, as early as 1953, New Jersey has authorized non-military voters absent from their polling location on the day of an election to vote by absentee ballot. See N.J.S.A. 19:57-1 to -40. Over the years, the Absentee Voting Law was amended until it was replaced with the Vote By Mail Law in 2009.

The 2018 Amendment revises and eases what has long been required by Title 19. The 2018 Amendment requires county clerks to send mail-in ballots for all future elections to voters who received mail-in ballots for the November 2016 General Election. As a result, these voters will no longer have to apply for mail-in ballots and the county clerks will no longer have to review and process mail-in applications from them. Additionally, the 2018 Amendment also requires voter registration forms to now include a mail-in ballot request option. Exercise of this option by voters will relieve them from requesting and filing mail-in ballot applications with the county clerks. L. 2018, c. 72, section 3. The 2018 Amendment streamlines and creates a uniform procedure for actions that county clerks were already performing. In that way, it simply revises an existing statutory requirement and is not an unfunded mandate.

Because N.J. Const. art. VIII, § 2, ¶ 5(c)(3) and the LMA specifically exempt mandates which repeal, revise, or ease an existing requirement, and because the 2018 Amendment simply

revises existing statutory requirements, it is not an unfunded mandate, and the State's Motion to Dismiss should be granted.

**CONCLUSION**

For the foregoing reasons, the State's Motion to Dismiss should be granted and the Complaint dismissed with prejudice.

Respectfully submitted,

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