

To: New Jersey Law Revision Commission
From: Whitney G. Schlimbach, Counsel
Re: Interpretation of the Vote By Mail Law
Date: April 10, 2023

MEMORANDUM

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 N.J.S. 19:63-26, however, 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 Appellate Division addressed whether N.J.S. 19:29-1 “appl[ies] to an election pursuant to the Vote By Mail Law,” in the case of *In re Election for Atlantic County Freeholder District 3 2020 General Election*.⁷ 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.”⁸

The Commission released a Tentative Report in October 2022 proposing modifications to N.J.S. 19:63-26 and N.J.S. 19:29-1.⁹ 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, consistent with the holding of *In re Atlantic County Election*.¹⁰ 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 changes.¹¹

Outreach was conducted to knowledgeable and interested individuals and organizations. The Commission did not receive any objections to the proposed modifications. One commenter proposed extensive modifications to N.J.S. 19:29-1 and indicated that subsections (g) and (h)

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 Mar. 7, 2023) [hereinafter “October 2022 Tentative Report”].

¹⁰ *Id.* at 8.

¹¹ *Id.* at 8-9; *see also* N.J. Law Revision Comm’n, *Minutes of NJLRC Meeting*, at *6, Oct. 10, 2022, www.njlr.org (last visited Mar. 7, 2023) (making the “linguistic changes proposed by Commissioner Bell”).

should be updated to reflect the current state of election law.¹² Based upon the response to outreach, Staff seeks guidance from the Commission regarding the direction of the project.

Statutes Considered

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; . . .¹³

N.J.S. 19:63-26 provides that “[n]o 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.).”¹⁴

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.¹⁵ 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.”¹⁶ The margin of victory in the election was 286 votes, and 335 erroneous ballots were sent to voters.¹⁷ 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).¹⁸

The winner of the election (Witherspoon) asserted 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

¹² See *infra* at 6.

¹³ N.J. STAT. ANN. § 19:29-1.

¹⁴ N.J. STAT. ANN. § 19:63-26.

¹⁵ *In re Atl. Cnty. Election*, 468 N.J. Super. at 346-47.

¹⁶ *Id.* at 347.

¹⁷ *Id.* at 351–52.

¹⁸ *Id.* at 349.

[in the preparation or forwarding of mail-in ballots] and supersedes N.J.S. 19:29-1.”¹⁹

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.”²⁰ The court found that voters who received defective ballots were “properly characterized as ‘rejected legal votes,’”²¹ and held that “Parker met his burden to set aside the election” pursuant to N.J.S. 19:29-1(e).²²

Analysis

On appeal, Witherspoon raised the same objections to the contest claim.²³ The *In re 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,”²⁴ and considered both the canons of statutory interpretation and the intent of the Legislature.²⁵

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.”²⁶ 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.”²⁷

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.”²⁸ 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.²⁹

¹⁹ *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).

²⁰ *Id.* at 351

²¹ *Id.* (“The judge reduced [335] to 328 to account for the seven voters who received corrected ballots.”).

²² *Id.* at 352.

²³ *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”).

²⁴ *In re Atl. Cnty. Election*, 468 N.J. Super. at 357.

²⁵ *Id.*

²⁶ *Id.* (internal quotations omitted).

²⁷ *Id.* at 358.

²⁸ *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.”)

²⁹ *Id.* at 360.

The *In re Atlantic County Election* Court aligned its holding with the position of the Attorney General 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.”³⁰

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

Shortly after the decision in *In re Atlantic County Election*, the Superior Court, Law Division, decided an election contest brought by the candidate who lost the November 2021 election for the Fourth Ward seat on the Old Bridge Township Committee by eleven votes.³¹ The Law Division addressed whether “misdirected ballots”³² were “legal votes wrongfully rejected pursuant to N.J.S.A. 19:29-1(e).”³³

The *Old Bridge* Court applied the reasoning of the *In re Atlantic County Election* decision: 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.”³⁴

Finding that the error was not the “fault of either the voters, the County Clerk, or the . . . candidates,” the Law Division concluded that the defeated candidate had demonstrated by a preponderance of the evidence that the inaccurate information in the Statewide Voter Registration System caused seventeen votes³⁵ to be “wrongfully rejected in violation of N.J.S.A. 19:29-1(e).”³⁶ Consequently, the Court was “unable to determine with certitude who won the election for the Fourth Ward Township Committee seat,” and ordered a special election held.³⁷

³⁰ *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.”).

³¹ *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), *cert. denied*, 250 N.J. 45 (2022).

³² *Id.* at 30 (an error in the Statewide Voter Registration System caused incorrect ballots to be sent to residents on the even-numbered side of Cymbeline Drive directing them to vote for the wrong Ward seat on the Township Committee).

³³ *Id.* at 10.

³⁴ *Id.* at 18 (citing *In re Election for Atl. Cty. Freeholder Dist. 3 2020 Election*, 468 N.J. Super. 341, 360 (App. Div. 2021)).

³⁵ *Id.* at 27 (“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)”).

³⁶ *Id.* at 37.

³⁷ *Id.*

Outreach

Outreach was conducted to several knowledgeable individuals and organizations, including: the New Jersey Division of Elections; the New Jersey Attorney General's Office; the Office of the County Counsel for Middlesex County; New Jersey County Boards of Elections and County Clerks; Seton Hall Law School Visiting Assistant Professor Eugene Mazo; and private attorneys, including those who represented the petitioners and respondents in *In re Atlantic County Election* and *In re Old Bridge Contest*.

Alternative Language

Scott D. Salmon, Esq., who represented Thelma Witherspoon in the *In re Atlantic County Election* case, proposed alternative language.³⁸ With regard to adding a rebuttable presumption to N.J.S. 19:63-26, Mr. Salmon contended that 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.”³⁹

In addition, Mr. Salmon opposed the modification in N.J.S. 19:29-1(a) changing the language “the voters of this State” to “any eligible voter of this State.”⁴⁰ He explained that the implication that “a single voter could contest the election” is inaccurate, given the requirement in N.J.S. 19:29-2 that a certain number of voters are required to contest an election.⁴¹ 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. 19:29-1.⁴²

Mr. Salmon suggested additional modifications to N.J.S. 19:29-1, including adding language to the catch-all provision in subsection (g) expanding it “to include public questions.”⁴³ Mr. Salmon also proposed restructuring the statute to group the available grounds according to

³⁸ 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”].

³⁹ *Id.*, citing *Kirk v. French*, 324 N.J. Super. 548, 552 (Super. Ct. 1998) (“N.J.S.A. 19:29-1 sets forth the exclusive, specific statutory grounds upon which an election contest must be based”). See also Proposed Revisions to Election Contest Statute (attached to Salmon Email, *supra* note 39) (proposing an additional subsection in N.J.S. 19:29-1 that reads: “[n]o election shall be held to be invalid based upon the action or inaction of the State or any other election official, except in cases of malconduct, fraud, or corruption, as stated above. Absent this type of conduct, an election contest may therefore only be based upon the acts or omissions by candidates or voters”).

⁴⁰ Salmon Proposed Revisions to Election Contest Statute (attached to Salmon Email, *supra* note 39).

⁴¹ *Id.*; see also N.J. STAT. ANN. § 19:29-2 (West 2023) (“the contest . . . shall be commenced by the filing of a petition . . . signed by at least 15 voters . . .”).

⁴² Salmon Proposed Revisions to Election Contest Statute (attached to Salmon Email, *supra* note 39); see also N.J. STAT. ANN. § 19:29-2 (“the contest . . . shall be commenced by the filing of a petition . . . signed by at least 15 voters of the county or by any defeated candidate for such nomination, party position or public office.”) (emphasis added).

⁴³ Salmon Proposed Revisions to Election Contest Statute (attached to Salmon Email, *supra* note 39) (proposing that subsection (g) read: “[f]or any other cause which shows that another was the person legally elected, or a different result to the public proposition”) (underline indicates proposed language).

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).”⁴⁴

Finally, Mr. Salmon 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.⁴⁵ He cited to two decisions⁴⁶ that have “abrogated this provision to [include only] ‘injunction actions filed during a campaign or criminal actions.’”^{47, 48}

Potential Inconsistency with N.J.S. 19:29-2

As pointed out by Mr. Salmon, N.J.S. 19:29-2 sets forth the requirements for filing a petition to contest an election result.⁴⁹ Depending on the geographic scope of the election, the statute requires the petition be “signed by at least 25 voters of the State,” or “by at least 15 voters of the county.”⁵⁰ The current language in N.J.S. 19:29-1 reflects this requirement by using the plural “voters.”⁵¹

The proposed language that an election may be contested by “any eligible voter” is not necessarily consistent with the requirements set forth in N.J.S. 19:29-2.⁵² Therefore, Staff requests guidance from the Commission regarding whether that language should be modified to remain consistent with N.J.S. 19:29-2.⁵³

⁴⁴ Salmon Proposed Revisions to Election Contest Statute (attached to Salmon Email, *supra* note 39). Prior to the October 2022 Commission meeting, Commissioner Bell made a similar suggestion that subsections (b), (c), and (d) should be combined because they address “eligibility” for nomination or office. E-mail from Commissioner Bernard Bell to Whitney G. Schlimbach, Counsel, NJLRC (Oct. 17, 2022) (on file with the NJLRC).

⁴⁵ 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.”).

⁴⁶ *See 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).

⁴⁷ Salmon Email, *supra* note 39 (explaining that subsections (g) and (h) “have effectively [been] gutted” and adding that “campaign finance violations should be sufficient to overturn an election if there is a sufficient nexus to the results).

⁴⁸ Salmon Proposed Revisions to Election Contest Statute (attached to Salmon Email, *supra* note 39).

⁴⁹ Salmon Email, *supra* note 39. *See also* N.J. STAT. ANN. § 19:29-2.

⁵⁰ *Id.* (allowing the petition to be signed either by a certain number of voters “or by any defeated candidate for such nomination, party position or public office”).

⁵¹ N.J. STAT. ANN. § 19:29-1 (“[t]he 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 . . .”) (emphasis added).

⁵² *See id.* *See also* October 2022 Tentative Report, *supra* note 9, at 8 (emphasis added).

⁵³ Salmon Proposed Revisions to Election Contest Statute (attached to Salmon Email, *supra* note 39).

Scope of N.J.S. 19:29-1(h)

Both cases cited by Mr. Salmon – *In re Contest of Democratic Primary Election of June 3, 2003 for Office of Assembly of Thirty-First Legislative District*⁵⁴ and *Nordstrom v. Lyon*⁵⁵ – address whether election contest claims based on campaign finance and reporting violations are cognizable under N.J.S. 19:29-1.⁵⁶ In each case, the trial court heard the election contest and the Appellate Division determined that the trial court should have transferred the action to the Election Law Enforcement Commission (“ELEC”).⁵⁷

In re Democratic Primary Election involved an election contest claim based on campaign financing violations of the Campaign Contributions and Expenditures Reporting Act (“Reporting Act”).⁵⁸ The Appellate Division determined that the trial court should have transferred the Reporting Act violation claims to the ELEC, finding “that the Legislature intended the ELEC to 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).”⁵⁹

The Appellate Division opined that the transfer of such claims to the ELEC “recognizes that while N.J.S.A. 19:29-1h, broadly interpreted, might support the maintenance of an election contest on the grounds that there is [a Reporting] Act violation, the better policy is to adjudicate the violation though [*sic*] the procedures the Legislature has expressed in the [Reporting] Act.”⁶⁰ Doing so “foster[s] a uniform application of the substantive provisions of the [Reporting] Act.”⁶¹

In *Nordstrom v. Lyon*, the Appellate Division addressed an election contest claim based on an excess campaign contribution in violation of the Reporting Act.⁶² Although the trial court did not “go so far as to trigger N.J.S. 19:29-1h,” it did hold that “setting aside the election would be

⁵⁴ *In re the Contest of the Democratic Primary Election of June 3, 2003*, 367 N.J. Super. 261 (App. Div. 2004).

⁵⁵ *Nordstrom v. Lyon*, 424 N.J. Super. 80 (App. Div. 2012).

⁵⁶ Salmon Proposed Revisions to Election Contest Statute (attached to Salmon Email, *supra* note 39).

⁵⁷ See *In re Democratic Primary Election*, 367 N.J. Super. at 266 and *Nordstrom v. Lyon*, 424 N.J. Super. at 102.

⁵⁸ *In re Democratic Primary Election*, 367 N.J. Super. at 264-65.

⁵⁹ *Id.* at 283.

⁶⁰ *Id.* at 285 (directing alternatively that, if, after conducting a primary jurisdiction analysis, a trial court retains jurisdiction, it may adjudicate the Reporting Act claim “apply[ing] the standards ELEC would apply if the case was before ELEC”). See also *id.* at 288 (“prudential considerations dictate that the trial judge ordinarily should allow ELEC to hear complaints of [Reporting] Act violations”).

⁶¹ *Id.* at 285.

⁶² *Nordstrom v. Lyon*, 424 N.J. Super. 80, 85 & 97 (App. Div. 2012) (addressing also a claim that the campaign failed to comply with reporting obligations under the Report Act filed pursuant to N.J.S. 19:3-7 and holding that the ELEC has “exclusive jurisdiction over alleged reporting violations”); see N.J. STAT. ANN. § 19:3-7 (West 2023) (“If any candidate for nomination for or election to any public office or party position, or his campaign manager, shall fail to file any statement or oath required by this Title to be filed, at the time, place and in the manner required by this Title, and duly verified as herein required, or shall file any false statement, the nomination or election of such candidate, if nominated or elected at the primary or other election concerning which such statement shall have been filed, shall be null and void.”) (emphasis added).

appropriate under these circumstances.”⁶³ The Appellate Division disagreed, finding that the trial court erred in concluding after its primary jurisdiction analysis that it should retain jurisdiction.⁶⁴

The *Nordstrom* Court 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”⁶⁵ Consequently, “the Law Division should have transferred [the] excess contribution claim to ELEC.”⁶⁶

Pending Bills

Currently, there are no pending bills addressing either N.J.S. 19:29-1 or 19:63-26.⁶⁷

Conclusion

In light of the response to outreach, which includes alternative proposed language as well as objections to some of the modifications proposed in the October 2022 Tentative Report, Staff requests guidance from the Commission regarding the direction of the Commission’s work in this area.

In addition, given the issues raised by commenters related to other subsections in N.J.S. 19:29-1, Staff also requests authorization to conduct research and outreach to determine whether the statute would benefit from modifications in these areas, as well.

⁶³ *Nordstrom*, 424 N.J. Super. at 99 (explaining that setting aside the election was not necessary because the trial court had already nullified the nomination pursuant to N.J.S. 19:3-7 based on violations of reporting obligations in the Reporting Act).

⁶⁴ *Id.* (noting the trial court’s recognition that setting aside the election pursuant to N.J.S. 19:29-1(h) was a remedy that “could not . . . be imposed by ELEC” and addressing therefore “whether it was truly available to the Law Division”).

⁶⁵ *Id.* at 102.

⁶⁶ *Id.*

⁶⁷ Although there are a substantial number of pending bills which involve New Jersey election laws, and the Vote By Mail Law particularly, none address the issue raised by *In re Atlantic County Election*.