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August 3, 2020

Heather Joy Baker, Clerk
Supreme Court of New Jersey
R.J. Hughes Justice Complex
P.O. Box 970
Trenton, New Jersey 08625-0970

Re: New Jersey Republican State Committee
a/k/a the NJGOP v. Murphy
Docket No. 084731

Civil Action

On Certification from Superior
Court of New Jersey, Law Division
Docket No. MER-L-1263-20

Letter Brief in Opposition to Brief of Amici
Jack M. Ciattarelli and James K. Webber, Jr.

Dear Ms. Baker:

Please accept this letter brief on behalf of Defendant, Governor Philip D. Murphy, in opposition to the amicus brief filed by Jack M. Ciattarelli and James K. Webber, Jr. ("Ciattarelli Amici").

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 3

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS 4

ARGUMENT 4

POINT I 4

AMICI'S CONCESSIONS REGARDING OFF-BUDGET AND ON-BUDGET EXPENDITURE OF GO BOND PROCEEDS ARE FATAL TO THEIR CLAIMS THAT THE STATE MAY NOT EXPEND THE BOND PROCEEDS HERE. 4

POINT II 7

AMICI ERR AS A MATTER OF LAW AND A MATTER OF FACT IN CLAIMING THE STATE MAY NOT BORROW HERE. 7

A. Amici Err In Discussing The Emergency Exception. 7

B. Amici Misapprehend The "Government Funds Exception" 10

POINT III 15

AMICI MISCONSTRUE REFUNDING BONDS AND THE REFUNDING PROVISION OF THE DEBT LIMITATION CLAUSE. 15

CONCLUSION 19

PRELIMINARY STATEMENT

In its merits brief, the State has already addressed – and rebutted – most of the Ciattarelli Amici's legal arguments. As the State explained in some detail, the elected branches are able to issue emergency General Obligation Bonds to meet the fiscal emergency that the COVID-19 pandemic has caused, and indeed, a fiscal emergency was precisely the sort of crisis that led the Framers of the 1947 Constitution to amend the Debt Limitation Clause in the first place. See Db42-52. And as the State further laid out, the 1% cap in the Debt Limitation Clause; the lifting of the cap during emergencies; the history of deficit spending in wartime and in the Great Depression, including spending on general expenses rather than just capital projects; and the principles that justify the Framers' approach show that if the Framers permitted the bonds to be issued, it follows that the Framers permitted the proceeds to be spent. See Db54-83.

The State now addresses the Amici's remaining arguments – both legal and rhetorical. First – and fatally – Amici in fact conceded that, in the past, GO Bond proceeds have been expended both off-budget through debt limitation appropriations and on-budget through transfer to the General Fund as revenue. Despite their best efforts to distinguish that latter practice, however, it only confirms the propriety of spending bond proceeds in this manner. Second, the Amici are flatly incorrect that federal

stimulus funds should be part of the calculus in this case. Third, the Amici misconstrue refunding bonds. Fourth, Amici's lengthy detour into federal funds on deposit is both irrelevant and erroneous. Finally, the Amici's "scare rhetoric" that a ruling for the State here would open up a Pandora's Box of debt issuance fails to recognize the sui generis nature of this pandemic.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

With one addition, the State adopts the procedural and factual history as set forth in its merits brief in opposition to the Plaintiffs. The State adds only that Amici moved to intervene or, in the alternative, to appear as amici. M-1297, 1298, 1299. The Court denied Amici's motion to intervene and granted their motion to appear as amici. Order Den. M-1297 and 1299, Granting M-1298 (Jul. 28, 2020).

ARGUMENT

POINT I

AMICI'S CONCESSIONS REGARDING OFF-BUDGET AND ON-BUDGET EXPENDITURE OF GO BOND PROCEEDS ARE FATAL TO THEIR CLAIMS THAT THE STATE MAY NOT EXPEND THE BOND PROCEEDS HERE.

As the State explained in its merits brief, the New Jersey COVID-19 Emergency Bond Act authorizes two mechanisms to expend GO bond proceeds: on-budget (i.e., through the FY21 annual

[1] Because they are closely related, the procedural and factual history is combined for efficiency and the Court's convenience.

Appropriations Act) and off-budget (i.e., through traditional "debt limitation appropriations" via stand-alone chapter laws separate and apart from the annual Appropriations Act). See Db69-72. The Ciattarelli Amici concede that both have been used in the past.

First, Amici admit that GO bonds are "not budgeted," see Ab23, thereby acknowledging the normalcy and validity of off-budget debt limitation appropriations. Ab23. As the State explained in its merits brief, this history and course of practice demonstrates that the proceeds of GO bonds may constitutionally be used to fund general expenses. Db69-72.

Second, and critically, Amici even admit that GO bond proceeds "do find their way into the budget." Ab23, n.6. Amici seek to distinguish the amount and the purpose of these on-budget interfund transfers from those the Act authorizes, see ibid., but they run into two problems. For one, Amici cannot avoid the fact that GO Bond proceeds have, in the past, been transferred to the General Fund as revenues, helpful confirmation that the State properly characterized the interplay between the Debt Limitation Clause and the Appropriations Clause. For another, as the State explained in its merits brief, any attempt to distinguish the Act from these prior interfund transfers fails. See Db59-61.

Moreover, the Ciattarelli Amici do not even attempt to reconcile their position with the fact that, as the proceedings of

the 1947 Constitutional Convention confirm, the Debt Limitation Clause permits the State to use GO Bond proceeds to make up for revenue deficiencies – with a cap of 1% in ordinary times and no cap during emergencies. See Db54-63. Similarly, the Amici appear unaware of the fact that during the Great Depression, GO Bond proceeds were used to offset general operating expenses. See Db63-66 (providing extended discussion). But those points, both textual and historical, prove fatal to their reading of the Clause.[2] Thus, whichever of the two mechanisms the State uses - a difference of form rather than substance - the State has the constitutional authority to expend the GO bond proceeds at issue here to meet its expenses during a fiscal emergency caused by disaster. Db69-72.

In short, given these concessions and admissions, and the avoidance of constitutional history unfavorable to them, the Ciattarelli Amici's argument is best characterized as one about how much the State should borrow as a matter of public policy, and not a legal one about whether the State may expend GO Bond proceeds as part of the budget process. Having lost that argument in the legislative process, they are not entitled to win it here.

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[2] It is thus no surprise that one of the Amici – Assemblyman Webber - was an attorney for the Lance plaintiffs and admitted in the reply brief in that case that the State may "use bond proceeds to offset appropriations if these bonds are issued in accordance with the Debt Limitation Clause, i.e., are general obligation debt." See Db80-81 (quoting Da664). He was right to do so, and that is precisely the State's position in this litigation.

POINT II

AMICI ERR AS A MATTER OF LAW AND A MATTER OF FACT IN CLAIMING THE STATE MAY NOT BORROW HERE.

Unable to avoid the plain text of subparagraph (e) of the Debt Limitation Clause, the Amici admit that debts incurred under both the federal funds and emergency provisions of this subparagraph are exempt from the voter approval and single object requirements that govern the creation of debt in ordinary times. See Ab19 (recognizing debt covered by subparagraph (e) is exempt "from the voter approval and 'single object or work distinctly specified' requirements of the Debt Limitation Clause"). But they incorrectly argue that these exceptions do not apply.

A. Amici Err In Discussing The Emergency Exception.

Beyond reiterating a number of Plaintiffs' arguments as to why the emergency exception should not apply, Amici's fundamental claim is that the Act "pretends to be necessary to address an emergency that the federal government already provided more than sufficient funds to address." Ab3; see also Ab20. The Amici's claim, however, is fundamentally incorrect.

First, Amici's arguments are based on the false premise that the pandemic is the emergency. As detailed extensively in the State's brief, the pandemic is the "disaster" and the fiscal crisis is the "emergency" that it caused. See Db45-46 (detailing

the distinction between the two). Failing to distinguish properly between the two leads to the narrow – and erroneous – conclusion that the emergency the State is trying to meet is centered on ventilators and not the broader fiscal picture. To make matters worse, such a crabbed interpretation would strip the State of its ability to address the public's need for services and undermine its economic recovery efforts at a key time. See Db72-77.

Second, the Amici's argument simply misunderstands the Treasurer's estimate of anticipated revenues and expenditures. See Muoio Cert. at ¶¶ 99-102.[3] Da20-21. When calculating the State's need for extended-FY20 and shortened-FY21, the Treasurer erased from both sides of the ledger Coronavirus Aid, Relief, and Economic Security Act ("CARES") monies and other federal stimulus funds that the State had received. See id. at ¶ 99. Da20. That is to say, her estimate of revenues and expenditures zeroed out federal stimulus funds. Ibid. What remains is the State's level of need after the federal stimulus funds have been accounted for. Ibid.; see also id. at ¶¶ 65, 112-15 (discussing expected revenue shortfalls for FY20 and FY21). Da14, 24-25.

Third, the idea that federal stimulus funds the State has received could somehow meet the State's emergent fiscal needs

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[3] The "Muoio Cert." refers to the Certification of State Treasurer Elizabeth M. Muoio that the State submitted in support of its merits brief.

that the pandemic caused ignores the nature of those needs. In this emergency, the State is unable to meet its normal expenses because of the fiscal crisis that was caused by the pandemic. See Muoio Assembly Testimony at 46. Da354. With few exceptions, the federal stimulus funds are being used for new, unaccounted for, pandemic-related expenditures. Muoio Cert. at ¶¶ 99-102. Da20-21. To the extent that federal resources exceed pandemic-related expenditures, federal guidelines generally restrict the funds from being used for any other purpose, especially revenue replacement. Ibid. Cf. Kellie Mejdrich and Katherine Landergan, 'Tidal wave': States fear fiscal disaster as Congress slow-walks aid, Politico (Aug. 3, 2020), https://www.politico.com/news/2020/08/03/states-fear-fiscal-disaster-congress-aid-390905 ("Congress explicitly prohibited the use of the fund" "to cover operating expenses" "when the money was appropriated in March."). Accordingly, the State cannot meet its fiscal emergency with the stimulus funds.

Fourth, to the extent Amici are asking the Court to substitute its assessment of the scope of the financial crisis for that of the Legislature and the Executive Branches, Amici wade into nonjusticiable matters. It is the elected branches who are constitutionally tasked with budget matters, have access to the raw figures, and have developed expertise in this area. See Gilbert v. Gladden, 87 N.J. 275, 282 (1981) (quoting Baker v. Carr, 369 U.S. 186 (1962)); see also Db49-50.

B. Amici Misapprehend The "Government Funds Exception."

As a threshold matter, although amici spill considerable ink discussing the exception to the Debt Limitation Clause for federal monies, the State contends that the GO Bonds that the Act authorizes it to sell to the public or private markets and the GO Bonds that the Act authorizes it to sell to the federal government both fall within the Debt Limitation Clause's exception for bonds issued to "meet an emergency caused by disaster." See N.J. Const. art. VIII, § 2, ¶ 3(e) (emergency provision); see also Act at § 4(a). So if the Court accepts the State's extensive argument that the current fiscal crisis constitutes an emergency caused by the COVID-19 disaster, see Db4-33 (factual analysis) and Db42-52 (legal argument), then it need not analyze the issue further. It is only if the Court thinks that the current fiscal crisis does not fall with the ambit of this emergency provision that the Court must address the State's alternate basis for being able to issue the bonds, namely that bond proceeds from the Federal Reserve's Municipal Liquidity Facility ("MLF") constitute federal funds within the scope of the first sentence of subparagraph (e) of the Debt Limitation Clause. See N.J. Const. art. VIII, § 2, ¶ 3(e), sentence 1 ("This paragraph shall not be construed to refer to any money that has been or may be deposited with this State by the government of the United States."). Therefore, Amici's pages-long

detour into the "Government Funds Exception," as they call it, should ultimately prove to be irrelevant.

Regardless, even if the Court decides to take up the issue, the State prevails.

First, the plain language of this exception sweeps broadly, encompassing "any money" deposited with this State by the federal government. N.J. Const. art. VIII, § 2, ¶ 3(e) (emphasis added). The proceeds from the GO bonds the State is authorized to sell to the federal government indisputably fall within the expansive phrase "any money."

Second, the history of the federal funds exception confirms the applicability in this case of the phrase "deposited with this State by the government of the United States." As the State explained at length in its merits brief, during the Presidency of Andrew Jackson the United States sought to loan stimulus money to the states. See Db52-53. In enacting the federal funds exception to the Debt Limitation Clause, it was this scenario and others like it that might arise in the future that the 1844 Framers were addressing, namely a federal loan in return for a pledge of repayment backed by the State's faith and credit. That is precisely the situation we have here. See Act at § 4(a), 7.

Third, Amici's alternate reading of the federal funds exception is not only unmoored from this history, but also

misconstrues the proceedings of the 1844 Constitutional Convention. Amici conflate the Debt Limitation Clause and the Credit Clause of the Constitution and attribute to the former a proposal raised at the Convention with regard to the latter. See Ab17-18 (relying on Aa112). However, the Credit Clause and the Debt Limitation Clause are two discrete Clauses with opposite concerns; the Credit Clause addresses the ability of the State to lend money and the Debt Limitation Clause addresses the State's ability to borrow money. Compare N.J. Const. art. VIII, § 2, ¶ 1 with N.J. Const. art. VIII, § 2, ¶ 3(e).

Thus, while the attendees of the Convention may have been appropriately concerned about the "dissolution of the Union" due to "rebellion" and the State's ability to loan money to the federal government during wartime, see Aa112, this concern is a Credit Clause concern, not a Debt Limitation one. Regardless, the Framers of the 1844 Constitution ultimately rejected lending the State's credit under any circumstances. See N.J. Const. of 1844, art. 4, § 6, ¶ 3 ("The credit of the State shall not be directly or indirectly loaned in any case."). Finally, to the extent that loaning money to the federal government can be considered the creation of a "debt" for purposes of the Debt Limitation Clause, this "debt" is addressed by the emergency exception of subparagraph 3(e) that permits the State to issue debt "for purposes of war,"

not by the preceding sentence concerning federal funds "deposited" with the State. See N.J. Const. art. VIII, § 2, ¶ 3(e).

Fourth, Amici's contention that the State cannot invoke the federal funds exception for amounts deposited by member banks of the Federal Reserve, see Ab19, n.5, is a misreading of the MLF and is meritless. The Federal Reserve's MLF, through which federal loans will be distributed to states, is thoroughly a creature of the federal government. The MLF was jointly established by the federal Treasury Department and the Federal Reserve under § 13(3) of the Federal Reserve Act, 12 U.S.C. § 343. The MLF was funded through federal legislative and executive action. CARES Act § 4027 appropriated $500 billion, $35 billion of which the Treasury Department directed to capitalize the MLF. See Kanef Cert. at Exh. H (Da529-36)[4]; see also Coronavirus and CARES Act, Testimony of Federal Reserve Chair Jerome H. Powell Before the Committee on Financial Services, U.S. House of Representatives (June 30, 2020), https://www.federalreserve.gov/newsevents/testimony/powell20200630a.htm ("The MLF is backed by $35 billion of CARES Act equity . . . ."). Further, the money used to capitalize the MLF could only be spent "[s]ubject to approval of the President" and under "exclusive control of the [Treasury] Secretary, and may not be

[4] The "Kanef Cert." refers to the Certification of Michael B. Kanef, the Director of the Office of Public Finance, that the State submitted in support of its merits brief.

used in a way that direct control and custody pass from the President and the Secretary." 31 U.S.C. § 5302(a)(2). So, the President and the Secretary expressly maintain "direct control and custody" of the MLF funds. Ibid.

The Federal Reserve also works hand in hand with Congress and the federal Treasury Department in administering the MLF. It must periodically report to both houses of Congress regarding the distribution of federal CARES Act funds to the States. See Kanef Cert. at Exhs. M-O. Da563-598. And any changes made to the MLF require federal Treasury Department approval. Id. at Exh. H, p. 1. Da530.

With this fundamental framework in mind, it is clear that Katsiavelos and Lewis, the employment law cases that Amici cite, are immaterial. See Ab19, n.5. In Katsiavelos, the district court held only that the Federal Reserve Bank of Chicago did not constitute an "executive agency" under the Rehabilitation Act of 1973, a statute that protects the rights of disabled employees. Katsiavelos v. Federal Reserve Bank of Chicago, 859 F. Supp. 1183, 1185 (N.D. Ill. 1994). Similarly, in Lewis, the Ninth Circuit held that the Federal Reserve Bank of San Francisco was not a "federal agency" under the Federal Tort Claims Act because of the degree of control that the regional Federal Reserve Banks exercise over their employees. Lewis v. United States, 680 F.2d 1239, 1240-41 (9th Cir. 1982). Contrary to Amici's contention, "Federal

Reserve Banks," which "are surely virtually . . . an arm of the Government" in ordinary circumstances, see Fasano v. Federal Reserve Bank of New York, 457 F.3d 274, 283 (3d Cir. 2006), are indisputably an arm here. See also Am. Bank & Tr. Co. v. FRB, 256 U.S. 350, 359 (1921) (finding that "the policy of the Federal Reserve Banks is governed by the policy of the United States").

In short, the federal government created the MLF to provide economic stability and assistance to state and local governments distressed by the COVID-19 Pandemic. It is beyond doubt that the MLF is a creature of the federal government.

POINT III

AMICI MISCONSTRUE REFUNDING BONDS AND THE REFUNDING PROVISION OF THE DEBT LIMITATION CLAUSE.

In 1983, the voters amended the Debt Limitation Clause to include a refinancing provision, which was again amended in 2008, and now provides in pertinent part:

> No voter approval shall be required for any such law under subparagraphs a. or b. of this paragraph authorizing the creation of a debt . . . for the refinancing of all or a portion of any outstanding debts or liabilities of the State, . . . so long as such law shall require that the refinancing provide a debt service savings determined in a manner to be provided in such law. . . .
>
> [N.J. Const. art. VIII, § 2, ¶ 3(c)].

For multiple and independent reasons, the Amici are simply incorrect that the Emergency GO Bond Act runs afoul of this refinancing provision.

First, the Ciattarelli Amici incorrectly frame the issue when they claim that the Emergency GO Bond Act violates subsection (c) of the Debt Limitation Clause. Yet, subparagraph (c) is - like the emergency provision in subparagraph (e) - an exception to the voter approval requirement in subparagraph (a).

As Assistant Treasurer Elizabeth Felker testified at the 1983 hearing on the refinancing amendment, "[e]very bond act has a provision in it that provides for refunding."[5] Senate Revenue, Finance and Appropriations Committee, Public Hearing on Senate Concurrent Resolution No. 3027 (July 7, 1983) at 18. If the refinancing does not achieve a debt service savings (that is, interest savings), then the voter approval requirement of subparagraph (a) applies; if the refinancing does achieve a debt service savings, then subparagraph (c) applies and exempts the State from having to obtain voter approval. See id. at pp. 18, 22-23. Therefore, the emergency provision in subparagraph (e) cannot possibly violate subparagraph (c), because subparagraph (c) is itself an exception and does not affirmatively mandate debt service savings.

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[5] For our purposes, "refunding" and "refinancing" are used interchangeably.

Second, and critically, the real issue here is therefore derivative of the issue discussed at length in the State's merits brief, namely, does the emergency provision in subparagraph (e) of the Debt Limitation Clause trump the voter approval requirement in subparagraph (a)? For all of the reasons exhaustively explained in the State's merits brief, see Db42-52, the plain text of the Debt Limitation Clause and the constitutional history of the emergency provision each conclusively demonstrates that during times of emergency the voter approval requirement of subparagraph (a) must yield to the emergency. The Amici admit this. See Ab19. This admission condemns their refunding argument.

Third, any notion that the State may issue emergency debt without voter approval, but must put any subsequent refinancing of this debt to a vote, is without merit. Such a construction would not only be contrary to the structure of the Debt Limitation Clause, which "notwithstands" the entirety of the Debt Limitation paragraph, see N.J. Const. art. VIII, § 2, ¶ 3(e), but would also be a negating force against being able to borrow under the emergency provision.

To find an example of this, we need look no further than present circumstances. Under the federal MLF, the federal government will loan New Jersey up to $9.2 billion, but the loan will be due in three years. See Db27; see also Kanef Cert. at ¶ 54, 56 (Da170-71). That means that at the end of three years,

the State must either refinance the loans in order to secure funds to repay the federal government, or must use General Fund revenues to make a lump sum payment of up to $9.2 billion. The latter option – impossible now – would be equally impossible in three years because it would slice away approximately one quarter of the entire annual State budget. That leaves refinancing as the only option for repayment. However, we do not know what the public and private markets will be like in three years and whether the State will be able to refinance with a debt service savings. While market predictions are difficult in normal years, they are particularly hard now given that the economic crisis is still unfolding and the pandemic may strike again. Worrying now about remote and speculative possibilities about refinancing would serve as a disincentive to emergency borrowing and would defeat the very "leeway" and "flexibility" that the Framers fought for and achieved when including an emergency provision in the Debt Limitation Clause. See Db35-38 (discussing 1947 constitutional proceedings).

Fourth, as discussed above, the Amici's argument is premised on the false notion that the State is relying solely upon the federal-funds-on-deposit exemption in subparagraph (e). See Ab21. However, the State is relying also – and primarily – on the emergency provision of subparagraph (e). Amici's entire refunding argument falls apart when this emergency provision is considered.

See Ab21 ("Refunding of Funds on Deposit From the Federal Government Violates the Debt Limitation Clause.").

Fifth, Amici overlook that the Act permits the State to borrow from the public or private markets the entire $9.9 billion that it authorizes. See Act at § 4. Moreover, the Debt Limitation Clause itself permits a 35-year maturity for bonds sold in these markets. See N.J. Const. art. VIII, § 2,¶ 3(a)

Finally, Amici's contention that the refunding bonds that the Act authorizes would be "new money," see Ab10-11, is unfounded. As the Director of the Office of Public Finance explains: "While refunding bonds are issuances of bonds, they simply replace the bonds already issued and outstanding and do not generate 'new money' available to be expended by the State on projects or expenses." See Kanef Cert. at ¶ 73 (Da176); see also id. at ¶¶ 70-76 (full discussion of refunding bonds) (Da175-177).

For all of these reasons, Amici's refunding argument is nothing more than a distraction from the legal issues upon which this case centers. And on those issues - whether the State can borrow to meet an unprecedented fiscal emergency, and whether it can spend the proceeds to address the related revenue deficiencies - the State ultimately prevails in light of the text, structure, history, and practice of the Debt Limitation Clause.

CONCLUSION

For these reasons, the Court should find for the State.

Respectfully submitted,

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