



New Jersey
30B Vreeland Road, Suite 100
Florham Park, NJ 07932
office: (973) 845-7640

New York
420 Lexington Ave., Suite 300-19
New York, NY 10170
office: (646) 205-8038

June 26, 2020

VIA ELECTRONIC FILING

Honorable Ernest M. Caposela, A.J.S.C.
Passaic County Courthouse
77 Hamilton Street, 6th Floor
Paterson, NJ 07505

Re: In re City of Paterson Third Ward Municipal Election of May 12, 2020
Docket No.: PAS-L-001751-20

Dear Judge Caposela:

On behalf of Petitioner, William McKoy, we respectfully request preliminary injunctive relief to prevent Respondent, Alex Mendez, from being sworn into office on July 1, 2020.¹ In the alternative, we request that the results of the election be decertified pending final adjudication of this matter.

In the May 2010 municipal election in Paterson, Kenneth McDaniel was declared the victor by a six-vote margin over Rigo Rodriguez.² Shortly thereafter, 49 mail-in ballots were "discovered" at the Passaic County Board of Elections. Upon counting these ballots, Mr. Rodriguez was declared the victor by a 41-vote margin over Mr. McDaniel. Approximately one week after the election, the New Jersey Attorney General's Office launched an investigation to see whether any wrongdoing took place during the election after receiving complaints of voter fraud. Mr. McDaniel filed an election contest, which was ultimately dismissed by Judge Thomas F. Brogan in October 2010 due to insufficient evidence of voter fraud.

While the election contest was pending, Mr. Rodriguez was sworn in. Then, on December 1, 2010, approximately two months after Judge Brogan dismissed the case,³ Mr. Rodriguez was arrested with his wife and 13 others for election fraud, mail-in ballot fraud, and witness tampering. Mr. Rodriguez continued to serve in his position for more than three more years while the case continued before he was finally indicted by a grand jury in mid-2014. Notwithstanding, Mr. Rodriguez completed his term and ran for Mayor of Paterson in 2014, ultimately losing with just 7.32% of the vote. On October 29, 2014, this Court, as Your Honor is aware, admitted Mr. Rodriguez into a pre-trial intervention program after he agreed to a lifetime ban on holding public office or employment.⁴

In the ordinary course of events, such as with Mr. Rodriguez, candidates declare their intention to run for office, they compete, and one is declared the victor following the election and sworn in. If the losing candidate finds

1. If elected in a May municipal election, the term of office is ordinarily to begin on July 1. See N.J.S.A. 40:45-17.
2. <https://patersonimes.com/2014/03/07/rodriguez-says-indictment-will-not-deter-him-from-mayoral-run/>
3. Given the timing of Judge Brogan's decision and when Mr. Rodriguez was charged, and with hindsight knowledge that the Attorney General was investigating the matter at the time while a Deputy Attorney General, serving as counsel to the Board of Elections, sat in Judge Brogan's courtroom not alerting the court to the existence of the investigation, it necessarily raises the question of what Judge Brogan would have done had he had access to the evidence, or even allegations, before him as this Court does now.
4. Interestingly, both Mr. Rodriguez and his wife both cast ballots in this most recent election in the Third Ward, but both ballots were rejected as they were among the group of ballots discovered bundled together at the post office in Paterson.

Hon. Ernest M. Caposela, A.J.S.C.
 June 26, 2020
 Page 2 of 7

sufficient legal reason to challenge the results of an election, they may file an election contest. While that is ongoing, however, there is typically little reason not to swear in the victor, who may be subsequently removed from office should they be found to have not received enough votes to win the election. However, this is not a typical case and so typical procedure should not be followed.

Yesterday, on June 25, 2020, New Jersey Attorney General Gurbir S. Grewal announced that he was filing charges against Mr. Mendez, among others, for election fraud. See Exhibit A. Mr. Mendez has been charged with: (1) Election Fraud; (2) Fraud in Casting Mail-In Vote; (3) Unauthorized Possession of Ballots; (4) False Registration or Transfer; (5) Tampering with Publish Records; and (6) Falsifying or Tampering with Records. Id. Unlike Mr. Rodriguez therefore, who was charged with these crimes six months after taking office, Mr. Mendez is being charged now, prior to being sworn in. Furthermore, while the full extent of Mr. Rodriguez's wrongdoing remains unknown, and whether there were sufficient ballots tampered with to actually change the result is in question, Petitioner has alleged a sweeping set of allegations about specific ballots, far in excess of the margin of victory.

Notably, Mr. Mendez is accused not of crimes entirely unrelated to the election, but of fraudulently tampering with the election itself. Under the charges, Mr. Mendez is being accused of fraudulently affecting the election from which he now seeks to benefit from by being sworn in. Like all those charged with breaking the law, Mr. Mendez is entitled to his procedural and substantive due process as well as the presumption of innocence until proven guilty. But that is not the standard now before this Court. We are not asking this Court to rule whether Mr. Mendez is guilty or innocent. Rather, Petitioner has laid out in his Verified Petition a series of allegations and evidence showing that it is impossible to tell, with any reasonable certainty, who actually won the May 12, 2020 municipal election for the Third Ward of the City of Paterson. Now we have the Attorney General himself corroborating some of these allegations to a degree sufficient to meet a probable cause standard.

In other words, we have shown that there is smoke, and the Attorney General is saying there is fire.

LEGAL ARGUMENT

A. This Court Should Enjoin Mr. Mendez From Being Sworn-In on July 1

The standard for the issuance of injunctive relief has long been detailed in Crowe v. DeGioia, 90 N.J. 126 (1982). In Crowe, the Court held that, "the determination to authorize preliminary relief summons the most sensitive of judicial discretion. In exercising that discretion, courts have been guided traditionally by certain fundamental principles." Id. at 132; see also Ispahani v. Allied Domecq Retail, 320 N.J. Super. 494 (App. Div. 1999) The Crowe opinion goes on to discuss four such fundamental principles:

- (1) "One principle is that a preliminary injunction should not issue except when necessary to prevent irreparable harm" Id. at 132 (the "Irreparable Harm" factor).
- (2) "A second principle is that temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled." Id. at 133 (the "Settled Legal Right" factor).
- (3) "A third rule is that a preliminary injunction should not issue where all material facts are controverted." Id. at 133 (the "Uncontroverted Material Facts" factor).

Hon. Ernest M. Caposela, A.J.S.C.
June 26, 2020
Page 3 of 7

(4) "The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief." *Id.* at 134 (the "Balancing of the Hardships" factor).

"Although it is generally understood that all these factors must weigh in favor of injunctive relief," *McKenzie v. Corzine*, 396 N.J. Super. 405, 414 (App. Div. 2007), a more flexible approach may be applied when the preliminary injunction seeks merely to maintain the status quo. *Waste Mgmt. of N.J., Inc. v. Union Cty. Utils. Auth.*, 399 N.J. Super. 508, 520 (App. Div. 2008) (citing *Gen. Elec. Co. v. Gem Vacuum Stores, Inc.*, 36 N.J. Super. 234, 236-37 (App. Div. 1955)). "When a case presents an issue of 'significant public importance,' a court must [also] consider the public interest in addition to the traditional Crowe factors." *Garden State Equal. v. Dow*, 216 N.J. 314, 321 (2013) (quoting *McNeil v. Legis. Apportionment Comm'n*, 176 N.J. 484 (2003)).

It is respectfully submitted that an application of these factors to the underlying facts of this matter supports the issuance of emergent relief as requested by Petitioner.

1. The "Irreparable Harm" Factor

In *Crowe*, the Court measured the "irreparable harm" standard in terms of whether the harm from which avoidance is sought could be remedied with monetary assessment. *See Crowe*, 90 N.J. at 132. Here, there can be no doubt that both Petitioner and Paterson itself will be irreparably harmed if Mr. Mendez is sworn in on July 1 while he is awaiting trial for his election fraud charges.

As Councilman, Mr. Mendez will be entitled to vote on critical issues facing Paterson. He will be able to vote on a \$285 million budget, establishing tax rates, awarding public contracts, and help set the short and long-term agenda for the City. No matter what happens, these votes cannot be undone. No amount of money will get the City back these votes. Moreover, it is manifestly unfair to allow Mr. Mendez to take this seat when there is credible evidence, sufficient to meet a probable cause standard, that he has only obtained that seat by virtue of fraud. It is unfair to the voters to let him make policy decisions on their behalf while he is charged with the crime of defrauding exactly those same voters to take the office in the first place. In other words, both Petitioner and Paterson itself will be irreparably harmed if Mr. Mendez is entitled to reap the benefits of his own wrongdoing.

Petitioner has made detailed allegations in the Verified Petition as to Mr. Mendez's conduct. Such allegations are backed by identification of specific ballots that could change the results of the election. Now, the Attorney General himself appears to concur with at least some of those allegations. Moreover, the crimes alleged by the Attorney General are not for unrelated conduct: Mr. Mendez is not accused of cheating on his taxes or driving without insurance, but rather specifically accused of stealing the seat for which he now seeks to be sworn into.

Petitioner submits that irreparable harm will be suffered if Mr. Mendez is able to benefit from the fruit of his crimes and thus requests that Mr. Mendez be enjoined from being sworn in, or, in the alternative, the results of the election decertified while this matter is ongoing.

2. The "Settled Legal Right" Factor

As to the second factor, a party seeking temporary relief need only show that the legal rights underlying its claim is settled. In other words, Petitioner must only have a settled legal basis for the ultimate legal relief in order to be entitled to a preliminary injunction. Such a factor is often construed alongside a weighing of the likelihood of

Hon. Ernest M. Caposela, A.J.S.C.
June 26, 2020
Page 4 of 7

success by Petitioner in his ultimate claims. If Petitioner is able to demonstrate such a likelihood, it weighs heavily in favor of granting an order such as the one presented to this Court.

While uncommon, there is nothing preventing this Court from enjoining Mr. Mendez from being sworn in on July 1. In In re Contest of November 8, 2011 General Election of Office of New Jersey General Assembly, 210 N.J. 29 (2012), the Supreme Court of New Jersey upheld an injunction preventing the incumbent from being sworn in when the incumbent was not qualified to hold the seat due to a durational residency requirement, even when the challenger had not timely filed the election contest. Id. at 91. Critically, the Supreme Court heavily weighed the public interest factor of preventing unqualified candidates from holding office in favor of upholding the injunction.

In the May 2001 municipal election in Passaic, Sammy Rivera was elected despite a felony conviction from the 1980s.⁵ The State of New Jersey filed an order to show cause to prevent Mr. Rivera from taking office just days before he was to be sworn in, arguing that Mr. Rivera had committed a crime of “moral turpitude” that barred him from holding office under the Faulkner Act. No election contest had been filed and there were no allegations of wrongdoing by Mr. Rivera related to the election itself. Judge Robert Passero dismissed the suit, largely for two reasons: (1) because the lawsuit was filed nearly a week after the deadline to contest the results of the election; and (2) because refusing to allow Mr. Rivera to be sworn in at the last minute could produce a power vacuum and “the potential for chaos.” Id.

Here, Petitioner filed the instant election contest within the permitted timeframe to do so and made the same detailed allegations that are believed to be at the root of the charges against Mr. Mendez. Although this injunction is sought close to the swearing in, it was not for lack of diligence on Petitioner’s part, but rather comes because of the charges being filed against Mr. Mendez. Petitioner is not coming late to the case or jumping on a bandwagon, as Petitioner provided dozens of pages of detailed allegations and credible evidence. Furthermore, unlike with Mr. Rivera, there is no issue regarding a power vacuum and the cause for chaos. We are not dealing with a mayor of a city with nearly 70,000 people, as is the case in Passaic. Rather, we are simply dealing with a single seat on a nine-person city council, in addition to Mayor Sayegh. The Third Ward has three at-large council members to represent them; they will not be deprived of representation without Mr. Mendez.

In any case, there can be no doubt that, while rare, there is nothing in the law preventing this Court from enjoining Mr. Mendez from being sworn in or from decertifying the results of the election.

Similarly, Petitioner is able to show a likelihood of success on the merits. Petitioner made detailed allegations in the Verified Petition specifically regarding the 552 ballots from the Third Ward that were discovered in mailboxes and rejected in bulk by the Board of Elections. See Exhibit B, ¶ 80-96. The Attorney General’s charges relate specifically to these same ballots as well as general improper collection of mail-in ballots. See Exhibit A. Further charges relate to an unknown number of voter registration applications known to be false. Id. At a minimum, the probable cause standard met by the Attorney General’s standard shows at least some level of likelihood of success on the merits by Petitioner in making identical claims. Even if Mr. Mendez is ultimately found innocent, and Petitioner does not dispute that he is innocent until proven guilty, Petitioner has still identified hundreds of ballots that were

5. <https://www.nytimes.com/2001/06/30/nyregion/the-mayor-elect-of-passaic-may-serve-despite-a-crime.html>

Hon. Ernest M. Caposela, A.J.S.C.
 June 26, 2020
 Page 5 of 7

improperly accepted or rejected, far more than the margin of victory, and thus still has a likelihood of success on the merits of ultimately winning the election contest.

To be sure, Mr. Mendez allegedly won the election by 240 votes. But with 1,109 rejected ballots, 24.29% of all ballots cast, and an untold number of accepted ballots that were fraudulently cast, it is thoroughly impossible for anyone, at least at this stage, to know with any reasonable certainty the results of the election. As Petitioner has cited, and will continue to cite, even Mr. Mendez's own attorney, Gregg F. Paster, Esq., believes this election is a fraudulent, stating, "This election is a sham, regardless of who are the ultimate victors and this process has to be reviewed by the courts to address the deficiencies in the planning and execution of the election."

Finally, when considering this factor in the context of a preliminary injunction:

[D]oubt about a suit's merits does not entirely preclude the entry of an interlocutory injunction designed to preserve the status quo. **So long as there is some merit to the claim, a court may consider the extent to which the movant would be irreparably injured in the absence of pendente lite relief, and compare that potential harm to the relative hardship to be suffered by the opponent if an injunction preserving the status quo were to be entered.** If these factors strongly favor injunctive relief, the status quo may be preserved through injunctive relief even though the claim on the merits is uncertain or attended with difficulties.

Waste Mgmt., 399 N.J. Super. at 535 (citation omitted) (emphasis added).

There can be no doubt that granting this order to show cause will preserve the status quo. If this Court does not grant the relief sought, an individual credibly charged with election fraud will be able to reap the benefit of said fraud and, even if he is simply removed months or years from now (or, perhaps, never, as with the case of Mr. Rodriguez), every vote cast will cause irreparable harm to the City. Instead, if Mr. Mendez is not permitted to be sworn in, no such votes will be cast and the City will not be harmed, especially given the existence of three other councilmembers-at-large who can adequately represent the interests of the Third Ward.

3. The "Uncontroverted Material Facts" Factor

To be sure, there are many controverted material facts in this case. Yet, unlike a motion for summary judgment, there need not be no such dispute whatsoever. Under Crowe, the standard is simply that an injunction should not issue when "**all**" material facts are controverted. See Crowe, 90 N.J. at 133 (emphasis added). Here, there several material facts that are not disputed:

1. The Board of Elections flagged and rejected 552 mail-in ballots in bulk due to credible indicia of fraud.
2. Petitioner timely brought this election contest, in large part on the basis of allegations that Mr. Mendez's campaign was behind the voter fraud program that gave rise to such fraudulent ballots.
3. The Attorney General has brought charges against Mr. Mendez for election fraud, specifically related to said bulk reject ballots in the instant election.
4. Such a quantity of bulk reject ballots, far more the margin of victory, to say nothing of the hundreds of other accepted and rejected ballots flagged by Petitioner, have made the results of the election uncertain.

Hon. Ernest M. Caposela, A.J.S.C.
June 26, 2020
Page 6 of 7

Such material facts cannot be controverted and as such, lean toward granting the injunctive relief sought.

4. The "Balancing of the Hardships" Factor

Finally, concerning the balancing of hardships mandated by the final factor, such a balance weighs in favor of the Petitioner's application. Petitioner is not seeking to be installed by this Court as the victor pending the outcome of a hearing or trial. Petitioner is rather seeking to maintain the status quo. Mr. Mendez is not currently the councilman for the Third Ward and so he will not suffer any real harm if he simply has to wait one or more months until this matter can be resolved. In contrast, both Petitioner and the voters of the Third Ward will suffer irreparable harm, as discussed previously, if Mr. Mendez is able to reap the fruit of his allegedly fraudulent conduct.

Petitioner is merely asking this Court to enjoin Mr. Mendez from taking an office for which there is credible evidence he did not obtain in a free and fair election, or, in the alternative, decertifying the results of said election pending the outcome of this matter, because it is impossible to tell with any reasonable certainty who won.

Given the significant public interest in ensuring a free and fair election, and in preventing individuals who were involved in stealing an election to hold the office that was stolen, the balance weighs in favor of granting Petitioner's application. If Petitioner is wrong and Mr. Mendez found to be not guilty, or if Petitioner loses in this election contest, Mr. Mendez can be sworn in accordingly. However, in the interim, whether it is one week, five weeks, or even ten weeks, it is far better to leave the seat vacant than to risk votes being cast by someone who has been investigated and is being charged for election fraud. As such., there is no relief sought herein that, if granted, cannot be undone if it turns out the facts do not support the granting of relief.

B. This Court Should, in the Alternative, Decertify the Results of the Election

Although rare, this Court has the authority to decertify the results of the election, which it should do in the alternative to specifically enjoining Mr. Mendez from being sworn in. See Holloway v. Byrne, 183 N.J. 379, 381 (2005). Here, Respondent, the City of Paterson Municipal Clerk, pursuant to N.J.S.A. 40:45-16, certified the results on June 23, 2020, two days prior to charges being filed against Mr. Mendez. See **Exhibit C**.

In 1994, the United States Court of Appeals for the Third Circuit upheld a preliminary injunction that prevented a winning candidate in a Pennsylvania State Senate race from exercising their authority as an elected official (and had the effect of decertifying the election results) due to allegations of massive absentee ballot fraud. See Marks v. Stinson, 19 F.3d 873, 875 (3d Cir. 1994). Mr. Stinson, the winning candidate, had a margin of victory of 461 votes. Id. He was subsequently sworn in as a State Senator. Id. The District Court heard testimony related to the Stinson campaign's coordinated effort to functionally steal absentee ballots by misrepresenting their nature to voters. Id. Campaign workers were paid for ballot obtained through such fraudulent means. Id. Moreover, there was some evidence that multiple Commissioners with the Board of Elections were in on the scheme and were involved in ensuring absentee ballots were delivered directly to the Stinson campaign rather than the voters. Id.

Notably, despite this evidence, the District Court did not find that the Stinson campaign had specifically engaged in wrongdoing in granting the preliminary injunction, just that there was wrongdoing that affected the election. Id. at 886. The Third Circuit stated that the District Court did not abuse its discretion in granting the preliminary injunction based upon the fact that "the wrongdoing was substantial, that it **could** have affected the outcome of

Hon. Ernest M. Caposela, A.J.S.C.
June 26, 2020
Page 7 of 7

the election, and that it rendered the certified vote count an unreliable indicator of the will of the electorate.” Id. (emphasis in original). The Court specifically held that:

The integrity of the election process lies at the heart of any republic. The people, the ultimate source of governmental power, delegate to their elected representatives the authority to take measures which affect their welfare in a multitude of important ways. When a representative exercises that authority under circumstances where the electors have no assurance that he or she was the choice of the plurality of the electors, the legitimacy of the governmental actions taken is suspect. Accordingly, where there is substantial wrongdoing in an election, the effects of which are not capable of quantification but which render the apparent result an unreliable indicium of the will of the electorate, courts have frequently declined to allow the apparent winner to exercise the delegated power.

Id. at 887 (citing Bell v. Southwell, 376 F.2d 659 (5th Cir. 1967)).

While the Court ultimately held that such evidence of voter fraud did not warrant an order certifying the losing candidate as the victor, it did hold that the results, as a whole, had to be decertified given the uncertainty of the results pending a final adjudication by the District Court as to the merits of the election contest.

Similarly, in this election, the public cannot have any confidence that this election was not stolen or at least fraudulently interfered with by Mr. Mendez. When the Municipal Clerk certified the results, she did so without the knowledge of the pending charges against Mr. Mendez related to this very election. Given the allegations brought forth in the Verified Petition, as well as the probable cause standard that was met in the filing of such charges, there is a reasonable possibility that the results of the election are not accurate.

To be sure, and as stated, Petitioner understands that Mr. Mendez is innocent until proven guilty and as such, is not asking that the results be permanently set aside or that Petitioner, in the interim, be declared the victor. Rather, based upon the charges and their direct relationship to the results that are to be certified, Petitioner asks that they be decertified pending the outcome of the election contest, as is what occurred in Stinson.

CONCLUSION

The question presented by this matter is simple: should an individual be allowed to be sworn in and take office while facing criminal charges for unlawfully interfering in the very election that gave him the right to the seat? For the sake of the sanctity of the democratic process, we hope not. Given the credible evidence already presented to this Court through the Verified Petition, and based upon the probable cause in the charges presented, we ask this Court to enjoin Mr. Mendez from being sworn in, or, in the alternative, decertify the results of this election until the election contest is complete.

Respectfully submitted,
JARDIM, MEISNER & SUSSER, P.C.

/s/ Scott D. Salmon, Esq.
Scott D. Salmon, Esq.