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Honorable Chief Justice and Associate Justices
Supreme Court of New Jersey
25 Market Street
Trenton, New Jersey 08625

Re: Borough of Englewood Cliffs v. Thomas J. Trautner, et al. (089406)

Honorable Chief Justice and Associate Justices:

Pursuant to Rule 2:6-2(b), please accept this letter brief in lieu of a more formal submission in response to the briefs filed by amici, the American Civil Liberties Union of New Jersey ("ACLU") and the Office of the Attorney General ("OAG") in the above-captioned matter. As nearly all the arguments made by ACLU and OAG were addressed in the moving papers, the Borough will not respond to every point and reserves the right to respond further during oral argument.

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1. The ACLU Seeks to Shift the Burden of Creating an Exemption from Discretionary Liability from the Legislature to Public Entities

The ACLU, like the Appellate Division before it, treats sovereign immunity as an exception rather than the rule. And they fail to even try to reconcile that such immunity exists unless expressly waived by the Legislature (as the Borough has previously discussed). In fact, this Court has repeatedly acknowledged that public entities can be subjected to discretionary awards **only** when explicitly stated by the Legislature. See, e.g., Pritchett v. State, 248 N.J. 85 (2021); Cavuoti v. N.J. Transit Corp., 161 N.J. 107 (1999); Abbamont v. Piscataway Twp. Bd. of Educ., 138 N.J. 405 (1994). For this Court to now hold otherwise would render the Legislature's carve-outs under the Tort Claims Act, N.J.S.A. 59:9-5, the Environmental Rights Act, N.J.S.A. 2A:35-10, the Law Against Discrimination, N.J.S.A. 10:5-27.1,[1] and the Conscientious Employee Protection Act, N.J.S.A. 34:19-5, just to name a few, completely superfluous. In other words, the ACLU has it backwards: if liability may be found against a public entity, it must be made explicitly so by the Legislature.[2] As shown by Judge Fisher in P.M., they have not done so here.

1. We note the language of the attorney's fees provision of LAD awards fees to the "prevailing party" and, in some cases, the "respondent." The Borough submits that the lack of reference to a "person," which can be found only in the Frivolous Litigation Statute ("FLS"), supports holding a public entity liable under LAD.

2. And again, the Legislature's failure to change the FLS to exclude public entities in the wake of Div. of Youth & Fam. Servs. v. P.M., 301 N.J. Super. 80 (Ch. Div. 1997) should be read as an endorsement of that decision.

2. The Cases Relied Upon by ACLU are Inapplicable or Unhelpful

As the ACLU's primary basis for support, they cite three cases: Borough of Seaside Park v. Sadej, No. A-6596-06T3 (App. Div. July 17, 2009); Rivkin v. Dover Township Rent Leveling Board, 143 N.J. 352 (1996); and Gannett Satellite Information Network, LLC v. Township of Neptune, 254 N.J. 242 (2023). The ACLU acknowledges that Sadej "did not decide the issue," Sadej, slip op. at *15, that Rivkin was made "without deciding the issue," Rivkin, 143 at 379-80, and that the "issue was not before this Court" in Gannett and merely a footnote and therefore does not have "the same precedential deference." ACLU Br. at pg. 10, n. 5.

Moreover, Rivkin was decided **before** P.M. and therefore could only have assumed the analysis set forth in In the Matter of K.L.F., 275 N.J. Super. 507 (Ch. Div. 1993).[3] And the language quoted from Gannett is plainly dicta in a footnote where the Court appears to assume the FLS' applicability without analyzing it or discussing it in any meaningful way. This issue was simply not contested in Gannett, and thus not addressed by the Court. As ACLU politely phrases it, such a footnote

3. The ACLU identifies proposed language to Rule 1:4-8 that does not distinguish between a "party" and a "nonprevailing person," but rather refers to everyone as a "party." **At the same time, they inexplicably fail to acknowledge that this is exactly the point: Rule 1:4-8 does not distinguish between types of litigants**, and that is why the Borough is not contesting Rule 1:4-8's applicability. **The FLS, however, does distinguish between the two and pointedly uses different language.** The ACLU fails to reconcile with this distinction, when this Court is clearly obligated to reconcile with and harmonize the choice to use different words. See Central Const. Co. v. Horn, 179 N.J. Super. 95, 101-02 (App. Div. 1981) ("The Legislature is presumed not to employ meaningless language."). The ACLU therefore fails to convincingly explain away what the Legislature intended when it chose to use different language to describe the two types of litigants, and fully ignores the Legislature's lack of action post-P.M.

does not have "the same precedential deference," but the truth is that it has **no** precedential deference.

At the same time, the ACLU handwaves away cases like Toll Brothers, Inc. v. Township of West Windsor, 190 N.J. 61 (2007) and Robert J. Pacilli Homes, LLC v. Pilesgrove Township Planning Board, Nos. A-3271-06T2, A-4226-06T2, & A-3301-06T1 (App. Div. Feb. 13, 2009), in which immunity under the analysis set forth in P.M. is either explicitly or tacitly approved. Even without the P.M. case, which, again, is a published decision, the ACLU's assertions as to how the FLS has been commonly understood in litigation falls apart the moment someone looks under the hood.

In Section 1(D) of the ACLU's brief, they cite multiple cases to show that public entities may, in certain instances, be able to avail themselves of the FLS and recover fees from individual litigants.[4] But that is not disputed: the FLS plainly allows any "party," which includes public entities, to recover from any "nonprevailing person," which includes pro se litigants. This does not, in any way, address the questions at issue here. At the heart of the ACLU's argument is the aphorism of "what is good for the goose is good for the gander." While a touching sentiment, that is not how sovereign immunity works. Public entities are not part of the gander unless the Legislature expressly designates them as such.

This Court must read and construe the language chosen by its generally accepted meaning unless manifestly intended otherwise, or expressly indicated, by the

4. Vetter v. Township of Warren, No. A-00309-22 (App. Div. Dec. 3, 2024) is irrelevant. In that case, the Appellate Division not only based its decision on the published opinion in **this case** (rendering it useless for precedential purposes) but cited it for purposes of Rule 1:4-8, not the FLS. The Borough is not contesting the applicability of Rule 1:4-8, so the citation is meaningless.

Legislature. N.J.S.A. 1:1-1. If the language of the FLS was that any "party" could recover from any "nonprevailing party," then the ACLU may be correct. But as Abraham Lincoln once said, "calling a tail a leg doesn't make it one."

3. The OAG Seeks to Create a Distinction Between Types of Public Entities Not Found in the FLS or Case Law

While the Borough does not wish to step on the OAG's toes (admittedly because it fully supports the Borough's position), there is one argument on which we disagree. The OAG argues that, under sovereign immunity principles as well as N.J.S.A. 2A:15-60, even if FLS liability can be found against municipalities, the State should be excluded from such liability. But the Borough points out that in both K.L.F. and P.M., it was an agency from the state, and not a municipality, that was either subject or not to the FLS. Neither made a distinction between the two, characterizing the issue as being about public entities in the general sense. And more importantly, the FLS does not draw this distinction either: it does not provide any type of carve-out to distinguish one type of public entity from another.

4. Conclusion

For the foregoing reasons, the Borough respectfully requests that this Court overturn the Appellate Division's decision and hold that public entities are immune from liability under the Frivolous Litigation Statute.

Respectfully submitted,

/s/ Scott D. Salmon, Esq.
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