



State of New Jersey

DEPARTMENT OF THE PUBLIC ADVOCATE

240 WEST STATE ST.

P.O. Box 851

TRENTON, NJ 08625-0851

PHONE: (609) 826-5090 FAX: (609) 984-4747

JON S. CORZINE
Governor

RONALD K. CHEN
Public Advocate

September 13, 2007

Honorable Linda R. Feinberg, A.J.S.C.
Superior Court of New Jersey
Law Division, Mercer County
209 South Broad Street, 3rd Floor
P.O. Box 8068
Trenton, New Jersey 08650

Re: Gusciora v. McGreevey, No. MER-L-2691-04
Letter-brief in support of motion
for leave to appear as *amicus curiae*

Dear Judge Feinberg:

Please accept this letter-brief in lieu of a more formal brief, on behalf of proposed *amicus curiae* Public Advocate of New Jersey (the "Public Advocate"), in support of his motion for leave to appear as *amicus curiae*.

The Public Advocate is authorized by statute and applicable rules that govern the Courts of New Jersey to intervene in any administrative or court proceeding in order to represent the public interest. N.J.S.A. §§ 52:27EE-57, 52:27EE-58, 52:27EE-60. The public interest is defined as "an interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. § 52:27EE-12. The Department of the Public Advocate is an independent department of state government.

As the New Jersey courts have explained in contrasting the Public Advocate's authority with that of the Attorney General:

It would appear that the Attorney General must determine whether the State is interested in any situation. The Public Advocate, on the other hand, must determine whether the public interest demands legal representation in various matters. . . . The Legislature obviously thought that there may be times when the state interest and public interest are not synonymous and that both interests needed a legal spokesman. The office of the Public Advocate . . . does not duplicate that of the Attorney General, although their positions may coincide in certain instances, as here, to a degree.

Van Ness v. Borough of Deal, 139 N.J. Super. 83, 94 (Ch. Div. 1975), *rev'd on other grounds*, 145 N.J. Super. 368 (App. Div. 1976), *rev'd in part*, 78 N.J. 174 (1978).

The immediate issue in the Court's upcoming case management conference is what voting system the citizens of New Jersey will use in the February 2008 Presidential Primary and for some indefinite period thereafter. Resolving this issue, in turn, requires consideration of whether the voting systems the Attorney General is considering for certification have been thoroughly tested, whether they are reliable, secret and accurate, and whether they will ultimately withstand administrative and judicial review of the certification process. These issues directly concern the public interest of the citizens of New Jersey as a whole.

The Public Advocate seeks to appear in this matter at this time to urge the Court to ensure that any voting system put in place for use after January 1, 2008 – whether on an interim or more lasting basis – meet the state statutory standards requiring *inter alia* thorough testing, prevention of over-votes, reliability, secrecy, and accuracy. N.J.S.A. § 19:48-1. The Public Advocate has, and has repeatedly expressed to the Office of the Attorney General over many months, serious concerns about the testing standards and protocols the State has so far employed in the certification process. The inadequacies of these standards and protocols leave the voting systems presently under consideration vulnerable to challenge in an appropriate proceeding should the Attorney General ultimately decide to certify them. Because such a challenge could delay or even prevent the final adoption of these systems, New Jersey citizens could find themselves voting on an


“interim” or “stop-gap” system in more elections over a longer period than might be anticipated. It is therefore critical that any such interim system itself conform to all relevant statutory requirements.

The Public Advocate has done thorough legal and factual analysis related to voting systems including but not limited to:

- offering comments to the Office of the Attorney General on April 16, 2007, about the insufficiency of its proposed criteria for evaluating voting systems;
- testifying and submitting documentary evidence at hearings before the Voting Machine Examination Committee on July 24-26, 2007, to show that neither the criteria against which the systems were measured, nor the testing the New Jersey Institute of Technology performed to evaluate the systems' conformity with those criteria, were sufficient to establish that the systems met the statutory standards;
- submitting expert reports to the Voting Machine Examination Committee and the Attorney General regarding the insufficiency of the criteria and the testing;
- monitoring alternative voting systems, such as Precinct-Count Optical Scan Systems and other Direct Record Electronic voting systems, that have passed rigorous testing in other states.

Based on the foregoing the Public Advocate is well positioned to assist the Court in resolving the issue before it. We therefore respectfully request that Court grant the motion and entertain the merits brief we have filed contemporaneously. We believe that participation by the Public Advocate as *amicus curiae* will advance the public interest without unduly prejudicing any party.

Respectfully submitted,


By: ALEXANDER D. GLADNEY
Assistant Deputy Public Advocate

CATHERINE WEISS
Director of the Division of
Public Interest Advocacy

FLAVIO L. KOMUVES
Deputy Public Advocate

Counsel for proposed Amicus Curiae
Public Advocate of New Jersey

cc: Donna Kelly, Esq., Assistant Attorney General
Jason Orlando, Esq., Deputy Attorney General
Penny Venetis, Esq.
John McGahren, Esq.