



## NEW JERSEY LAW REVISION COMMISSION

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

**October 20, 2022**

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 **December 20, 2022**.

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 laws governing voting and elections are primarily contained in Title 19.<sup>1</sup> The grounds for contesting an election,<sup>2</sup> and the procedures and rules governing voting by mail (Vote By Mail Law<sup>3</sup>) are addressed therein. An election “may be contested” based upon one or more of the nine grounds enumerated in N.J.S. 19:29-1,<sup>4</sup> including “[w]hen . . . legal votes rejected at the polls [are] sufficient to change the result.”<sup>5</sup> 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.”<sup>6</sup>

The *In re Election for Atlantic County Freeholder District 3 2020 General Election* case addressed a defeated candidate’s election contest claim that the number of defective mail-in ballots was sufficient to change the outcome of the election.<sup>7</sup> The issue before the court was whether N.J.S. 19:29-1 “appl[ies] to an election pursuant to the Vote By Mail Law.”<sup>8</sup> The Appellate Division found the defective ballots constituted “rejected legal votes as defined by N.J.S.A. 19:29-1(e).”<sup>9</sup> To “[h]armonize N.J.S.A. 19:63-26 and N.J.S.A. 19:29-1,” the court held that, if applicable 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.”<sup>10</sup>

The proposed modifications in the Appendix add language to N.J.S. 19:63-26 to clarify that the statute creates a rebuttable presumption when an election is contested pursuant to N.J.S. 19:29-1, as held in *In re Atlantic County Election*. The proposed modifications also add a cross-reference in N.J.S. 19:29-1 to make clear that the grounds for invalidating an election in that statute are subject to the rebuttable presumption established N.J.S. 19:63-26, if applicable.

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<sup>1</sup> N.J. Stat. Ann. §§ 19:1-1 to :63-31 (West 2022).

<sup>2</sup> N.J. STAT. ANN. §§ 19:29-1 to -14 (West 2022).

<sup>3</sup> N.J. STAT. ANN. §§ 19:63-1 to -31 (West 2022).

<sup>4</sup> N.J. STAT. ANN. § 19:29-1a.–i. (West 2022) (“a. Malconduct, fraud or corruption on the part of the members of any district board, or of any members of the board of county canvassers, sufficient to challenge the result; b. When the incumbent was not eligible to the office at the time of the election; c. 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. 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; . . . f. 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. For any other cause which shows that another was the person legally elected; 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; i. When a petition for nomination is not filed in good faith or the affidavit annexed thereto is false or defective.”).

<sup>5</sup> N.J. STAT. ANN. § 19:29-1e.

<sup>6</sup> N.J. STAT. ANN. § 19:63-26 (West 2022).

<sup>7</sup> *In re the Election for Atl. Cnty. Freeholder Dist. 3 2020 Gen. Election*, 468 N.J. Super. 341, 347-48 (App. Div. 2021).

<sup>8</sup> *Id.* at 357.

<sup>9</sup> *Id.* at 356.

<sup>10</sup> *Id.* at 360.

## Relevant Statutes

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:

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e. When illegal votes have been received, or legal votes rejected at the polls sufficient to change the result; . . .<sup>11</sup>

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.).<sup>12</sup>

## Background

The *In re Atlantic County Election* decision concerned an election contest filed by the unsuccessful candidate (Parker) in the November 3, 2020, election for Third District Commissioner.<sup>13</sup> 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.”<sup>14</sup> The margin of victory in the election was 286 votes, and 335 erroneous ballots were sent to voters.<sup>15</sup>

Parker contended that voters who received defective ballots “were unable to vote for a candidate of their choice,” and as a result, “had their legal votes rejected and were disenfranchised.”<sup>16</sup> Since enough “legal votes [were] rejected at the polls . . . to change the results,” Parker argued the election result should be invalidated pursuant to N.J.S. 19:29-1(e).<sup>17</sup>

The winner of the election (Witherspoon) countered that the margin of victory should be compared against the number of defective ballots that were actually returned (237), rather than the total number of erroneous ballots (335).<sup>18</sup> She also asserted that N.J.S. 19:63-26 “barred Parker’s

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<sup>11</sup> N.J. STAT. ANN. § 19:29-1.

<sup>12</sup> N.J. STAT. ANN. § 19:63-26.

<sup>13</sup> *In re Atl. Cnty. Election*, 468 N.J. Super. at 346-47.

<sup>14</sup> *Id.* at 347.

<sup>15</sup> *Id.* at 351–52.

<sup>16</sup> *Id.* at 349.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 350 (“Witherspoon contends there is no evidence . . . that qualified voters who should have been sent a ballot that contained the race, and did not vote, would have voted if sent the correct ballot [and] voters were explicitly given the option to cure the ballot deficiencies by voting provisionally on Election Day.”) (internal quotations omitted).

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.”<sup>19</sup>

The trial court rejected Witherspoon’s statutory argument, finding that “election laws should not be construed so as to deprive voters of their franchise,” and 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.”<sup>20</sup> With respect to the correct calculation of “rejected legal votes,” the trial court observed that the New Jersey Supreme Court has previously framed “[t]he essential question [as] whether voters were denied the opportunity to vote for a candidate of their choice.”<sup>21</sup>

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

### Analysis

On appeal, Witherspoon raised the same objections to Parker’s contest claim. The Attorney General<sup>24</sup> argued that N.J.S. 19:63-26 creates a “rebuttable presumption against overturning an election unless there are grounds to do so under N.J.S. 19:29-1.”<sup>25</sup> The Court began its analysis with the principle that “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.”<sup>26</sup>

- *Meaning of “Rejected” Votes*

The Appellate Division initially examined whether the defective ballots constituted “rejected” votes within the meaning of N.J.S. 19:29-1(e).<sup>27</sup> To find an election invalid, “those contesting it [must] show that as a result of irregularities ‘the free expression of the popular will in all human likelihood has been thwarted.’”<sup>28</sup> The 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

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<sup>19</sup> *Id.* at 352–53; *see id.* at 359–60 (“[T]he 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).

<sup>20</sup> *Id.* at 351

<sup>21</sup> *Id.* (citing *In re Petition of Gray-Sadler*, 164 N.J. 468, 475 (2000)).

<sup>22</sup> *Id.* (“The judge reduced [335] to 328 to account for the seven voters who received corrected ballots.”).

<sup>23</sup> *Id.* at 352.

<sup>24</sup> *Id.* at 346 n.2 (“Parker did not participate in this appeal. In the trial court, the Attorney General appeared on behalf of the Board and the Superintendent of Elections to address the aspect of this case relating to the utilization of expert testimony. We granted his motion to appear as *amicus curiae* in this appeal.”).

<sup>25</sup> *Id.* at 353.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 354.

<sup>28</sup> *Id.* (quoting *Gray-Sadler*, 164 N.J. at 482).

the voting procedures.”<sup>29</sup> To contest an election, “a petitioner . . . need not identify for whom the rejected voter voted or would have voted, only that the rejected votes were sufficient in number that, if all were credited to him, the results of the election would change.”<sup>30</sup>

In rejecting Witherspoon’s argument that the calculation of “rejected” votes depends on whether a voter actually voted by returning their mail-in ballot, the court analogized to the facts in the New Jersey Supreme Court case *In re Petition of Gray-Sadler*.<sup>31</sup> In *Gray-Sadler*, the irregularity arose from unclear instructions for submitting a vote for write-in candidates in the race for borough council.<sup>32</sup> Although the number of write-in votes that were rejected by the Board of Elections was not more than the margin of victory, the Court “concluded [that] many of the voters who did not vote for council at all may have been deterred by the confusing instructions,” and therefore, “it was impossible to determine with reasonable certainty those candidates who received a majority of the votes.”<sup>33</sup> Similarly, in *In re Atlantic County Election* “[t]he defective ballots sent to 335 voters provided them no opportunity to vote for any candidate in the Third District County Commissioner race” and thus, “[r]egardless of their intent, these voters were disenfranchised.”<sup>34</sup>

Consequently, the Appellate Division held the defective mail-in ballots fell within the definition of “rejected legal votes” in N.J.S. 19:29-1(e).<sup>35</sup>

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

The Court then addressed 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.”<sup>36</sup> In analyzing this “issue of first impression,” the Court considered both the canons of statutory interpretation and the intent of the legislature.<sup>37</sup>

To “discern[] . . . legislative intent,” the Appellate Division examined “not only the particular statute in question, but also the entire legislative scheme of which it is a part,” as well as “the legislative objectives sought to be achieved by enacting the statute.”<sup>38</sup> 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.”<sup>39</sup>

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.”<sup>40</sup> The Court rejected Witherspoon’s argument that the omission of “mail-in

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<sup>29</sup> *Id.* at 355 (quoting *Gray-Sadler*, 164 N.J. at 475–76).

<sup>30</sup> *Id.* at 354.

<sup>31</sup> *In re Petition of Gray-Sadler*, 164 N.J. 468 (2000).

<sup>32</sup> *In re Atlantic County Election*, 468 N.J. Super. at 355.

<sup>33</sup> *Id.* (citing *Gray-Sadler*, 164 N.J. at 482–84).

<sup>34</sup> *Id.* at 356.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 357.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (internal quotations omitted).

<sup>39</sup> *Id.* at 358.

<sup>40</sup> *Id.* at 360.

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.”<sup>41</sup> The Court found this interpretation “would lead to an absurd result, construe [the] election laws in a way to deprive voters of the franchise, and devitalize N.J.S.A. 19:29-1.”<sup>42</sup> 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.<sup>43</sup>

Therefore, the Court held 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.”<sup>44</sup>

### **In re Contest of the Nov. 2, 2021 Gen. Election for the Old Bridge Twp. Comm., Fourth Ward**

In December 2021, the Superior Court, Law Division, of Middlesex County decided an election contest brought pursuant to N.J.S. 19:29-1 by the candidate (Petitioner) who lost the November 2021 election for the Fourth Ward seat on the Old Bridge Township Committee by eleven votes.<sup>45</sup> The election contest claim arose from an error in the Statewide Voter Registration System (“SVRS”) which indicated that residents on the even-numbered side of Cymbeline Drive should vote for the Second Ward seat, rather than the Fourth Ward seat, on the Township Committee.<sup>46</sup> The Petitioner asserted that these votes should have been cast in the election for the Fourth Ward seat, and therefore, were “legal votes wrongfully rejected pursuant to N.J.S.A. 19:29-1(e).”<sup>47</sup>

The *In re Old Bridge Contest* Court explained that “N.J.S.A. 19:63-26 establishes a rebuttable presumption that an irregularity or failure in forwarding of any mail-in ballot will not invalidate an election, however, a contestant may rebut the presumption by asserting one or more of the grounds under N.J.S.A. 19:29-1 as a basis to invalidate an election.”<sup>48</sup>

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<sup>41</sup> *Id.* at 357 (“She argues ‘mail-in ballots are simply different than regular in-person ballots’ because, unlike in-person voting, mail-in voting allows the voter the recourse of filling out a provisional ballot on election day.”).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 360.

<sup>44</sup> *Id.* (“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.”).

<sup>45</sup> *In re Contest of the Nov. 2, 2021 Gen. Election for the Old Bridge Twp. Comm., Fourth Ward*, No. MID–L–6893–21, at 9 (N.J. Super. Ct. Law Div. Dec. 29, 2021).

<sup>46</sup> *Id.*, at 22 (“Cymbeline Drive is the official boundary line separating [the Fourth Ward] from [the Second Ward],” and therefore, “[t]he even-numbered homes [on one side of the street] are supposed to be in the Fourth Ward, and the odd-numbered homes [on the other side] are supposed to be in the Second Ward.”).

<sup>47</sup> *Id.* at 10.

<sup>48</sup> *Id.* at 18 (citing *In re Election for Atl. Cty. Freeholder Dist. 3 2020 Election*, 468 N.J. Super. 341, 360 (App. Div. 2021)).

The Court concluded that the SVRS had erroneously identified residents on the even-numbered side of Cymbeline Drive as Second Ward voters.<sup>49</sup> As a result of the “irregularity of the misdirected ballots,” seventeen residents “were deprived of the opportunity to vote for the candidate of their choice” because they were directed to vote in the Second Ward rather than the Fourth Ward election.<sup>50</sup> The votes were a mix of early voting, mail-in ballots, and in-person voting on Election Day.<sup>51</sup>

Finding that the error was not the “fault of either the voters, the County Clerk, or the . . . candidates,” the Court concluded that the Petitioner had demonstrated by a preponderance of the evidence that the inaccurate information in the SVRS caused seventeen votes to be “wrongfully rejected in violation of N.J.S.A. 19:29-1(e).”<sup>52</sup> Consequently, the Court was “unable to determine with certitude who won the election for the Fourth Ward Township Committee seat.”<sup>53</sup>

Therefore, the *In re Old Bridge Contest* Court granted summary judgment to the Petitioner, set aside the election pursuant to N.J.S. 19:29-9,<sup>54</sup> and ordered a special election held.<sup>55</sup>

### **Pending Bills**

Currently, there are no pending bills addressing either N.J.S. 19:29-1 or 19:63-26.<sup>56</sup>

### **Conclusion**

In accordance with the holding of *In re Atlantic County Election*, the proposed modifications to N.J.S. 19:63-26 add language clarifying that, when an election involving mail-in ballots is contested, N.J.S. 19:63-26 operates as a rebuttable presumption which may be overcome by establishing one of the grounds in N.J.S. 19:29-1. The proposed modification to N.J.S. 19:29-1 adds a cross-reference to N.J.S. 19:63-26.

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<sup>49</sup> *Id.* at 27 (“Cymbeline Drive was, and has been, the unaltered and standing boundary line between [the Fourth Ward] and [the Second Ward], as adopted by the ward commission that re-drew the lines after the 2010 census and still in effect for the 2021 General Election.”).

<sup>50</sup> *Id.* at 30.

<sup>51</sup> *Id.* (finding that “eight (8) Cymbeline Drive voters voted via mail-in ballots (one of which was rejected), [and] nine (9) Cymbeline Drive voters voted by machine on Election Day (two (2) voters of those nine voted by “EV”, or early voting)”).

<sup>52</sup> *Id.* at 37.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 31. *See* N.J. STAT. ANN. § 19:29-9 (West 2022) (“If the judge finds that no person was duly elected, the judgment shall be that the election be set aside.”).

<sup>55</sup> *Id.* at 38.

<sup>56</sup> Although there are a substantial number of pending bills which involve New Jersey election laws, and the Vote By Mail Law particularly, they do not address the issue raised by *In re Atlantic County 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, and N.J.S. 19:29-1, Grounds stated, (shown with ~~strike through~~, and underlining), follow:

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

a. ~~No~~ An election shall not be held to be invalid solely 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.).

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

### *Subsection a.*

The proposed modifications divide the statute into two lettered subsections to improve accessibility. In addition, 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 . . .” in order to alert the reader that the prohibition is qualified by the rebuttable presumption set forth in subsection b.

### *Subsection b.*

The proposed modifications add language to N.J.S. 19:63-26 in new subsection b. clarifying that the statute operates as a rebuttable presumption, as established by the *In re Atlantic County Election* holding.<sup>57</sup> The proposed language is derived from the language employed by the Appellate Division in that decision, except that the term “asserting one or more of the grounds” has been replaced with “establishing one or more of the grounds,” with respect to what is required to rebut the presumption.<sup>58</sup>

### **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 voters of this State or of any of its political subdivisions affected thereby upon 1 or more of the following grounds:

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

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

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<sup>57</sup> *In re Election for Atl. Cnty. Freeholder Dist. 3 2020 Gen. Election*, 468 N.J. Super. 341 (App. Div. 2021).

<sup>58</sup> *Id.* at 360 (“N.J.S.A. 19:63-26 establishes a presumption that an irregularity or failure in the preparation or forwarding of any mail-in ballot will not invalidate an election[, but] a contestant may rebut the presumption by asserting one or more of the grounds under N.J.S.A. 19:29-1 as a basis to invalidate the election”).



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;

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 legally elected;

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;

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.

#### COMMENT

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

##### ***Subsection a.***

The proposed modifications replace the term “voters of this State” with the language “any eligible voter” to clarify that individual voters are permitted to bring a contest claim under N.J.S. 19:29-1. In subsection (a)(1), the language is modified to be consistent with subsequent subsections by adding the word “when” to the beginning of the subsection. 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.

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 a contest claim.

##### ***Subsection c.***

Finally, the proposed modifications add new subsection c., which contains a cross-reference to the presumption in N.J.S. 19:63-26, making clear that the grounds for invalidating an election set forth in N.J.S. 19:29-1 may rebut the presumption pursuant to N.J.S. 19:63-26, if relevant.