



International Human Rights Clinic
 Rutgers, The State University of New Jersey
 Center for Law and Justice
 123 Washington Street
 Newark, NJ 07102-3026

Penny M. Venetis, Director
 Member of NJ and NY Bars

Tel: 973-353-5687, Main No.
 Fax: 973-353-1249

Judge Mary C. Jacobson
 New Criminal Courthouse
 400 S. Warren Street, 4th Floor
 Trenton, NJ 08650

May 11, 2020

Re: Gusciora et al. v. Corzine et al. (Docket No. MER-L-2691-04)

Dear Judge Jacobson,

Please accept this letter brief in support of Plaintiffs' order to show cause to enforce a court order issued in this case over ten years ago, banning Internet-based voting permanently in New Jersey, because votes cast on Internet-based systems can be hacked.

BACKGROUND

Based on statements made by Alicia D'Alessandro on May 4, 2020, quoted in the Wall Street Journal, and confirmed by the State of New Jersey via telephone on May 11, 2020, Democracy Live, an Internet-based voting system, is being rolled out for tomorrow's May 12th election for use by disabled voters. This violates an order issued by Judge Feinberg on March 8, 2010. It also violates Executive Order 105, issued by Governor Murphy, on March 9, 2020, which modified voting procedures during the COVID-19 pandemic.

Judge Feinberg's March 8, 2010 order unequivocally states that Internet voting is prohibited under any circumstances in New Jersey, stating that "FURTHER ORDERED that the State shall advise the County Clerks that computers utilized for election-related duties shall at no time be connected to the Internet. . . ." (Emphasis in original.)

Additionally, reference to Internet voting is completely absent from Governor Murphy's March 19, 2020 Executive Order 105. It explicitly makes clear which election-related documents can be transmitted online and only permits the delivery of candidate and delegate petitions electronically or



through an online-form created by the N.J. Secretary of State.¹ Indeed, the order specifies very clearly that all voting during the COVID-19 crisis will be done by mail:

9. All elections that take place on May 12, 2020, including those previously scheduled for that date and those rescheduled as a result of this Order, shall be conducted solely via vote-by-mail ballots, which will automatically be sent to all registered voters without the need for an application to receive a vote-by-mail ballot.²

Immediately after learning about the May 4 Wall Street Journal article, the Plaintiffs contacted the Attorney General's office asking for clarification. On May 7, 2020, the Plaintiffs heard back from the Attorney General's office. The Plaintiffs immediately sent a formal letter to the Attorney General's Office, the Governor's Office, the Secretary of State's Office, and to the Division of Elections, reminding the State that Internet-voting was not permitted in New Jersey pursuant to Judge Feinberg's order. The letter stated in pertinent part:

The order, issued in March of 2010, states unequivocally, on page 3, that no voting system in New Jersey can be connected to the Internet: "FURTHER ORDERED that the State shall advise the County Clerks that computers utilized for election-related duties shall at no time be connected to the Internet. . . ." (Emphasis in original.) This order is absolute and applies to all components of all voting machines. This order also applies to all circumstances, which would include the current pandemic.

The letter also urged the State to immediately abandon any efforts to implement Internet-voting. The letter, attached to the May 11, 2020 Venetis Certification as Exhibit 1, contained four exhibits, which offered scientific support about the insecurity of Internet voting. Those exhibits are:

- A. Judge Feinberg's March 8, 2010 Order;
- B. Judge Feinberg's February 1, 2010 Opinion;
- C. Letter from voting security experts to state governors and election officials; and

¹ N.J. Exec. Order No. 105 (March 19, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-105.pdf>

² *Id.*



D. Letter from U.S. House of Representatives Homeland Security Committee, dated April 22, 2020

On May 8, 2020, the U.S. Department of Homeland Security sent a letter to each state warning of the dangers of using any form of Internet-based voting, including for disabled voters. That document, like the other materials sent by the Plaintiffs to the state on May 7, 2020, is backed by numerous scientific studies. The Homeland Security Letter, in pertinent part states:

While web applications support stronger security mechanisms than e-mail, they are nonetheless exposed to cyber-attacks as other internet-connected systems. Software vulnerabilities in web applications could allow attackers to modify, read or delete sensitive information, or to gain access to other systems in the election infrastructure. Sites that receive public input, such as web forms or uploaded files, may be particularly vulnerable to such attacks. . . .

As the Venetis Certification states, on May 11, 2020, the Plaintiffs communicated with the State three times requesting a meeting. One of those communications was a formal letter containing the Homeland Security report. At 3:30 pm, Plaintiffs, their experts, and the State spoke by conference call. Plaintiffs and their experts discussed how Internet voting violated Judge Feinberg's order and put the votes of disabled voters at risk. As Professor Appel's May 11, 2020 Certification states, he specifically spoke to the State about the dangers of the Democracy Live system. He stated that:

8. The reason this is so dangerous is that hackers, anywhere in the world, may be able to exploit security vulnerabilities in the voter's computer or phone, or in the Democracy Live "portal" servers, *or* in the elections office computer, to alter votes. If the voters' computers are hacked, then the hacker can make it appear to the voters that their own selections are transmitted, while actually transmitting different votes. If the portal computer or the elections-office computer is hacked, then many more votes can be altered. The eventual votes "printed by the elections office" will be *after* they are susceptible to alteration by this hacking. And because the printed paper ballot is never seen by the voter, the voter has no opportunity to correct it.

Plaintiffs and their experts also informed the State of various secure voting systems for disabled voters, including systems in place in California, provided by the same vendor that the State of New Jersey is using. The State nonetheless refused to disable the Internet based voting system,



contemplated for use on May 12, 2020. Plaintiffs then informed the State that they would seek injunctive relief to enforce Judge Feinberg's 2010 order.

ARGUMENT

This Court has The Authority to Enforce Its Own Orders

On March 8, 2010, this Court issued a final order in this matter. The court's order unambiguously stated that it was "further ordered that the State shall advise the County Clerks that computers utilized for election-related duties shall at no time be connected to the Internet." Gusciora 2010 N.J. Super. Unpub. LEXIS 2319, *353 (emphasis in original). The court made it clear that the State of New Jersey cannot conduct any elections via the Internet. Plaintiffs are now seeking injunctive relief to enjoin the State of New Jersey authorities from implementing a vote by Internet-based program. This Court should order the State of New Jersey to comply with Judge Feinberg's 2010 order.

It is well-established that "The power of the court to enforce an order has neither been put in question . . . nor is it questionable." Bd. of Educ., Tp. of Middletown v. Middletown Tp. Educ. Ass'n, 352 N.J. Super. 501, 508 (Ch. Div. 2001). R. 1:10-3 of the New Jersey Court Rules allows litigants to "seek relief by application in the action" where an opposing party has failed to comply with an order. *See* Haynoski v. Haynoski, 264 N.J. Super. 408, 414 (App. Div. 1993). R. 1:10-3 is the "appropriate vehicle for a party who, armed with a judgment...alleges a violation of that judgment." Loigman v. Twp. Comm. of Tp. of Middleton in Cty. of Monmouth, 308 N.J. Super. 500, 504 (Super. Ct. App. Div. 1998).

New Jersey Courts have firmly established that "Courts have inherent power to enforce their own judgments and should see to it that they are enforced when called upon to do so." Welser v.



Welser, 54 N.J. Super. 555, 564 (Super. Ct. App. Div. 1959). Furthermore, the New Jersey Supreme Court has emphasized that judicial judgments should be respected and that “the first and most obvious consequence of a judgment is that it establishes an indisputable obligation and confers upon the successful party the right to issue execution or other process of the court for its enforcement.” W. Jersey Title & Guar. Co. v. Indus. Tr. Co., 27 N.J. 144, 150 (1958).

The State of New Jersey is not exempt from the obligation to comply with judicial orders. The New Jersey Supreme Court has stated that “like anyone else, the State is not free to walk away from judicial orders enforcing constitutional obligations.” Abbott v. Burke, 206 N.J. 332, 342 (2011). In Abbott, the State of New Jersey underfunded the School Funding Reform Act of 2008 (SFRA) in defiance of the court’s orders in Abbott ex rel. Abbott v. Burke, 199 N.J. 140 (2009) requiring the State to fully fund the SFRA. There, the New Jersey Supreme Court stated that political branches are not “free to ignore judicial orders.” Abbott at 363. The court required the state government to fund schools according to the SFRA. Id. at 343.

Internet Voting Denies Disabled Persons Equal Protection

Article 1, Paragraph 1 of the New Jersey Constitution protects against “the unequal treatment of those who should be treated alike.” N.J. Const., Art. I, Para. 1. In Greenberg v. Kimmelman, 99 N.J. 552, 568, (1985), the New Jersey Supreme Court adopted a two-tier “balancing test” under which courts consider: (1) the nature of the affected right; (2) the extent to which the governmental restriction intrudes upon it; and (3) the public need for the restriction. See, Greenberg, 99 N.J. at 567.

If the State is allowed to implement an Internet-based voting program, votes cast over the Internet by disabled persons can be altered. The State would not have a way to confirm the integrity of the votes cast over the Internet. As Professor Appel’s May 11, 2020 Certification makes clear, it is uncontested that votes cast over the Internet are highly insecure. Votes cast over the Internet are



vulnerable to hackers that may intercept and alter a voter's ballot. The potential for the right of disabled persons to vote is so compromised by the State's Internet-based voting program that there is a strong public need to prevent its implementation. The law is clear that there exist few rights of greater importance than the right to vote. It is "the keystone of a democratic society . . . Other rights, even the most basic, are illusory if the right to vote is undermined." Gangemi v. Rosengard, 44 N.J. 166, 170 (1965) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)). The balance of factors here weighs heavily in favor of preventing the implementation of an Internet-based voting program. Plaintiffs respectfully request that the Court prohibit the State from adopting this unauthorized Internet-based voting program and ensure that all votes cast by New Jersey citizens are given equal weight.

Plaintiffs Are Entitled to Emergency Injunctive Relief

Plaintiffs seek injunctive relief to enforce Judge Feinberg's order. When considering a grant of preliminary injunctive relief, a court must consider four factors:

(1) the likelihood that the applicant will prevail on the merits at final hearing; (2) the extent to which the plaintiffs are being irreparably harmed by the conduct complained of; (3) the extent to which the defendants will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest. S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 374 (3d Cir. 1992).

An analysis of these four factors weigh heavily in favor of granting injunctive relief and enjoining the State from implementing its contemplated Internet-based voting program.

First, there is a great likelihood that Plaintiffs will prevail at a final hearing because Judge Feinberg's order was clear and unambiguous in its prohibition of using the Internet for the purposes of voting. Second, voters in New Jersey will be irreparably harmed if the State is allowed to implement an Internet-based voting program. Scientific reports by the world's top computer security experts state unambiguously that Internet-based voting is insecure. The Department of Homeland Security and the U.S. House of Representatives share these views. The State cannot guarantee the integrity of votes cast



over the Internet. The Department of Homeland Security has warned states that using Internet voting is “high-risk” because hackers can easily alter ballots. The U.S. House of Representatives Homeland Security Committee recently sent a letter to the U.S. Department of Homeland Security and to the Election Assistance Commission, discussing the dangers of Internet voting, and its threat to our democracy. (The House letter dated April 22, 2020 is attached to the May 11, 2020 Venetis Certification as Exhibit D.) As that letter states:

This Committee has long subscribed to the need for offline voting methods (i.e. paper ballots, in-person voting) to promote greater election security, and are encouraged that the consensus of cybersecurity professionals is that voting and reporting should not be done by mobile app. . . . I am concerned the debate to use mobile technology to vote is not over, particularly in the wake of COVID-19. CISA and the EAC must clearly state the security flaws inherent in these technologies and make public clear recommendations to this effect.

The House Letter makes clear that Internet-based voting is highly insecure and should not be implemented in the United States.

Third, the State will not suffer a harm if the injunction is issued. Governor Philip D. Murphy has already issued Executive Order 105 allowing votes in New Jersey to exclusively vote by mail. N.J. Exec. Order No. 105 (Mar. 19, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-105.pdf>. Consistent with Executive Order 105 and Judge Feinberg’s order, the State can simply proceed to issue mail-in ballots to voters. Requiring the State to issue mail-in ballots is not a harm to the State because N.J.S.A. § 19:63-9 already provides that county clerks mail ballots to voters. There is, therefore, no harm to the State by requiring them to comply with Judge Feinberg’s order and Executive Order 105.

Lastly, there is a strong public interest in preserving the integrity of elections and ensuring public confidence in the election process. New Jersey courts have affirmed that “the maintenance of the integrity of the elective process is a primary concern.” In re Mallon, 232 N.J. Super. 249, 265 (Super. Ct. App. Div. 1989). See also, Barrett v. Monmouth Cty. Bd. of Elections, 307 N.J. Super. 403,



415 (Super. Ct. Law Div. 1997) (stating that the goals of the voting process should be “safeguarding the secrecy of the ballot, preventing fraud and maintaining the integrity of the election process”). The State of New Jersey should not be allowed to disregard these principles in favor of Internet voting where using mail-in ballots would accomplish these goals.

The State of New Jersey has an obligation to comply with the judgment entered in Gusciora. The State cannot and should not be permitted to willfully disregard an unambiguous order not to conduct elections using the Internet. The Court should issue an injunction enjoining the State from disregarding a valid judicial order.

CONCLUSION

For the reasons stated above, Plaintiffs request injunctive relief preventing the State from using any form of Internet voting, at any time, in violation of Judge Feinberg’s order.

Respectfully Submitted,

/s/ Penny M. Venetis

Penny M. Venetis