

EDWARD CORREA AND NEW JERSEY
DEMOCRATIC STATE COMMITTEE,

Petitioners/Appellants,

v.

ANN GROSSI, JOHN WOJTASZEK
and TARA PETTONI, in their
official capacities,

Respondents/Appellees.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO: A-004883-17

On Appeal from a Decision of the
Superior Court of New Jersey, Law
Division, Morris County:
Docket No. MRS-L-001026-18

Sat Below:
Hon. Stuart A. Minkowitz, A.J.S.C.

BRIEF OF *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF *NEW JERSEY*

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TABLE OF CONTENTS

PRELIMINARY STATEMENT..... 1

STATEMENT OF INTEREST OF AMICUS CURIAE..... 3

 A. THE CANNONS OF STATUTORY INTERPRETATION LEAD TO
 ONLY ONE RESULT: BOTH SAMPLE BALLOTS AND
 OFFICIAL BALLOTS MUST BE BILINGUAL..... 6

 B. THE TRIAL COURT’S INTERPRETATION DISENFRANCHISES
 SPANISH-SPEAKING VOTERS AND UNDERMINES THE
 LEGISLATURE’S DESIRE TO ACCOMMODATE THEM..... 12

CONCLUSION..... 18

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>Afran v. Cty. Of Somerset,</u> 244 N.J. Super. 229 (App. Div. 1990)	7, 12
<u>Arroyo v. Tucker,</u> 372 F. Supp. 764 (E.D. Pa. 1974)	4, 15
<u>Civil Serv. Dep't. v. Clark,</u> 15 N.J. 334 (1954)	12
<u>Comm'r of Ins.'s Issuance of Orders A-92-189 & A-92-212,</u> 137 N.J. 93 (1994).	10, 11
<u>Deamer v. Jones,</u> 42 N.J. 516 (1964)	7
<u>Gormley v. Lan,</u> 88 N.J. 26 (1981)	4, 15
<u>Greenless v. Almond,</u> 277 F.3d 601 (1st Cir. 2002)	10
<u>Hargrove v. Sleepy's, LLC,</u> 220 N.J. 289 (2015)	6
<u>Houman v. Mayor & Council of Borough of Pompton Lakes,</u> 155 N.J. Super. 129 (Law Div. 1977)	12
<u>In re Adoption of a Child by W.P. and M.P.,</u> 163 N.J. 158 (2000)	8
<u>In Re Carter,</u> 230 N.J. 258 (2017)	9
<u>In re Contest of Nov. 8, 2005 Gen. Election for Office of Mayor of Twp. Of Parsippany-Troy Hills,</u> 192 N.J. 546 (2007)	3
<u>In re Gray-Sadler,</u> 164 N.J. 468 (2000)	7, 14
<u>In re Holmes,</u> 346 N.J. Super. 372 (App. Div. 2001)	7

<u>Komuves v. Members of Taxpayers Against Change in Gov't Comm.,</u> 261 N.J. Super. 373 (Law. Div. 1992)	4
<u>Michaels v. Johnson,</u> 33 N.J. Super. 77 (App. Div. 1953)	4
<u>New Jersey Ass'n of Sch. Adm'rs v. Schundler,</u> 211 N.J. 535 (2012)	10
<u>Riecker v. Hartmann,</u> 130 N.J. Super. 266 (Law. Div. 1974)	8
<u>Sadloch v. Allan,</u> 25 N.J. 118 (1957)	7
<u>Saint Peter's Univ. Hosp. v. Lacy,</u> 185 N.J. 1 (2005)	8
<u>Smith v. Hayes,</u> 116 N.J. Super. 133 (App. Div. 1971)	8
<u>Smith v. Penta,</u> 81 N.J. 65 (1979)	3
<u>State v. A.T.C.,</u> 454 N.J. Super. 235 (App. Div. 2018)	11
<u>State v. Morrison,</u> 227 N.J. 295 (2016)	12
<u>State v. Regis,</u> 208 N.J. 439 (2011)	9
<u>Swede v. City of Clifton,</u> 22 N.J. 303 (1956)	10
<u>Torres v. Sachs,</u> 381 F. Supp. 309 (S.D.N.Y. 1974)	16
<u>U.S. v. Berks County, Pa,</u> 250 F.Supp.2d 525 (E.D. Pa. 2003)	15
<u>U.S. v. Borden Co.,</u> 308 U.S. 188 (1939)	10
<u>Verry v. Franklin Fire Dist. No. 1,</u> 230 N.J. 285 (2017)	17

Wesberry v. Sanders,
376 U.S. 1 (1964) 3

Wilson ex rel. Manzano v. City of Jersey City,
209 N.J. 558 (2012) 6, 8, 9, 12

Zirger v. Gen. Acc. Ins. Co.,
144 N.J. 327 (1996) 5

STATUTES

N.J.S.A. 19:3-6..... 4

N.J.S.A. 19:6-1..... 13

N.J.S.A. 19:12-9..... 13

N.J.S.A. 19:14-21..... 5

N.J.S.A. 19:14-22..... 5

N.J.S.A. 19:15-18.2..... 13

N.J.S.A. 19:23-22.4..... 5-9, 12, 18

N.J.S.A. 19:23-31..... 6-9, 11-13, 18

N.J.S.A. 19:31-6.4..... 13

N.J.S.A. 19:32-4.1..... 13

N.J.S.A. 19:52-3..... 14

P.L. 94-75 (HR6219)..... 16

52 U.S.C.A. § 10503(b)(2)..... 17

OTHER AUTHORITIES

“Why Should I Go Vote Without Understanding What I Am Going to Vote for?” the Impact of First Generation Voting Barriers on Alaska Natives,
22 Mich. J. Race & L. 327 (2017)..... 16

Constitutional and Statutory Voting Rights for People with Disabilities,
14 Stan. L. & Pol’y Rev. 353 (2003)..... 16

Interpreting Statutes in the Regulatory State,
103 Harv. L. Rev. 405 (1989)..... 10

S. Rep. No. 94-295..... 17

The Power of Observation: The Role of Federal Observers Under
the Voting Rights Act,
13 Mich. J. Race & L. 227 (2007)..... 13

PRELIMINARY STATEMENT

The right to vote is a fundamental right and implicit in that right is the right to be informed about who or what is on the ballot. The Legislature has recognized that right in several ways in our election laws, including requiring voters to have access to a sample ballot in advance of any election and requiring the sample ballot to be a "facsimile" of the official ballot so there is no confusion. Those requirements have been in place for nearly a century and apply to both the primary and general elections.

In the 1970's, New Jersey enacted a series of provisions to accommodate Spanish-speaking voters and help them be informed about the candidates or questions that are up for a vote. One statute, N.J.S.A. 19:23-22.4, requires that in any district in which Spanish is the primary language of at least ten percent of registered voters, sample ballots must be printed bilingually, in both English and Spanish. Because that statute on its face refers only to bilingual sample ballots, the trial court ruled that the Defendants in this case had no obligation to print bilingual official ballots, despite the separate long-standing statutory requirement in N.J.S.A. 19:23-31 that all sample ballots must be "facsimiles" of official ballots.

The Legislature obviously could have been more explicit in enacting N.J.S.A. 19:23-22.4 by providing expressly that it also

mandated the official ballots to be bilingual. Nonetheless, every cannon of statutory interpretation applied by our courts leads to that result. Courts presume that a Legislature is aware of its prior enactments, and our case law clearly holds that statutes should be construed in a manner that precludes the implied repeal of earlier related statutes. Therefore, this Court must presume that the Legislature knew, when it required bilingual sample ballots, that it was simultaneously requiring bilingual official ballots. N.J.S.A. 19:23-31, which had been in effect for more than 40 years, mandated that all sample ballots be "facsimiles" of official ballots.

To presume otherwise would render N.J.S.A. 19:23-31 inoperative, a result this Court must avoid. Instead, like all election statutes, the Court must construe the statutes at issue in this case liberally and in order to effectuate a public policy in favor of the enfranchisement of voters. N.J.S.A. 19:23-22.4 must be read in *pari materia* with N.J.S.A. 19:23-31, with the Legislature's clear goal of accommodating and enfranchising Spanish-speaking voters in mind. The trial court erred in failing to view these statutes as a harmonious whole and its holding had the effect of impliedly repealing N.J.S.A. 19:23-31. It applied only one provision of Title 19, while completely ignoring another. That is simply not how our courts interpret statutes. Accordingly, the American Civil Liberties

Union of New Jersey (ACLU-NJ) files this *amicus curiae* brief asking the Court to reverse the trial court.

STATEMENT OF INTEREST OF AMICUS CURIAE

ACLU-NJ relies upon the attached Certification of Alexander Shalom, Esq. in support of its motion to appear as *amicus curiae*.

LEGAL ARGUMENT

POINT I

IN DISTRICTS WHERE THE PRIMARY LANGUAGE OF AT LEAST TEN PERCENT OF REGISTERED VOTERS IS SPANISH, BOTH THE SAMPLE AND OFFICIAL BALLOTS MUST BE PRINTED BILINGUALLY IN ENGLISH AND SPANISH

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." In re Contest of Nov. 8, 2005 Gen. Election for Office of Mayor of Twp. of Parsippany-Troy Hills, 192 N.J. 546, 559 (2007) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)). "Other rights, even the most basic, are illusory if the right to vote is undermined." Ibid. See also Smith v. Penta, 81 N.J. 65, 81 (1979) ("The franchise is one of our most fundamental and cherished rights.").

The right to vote "does not encompass merely the ability to cast a ballot." Smith, 81 N.J. at 81. Rather, courts have interpreted the right to vote "broadly" to include other

implicit rights, such as "the right to be informed" and "the right to an effective vote." Arroyo v. Tucker, 372 F. Supp. 764, 767 (E.D. Pa. 1974) (internal quotation marks and citations omitted). See also Gormley v. Lan, 88 N.J. 26, 37 (1981) ("A proper concern for protecting the ballot requires that the voters be informed as to the choices being made."). In a democratic form of government, "it is axiomatic that a fully informed electorate is better able to exercise their duties." Komuves v. Members of Taxpayers Against Change in Gov't Comm., 261 N.J. Super. 373, 375-76 (Law. Div. 1992).

The spirit and legislative intent of New Jersey's election laws is "that it should be an informed electorate when they are called upon to participate in an election." Michaels v. Johnson, 33 N.J. Super. 77, 85 (App. Div. 1953). Numerous statutes in Title 19 therefore ensure that voters are fully informed about the questions and candidates on the ballot before they head into the voting booth. See, e.g., N.J.S.A. 19:3-6 (providing that public questions on a ballot must be "presented in simple language that can be easily understood by the voter").

The two statutes at issue in this case were undoubtedly enacted to help voters be better informed when they cast their ballots. The first statute, N.J.S.A. 19:23-31, was enacted in 1930 and provides that "[t]he official primary sample ballot shall be, as nearly as possible, a facsimile of the official

primary ballot to be voted on at the primary election." Although not expressly stated, the obvious legislative intent was to ensure that voters are not confused by a general election ballot that differs in any respect from the sample ballot they studied prior to voting.

More than forty years later, the Legislature enacted the second statute at issue in this case, N.J.S.A. 19:23-22.4, which provides that

for each election district within the county in which the primary language of 10% or more of the registered voters is Spanish, the county clerk shall similarly cause to be printed bilingually in English and Spanish a sufficient number of official primary sample ballots of each political party, and shall similarly furnish such official primary sample ballots to the proper officer or officers.

[N.J.S.A. 19:23-22.4.]¹

That statute is one of many statutes intended to accommodate Spanish-speaking voters and help them understand for whom or what they are voting.

¹ Although the primary election has already passed, the Court should still decide this issue because it is an issue of "substantial importance, likely to reoccur but capable of evading review." Zirger v. Gen. Acc. Ins. Co., 144 N.J. 327, 330 (1996). Not only will there be future primary elections, but similar provisions apply to the upcoming general election. See N.J.S.A. 19:14-22 (requiring sample ballots for the general election to be facsimiles of the official general election ballot); N.J.S.A. 19:14-21 (requiring bilingual general election sample ballots in districts where at least ten percent of registered voters speak Spanish as a primary language).

The trial court elected to apply only N.J.S.A. 19:23-22.4 in this case and ignored the plain language of N.J.S.A. 19:23-31, which requires official ballots to be identical to sample ballots. Thus, it erroneously concluded that Defendants were obligated to print only bilingual *sample* ballots, but not bilingual *official* ballots, because N.J.S.A. 19:23-22.4 refers only to sample ballots. Respectfully, the trial court's decision is at odds with how our courts interpret and apply statutes and must be reversed.

A. The Canons of Statutory Interpretation Lead to Only One Result: Both Sample Ballots and Official Ballots Must Be Bilingual

A court's purpose is to "give effect to the Legislature's intent," but "not every statute is a model of clarity." Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 572 (2012). When interpreting any statute, but especially election laws, our courts apply the canons of statutory construction to ascertain the Legislature's intent in cases where "the statute is ambiguous, the plain language leads to a result inconsistent with any legitimate public policy objective, or it is at odds with a general statutory scheme." Hargrove v. Sleepy's, LLC, 220 N.J. 289, 301 (2015). When applied to the statutes at issue in this case, each relevant canon leads to only one result: the trial court erred in concluding that the Defendants were

required to provide only bilingual sample ballots and not bilingual official ballots.

Initially, the Court must recognize that “[b]ecause 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.” Afran v. Cty. of Somerset, 244 N.J. Super. 229, 231-32 (App. Div. 1990). See also In re Gray-Sadler, 164 N.J. 468, 475 (2000) (election statutes should be liberally construed); Deamer v. Jones, 42 N.J. 516 (1964) (same); Sadloch v. Allan, 25 N.J. 118 (1957) (same). “This canon of construction is indeed so critical to the preservation of our democratic institutions that it has been applied to the state constitution itself.” Afran, 244 N.J. Super. at 232. “Even election laws that appear straightforward should be read in a manner that minimizes disenfranchisement of eligible voters.” In re Holmes, 346 N.J. Super. 372, 376 (App. Div. 2001).

Beyond failing to construe the statutes liberally in favor of voter enfranchisement, perhaps the trial court’s most glaring error is that it applied only N.J.S.A. 19:23-22.4 and ignored N.J.S.A. 19:23-31 altogether. It is fundamental that we do not read election laws, nor any statute for that matter, in

isolation from other laws on the same subject. Saint Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 15 (2005). Where an election statute "is ambiguous or conflicts with some other law, then the court must consider the election laws as being in *pari materia* and arrive at the intent of the Legislature." Smith v. Hayes, 116 N.J. Super. 133, 136 (App. Div. 1971). See also Riecker v. Hartmann, 130 N.J. Super. 266, 274 (Law. Div. 1974) ("The election laws, particularly in their application to primaries, should be construed liberally and in *pari materia*"). Statutes that pertain to the same subject matter should be "construed together as a 'unitary and harmonious whole.'" Saint Peter's Univ. Hosp., 185 N.J. at 15 (quoting In re Adoption of a Child by W.P. and M.P., 163 N.J. 158, 182-83 (2000) (Poritz, C.J., dissenting) (citation, footnote, and internal quotation marks omitted)). Each statutory provision must be viewed "in relation to other constituent parts so that a sensible meaning may be given to the whole of the legislative scheme." Wilson, 209 N.J. at 572.

Collectively, a fair reading of N.J.S.A. 19:23-22.4 and N.J.S.A. 19:23-31 leads to the conclusion that they require both sample and official ballots to be bilingual. N.J.S.A. 19:23-22.4 requires bilingual sample ballots to be printed in any district where the primary language of at least ten percent of registered voters is Spanish. In turn, N.J.S.A. 19:23-31

requires the official primary sample ballot to be "as nearly as possible, a facsimile of the official primary ballot to be voted on at the primary election," which necessarily means those official ballots will also be bilingual. See FACSIMILE, Black's Law Dictionary (10th ed. 2014) (facsimile means "an exact copy").

By applying only N.J.S.A. 19:23-22.4 in this case, but not N.J.S.A. 19:23-31, the trial court violated the fundamental rule that election statutes are to be liberally construed and read in *pari materia*, giving a sensible meaning to each statute. This led the trial court to render N.J.S.A. 19:23-31 inoperative and superfluous, a course of action that is generally forbidden by the rules of statutory interpretation. See, e.g., In Re Carter, 230 N.J. 258, 274 (2017) ("[L]egislative language must not, if reasonably avoidable, be found to be inoperative, superfluous or meaningless.") (quoting State v. Regis, 208 N.J. 439, 449 (2011)).

The Legislature could have more clearly mandated that official election ballots be bilingual, but "not every statute is a model of clarity." Wilson, 209 N.J. 572. Nothing in the legislative history of N.J.S.A. 19:23-22.4 demonstrates that the Legislature intended to repeal N.J.S.A. 19:23-31, or render it inoperative as to bilingual ballots. That result clearly must be avoided.

Courts "do not lightly assume that one statute has implicitly repealed another." Greenless v. Almond, 277 F.3d 601, 608 (1st Cir. 2002) (citing C.R. Sunstein, Interpreting Statutes in the Regulatory State, 103 HARV. L. REV. 405, 475 (1989)) Thus, "there is a strong presumption in the law against implied repealers and every reasonable construction should be applied to avoid such a finding." New Jersey Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 555-56 (2012)(internal quotation marks and citations omitted). "To overcome that presumption, a high threshold must be vaulted: 'a repeal by implication requires clear and compelling evidence of legislative intent, and such intent must be free from reasonable doubt.'" Ibid. (quoting In re Comm'r of Ins.'s Issuance of Orders A-92-189 & A-92-212, 137 N.J. 93, 99 (1994). See also Swede v. City of Clifton, 22 N.J. 303, 317 (1956) ("Repeals by implication are not favored in the law; and where the statutory provisions may reasonably stand together, each in its own particular sphere of action, there is not the repugnancy importing the design to repeal the earlier provision."); U.S. v. Borden Co., 308 U.S. 188, 198 (1939) ("It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of

the legislature to repeal must be clear and manifest.") (internal citations omitted).

Given the absence of any express statements of legislative intent to repeal N.J.S.A. 19:23-31, this Court must presume that the Legislature was aware of N.J.S.A. 19:23-31's requirement that sample ballots must be identical to official ballots and thus presume the Legislature was also aware that by imposing any requirement regarding the content of sample ballots, it was simultaneously imposing an identical requirement for official ballots. See In re Comm'r of Ins.'s Issuance of Orders A-92-189 & A-92-212, 137 N.J. at 96 ("The Legislature is presumed to be familiar with its prior enactments."); State v. A.T.C., 454 N.J. Super. 235, 249 (App. Div. 2018) (same). Accordingly, when confronted with an apparent inconsistency between an earlier and later statute, our courts presume that the Legislature was fully aware of the earlier statute and resolve the inconsistency by construing both statutes in a manner that harmonizes and reconciles their language.

Any presumption to the contrary would contradict the mandate that election laws be construed liberally in favor of voter enfranchisement. To permit the Legislature to enact conflicting laws would only lead to confusion and chaos as courts struggled to determine which statute to apply. Instead, the rules of statutory interpretation instruct the Court to

harmonize conflicting statutes and apply an interpretation that gives each statute meaning, Wilson, 209 N.J. at 572, and which promotes voter enfranchisement. Afran, 244 N.J. Super. at 231-32.

The trial court failed to apply those long-standing rules of statutory construction and instead effectively re-wrote our election laws so that only N.J.S.A. 19:23-22.4 applies, not N.J.S.A. 19:23-31. That approach warrants reversal by this Court.

B. The Trial Court's Interpretation Disenfranchises Spanish-Speaking Voters and Undermines the Legislature's Desire to Accommodate Them

Our courts construe statutes consistent with the "legislative objectives sought to be achieved by enacting the statute." Wilson, 209 N.J. at 572. See also State v. Morrison, 227 N.J. 295, 308 (2016) ("We will not adopt an interpretation of the statutory language that leads to an absurd result or one that is distinctly at odds with the public-policy objectives of a statutory scheme."). Thus, "[i]f statutory expression is susceptible of two meanings, that meaning will be adopted which comports with the general public policy of the State as manifested by its legislation rather than that which runs counter to such policy." Houman v. Mayor & Council of Borough of Pompton Lakes, 155 N.J. Super. 129, 152 (Law Div. 1977) (citing Civil Serv. Dep't. v. Clark, 15 N.J. 334 (1954)).

New Jersey was one of the first states to enact legislation to accommodate Spanish-speaking voters, doing so even before the 1975 enactment of Section 203 of the Voting Rights Act. James Tucker, The Power of Observation: The Role of Federal Observers Under the Voting Rights Act, 13 MICH. J. RACE & L. 227, 257 (2007). Through a series of statutes, the Legislature has expressed a clear public policy in favor of the enfranchisement of Spanish-speakers. That includes requiring voter registration applications to be available statewide in Spanish, N.J.S.A. 19:31-6.4. Additionally, where at least ten percent of registered voters speak Spanish as a primary language, the County Election Board of Elections must appoint two additional members who are of Hispanic origin or fluent in Spanish, N.J.S.A. 19:6-1; the County Board of Elections' notice to voters setting forth the procedures to be used when challenging a voter must be bilingual, as well as the actual affidavit and instructions that a voter must complete to establish their right to vote, N.J.S.A. 19:12-9 and N.J.S.A. 19:15-18.2; and, finally, bilingual complaint forms must be available in each polling place so that voters can register their complaints about the conduct of the election, N.J.S.A. 19:32-4.1.

The trial court's decision not to apply N.J.S.A. 19:23-31 and require both sample and official ballots to be bilingual undermines the public policy objectives of our election laws and

will inevitably lead to voter confusion and disenfranchisement. Although Defendants argued below that bilingual official ballots were not necessary because bilingual sample ballots are posted at each polling place and there are Spanish-speaking poll workers on-site, those measures are simply not sufficient. [1T50].² A Spanish-speaking voter who receives a bilingual sample ballot in the mail will reasonably assume that the official ballot will also be in Spanish. Once that voter heads into the voting booth and realizes that the ballot is only in English, she would be out of luck because a voter cannot leave a voting booth to ask for assistance. See N.J.S.A. 19:52-3 ("No voter after having entered and emerged from the voting machine booth shall be permitted to reenter the same on any pretext whatsoever"); In re Gray-Sadler, 164 N.J. at 480 n.2 (describing the testimony of a voter who stepped outside the voting booth to ask for assistance regarding deficient voting instructions and had the lever pulled before she was finished voting).

It is doubtful that our courts would accept a scenario in which an English-speaking voter receives a bilingual ballot in the mail and then arrives at the voting booth to find a Spanish-language official ballot. Surely courts would recognize that even if the English-speaking voter could still recognize the names of the candidates on the Spanish-language ballot, that

² 1T = June 1, 2018 Order to Show Cause Hearing Transcript

voter would nonetheless be at a significant disadvantage because she could not understand the remainder of the ballot, including the instructions on how to use the machine or how to deal with questions presented to the public. As the United States District Court for the Eastern District of Pennsylvania so aptly stated:

Voting without understanding the ballot is like attending a concert without being able to hear. Even if the voter, illiterate in English, may be able to distinguish one candidate's last name from another, the voter illiterate in English may not understand the office for which the various candidates are running, and surely cannot understand the various propositions, ranging from bond authorizations to constitutional amendments. But the meaningful right to vote extends beyond the immediate four corners of the voting machine.

[U.S. v. Berks County, Pa, 250 F.Supp.2d 525, 527 (E.D. Pa. 2003) (noting that one Spanish-speaking voter said "she was unable to read the English-language ballot, and simply 'pushed all kinds of buttons' on the machine, and in the end was 'not sure who [she] voted for.'").]

A voter has a right to be "informed as to the choices being made" in the voting booth, Gormley, 88 N.J. at 37, and if the voter cannot even read the ballot then that voter is disenfranchised. Arroyo, 372 F. Supp. at 767 (holding a plaintiff cannot make an "informed" or "effective" vote "without demonstrating an ability to comprehend the . . . ballot itself"). When equal voting opportunities are denied to a

particular group based on its inability to speak English, "it perpetuates their place as second-class citizens." James Tucker, "Why Should I Go Vote Without Understanding What I Am Going to Vote for?" the Impact of First Generation Voting Barriers on Alaska Natives, 22 MICH. J. RACE & L. 327, 340 (2017) (quoting Michael Waterstone, Constitutional and Statutory Voting Rights for People with Disabilities, 14 STAN. L. & POL'Y REV. 353, 369 (2003).)

In order that the phrase 'the right to vote' be more than an empty platitude, a voter must be able effectively to register his or her political choice. This involves more than physically being able to pull a lever or marking a ballot. It is simply fundamental that voting instructions and ballots, in addition to any other material which forms part of the official communication to registered voters prior to an election, must be in Spanish as well as English, if the vote of Spanish-speaking citizens is not to be seriously impaired. . . . Plaintiffs cannot cast an effective vote without being able to comprehend fully the registration and election forms and the ballot itself.

[Torres v. Sachs, 381 F. Supp. 309, 312 (S.D.N.Y. 1974) (internal footnote removed).]

Although it does not appear that the Federal Voting Rights Act applies in this case,³ what is obvious is that New Jersey's

³ The 1975 Amendments to Section 203(b) of the Voting Rights Act limit the requirement for the provision of bilingual materials to jurisdictions in which the illiteracy rate is higher than the national average. P.L. 94-75 (HR6219), August 6, 1975.

statutes share the same policy goal that led Congress in 1975 to amend the Voting Rights Act to remove barriers that Spanish-speakers face when they vote and to make it easier for them to receive election all materials in their primary language, including both the sample ballot and the official ballot. See S. Rep. No. 94-295 (1975), at *8, 24-31 (report by United States Senate detailing the long discrimination against voting minorities that made it hard for them to vote, including the obstacle of election materials being printed only in English). The 1975 amendments to the Voting Rights Act more explicitly provide that all voting materials, including official ballots, must be bilingual, 52 U.S.C.A. § 10503(b)(2). Like the Federal Voting Rights Act, New Jersey enacted a series of laws to make all election materials bilingual, in English and Spanish. It makes no sense to assume New Jersey's Legislature would not have intended to require the official ballots to be bilingual as well. See Verry v. Franklin Fire Dist. No. 1, 230 N.J. 285, 308 (2017) ("Our canons of statutory interpretation instruct us to harmonize congruent statutory provisions with the understanding that the Legislature does not intend its enactments to lead to absurd results.").

Although it would have been preferable for the Legislature to expressly provide that both sample ballots and official ballots need to be bilingual, this Court must consider the clear

public policy in favor of accommodating Spanish-speaking voters when construing N.J.S.A. 19:23-22.4. Taking that public policy preference into consideration, together with N.J.S.A. 19:23-31's clear mandate that sample ballots and official ballots be identical so as to reduce voter confusion, this Court should hold that Defendants were obligated to print both the sample ballots and official ballots in English and Spanish.

CONCLUSION

Accordingly, for the reasons argued above, this Court should reverse the lower court's decision.

Respectfully Submitted,

/s CJ Griffin _____
CJ Griffin

Dated: September 11, 2018