



NEW JERSEY LAW REVISION COMMISSION

Revised Draft Tentative Report Concerning Interpretation of the Vote By Mail Law in N.J.S. 19:63-26

December 11, 2023

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **February 19, 2024**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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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 Law²) 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. 19:63-26 and N.J.S. 19:29-1 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,¹¹ the Commission considered Revised Draft Tentative Reports in October 2023 and November 2023 that proposed additional modifications to N.J.S. 19:29-1 and the Campaign Contributions and Expenditures Reporting Act (Reporting Act) related to the jurisdiction of the Election Law Enforcement Commission (ELEC).¹² The

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 2022).

⁵ N.J. STAT. ANN. § 19:29-1e.

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 Dec. 7, 2023) [hereinafter “October 2022 Tentative Report”] (making additional “linguistic changes proposed by Commissioner Bell”).

¹⁰ N.J. Law Revision Comm’n, *Update Memorandum Re: Interpretation of the Vote By Mail Law*, at 6 (Apr. 10, 2023), www.njlr.org (last visited Dec. 7, 2023) [hereinafter “April 2023 Update Memorandum”] (“[a commenter] indicated that the scope of N.J.S. 19:29-1(h) has been impacted by the formation of the New Jersey Election Law Enforcement Commission, which has jurisdiction over claims arising under the Campaign Contributions and Expenditures Reporting Act”).

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. Law Revision Comm’n, *Revised Draft Tentative Report Concerning Interpretation of the Vote By Mail Law*, (Oct. 10, 2023), www.njlr.org (last visited Dec. 7, 2023); N.J. Law Revision Comm’n, *Revised Draft Tentative Report Concerning Interpretation of the Vote By Mail Law*, (Nov. 6, 2023), www.njlr.org (last visited Dec. 7, 2023).

Commission provided direction and guidance regarding the proposed modifications and requested that the additional revisions be incorporated into a Revised Draft Tentative Report to be discussed at a future meeting.¹³

The Appendix to this Report sets forth proposed modifications to N.J.S. 19:63-26, N.J.S. 19:29-1, N.J.S. 19:29-2, and the Reporting Act. These modifications reflect the holding of *In re Atlantic County Election*, and clarify ELEC’s jurisdiction over violations of the Reporting Act.¹⁴

Relevant Statutes¹⁵

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; . . .

h. 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;¹⁶

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.).¹⁷

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. Law Revision Comm’n, *Minutes of NJLRC Meeting*, at 5-6, Oct. 19, 2023, www.njlrc.org (last visited Dec. 7, 2023) [hereinafter “October 2023 Minutes”].

¹⁴ See *infra* at pp. 15-23.

¹⁵ Additional modifications are proposed in 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.

¹⁶ N.J. STAT. ANN. § 19:29-1.

¹⁷ N.J. STAT. ANN. § 19:63-26.

Commissioner.¹⁸ 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.”¹⁹ 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).²⁰

The winner of the election (Witherspoon) responded by arguing 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.”²¹

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.”²² The court found that voters who received defective ballots were “properly characterized as ‘rejected legal votes,’”²³ and held that “Parker met his burden to set aside the election” pursuant to N.J.S. 19:29-1(e).²⁴

Analysis

On appeal, Witherspoon raised the same objections to the contest claim.²⁵ The *Atlantic County Election* Court noted that whether “N.J.S.A. 19:29-1 [applies] to an election pursuant to the Vote By Mail Law, N.J.S.A. 19:63-1 to -28” was an “issue of first impression,”²⁶ and considered both the canons of statutory interpretation and the intent of the Legislature.²⁷

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

¹⁸ *In re Atl. Cnty. Election*, 468 N.J. Super. at 346-47.

¹⁹ *Id.* at 347 (Parker lost the election by 286 votes and 335 erroneous ballots were sent to voters).

²⁰ *Id.* at 349.

²¹ *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).

²² *Id.* at 351

²³ *Id.* (“The judge reduced [335] to 328 to account for the seven voters who received corrected ballots.”).

²⁴ *Id.* at 352.

²⁵ *Id.* (affirming the trial court with respect to whether defective mail-in ballots fell within the definition of “rejected legal votes” in N.J.S. 19:29-1(e)” and concluding 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,’” including the defective mail-in ballots that “provided [voters with] no opportunity to vote for any candidate in the Third District County Commissioner race”). *See also In re Petition of Gray-Sadler*, 164 N.J. 468, 482 (2000) (holding that unclear instructions for submitting a vote for a write-in candidate made it impossible to “determine with reasonable certainty those candidates who received a majority of the votes”).

²⁶ *In re Atl. Cnty. Election*, 468 N.J. Super. at 357.

²⁷ *Id.*

statute.”²⁸ 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.”²⁹

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.”³⁰ 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.³¹

The *Atlantic County Election* Court aligned its holding with the position of the Attorney General³² 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.”³³

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 of *Atlantic County Election*.³⁴ 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. 19:29-1.³⁵ 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.³⁶

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.³⁷ The

²⁸ *Id.* (internal quotations omitted).

²⁹ *Id.* at 358.

³⁰ *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.”)

³¹ *Id.* at 360.

³² *Id.* at 353.

³³ *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.”).

³⁴ October 2022 Tentative Report, *supra* note 9.

³⁵ *Id.* at 8.

³⁶ *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 Dec. 7, 2023) [hereinafter “October 2022 Minutes”] (making the “linguistic changes proposed by Commissioner Bell”).

³⁷ 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”].

feedback and alternate language from Mr. Salmon was presented to the Commission in an Update Memorandum prepared for the April 20, 2023, Commission Meeting.³⁸

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.³⁹ He provided two decisions in which the courts “abrogated this provision to ‘injunction actions filed during a campaign or criminal actions.’”⁴⁰

During the April 2023 Commission meeting, the Commission authorized continued research and outreach in this area.⁴¹ The Commission directed Staff to review recent legislation in the area of election law, including the Elections Transparency Act, to determine its impact on the Vote By Mail law.⁴²

Recent Legislation

As the Commission noted, the Elections Transparency Act extensively amended the Reporting Act when it was enacted in April 2023.⁴³ The amendments 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”

³⁸ 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 (West 2023). 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).

³⁹ N.J. STAT. ANN. §§ 19:44A-1 to -47 (West 2023). *See also* N.J. STAT. ANN. § 19:44A-6(b) (West 2023) (“It shall be the duty of the commission to enforce the provisions of this act, to conduct hearings with regard to possible violations and to impose penalties; and for the effectual carrying out of its enforcement responsibilities the commission shall have the authority to initiate a civil action in any court of competent jurisdiction for the purpose of enforcing compliance with the provisions of this act or enjoining violations thereof or recovering any penalty prescribed by this act. The commission shall promulgate such regulations and official forms and perform such duties as are necessary to implement the provisions of this act.”).

⁴⁰ *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)).

⁴¹ April 2023 Minutes, *supra* note 11, at 6.

⁴² *Id.* at 5.

⁴³ L.2023, c.30, eff. Jan.1, 2023.

for candidates.⁴⁴

With respect to ELEC, the Elections Transparency Act amendments replaced the current appointed commissioners with gubernatorial appointees⁴⁵ and imposed a two-year statute of limitations for enforcement actions, to be applied retroactively.⁴⁶ The Elections Transparency Act did not make any changes to, or have any impact on, the Vote By Mail law, nor did it address the jurisdictional conflict between N.J.S. 19:29-1 and the Reporting Act.

In addition to the Elections Transparency Act, several amendments were made to the Vote By Mail law during the 2022-2023 Legislative session.⁴⁷ These amendments did not impact the relationship between N.J.S. 19:29-1 and N.J.S. 19:63-26.⁴⁸

Finally, there is one pending bill that proposes requiring “an initial judgment within 24 hours, or in the shortest amount of time deemed practicable by the court” when “an election-related cause of action authorized pursuant to . . . Title 19 . . . is brought before a court of competent jurisdiction” in the fourteen days before an election.⁴⁹ The bill would also “authorize[] . . . ELEC[] to petition the Superior Court to immediately suspend, temporarily or permanently, the campaign accounts of persons . . . who violate State campaign finance laws.”⁵⁰

Jurisdiction of ELEC Over Claims Arising Under the Reporting Act

ELEC was created in 1973 with the enactment of the Reporting Act to “administer its provisions.”⁵¹ As noted by Mr. Salmon, the Appellate Division has held that election contest claims premised on Reporting Act violations generally should be heard by ELEC in the first

⁴⁴ *Id.*

⁴⁵ *Id.* (amending N.J.S. 19:44A-5 to require that, “. . . within 90 days following the enactment date of this act . . . , the Governor shall directly appoint four members to the commission, . . . and the terms of office of the members of the commission currently serving shall expire upon the Governor's appointment of the new members. . . . [u]pon the expiration of the initial term of each member appointed pursuant to this subsection, members of the commission shall be appointed pursuant to subsection a. of this section”).

⁴⁶ *Id.* (enacting N.J.S. 19:44A-6a, which requires that “[a]ny enforcement action brought by the Election Law Enforcement Commission for any violations of P.L.1973, c. 83 (C.19:44A-1 et seq.) shall be subject to a statute of limitations of two years following the occurrence of the alleged violation”).

⁴⁷ L.2022, c.67; L.2022, c.68; L.2022, c.69; L.2022, c.70.

⁴⁸ L.2022, c.67 (amending N.J.S. 19:63-3, -6, -17, & -22 to “require[] ballot privacy sleeves” and “make[] various changes to . . . mail-in voting procedures”); L.2022, c.68 (amending N.J.S. 19:63-3, -3.1, -5, -6 & -9 to “specif[y] circumstances when voter will be removed from permanent vote by mail status and when ballot will be sent to primary address”); L. 2022, c.70 (amending N.J.S. 19:63-9 & -16.1 to “change[] deadlines for mailing of mail-in ballots[,]” “require[] certain reporting on canvass of ballots[,]” and “permit[] establishment of pickup schedule for certain mail-in ballots”).

⁴⁹ S.B. 4051, 220th Leg., 2023 Sess. (June 30, 2023) (“[r]equires court to respond within 24 hours for election-related actions arising within 14 days of election; authorizes ELEC to petition court to suspend campaign accounts of persons who violate campaign finance laws”).

⁵⁰ *Id.*

⁵¹ See *O'Neill v. Lerner*, 154 N.J. Super. 317, 321 (App. Div. 1977); see also N.J. STAT. ANN. § 19:44A-6(b) (West 2023) (“The commission shall promulgate such regulations and official forms and perform such duties as are necessary to implement the provisions of this act.”).

instance.⁵²

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).⁵³ 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 ELEC after conducting a primary jurisdiction analysis.⁵⁴

- *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 contest⁵⁵ brought pursuant to N.J.S. 19:29-1⁵⁶ based on alleged campaign contribution violations of the Reporting Act during a primary election.⁵⁷ 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).”⁵⁸

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 ELEC or the court in “three different situations.”⁵⁹ 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 summary action proceeding, which a court considers.”⁶⁰

⁵² See *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 266; see also *Nordstrom*, 424 N.J. Super. at 102.

⁵³ Salmon Proposed Revisions to Election Contest Statute (attached to Salmon Email, *supra* note 37).

⁵⁴ See *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 266 and *Nordstrom v. Lyon*, 424 N.J. Super. at 102.

⁵⁵ *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 properly cognizable in the Superior Court under the election contest provisions of Title 19,” and “were never substantiated [so] this aspect of the complaint was dismissed”).

⁵⁶ *Id.* at 265, n.1 (citing subsection (h) of N.J.S. 19:29-1).

⁵⁷ *Id.* at 264-65 (reversing the trial court’s determination that the Reporting Act did not apply to primary elections).

⁵⁸ *Id.* at 283.

⁵⁹ *Id.*

⁶⁰ *Id.* (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 (West 2023)).

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. *Hammer v. N.J. Voice, Inc.*, 302 N.J. Super. 169, 171 (Law. Div. 1996); see also N.J. STAT. ANN. § 19:44A-22.1 (“If a political committee . . . , having been established or consisting of members or having received contributions in violation of this act, shall have made any contribution or expenditure in opposition to . . . a candidate, that candidate may, in a summary action in the Superior Court, apply for an order directing that political committee . . . to show cause why the court should not grant

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.”⁶¹ Rather than “allow a complaint of an Act violation to proceed as an election contest,” the Appellate Division directed that:

a trial judge should (a) deem a verified petition that contains alleged Act violations as if it were a complaint under N.J.S.A. 19:44A–22d; (b) transfer the case, or the relevant counts containing Act violations, to ELEC, to whom the Legislature in our view assigned primary jurisdiction, . . . unless the judge determines to keep jurisdiction after an appropriate analysis; and (c) if the judge decides to retain jurisdiction under the aegis of N.J.S.A. 19:29–1h, apply the standards ELEC would apply if the case was before ELEC.⁶²

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.*⁶³ The Court provided that “[p]rimary jurisdiction principles are applicable . . . because the judge conceivably had a basis for jurisdiction” pursuant to N.J.S. 19:29-1(h).⁶⁴ 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.”⁶⁵

Therefore, the *In re Contest of Democratic Primary Election* Court held 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.”⁶⁶

such injunctive relief as the candidate may seek.”). 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 the 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.

⁶¹ *In re Contest of Democratic Primary Election*, 367 N.J. Super. 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]”).

⁶² *Id.* (emphasis added).

⁶³ *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)).

⁶⁴ *Id.* at 287-88.

⁶⁵ *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”).

⁶⁶ *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.⁶⁷ After conducting a primary jurisdiction analysis,⁶⁸ the trial court held the winning candidate’s nomination to be “null and void.”⁶⁹

The Appellate Division addressed the jurisdiction of ELEC over excess contribution and reporting violations of the Reporting Act separately.⁷⁰ The Court reiterated the *In re Contest of Democratic Primary Election* holding that ELEC has primary, but not exclusive, jurisdiction over excess contribution claims.⁷¹ After reviewing the *Muise* factors,⁷² 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.”⁷³

The Court found, however, that “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

⁶⁷ *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’”).

⁶⁸ *Id.* at 88 (“[c]oncluding that at least three of the four [*Muise*] factors skewed in favor of judicial, rather than administrative, oversight, and finding that ‘this matter clearly involves an issue of urgency which can be better addressed in this forum’”).

⁶⁹ *Id.* (“the . . . Republican Committee timely selected [the other nominee candidate] to fill the vacancy created by the nullification of the . . . primary election” and “[a]t the . . . general election, [the Republican Party nominee] defeated [the] Democratic Party opponent”); *see also* N.J. STAT. ANN. § 19:3-7 (West 2023) (“If any candidate . . . shall fail to file any statement or oath required by this Title to be filed . . . or shall file any false statement, the nomination or election of such candidate . . . shall be null and void.”).

⁷⁰ *Id.* at 97.

⁷¹ *Id.*; *see also In re Contest of Democratic Primary Election Court* (holding 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”).

⁷² *Nordstrom*, 424 N.J. Super. at 100-102 (finding first that “ELEC – author of the regulations and overseer of the Reporting Act on a daily basis – was in the best position to first weigh in on the excess contribution controversy[;]” second, that “[t]he Reporting Act is squarely within the expertise of ELEC as the commission was created specifically with the intention that it have the fulsome ability to interpret and apply the law[;]” third, contrary to its assurance that “there would be no danger of disrupting the statutory scheme,” the trial court “nullification of [the] nomination . . . was disproportionate to the putative violation and absolutely beyond the range of ELEC’s power [which] create[d] the very real potential for disparate outcomes in the future[;]” and finally, the complaint was not “lodged with ELEC before . . . proceed[ing] . . . in court” which “weighed in favor of . . . agency primacy”).

⁷³ *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”).

remedy for the given situation.”⁷⁴ 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. 19:3-7⁷⁵) “is inapplicable to [the] reporting obligations imposed by the Reporting Act.”⁷⁶

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

In 2023, the Appellate Division reaffirmed the *Nordstrom* holding in *South Hunterdon*.⁷⁷ 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.”⁷⁸

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).”⁷⁹ 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.”⁸⁰

The *South Hunterdon* Court added that, in the case before it, “part of the remedy sought by plaintiffs requires a finding of Reporting Act violations,” and the Reporting Act “has vested jurisdiction for such claims with ELEC.”⁸¹

November 2023 Commission Meeting

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

⁷⁴ *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)”).

⁷⁵ 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”).

⁷⁶ *Id.* 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”).

⁷⁷ *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).

⁷⁸ *Id.* at 5.

⁷⁹ *Id.*

⁸⁰ *Id.* (quoting *Nordstrom*, 424 N.J. Super. at 97).

⁸¹ *Id.* (citing *In re Election L. Enft Comm’n Advisory Opinion No. 01-2008*, 201 N.J. 254, 261–62 (2010) (“The Election Law Enforcement Commission has been charged by the Legislature with enforcing the provisions of the New Jersey Campaign Contributions and Expenditures Reporting Act . . . ”)).

the phrase “legal votes rejected,” in N.J.S. 19:29-1(e).⁸²

- *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.”⁸³ In coming to this conclusion, the Appellate Division cited the New Jersey Supreme Court’s discussion in *In re Gray-Sadler*.⁸⁴ The *Gray-Sadler* decision addressed write-in votes, rather than mail-in ballots, but the election contest was similarly based on the rejection of legal votes pursuant to N.J.S. 19:29-1(e).⁸⁵

Both the Appellate Division and the Supreme Court recognized the broad and well-established policy favoring voter enfranchisement.⁸⁶ 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.”⁸⁷ To achieve these purposes, New Jersey courts “have held that it is [their] duty to construe election laws liberally.”⁸⁸

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

⁸² N.J. Law Revision Comm’n, *Minutes of NJLRC Meeting*, at *3, Nov. 16, 2023, www.njlrc.org (last visited Dec. 7, 2023) [hereinafter “November 2023 Minutes”].

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. 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). He expressed support for incorporating standard of review language into Title 19 generally, and specifically, advocated for including language defining a “legal vote rejected” as requiring a demonstration that the voter “actually attempted to vote,” in reliance on the reasoning in *Gray-Sadler*. *Id.* (“My opinion is that there should be a showing that the voter actually attempted to vote, rather than a theoretical showing that they could have voted. In *Gray-Sadler*, they showed that voters attempted to vote but couldn’t, and therefore it was a legal vote rejected. In *Witherspoon*, there was no showing that any of the voters who had received the incorrect ballots had attempted to vote. Part of that is the difference between in-person and VBM voting, but it’s still not hard to show that a VBM voter tried to vote (either by actually sending in their ballot or getting affidavits from them).”). However, the Appellate Division in *Atlantic County Election* rejected this aspect of *Witherspoon*’s argument specifically. *See Atlantic County Election*, 468 N.J. Super. at 356 (“the issue here is ‘whether voters were denied the opportunity to vote for a candidate of their choice,’ . . . not as *Witherspoon* asserts, whether these voters would have voted had they not been deprived of the opportunity to do so [therefore r]egardless of their intent, these voters were disenfranchised”).

⁸³ *In re Atl. Cnty. Election*, 468 N.J. Super. at 356.

⁸⁴ *Id.* at 355 (citing *Gray-Sadler*, 164 N.J. at 482-84); *see also supra* note 25.

⁸⁵ *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”).

⁸⁶ *Id.* 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)).

⁸⁷ *Gray-Sadler*, 164 N.J. at 474-75.

⁸⁸ *Id.* at 475.

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.⁸⁹

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.”⁹⁰ The Supreme Court analogized the situation to previous cases in which an election was contested based on defective or broken voting machines.⁹¹

The Appellate Division reached the same conclusion in *Atlantic County Election*. 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 [an] irregularity in the voting procedures.’”⁹² Therefore, the Court found the mail-in ballots were “legal votes rejected” within the meaning of N.J.S. 19:29-1(e).⁹³

The expansive standard articulated in *Gray-Sadler*, and reiterated in *Atlantic County Election*, reflects the “broad purpose of the election laws to prevent disenfranchisement of qualified voters.”⁹⁴

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.

Conclusion

In accordance with the holding of *Atlantic County Election*, the proposed modifications to N.J.S. 19:63-26 add language clarifying that, despite the prohibitive language in N.J.S. 19:63-26, an election involving mail-in ballots may be contested by establishing one of the grounds in N.J.S. 19:29-1.

⁸⁹ *Id.* at 475-76 (emphasis added).

⁹⁰ *Id.* at 479.

⁹¹ *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)).

⁹² *In re Atl. Cnty. Election*, 468 N.J. Super. at 356.

⁹³ *Id.*

⁹⁴ *Gray-Sadler*, 164 N.J. at 476; *see also In re Atl. Cnty. Election*, 468 N.J. Super. at 358 (“In construing election laws, we bear in mind their fundamental purpose[:] ‘Because the right to vote is the bedrock upon which the entire structure of our system of government rests, our jurisprudence is steadfastly committed to the principle that election laws must be liberally construed to effectuate the overriding public policy in favor of the enfranchisement of voters.’”) (quoting *Afran v. Cty. of Somerset*, 244 N.J. Super. 229, 232, 581 A.2d 1359 (App. Div. 1990)).

Proposed modifications to N.J.S. 19:29-1 reflect feedback received from commenters and the guidance of the Commission, including new proposed language reflecting the scope of the phrase “legal votes rejected,” as discussed in *Gray-Sadler* and *Atlantic County Election*.

Additional proposed 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 made in the Reporting Act and N.J.S. 19:29-2, which sets forth the requirements for filing a petition to contest an election.

APPENDIX

The proposed 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; and N.J.S. 19:29-2, Petition filed with Clerk of Superior Court; contents; verification; bond to incumbent, are shown on the following pages (with ~~strikethrough~~, underlining, *italics*,⁹⁵ and **bold**⁹⁶).

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

a. ~~No~~⁹⁷ An election shall not be held to be invalid solely⁹⁸ 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.A. 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.~~⁹⁹

COMMENT

Subsection (a)

The proposed 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”¹⁰⁰

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*.

⁹⁵ Italicized language represents language that has been modified since the release of the October 2022 Tentative Report.

⁹⁶ Bolded language represents revisions made since the October 2023 Commission meeting, including modifications added since the November 2023 Commission meeting.

⁹⁷ See October 2022 Minutes, *supra* note 36, 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’”).

⁹⁸ 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’”).

⁹⁹ 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 could be invalidated. October 2023 Minutes, *supra* note 13, at 5-6.

¹⁰⁰ See *supra* note 99.

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,**¹⁰¹ *or by any defeated candidate for such nomination, party position or public office,*¹⁰² upon ~~±~~ *one* or more of the following grounds:

~~a.~~ 1. ~~When~~ ~~Mal~~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~~ challenge the result;¹⁰³

~~b.~~ 2. When the incumbent was not eligible ~~to~~ for¹⁰⁴ the office at the time of the election;¹⁰⁵

~~c.~~ 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;

¹⁰¹ See October 2023 Minutes, *supra* note 13, at 6 (adopting a proposal by Commissioner Bell).

¹⁰² 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 38. The proposed 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.

¹⁰³ To conform the proposed language in N.J.S. 19:29-1(a) with the language in the statute’s introductory paragraph, which permits challenges to nominations, elections *and* public propositions, the proposed modifications replace the proposed language “nomination or election” with the original language: “result.” See *supra* note 38 (proposing that N.J.S. 19:29-1(g) should “include public questions”).

¹⁰⁴ See October 2023 Minutes, *supra* note 13, at 6 (adopting a proposal by Commissioner Bell).

¹⁰⁵ 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. 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, through no fault of their own, a qualified voter is [denied access to the polls] [prohibited from voting for a specific candidate by an irregularity in the voting procedures];**¹⁰⁶

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;¹⁰⁷

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**¹⁰⁸;

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

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. 19:63-26.¹⁰⁹

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 proposed 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.¹¹⁰

¹⁰⁶ See November 2023 Minutes, *supra* note 82, at * 3.

¹⁰⁷ This language was derived from a proposal by Mr. Salmon. See *supra* note 38.

¹⁰⁸ 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 13, at 5.

¹⁰⁹ As noted *supra* at note 100, 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 13, at 5-6.

¹¹⁰ N.J. STAT. ANN. § 19:29-2; see *supra* note 102.

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.”¹¹¹

In addition, given the ambiguity of the phrase “sufficient to challenge the result” in the context of determining the necessary degree of “malconduct, fraud or corruption,” the proposed modifications replace this term with language indicating that the misconduct must be “sufficient to cast doubt on the validity” of the outcome.¹¹²

Finally, the proposed language no longer replaces the word “result” with “nomination or election” to ensure that this subsection is not inappropriately narrowed to exclude public propositions. Retaining the word “result” in subsection (a)(1) maintains consistency with subsections (a)(5) and (a)(6), which also are not limited to the nomination or election of an individual.

Subsection (a)(2)

The modification to subsection (a)(2) replaces the word “for” with “to” to improve readability.¹¹³

Subsection (a)(5)

In subsection (a)(5), the proposed 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.¹¹⁴

In addition, the proposed modifications add language reflecting the aspect of the *Atlantic County Election* holding that addressed whether the defective mail-in ballots fell within the scope of “legal votes rejected” pursuant to N.J.S. 19:29-1(e).¹¹⁵ The proposed language clarifies that a vote-by mail is a legal vote that can be rejected.¹¹⁶ The remaining proposed language reflects the New Jersey Supreme Court’s articulation of the scope of the term “rejected” in *Gray-Sadler*.¹¹⁷ This language was also employed by the Appellate Division in *Atlantic County Election* in the context of defective mail-in ballots.¹¹⁸

The first language option reflects the Supreme Court’s broader statement that New Jersey case law has “define[d] the term ‘rejected’ ‘to include any situation in which qualified voters are denied access to the polls.’”¹¹⁹ The second option is derived from the Supreme Court’s further explanation that “[v]oters need not be physically barred

¹¹¹ See October 2022 Minutes, *supra* note 36, at 6 (“Commissioner Bell would add the word ‘when’ to subsection a.(1) . . .”).

¹¹² *Id.* (“Commissioner Bell would . . . modify ‘sufficient to change the result’ to ‘is sufficient to cast doubt on the validity of the nomination or election.’”).

¹¹³ October 2023 Minutes, *supra* note 13, at 6.

¹¹⁴ October 2022 Minutes, *supra* note 36, at 6 (“Commissioner Bell suggested . . . eliminat[ing] the phrase ‘at the polls’ in subsection a.(5).”).

¹¹⁵ See November 2023 Minutes, *supra* note 82, at *3.

¹¹⁶ *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)).

¹¹⁷ See *supra* at pp. 12-14.

¹¹⁸ *Id.*

¹¹⁹ *Gray-Sadler*, 164 N.J. at 476 (emphasis added); see also *In re Atl. Cnty. Election*, 468 N.J. Super. at 351.

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.”¹²⁰

Commission guidance is requested with respect to the two proposed options appearing in brackets above.

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.¹²¹

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.

¹²⁰ *Gray-Sadler*, 164 N.J. at 476 (emphasis added); *see also In re Atl. Cnty. Election*, 468 N.J. Super. at 356 (“As in *Gray-Sadler*, the defective ballots issued by the Atlantic County Clerk here prevented voters from voting ‘through no fault of their own’ and ‘prohibited [them] from voting for a specific candidate by some irregularity in the voting procedures.’”).

¹²¹ *See supra* note 38.

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

N.J.S. 19:29-2 has been re-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 proposed language reflects the holdings in *In re Democratic Primary Election* and *Nordstrom*.¹²²

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

¹²² *See supra* at pp. 8-11.

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 ELEC’s jurisdiction over different types of Reporting Act violations, the proposed modifications create a new statutory section in the Reporting Act that reflects the common law on this issue.¹²³

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. However, the Reporting Act is extensive and complicated, and understandably, courts have not necessarily addressed ELEC’s jurisdiction over the broad range of possible Reporting Act violations.

Given the significance of language defining the jurisdictional limits of ELEC, the Commission seeks commenter feedback on the propriety of this modification.

Subsection (a)-(b)

The proposed 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.¹²⁴

Subsection (a) sets forth the holding in *Nordstrom*, which provides that ELEC maintains exclusive jurisdiction over reporting violations of the Reporting Act.¹²⁵

Subsection (b) provides that ELEC has primary jurisdiction over all other violations of the Reporting Act. This proposed 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).”¹²⁶ In *Nordstrom*, the Appellate Division held that “ELEC

¹²³ *See id.*

¹²⁴ N.J. STAT. ANN. § 19:44A-21 (setting forth conduct constituting fourth degree crimes); N.J. STAT. ANN. § 19:44A-22.1 (“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”). *See also Hammer, supra* note 60, at 175-77 (addressing “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” and holding 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’”).

¹²⁵ *Nordstrom*, 424 N.J. Super. at 97 (“ELEC has exclusive jurisdiction regarding reporting violations”); *see also South Hunterdon*, 2023 WL 2171099, at *5.

¹²⁶ *In re Contest of Democratic Primary Election*, 367 N.J. Super. at 283.

has primary jurisdiction over excess contribution claims under the Reporting Act.”¹²⁷ In *South Hunterdon*, the Appellate Division found the trial court properly declined jurisdiction over claims of “illegal expenditures” after conducting a primary jurisdiction analysis.¹²⁸

Finally, courts have addressed ELEC’s jurisdiction over Reporting Act violations outside the context of an election contest claim, as well. 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 ELEC that alleged misuse of campaign funds to cover legal fees.¹²⁹ After conducting a primary jurisdiction analysis, the Court held that “under these narrow, limited factual circumstances, the court does have subject matter jurisdiction.”¹³⁰

Similarly, in *Brennan on behalf of State v. Lonegan*, the Appellate Division considered a complaint filed pursuant to the False Claims Act (“FCA”), which alleged that a candidate “submitt[ed] a false statement in a request for public campaign funds.”¹³¹ The *Brennan* Court found that 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.”¹³²

¹²⁷ *Nordstrom*, 424 N.J. Super. at 97 (emphasis added).

¹²⁸ *South Hunterdon*, 2023 WL 2171099, at *5-6 (“the trial court correctly declined jurisdiction after applying the appropriate analysis of the *Muise*^[1] factors”).

¹²⁹ 2014 WL 7597254, at *6 (N.J. Super. Ct. App. Div. Jan. 16, 2015).

¹³⁰ *Id.*

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

¹³² *Id.* at 620-21 (finding “Plaintiff is not permitted to use the FCA to circumvent or re-litigate a Commission decision he disputes”).