



NEW JERSEY LAW REVISION COMMISSION

Draft Final Report Concerning Interpretation of the Vote By Mail Law

April 8, 2024

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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Project Summary

In New Jersey, the grounds for contesting an election,¹ and the procedures and rules governing voting by mail (“Vote By Mail Law”²) are contained in Title 19.³ An election “may be contested” based upon one or more of the nine grounds enumerated in N.J.S. 19:29-1,⁴ including “[w]hen . . . legal votes rejected at the polls [are] sufficient to change the result.”⁵ By contrast, N.J.S. 19:63-26 directs that “[n]o election shall be held invalid due to any irregularity or failure in the preparation or forwarding of any mail-in ballots.”⁶

The *In re Election for Atlantic County Freeholder District 3 2020 General Election* decision addressed whether N.J.S. 19:29-1 “appl[ies] to an election pursuant to the Vote By Mail Law.”⁷ The Court in that case held that, if relevant to a contest claim, “N.J.S.A. 19:63-26 operates as a rebuttable presumption [when a] contestant . . . assert[s] one or more of the grounds under N.J.S.A. 19:29-1.”⁸

The Commission released a Tentative Report in October 2022 proposing modifications to N.J.S. 19:29-1 and N.J.S. 19:63-26 that were intended to clarify that N.J.S. 19:63-26 creates a rebuttable presumption when vote by mail elections are contested pursuant to N.J.S. 19:29-1.⁹ Following outreach to knowledgeable and interested individuals and organizations, an Update Memorandum was presented to the Commission in April 2023 summarizing the feedback received.¹⁰

After additional research and outreach related to the jurisdictional reach of the Election Law Enforcement Commission (“ELEC”),¹¹ the Commission considered Revised Draft Tentative Reports in October, November, and December of 2023, proposing additional modifications to N.J.S. 19:29-1, N.J.S. 19:29-2,¹² and the Campaign Contributions and Expenditures Reporting

¹ N.J. STAT. ANN. §§ 19:29-1 to -14 (West 2023).

² N.J. STAT. ANN. §§ 19:63-1 to -31 (West 2023).

³ N.J. STAT. ANN. §§ 19:1-1 to :63-31 (West 2023).

⁴ N.J. STAT. ANN. § 19:29-1 (West 2023).

⁵ N.J. STAT. ANN. § 19:29-1(e).

⁶ N.J. STAT. ANN. § 19:63-26 (West 2023).

⁷ *In re the Election for Atl. Cnty. Freeholder Dist. 3 2020 Gen. Election*, 468 N.J. Super. 341, 357 (App. Div. 2021).

⁸ *Id.* at 360.

⁹ N.J. Law Revision Comm’n, *Tentative Report Concerning Interpretation of the Vote By Mail Law in N.J.S 19:63-26* (Oct. 10, 2022), www.njlr.org (last visited Apr. 3, 2024) [hereinafter “October 2022 Tentative Report”].

¹⁰ N.J. Law Revision Comm’n, *Update Memorandum Re: Interpretation of the Vote By Mail Law* (Apr. 10, 2023), www.njlr.org (last visited Apr. 3, 2024) [hereinafter “April 2023 Update Memorandum”].

¹¹ N.J. Law Revision Comm’n, *Minutes of NJLRC Meeting*, at *6, Apr. 20, 2023, www.njlr.org (last visited Oct. 4, 2023) [hereinafter “April 2023 Minutes”] (agreeing “that this is an area of law that would benefit from clarification”).

¹² N.J. STAT. ANN. § 19:29-2 (West 2023).

Act¹³ (“Reporting Act”).¹⁴ A Revised Tentative Report was released in December 2023, and outreach was again conducted to knowledgeable and interested individuals.¹⁵

The Appendix sets forth recommended modifications to N.J.S. 19:29-1 and 19:63-26 reflecting the *Atlantic County Election* holding, and to N.J.S. 19:29-2 and the Reporting Act clarifying the scope of the ELEC’s jurisdiction over election contest claims premised on Reporting Act violations.

Statutes Considered¹⁶

N.J.S. 19:29-1 provides, in relevant part, that:

The nomination or election of any person to any public office or party position, or the approval or disapproval of any public proposition, may be contested by the voters of this State or of any of its political subdivisions affected thereby upon 1 or more of the following grounds:

e. When illegal votes have been received, or legal votes rejected at the polls sufficient to change the result;¹⁷

N.J.S. 19:63-26 provides, in relevant part, that:

No election shall be held to be invalid due to any irregularity or failure in the preparation or forwarding of any mail-in ballots prepared or forwarded pursuant to the provisions of P.L.2009, c. 79 (C.19:63-1 et al.).¹⁸

Background

The *Atlantic County Election* decision concerned an election contest filed by the unsuccessful candidate (Parker) in the November 3, 2020, election for Third District

¹³ N.J. STAT. ANN. §§ 19:44A-1 to -47 (West 2023).

¹⁴ N.J. Law Revision Comm’n, *Revised Draft Tentative Report Concerning Interpretation of the Vote By Mail Law* (Oct. 10, 2023), www.njlrc.org (last visited Apr. 3, 2024); N.J. Law Revision Comm’n, *Revised Draft Tentative Report Concerning Interpretation of the Vote By Mail Law* (Nov. 6, 2023), www.njlrc.org (last visited Apr. 3, 2024); N.J. Law Revision Comm’n, *Revised Draft Tentative Report Concerning Interpretation of the Vote By Mail Law* (Dec. 11, 2023), www.njlrc.org (last visited Apr. 3, 2024).

¹⁵ N.J. Law Revision Comm’n, *Revised Tentative Report Concerning Interpretation of the Vote By Mail Law* (Dec. 21, 2023), www.njlrc.org (last visited Apr. 3, 2024) [hereinafter “December 2023 Revised Tentative Report”].

¹⁶ Additional modifications are recommended to N.J.S. 19:29-2, which sets forth the requirements for filing a petition to contest an election, and in the Reporting Act. *See infra* at pp. 20-23.

¹⁷ N.J. STAT. ANN. § 19:29-1.

¹⁸ N.J. STAT. ANN. § 19:63-26.

Commissioner.¹⁹ Parker filed a claim to “invalidate the election because a number of voters received defective ballots that did not include the Third District Commissioner election.”²⁰ Parker contended that enough “legal votes [were] rejected at the polls . . . to change the results,” and asserted that the election result should be invalidated pursuant to N.J.S. 19:29-1(e).²¹

The winner of the election (Witherspoon) responded that N.J.S. 19:63-26 “barred Parker’s challenge because the statute limits the court’s ability to overturn an election due to irregularities [in the preparation or forwarding of mail-in ballots] and supersedes N.J.S. 19:29-1.”²²

The trial court rejected Witherspoon’s statutory argument, concluding that “the issues raised . . . were . . . fundamental errors that may have altered the outcome of the election because voters were denied the right to vote.”²³ The court found that voters who received defective ballots were “properly characterized as ‘rejected legal votes,’”²⁴ and held that “Parker met his burden to set aside the election” pursuant to N.J.S. 19:29-1(e).²⁵

Analysis

On appeal, Witherspoon raised the same objections, including whether the defective mail-in ballots constituted “rejected legal votes,” and the impact of the prohibition in N.J.S. 19:63-26 on a vote by mail election contested pursuant to N.J.S. 19:29-1.²⁶

- “Rejected” Legal Votes

With respect to whether the defective ballots fell within the scope of N.J.S. 19:29-1(e), the *Atlantic County Election* Court stated that “[a] vote has been ‘rejected’ . . . ‘in any situation in which qualified voters are denied access to the polls’ . . . or . . . ‘through no fault of their own’ [are] ‘prohibited from voting for a specific candidate by some irregularity in the voting procedures.’”²⁷

Concluding that “[t]he defective ballots sent to 335 voters provided them no opportunity to vote for any candidate in the Third District County Commissioner race,” the Court found that, “[r]egardless of their intent, these voters were disenfranchised.”²⁸ Therefore, the defective ballots

¹⁹ *In re Atl. Cnty. Election*, 468 N.J. Super. at 346-47.

²⁰ *Id.* at 347 (Parker lost the election by 286 votes and 335 erroneous ballots were sent to voters).

²¹ *Id.* at 349.

²² *Id.* at 352–53; *see id.* at 359–60 (“the parties stipulated the ballot defect was an error by the Office of the Atlantic County Clerk, not the voters [and t]herefore, the defect here was in mailing or preparation of the ballots, and implicated N.J.S.A. 19:63-26”) (internal quotations omitted).

²³ *Id.* at 351

²⁴ *Id.*

²⁵ *Id.* at 352.

²⁶ *Id.*

²⁷ *Id.* at 354-55 (quoting *In re Petition of Gray-Sadler*, 164 N.J. 468, 475-76 (2000)).

²⁸ *Id.* at 356.

were “rejected legal votes” pursuant to N.J.S. 19:29-1(e).²⁹

- *Interaction Between N.J.S. 19:29-1 and N.J.S. 19:63-26*

The Court observed that whether “N.J.S.A. 19:29-1 [applies] to an election pursuant to the Vote By Mail Law” was an “issue of first impression,” and considered both the canons of statutory interpretation and the intent of the Legislature.³⁰

To “discern[] . . . legislative intent,” the Appellate Division examined N.J.S. 19:63-26 in the context of Title 19, as well as “the legislative objectives sought to be achieved by enacting the statute.”³¹ When interpreting election laws, courts “must . . . construe [statutes] in a common-sense way that accords with the legislative purpose” of favoring “the enfranchisement of voters.”³²

Guided by these principles, the Court determined that the Legislature did not “intend[] to eliminate the ability to contest an election pursuant to N.J.S.A. 19:29-1 merely because the vote occurred by mail.”³³ Rather, the Court favored the Attorney General’s suggested interpretation, which it found “[h]armoniz[ed] N.J.S.A. 19:63-26 and N.J.S.A. 19:29-1 and read[the] statutes *in pari materia* with the overall scheme” of the election laws.³⁴

The *Atlantic County Election* Court aligned its holding with the position of the Attorney General³⁵ that “N.J.S.A. 19:63-26 establishes a presumption that an irregularity or failure in the preparation of forwarding of any mail-in ballot will not invalidate an election,” which may be rebutted “by asserting one or more of the grounds under N.J.S.A. 19:29-1 as a basis to invalidate the election.”³⁶

October 2022 Tentative Report

The Commission released a Tentative Report in October 2022 (“October 2022 Tentative Report”) proposing modifications to N.J.S. 19:63-26 and N.J.S. 19:29-1 that reflected the holding in *Atlantic County Election*.³⁷ The proposed modifications to N.J.S. 19:63-26 clarified that the statute creates a rebuttable presumption when an election is contested pursuant to N.J.S. 19:29-

²⁹ *Id.*

³⁰ *Id.* at 357.

³¹ *Id.* (internal quotations omitted).

³² *Id.* at 358.

³³ *Id.* at 360 (rejecting Witherspoon’s argument that the omission of “mail-in ballot deficiencies” from N.J.S. 19:29-1 demonstrated a legislative intent “to exclude such deficiencies as potential grounds for invalidating an election,” and that the enactment of N.J.S. 19:63-26 “clarified that exclusion.”)

³⁴ *Id.* at 360.

³⁵ *Id.* at 353.

³⁶ *Id.* at 360 (“An election shall be set aside if the trial judge concludes the contestant has proved a basis to do so under N.J.S.A. 19:29-1 by a preponderance of the evidence and the judge finds that no person was duly elected, as per N.J.S.A. 19:29-9.”).

³⁷ October 2022 Tentative Report, *supra* note 9.

1.³⁸ The proposed modifications to N.J.S. 19:29-1 added a cross-reference to the rebuttable presumption in N.J.S. 19:63-26, as well as other minor language changes.³⁹

April 2023 Update Memorandum

Following the release of the October 2022 Tentative Report, outreach was conducted to knowledgeable individuals and organizations. Alternative language was proposed by Scott D. Salmon, Esq., who represented Thelma Witherspoon in the *Atlantic County Election* case.⁴⁰ The feedback and alternative language from Mr. Salmon was presented to the Commission in an Update Memorandum prepared for the April 20, 2023, Commission Meeting.⁴¹

Mr. Salmon also informed Staff that the scope of N.J.S. 19:29-1(h) was impacted by the formation of the ELEC, which has jurisdiction over claims arising under the Reporting Act.⁴² He provided two decisions in which the courts “abrogated this provision to ‘injunction actions filed during a campaign or criminal actions.’”⁴³

During the April 2023 Commission meeting, the Commission authorized continued research and outreach in this area.⁴⁴ The Commission also directed Staff to review recent

³⁸ *Id.* at 8.

³⁹ *Id.* at 8-9; *see also* N.J. Law Revision Comm’n, *Minutes of NJLRC Meeting*, at *6, Oct. 10, 2022, www.njlrc.org (last visited Apr. 3, 2024) [hereinafter “October 2022 Minutes”] (making the “linguistic changes proposed by Commissioner Bell”).

⁴⁰ E-mail from Scott Salmon, Esq., Partner, Jardim, Meisner & Susser, P.C., to Whitney G. Schlimbach, Counsel, NJLRC (Dec. 5, 2022, 1:07 PM EST) (on file with NJLRC) [hereinafter “Salmon E-mail”].

⁴¹ April 2023 Update Memorandum, *supra* note 10. *See also* April 2023 Minutes, *supra* note 11, at 5.

Mr. Salmon contended that, rather than add a rebuttable presumption to N.J.S. 19:63-26, the statute “should simply [be] repeal[ed] and maybe . . . a clarifying point [added] within 19:29-1 that the basis for an election contest must be found in that statute.” April 2023 Update Memorandum, *supra* note 10, at 5. In addition, Mr. Salmon opposed the change in N.J.S. 19:29-1(a) changing the language “the voters of this State” to “any eligible voter of this State.” *Id.* He pointed out that N.J.S. 19:29-2 requires a certain number of voter signatures to contest an election and the implication of “any eligible voter” is that “a single voter could contest the election.” *Id.*; *see also* N.J. STAT. ANN. § 19:29-2. Mr. Salmon also suggested that “candidates to said election” should be added to the list of entities that may contest an election pursuant to N.J.S. 19:29-1 and N.J.S. 19:29-1(g) should “include public questions.” April 2023 Update Memorandum, *supra* note 10, at 5. Finally, Mr. Salmon proposed restructuring N.J.S. 19:29-1 to group the available grounds according to whether they constitute “offenses that, on their own, are sufficient to overturn a result, [or] require more of a demonstration (i.e., sufficient to change the results).” *Id.* at 5-6 (Commissioner Bell made a similar suggestion that subsections (b), (c), and (d) should be combined because they address “eligibility” for nomination or office).

⁴² *See* N.J. STAT. ANN. § 19:44A-6(b) (West 2023) (“[i]t shall be the duty of the commission to enforce the provisions of this act . . .”).

⁴³ *See* April 2023 Update Memorandum, *supra* note 10, at 6 (citing *In re Contest of Democratic Primary Election of June 3, 2003 for Off. of Assembly of Thirty-First Legislative Dist.*, 367 N.J. Super. 261 (App. Div. 2004) and *Nordstrom v. Lyon*, 424 N.J. Super. 80 (App. Div. 2012)).

⁴⁴ April 2023 Minutes, *supra* note 11, at 6.

legislation in the area of election law, including the Elections Transparency Act, to determine its impact on the Vote By Mail law.⁴⁵

Jurisdiction of ELEC Over Claims Arising Under the Reporting Act

The ELEC was created in 1973 to “administer [the] provisions” of the Reporting Act.⁴⁶ As noted by Mr. Salmon, the Appellate Division has held that election contest claims premised on Reporting Act violations generally should be heard by the ELEC in the first instance.⁴⁷

Both *In re Contest of Democratic Primary Election of June 3, 2003 for Office of Assembly of Thirty-First Legislative District* and *Nordstrom v. Lyon* address whether election contest claims based on campaign finance and reporting violations are cognizable under N.J.S. 19:29-1(h).⁴⁸ In each case, the trial court decided the election contest claim and the Appellate Division held that the Reporting Act violations should have been transferred to the ELEC after conducting a primary jurisdiction analysis.⁴⁹

- *In re Contest of Democratic Primary Election of June 3, 2003 for Office of Assembly of Thirty-First Legislative District*

In re Contest of Democratic Primary Election involved an election contest⁵⁰ brought pursuant to N.J.S. 19:29-1⁵¹ based on alleged campaign contribution violations of the Reporting Act during a primary election.⁵² The Appellate Division “conclude[d] that the Legislature intended that ELEC have primary jurisdiction over [Reporting] Act complaints not brought under either N.J.S.A. 19:44A-21 (criminal complaint) or 19:44A-22.1 (pre-election summary action).”⁵³

In reaching this determination, the Appellate Division examined the language of three Reporting Act statutes and found that the Reporting Act provides jurisdiction to either the ELEC

⁴⁵ *Id.* at 5. See December 2023 Revised Tentative Report, *supra* note 15, at 6-7. The Elections Transparency Act extensively amended the Reporting Act, but primarily altered regulatory provisions in the Reporting Act, including increasing contribution and expenditure limits, changing reporting requirements and public contract rules, and creating a “housekeeping account” for candidates. See L.2023, c.30, eff. Jan.1, 2023. Additional amendments to the Vote By Mail Law made changes to mail-in voting procedures, see L.2022, c.67, specified circumstances in which a voter is removed from vote by mail status, see L.2022, c.68, and changed deadlines for mailing ballots, see L. 2022, c.70.

⁴⁶ See N.J. STAT. ANN. § 19:44A-6(b) (“The commission shall promulgate such regulations and official forms and perform such duties as are necessary to implement the provisions of this act.”).

⁴⁷ See *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 266; see also *Nordstrom*, 424 N.J. Super. at 102.

⁴⁸ Salmon Proposed Revisions to Election Contest Statute (attached to Salmon E-Mail, *supra* note 37).

⁴⁹ See *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 266 and *Nordstrom v. Lyon*, 424 N.J. Super. at 102.

⁵⁰ *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 265 (“[t]he complaint also alleged claims of other election irregularities, not covered by the [Reporting] Act” which were dismissed).

⁵¹ *Id.* at 265, n.1 (citing subsection (h) of N.J.S. 19:29-1).

⁵² *Id.* at 264-65 (reversing the trial court’s determination that the Reporting Act did not apply to primary elections).

⁵³ *Id.* at 283.

or the court in “three different situations.”⁵⁴ N.J.S. 19:44A-22 involves (1) a “non-criminal complaint of an Act violation, which ELEC considers;” N.J.S. 19:44A-21 covers (2) “the criminal complaint, which a court considers; and” N.J.S. 19:44A-22.1 addresses (3) “the pre-election^[55] summary action proceeding, which a court considers.”⁵⁶

The Court explained that the case had “proceeded in the Law Division on the theory that a Superior Court judge can adjudicate a [Reporting] Act-based complaint as if it were an election contest under N.J.S.A. 19:29-1h.”⁵⁷ Rather than “allow a complaint of an Act violation to proceed as an election contest,” the Appellate Division directed that the complaint or relevant counts should be transferred to the ELEC “unless the judge determines to keep jurisdiction after an appropriate analysis.”⁵⁸

With respect to the “appropriate analysis,” the Appellate Division instructed trial courts to “engage in a primary jurisdiction analysis before retaining the case,” as articulated in *Muise v. GPU, Inc.*⁵⁹ In the context of an election contest claim premised on Reporting Act violations, the Court found that “prudential considerations dictate that the trial judge should ordinarily allow ELEC to hear complaints of Act violations.”⁶⁰

Therefore, the *In re Contest of Democratic Primary Election* Court concluded that “complaints about campaign finance violations, other than injunction actions filed during a campaign or criminal actions, presumptively should be heard by ELEC under the doctrine of primary jurisdiction.”⁶¹

⁵⁴ *Id.*

⁵⁵ In *Hammer v. N.J. Voice, Inc.*, the Superior Court addressed a request for injunctive relief pursuant to N.J.S. 19:44A-22.1 based on allegations of campaign financing violations of the Reporting Act. 302 N.J. Super. 169, 171 (Law. Div. 1996); see also N.J. STAT. ANN. § 19:44A-22.1 (West 2023). By the time depositions and discovery were completed, the affected election had passed, and the *Hammer* Court concluded that “the threat of irreparable harm alleged ha[d] been rendered moot.” *Hammer*, 302 N.J. Super. at 175. Therefore, the Court “addressed . . . whether the Superior Court has jurisdiction under the Reporting Act and, more particularly, N.J.S.A. 19:44A–22.1, if irreparable harm does not exist.” *Id.* Relying on language in N.J.S. 19:44A-22.1 and -22(f), the Appellate Division found that “[a]s it relates to the issue of jurisdiction in post-election matters, the legislative intent appears to yield to the expertise of ‘ELEC.’” *Id.* at 177.

⁵⁶ *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 283 (citing N.J. STAT. ANN. § 19:44A-22(d) (West 2023); and N.J. STAT. ANN. § 19:44A-21 (West 2023); and then N.J. STAT. ANN. § 19:44A-22.1).

⁵⁷ *Id.* at 283-84 (permitting “a person [to] contest a primary or general election for ‘[t]he paying, promise to pay or expenditure of any money or other thing of value or incurring of any liability in excess of the amount permitted by this title for any purpose or in any manner not authorized by this title [Title 19]’”).

⁵⁸ *Id.*

⁵⁹ *Id.* at 285-86 (citing *Muise v. GPC Inc.*, 332 N.J. Super. 140, 158 (App. Div. 2000) (“Primary jurisdiction is defined as the circumstance in which a court declines original jurisdiction and refers to the appropriate body those issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.”) (internal quotations omitted)).

⁶⁰ *Id.* at 288 (finding the trial court “should have transferred the case to ELEC so the agency could have exercised its primary jurisdiction” and “remand[ing] the case to ELEC to develop a record and utilize its expertise in interpreting the Act’s provisions as to the claimed violations”).

⁶¹ *Id.* at 291-92.

- *Nordstrom v. Lyon*

In *Nordstrom v. Lyon*, the Appellate Division addressed an election contest claim filed after the primary election, which was based on the nominated candidate’s failure to comply with reporting obligations and contribution limits under the Reporting Act.⁶² After conducting a primary jurisdiction analysis, the trial court held the winning candidate’s nomination to be “null and void.”⁶³

The Appellate Division addressed the jurisdiction of ELEC over excess contribution and reporting violations of the Reporting Act separately.⁶⁴ The Court reiterated the *In re Contest of Democratic Primary Election* holding that ELEC has primary, but not exclusive, jurisdiction over excess contribution claims.⁶⁵ After reviewing the *Muise* factors, the Appellate Division concluded that “[t]he management, control, and remediation of excess campaign contributions are best left with the agency most experienced and equipped by the Legislature to handle such matters: ELEC, not the judiciary.”⁶⁶

The Court found, however, that the “ELEC has exclusive jurisdiction regarding reporting violations” based on the “general rule [that] jurisdiction of an administrative agency may be said to be exclusive when the remedy which the agency is empowered to grant is the only available remedy for the given situation.”⁶⁷ The Court explained that “the only vehicles for nullifying an election for Reporting Act violations” are found in the Reporting Act, and the provision relied upon by the trial court (N.J.S. 19:3-7⁶⁸) “is inapplicable to [the] reporting obligations imposed by the Reporting Act.”⁶⁹

- *South Hunterdon Regional School District Public Question v. Hunterdon County Board of Elections*

⁶² *Nordstrom*, 424 N.J. Super. at 85 (“petition asserted that [the winning candidate] committed violations of N.J.S.A. 19:29-1(h) and ‘the campaign finance law, N.J.S.A. 19:44A-21(c),’ [and s]pecifically . . . urged that [the winning candidate] had (1) willingly exceeded the campaign contribution limits by accepting a \$16,000 contribution from his father[] and (2) failed ‘to disclose donations as required by the 48 hour rule’”).

⁶³ *Id.*

⁶⁴ *Id.* at 97.

⁶⁵ *Id.*

⁶⁶ *Id.* at 102 (“except for the limited circumstances under *N.J.S.A.* 19:44A-21(c) (voiding a nomination or office after a finding of guilt to certain election-related fourth-degree crimes) and -22.1 (permitting an aggrieved candidate to bring a summary action”).

⁶⁷ *Id.* at 97-98 (explaining that “N.J.S.A. 19:44A-16 comprehensively details candidates’ reporting obligations,” and the “[f]ailure to comply with the statute and its implementing regulations, . . . exposes applicable persons—including candidates—to an array of penalties, including potential criminal sanctions found in N.J.S.A. 19:44A-21(b), and civil remedies found in N.J.S.A. 19:44A-22(a)(1)”).

⁶⁸ N.J. STAT. ANN. § 19:3-7 (West 2023) (directing that failure “to file any statement or oath required by this Title . . . , or [the filing of] any false statement” shall render “the nomination or election of such candidate . . . null and void”).

⁶⁹ *Nordstrom*, 424 N.J. Super. at 98 (holding that “[t]he use of N.J.S.A. 19:3-7 to invalidate [the] nomination was an unwarranted judicial arrogation of ELEC’s authority”).

In 2023, the Appellate Division reaffirmed the *Nordstrom* holding in *South Hunterdon*.⁷⁰ Before the Appellate Division, the “[p]laintiffs argue[d] the trial court erred in dismissing [the] count . . . alleging illegal expenditures, and electioneering to steer the electorate to a ‘Yes’ vote” when it “declin[ed] to exercise jurisdiction to consider [these] Reporting Act grievances.”⁷¹

The *South Hunterdon* Court rejected the plaintiff’s assertion that “the court may retain jurisdiction to hear Reporting Act violations through N.J.S.A. 19:29-1(h).”⁷² Rather, the Appellate Division reaffirmed that “the better policy is to adjudicate the violation through the procedures the Legislature has expressed in the Reporting Act,” and reiterated the *Nordstrom* Court’s holding that “while ELEC has primary jurisdiction over excess contribution claims under the Reporting Act, it enjoys exclusive jurisdiction over alleged reporting violations.”⁷³

November 2023 Commission Meeting⁷⁴

During the November 2023 Commission meeting, the Commission requested additional revisions related to the aspect of the *Atlantic County Election* decision analyzing the meaning of the phrase “legal votes rejected,” in N.J.S. 19:29-1(e).⁷⁵

- Meaning of “legal votes rejected”

The *Atlantic County Election* Court concluded that the mail-in ballots that did not contain the Third District Commission election qualified as “legal votes rejected.”⁷⁶ In coming to this conclusion, the Appellate Division relied on the New Jersey Supreme Court’s discussion in *In re Gray-Sadler*.⁷⁷ The *Gray-Sadler* decision addressed write-in votes, rather than mail-in ballots, but

⁷⁰ *S. Hunterdon Reg'l Sch. Dist. Pub. Question v. Hunterdon Cnty. Bd. of Elections*, 2023 WL 2171099, at *5-6 (N.J. Super. Ct. App. Div. Feb. 23, 2023).

⁷¹ *Id.* at *5.

⁷² *Id.*

⁷³ *Id.* (quoting *Nordstrom*, 424 N.J. Super. at 97).

⁷⁴ During the October 2023 Commission meeting, the Commission suggested that the proposed language clarifying the jurisdiction of the ELEC should appear in N.J.S. 19:29-2 rather than N.J.S. 19:29-1, given the relative focuses of the two statutes. See N.J. Law Revision Comm’n, *Minutes of NJLRC Meeting*, at 5, Oct. 19, 2023, www.njlrc.org (last visited Apr. 3, 2024) [hereinafter “October 2023 Minutes”] (noting that “the proposed language in subsection (a)(8) lacks clarity because it is attempting to address two very distinct concepts – contest and venue” and “recommend[ing] treating jurisdiction separately and having one section for the grounds for action to bring a contest and another section that references jurisdiction”). The Commission also proposed revising the language in N.J.S. 19:63-26, to clarify that a vote-by-mail election may be contested based on the grounds set forth in N.J.S. 19:29-1 and removing the reference to a “rebuttable presumption.” *Id.* at 5-6 (clarifying that “the statute’s intent is that mail-in irregularities alone will not invalidate an election, but if another independent standard is met, then it may lead to the election’s invalidation”).

⁷⁵ N.J. Law Revision Comm’n, *Minutes of NJLRC Meeting*, at 2, Nov. 16, 2023, www.njlrc.org (last visited Apr. 3, 2024) [hereinafter “November 2023 Minutes”]. See also *supra* at p. 4.

Outreach was conducted to Scott Salmon, Esq., on this issue, given his gracious assistance on this project. Mr. Salmon explained that this issue was briefed by the parties during litigation of the *Atlantic County Election* case and expressed support for incorporating standard of review language into Title 19. E-mail from Scott Salmon, Esq., Partner, Jardim, Meisner & Susser, P.C., to Whitney G. Schlimbach, Counsel, NJLRC (Dec. 4, 10:45 AM EST) (on file with NJLRC).

⁷⁶ *In re Atl. Cnty. Election*, 468 N.J. Super. at 356.

⁷⁷ *Id.* at 355 (citing *Gray-Sadler*, 164 N.J. at 482-84).

the election contest was similarly based on the rejection of legal votes pursuant to N.J.S. 19:29-1(e).⁷⁸

Both the Appellate Division and the Supreme Court recognized the broad and well-established policy favoring voter enfranchisement.⁷⁹ In *Gray-Sadler*, the Court provided that Jersey’s “election laws are designed to deter fraud, safeguard the secrecy of the ballot, and prevent disenfranchisement of qualified voters.”⁸⁰ To achieve these purposes, New Jersey courts “have held that it is [their] duty to construe election laws liberally.”⁸¹

Therefore, the Supreme Court explained that, in N.J.S. 19:29-1(e), the phrase “legal votes rejected” includes:

any situation in which qualified voters are denied access to the polls. . . . Voters need not be physically barred from voting to have their votes rejected, but may instead show that, through no fault of their own, they were prohibited from voting for a specific candidate by some irregularity in the voting procedures. . . . The essential question is whether voters were denied the opportunity to vote for a candidate of their choice.⁸²

In *Gray-Sadler*, “conflicting and incomplete instructions” regarding the procedure for submitting a write-in vote caused “confusion [that was] attributable to defects outside of [the voters’] control.”⁸³ The Supreme Court analogized the situation to previous cases in which an election was contested based on defective or broken voting machines.⁸⁴

The Appellate Division reached the same conclusion in *Atlantic County Election*.⁸⁵ The Court found that, “because the ballots sent to numerous voters in the Third District were defective, rendering voters incapable of voting for County Commissioner,” voters were “prevented . . . from voting ‘through no fault of their own’ and ‘prohibited . . . from voting for a specific candidate by

⁷⁸ *Gray-Sadler*, 164 N.J. at 475 (alleging that “write-in votes placed on the wrong line due to insufficient and unintelligible instructions were ignored or counted as votes for offices that the candidates were not seeking[, and] that the inadequate instructions prevented other voters from casting any write-in votes at all”).

⁷⁹ *In re Atl. Cnty. Election*, 468 N.J. Super. at 353 (“As a general proposition, ‘election laws are to be liberally construed to the end that voters are permitted to exercise the franchise and that the will of the people as expressed through an election is heard.’”) (quoting *In re Contest of Nov. 8, 2005 Gen. Election for Off. of Mayor of Twp. of Parsippany-Troy Hills*, 192 N.J. 546, 559 (2007)).

⁸⁰ *Gray-Sadler*, 164 N.J. at 474-75.

⁸¹ *Id.* at 475.

⁸² *Id.* at 475-76.

⁸³ *Id.* at 479.

⁸⁴ *Id.* at 481 (citing *In re 1984 Gen. Election for the Off. of Council of the Twp. of Maple Shade Burlington Cnty.*, 203 N.J. Super. 563, 585 (Law. Div. 1985); *Application of Moffat*, 142 N.J. Super. 217, 222 (App. Div. 1976); *Magura v. Smith*, 131 N.J. Super. 395, 397 (Law. Div. 1974), *overruled by Matter of Mallon*, 232 N.J. Super. 249 (App. Div. 1989)).

⁸⁵ *In re Atl. Cnty. Election*, 468 N.J. Super. at 356.

[an] irregularity in the voting procedures.”⁸⁶ Therefore, the Court found the mail-in ballots were “legal votes rejected” within the meaning of N.J.S. 19:29-1(e).⁸⁷

Outreach Related to the December 2023 Revised Tentative Report

Following the release of the December 2023 Revised Tentative Report, outreach was conducted to interested and knowledgeable organizations and individuals, including the attorneys who represented the parties in *Atlantic County Election* and in the *Old Bridge* election case,⁸⁸ the Attorney General’s Office, the county boards of election, the New Jersey State Bar Association and professors specializing in election law at Seton Hall University Law School.

Response was again received from Mr. Salmon, who has provided extensive assistance with this project.⁸⁹ He expressed his support for the recommended modifications, with the exception of the language in N.J.S. 19:29-1(a)⁹⁰ that “malconduct, fraud or corruption” are “sufficient to cast doubt on the validity of the result.”⁹¹ Mr. Salmon provided that this proposed language is broad and potentially expands judicial discretion beyond what was intended.⁹²

In addition, Mr. Salmon suggested that an additional modification should be made to N.J.S. 19:29-1(h)⁹³ clarifying that the section is only applicable to violations of the Reporting Act resulting in criminal charges or injunctive relief.⁹⁴ He explained that leaving subsection (h) as is, “given the creation of the new section” in N.J.S. 19:29-2, would result in “the same voter confusion without at least a clarification in [(h)] that it only applies to criminal charges or injunctions.”⁹⁵

Mr. Salmon indicated that the goal of his proposed language is to “clarif[y] both what actually may be challenged under the contest statute, as well as give a standard of how to judge

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See April 2023 Update Memorandum, *supra* note 10, at 4 (summarizing the holding of *In re Contest of the Nov. 2, 2021 Gen. Election for the Old Bridge Twp. Comm., Fourth Ward*, No. MID-L-6893-21 (N.J. Super. Ct. Law Div. Dec. 29, 2021)). A copy of the *Old Bridge* decision is also available on the NJLRC website: www.njlrc.org.

⁸⁹ E-Mail from Scott D. Salmon, Shareholder, Jardim Meisner Salmon Sprague & Susser, to Whitney G. Schlimbach, Counsel, NJLRC (Jan. 17, 2024, 3:13PM EST) [hereinafter “2024 Salmon E-Mail”].

⁹⁰ In the Appendix, subsection (a) has been re-lettered as subsection (a)(1). See *infra* at p. 16.

⁹¹ 2024 Salmon E-Mail, *supra* note 89. See *infra* at note 111.

⁹² 2024 Salmon E-Mail, *supra* note 89.

⁹³ In the Appendix, subsection (h) has been re-lettered as subsection (a)(8). See *infra* at p. 17.

⁹⁴ 2024 Salmon E-Mail, *supra* note 89. Preliminary language was provided by Mr. Salmon as follows:

For any violation of [the Reporting Act] that results in either an injunction prior to the election or criminal charges based thereupon, when said violation is likely to have affected an election sufficient to change its results.

Id. Mr. Salmon’s proposed language originally read that the “violation is likely to have affected an election sufficient to change its results or when said violation results in it being reasonably impossible to determine the winner of the election,” but during a subsequent phone call to clarify his comments, he agreed that the quoted language accomplished his goal. *Id.* (emphasis added).

⁹⁵ *Id.*

it.”⁹⁶ With respect to the appropriate standard, Mr. Salmon stated that, in contrast to a challenge premised on illegal or rejected votes, it is often “difficult to tell how any violation of the Reporting Act actually changed the results,” and therefore, an election challenge pursuant to subsection (h) does not need to allege that the Reporting Act violation “actually changed a specific number of votes.”⁹⁷

Comment was also received from Daniel Antonelli, who represented the respondent in the *Old Bridge* case.⁹⁸ Mr. Antonelli stated that he supports the recommended modification codifying the holding of *Atlantic County Election* because doing so eliminates any “dispute who has the burden of proof.”⁹⁹ Mr. Antonelli noted, however, that additional clarity would be of assistance regarding the jurisdictional issue.¹⁰⁰ He described a case involving reporting violations of the Reporting Act wherein a “trial court judge said he was bound by *Nordstrom* and didn’t have jurisdiction” although the complaint requested injunctive relief and was filed prior to the election.¹⁰¹

Mr. Antonelli suggested therefore that “clarity could be provided that while the ELEC has primary jurisdiction, in cases where there is an allegation that a candidate has not complied with the reporting requirements, that is filed **before** the election, the court should have limited jurisdiction to hear the application” before transferring the matter to the ELEC.¹⁰²

Pending Bills

There are no pending bills that address N.J.S. 19:63-26, N.J.S. 19:29-1, or N.J.S. 19:29-2, or the jurisdictional scope of the ELEC.

⁹⁶ *Id.*

⁹⁷ *Id.* (referring to the decision in *McKoy v. Passaic County Board of Elections, et. al.*). The election in *McKoy* was “invalidated” following the judge’s finding “that the May 12, 2020 election for the Third Ward Paterson City Council was not the fair, free and full expression of the intent of the voters” because “[i]t was rife with mail in vote procedural violations constituting nonfeasance and malfeasance.” See *Statement of Reasons, McKoy v. Passaic County Board of Elections, et. al.*, Docket No. PAS-L-1751-20 (N.J. Sup. Ct. Aug. 19, 2020) [hereinafter “*McKoy* Statement of Reasons”]. The election challenge in *McKoy* was premised on “allegations of election fraud rising to the level of criminal charges” against one of the candidates, following the discovery of hundreds of mail-in ballots in a mailbox in an adjacent town, as well as a “substantial number of ballots [that] were left on the floor in an apartment building rather than being delivered to the individual mailboxes of the residents.” *Id.* at *1. The *McKoy* Court declined to “make [a] specific finding as to whether there was fraud” but noted that almost a quarter of the mail-in ballots in the Third Ward City Council election were rejected. *Id.* (comparing the number rejected “to 31 municipal elections in New Jersey on May 12, 2020 where only 9.6% were rejected” and observing that “[n]o other municipality had more than 13% of ballots rejected”).

⁹⁸ E-Mail from Daniel Antonelli, Partner, Antonelli Kantor Rivera, to Whitney G. Schlimbach, Counsel, NJLRC (Feb. 4, 2024 5:05 PM EST) [hereinafter “Antonelli E-Mail”]. See *supra* note 88.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* (“My application was for temporary restraints, requiring [the candidate] to file his reports, and to freeze raising or spending money until such time he filed his required reports”). See *Donald A. Shaw v. Jamel C. Holley, et al.*, Docket No. UNN-L-1712-23 (filed May 26, 2023).

¹⁰² Antonelli E-Mail, *supra* note 98.

Conclusion

In accordance with the holding of *Atlantic County Election*, the recommended modifications to N.J.S. 19:63-26 add language clarifying that, despite its prohibitive language, an election involving mail-in ballots may be contested by establishing one of the grounds in N.J.S. 19:29-1. Additional recommended modifications to N.J.S. 19:29-1 reflect feedback received from commenters and the guidance of the Commission, including language articulating the scope of the phrase “legal votes rejected,” as discussed in *Gray-Sadler* and *Atlantic County Election*.

Modifications that reflect the scope of ELEC’s jurisdiction over Reporting Act violations, as held in *In re Contest of Democratic Primary Election* and *Nordstrom*, among other Appellate Division decisions, are recommended to the Reporting Act and N.J.S. 19:29-2.

APPENDIX

The recommended modifications to N.J.S. 19:63-26, “Validity of election due to irregularity or failure in mail-in ballot processing”; N.J.S. 19:29-1, “Grounds stated”; N.J.S. 19:29-2, “Petition filed with Clerk of Superior Court; contents; verification; bond to incumbent”; and the Reporting Act, are shown on the following pages (with ~~striketrough~~, underlining, *italics*,¹⁰³ and **bold**¹⁰⁴).

N.J.S. 19:63-26. Validity of election due to irregularity or failure in mail-in ballot processing

~~a.~~ ¹⁰⁵ An election shall not be held to be invalid solely¹⁰⁶ due to any irregularity or failure in the preparation or forwarding of any mail-in ballots prepared or forwarded pursuant to the provisions of P.L.2009, c. 79 (C.19:63-1 et al.), **unless one or more of the grounds set forth in N.J.S. 19:29-1 is established.**

~~b. This section establishes a rebuttable presumption that an irregularity or failure in the preparation or forwarding of any mail-in ballots shall not invalidate an election. This presumption may be rebutted by establishing one or more of the grounds set forth in N.J.S. 19:29-1 as a basis to invalidate an election.~~

COMMENT

The recommended modifications replace the language “No election shall be held to be invalid due to . . .” with “An election shall not be held to be invalid solely due to . . .,” to indicate that a vote by mail election may be contested pursuant to N.J.S. 19:29-1.¹⁰⁷

In addition, the modifications add language to the end of N.J.S. 19:63-26 making clear that an election by mail may be held invalid if any of the grounds in N.J.S. 19:29-1 is established, to reflect the holding of the *Atlantic County Election Court*.¹⁰⁸

¹⁰³ Italicized language represents language that has been modified since the release of the October 2022 Tentative Report.

¹⁰⁴ Bolded language represents revisions made since the October 2023 Commission meeting, including modifications since the November and December 2023 Commission meetings.

¹⁰⁵ See October 2022 Minutes, *supra* note 39, at 6 (“[Commissioner Bell] noted that ‘no election shall be held to be invalid’ should be changed to ‘an election shall not be held to be invalid’”).

¹⁰⁶ See *id.* (“Commissioner Bunn . . . suggested in [N.J.S. 19:63-26(a)] adding in the word ‘solely’ so that it reads ‘An election shall not be held to be invalid “solely” due to any irregularity’”).

¹⁰⁷ See November 2023 Minutes, *supra* note 75 (“the decision to add the word ‘solely’ was intended to make clear that mail issues alone are not enough, but they can be raised in conjunction with other legitimate grounds”).

¹⁰⁸ During the October 2023 Commission meeting, Commissioner Long pointed out that, although the Court characterized it as a “rebuttable presumption” in the *Atlantic County Election* decision, the statute’s intent is that mail-in ballot irregularities *alone* will not invalidate an election, but if another independent standard is met, like those set forth in N.J.S. 19:29-1, the election may be invalidated. October 2023 Minutes, *supra* note 74, at 5-6.

N.J.S. 19:29-1. Grounds stated

a. The nomination or election of any person to any public office or party position, or the approval or disapproval of any public proposition, may be contested by ~~the any eligible~~ **requisite number of** voters of this State or of any of its political subdivisions affected thereby, **as specified in N.J.S.A. 19:29-2,**¹⁰⁹ ~~or by any defeated candidate for such nomination, party position or public office,~~¹¹⁰ upon ~~± one~~ or more of the following grounds:

~~a. 1. When Malconduct, fraud or corruption on the part of the members of any district board, or of any members of the board of county canvassers, is sufficient to cast~~ **doubt on the validity of the nomination or election** challenge¹¹¹ the result;

~~b. 2. When the incumbent was not eligible to for~~¹¹² the office at the time of the election;¹¹³

¹⁰⁹ See October 2023 Minutes, *supra* note 74, at 6 (adopting a proposal by Commissioner Bell).

¹¹⁰ Following the release of the October 2022 Tentative Report, Mr. Salmon suggested that N.J.S. 19:29-1 should include “candidates to said election” in the list of entities that may bring an election contest. See *supra* note 41. The recommended language is derived from N.J.S. 19:29-2, which permits “any defeated candidate for such nomination, party position or public office” to sign the petition contesting an election. N.J. STAT. ANN. § 19:29-2.

¹¹¹ Given that the language “sufficient to cast doubt on the validity of the result” has not yet been interpreted by the courts, commenters questioned whether this language might inadvertently broaden the reach of this subsection or cause unnecessary litigation over the meaning of the new phrase. See 2024 Salmon E-Mail, *supra* note 89. The language “sufficient to challenge the result” has been included in N.J.S. 19:29-1(a) since the statute’s enactment in 1930. See L.1930, c. 187, ¶ 355, p.829. The New Jersey Supreme Court has twice held that the phrase is understood to mean “to call in question; dispute” and there does not appear to be any inconsistency in the judicial interpretations of the standard set forth in subsection (a). See *Petition of Clee*, 119 N.J.L. 310, 316 (Sup. Ct. 1938) (“It will be noticed that the malconduct, fraud, or corruption, stated as a ground for contest under the first heading, must be such as to challenge the result of the election. ‘Challenge’ means to put into dispute or to put in question. It is defined thus: ‘To call in question; dispute.’”) (quoting Funk & Wagnalls New Standard Dictionary, 1932) (emphasis added); and *Burkett v. Francesconi*, 127 N.J.L. 541, 543 (Sup. Ct. 1942) (“Then it is argued that the word ‘challenge’ mentioned in the statute above quoted, subdivision ‘a’, means ‘to call in question, dispute or doubtful.’ This, too, may be conceded.”) (citing *Clee*, 119 N.J.L. 310, 316 (1938) (emphasis added)). To avoid any potential confusion caused by introducing different language into the statute, the recommended modification retains the original statutory language, that the “malconduct, fraud or corruption” must be sufficient to “challenge the result.” N.J. STAT. ANN. § 19:29-1(a) (emphasis added).

¹¹² See October 2023 Minutes, *supra* note 74, at 6 (adopting a proposal by Commissioner Bell).

¹¹³ The Commission requested information regarding the meaning of this subsection, including whether a candidate must meet the age requirements of political office at the time of the election or at the time of taking office. See E-mail from Bernard Bell, Commissioner, NJLRC, to Whitney G. Schlimbach, Counsel, NJLRC (Oct. 16, 2023, 5:59 PM EST) (on file with NJLRC). According to a Formal Opinion issued by Attorney General John J. Degan in 1980,

a candidate for election to the Legislature must meet the qualifications for office set forth in the New Jersey Constitution, Art. IV, §1, par. 2 as follows: he must satisfy the minimum age requirement by the day he is sworn into office; he must meet the citizenship and residency requirements by election day, and he must be entitled to the right of suffrage on the day that he files a certificate with the Secretary of State accepting the nomination, be it as an accompaniment to his petition or in response to a write-in vote.

Attorney General John J. Degan Formal Opinion No. 5, addressed to Hon. Donald P. Lam (Feb. 26, 1980) (on file with NJLRC).

e. 3. When the incumbent had been duly convicted before such election of any crime which would render him incompetent to exercise the right of suffrage, and the incumbent had not been pardoned at the time of the election;

d. 4. When the incumbent had given or offered to any elector or any member of any district board, clerk or canvasser, any bribe or reward, in money, property or thing of value for the purpose of procuring his election;

e. 5. When illegal votes have been received, or legal votes rejected at the polls in sufficient numbers to change the result, **A legal vote, including a vote by mail, is rejected when, a qualified voter, through no fault on the voter's part, has not been provided the opportunity to vote for a specific candidate, either due to a defect in the ballot, an irregularity in the voting procedures, or denial of access to the polls. If the defect permits the voter to vote for candidates for other races on the ballot, the legal vote is rejected only for those races involving candidates for which the voter was not provided the opportunity to vote;**¹¹⁴

f. 6. For any error by any board of canvassers in counting the votes or declaring the result of the election, if such error would change the result;

g. 7. For any other cause which shows that another ~~was the~~ person was legally elected or another outcome on a public proposition was the legal result;¹¹⁵

h. 8. The paying, promise to pay or expenditure of any money or other thing of value or incurring of any liability in excess of the amount permitted by this title for any purpose or in any manner not authorized by this title, ~~except as subject to the jurisdiction of the Election Law Enforcement Commission in N.J.S. 19:44A-11~~¹¹⁶;

i. 9. When a petition for nomination is not filed in good faith or the affidavit annexed thereto is false or defective.

¹¹⁴ See E-Mail from Commissioner Bernard Bell, NJLRC, to Laura C. Tharney, Executive Director, NJLRC; Samuel M. Silver, Deputy Director, NJLRC; and Carol Disla-Roa, Legislative Fellow, NJLRC (Dec. 13, 2023, 12:25 PM EST) (on file with NJLRC) [hereinafter “Bell E-mail”] (providing to Staff a memorandum detailing comments and revisions to the proposed modifications contained in the December 2023 Revised Draft Tentative Report).

¹¹⁵ This language was derived from a proposal by Mr. Salmon. See *supra* note 41.

¹¹⁶ During the October 2023 Commission meeting, Commissioner Bunn recommended that this modification should be made to a different statute, given that the purpose of N.J.S. 19:29-1 is to set forth the grounds for an election contest, rather than the appropriate venue for an election contest. October 2023 Minutes, *supra* note 74, at 5.

In his response to the Tentative Report, Mr. Salmon suggested an additional modification clarifying that this subsection applies only to those Reporting Act violations not subject to the jurisdiction of the ELEC, namely violations arising under N.J.S. 19:44A-21 (criminal complaints) and N.J.S. 19:44A-22.1 (summary actions). See 2024 Salmon E-Mail, *supra* note 89 (proposing the following language: “For any violation of [the Reporting Act] that results in either an injunction prior to the election or criminal charges based thereupon, when said violation is likely to have affected an election sufficient to change its results”) (emphasis added). He further proposed that the new language should parallel the structure of the recommended language in subsection (e) and include a standard for reviewing election challenges premised on Reporting Act violations. *Id.* (explaining the proposed language clarifies that a party is not required “to prove that the criminal charges [or other Reporting Act violation] actually changed a specific number of votes”) (citing *McKoy* Statement of Reasons, *supra* note 97).

b. The term “incumbent” means the person whom the canvassers declare elected or the person who is declared elected as a result of a recount; but in the case of a tie vote as a result of the canvass or recount, either party may contest the election, in which case the term “incumbent” means the person having an equal number of votes with the contestant.

~~c. The grounds set forth in subsection (a) of this section may rebut the presumption pursuant to N.J.S. 19:63-26.~~¹¹⁷

COMMENT

The statute has been re-lettered and numbered to improve accessibility, in keeping with current statutory drafting practices.

Subsection (a)

In the introductory paragraph in subsection (a), the recommended modifications replace the language “voters of this State” with the language “the requisite number of voters of this State . . . as set forth in N.J.S.A. 19:29-2” to clarify that N.J.S. 19:29-2 requires multiple voter signatures to file an election contest petition.¹¹⁸ The modifications also add that a petition may be brought by “any defeated candidate for such nomination, party position or public office,” as permitted by N.J.S. 19:29-2.¹¹⁹

Subsection (a)(1)

In subsection (a)(1), the language is modified to be consistent with subsequent subsections by beginning the subsection with the word “when.”¹²⁰

Previously, the proposed modifications replaced the phrase “sufficient to challenge” with language indicating that the misconduct, fraud or corruption must be “sufficient to cast doubt on the validity” of the outcome.¹²¹ However, given the response from commenters that new language may prompt unnecessary litigation,¹²² and in light of the courts’ consistent interpretation of the phrase “sufficient to challenge the result,”¹²³ no modification is recommended with respect to this language.

Subsection (a)(2)

The modification to subsection (a)(2) replaces the word “for” with “to” to improve readability.¹²⁴

¹¹⁷ As noted *supra* at note 108, Commissioner Long’s clarification of the proposed modifications to N.J.S. 19:63-26 render this modification unnecessary. *See also* October 2023 Minutes, *supra* note 74, at 5-6.

¹¹⁸ N.J. STAT. ANN. § 19:29-2; *see supra* note 109.

¹¹⁹ N.J. STAT. ANN. § 19:29-2 (“[i]n the case of an office or proposition voted for by the voters of the entire State or more than 1 county thereof, the contest shall . . . be commenced by the filing of a petition . . . signed by at least 25 voters . . . or by any defeated candidate for such nomination, party position or public office” and “[i]n all other cases the contest shall . . . be commenced by the filing of a petition . . . signed by at least 15 voters . . . or by any defeated candidate for such nomination, party position or public office”) (emphasis added).

¹²⁰ *See* October 2022 Minutes, *supra* note 39, at 6.

¹²¹ *Id.* (“Commissioner Bell would . . . modify ‘sufficient to change the result’ to ‘is sufficient to cast doubt on the validity of the nomination or election.’”).

¹²² 2024 Salmon E-Mail, *supra* note 89.

¹²³ *See supra* note 111.

¹²⁴ October 2023 Minutes, *supra* note 74, at 6.

Subsection (a)(5)

In subsection (a)(5), the recommended modifications eliminate the phrase “at the polls” as it is not clear that this language is necessary to convey the legislative intent that illegal votes or rejected legal votes in sufficient numbers may form the basis for an election contest claim.¹²⁵

In addition, the modifications add language reflecting the aspect of the *Atlantic County Election* holding addressing whether the defective mail-in ballots fell within the scope of “legal votes rejected” in N.J.S. 19:29-1(e).¹²⁶ The recommended language clarifies that a vote by mail is a legal vote that can be rejected.¹²⁷ The remaining language was proposed by Commissioner Bell prior to the November 2023 Commission meeting and approved by the Commission during the meeting.¹²⁸ The language is derived from the decisions in *Atlantic County Election* and *Gray-Sadler*.¹²⁹

The final sentence of the new language is intended to “ensur[e] that a denial of the opportunity to select from among *all* candidates in one race, does not necessarily invalidate other races on the same ballot in which voters were given the opportunity to select from *all* candidates.”¹³⁰

Subsection (a)(7)

The proposed modifications to subsection (a)(7) add language clarifying that the provision is applicable to elections *and* public propositions, as suggested by Mr. Salmon.¹³¹

Subsection (a)(8)

Mr. Salmon provided a suggested modification clarifying that, when the election contest is premised on a Reporting Act violation resulting in either criminal charges (N.J.S. 19:44A-21) or injunctive relief (N.J.S. 19:44A-22.1), the violation must be “likely to have affected an election sufficient to change its results.”¹³²

Commission guidance is requested with respect to Mr. Salmon’s proposal.

Subsection (b)

There are no modifications proposed with respect to the substance of subsection (b), which has been re-lettered consistent with modern statutory drafting practice.

¹²⁵ October 2022 Minutes, *supra* note 74, at 6.

¹²⁶ See November 2023 Minutes, *supra* note 75, at 2.

¹²⁷ *In re Atl. Cnty. Election*, 468 N.J. Super. at 359 (“The Vote By Mail Law grants all qualified voters the right to vote using a mail-in-ballot ‘in all future elections, including general elections, held in this State, in which the voter is eligible to vote.’”) (quoting N.J. STAT. ANN. § 19:63-3(a)(1) (West 2023)).

¹²⁸ See Bell E-Mail, *supra* note 114. See also N.J. Law Revision Comm’n, *Minutes of NJLRC Meeting*, Dec. 21, 2023, www.njlrc.org (last visited Apr. 3, 2024) (releasing a Revised Tentative Report as amended by Commissioner Bell).

¹²⁹ See Bell E-Mail, *supra* note 114 (explaining that his “proposed definition . . . best describes the test in *Gray-Sadler*, which discusses rejection of legal votes both in terms of ‘deni[al of] access to the polls’ and ‘[th]e essential question [being] whether voters were denied the opportunity to vote for a candidate of their choice’” and “specifies the particular problem of this project addressing mail-in voting, namely defects in printed ballots”).

¹³⁰ *Id.*

¹³¹ See *supra* note 41.

¹³² 2024 Salmon E-Mail, *supra* note 89. See also *supra* note 116.

N.J.S. 19:29-2. Petition filed with Clerk of Superior Court; contents; verification; bond to incumbent

a. In the case of an office or proposition voted for by the voters of the entire State or more than 1 county thereof, the contest shall be heard by any judge of the Superior Court assigned for that purpose by the Chief Justice of the Supreme Court, and shall be commenced by the filing of a petition therefor with the Clerk of the Superior Court signed by at least 25 voters of the State or by any defeated candidate for such nomination, party position or public office.

b. In all other cases the contest shall be heard and determined by a judge of the Superior Court assigned to the county wherein such office or proposition is to be contested, and shall be commenced by the filing of a petition therefor with the Clerk of the Superior Court, signed by at least 15 voters of the county or by any defeated candidate for such nomination, party position or public office.

c. The petition shall be verified by the oath of at least 2 of the petitioners, or by the candidate filing the same, as the case may be, which verification may be made on information and belief. The petition shall be accompanied by a bond to the State in the case approval or disapproval of any proposition is to be contested and to the incumbent in all other cases, with 2 or more sureties, or a deposit of cash security, to be approved by such judge, in the penal sum of \$500.00, conditioned to pay all costs in case the election be confirmed, or the petition be dismissed or the prosecution fail. When the reception of illegal or the rejection of legal voters is alleged as a cause of contest, the names of the persons who so voted, or whose votes were rejected, with the election district where they voted, or offered to vote, shall be set forth in the petition, if known.

d. No petition heretofore filed pursuant to this section shall be dismissed or the prosecution fail because the petitioner shall not have filed a bond with sureties as required herein, and the court shall be construed to have acquired jurisdiction to hear and determine such contest if the petitioner shall have filed with the petition a bond, without sureties, in the penal sum of \$500.00, conditioned as required in this section, with a deposit of \$500.00 as cash security therefor, approved by a judge of the Superior Court.

e. When a petition filed pursuant to this section alleges a violation of the provisions of “The New Jersey Campaign Contributions and Expenditures Reporting Act,” P.L.1973, c. 83 (C.19:44A-1 et seq.), the Election Law Enforcement Commission shall have:

(1) exclusive jurisdiction over violations of reporting requirements in P.L.1973, c. 83 (C.19:44A-1 et seq.); and

(2) primary jurisdiction over violations of any other requirements in P.L.1973, c. 83 (C.19:44A-1 et seq.).

COMMENT

The paragraphs in N.J.S. 19:29-2 have been lettered to improve readability and accessibility.

Subsection (e) has been added to clarify that, when a petition contains an allegation of a Reporting Act violation, the violations are subject to either the primary or exclusive jurisdiction of ELEC, depending on the type of violation. This language reflects the holdings in *In re Democratic Primary Election* and *Nordstrom*.¹³³

The recommended language hews as closely as possible to the modifications in the Reporting Act, clarifying the scope of ELEC's jurisdiction over different types of violations of the Reporting Act.

¹³³ *See supra* at pp. 7-9.

N.J.S. 19:44A-[] (new section)

Subject to the provisions of N.J.S. 19:44A-21 and N.J.S. 19:44A-22.1, the Election Law Enforcement Commission shall have:

(a) exclusive jurisdiction over violations of the reporting requirements of this Act; and

(b) primary jurisdiction over violations of all other requirements of this Act.

COMMENT

To clarify the scope of the ELEC’s jurisdiction over different types of Reporting Act violations, the recommended modifications create a new statutory section in the Reporting Act reflecting the common law on this issue.¹³⁴ The current Reporting Act does not clearly define the breadth of ELEC’s jurisdiction and appellate courts have crafted the jurisdictional scope of ELEC over Reporting Act violations in various contexts, including election contest claims, by relying on jurisdictional principles and statutory language.¹³⁵

Subsection (a)-(b)

The introductory sentence sets forth that ELEC maintains jurisdiction over Reporting Act violations, subject to the provisions in N.J.S. 19:44A-21, which addresses the filing of a criminal complaint, and N.J.S. 19:44A-22.1, which addresses pre-election summary actions for injunctive relief.¹³⁶

¹³⁴ See *id.*

¹³⁵ See *infra* at p. 23.

¹³⁶ N.J. STAT. ANN. § 19:44A-21; N.J. STAT. ANN. § 19:44A-22.1.

With respect to Mr. Antonelli’s comment that the modifications should make clear that a court has jurisdiction over requests for injunctive relief made *before* an election that are related to reporting violations of the Reporting Act, see Antonelli E-Mail, *supra* note 98, the exclusion of complaints brought pursuant to N.J.S. 19:44A-22.1 from the jurisdiction of the ELEC was intended to address this issue. See N.J. STAT. ANN. § 19:44A-22.1 (“If a political committee or continuing political committee . . . shall have made any contribution or expenditure in opposition to, or in furtherance of the defeat of, a candidate, that candidate may, in a summary action in the Superior Court, apply for an order directing that political committee or continuing political committee to show cause why the court should not grant such injunctive relief as the candidate may seek.”) (emphasis added); see also *Markwardt v. New Beginnings*, 304 N.J. Super. 522, 537 (App. Div. 1997) (“We construe N.J.S.A. 19:44A–22.1 consonant with its obvious purpose—to afford an aggrieved candidate a judicial remedy in order to prevent irreparable injury.”). Mr. Antonelli indicated that the judge in *Shaw v. Holley* relied on *Nordstrom* to find that the ELEC retained jurisdiction. See *supra* note 101. However, the *Nordstrom* Court excluded summary actions under N.J.S. 19:44A-22.1 from its determination of the jurisdictional issue:

N.J.S.A. 19:44A–16 comprehensively details candidates' reporting obligations. Failure to comply with the statute and its implementing regulations, see *e.g.*, N.J.A.C. 19:25–8.1 to –8.12, exposes applicable persons—including candidates—to an array of penalties, including potential criminal sanctions found in N.J.S.A. 19:44A–21(b), and civil remedies found in N.J.S.A. 19:44A–22(a)(1). Except for criminal matters and summary actions under N.J.S.A. 19:44A–22.1, judicial involvement is extremely limited.

Nordstrom, 424 N.J. Super. at 98 (emphasis added). To the extent that N.J.S. 19:44A-22.1 does not cover the factual scenario addressed in *Shaw*, Staff has not located any judicial opinion or legislative history directly on point regarding this issue.

Subsection (a) sets forth the holding in *Nordstrom*, which provides that ELEC maintains exclusive jurisdiction over reporting violations of the Reporting Act.¹³⁷

Subsection (b) provides that ELEC has primary jurisdiction over all other violations of the Reporting Act. This language reflects that appellate courts have held that ELEC maintains primary jurisdiction over different types of Reporting Act violations both in and outside the context of an election contest claim.

The *In re Contest of Democratic Primary Election* Court determined that “the Legislature intended that ELEC have primary jurisdiction over [Reporting] Act complaints not brought under either N.J.S.A. 19:44A-21 (criminal complaint) or 19:44A-22.1 (pre-election summary action).”¹³⁸ In *Nordstrom*, the Appellate Division held that “ELEC has primary jurisdiction over excess contribution claims under the Reporting Act.”¹³⁹ In *South Hunterdon*, the Appellate Division found the trial court properly declined jurisdiction over claims of “illegal expenditures” after conducting a primary jurisdiction analysis.¹⁴⁰

Courts have also addressed the ELEC’s jurisdiction over Reporting Act violations outside the context of an election contest claim. In *New Jersey Election Law Enforcement Commission v. James*, the Appellate Division considered whether the trial court appropriately retained jurisdiction over a complaint filed by the ELEC that alleged misuse of campaign funds to cover legal fees.¹⁴¹ After conducting a primary jurisdiction analysis, the Court held that “under these narrow, limited factual circumstances, the court does have subject matter jurisdiction.”¹⁴²

Similarly, in *Brennan on behalf of State v. Lonagan*, the Appellate Division considered a complaint filed pursuant to the False Claims Act (“FCA”), which alleged that a candidate “submit[ed] a false statement in a request for public campaign funds.”¹⁴³ The *Brennan* Court found that the ELEC “maintains jurisdiction over claims arising out of the Reporting Act,” and although the complaint “allege[d] a violation of the FCA, . . . the underlying accusation . . . is a Reporting Act violation.”¹⁴⁴

¹³⁷ *Nordstrom*, 424 N.J. Super. at 97 (“ELEC has exclusive jurisdiction regarding reporting violations”); *see also South Hunterdon*, 2023 WL 2171099, at *5.

¹³⁸ *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 283.

¹³⁹ *Nordstrom*, 424 N.J. Super. at 97 (emphasis added).

¹⁴⁰ *South Hunterdon*, 2023 WL 2171099, at *5-6 (“the trial court correctly declined jurisdiction after applying the appropriate analysis of the *Muise* factors”).

¹⁴¹ 2014 WL 7597254, at *6 (N.J. Super. Ct. App. Div. Jan. 16, 2015).

¹⁴² *Id.*

¹⁴³ 454 N.J. Super. 613, 616 (App. Div. 2018)

¹⁴⁴ *Id.* at 620-21 (finding “Plaintiff is not permitted to use the FCA to circumvent or re-litigate a Commission decision he disputes”).