

NEW JERSEY REPUBLICAN STATE : SUPREME COURT OF NEW JERSEY  
COMMITTEE a/k/a the NJGOP; : DOCKET NO. 084731  
DECLAN O'SCANLON; HAL WIRTHS; :  
LISA NATALE-CONTESSA; and ILEANA : CIVIL ACTION  
SCHIRMER, :  
 : Certified Pursuant to Rule  
 : 2:12-1 from Superior Court  
 : of New Jersey, Law  
Plaintiffs, : Division, Mercer County,  
 : Docket No. MER-L-1263-20  
v. :  
 :  
PHILIP D. MURPHY, in his :  
Official Capacity as Governor of :  
New Jersey; :

Defendant.

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**BRIEF OF PROPOSED INTERVENORS JACK M. CIATTARELLI AND  
JAMES K WEBBER, JR.**

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## PRELIMINARY STATEMENT

The "New Jersey COVID-19 Emergency Bond Act" (P.L. 2020, c.60) (the "Act") is a direct assault on the holding of Lance v. McGreevey, that bond proceeds do not constitute "revenue" when used to fund general expenses. 180 N.J. 596 (2004) The Act does exactly what Lance prohibited, it authorizes bonds and declares the proceeds "revenue" to cover general operating expenses. Although the Act involves general obligation debt rather than contract debt, there is no basis to treat the proceeds differently. Irrespective of the type of debt, borrowed funds "scarcely resemble 'State revenue'." Lance, supra, 180 N.J. at 597 (citations omitted). Accordingly, the Act is unconstitutional.

The Act also violates the Debt Limitation Clause)because it authorizes "bonds" backed by the full faith and credit of the State without voter approval that are not for "some single object or work specified therein". N.J. CONST. ART. VIII, §2 ¶3 (the "Debt Limitation Clause" (Ia65-8). To escape these requirements, the Act attempts to write the bonds into the exceptions contained in subparagraph e of the Debt Limitation Clause. The proceeds from the sale of bonds pursuant to the Act, however, fail to satisfy these carefully crafted exceptions.

The Act labels the proceeds of bonds sold to the federal government "money deposited with this State by the government of the United States." (Ia74). However, stating it does not make it

so. The history of this provision makes plain that the exception does not apply in these circumstances. Without conceding the point, even if the borrowing authorized by the Act falls within the government funds exception to the Debt Limitation Clause, the authorized refunding of such bonds in a private sale without voter approval is unconstitutional. A refunding is an entirely new bond issuance with new terms including up to a 35-year maturity. Thus, proceeds of a private sale refunding do not satisfy the government funds exception in subparagraph e. Any such refunding is unconstitutional.

Similarly, the bonds issued pursuant to the Act are not debt incurred to "meet an emergency caused by a disaster or an act of God." N.J. CONST. ART. VIII, §2 ¶3. The federal government provided the State with more than \$5.3 billion to meet the COVID-19 emergency. The State spent only a fraction of that money and is unable to spend the remainder because the federal grants prohibit the use of such funds to fill shortfalls in government revenue or as revenue replacement. The plain language of the Act also belies any claim that the borrowing is to meet the emergency. It concedes that the sole purpose of the borrowing is "to address the State's financial problems that have arisen as a consequence of the COVID-19 Pandemic." (Ia74). This is not borrowing to meet an emergency; this is borrowing to meet unattained economic goals, to recreate lost revenue. The Constitution permits borrowing without voter

approval when the State needs the funds to meet an emergency, it does not authorize borrowing for the State's amorphous and speculative consequential damages that may or may not actually flow from the emergency. N.J. CONST. ART. 8, §2 ¶3

In short, the Act is an unconstitutional effort to satisfy the fiscal desires of the political branches in an election year. It is an assault on Lance and the epitome of bad fiscal policy. Worse, it pretends to be necessary to address an emergency that the federal government already provided more than sufficient funds to address. In fact, the only redeeming quality of the Act is that it provides this Court a unique opportunity to harmonize its decisions on the Appropriations Clause (N.J. CONST. ART. VIII, §2 ¶2) and the Debt Limitation Clause (N.J. CONST. ART. VIII, §2 ¶3) while again making clear that the Constitution does not permit debt financing of the general operating expenses of government.

#### PROCEDURAL HISTORY

On July 16, 2020, Plaintiffs initiated this litigation with the filing of a Verified Complaint and Order to Show Cause in the Law Division of the Superior Court of New Jersey, Mercer County. (Pa1). On July 17, 2020, Plaintiffs filed a First Amended Verified Complaint to reflect that the Act was signed into law. (Pa15). On July 17, 2020, the Supreme Court of New Jersey granted direct certification pursuant to R. 2:12-1. (Pa30)

Concurrent with the filing of this brief, Proposed Intervenors filed a Notice of Motion to Intervene (Ia114), a letter brief in support of the motion (Ia117), along with certifications from Jack M. Ciattarelli (Ia128), James K. Webber, Jr. (Ia124), and proposed order. Proposed Intervenors sought the consent of the State and Plaintiffs to intervene in this matter so they would enjoy all of the rights of a party including the right to file a reply brief and participate in oral argument. Plaintiffs graciously consented. The State refused to consent. (Ia117).

#### STATEMENT OF FACTS

The relevant facts in this matter are as follows. Pursuant to the Constitution's Appropriations Clause, at the outset of each fiscal year (which traditionally run from July 1 to June 30) New Jersey's Governors certify revenue they reasonably anticipate will be available to the State to spend on general operating expenses. The sources of revenue the Governors certify include taxes, fees, and proceeds from other miscellaneous sources.<sup>1</sup> Over the years, the revenue available to satisfy the general expenses of the budget usually increases from year to year; on occasion, it has decreased.

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<sup>1</sup> To Intervenors' knowledge, and aside from marginal or ministerial use of proceeds for administrative expenses, on only one occasion, in FY 2005, has the Governor certified proceeds from bond issuances as revenue to finance general operating expenses. Lance ruled that practice unconstitutional. 180 N.J. 596.



Following the conclusion of each fiscal year, the New Jersey Department of the Treasury's Office of Management and Budget conducts an audit of the State's finances to determine more precisely how much revenue the State actually had available to it in the prior fiscal year. That audit is the Comprehensive Annual Financial Report ("CAFR"). A summary of the amounts certified as available revenue by the Governors and the actual CAFR figures for those years since FY 2007 is below. (Ia2; Ia4; Ia5-18)

<b>Fiscal Year</b>	<b>Governor's Certified Revenues at Beginning of FY</b>	<b>CAFR Revenues at Conclusion of FY</b>
2007	\$32.0 Billion	\$31.2 Billion
2008	\$34.0 Billion	\$32.6 Billion
2009	\$33.4 Billion	\$28.9 Billion
2010	\$29.4 Billion	\$27.9 Billion
2011	\$28.6 Billion	\$28.7 Billion
2012	\$30.3 Billion	\$29.1 Billion
2013	\$32.3 Billion	\$30.9 Billion
2014	\$33.2 Billion	\$31.3 Billion
2015	\$32.9 Billion	\$33.1 Billion
2016	\$34.5 Billion	\$32.9 Billion
2017	\$35.1 Billion	\$34.1 Billion
2018	\$35.1 Billion	\$35.8 Billion
2019	\$37.3 Billion	\$38.6 Billion
2020	\$40.1 Billion	Not available

As of February 2020, Governor Murphy anticipated revenue of \$41.161 billion in FY 2021. (Ia25). Over the last several months, the State experienced a decline in expected revenue, however. The State's actual revenues did not reach the expected \$40.1 billion in the 12 months ending June 30, 2020, and the State revised expectations for revenue in FY 2021 downward. (Ia26-31). In May,

the State Treasurer revised the State's estimate for available revenue in FY 2020 to \$36.733 billion, which is still approximately \$900 million (or 2.5%) more than the last budget before Governor Murphy assumed office. Ibid. The Treasurer's May estimate is that \$33.954 billion will be available for FY 2021, representing a three-year drop in revenue of \$1.9 billion, or 5.3% less than the end of FY 2018.<sup>2</sup> Ibid. Despite the expected \$1.9 billion drop in revenue from FY 2018 to FY 2021, the Governor and the Treasurer both insist that the State faces a "\$10 billion deficit" in FY 2021. (Ia47); (Ia20).

The Treasurer's revenue estimates for the balance of FY 2020 and FY 2021 are fluid - by June 30, the State already had revised upward by \$462 million its estimate of revenues anticipated by September 30, 2020. (Ia52). The Treasurer now believes that the State will have a \$956 million surplus on September 30, 2020. Ibid. To underscore the unpredictability of the State's revenue forecast, on July 6, 2020, the Treasurer made a voluntary disclosure to the Securities and Exchange Commission that read in pertinent part:

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<sup>2</sup> In response to the disruption caused at least in part by the COVID-19 pandemic and the various policy responses to it, the Legislature and the Governor took the unprecedented step of making a one-time adjustment to the State's fiscal year, extending FY 2020 to September 30, 2020. P.L. 2020, c.19. For the sake of consistency and comparison, however, the Treasurer's revenue estimates stuck to the traditional 12-month fiscal year.

As stated in the Prior COVID-19 Disclosures, the State does not know the full impact that COVID-19 will have on its economy or financial condition, which will also depend significantly on future actions and developments many of which are outside of the control of the State. All projections of the State are based on limited data without historical precedence, and the State expects many changes to its projections as the full impact of COVID-19 becomes better known.

(Ia54-55)

Once the State analyzes the July 15 tax payments, it will have a better idea of expected revenues for the remainder of FY 2020 and FY 2021. The Treasurer must provide a revised revenue forecast to the Legislature by August 25, 2020.

It is important to note that the Governor's revenue estimates for FY 2020 and FY 2021 do not count the direct federal cash assistance the State already has received. That is significant, because to help states respond to the COVID-19 crisis, the federal government provided multiple channels of massive financial and logistical support to states. The CARES Act alone provided \$150 billion to state and local governments for unexpected COVID-19-related expenditures in 2020. P.L. 116-160. The United States Treasury explains that CARES Act moneys include reimbursement of expenditures

incurred to allow the State, territorial, local, or Tribal government to respond directly to the emergency, such as by addressing medical or public health needs, as well as expenditures incurred to respond to second-order effects of the emergency, such as by providing economic support to those suffering from employment or business interruptions due to COVID-19-related business closures. Funds may not be used to fill shortfalls in government

revenue to cover expenditures that would not otherwise qualify under the statute. Although a broad range of uses is allowed, revenue replacement is not a permissible use of Fund payments.  
(Ia55)

To date, New Jersey has received \$5.317 billion from the Coronavirus Relief Fund and related statutes, with at least an additional \$1.4 billion to NJ Transit.<sup>3</sup> (Ia59-60;Ia61) Consistent with the federal statutes, the funds are to be used for a panoply of specified purposes, some, like laboratory testing, the purchase of personal protective equipment, and Medicaid enhancements, have a close nexus to the COVID-19 pandemic, and others, like payments for school lunches, meals for seniors, and childcare, are slightly more attenuated. (Ia59-60). Placed in proper context and considering the ample federal support the State has received to address the COVID-19 crisis, the State's description of its fiscal condition seems unduly bleak.

On top of having myriad COVID-19-related expenses reimbursed or subsidized outright by the federal government, the Governor and the Legislature seek to borrow \$9.9 billion to use for general operating expenses going forward. (Ia64-86). There is no dispute that the proposed borrowing attempts to save the State from having to cut general expenses in FY 2021, and that the State will use

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<sup>3</sup> Those figures do not include direct assistance to local governments, institutions such as hospitals, universities, and businesses, or direct cash payments to individuals, which represent billions more in aid.

the monies for items wholly unrelated to the State's response to the pandemic. The borrowing has no specific purpose other than to make up for the money the Governor had hoped would come. "The fact of the matter is we are going to have serious cash flow issues," said the Governor on April 16, 2020. (Ia62-63). Speaker of the Assembly Craig Coughlin also expressed a similar intent with the borrowing bill: "to help us through the unique challenges and the significant revenue loss the coronavirus public health emergency has caused, I support the legislation to responsibly borrow funds to make up for our substantial revenue shortfall and stimulate our economy." (Ia87).

The vehicle for that borrowing is the first-of-its-kind New Jersey COVID-19 Emergency Bond Act, P.L. 2020, c. 60, signed into law on July 16, 2020. (Ia64-86). The legislative declarations portion of the Act recites a litany of Executive Orders issued by the Governor in response to the COVID-19 pandemic. (Ia65-72). In Section 4.a., the Act then purports to authorize the State to borrow \$2.7 billion by September 30, 2020, and \$7.2 billion between October 1, 2020, and June 30, 2021, "to address the State's financial problems that have arisen as a consequence of the COVID-19 Pandemic." (Ia74) The Act does not confine the State's sale of bonds to the federal government; the legislation permits the State to sell bonds to the federal government or at any private or public sale. (Ia74) Perhaps as importantly, the Act's Section 4.b.

authorizes the issuance of refunding bonds, with a maturity date not greater than 35 years from the bonds' issuance, pursuant to section 5 of the Act. (Ia75-76) So the Act seeks to authorize the issuance of not one set of bonds, but two.

Section 7. of the Act provides that the bonds issued will be direct obligations of the State, backed by its full faith and credit. (Ia77) Section 11.a. indicates that the State may sell the bonds at a private sale, with or without advertising, to the federal government or others. (Ia 78). Pursuant to Section 13, proceeds from the sale of bonds will be deposited into the "New Jersey COVID-19 State Emergency Fund" (the "Emergency Fund"). (Ia78-79). Section 14 of the Act gives the Treasurer the discretion to withdraw monies from the Emergency Fund and deposit them into the General Fund to support appropriations made by the Legislature in FY 2021. (Ia79-80). Section 14 states that "such amounts shall constitute State revenues." (Ia79). The Act then authorizes the Legislature to appropriate monies left over in the Emergency Fund.

To repay the principal and interest on the bonds, Section 22 of the Act pledges monies received from the taxes collected under the Sales and Use Tax Act, N.J.S.A. 54:32B-1 et seq. (Ia84). If those funds are insufficient, the Act requires the State to levy a tax on real or personal property within the State to pay the principal and interest due on the bonds. (Ia85). Nowhere in the

Act is there a requirement to submit the bond issuances to the voters of the State for their approval and even if there were, the Act is not limited to a "single object or work distinctly specified."

The scope and scale of the Act's proposed bond issuance is breathtaking. The borrowing would be the largest general obligation debt issuance ever offered by the State. One analysis estimates that the \$9.9 billion in borrowing would be the equivalent of what New Jersey traditionally borrows in an entire decade, increasing the State's indebtedness by 20% in one fell swoop. (Ia89-95). Beyond its size, the unrestrained nature of the proposed bonding is unlike any the State has ever seen. No other general obligation debt ever has had as its only stated purpose to supplement legitimate State revenues for deposit, wholesale and unencumbered, into the General Fund.

#### LEGAL ARGUMENT

##### I. The Act Violates the Appropriations Clause.

The Constitution requires that "the State's finances be conducted on the basis of a single fiscal year covered by a single balanced budget." See City of Camden v. Byrne, 82 N.J. 133, 151 (1980); N.J. CONST. ART. VIII, §2, ¶2. It specifically states that:

[n]o general appropriation law or other law appropriating money for any State purpose shall be enacted if the appropriation



contained therein, together with all prior appropriations made for the same fiscal period, shall exceed the total amount of revenue on hand and anticipated which will be available to meet such appropriations during such fiscal period, as certified by the Governor.

N.J. CONST. ART. VIII, §2, ¶2 (the "Appropriations Clause"). As such, it requires a "balanced budget," and not merely that the State be able to obtain enough monies to pay its appropriations. See City of Camden 82 N.J. at 151. It requires that the State's anticipated yearly appropriations equal its anticipated yearly "revenue."

The purpose of the Appropriations Clause is to "bar the State from adopting an annual budget in which expenditures exceed revenues." Lance v. McGreevy, 180 N.J. at 596. Lance recognized the "straightforward notion" that, "borrowed monies, which themselves are a form of expenditure when repaid, are not income (i.e. revenues) and cannot be used for the purpose of funding or balancing any portion of the budget pertaining to general costs without violating the Appropriations Clause." Id.<sup>4</sup>

In stark contrast to both that "straightforward notion" and the clear dictate in Lance, Section 14 of the Act grants the Treasurer the discretion to withdraw bond proceeds - which

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<sup>4</sup> The Court defined "general expenses" to "include the ordinary, operating, and day-to-day costs of government." Lance, supra, 180 N.J. at 596.



unquestionably constitute "borrowed monies" - deposited in the Emergency Fund and deposit them into the General Fund "to support appropriations made by the Legislature." (Ia79) (emphasis added). The Act even specifies, "such amounts shall constitute State revenues." (Ia79) (emphasis added). For these reasons, this Court must once again address a dispute "over how to treat bond proceeds that are intended to fund general expenses of the State." Lance, supra, 180 N.J. at 597. It must also remind the political branches that deficit financing of general expenses is not permitted by the Constitution.

Lance held that the Appropriations Clause precludes counting borrowed funds as "revenues" for the purposes of funding or balancing any portion of the budget pertaining to general expenses. The Act's attempt to allow certification of borrowed funds as revenues, that are then permitted to "support appropriations made by the Legislature" without any limitation preventing the funding of general expenses is a flagrant violation of this Court's dictate in Lance. As such, this Court must find the Act unconstitutional under the Appropriations Clause.

Although the Court's decision in Lance arose in the context of so-called contract debt, the holding in Lance applies with equal, if not greater, force to general obligation debt backed by the full faith and credit of the State because the State and its citizenry cannot avoid the payment obligation. The use of either

violates the straightforward notion that "borrowed monies, which themselves are a form of expenditure when repaid, are not income (i.e. revenues) and cannot be used for the purpose of funding or balancing any portion of the budget pertaining to general costs without violating the Appropriations Clause." Lance, supra, 180 N.J. at 598.

## II. The Act Violates the Debt Limitation Clause.

The Debt Limitation Clause requires voter approval of general obligation debt unless the debt satisfies the exceptions in subparagraph e. Unable and unwilling to face the voters, the State simply wrote into the Act that the borrowing satisfied the exceptions to the Debt Limitation Clause. With the wave of a pen, it declared that bonds issued to the federal government constitute money on deposit with the State by the federal government and bonds sold in a private sale are necessary to meet the emergency occasioned by the COVID-19 pandemic. It then authorized the use of those bond proceeds for general operating expenses. This transparent end run around the Constitution, the voters, and this Court's decision in Lance, cannot withstand scrutiny.

### A. The Act Does Not Satisfy The Exceptions Contained in Subparagraph e of the Debt Limitation Clause.

"The purpose to be achieved by the Debt Limitation Clause dovetails with the Framers intent for a fiscally responsible annual budgeting process." Burgos v. State, 222 N.J. 175, 183 (2015).

"[I]n drafting the Debt Limitation Clause, the Framers intended to empower the people of the State by giving them the final word in respect of creating financial commitments that might impair the State's fiscal health and have inter-generational repercussions." Id. at 198; Spadoro v. Whitman, 150 N.J. 2, 12-13 (1997) (Handler, J., concurring in part and dissenting in part) (explaining that Debt Limitation Clause serves the broad and fundamentally important purpose of not binding future majorities to the financial policies of current majorities). Only in very narrowly prescribed circumstances - none of which is present here - did the Framers allow the State to avoid voter approval for general obligation debt.

To ensure financial responsibility and protect unbridled borrowing that saddled future generations, the Framers adopted certain safeguards that form the foundation of the Debt Limitation Clause. Subparagraphs a. and b. each prohibit the Legislature from creating specified types of debt unless the voters of the state authorize it and it is "for some single object or work distinctly specified." N.J. CONST. ART. VIII, §2 ¶3. Subparagraph c. exempts certain types of debt refinancing from voter approval, but only where such refinancing "provide a debt service savings." Id. Subparagraph d. confines the use of funds raised "only to the specific object stated therein." Id. Finally, and most relevant

here, subparagraph e. provides certain limited exceptions. Id.  
Specifically, it provides:

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. Nor shall anything in this paragraph contained apply to the creation of any debts or liabilities for purposes of war, or to repel invasion, or to suppress insurrection or to meet an emergency caused by disaster or act of God.

Id.

The Act purports to allow "borrowing from the federal government *in accordance with Article VIII, Section II, paragraph 3, subparagraph e. of the Constitution of the State* to respond to the fiscal exigencies caused by the COVID-19 Pandemic and to maintain and preserve the fiscal integrity of the State." (Ia78) (emphasis added). Section 4a. purports, in part, to authorize the issuance of bonds to the federal government and declares that "*any such amounts received, as specifically authorized by this subsection, shall be considered monies deposited with the State by the government of the United States for purposes of Article VIII, Section II, paragraph 3, subparagraph e. of the Constitution of the State.*" (Ia74-76) (emphasis added). It further provides that any such borrowing shall be treated as a bond ...." Id.

Subparagraph e. of the Debt Limitation Clause states "[t]his 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." N.J. CONST. ART. VIII, §2 ¶3(e) (the "Government Funds Exception"). However, there is no support for the Act's assertion that either loans provided by the federal government or proceeds paid by the federal government in connection with the purchase of bonds issued pursuant to the Act fall within the ambit of this language. Although Intervenors were unable to locate any judicial opinions addressing the Government Funds Exception, the limitations of the Government Funds Exception can be discerned from a review of the discussion among the Framers that led to its inclusion.

The language at issue, while not contained in the original draft language proposed by the Committee on the Legislative Department on May 28, 1844, was added to the Constitution by an amendment proposed during the Constitutional Convention of 1844. (Ia100-105). "Proceedings of the New Jersey Constitutional Convention of 1844" recounts the debate leading to the inclusion of this language. (Ia107). The debate establishes that the added language addressed the narrow concern that the phrase "the credit of the State shall not be loaned" would prohibit the State from using its credit to help *provide funds to the federal government* to help support it if necessary in the case of war. (Ia112) "Mr. Parker said in case of war, it might be necessary to loan the credit of the State to the U. States, and a case may arise, which

shall threaten the dissolution of the Union, as of rebellion, and the United States could not then borrow money at all and the States should then be able and willing to loan their credit to her, if necessary." Ibid. While one Framers believed that the proposed exception for "purposes of war, or to repel invasion, or to suppress insurrection" addressed that situation, another noted that his concerns were not satisfied by such language because "[i]n case of war we cannot lend our bonds to the U. States to raise money upon, but we must raise the money ourselves." (Ia112). For that reason, he moved to add the "except for purposes of war, or to repel invasion or suppress insurrection" language to "the credit of the State shall not be loaned" phrase. Ibid. After debate, the Framers rejected this approach and offered the language at issue to specify that the proposed debt limitation language should not apply to "any monies that are or may be deposited with this State by the General Government." Ibid.

The context of the debate establishes that far from addressing loans from the federal government, which are tantamount to debt of the State rather than monies on deposit, the Government Funds Exception addressed the Framers' concerns that without it the proposed debt limitation language might prohibit New Jersey from supporting the federal government. Given this historical context,

the Act's attempt to rely on the Government Funds Exception to save it from its constitutional infirmity is unavailing.<sup>5</sup>

Subsection e. also excepts the "creation of any debts or liabilities for purposes of war, or to repel invasion, or to suppress insurrection or to meet an emergency caused by disaster or act of God" from the voter approval and "single object or work distinctly specified" requirements of the Debt Limitation Clause. Relevant here is only the exception for debt or liabilities "to meet an emergency caused by disaster or act of God." N.J. CONST. ART. VIII, §2 ¶3(e) (the "Emergency Exception"). As noted above, the Act purports to allow the issuance of bonds "to respond to the fiscal exigencies caused by the COVID-19 Pandemic and to maintain and preserve the fiscal integrity of the State." (Ia72) (emphasis added). The Act also states that the bonds are authorized to be issued to "address the State's financial problems that have arisen

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<sup>5</sup> Intervenor's further assert that the State must establish that any particular amounts at issue were deposited "by the government of the United States." To the extent amounts are deposited by member banks of the Federal Reserve, the State cannot satisfy its burden. See Katsiavelos v. Fed. Reserve Bank of Chicago, 859 F.Supp. 1183, 1185 (N.D.Ill.1994) ("The structure of the Federal Reserve System demonstrates that the Bank does not meet this definition. The Bank is a private, independent entity independently run by its own board of directors. It is not run by the Federal Reserve Board of Governors or any other part of the executive branch. Thus, the Bank "act[s] with sufficient independence under private ownership and control such that they do not qualify as government corporations or independent establishments."); Lewis v. United States, 680 F.2d 1239, 1241 (9thCir.1982) (explaining the structure of Federal Reserve Banks).



as a consequence of the COVID-19 Pandemic." (Ia74). The inclusion of this language appears to be an attempt to satisfy the Emergency Exception, but stating something does not necessarily make it so. As recounted above, amounts necessary to "meet the emergency" caused by COVID-19 were provided by the federal government in the form of reimbursement for expenses incurred to respond directly to the emergency. It also included expenditures incurred to respond to the second-order effects of the emergency, such as by providing economic support for those suffering from employment or business interruptions due to COVID-19-related business closures. To date, New Jersey has received \$5.317 billion from the Coronavirus Relief Fund and related statutes. Considering these facts, it is clear that the \$9.9 billion authorized under the Act cannot constitute amounts necessary to "meet the emergency" cause by COVID-19. The federal government already provided the funds necessary "to the meet the emergency."

Instead, it is clear that rather than raising funds to "meet the emergency," the Act represents an attempt to replace revenue that the Governor hoped would have been generated if the COVID-19 crisis had not occurred. While such an attempt may be understandable, that understanding does not make it constitutional. Similar to how the federal government excluded "shortfalls in government revenue" from reimbursement eligibility under the CARES Act, this Court should find that the Legislature's



attempt at revenue replacement under the Act falls outside the reach of the Emergency Exception contained in the Debt Limitation Clause.

**B. Refunding of Funds on Deposit From the Government Violates the Debt Limitation Clause.**

As set forth above, no portion of the Act satisfies the Government Funds Exception of the Debt Limitation Clause. However, even if funds raised by any portion of the Act could satisfy that exception, the Debt Limitation Clause still prohibits the refunding through a private sale of any monies deposited with the State by the government of the United States.

Section 4.b. of the Act authorizes refunding of any bonds authorized to be issued under the Act, including any bonds issued to the federal government. (Ia74-75). A private refunding, however, is an entirely new bond issuance with new terms including up to a 35-year maturity and this "new money" would replace the very funds on deposit from the United States. Therefore, even if funds raised from the federal government pursuant to the Act could otherwise qualify under the Government Funds Exception, any private refinancing of such funds pursuant to the Act would violate the Debt Limitation Clause.

**III. The Appropriations Clause and the Debt Limitation Clause Read Together Prohibit Debt Financing of General Expenses.**

This case represents the clearest opportunity yet for the Court to reconcile the Appropriations Clause with the Debt

Limitation Clause and put an end to the political branches' efforts to engage in deficit financing of general operating expenses. The only way to do that is to hold that the New Jersey State Constitution prohibits borrowing for operating expenses. Any other interpretation necessarily harms one of these two pillars of the New Jersey State Constitution.

As the Court acknowledged in Lance, the Appropriations Clause creates a balanced budget requirement that prohibits deficit financing of operating expenses. It is also clear that the Debt Limitation Clause allows the State to borrow in certain circumstances and to expend those funds. These seemingly inconsistent provisions work in harmony to allow the State flexibility to borrow for specific projects or works with voter approval or without voter approval in narrowly tailored circumstances while prohibiting borrowing for general operating expenses.

The Debt Limitation Clause is the lynchpin of this flexibility. It allows the State to borrow, with voter approval, and pay for single objects or work distinctly specified in the relevant legislation as long as the legislation also provides a means to pay for the principal and interest on that debt. It also allows for borrowing without voter approval to pay for very specific costs. However, the requirements of the Debt Limitation Clause prohibit borrowing for general operating expenses.

The balanced budget requirement in the Appropriations Clause further supports this analysis. The common understanding is that the "budget" refers to the operating expenditures of the State and the revenues necessary to satisfy those expenditures. The Governor's annual revenue certification, which only certifies revenues necessary to offsetting operating expenditures of the State, supports this conclusion, as does the Treasurer's annual audit in the Comprehensive Annual Financial Report ("CAFR"). Neither includes as "revenue" proceeds from general obligation bonds used to pay for the projects authorized by debt issued pursuant to the Debt Limitation Clause.<sup>6</sup> Such projects are simply not "budgeted" because their authorizing legislation specifies what the proceeds will be used for and how the bonds will be repaid. Because there is no need to "budget" for these expenditures, the Governor does not include the corresponding bond proceeds in his revenue certification and the Treasurer's office does not include them in the CAFR.

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<sup>6</sup> Through "interfund transfers," small amounts necessary for the administration of voter-approved debt do find their way into the budget. The transfers of these *de minimis* amounts are for administrative convenience and only for narrowly tailored purposes authorized by the enabling legislation. Their constitutionality remains unchallenged, but perhaps it should be. Irrespective, they pale in size and scope with the transfers authorized by the Act. Accordingly, the State cannot hide behind these factually distinguishable transfers.

The prohibition on borrowing to fund general operating expenses under the Appropriations Clause is necessary to prohibit deficit spending. To conclude otherwise would eviscerate the balanced budget requirement this Court has acknowledged repeatedly. Moreover, this analysis also gives full effect to the Debt Limitation Clause. There is simply only one way to harmonize these provisions while giving full effect to each.

#### **IV. The Act Is Bad Public Policy that Threatens the Public Fisc.**

The policy arguments offered by the State cannot cure or excuse the Act's unconstitutionality. The Act represents bad fiscal policy based on flawed premises that threaten to set troubling precedents about which this Court ought to care deeply.

As an initial matter, it is painfully obvious that the Governor and the Legislature have exaggerated the fiscal difficulties facing the State. The expected three-year decline in revenue from FY 2018 to FY 2021 of about 5.3% is notable, but hardly unprecedented. Indeed, during the last recession between FY 2008 and FY 2011, revenues declined by \$3.9 billion, or 11.9% over three years - proportionately more than twice the drop than the State anticipates today. Neither Governor Corzine nor Governor Christie sought recourse to borrowing to replace "lost" revenue when faced with their fiscal challenges. The Governors and Legislature did what this Governor and Legislature ought to do: they made legitimate, constitutionally permissible policy choices

to bring expenditures in line with revenues. In short, they did their jobs, and the State survived just fine.

The State's argument that there is \$10 billion in "lost" revenue is fallacious. The State has not "lost" anything - it never had the revenue it argues it "lost" in the first place. By way of analogy, if a law firm expects to make \$100,000 this year, but only makes \$80,000, it can hardly be said that it has "lost" \$20,000 - the firm simply did not make as much as it had hoped. To suggest that the State has "lost" \$10 billion in revenue is pure Trenton-speak, and makes no sense in the real world.

Governor Murphy enjoyed a steep increase in available revenue for his first budget (FY 2019) over the last year of the Christie Administration, and counted on even greater increases for FY 2020 and FY 2021. In all, Governor Murphy had planned a \$5.3 billion (or 15%) increase in his budget from the last Christie budget in FY 2018 to FY 2021. Instead, the Governor faces a 5.3% decrease, not counting the billions of dollars of federal aid flowing into the State to reimburse or relieve the State from COVID-19-related expenses. While that decrease might frustrate the Governor's aspirations for the size and scope of his budget - disappointment is natural when developments impose a downward adjustment in what one had hoped to be able to spend. The revenue decline also imposes genuine policy choices for the Governor and the Legislature, which will not necessarily be easy. Nevertheless, a

5% decline in revenue over a three-year span does not represent the epic crisis that the State depicts.

Another flawed premise of the Act is that it attributes the State's revenue drop entirely to the COVID-19 pandemic. As the Court is well aware, State revenues are affected by millions of decisions individuals make every day, from whether businesses start or close, to whether a wealthy taxpayer leaves the State, to whether someone decides to buy a car or municipal bonds. Broad macroeconomic factors also always play a role - from the effect of trade wars with China to the expected winners of Presidential elections. Of course, a state's policy decisions, like how much to shut down the State during a health crisis, and when and how quickly to reopen, also play a major role in the amount of revenue the State's taxpayers can generate. Intervenors do not dispute that the COVID-19 pandemic has been a significant cause of the State's revenue drop. However, no one can assess with any degree of certainty what the virus's role in that decrease has been in comparison with many other factors. Justifying billions in borrowing by assigning responsibility to a single economic factor is, for the Governor and Legislature, conveniently myopic.

In addition to the bad economics underlying the Act, the precedent the Act will set is deeply troubling. If the Court permits a Governor to borrow to "replace" actual revenue every time revenues do not meet expectations during a state of emergency,

the State's fisc will be in ruins. Intervenors point out as a point of reference that, as a technical matter, the state of emergency declared by Governor Christie in response to Superstorm Sandy arguably is still in effect; it was never rescinded and had no expiration date. How long the State will remain under the current state of emergency is unclear, but one easily can imagine the Governor extending it past FY 2021. Granting the State a pass on unconstitutional borrowing because we are under a state of emergency would encourage the extension of those states of emergency, if only de jure, and enable Governors to rely upon those extended declarations to borrow and spend beyond the State's means.

#### CONCLUSION

Proposed Intervenors Jack M. Ciattarelli and James K. Webber, Jr. respectfully submit that the Act is unconstitutional based on this Court's prior decision in Lance and further, that it violates the Debt Limitation Clause of the Constitution. Accordingly, Intervenors respectfully request that the Court grant Plaintiffs' proposed relief declaring the Act unconstitutional and enjoining the sale and/or refunding of any bonds authorized by the Act.

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Intervenors Jack Ciattarelli  
and the Honorable James K.  
Webber, Jr.

Dated: July 24, 2020

And

WEBBER MCGILL LLC

A handwritten signature in cursive script that reads "Jay Webber".

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James K. Webber, Jr.  
*Pro Se* and on behalf of Jack  
Ciattarelli.