SUPREME COURT OF NEW JERSEY
Docket No. 072813

DANIEL TUMPSON, RUSSELL HOOVER, ERIC VOLPE, CHERYL FALLICK, and JOEL HORWITZ ("COMMITTEE OF PETITIONERS"),

Petitioners-Plaintiffs-Respondents/Cross-Appellants,

- vs -

JAMES FARINA, in his capacity as Hoboken City Clerk, and the CITY OF HOBOKEN,

Respondents-Defendants-Appellants/Cross-Respondents

and

MILE SQUARE TAXPAYER ASSOCIATION 2009, INC., GINA DeNARDO, individually and on behalf of all similarly situated and 611-613 LLC, individually and on behalf of all similarly situated,

Respondents-Intervenors-Appellants/Cross-Respondents.

ON CERTIFICATION FROM A FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Docket No. A-5454-10T4

Sat below:

Hons. Clarkson S. Fisher, Jr., P.J.A.D., Carmen H. Alvarez, J.A.D., and Jerome M. St. John, J.A.D.

CIVIL ACTION

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

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PRELIMINARY STATEMENT

The New Jersey Civil Rights Act (NJCRA), *N.J.S.A.* 10:6-1 to -2, by its plain language, provides a cause of action for deprivations of all substantive rights secured by the Constitution or laws of this State. Here, defendant James Farina and the City of Hoboken ("Hoboken"), (collectively, "Respondents" or "Defendants"), by violating the Optional Municipal Charter Law (the Faulkner Act), *N.J.S.A.* 40:69A-1 to -210, violated Plaintiffs' substantive right under the Faulkner Act to approve or reject at the polls a council ordinance, in violation of the NJCRA. Indeed, this violation involved the fundamental right to vote and to petition the government.

Plaintiffs successfully vindicated their rights under the Faulkner Act in Court, but were nonetheless denied attorneys' fees under the NJCRA's fee-shifting provision. Specifically, the Appellate Division held that, because Plaintiffs prevailed in Court and the referendum thus took place, they were not deprived of a right, within the meaning of the NJCRA, *N.J.S.A.* 10:6-2. But this holding cannot be squared with the purpose of NJCRA's attorneys' fee provision, which -- like other fee-shifting provisions of New Jersey law -- was enacted in order to ensure that New Jersey residents whose substantive rights have been violated will be able to obtain effective, committed legal counsel to assist them. Without such access to competent counsel and the courts, many New Jersey residents -- especially the poor -- will be powerless to act in defense of their rights.

As Plaintiffs are the prevailing party in an action to remedy the deprivation of their substantive rights under the NJCRA, they are entitled to the payment of their attorneys' fees. Accordingly, this Court should reverse the decision of the Appellate Division denying them this statutorily mandated relief.

INTEREST OF *AMICUS*

Amicus curiae the American Civil Liberties Union of New Jersey ("ACLU-NJ") is a non-profit organization devoted to protecting the basic civil liberties of all New Jersey residents. Founded in 1960, the ACLU-NJ has approximately 15,000 members and supporters in the State of New Jersey. The ACLU-NJ is the state affiliate of the American Civil Liberties Union, which was founded in 1920 for identical purposes and has approximately 500,000 members and supporters nationwide.

One of the ACLU-NJ's (and National ACLU's) policy goals is to ensure the ability of persons, including poor persons, to access courts in order to vindicate their civil rights and seek redress for violations thereof. To that end, the ACLU-NJ has brought NJCRA claims on behalf of numerous clients who were deprived of civil or constitutional rights. *See, e.g., Jones v. Hayman*, 418 *N.J. Super.* 291 (App. Div. 2011); *Lima v. Newark Police Dep't*, 658 *F.*3d 324 (3rd Cir. 2011); *Occupy Trenton, et al. v. Zawacki, et al.*, No. MER-C-72-11 (Ch. Div., filed Oct. 27, 2011); *Fitchette v. City of Newark*, No. ESS-L-3995-11 (L. Div., filed May 11, 2011).

Additionally, the ACLU-NJ considers fee-shifting provisions an important tool in ensuring access to the Courts for the

vindication of civil rights. Accordingly, the ACLU-NJ has served as direct counsel or as *amicus* in numerous significant cases involving the availability or applicability of fee-shifting provisions, including the fee-shifting provision of the NJCRA. For example, in *Jones v. Hayman*, the ACLU-NJ directly represented female prisoners who were transferred from a women's prison to a men's prison and were subjected to more oppressive conditions than the male prisoners. The suit raised claims under the NJCRA and the Law against Discrimination ("LAD"), *N.J.S.A.* 10:5-1, *et seq.* After the State improved the conditions in the women's unit and then, during a critical stage of the lawsuit, transferred all of the women back to the women's prison, the plaintiffs sought attorneys' fees under the NJCRA and LAD. The matter resulted in a significant Appellate Division decision clarifying the standards for an award of attorneys' fees under the so-called "catalyst theory," discussed further below. Further, as *amicus* in *K.L. v. Evesham Twp. Bd. of Educ.*, 423 *N.J. Super.* 337 (App. Div. 2011), the ACLU-NJ successfully argued that a parent was entitled to attorneys' fees under the Open Public Records Act, *N.J.S.A.* 47:1A-1, *et seq.*, despite the fact that the case centered on the district's reliance on a federal privacy statute that did not contain a fee-shifting provision. *See also Pinto v. Spectrum Chem. and Lab. Prod.*, 200 *N.J.* 580 (2010) (ACLU-NJ as *amicus* in case involving settlement procedures' effect on ability of plaintiffs who are represented by public interest legal organizations to obtain fees); *New Jerseyans for Death Penalty Moratorium v. New Jersey Dep't of Corr.*, 185 *N.J.* 137 (2005)

(ACLU-NJ as *amicus* in case confirming right to fees, including fee enhancements, when pro bono legal organizations serve as counsel).

In light of its interest in and experience and expertise with regard to this issue, the ACLU-NJ respectfully submits this brief *amicus curiae* in order to assist the Court in the evaluation of the claims of Plaintiffs, who were deprived of a substantive right arising under the Faulkner Act -- indeed, one which directly involves the fundamental right to vote and to petition the government -- and who successfully vindicated that right in court but were nevertheless denied attorneys' fees under the NJCRA's fee-shifting provision. For the reasons set forth below, the decision of the Appellate Division denying Plaintiffs' application for attorneys' fees should be reversed.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Plaintiffs are residents of the City of Hoboken ("Hoboken"), which is organized under the Optional Municipal Charter Law (the Faulkner Act), *N.J.S.A.* 40:69A-1 to -210. Pursuant to *N.J.S.A.* 40:69A-185, the voters of Hoboken "have the power of referendum which is the power to approve or reject at the polls . . . any ordinance passed by the council, against which a referendum petition has been filed" as provided in the Faulkner Act. On March 30, 2011, Plaintiffs presented a petition to defendant Farina, the Hoboken City Clerk, seeking repeal of the Ordinance.

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[1] A more complete procedural history and statement of facts is set forth in the Appellate Division's decision. *See Tumpson v. Farina*, 431 *N.J. Super.* 164, 169-74 (App. Div. 2013).

Tumpson v. Farina, 431 *N.J. Super.* 164, 170 (App. Div. 2013). After Farina declined to file the petition and a supplemental petition, Plaintiffs brought suit, alleging violations of both the Faulkner Act and the New Jersey Civil Rights Act (NJCRA), *N.J.S.A.* 10:6-1 to -2; among the forms of relief requested was attorneys' fees pursuant to *N.J.S.A.* 10:6-2(f). *Tumpson*, 431 *N.J. Super.* at 170-71.

Plaintiffs prevailed: the trial court ordered defendant Farina to process and review the original and supplementary petitions. *Id.* at 172. The trial judge later denied intervenors' motion for a stay, and, when defendant Farina still did not allow the referendum to go forward, granted a motion to enforce litigants' rights, filed by Plaintiffs; on appeal, the Appellate Division remanded, at which point, a new trial judge granted summary judgment to Plaintiffs on, *inter alia*, the Count of the Complaint that charged a violation of the NJCRA, including that it granted attorneys' fees to the Plaintiffs. *Id.* at 173.

Thereafter, on November 8, 2011, Hoboken voters voted on, and rejected, the referendum. Meanwhile, on appeal, the Appellate Division agreed with the trial court that Respondents violated the Faulkner Act, but held that this violation did not engender a violation of the NJCRA because, the court reasoned, the fact that the referendum had taken place meant that there had been no violation of Plaintiffs' rights. Accordingly, there was no longer any basis to award Petitioners' attorneys' fees. On September 20, 2013, this Court granted certification on the question whether the Hoboken City Clerk's actions violated the Faulkner Act and, if so,

whether his non-compliance therewith violated the NJCRA, thus permitting an award of attorneys' fees. This brief addresses only the applicability of the NJCRA to a violation of the Faulkner Act, and its implications for the grant of attorneys' fees.

ARGUMENT

I. BY VIOLATING PLAINTIFFS' RIGHTS UNDER THE FAULKNER ACT, RESPONDENTS DEPRIVED PLAINTIFFS OF RIGHTS PROTECTED BY THE NEW JERSEY CIVIL RIGHTS ACT.

A. The New Jersey Civil Rights Act

The New Jersey Civil Rights Act (NJCRA), *N.J.S.A.* 10:6-1 to -2, establishes that

> [a]ny person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.
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> [*N.J.S.A.* 10:6-2(c).]

New Jersey courts recognize "two types of claims under the Act: first, a claim for when one is 'deprived of a right,' and second, a claim for when one's 'rights are interfered with by threats, intimidation, coercion or force.'" *E.g.*, *Ramos v. Flowers*, 429 *N.J. Super.* 13 (App. Div. 2012) (quoting *Felicioni v. Admin. Office of Courts*, 404 *N.J. Super.* 382, 400 (App. Div.

2008), *certif. denied*, 203 *N.J.* 440 (2010)). *See also Tumpson*, 431 *N.J. Super.* at 181-82 (quoting *Felicioni*, 404 *N.J. Super.* at 400). In addition, the NJCRA provides that, "in an action brought pursuant to subsection c. of this section, the court may award the prevailing party reasonable attorney's fees and costs." *N.J.S.A.* 10:6-2(f).

B. Section c of the NJCRA applies to any substantive rights.

At issue here is whether non-compliance by a municipality with the Faulkner Act also engenders a violation of the NJCRA. Resolving this question, however, requires only that the Court look to the plain language of the NJCRA, which provides that a person may bring a civil action if that person has been deprived of "*any* substantive rights, privileges or immunities secured by the Constitution or laws of this State." *N.J.S.A.* 10:6-2(c) (emphasis added). *See generally In re Petition for Referendum on Trenton Ordinance 09-02*, 201 *N.J.* 349, 358-59 (2010) (in interpreting a statute, this Court "look[s] first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen.") (quoting *Bosland v. Warnock Dodge Inc.*, 197 *N.J.* 543, 553 (2009) (internal quotation marks omitted)). *See also In re Referendum Petition to Repeal Ordinance 04-75*, 192 *N.J.* 446, 461 (2007) ("We must 'ascribe to the statutory words their ordinary meaning and significance.'" (quoting *DiProspero v. Penn*, 183 *N.J.* 477, 492 (2005)); *Lawrence v. Schrof*, 174 *N.J. Super.* 624, 628 (App. Div. 1980) ("the words

and phrases of statutes are to be given their generally accepted meaning"). That language does not suggest that the Legislature intended any specific category of substantive rights to be exempted from the NJCRA. To the contrary, as this Court has stated, the Legislature's use of the word "'any' clearly is synonymous with the word 'all.'" *Cf. In re Referendum Petition to Repeal Ordinance 04-75*, 192 *N.J.* at 460-61 (discussing the Faulkner Act and holding that "[t]he words, '*any* ordinance passed by the council,' N.J.S.A. 40:69A-185, standing alone, do not suggest that the Legislature intended a particular category of ordinance to be exempted from the referendum requirement. The Legislature could have qualified the referendum right by stating that only 'some ordinances' or 'legislative ordinances' are subject to voter approval. But it did not. Instead, it enacted a statute stating that 'the power of referendum' applies to 'any ordinance.'" (emphasis in *In re Referendum Petition to Repeal Ordinance 04-75*)).

Cases interpreting the federal Civil Rights Act, upon which the NJCRA is modeled, are instructive in this regard. *Ramos*, 429 *N.J. Super.* at 21, 23 (noting that the NJCRA "was 'modeled on the federal civil rights law which provides for a civil action for deprivation of civil rights (42 *U.S.C.A.* § 1983)'" and that 42 *U.S.C.* § 1983 is "the federal equivalent of the [New Jersey Civil Rights] Act" (quoting A. Judiciary Comm., *Statement to Assemb. Bill No. 2073*, at 2)). The language of section 1983 provides a cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United

States, 42 *U.S.C.* § 1983; that language is nearly identical to that of the NJCRA, which provides a cause of action for deprivations of "any substantive rights, privileges or immunities secured by the Constitution or laws of this State," *N.J.S.A.* 10:6-2(c). Significantly, in interpreting section 1983, the United States Supreme Court has held that "and laws," as the phrase is used in section 1983, "means what it says" and is not "limited to some subset of laws" because "Congress attached no modifiers to the phrase" and "the legislative history does not demonstrate that the plain language was not intended." *Maine v. Thiboutot*, 448 *U.S.* 1, 4, 8 (1980).

Like Congress, the New Jersey Legislature "was aware of what it was doing" by including the phrase "or laws of this State" in the NJCRA and the legislative history of the NJCRA does not show that the plain language was not intended. *Id.* at 8. Indeed, its use of the word "any" only serves to emphasize the broad remedial scope of the NJCRA. *See Owens v. Feigin*, 194 *N.J.* 607, 613-14 (2008) (holding that, "[i]n light of the broad remedial purpose of the [NJCRA], and absent any legislative expression to the contrary," the Legislature did not require that claims brought under the NJCRA satisfy notice-of claim requirements under the New Jersey Tort Claims Act, *N.J.S.A.* 59:1-1 to 12-3). *See generally Sabella v. Lacey Township*, 204 *N.J. Super.* 55, 59 (App. Div. 1985) ("liberal construction is required in the case of remedial legislation") (citing *Service Armament Co. v. Hyland*, 70 *N.J.* 550, 559 (1976)).

The question, then, is the definition of "substantive rights" for purposes of the NJCRA. The plain language of the Act itself makes clear that it is not limited to "substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States," for those are otherwise provided for.[2] In seeking to understand what the

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[2] Nor, obviously, did the Legislature mean to limit the NJCRA to *State* substantive due process or equal protection rights -- it knew how to utilize those terms where it wished to do so and did not so limit the Act. Thus, the Appellate Division's holding that there was no violation of the NJCRA in the absence of a deprivation of "substantive due process rights," *Tumpson*, 431 *N.J. Super.* at 182, is clearly at odds with the language of the statute.

Notwithstanding the clear language of the statute, there is some legislative history to support an interpretation of the NJCRA that would limit its application to violations of "civil rights." *See* S. Judiciary Comm., *Statement to Assemb. Bill No. 2073*, at 1 (May 6, 2004) ("to protect and assure against deprivation of the free exercise of civil rights"; "provides a remedy when one person interferes with the civil rights of another"; "attempts to provide the citizens of New Jersey with a *State* remedy for deprivation of or interference with the civil rights of an individual"); A. Judiciary Comm., *Statement to Assemb. Bill No. 2073*, at 1 (Feb. 19, 2004) ("[e]very individual in this State enjoys the free exercise of his civil rights"; "it is necessary to provide a remedy when one person interferes with the civil rights of another"; "attempts to provide the citizens of New Jersey with a *State* remedy for deprivation of or interference with the civil rights of an individual"). That said, resort to such history is improper where, as here, the plain language is so clear. *See Bosland v. Warnock Dodge Inc.*, 197 *N.J.* 543, 553 (2009) (in interpreting a statute, this Court seeks guidance beyond the plain language of the statute "only to the extent that the Legislature's intent cannot be derived from the words it has chosen" (quoting *Pizzullo v. N.J. Mfrs. Ins. Co.*, 196 *N.J.* 251, 264 (2008) (internal quotation mark omitted)). However, in any event, the rights here at stake, which address issues of voting and of petitioning government certainly are civil rights, even if the NJCRA were so limited. *See Mochary v. Caputo*, 100 *N.J.* 119, 124

Legislature meant by "any substantive rights, privileges or immunities secured by the Constitution or laws of this State," it is again instructive to consult with the jurisprudence that has evolved with regard to what constitutes a "right" under 42 *U.S.C.* § 1983. Thus, a plaintiff seeking redress under the federal Civil Rights Act "must assert the violation of a federal *right*, not merely a violation of federal *law*." *Blessing v. Freestone*, 520 *U.S.* 329, 340 (1997) (citing *Golden State Transit Corp. v. Los Angeles*, 493 *U.S.* 103, 106 (1989)) (emphases in original). The United States Supreme Court "traditionally look[s] at three factors when determining whether a particular statutory provision gives rise to a federal right:"

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms.
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> [*Blessing*, 520 *U.S.* at 340-41 (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 *U.S.* 418, 431-32 (1987)) (internal citations omitted).]

(1985) ("The right to participate equally in the electoral process is the bedrock of our system. It is 'of the essence of a democratic society.' It is the right upon which all other civil rights depend." (quoting *Reynolds v. Sims*, 377 *U.S.* 533, 555 (1964))).

If a federal statutory provision thus creates a right, then that right is enforceable under section 1983 unless Congress specifically foreclosed that remedy. *Blessing*, 520 *U.S.* at 341.

For the reasons set forth below, the Faulkner Act certainly contains a right remediable through the NJCRA. And this is so notwithstanding that the language of the NJCRA, unlike that of section 1983, adds a further requirement: the right at issue must be "substantive." *N.J.S.A.* 10:6-2(c). According the term its "ordinary meaning," a substantive right is not merely procedural, entitling one to a certain process, but rather, one that is substantive, in that it "defines our rights and duties." *Winberry v. Salisbury*, 5 *N.J.* 240, 247-48 (1950) (noting "[t]he distinction between substantive law, which defines our rights and duties, and the law of pleading and practice, through which such rights and duties are enforced in the courts"). *See also In re P.L. 2001, Chapter 362*, 186 *N.J.* 368, 380 (2006) (noting that substantive law is "legislation and the common law, as opposed to pleading and practice"); *In re Appeal of Certain Sections of Uniform Administrative Procedure Rules*, 90 *N.J.* 85, 96-97 (1982) (discussing a rule that divides "orders into two categories - 'substantive' and 'procedural'" and noting that the term procedural "'relates solely to the conduct or management of the case'" and that "'substantive' will cover everything else").

C. Petitioners' claims are for violations of their substantive rights.

As noted above, Hoboken is organized under the Optional Municipal Charter Law, *N.J.S.A.* 40:69A-1 to -210, commonly called

the Faulkner Act, such that a council exercises legislative power by ordinance. *N.J.S.A.* 40:69A-36. Pursuant to *N.J.S.A.* 40:69A-185, the voters of Hoboken "have the power of referendum which is the power to approve or reject at the polls . . . any ordinance passed by the council, against which a referendum petition has been filed." Voters have this "right of referendum" under the Faulkner Act in order to "arous[e] public interest" and "plac[e] in the hands of the voters . . . direct means of controlling proposed or already enacted municipal legislation." *City of Ocean City v. Somerville*, 403 *N.J. Super.* 345, 352 (App. Div. 2008) (quoting *Maese v. Snowden*, 148 *N.J. Super.* 7, 11 (App. Div. 1977)) (internal quotation marks omitted). Moreover, this aspect of the Faulkner Act "should be liberally construed . . . to promote the 'beneficial effects' of voter participation." *In re Ordinance 04-75*, 192 *N.J.* at 459.

Here, the parties do not dispute, and the lower court held, that "voters have *the right* to approve or reject an ordinance, if the provisions of the Faulkner Act are complied with," *Tumpson v. Farina*, 431 *N.J. Super.* at 177 (emphasis added), and, thus, that Plaintiffs' Faulkner Act claims involved rights. Indeed, under *Blessing v. Freestone*, there can be little question but that the Faulkner Act gives rise to rights. Accordingly, the first *Blessing* factor -- that the Legislature "must have intended that the provision in question benefit the plaintiff," *Blessing*, 520 *U.S.* at 340 -- is clearly met. By its terms, the Faulkner Act provides to Plaintiffs, as residents of a city that is organized under the Act, "the power to approve or reject at the polls . . .

any ordinance passed by the council." *N.J.S.A.* 40:69A-185. In adopting a statute that gives "the power of referendum," *N.J.S.A.* 40:69A-185, to Plaintiffs, there can be no question but that the Legislature intended that these provisions of the Faulkner Act benefit them; the Act "plac[es] in the hands of the voters . . . direct means of controlling proposed or already enacted municipal legislation." *Somerville*, 403 *N.J. Super.* at 352. Indeed, the Appellate Division was "satisfied that the Legislature intended that petitioners, as here, should enjoy *the right* to amend an insufficient petition for referendum." *Tumpson*, 431 *N.J. Super.* at 180 (emphasis added).

Second, there is no contention that the right protected by the statute is "so 'vague and amorphous' that its enforcement would strain judicial competence." *Blessing*, 520 *U.S.* at 340-41. Indeed, multiple courts in this very litigation -- and many others -- have held that Respondents violated Plaintiffs' rights and have required, at trial and on appeal, the enforcement of rights under the Faulkner Act. *See, e.g., Tumpson*, 431 *N.J. Super.* at 180 (requiring that Respondents place the referendum on the ballot and noting that the requirements of the Faulkner Act "are not onerous, and it was not unreasonable to insist that Farina adhere to them."); *see also id.* at 171-73 (describing orders of the trial court); *Tumpson v. Farina*, No. L-2375-11, Order, at 2 (L. Div. Nov. 4, 2011), available at Dsa29[3]; *Tumpson v. Farina*, No. L-2375-

[3] "Dsa#" refers to pages in Defendants-Respondents/Cross Petitioners' Supplemental Appendix as submitted with Defendants-

11, Order at 2 (L. Div. Oct. 24, 2011), available at Dsa51 (granting Plaintiffs' motion for summary judgment, finding that defendant Farina and Hoboken violated Plaintiffs' substantive right under the Faulkner Act and awarding Plaintiffs' attorneys' fees); *Tumpson v. Farina*, No. L-2375-11, Order Enforcing Litigants' Rights at 2 (L. Div. Aug. 25, 2011), available at Dsa53; *Tumpson v. Farina*, No. L-2375-11, Order to Show Cause, at 2 (L. Div. June 14, 2011), available at Dsa31; *Tumpson v. Farina*, No. L-2375-11, Decision on Order to Show Cause, at 12-13 (L. Div. June 14, 2011), available at Dsa44-45 (finding defendant Farina's actins arbitrary and capricious and ordering that defendant Farina process plaintiffs' petition as provided by law and review it and the amended petition in a manner consistent with the Faulkner Act); *Tumpson v. Farina*, No. L-2375-11, Order Denying Defendants' Cross Motion to Dismiss, at 1-2 (L. Div. June 14, 2011), available at Dsa48-49.

Third, the relevant Faulkner Act provisions are "couched in mandatory rather than precatory terms." *Blessing*, 520 *U.S.* at 341. The language of the statute "unambiguously impose[s] a binding obligation," *id.*, on the municipal council and municipal clerk. *See N.J.S.A.* 40:69A-185 (providing that voters "shall" have the power of referendum; no ordinance passed by the municipal council "shall" take effect before twenty days from the time of its final passage; if a petition meeting certain conditions if

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Respondents/Cross Petitioners' Protective Cross Petition for Certification dated June 28, 2013.

filed within those twenty days, the ordinance "shall" be suspended from taking effect); *N.J.S.A.* 40:69A-187 (providing that, within twenty days of the filing of the petition, the municipal clerk "shall" determine whether each paper of the petition meets certain conditions and whether the petition is signed by a sufficient number of qualified voters; the municipal clerk "shall" certify the results of his examination of the petition to the council; if the petition is insufficient, the municipal clerk "shall" set forth the specific ways in which the petition is deficient in his certificate and "shall" at once notify at least two members of the Committee of the Petitioners of his findings); *N.J.S.A.* 40:69A-188 (within five days after an amendment is filed, the municipal clerk "shall" examine the amended petition and take other specified steps; if the petition is still insufficient, the municipal clerk "shall" file his certificate and notify the Committee of the Petitioners of his findings). Indeed, the Appellate Division specifically held that the language in the applicable Faulkner Act provisions is mandatory, rather than precatory:

> [N]othing in the statute authorizes a municipal clerk to not file a petition, particularly since the statute states the petition "shall be filed[,]" thereby imposing an unequivocal filing obligation on the municipal clerk. Once filed, the municipal clerk is *obligated* to determine if the petition is signed by the requisite fifteen percent of qualified voters.
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> *The language is clear and unambiguous*, the municipal clerk *must* set forth the "particulars in which [the petition] is

> defective[,]" not, as interpreted by Farina, only one defective particular of his choosing.
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> * * *
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> A municipal clerk *lacks the discretion* to refuse to file a petition, even if the signatures thereon are less than the mandated fifteen percent of qualified voters.
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> [*Tumpson*, 431 *N.J. Super.* at 177-80 (internal citations omitted) (emphases added).]

Thus, the Faulkner Act provisions meet all three factors for determining whether a statutory provision gives rise to a right under *Blessing*, which has not been foreclosed by the Legislature. *See Blessing*, 520 *U.S.* at 341. Moreover, the right at issue is, in fact, substantive and not merely procedural. The Faulkner Act provides persons like Plaintiffs "the power of referendum which is the power to approve or reject at the polls . . . any ordinance passed by the council, against which a referendum petition has been filed." *N.J.S.A.* 40:69A-185. This right gives voters "direct means of controlling proposed or already enacted municipal legislation." *Somerville*, 403 *N.J. Super.* at 352. And such provisions are certainly substantive -- they define "rights and duties," *Winberry*, 5 *N.J.* at 247-48 -- as opposed to being procedural -- relating only to "pleading and practice," *id.*, or "solely to the conduct or management of the case," *In re Uniform Administrative Procedure Rules*, 90 *N.J.* at 96-97. In sum, the NJCRA encompasses the violations of Plaintiffs' claims under the Faulkner Act because their claims were for violations of their substantive rights under the laws of this State.

II. PETITIONERS ARE ENTITLED TO ATTORNEYS' FEES UNDER THE NEW JERSEY CIVIL RIGHTS ACT.

A. Attorneys' Fees and Fee-Shifting Standards in New Jersey

Although New Jersey courts generally adhere to the so-called American Rule, under which each party must pay his or her own attorney's costs and the prevailing party is not entitled to collect attorneys' fees from the losing party, the Legislature has enacted "numerous statutes that include fee-shifting provisions" when doing so serves the interests of justice. *Walker v. Giuffre*, 209 *N.J.* 124, 127-28 (2012). *See also Rendine v. Pantzer*, 141 *N.J.* 292, 322 (1995) (noting that New Jersey follows the American Rule but that "our Legislature also has passed a substantial number of statutes authorizing an award of a reasonable counsel fee to the attorney for the prevailing party") (citing *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 *U.S.* 240, 247 (1975)); *Coleman v. Fiore Brothers, Inc.*, 113 *N.J.* 594, 596-97 (1989) (noting that New Jersey accepts the premise of the American Rule, but modifies that rule when it does "not serve[] the interests of justice"). Indeed, both Congress and the New Jersey Legislature have specifically modified the American Rule to allow for fee-shifting in actions that vindicate constitutional or civil rights. *Coleman*, 113 *N.J.* at 597 (citing *Hensley v. Eckerhart*, 461 *U.S.* 424 (1983)). *See also Rendine*, 141 *N.J.* at 322 (citing fee-shifting provisions in the Law Against Discrimination ("LAD"), *N.J.S.A.* 10:5-1 to -42; *N.J.S.A.* 56:8-19 (consumer fraud actions); *N.J.S.A.* 34:19-5e (actions against employer retaliation)).

This Court has identified "three essential purposes" underlying civil rights fee-shifting provisions:

> First, they are designed to address the "problem of unequal access to the courts." Second, they are intended to provide the individuals, whose rights are being protected by statutes, with the resources to enforce those rights in court. Finally, they operate so as to "[e]ncourage adequate representation [which] is essential" to ensuring that those laws will be enforced. In addition, we observed, that fee-shifting provisions "are designed . . . to promote respect for the underlying law and to deter potential violators of such laws."
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> [*Walker*, 209 *N.J.* at 129-30 (quoting *Coleman*, 113 *N.J.* at 597) (internal citations omitted).][4]

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[4] In *Coleman v. Fiore Brothers*, Justice O'Hern referred to the Statement of the sponsor of 42 *U.S.C.* § 1988, the Civil Rights Attorney's Fee Awards Act of 1976, to explain the rationale for Congress's -- and the New Jersey Legislature's -- adoption of fee-shifting provisions in for civil rights cases:

> The problem of unequal access to the courts in order to vindicate congressional policies and enforce the law is not simply a problem for lawyers and courts. Encouraging adequate representation is essential if the laws of this Nation are to be enforced. Congress passes a great deal of lofty legislation promising equal rights to all.
>
> Although some of these laws can be enforced by the Justice Department or other Federal agencies, most of the responsibility for enforcement has to rest upon private citizens, who must go to court to prove a violation of law. * * * But without the availability of counsel fees, these rights exist only on paper. Private citizens must be given not only the rights to go to court, but also the legal resources. If the citizen does not have

In sum, fee-shifting provisions like that in the NJCRA, ensure that "plaintiffs with *bona fide* claims are able to find lawyers to represent them" and "are designed to attract competent counsel in cases involving an infringement of statutory rights, to achieve uniformity in those statutes and to ensure justice for all citizens." *Coleman*, 113 *N.J.* at 598.

With these same goals in mind, Congress enacted 42 *U.S.C.* § 1988, the Civil Rights Attorney's Fee Awards Act of 1976. *Patterson v. McLean Credit Union*, 491 *U.S.* 164, 204 (1989); *Urban League of Essex County v. Twp. of Matawan*, 115 *N.J.* 536, 542-44 (1989). Specifically, section 1988 was an attempt to "remedy 'anomalous gaps' created in the award of attorney's fees by the case of *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 *U.S.* 240, 247 (1975)," which adopted the American Rule. *Urban League of Essex County*, 115 *N.J.* at 542. Section f of the NJCRA serves a similar remedial purpose -- to address gaps in remedies under New Jersey statutes. *See* S. Judiciary Comm., *Statement to Assemb. Bill No. 2073*, at 1-2 (stating that the NJCRA, which the Legislature intended to address "potential gaps" in other statutory remedies, is modeled on 42 *U.S.C.* § 1983, the

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> the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.
>
> [*Coleman*, 113 *N.J.* at 597 (quoting 122 Cong. Rec. 33, 313 (1976) (Statement of Sen. Tunney)).]

Massachusetts Civil Rights Act, *MA ST* 12 § 11H, and the Maine Civil Rights Act, 5 *M.R.S.A.* § 4681 *et seq.*); A. Judiciary Comm., *Statement to Assemb. Bill No. 2073*, at 1-2 (same). And the inclusion of a fee-shifting provision in the NJCRA, like that in section 1988, evidences the Legislature's recognition of the importance of private enforcement of rights guaranteed by the State and federal Constitutions and laws, in order to supplement the State's own enforcement efforts. In particular, by providing attorneys' fees in cases like this one, the Legislature intended to ensure that New Jersey residents whose civil rights have been violated will be able to obtain effective, committed legal counsel to assist them. Without such access, many -- especially the poor -- will be powerless to act in defense of their rights.

B. As the prevailing party in an action to remedy the deprivation of their substantive rights under the NJCRA, Petitioners are entitled to attorneys' fees.

The NJCRA, *N.J.S.A.* 10:6-2(f), provides that "the court may award the prevailing party reasonable attorney's fees and costs" in an action "brought pursuant to subsection c." Here, of course, Plaintiffs did prevail, having obtained "enforceable judgments on the merits" or "court-ordered consent decrees" when the trial court ordered defendant Farina to process their petitions and subsequently granted Plaintiffs' motion in aid of litigants' rights. *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 *U.S.* 598, 604 (2001). That is, the litigation here at issue, "created the 'material alteration of the legal relationship of the parties.'" *Buckhannon*, 532 *U.S.* at 604

(quoting *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 *U.S.* 782, 792-93 (1989)). Indeed, the United States Supreme Court has specifically held that obtaining an injunction, as Plaintiffs did here, satisfies this test. *Lefemine v. Wideman*, ___ *U.S.* ____, 133 *S. Ct.* 9, 11 (2012). Certainly, then, Plaintiffs were the prevailing party here.

Furthermore, in New Jersey, a party is also deemed to have prevailed "if the suit 'achieves the desired result because [it] brought about a voluntary change in the defendant's conduct.'" *Jones*, 418 *N.J. Super.* at 305 (quoting *Mason v. City of Hoboken*, 196 *N.J.* 51, 72 (2008); *D. Russo, Inc. v. Township of Union*, 417 *N.J. Super.* 384, 389 (App. Div. 2010)). Under this so-called "catalyst theory," which has been renounced by the United States Supreme Court with regard to fee provisions in federal statutes, *Buckhannon, supra*, but reaffirmed in New Jersey for state statutes, *Mason*, 196 *N.J.* at 70-76, a plaintiff must demonstrate "(1) a factual causal nexus between the litigation and the relief ultimately achieved; and (2) that the relief ultimately secured by plaintiff had a basis in law." *Mason*, 196 *N.J.* at 76 (internal quotation marks and citation omitted).

Both requirements for a plaintiff to be considered a prevailing party for the purpose of attorneys' fees are clearly met here. First, there can be no question of a factual causal nexus between the Plaintiffs' litigation and the relief ultimately achieved: in an order enforcing litigants' rights in this case, the trial court granted Plaintiffs their requested relief by ordering that defendant Farina "certify their petition as proper,

valid and sufficient in all respects" and prohibiting Hoboken from enforcing the ordinance until Plaintiffs withdrew the petition or "until repeal of the ordinance by vote of the council or approval or disapproval of the ordinance by the voters." *Tumpson v. Farina*, No. L-2375-11, Order Enforcing Litigants' Rights, at 2 (L. Div. Aug. 25, 2011), available at Dsa53. Second, both the trial court and the Appellate Division held that the relief secured by Plaintiffs had a basis in law -- Farina's actions violated the Faulkner Act and denied Plaintiffs the referendum right to which they were entitled. *See, e.g.*, *Tumpson*, 431 *N.J. Super.* at 180 (declining to set aside the trial judge's orders that Plaintiffs be allowed to amend their petition for referendum and that the ordinance not be enforced until Plaintiffs withdrew their petition or until after the referendum vote); *id.* at 171-72 (noting that the trial judge found that Farina's actions violated the Faulkner Act); *id.* at 173 ("The trial judge granted plaintiffs' motion to enforce litigants rights, required Farina to certify the petition as valid, and prohibited the city from enforcing the Ordinance pending the outcome of the referendum in the general election.").

The Appellate Division, however, held that, precisely because they had achieved the success they did in this litigation -- both in the trial court and appeal -- Plaintiffs were "not deprived" of their right to referendum. *Tumpson*, 431 *N.J. Super.* at 181. That is, the Appellate Division held that because the referendum that the Plaintiffs sought and obtained through this litigation had, in fact, taken place, they were not, ultimately, "deprived of a right," within the meaning of the NJCRA. *Tumpson*, 431 *N.J. Super.*

at 181-82.[5] But this interpretation would eviscerate any claim to attorneys' fees under any circumstances, for if a Plaintiff prevails, he or she has necessarily obtained redress for any deprivation; certainly, it would eviscerate any claim for attorneys' fees in cases, such as this one, seeking injunctive relief, since such relief per force ends any deprivation. Of course, such an interpretation is completely inconsistent with the law, which does not preclude civil right Plaintiffs who successfully obtain injunctions from being deemed prevailing parties. *Mason*, 96 *N.J.* at 76. It also ignores New Jersey caselaw, pursuant to which, having won at trial and on appeal, and obtained all of the relief they sought, Plaintiffs here are certainly prevailing parties. Indeed, a contrary holding would be both misguided and dangerous, undermining all of the salutary purposes of fee-shifting set forth above.

From the perspective of *amicus curiae* ACLU-NJ, under the Appellate Division's holding, plaintiffs would be denied fees in the most prototypical free speech cases. Take, for example, cases instituted after a permit for a march or rally has been denied or where an unconstitutional sign ordinance was passed and is about to take effect. If a plaintiff prevails in Court in an action seeking to vindicate the right to free speech, under the Appellate Division's holding, because the rally or parade in fact went

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[5] The Appellate Division was correct both that Plaintiffs did not assert that they had shown "threats, intimidation or coercion," and that they could nonetheless prevail under the NJCRA if they showed deprivation of a right. *Tumpson*, 431 *N.J. Super.* at 182.

forward following the Court's Order, or because the unconstitutional ordinance was enjoined before it became effective, attorneys' fees would not be allowed because the Plaintiffs were not ultimately "denied" their rights. But this, of course, is not the law: speakers have the right not to have their speech permits rejected by government officials for improper reasons. The improper refusal to grant a speaker a speech permit is, *in itself*, the constitutional deprivation that forces one to go to court to remedy the violation. Similarly, here, the Faulkner Act required that the clerk accept the Plaintiffs' petition. The clerk refused. The clerk's refusal to place the referendum on the ballot was *itself* the deprivation of a right that forced Plaintiffs to endure the time and expense of going to court to successfully obtain a remedy. And when that occurs, attorneys' fees must be awarded to those, like the Plaintiffs here or the ACLU-NJ in such a free-speech case, who, as a result of the litigation, fully prevailed. *See, e.g., Lefemine v. Wideman*, 133 *S. Ct.* at 11 ("Before the ruling, the police intended to stop Lefemine from protesting with his signs; after the ruling, the police could not prevent him from demonstrating in that manner. So when the District Court 'ordered [d]efendants to comply with the law,' the relief given--as in the usual case involving such an injunction--supported the award of attorney's fees."); *People Against Police Violence v. City of Pittsburgh*, 520 *F.*3d 226, 228-34 (3d Cir. 2008) (holding that trial court did not err in finding plaintiffs to be prevailing party for purposes of attorneys' fees award under 42 *U.S.C.* § 1988 where District Court issued

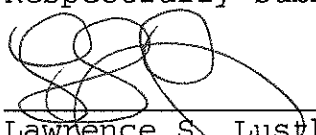
preliminary injunction prohibiting the city from enforcing the challenged ordinance regulating expressive activities in public forums); *County of Morris v. Nationalist Movement*, 273 *F.*3d 527, 529, 531-32, 535-36 (3d Cir. 2001) (reversing and holding that Nationalist Movement was a prevailing party after the parade it sought took place after county policy regarding fees and insurance were held unconstitutional and unenforceable); *Bell v. Balt. County*, 550 *F.Supp.* 2d 590, 591-93 (D. Md. 2008) (awarding attorneys' fees to plaintiffs who successfully challenged a zoning ordinance which restricted the posting of certain political lawn signs, which were thus permitted before the election at issue).

In sum, because Plaintiffs properly brought an action under the NJCRA and prevailed, they are entitled to recover reasonable attorneys' fees and costs under *N.J.S.A.* 10:6-2(f). The decision of the Appellate Division to the contrary should be reversed.

CONCLUSION

For the foregoing reasons, *amicus curiae* ACLU-NJ respectfully submits that the Court should reverse the decision of the Appellate Division that Respondents' conduct did not constitute a violation of the NJCRA and remand this matter for a determination of the appropriate attorneys' fees and costs to be assessed against the Defendant.

Respectfully submitted,



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