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PRELIMINARY STATEMENT

COVID-19 is a disaster quite unlike any that the State, or the country, has ever seen. Some of the impacts were to public health: precious lives lost too soon, hospitals reaching divert status, ventilators dwindling in number, and personal protective equipment in short supply. Still other impacts flowed even to the healthy: residents sheltered at home, non-essential retail stores closed, parents balanced work and child care responsibilities, and even construction projects came to a halt, all in an effort to limit person-to-person contact, slow the spread of this virus, and protect the most vulnerable among us. And the pandemic caused a calamitous fiscal emergency too. The slowdown of economic activity, part and parcel of the State's emergency response, resulted in a historic spike in unemployment and led to an unprecedented collapse in tax revenues, exactly at the same time as the need for public services among the population soared.

The question this case asks is whether the Constitution strips the State of its ability to emerge from this unprecedented emergency, or whether the State must allow that fiscal emergency to devastate public services at the very time its residents most need them and which would hinder the economic recovery itself. In times of plenty, of course, the Constitution places strict limits on the circumstances under which the State may incur debt, and the methods by which revenues and expenses must balance. For good

reason: the Framers understood that deficit spending would allow public officials to simply pass the buck in the financial arena, keeping revenues low and public expenses high, and saddling future generations with crushing debt.

But the Framers, fresh from the throes of the Great Depression, also understood the rule had to be different in the midst of an emergency. The Framers recalled the spectacle of unemployed New Jersey residents waiting for relief - a relief too slow in coming while the State waited for voter approval to incur debt. Resolved that the State should never be hamstrung like that again, the Framers gave the State ample tools to respond to fiscal emergencies like this one. So the Debt Limitation Clause includes careful provisions to ensure that the stringent debt rules that govern in ordinary times give way to the demands of flexibility and urgency during an emergency. In short, while Plaintiffs read the Constitution to push New Jersey off a fiscal cliff in the midst of an emergency, the Framers had a very different idea.

A number of features of the Constitution, bolstered by history and practice, thus establish both that the State may issue General Obligation bonds to meet the present fiscal emergency, and that it may spend the General Obligation bond proceeds to make up for revenue deficiencies:

First, the text and structure of the Debt limitation Clause permits the State to issue General Obligation bonds in times of emergency without voter approval or a single object.

Second, as far back as the Civil War, the State issued emergency General Obligation bonds to meet general expenses, and nothing changed with the advent of the 1947 Constitution. The Framers explicitly approved of the issuance of General Obligation bonds to make up for revenue deficiencies in an emergency.

Third, in the modern era, the State has in fact transferred the proceeds of General Obligation bonds to the General Fund as revenues to balance the budget.

Fourth, during the Great Depression and up to the present day, the State has appropriated General Obligation Bond proceeds as "debt limitation appropriations" in stand-alone chapter laws that are separate and apart from the annual Appropriations Act and therefore outside of the balanced budget requirement of the Appropriations Clause.

In other words, the Framers crafted the Constitution to permit the State to meet a fiscal emergency, not succumb to it. When the Appropriations Clause and the Debt Limitation Clause are properly read as a whole, and in light of the 1947 Constitutional Proceedings, there is only one permissible reading: during an emergency, the revenues on which the budget may rely necessarily include the proceeds of General Obligation bonds.

FACTS AND PROCEDURAL HISTORY¹

A. The COVID-19 Pandemic is a Disaster that Necessitated an Emergency Response.

Coronavirus disease 2019 ("COVID-19") is a contagious, and at times fatal, respiratory disease caused by the "severe acute respiratory syndrome coronavirus 2" virus, or "SARS-CoV-2." Its discovery at the end of 2019 in China, and its eventual spread to the United States, are well-documented.² Symptoms of the illness include fever, cough, and shortness of breath, which may appear in as few as two or as long as 14 days after exposure. See Centers for Disease Control and Prevention ("CDC"), Coronavirus Disease 2019 - Frequently Asked Questions (available at <https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last visited July 24, 2020) ("CDC FAQ")). COVID-19 can result in pneumonia, acute respiratory distress syndrome, septic shock, and multi-organ failure. See Executive Order 102 (Murphy Feb. 3, 2020) at 1.

COVID-19 is especially pernicious given the ease with which it spreads. The CDC has explained that "[t]he virus that

¹ The Facts and Procedural History are inextricably intertwined, and the State has combined them for the Court's convenience.

² See, e.g., Michelle L. Holshue, et al., "First Case of 2019 Novel Coronavirus in the United States," *N. Engl. J. Med.* 382:929-36 (Mar. 5, 2020); B. Natasha Khan, "New Virus Discovered by Chinese Scientists Investigating Pneumonia Outbreak," *Wall Street Journal* (Jan. 8, 2020); C. Berkeley Lovelace, Jr. & William Feuer, "CDC Confirms First Human-to-human Transmission of Coronavirus in US," *CNBC* (Jan. 30, 2020).

causes COVID-19 is thought to spread mainly from person to person, mainly through respiratory droplets produced when an infected person coughs or sneezes. These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs." CDC FAQ, supra. And it can spread even though the COVID-19 carrier may be asymptomatic or have only mild, cold-like symptoms, and thus be entirely unaware that they are infected. See CDC, Coronavirus Disease 2019 (COVID-19) - Protect Yourself, (available at <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited July 24, 2020)). In certain states - including in New Jersey - COVID-19 has spread "easily and sustainably in the community . . . in many affected geographic areas. Community spread means people have been infected with the virus in an area, including some who are not sure how or where they became infected." CDC FAQ, supra. There remains no vaccine or cure for COVID-19.

As state and federal officials have recognized, COVID-19 represents a public health emergency unprecedented in modern times. On January 31, 2020, the United States declared a public health emergency in light of COVID-19. See U.S. Dep't of Health and Human Services, Determination that a Public Health Emergency Exists (Jan. 31, 2020). On March 13, 2020 and on March 18, 2020, President Trump declared a national emergency pursuant to a variety of federal laws, including Sections 201 and 301 of the National

Emergencies Act, 50 U.S.C. § 1601-1651, and Sections 401 and 501 of the Stafford Act on March 13, 42 U.S.C. § 5121-5207. These declarations all remain in effect today.

As of the filing of this brief, worldwide 17,322,041 confirmed COVID-19 cases have been reported, and at least 673,833 lives have been lost. John Hopkins University, Coronavirus Resource Center, available at <https://coronavirus.jhu.edu/> (last visited Jul. 31, 2020). The United States remains at the center of the pandemic, with more confirmed cases (4,495,224) and deaths (152,075) than in any other nation. Ibid. Its impact in New Jersey was, from the onset, especially acute. On March 25, 2020, the Federal Government declared New Jersey a "major disaster area." Medical Resources EO. As of this filing, there have been 180,766 confirmed cases and 15,923 deaths in New Jersey alone. <https://www.nj.gov/health/>. In other words, this communicable disease has killed more New Jerseyans than were killed in World War I, the Korean War, the Vietnam War, both Gulf Wars, the war in Iraq, the war in Afghanistan, Superstorm Sandy, and 9/11 combined. See Transcript, 2020 Coronavirus Briefing Media, Governor Phil Murphy (April 29, 2020), <https://nj.gov/governor/news/news/562020/approved/20200429d.shtm>. Medical experts have estimated that, in the worst case scenario, millions of Americans would have died had states done nothing to

prevent the spread of COVID-19. Sheri Fink, "Worst-Case Estimates for U.S. Coronavirus Deaths," N. Y. Times (Mar. 13, 2020).

At the outset of the pandemic, the Governor invoked his powers under the Disaster Control Act, N.J.S.A. App. A:9-30 to -63, and the Emergency Health Powers Act, N.J.S.A. 26:13-1 to -31, and declared a State of Emergency and a Public Health Emergency. See Executive Order 103 (Murphy Mar. 9, 2020) ("EO103"). Both declarations remain in effect, meaning that the impact of COVID-19 is ongoing and we have yet to experience its full effect. See Executive Order 162 (Murphy July 2, 2020) ("EO162"). Indeed, the public health emergency has been renewed five times.

Of the more than five dozen Executive Orders ("EO") the Governor subsequently issued in response to the coronavirus, EO104 and EO107 are especially relevant. Among other things, the former mandated the closure of all public and private schools, casinos, racetracks, gyms, and entertainment centers. EO104 (Murphy Mar. 16, 2020). EO104 also ordered the closure of all restaurants and bars, except takeout and delivery. Ibid. Just a few days later, EO107 went even further, closing all non-essential businesses in the State, including retail businesses, personal care services, and recreational businesses. EO107 (Murphy Mar. 21, 2020). EO107 also required all New Jersey residents, with limited exceptions, to remain at their place of residence. Ibid. These various business closure orders, and the "Stay-At-Home Order," remained in

effect for months, and even now, certain establishments remain closed because they present an especially high risk of COVID-19 spread. These orders are consistent with the actions of the vast majority of other governors across the nation, based on the recommendations of public health experts that orders of this kind were essential in stemming the tide of COVID-19 and the human toll it was taking.

B. That Disaster Has Caused An Ongoing Fiscal Emergency.

The need for social distancing, and the related closures of businesses and schools, had an immediate and ongoing impact on the economy and, consequently, on the fiscal outlook for the State, as it has across the country. Indeed, during the second quarter, Gross Domestic Product ("GDP") fell by 32.9% on an annualized basis, a rate that "was unprecedented in its speed and breathtaking in its severity." Ben Casselman, "The U.S. Economy's Contraction in the Second Quarter was the Worst on Record," N.Y. Times (July 30, 2020). The dramatic fall in GDP was one of the steepest in modern American history, comparable to the collapse that occurred during the Great Depression and the demobilization after World War II. Ibid. And because economic activity came to a near halt, the public need for government services increased exponentially at the very same time that state tax revenues have "fallen off a cliff" and unemployment reached heights that dwarf those of the Great

Recession. Taken together, the rising need for services and falling tax revenues paint a bleak fiscal picture.

1. The Need for Public Services Has Exploded

As the Treasurer explained during her recent testimony before the Assembly: "As the global pandemic has unfolded, one thing it has made clear is that the need for essential government services increases exponentially in time of crisis." Testimony of Treasurer Elizabeth Muoio on A-4175 before the Assemb. Budget Committee (June 1, 2020) ("Muoio Assembly Testimony") at 1. Da046. "Demand for and reliance on public health professionals, law enforcement, first responders, financial assistance, and Medicaid, just to name a few, have all increased significantly." Ibid. The increased need for services - and the funds that support them - was felt across all aspects of society. Beginning one day after the Governor declared a state of emergency, the legislative budget committees convened a series of public hearings for the purpose of receiving testimony on the fiscal needs of the population. Certification of State Treasurer Elizabeth Maher Muoio ("Muoio Cert.") at ¶ 24. Da006. At those hearings, dozens of advocates "requested additional funding for a variety of unmet needs in various areas including education, health care, transportation infrastructure, child services, mental health, addiction services, and many others." Ibid.; see also Phil Oliff, Chris Mai, and Vincent Palacios, States Continue to Feel

Recession's Impact Center for Budget and Policy Priorities (June 27, 2012) at 1, 4 (noting that lost jobs during an economic downturn lead to millions more people receiving subsidized health insurance and seeking access to "other essential services that states provide"); Tracy Gordon, State and Local Budgets and the Great Recession, Brookings Institution (Dec. 31, 2012) at 2 (observing that "[a] hallmark of economic downturns is that, just as revenues decline, demands for many types of spending, particularly those involving public welfare, intensify"). "Meanwhile," as the need for government services increased, the State's "fiscal resources have followed the opposite trajectory." Muoio Assembly Testimony at 1. Da046.

2. Revenues Have "Fallen Off a Cliff"

As Governor Murphy succinctly declared in one of his daily COVID-19 briefings, "revenues have blown up" and have "fallen off a cliff." See Transcript, 2020 Coronavirus Briefing Media, Governor Phil Murphy (April 14, 2020), <https://www.nj.gov/governor/news/news/562020/20200414.shtml>. The Treasurer has reported "steep declines in nearly all of our major revenue sources due to COVID-19." Muoio Assembly Testimony at 1 (Da046); see also Muoio Cert. at ¶¶ 40-48 (detailing amounts and percentages of decline across every major tax). Da009-011. Matters were so dire that, according to early estimates, the State was "facing a \$2.7 billion shortfall through June 30" of this year

and "an additional \$7 billion shortfall through the end of Fiscal Year 2021 next June, for a combined shortfall of roughly \$10 billion." Muoio Assembly Testimony at 1. Da046. By June, the economy had improved slightly, with revenue projections estimating a \$2.3 billion shortfall for extended-FY20 and a \$6.9 billion for shortened-FY21. Muoio Cert. at ¶ 65. Da014. While New Jersey has been more successful than other States in beating back the coronavirus pandemic, a re-emergence of the virus in the Fall or Winter would drive down revenues by an additional \$1.065 billion. Id. at ¶ 116. Da024. Another wave of the pandemic in the Spring of 2021 would cause FY21 revenue collections to decline even more, with potential carry over into FY22. Id. at ¶ 69. Da014-015.

A comparison of these pandemic-caused revenue shortfalls to the revenues shortfalls experienced during the dotcom recession and the Great Recession underscores the severity of the present crisis. Muoio Cert. at ¶ 48. Da011. During the dotcom recession of 2001, the FY02 shortfall between the original GBM forecast and the Appropriations Act was approximately \$2.299 billion, or -10.1%. Ibid. In the two-year period of the Great Recession, the combined shortfall for FY08 and FY09 was approximately \$4.348 billion (-10.7% in FY08 and -3.0% in FY09). Here, in contrast, at the time the Treasurer's May Report was prepared, the revenue shortfall for FY21 was projected to be \$7.207 billion, or -17.5%.

Muoio Cert. at ¶ 65 (Da014); Muoio Assembly Testimony at 4 (Da040). Further, another wave of the pandemic in the Fall or Winter, or even the Spring of 2021, would cause FY21 revenue collections to decline even more, with potential carry over into FY22. Ibid.

Simply put, the COVID-19 pandemic, which pays no heed to artificial constructs such as fiscal years, has cratered revenues across multiple years and reporting periods.

3. Unemployment Rates Have Soared.

Because of the COVID-19 disaster, unemployment in New Jersey has risen to levels that exceed those of the Great Recession. See Certification of Lesley Hirsch ("Hirsch Cert.") at ¶ 9-10. Da641-43. During the six-week period beginning March 14, 2020 and ending April 25, 2020, nearly one million residents (i.e., 21% of the total number of residents employed in New Jersey) filed initial unemployment insurance claims. Id. at ¶ 9. Da641-42. This six-week total is almost twice the total number of claims filed in all of 2019 and is more than 50% greater than the average annual number of initial claims filed from 1971 to 2019. Id. at ¶ 9. Da642. In the weeks since April 25, the number of unemployed has continued to soar, with tens of thousands of additional claims being submitted each week. Id. at ¶ 13. Da642.

In addition to filing initial claims, claimants must certify each week their continued eligibility to collect unemployment benefits. Id. at ¶ 15. Da645. During the Great

Recession the number of certified weekly eligibility claims reached a high of 230,000. Id. at ¶ 16. Da645. In contrast, on May 9, 2020, the Department of Labor had a record number of 715,433 certified weekly eligibility claims, more than triple the number of certifications filed during the Great Recession. Id. at ¶ 17. Da645-46. After reaching this May high, continuing claims have decreased each week as workers return to their jobs. Ibid. Nevertheless, the number of continuing claims is still close to 500,000. Ibid. The State has requested an advance of up to \$1.7 billion from the federal government in order to keep the Unemployment Insurance Trust Fund solvent and continue to make benefit payments from August through October 2020. Id. at ¶ 21. Da647-48. 19.

Behind each unemployment statistic is a family struggling to survive. Unemployed New Jerseyans "have been pushed to the edge of hunger," causing mile-long lines at food banks throughout the State. Tracey Tully, Food Lines a Mile Long in America's Second-Wealthiest State, N.Y. Times, Apr. 30, 2020, <https://www.nytimes.com/2020/04/30/nyregion/coronavirus-nj-hunger.html>. Officials for the Community Food Bank, the State's largest provider of emergency food, reported that the increase in need is "unlike anything seen before." Ibid. The Community Food Bank distributed enough food in April to make 7 million meals, the most in its 45-year history. Ibid. Until the State fully reopens,

it will be impossible to predict how many businesses will actually survive the economic shutdown and begin to rehire employees. Hirsch Cert. at ¶ 24. Da648. Until then, the public's need will continue.

4. Businesses are Struggling to Survive.

With the New Jersey economy in a downward spiral because of COVID-19, small- and medium-sized businesses and non-profits ("SMEs") found themselves cash flow constrained, struggling to meet operating expenses, and facing collapse. See Certification of Timothy Sullivan ("Sullivan Cert.") at ¶ 11. Da630. Many SMEs were also in the difficult position of having no choice but to lay-off or fire employees. Id. at ¶ 12. Da630. To provide a lifeline, the New Jersey Economic Development Authority ("NJEDA") immediately launched six emergency initiatives, including a Grant Program and a Loan Program. Id. at ¶ 15. Da630. The overwhelming response of the SMEs to these programs highlights just how extraordinary the need for assistance is.

During Phase 1 of the Grant Program, NJEDA extended grants of up to \$5,000 to SMEs to cover short-term payroll and working capital expenses. Id. at ¶ 16. Da631. During the one-week application period, NJEDA received an unprecedented 34,403 applications. Id. at ¶ 17. Da631. To date, the NJEDA has approved nearly \$11 million in grants. Id. at ¶ 18. Da631. If the average award size were applied to all submitted applications, demand would

equal approximately \$112 million, an amount that far exceeds NJEDA resources. Id. at ¶ 18. Da632. With demand soaring and NJEDA's funds exhausted, the State appropriated an additional \$45 million in CARES stimulus money to the agency, enabling Phase 2 of the Grant Program. Id. at ¶ 22. Da632. Over a three-week period 37,162 applications were submitted. Id. at ¶ 24. Da633. As of July 24, 2020, EDA had approved 7,028 applications in the aggregate amount of \$22,722,000. Ibid.

Demand for assistance from NJEDA's Loan Program was equally intense. The Loan Program provides a ten-year direct loan of up to \$100,000 at zero percent interest for the first five years. Sullivan Cert. at ¶ 26. Da634. During the four-day application period, SMEs sought an aggregate total of \$250 million in financial assistance. Id. at ¶ 28. Da634.

In June, with mitigation efforts to contain the virus showing signs of success, Governor Murphy began implementing a multi-stage reopening plan for shuttered businesses. See E0153 (Murphy June 9, 2020). By July, however, the re-opening was paused as the virus's rate of reproduction (the number of people the average infected person would go on to infect) hovered around one, threatening community spread once again. Brent Johnson, Murphy hitting pause on reopening N.J. as coronavirus rate of transmission rises, N.J. Advance Media (Jul. 6, 2020), <https://www.nj.com/coronavirus/2020/07/murphy-hitting-pause-on->

reopening-as-coronavirus-rate-of-transmission-rises.html.

Moreover, current indications are that lifting social restrictions will not instantaneously restore the State economy to its pre-COVID-19 level. Residents who have been laid off will delay spending until they have repaid arrearages on rent, utility bills, and other debts. See Muoio Cert. at ¶ 37. Da008. Accordingly, although businesses will be able to re-open, there will be far less demand for their goods and services. Ibid. Similarly, many businesses will have to repay several months' worth of back-rent and invoices and may postpone or forego altogether rehiring employees. See id. at ¶ 37 (Da008); Hirsch Cert. at ¶ 24 (Da648).

C. The State Has Taken Extraordinary Measures to Meet the Fiscal Emergency that the Pandemic has Caused, But Even These Measures are not Enough.

"The COVID-19 pandemic hit New Jersey with a ferocious punch, leaving the state scrambling to contain the spread of the virus, save lives, and provide financial relief to the families and businesses who need it most." New Jersey Policy Perspective, Years of Disinvestment Hamper New Jersey's Pandemic Response, April 2020. Without adequate funding, the State will be "unable to weather the economic downturn" and "serve the needs of the public at a time when demand for services has reached an all-time high." Ibid. As the extent of the financial devastation that the COVID-19 pandemic caused began to come into focus, the State continued its attempts to respond, juggling limited options.

1. In the COVID-19 Fiscal Mitigation Act, the Legislature Took Two Drastic, but Necessary Steps.

In the COVID-19 Fiscal Mitigation Act, the unanimous Legislature took two steps to address the fiscal emergency. See L. 2020, c. 19. First, the Legislature changed New Jersey's tax-filing deadline from April 15, 2020 to July 15, 2020 to align with the federal extension. See id. at § 1; see also I.R.S. Notice 2020-18 (extending federal tax-filing deadline). The Legislature also extended fiscal year 2020 from June 30, 2020 through September 30, 2020 ("extended-FY20"). See L. 2020, c. 19, § 3. The extension of FY20 necessarily created a shortened, nine-month fiscal year for FY21, which will run from October 1, 2020 through June 30, 2021 ("shortened-FY21"). Ibid.

As Governor Murphy explained, extending the fiscal year was necessary in light of the tax-filing extension: "[N]ormally when folks file their income taxes on April 15 in New Jersey, we've got by the end of April a pretty darn good sense of what the income revenue side is going to look like for the balance of the year." See Transcript, 2020 Coronavirus Briefing Media, Governor Phil Murphy (Apr. 1, 2020), <https://www.nj.gov/governor/news/news/562020/approved/20200401c.shtml>. Then "you've got a couple of months, May and June essentially, to go through hearings and to negotiate for a responsible budget." Ibid. Extending the "State tax deadline from April 15 to July 15" to match the federal

extension was "a no-brainer." Ibid. However, "April 15 is in one fiscal year, July 15 is in another. So, we won't know in this case until the end of July where the numbers are coming out."³ Ibid. "[O]n top of that we've got an extraordinary crisis. So, the notion of extending the fiscal year to September 30th made sense at so many different levels." Ibid.

2. With Limited Options, the State has Juggled to Keep the Budget in Balance.

By the time the pandemic hit New Jersey in mid-March, three quarters of the way through the fiscal year, the State had already expended approximately \$30 billion of its \$40 billion FY20 budget. Muoio Cert. at ¶ 77. Da016. The State therefore had to take drastic steps "to remain solvent." See Prepared Remarks of Treasurer Elizabeth Muoio to the Senate Budget Committee ("Muoio Prepared Senate Remarks") (June 1, 2020) at 6. Da032. Among other actions, the Department of the Treasury ("Treasury")

- Placed approximately \$1 billion of available appropriations into reserve;
- Transferred the entire \$421 million in the Surplus Revenue Fund ("SRF") to the General Fund and, due to the unanticipated revenue declines through June 30, 2020, eliminated the planned additional deposit to the SRF on June 30, 2020;
- Implemented a Statewide hiring freeze with the exception of COVID-19 related needs;

³ As of the time this brief was submitted, the Department of Treasury was continuing the process of tabulating the July collection data. See Muoio Cert. at ¶ 58. Da171.

- Limited the hiring of hourly and temporary employees;
- Coordinated with vendors to obtain better procurement terms and conditions for new contracts and extensions;
- Conducted ongoing review and approval of departmental spending and contracting;
- Cancelled and reserved pre-encumbrances, which will result in deferral and elimination of planned departmental spending.

Muoio Cert. at ¶ 79. Da016-017.

In compliance with the mandate of the COVID-19 Fiscal Mitigation Act, see L. 2020, c. 19, § 5, the Treasurer submitted to the Legislature a Report on the Financial Condition of the State Budget for Fiscal Years 2020 and 2021 (May 22, 2020) ("Financial Condition Report"). See Muoio Cert at ¶ 3. Da001. In this report, the Treasurer proposed a spending plan for the ninety-day extended Fiscal Year ending September 30, 2020, that included \$5 billion in proposed cuts and deferrals of payments "across all branches of government." Financial Condition Report at ¶ 14-28. Da004-006 ("Detailed Spending Plan for FY2020").

The Legislature subsequently adopted, and the Governor signed into law, a Supplemental Appropriations Act for extended-FY20. See L. 2020, c. 43. This Supplemental Appropriations Act de-appropriated \$1.19 billion dollars; cut spending across the board by 5% for non-salary operating funds and by 10% for discretionary grant programs; and deferred into shortened-FY21

numerous discretionary payments totaling \$2.188 billion. Muoio Cert. at ¶¶ 84-85. Da018. As a result of these actions, the State had an undesignated ending fund balance of \$704 million on June 30, 2020 and an anticipated undesignated ending fund balance of \$957 million on September 30, 2020. Id. at ¶ 94. Da019. These ending fund balances, however, are "hardly adequate to cover the State's financial needs." Id. at ¶ 95. Da019. The \$957 million ending fund balance for extended-FY20 only exists because billions of dollars of payments were deferred until shortened-FY21. In normal times, we would be considering the entire twelve months of FY21 and not breaking the year into two separate periods. Moreover, these fund balances could "disappear in a flash," especially because the fiscal situation is "so volatile." Ibid. For example, the State continues to process tax payments received on July 15, 2020. Further, the situation regarding federal relief funds is fluid. Id. at ¶ 102. Da020. Questions exist concerning how federal relief funds that the State has already received may be spent. Id. at ¶ 99-102. Da020. These questions arise directly from the text of the CARES act itself as well as guidance that the United States Department of the Treasury is continually updating. Amounts paid from the Coronavirus Relief Fund are subject to the restrictions outlined in section 601 of the Social Security Act (42 U.S.C. 301 et seq.), as amended by section 5001 of the CARES Act. Section 601(d) outlines the authorized use of proceeds.

Section 601(f)(1) provides that the "Inspector General of the Department of the Treasury shall conduct monitoring and oversight of the receipt, disbursement, and use of funds made available under this section." And, it is uncertain whether a new federal stimulus package is forthcoming and, even it is, what its timing or terms will be. Muoio Cert. at ¶ 102. Da020. Finally, as public health experts have warned us, we still do not know the extent to which COVID-19 will spike again during FY21.

3. The "Wheels Come Off" the Budget on October 1 and Ordinary Budget-Tightening Will not be Enough.

These measures that the State has taken are wide-ranging, drastic, and unprecedented. Nonetheless, they are insufficient to stave off economic calamity. The Supplemental Appropriations Act that allowed the State to balance the budget through extended-FY20 was premised on the deferral of several payments that, while discretionary, would have devastating repercussions on the State economy and on municipalities if they are not made. These deferred payments include a \$950 million pension payment; \$467 million in school aid; \$355 million for Consolidated Municipal Property Tax Relief ("CMPTR") and Energy Tax Receipts ("ETR"); and \$250 million in Extraordinary Special Education aid. Id. at ¶ 115. Da024.

Simply stated, with a projected revenue deficit of approximately \$7 billion for shortened-FY21, the State will not

have enough money to cover these deferred expenditures; meet its constitutionally-mandated spending obligations, such as debt service payments; support essential services; and keep the government operating. Id. at ¶ 112. Da024. As the Treasurer pithily put it, “the wheels come off the bus October 1.” Muoio Assembly Testimony at 28. Da336. There is a “massive hole for Fiscal Year 2021,” and without borrowing, the State would have to make “drastic” and brutal cuts to the budget. Id. at 46. Da354. This would entail “a massive shutdown in what most people have come to depend on the State for,” at the very “time when most people are turning to their local and state governments to try and help them meet the challenges they’re facing.” Id. at 46-47. Da354-355.

The Treasurer’s Certification explains in detail why traditional belt-tightening simply will not be sufficient. See Muoio Cert. at ¶¶ 28-32. Da006-007 “Following deep and painful budgetary cuts necessitated by the Great Recession, the annual appropriations act has not contained a high percentage of spending that might readily be reduced or altogether eliminated without triggering immediate and potentially far-reaching impacts on New Jersey residents.” Id. at ¶ 28. Da006.

An analysis of the FY20 Appropriations Act reveals why. “[L]ess than 10% of budgeted funds for FY20 supported Executive Branch operations, which include human services, mental health

institutions, children and families, veterans' homes, adult prisons, juvenile facilities, State police, and law enforcement." Id. at ¶ 30. Da006. By contrast, "over 70% of budgeted funds were appropriated for distribution to non-State entities." Ibid. These funds include "municipal aid," "education aid," and "support for county colleges," as well as "Grants-in-aid" such as "property tax relief programs, NJ FamilyCare, pharmaceutical assistance, nursing homes, and support for higher education." Ibid. If the State were to slash this aid, it would not be solving the fiscal problem, but rather foisting it upon the hundreds of municipalities, non-profits, and residents that are already struggling to survive. These entities would have to decide what programs or personnel would bear the brunt of necessarily draconian cuts.

Further, "some departments, including Children and Families and Human Services, are subject to court monitors, consent decrees, and pending litigation involving constitutional issues that effectively limit or preclude the possibility of major cuts implicating areas such as foster care and child welfare." Id. at ¶ 31. Da007.

"So the type of cuts that would be necessary to balance the entire projected shortfall through FY 2021 would be devastating at both the state and local level." Muoio Prepared Senate Remarks at p. 7. Da007.

Responding to an economic crisis by slashing social programs upon which so many residents rely will also only drag down economic recovery in the long term. See "State Budget Basics During an Economic Downturn," Nat'l Ass'n of State Budget Officers (May 6, 2020). Time and again, governments that have embarked on a course of cutting services in response to economic calamity have seen poverty and unemployment rise, consumer spending and business investment fall, and long-term recovery limp along.⁴ State and local governments must rise to the challenge of containing the economic carnage wrought by the pandemic, or risk falling prey to this vicious - and eminently predictable - cycle.⁵ It is true, of course, that future generations of New Jerseyans will have to carry the burden of repaying any debt the State incurs to meet this unprecedented emergency. This is not a burden the State imposes lightly. But the alternative is to visit upon future generations a far more grievous legacy - namely, the indelible imprint of a

⁴ See Giovanni Dosi, Mauro Napoletano, Andrea Roventini, and Tania Treibich, The Short- and Long-Run Damages of Fiscal Austerity: Keynes beyond Schumpeter 4, Institute of Economics, Laboratory of Economics and Management, Working Paper Series (Nov. 2014); Phil Oliff, Chris Mai, and Vincent Palacios, States Continue to Feel Recession's Impact, Center for Budget and Policy Priorities (June 27, 2012).

⁵ See Dosi, et al., supra note 3, at 17; Tracy Gordon, State and Local Budgets and the Great Recession, Brookings Institution (Dec. 31, 2012").

generation or more lost to poverty and unemployment, and the loss of productive potential never to be recovered.⁶

In short, GO Bonds are a necessary tool in the State's "toolbox" if the State is to avoid fiscal calamity. Muoio Cert. at ¶ 112. Da024.

D. The Federal Municipal Liquidity Facility.

Shortly after the pandemic began, the Federal Reserve and United States Department of Treasury established a Municipal Liquidity Facility ("MLF" or "Federal Reserve facility") under Section 13(3) of the Federal Reserve Act. See 12 U.S.C. § 343. The MLF enables the federal government to lend money to state and local governments to help them "'manage the cash flow impact of income tax deferrals resulting from an extension of an income tax filing deadline'" and cope with "'increases in expenses related to or resulting from the COVID-19 pandemic.'" Certification of Michael Kanef, Director of the Office of Public Finance ("Kanef Cert.") at ¶ 51. Da169. The MLF "is a novel and aggressive response by the Federal government to stabilize the economy" and marks "the first time that the Federal Reserve has involved itself in state and local finance by directly purchasing bonds." Id. at ¶ 53. Da170. Several features of the MLF are relevant to this case.

⁶ See Dosi, et al., supra note 3 at 4.

First, through the MLF, the federal government has the authority to lend up to \$500 billion to the States and local governments. Kanef Cert. at ¶ 54. Da170. The States do not need to compete against each other for a share of this money.⁷ See Muoio Assembly Testimony at 8 (Da316); Kanef Cert. at ¶ 55 (Da170). Rather, the federal government has allocated specific amounts to each State, with New Jersey eligible to receive approximately \$9.2 billion for its own needs, exclusive of the needs of counties and municipalities within the State. Kanef Cert. at ¶ 56. Da171.

Second, the MLF Term Sheet mandates that the State must pledge as a source of repayment and security for the loans the “strongest security typically pledged to repay publicly offered obligations” of the State. Id. at ¶ 57. Da171. Given that New Jersey’s strongest security is its general obligation credit, the State must issue General Obligation (“GO”) Bonds to support any borrowings from the MLF. Ibid. Stated differently, unless it issues GO bonds as security, the State will be unable to access the MLF and unable to take advantage of the federal loan program. Ibid. Da171.

⁷ Illinois has already applied for and is authorized to receive \$5 billion. See <https://www.reuters.com/article/us-usa-illinois-fed/illinois-to-sell-debt-in-first-deal-with-feds-muni-liquidity-facility-idUSKBN239328>.

Third, as presently constituted, the MLF will close on December 31, 2020, which means that the federal government will not permit the State to borrow money under the MLF after this date. Id. at ¶ 68. Da174.

Fourth, due to the involvement of the federal government, this case is different from the State House Renovation case where the State sold its GO bonds within minutes of receiving authorization to issue them. Cf. Wisniewski v. Christie, MER-L-1002-17 (Law Div. June 14, 2017). As the Director of the Office of Public Finance explained during recent testimony before the Assembly: "In order to apply to the Federal Reserve facility, you have to state affirmatively that you have authorization to issue bonds to the Federal Reserve. So that's a prerequisite for us to move forward." Testimony of Michael Kanef on A-4175 before the Assemb. Budget Committee (June 1, 2020) ("Kanef Assembly Testimony") at 15. Da323. Once the State has decided to move forward, "it would still take the State several weeks to be prepared to" access "the Federal Reserve facility." Id. at 14. Da322. Finally, "the Federal Reserve" will need a "couple of weeks" to process the application and provide "access" to the cash. Ibid. Da322.

Fifth, the MLF Term sheet currently provides that any monies the State borrows through the MLF must be repaid within three years. Kanef Cert. at ¶ 74. Da176.

E. The Emergency General Obligation Bond Act.

Pursuant to the constitutionally-mandated legislative process, the Legislature introduced, heard testimony on, debated, amended, and passed the Emergency General Obligation Bond Act ("Emergency GO Bond Act" or "Act"). See L. 2020, c. 60. Da506-528. The Governor signed it into law immediately. Plaintiffs - who voted against the Act - complain that it is premature, excessive, and unconstitutional. Unable to convince their fellow legislators concerning these matters and unwilling to accept that they were on the losing side of the legislative process, Plaintiffs rushed to Court. Several features of General Obligation Bonds in general and of the Emergency GO Bond Act in particular are relevant to Plaintiffs' claims.

First, the State has a long history of issuing General Obligation Bonds, and in the past has issued them to pay "the expenses of the Civil War," provide emergency "unemployment relief during the Great Depression," and promote "economic development." Kanef Cert. at ¶ 8 (Da160); see also p. 34, infra (discussing Civil War GO Bonds) and pp. 34-35 (discussing Depression-era GO Bonds). Here, similarly, under the Emergency GO Bond Act, "Bonds of the State of New Jersey are authorized to be issued to address the State's financial problems that have arisen as a consequence of the COVID-19 Pandemic." Emergency GO Bond Act at §4(a). Da516.

Second, the Act permits the State to issue Emergency GO Bonds in order to borrow up to \$9.9 billion from the federal government under the MLF and/or from the public or private markets. See Act at § 4(a) (Da516); see also Kanef Cert. at ¶ 24 (Da164). Specifically, the bonds "are authorized to be issued in the aggregate principal amount of \$2,700,000,000 for the period that began July 1, 2019 and ends September 30, 2020" and "in the aggregate principal amount of \$7,200,000,000 for the period that begins October 1, 2020 and ends June 30, 2021, for a total combined aggregate principal amount of \$9,900,000,000 issued over the two State fiscal periods." Emergency GO Bond Act at §4(a). Da516. All bond proceeds must be deposited into and "held by the State Treasurer in a separate fund, which fund shall be known as the 'New Jersey COVID-19 State Emergency Fund'" ("Emergency Fund"). Id. at § 13. Da520-521.

Third, although the Act authorizes the issuance of up to \$9.9 billion in GO Bonds, the Legislature inserted a number of circuit breakers in the Act requiring a specific sequence of events before any level of borrowing can actually occur. Specifically, if the Governor, the Treasurer, and the Director of the Division of Budget and Accounting determine that it is necessary to issue bonds, they must - prior to issuing or selling the bonds - transmit to the "Select Commission on Emergency COVID-19 Borrowing" ("Select Commission") a "report that a decision has been made and describing

the bonds proposed to be issued.” Id. at § 6. Da518-519. The Select Commission, “comprised of two members of the Senate selected by the Senate President and two members of the General Assembly selected by the Speaker of the General Assembly,” must review the bond proposal. Ibid. Da518-519. “No bonds shall be issued” unless the Select Commission approves the report. Ibid. Da518-519. “Failure of the Commission to meet or act within six days of submission of the report or to approve the report by an affirmative vote of three or more members of the Commission shall constitute disapproval.” Ibid. Da518-519. By requiring the Select Commission’s affirmative approval, the Legislature has ensured that the Governor does not simply have unfettered authority to borrow in support of fiscal policy decisions the Legislature may not share. The constitutional system of checks and balances that governs all fiscal matters in the State remains in place.

Fourth, the Act provides two mechanisms through which the GO Bond proceeds may be spent. Under the first mechanism, “[a]mounts on deposit” in the Emergency Fund “shall be withdrawn by the State Treasurer for deposit into the General Fund or the Property Tax Relief Fund as needed to support appropriations made by the Legislature in the Fiscal Year 2021 Appropriations Act, and such amounts shall constitute State revenues.” Id. at § 14. Da521. It is this mechanism to which Plaintiffs raise objections - which the State rebuts below.

The Act, however, contains a second disbursement mechanism to which Plaintiffs apparently do not - and could not - object given its historical usage. Specifically, the Legislature has, for at least a half century, appropriated GO Bond proceeds using a mechanism known colloquially as a "Debt Limitation Appropriation." See Muoio Cert. at ¶¶ 103-104 (explaining Debt Limitation Appropriations) (Da021). In Debt Limitation Appropriations, the Legislature uses a stand-alone chapter law - which is separate from and outside of the annual Appropriations Act and any supplements thereto - to appropriate GO Bond proceeds out of the fund into which they were deposited upon issuance. See Muoio Cert. at ¶¶ 105-107 (giving historical examples) (Da021-022). Here, as the Director of the Office of Public Finance explains, the Emergency GO Bond Act provides a mechanism for Debt Limitation Appropriations. See Kanef Cert. at ¶ 43 (Da167-168); see also Emergency GO Bond Act at § 14 (providing that "balance of amounts on deposit" in Emergency Fund "shall be subject to appropriation by the Legislature") (Da167-168).

Fifth, the Act permits the State to refinance the Emergency GO Bonds "without regard to the 'Refunding Bond Act of 1985.'" Emergency GO Bond Act at §4(b). Da517-518. It was necessary for the Legislature to "notwithstanding" the prior act because the Refunding Bond Act has a debt service savings requirement, see N.J.S.A. 49:2B-5b(3), and Bonds the State sells

to the MLF mature in three years, see Kanef Cert. at ¶ 74. Da176. Given the volatility of the markets in these unprecedented times, the State has no way of knowing for certain whether in three years it will be able to refinance with a debt service savings. Kanef Cert. at ¶ 75. Da176. Therefore, in order to avoid an untenable situation wherein the State would have to make a lump sum payment to the federal government of up to \$9.9 billion in three years, the Legislature exempted these Bonds from any debt service savings requirement. Kanef Cert. at ¶ 76. Da176.

Sixth, the Emergency GO Bond Act - as enacted - deleted two types of borrowing that the initial GO Bond *Bill* would have permitted. Compare L. 2020, c. 60, § 4 with A-4175 as Introduced (May 28, 2020) at §4 ("A-4175"). Specifically, the Act removed a provision that would have allowed the State to borrow from the MLF on behalf of counties and municipalities. Compare Act with A-4175 at §4(c). Further, and relevant to this case, the Act deleted a provision that would have allowed the State to issue bonds "in the form of short term notes to provide effective cash flow management for revenues and expenditures" in extended-FY20 and shortened-FY21. Compare Act with A-4175 at §4(d). Unaware that the Legislature deleted the authorization to issue short term notes, Plaintiffs are still challenging this now non-existent provision. See Amended Compl. at ¶ 19 (challenging § 4(d) of original bill, which was subsequently deleted).

In short, the "COVID-19 Pandemic has had a severe impact on the State's economy" and "continues to significantly and materially adversely affect the State's financial resources for Fiscal Year 2020 and Fiscal Year 2021." Emergency GO Bond Act at § 2(hh). To meet this emergency, "the State will need to have all of its budgetary tools in its toolbox, including decreasing spending, increasing revenues and borrowing to address the remaining need." Kanef Cert at ¶ 21 (Da163); see also Muoio Cert. at ¶ 119 (Da025). Luckily, as explained extensively below, the Framers of the 1947 Constitution learned the lessons of the Great Depression and drafted a document that provides the State the means to meet a fiscal emergency of unprecedented proportions, instead of being fatally overwhelmed by it.

F. An Understanding of the State's Experience with GO Bonds in the Civil War and the Great Depression as well as an Analysis of the 1947 Constitutional Proceedings are Critical for Understanding the Issues this Case Raises.

While the pandemic marks the first time most residents have experienced an emergency of this breadth and scale, the State has weathered two prior emergencies of similar dimension: the Civil War and the Great Depression. In each of these instances, the State met the emergency by issuing General Obligation Bonds and expending the proceeds thereof. And those crises had an impact on the language of the relevant constitutional provisions.

First, the Debt Limitation Clause has been in the State Constitution since 1844, and its original form and early usage are instructive. In 1844, the Debt Limitation Clause provided in pertinent part:

The legislature shall not, in any manner, create any debt or debts, liability or liabilities, of the State, which shall singly or in the aggregate with any previous debts or liabilities at any time exceed one hundred thousand dollars, except for purposes of war, or to repel invasion, or to suppress insurrection, . . . and no such law shall take effect until it shall, at a general election, have been submitted to the people, and have received the sanction of a majority of all the votes cast for and against it at such election. . . .

[New Jersey Const. of 1844, article IV, § VI, ¶ 4

(emphases added)].

Notably, the only exceptions to the \$100,000 debt limit were instances of "war," "invasion," and "insurrection." During the Civil War, the Legislature invoked these exceptions several times. For example, in 1861, the Legislature authorized the Governor to issue General Obligation bonds not to exceed the "sum of two millions of dollars" for the purpose of paying "expenses" incident to "the suppression of the rebellion now existing against the government of the United States or for the purpose of repelling any invasion of this state." See L. 1861, c. 8. The Governor was permitted to issue these General Obligation bonds whenever in his "opinion" he deemed it "expedient" to do so. Ibid. The Legislature also authorized General Obligation Civil War bonds in

1863 and 1864. See L. 1863, c. 250 (authorizing Governor, whenever it "shall appear" to him "to be necessary," to issue an additional \$1 million in bonds for purpose of quelling rebellion and repelling invasion); L. 1864, c. 433 (same, bringing total authorized General Obligation Civil War bond issuance to \$4 million dollars). The State explains in detail below, see pp. 66-67, infra, the wide-ranging purposes for which these bond proceeds were expended. Finally, and notably, while the 1844 Debt Limitation Clause contained exceptions for war, rebellion, and insurrection, it did not include any exceptions for emergencies or disasters.

Second, the Great Depression revealed a critical defect in the Debt Limitation Clause that hindered the Legislature's ability to meet in a timely manner the existential exigency of putting bread on people's tables. Specifically, the Legislature was hampered in its effort to issue emergency bonds by a restraint in the 1844 Debt Limitation Clause that expressly provided that, subject to the delineated exceptions concerning war, "no" statute authorizing debt could "take effect until it shall, at a general election, have been submitted to the people, and have received the sanction of a majority of all the votes cast for and against it at such election." New Jersey Const. of 1844, article IV, § VI, ¶ 4. Four separate times during the Depression, the Legislature sought to issue General Obligation "emergency relief bonds" for "the relief of the people of the State from the hardships and suffering

caused by unemployment and the effects thereof on the public health and welfare," and each time the Legislature had to wait and first get voter approval. See L. 1932, c. 251, § 6 (putting to popular vote whether \$20 million in General Obligation bonds for emergency relief could be issued); L. 1933, c. 398, § 6 (same, regarding additional \$5 million in General Obligation bonds for emergency relief); L. 1934, c. 255, § 6 (same, regarding additional \$10 million in General Obligation bonds for emergency relief); L. 1939, c. 329, §§ 1, 6 (same, regarding additional \$21 million in General Obligation bonds for emergency relief).

The Framers of the 1947 Constitution were well aware of the fiscal throes of the Great Depression from which the State had recently emerged. They were also aware of how the Debt Limitation Clause's voter approval requirement had hindered a response to this emergency. Multiple individuals invited to testify at the convention stressed to the Framers that it "wasn't many years ago" that "this country was in the depths of the depression," and people were "seeking, clamoring for relief" from the courts and the Legislature alike. See IV Proceedings of the 1947 Constitutional Convention 535-36. The Framers were urged to structure the new Constitution so as to "insure at all times a flexibility of legislative fiscal action that will meet changing conditions as they arise, without any possibility of the State Legislature being handicapped" in the event of "any future economic emergency." V

Proceedings of the 1947 Constitutional Convention 743. "You cannot be sure today, when you are writing a Constitution for years to come, that nothing like" the Great Depression will "ever happen" again. Ibid.

Another witness testified that a Legislature must be able to enact laws "to meet current needs." V Proceedings of the 1947 Constitutional Convention 722. This witness noted that during the Great Depression, the Legislature had made the extraordinary, but necessary decision to divert \$65 million in dedicated highway funds for unemployment relief, see ibid., an action that triggered a federal penalty.⁸ "We do not know what lies ahead. It is quite possible that in the future the people of the State of New Jersey through their legislators would again" need "funds for urgent needs." Ibid. The witness urged that the Constitution be flexible

⁸ At the height of the Great Depression and in view of "the present condition of unemployment and financial stress," the Legislature began diverting State receipts from motor vehicle licensing fees and the tax on motor fuels away from their intended highway-construction purpose and instead appropriating them for "emergency relief purposes." See, e.g., L. 1935, c. 22; L. 1936, c. 26; L. 1937, c. 43; see also V Proceedings of the 1947 Const. Convention 743 (explaining that during "dreary" Depression years, State was "faced with the question of utilizing available highway funds to keep the people from starving, or retaining these funds to build roads. In those days it was a question of 'Shall the jobless people have food or shall they eat concrete?'"). This diversion triggered "a penalty under the terms of the Hayden-Cartwright Act," and resulted in the State receiving up to one-third less in federal highway aid than it otherwise would have. See Legislature's Joint Resolution No. 9 (1938).

because “[i]f such an emergency should arise it would be most unfortunate for us to find that to meet a pressing need would require an amendment to the State Constitution. Emergencies cannot be met or anticipated by a constitutional provision.” Ibid;

Still other witnesses made similar points. See I Proceedings of the 1947 Constitutional Convention 147 (urging against constitutional rigidity because of “Depressions,” “emergencies,” and “things you fail to foresee now”); V Proceedings of the 1947 Constitutional Convention 694 (recalling financial adaptations required in Great Depression and urging Framers to avoid an “attitude” that “would give no flexibility to anybody in determining” State financial matters); V Proceedings of the 1947 Constitutional Convention 698 (urging Framers not to “lock” State into rigid financial provisions because “every segment in our business community was seriously impaired as a result” of the Great Depression, and “salvation reposed” in the State’s ability to respond flexibly to crisis).

Third, heeding this wisdom born from the crucible of experience and suffering, the Framers made three significant amendments to the Debt Limitation Clause to permit greater flexibility. The first change was to delete the \$100,000 cap and instead allow the Legislature to create debts up to “one per centum” of the amount appropriated in the annual appropriations act without voter approval. See New Jersey Const., art. VIII,

§ 2, ¶ 3. The second change was to expand the exceptions to this cap to include not only "war," "invasion," and "insurrection," but also "meet[ing] an emergency caused by disaster or act of God."⁹ Ibid. The third change was moving the exceptions to the bottom of the clause so that they became exceptions not just to the monetary cap, but rather to all Debt Limitation Clause requirements. Ibid. Specifically, the Debt Limitation Clause that the Framers crafted and the voters ratified provided in pertinent part:

The Legislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State, which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year, . . . No such law shall take effect until it shall have been submitted to the people at a general election and approved by a majority of the legally qualified voters of the State voting thereon. . . . 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.

[New Jersey Const. of 1947 (as ratified and prior to subsequent amendment), art. VIII, § 2, ¶ 3].

⁹ The emergency provision was also included in the proposed 1944 Constitution. See II Proceedings of the 1947 Constitutional Convention 1718-19.

In the years since 1947, the Debt Limitation Clause has been amended several times and broken into subparagraphs. See Senate Concurrent Resolution 3027 (1983) (providing exception for refinancing bonds); Senate Concurrent Resolution 39 (2008) (breaking Debt Limitation Clause into subparagraphs and requiring voter approval when State borrows money using State independent authority contract bonds). The basic structure of the Debt Limitation Clause, however, remained the same. See New Jersey Const., art. VIII, § 2, ¶ 3.

For all of the reasons explained above and those explained in detail below, the State is able to issue emergency GO Bonds under the Act and expend the proceeds thereof to meet the fiscal emergency the COVID-19 pandemic has caused.

ARGUMENT

POINT I

**PLAINTIFFS CANNOT MEET THEIR HIGH BURDEN OF PROVING
THE CHALLENGED LEGISLATION IS REPUGNANT TO THE
CONSTITUTION.**

The "standard" for determining the constitutionality of legislation is "well-settled: a legislative act will not be declared void unless its repugnancy to the constitution is clear beyond reasonable doubt." State v. Buckner, 223 N.J. 1, 14 (2015) (emphasis in original). "To overcome the strong presumption of validity and deference due to any legislative enactment, the challenger must demonstrate - unmistakably - that the law in question runs afoul of the Constitution." Ibid. (internal quotations and citation omitted). "When reasonable people might differ about the constitutionality of a law, courts must defer to the will of the lawmakers." Id. at 15 (internal quotations and citation omitted). "In the end," the Court must "return to two fundamental principles: the strong presumption of validity that attaches to every legislative enactment, and the Court's obligation to act with extreme self restraint before it overrides the Legislature and pronounces a law unconstitutional." Id. at 37-38 (internal quotations and citation omitted).

Plaintiffs' claims that the Act violates both the Debt Limitation Clause and the Appropriations Clause cannot satisfy that high burden. With respect to the former, the limits contained

in the Debt Limitation Clause do not apply to any bonds issued to meet an emergency, and do not apply to any monies deposited with this State by the government of the United States, both of which are dispositive here. Moreover, the text and history of the Debt Limitation Clause and the Appropriations Clause make clear that the proceeds of validly issued GO Bonds may be used as revenues to help to State through this fiscal emergency.

POINT II

THE DEBT LIMITATION CLAUSE PERMITS THE GOVERNMENT TO CREATE DEBT TO MEET THIS FISCAL EMERGENCY.

Plaintiffs' arguments that the Act violates the Debt Limitation Clause because it allows for debt to be created without voter approval and without a single object runs into an immediate problem: the text of the Constitution exempts from these rules debt created to meet an emergency caused by a disaster, and monies from the federal government. Both exceptions apply.

A. The Debt Limitation Clause Exempts Certain Debt From The Voter-Approval And Single-Object Requirements.

Section II, Paragraph 3 of the Constitution lays out the rules that govern the issuance of General Obligation bonds. As Plaintiffs rightly explain, the Legislature may not "create" any "debt" unless and "until it shall have been submitted to the people at a general election and approved by a majority of the legally qualified voters," and even then can only create debt "for some

single object or work distinctly specified therein." See New Jersey Const. art. VIII, § 2, ¶ 3(a). That is the typical rule.

The problem for Plaintiffs is that this tells only part of the story. A few provisions later in the same Paragraph 3, the Debt Limitation Clause makes clear there are number of exceptions to its general requirements, including, inter alia, an exception for federal monies, and a separate exception for any debt created "to meet an emergency caused by disaster." Id. at ¶ 3(e). For ease of review, Subparagraph (e) provides in full:

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. at ¶ 3(e) (emphases added)].

There is only one paragraph to which "this paragraph" could be referring - the entire Debt Limitation Clause, which is paragraph 3 of section 2 of the Taxation and Finance Article. (Indeed, this language could not possibly be referring to subparagraph 3(e) alone, because subparagraph 3(e) does not contain any affirmative requirements that would need to be waived.)

It follows that if either the debt was issued "to meet an emergency caused by disaster," or involves "money that has been or may be deposited with this State by the government of the United

States," then the voter-approval and single-object rules of the Debt Limitation Clause cannot apply. After all, to "understand the meaning and intent of a constitutional provision, courts look" to the "plain language the framers used." Buckner, 223 N.J. at 15. The words used must be given their "normal and ordinary" meaning, and "where the intention is clear, there is no room for construction and no excuse for interpolation or addition." Gangemi v. Berry, 25 N.J. 1, 16 (1957). And here, the phrase "[n]or shall anything in this paragraph contained" is broad, expansive, and all-encompassing. See New Jersey Const. art. VIII, § 2, ¶ 3(e)(emphasis added). The "anything . . . contained" refers to all the other provisions and requirements in the Debt Limitation paragraph, including the voter approval and single object mandates in subparagraph (a). In other words, Subparagraphs (a) and (e) are complementary, with subparagraph (a) recognizing that there would be exceptions "hereinafter provided," and subsection (e) explicitly detailing the relevant exceptions that exist. Id. at ¶ 3(a), 3(e).

B. This Case Meets the Requirements of Both Exceptions

i. The Emergency Exception Applies.

There are two arguments Plaintiffs appear to be making in arguing that the Act violates the Debt Limitation Clause: that the current fiscal emergency is not (as a matter of law) the kind of emergency contemplated by subparagraph (e), and that it is not

(as a matter of fact) a sufficiently grave fiscal crisis. Neither claim withstands closer scrutiny.

As to the law, there should be little doubt that a fiscal emergency resulting from a public health disaster is precisely the sort of emergency that triggers application of subparagraph (e). That reflects the plain text, history, and precedent.

First, while other states included provisions in their Debt Limitation Clauses that would permit the Legislature to issue GO bonds without voter approval in order to "meet[] a disaster," see, e.g., Alaska Const. art. IX, § 8,¹⁰ the New Jersey Framers, fresh from the Great Depression, made the exception broader to include "an emergency caused by disaster." See N.J. Const., art. VIII, § 2, ¶ 3(e) (emphasis added). The distinction is crucial in determining what the bond proceeds may be used for. Erroneously denominating the pandemic as the "emergency" as Plaintiffs do, see Pb25, leads to the myopic conclusion that the proceeds can only be used to purchase ventilators or personal protective equipment. However, the pandemic is the underlying "disaster" and the fiscal crisis, including the drastic diminution in revenue - which flows

¹⁰ Cf. N.C. Const. art. V, § 4 (State may issue debt "to meet emergencies immediately threatening the public health or safety; La. Const. Ann. art. VII, § 6 (State may issue debt to "provide relief from natural catastrophes").

directly from the social distancing needed to address this virus - is the "emergency" that the disaster caused.

Second, history is in accord. Plaintiffs lose sight of the fact that it was precisely the Framers' recent experience with a fiscal emergency - the Great Depression - that motivated them to add the emergency provision to the Debt Limitation Clause. Depression-era deficit spending served as the model for the expansion of the Clause beyond wars and insurrections. From 1932 through 1939, the Legislature passed four separate Acts authorizing the issuance of bonds to meet the fiscal emergency that was gripping every segment of the population. See L. 1932, c. 251; L. 1933, c. 398; L. 1934, c. 255; L. 1939, c. 329. But as already laid out above, these Acts were slow in taking effect in light of the need for voter approval. Building on this legacy, the Committee on Finance introduced at the 1947 proceedings language that would permit debt "to meet an emergency caused by act of God or disaster."¹¹ See I Proceedings of the 1947 Constitutional Convention 149. In the words of the Committee, permitting emergency borrowing during a fiscal crisis "was practically done in 1932 by the Legislature and looked upon with a great deal of propriety by the people of the State because those

¹¹ Although the Committee was responsible for introducing this language in the 1947 proceedings, the same language was also included in the proposed 1944 Constitution. See Tilton Monograph at II Proceedings of the 1947 Constitutional Convention 1718-19.

things had to be done. Therefore, we placed those words in there." I Proceedings of the 1947 Constitutional Convention 149. Said simply, the Committee expressly added the emergency language to the Clause in order to specifically constitutionalize the multi-year Depression-era borrowing necessary to meet the fiscal crisis. The Framers thus understood emergency borrowing for fiscal needs to be not just permissible, but desirable - so much so that it warranted a constitutional amendment. Ibid.

Third, while the Debt Limitation Clause does not itself define what "meeting" an emergency entails, the language of the Appropriations Clause offers helpful guidance. At the very time the Framers were amending the Debt Limitation Clause to permit the State to "meet" an emergency, they were amending the Appropriations Clause to mandate the State have enough revenues on hand to "meet" expenditures. See N.J. Const. art. VIII, § 2, ¶ 2. It is an established canon of statutory construction that "in the absence of a clear indication to the contrary," a word "should have the same meaning throughout the statute." Perez v. Pantasote, Inc., 95 N.J. 105, 116 (1984). Here, the Framers necessarily used "meet" in the Appropriations Clause to mean 'provide for the full extent of.' That is to say, the State was to have enough revenue on hand or anticipated to "meet" or cover the entirety of the legislative

appropriations.¹² In the Debt Limitation Clause, the word "meet" must receive the same definition, which means that the Legislature is permitted to incur debt to 'provide for the full extent of' a fiscal emergency need. That is to say, the State may "meet" or cover the entirety of the financial fallout of the crisis for both the extended FY20 and the shortened FY21.

Fourth, on both a State and federal level, courts have consistently been extremely deferential to the democratic branches during times of emergency, including great deference regarding what the precise emergency is. As this Court noted, "An 'emergency' is an unusual public exigency calling for exercise" of legislative "power to alleviate common peril or need, and the inquiry in all such cases is whether, in right reason, public urgency sustains the remedy invoked." Jamouneau v. Harner, 16 N.J. 500, 514 (1954); cf. Worthington v. Fauver, 88 N.J. 183, 201 (1982) ("validity of executive actions pursuant to emergency power will depend on the nature of the emergency and the gravity of the threat to the public. Thus, a more serious emergency may justify greater responsive measures"). During an emergency, "the Legislature has a broad discretion in assessing the need and the

¹²See also Oxford English Dictionary, Oxford Univ. Press (3d Ed. 2001) at the verb form of "meet" (in Depression-era one definition of "meet" was to "stand up to in combat, especially with a weapon or force") (available at <https://find.library.duke.edu/catalog/DUKE002744777>).

means requisite for the protection of the common weal." Jamouneau, 16 N.J. at 515. The Legislature's means to respond to the emergency are assumed valid unless wholly "arbitrary" or an "abuse" of power. See id. at 517-18.

In keeping with the tradition of judicial restraint in crisis, federal courts have refrained from interfering in the elected branches' ability to fully and flexibly respond to the emergency that COVID-19 has caused. The U.S. Supreme Court recently considered whether to enjoin California from limiting attendance in places of worship. See S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (Mem.). With four justices seeking to deny injunctive relief and four seeking to grant it, Chief Justice Roberts cast the deciding vote. His concurrence reveals the reasoning that tipped the balance in the case. Because California had not exceeded the "broad limits" afforded to the "politically accountable officials" in responding to the emergency that COVID-19 had caused, the State "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise" needed to respond to the crisis and "is not accountable to the people." Id. at 1613-14 (Roberts, C.J., concurring) (citations omitted).

While South Bay dealt with policy decisions aimed at stemming the physical spread of the virus, at least one federal court has addressed the elected branches' efforts to combat the

"overall economic destruction" and the "huge economic dislocations across all industries" that the "COVID-19 pandemic" has caused. See Schuessler v. United States Sm. Bus. Admin., 2020 WL 2621186 at 13 (Bankr. E.D. Wisc. 22 May 2020). Da849. In Schuessler, "Congress and the President" excluded certain categories of businesses "from receiving loans under the Paycheck Protection Program," and plaintiffs, some of those excluded from this economic stimulus plan, sued. Ibid. Da849. Finding the issue non-justiciable, the court held that to "the extent there is a remedy for the plaintiffs' situation, it lies with the political branches, not this court." Ibid. Da849.

Finally, also instructive is a decision by the Alaska Supreme Court when it had to grapple with the question of whether mortgage relief after an earthquake constituted "meeting a disaster" within the contemplation of the Debt Limitation Clause of the Alaska Constitution. See Suber v. Alaska State Bond Comm., 414 P.2d 546 (Alaska 1966); see also Alaska Const. art. IX, § 8. Preliminarily, the court conceded that the "concept of 'meeting natural disasters,' within the meaning of the constitution, is one that is not capable of precise definition or description." Id. at 550. The court therefore determined that the question of whether a debt "meets a natural disaster must be decided as each case arises and in the light of the particular facts and circumstances of each case." Ibid. Since "legislative judgment and discretion"

were involved, the court adopted a deferential standard, noting: "As in the case of the appropriation or expenditure of funds for what the legislature deems a public purpose, we will not set aside the determination by the legislature that the contracting of a debt meets a natural disaster unless it clearly appears that such determination is arbitrary and without any reasonable basis in fact." Ibid. Using this standard, the court ultimately upheld the incurrence of debt for the purpose of relieving the "crushing financial burden placed on homeowners who lost their homes" during the earthquake. Id. at 551. Especially given the more capacious language the New Jersey Constitution uses, such a deferential standard offers yet more reason that the State could validly conclude the fiscal emergency caused by the COVID-19 disaster justifies creating debt pursuant to the Act.

For each of these reasons, the State may issue General Obligation bonds to "meet" a fiscal emergency.

Nor can there be any question that this fiscal emergency qualifies as a matter of fact - a question on which the State must be owed extraordinary deference. As detailed extensively above and in the attached certifications, COVID-19 is a disaster of historical proportions and has created not only a health emergency, but a fiscal one as well. See pp. 9-23, supra; Muoio Cert. at ¶¶ 17-48 (Da004-048); Sullivan Cert. at ¶¶ 9-36 (Da629-637); Hirsch Cert. ¶¶ 3-24 (Da640-648). Revenues have fallen off the cliff,

the direct result of an unprecedented series of actions the State and its population had to take so as to stop the spread of a lethal virus. For these reasons, the voter approval and single object requirements do not apply, and the State may issue the GO Bonds here in order to meet the fiscal emergency that the COVID-19 disaster has caused.

ii. The Federal Funds Exception Applies.

Although the above discussion suffices to demonstrate that the Emergency Bond Act is consistent with the Debt Limitation Clause, if the Court disagrees, then the State may still issue the Bonds under the separate federal funds exception.

First, the plain language of the federal funds exception sweeps broadly, encompassing "any money . . . deposited with this State" by the federal government. N.J. Const. art. VIII, § 2, ¶ 3(e) (emphasis added). Here, the Act authorizes the State to sell GO Bonds to the federal government and to apply for federal stimulus loans. See Act at §4. The federal monies the State will receive in return fall within this expansive phrase.

Second, even if the text of the federal funds exception were ambiguous, history once again confirms its applicability in this context. By the 1820s, the federal government enjoyed a considerable surplus that some federal lawmakers feared would augment the power of the federal government at the expense of the states. See, e.g., 3 Cong. Deb. 210 (1827). To neutralize this

perceived threat, Congress began debating a proposal to distribute the federal surplus to the states "for the purposes of education and internal improvement." Ibid. President Andrew Jackson embraced the idea as early as 1829, see First Annual Message to Congress (Andrew Jackson Dec. 8, 1829), but it took Congress until 1836 to enact the proposal, see Pub. L. 24-115, 5 Stat. 52, § 13 (1836). In exchange for funds drawn from the federal surplus, the states would issue "certificates of deposite" to the federal government that would carry "the usual and legal obligations, and pledge the faith of the State, for the safe keeping and repayment therof." Ibid. In November 1836, New Jersey enacted a statute authorizing the issuance of such certificates of deposit. Act of Nov. 4, 1836, Sixty-First General Assembly, First Sitting, p. 10. In enacting the federal funds exception to the Debt Limitation Clause, it was this scenario and others like it that might arise in the future that the 1884 Framers were addressing, namely a federal loan in return for a pledge of repayment backed by the State's faith and credit. That is precisely the situation we have here. See Act at §49(a).

In short, under either or both exceptions, the State may issue the GO Bonds at issue here without complying with the voter approval or single object provisions of Debt Limitation Clause.

POINT III

THE STATE CAN EXPEND THE BOND PROCEEDS OF THE DEBT VALIDLY CREATED TO MEET THE FISCAL EMERGENCY; THIS INCLUDES USING THE MONIES FOR OPERATING EXPENSES OR REVENUE REPLACEMENT ACROSS MULTIPLE FISCAL YEARS.

Because the State's authority to create debt in the ways contemplated by the Act is clear, the question becomes whether the State may spend the bond proceeds to address the fiscal emergency that the Debt Limitation Clause anticipated. To ask that question is to answer it: the State may spend the proceeds of the bonds the Constitution allowed it to issue. Although Plaintiffs rely almost exclusively on the Appropriations Clause to argue otherwise, the interplay between the Appropriation Clause and the specific, relevant provisions of the Debt Limitation Clause, read in light of text and structure, history, practice, and principles, confirm the State's logical position. Simply, the State may use bond proceeds of the debt validly created pursuant to that Clause for revenue replacement across multiple fiscal years.

A. Under the Constitution, the State may Use Proceeds of GO Bonds to Make Up for Deficiencies in Revenue.

Although the Appropriations Clause makes clear expenses may not exceed revenues, from its inception, the Constitution has permitted the State - in normal years and in emergencies - to issue General Obligation bonds to cure deficiencies in revenues.

First, the 1844 Debt Limitation Clause provided in pertinent part: "The legislature shall not, in any manner, create

any debt or debts . . . which shall singly or in the aggregate with any previous debts or liabilities at any time exceed one hundred thousand dollars." New Jersey Const. of 1844, article IV, § VI, ¶ 4 (emphasis added). In his Monograph for the delegates to the 1947 Constitutional Convention, Amos Tilton discussed this provision of the 1844 Debt Limitation Clause and explained: "Debt of \$100,000 is permitted for casual deficiencies. Additional debt must be approved by a majority of state electors." II Proceedings of the 1947 Constitutional Convention 1724 (emphasis added). The "casual deficiencies" Tilton mentioned referred to deficiencies in revenue - the very kinds of deficiencies at issue here.

If there were any doubts about this matter, Senator Van Alstyne, a delegate to the convention and the Chairman of the Senate Appropriations Committee, dispelled them. Recognizing that the value of money had changed since the nineteenth century, Senator Van Alstyne proposed an amendment wherein the \$100,000 limit would be raised to "1 per cent of the total amount of money appropriated for the State in any given year." I Proceedings of the 1947 Constitutional Convention 702. Critically for our purposes, he went on to explain: "Those of you who have had much to do with preparing budgets a year to a year and a half in advance, which is what we have to do with the State budget, will realize that if you hit your budget within one per cent you have done very

well indeed." Ibid. Thus, the amendment was proposed with the very idea of budget deficiencies in mind.

The Framers accepted and the voters ratified Senator Van Alstyne's amendment, such that the Debt Limitation Clause now provides in pertinent part: "The Legislature shall not, in any manner, create in any fiscal year a debt or debts . . . which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year. New Jersey Const., art. VIII, § 2, ¶ 3 (emphasis added). The 1% cap in ordinary years, then, was to help the State "hit" its budget if revenues were deficient. Plaintiffs' argument that the proceeds of GO Bonds issued pursuant to the Debt Limitation Clause could not be used to balance the budget under the Appropriations Clause is directly contrary to - and cannot be squared with - this 1% cap.

Second, in 2004, in support of Senator Lance's Lance v. McGreevey lawsuit, the Office of Legislative Services ("OLS") confirmed that the State could issue General Obligation bonds to make up for revenue deficiencies. See Letter from Albert Porroni, Legislative Counsel to the Hon. Leonard Lance (June 17, 2004) ("2004 OLS Opinion"). Da674-684. Having reviewed the 1947 constitutional proceedings, OLS concluded that "the State's ability to incur debt of up to one percent of appropriations was intended to help the State meet its operating expenses in those

years when revenue anticipated in the beginning of the fiscal year fell short of expectations." 2004 OLS Opinion at 5. Da678. OLS further explained, "it seems that the provision of limiting to one percent of the total amount appropriated in the fiscal year was understood by the framers to authorize the creation of debt in that amount as a means of balancing an unbalanced budget." Id. at 6. Da679. OLS summed this up as a constitutionally-authorized "type of deficit financing." Ibid. In short, in ordinary years, the Constitution permits the State to use the proceeds of General Obligation bonds to make up for revenue deficiencies, as long as the State stays beneath the 1% cap, a point Plaintiffs do not address and to which they have no response.

Third, during emergencies, this cap is lifted, thereby allowing the State to use General Obligation bond proceeds to meet revenue deficits beyond that amount. Proof of this can be found in the proceedings of the constitutional convention. At one point during the proceedings, the Framers had already adopted the emergency provision of the Clause and were considering whether to amend the borrowing cap. Delegate Francis Murray, Vice-Chairman of the Finance Committee, then noted that the \$100,000 cap in the 1844 Debt Limitation Clause that permitted the State to make up for revenue deficiencies "has exceptions." I Proceedings of the 1947 Constitutional Convention 702. "The State," he explained, "may incur a debt over \$100,000 and without limits, for the

purposes of war, or to repel invasion, or to suppress insurrection, or to meet an emergency caused by an act of God or disaster. So that we do have a leeway to meet any emergency of that kind." Ibid. (emphasis added). Notably, while the Framers changed the amount the State may bond for revenue deficits in an ordinary year, they did not change in any way the unlimited borrowing for revenue deficits that they had already authorized for times of emergency. The "leeway" to "meet an emergency caused by an act of God or disaster" remained intact. Ibid. That leeway was not simply to borrow, but obviously also to spend the resultant proceeds.

Fourth, during the Civil War and the Great Depression, the State faced existential emergencies and was able to expend monies beyond available revenues to meet them. According to an 1866 Congressional Report, New Jersey incurred a whopping debt of \$26,786,421.00 during the Civil War. See United States House of Representatives, Report No. 16, "War Debts of the Loyal States," 39th Congress, 1st Session (Feb. 16, 1866) (accompanying bill H.R. No. 282). This nearly \$27 million debt dwarfed - by nearly ten-fold - the State's annual revenues, which totaled a mere \$278,157.57 in 1862. See R.M. Smith, Treasurer's Report (March 11, 1863) at 6. Similarly, in FY1938, which ran from July 1, 1938 through June 30, 1939, the State appropriated \$39 million through its annual Appropriations Act. See L. 1938, c. 313 at p. 779. Nonetheless, in 1939, the State raised an additional \$21 million

for emergency relief through issuance of General Obligation bonds. See L. 1939, c. 329, § 1. The bond proceeds thus increased by 54 percent the revenues available to meet expenditures.

Fifth, in the past, the State has, through a mechanism known as interfund transfer, done exactly what the Act here proposes to do, namely transfer GO Bond proceeds to the General Fund as revenue to meet general operating expenses. See Muoio Cert. at ¶ 110. Da022. For example, in FY16, proceeds of bonds authorized by the Port of New Jersey Revitalization, Dredging, Environmental Cleanup, Lake Restoration, and Delaware Bay Area Economic Development Bond Act of 1996 ("Dredging Bonds"), see L. 1996, c. 70, were transferred as revenue to the General Fund. Specifically, the Fiscal Year 2016 Appropriations Act listed as "Anticipated Resources," \$454,000 of Dredging Bond proceeds. See Muoio Cert. at ¶ 110 (Da022-023); see also L. 2015, c. 63 (FY16 Appropriations Act) at A-10. These proceeds were to be used to meet the administrative expenses of the "Office of Dredging and Sediment Technology" in the Department of Environmental Protection. See Muoio Cert. at ¶110 (Da023); see also L. 2015, c. 63 (FY16 Appropriations Act) at B-64. As it turned out, actual expenses were only \$429,975.27, so that was the amount of Dredging Bond proceeds the General Fund actually received. See Muoio Cert. at ¶ 110. Da023. The "transfers to other funds" line on page 159 of the Consolidated Annual Financial Report ("CAFR") for FY16

reports this movement and records the funds as revenue. See Muoio Cert. at ¶110 (Da023); see also FY16 CAFR at p. 159 "Dredging and Containment Facility Fund" <https://www.nj.gov/treasury/omb/publications16cafr/pdf/fullcafr.pdf>. The Governor's FY18 Budget Message likewise demonstrates that the General Fund actually received \$430 thousand in Dredging Bond proceeds, recorded them as revenue, and used them to support of General Fund expenditures. See Muoio Cert. at ¶ 110 (Da023); see also Governor's FY18 Budget Message at C-7, D-128 (available at <https://www.nj.gov/treasury/omb/publications/18budget/pdf/FY18BudgetBook.pdf>).

Several features of this interfund transfer, and others like it, are noteworthy. See Muoio Cert. at ¶111 (Da023) (providing another example from 2018). Preliminarily, these interfund transfers involved the transfer of the bond proceeds themselves (i.e., the principal amount received after issuance) and not mere interest on investment earnings. See Muoio Cert. at ¶¶110-111. Da022-024. Further, while the interfund transfers and the transfers into the General Fund that the Act authorizes may differ in size, they do not differ in essential nature or quality. That is to say, the interfund transfers described above and in the Treasurer's certification - just like the transfer contemplated by Section 14 of the Act - involve GO bond proceeds being transferred to the General Fund as revenue. Plaintiffs

cannot sidestep what is for them the uncomfortable fact that precedent exists for what the Legislature has authorized in the Act.

Moreover, any attempt to distinguish the above-described interfund transfer by saying it was merely for the purpose of administering the bonds would be unavailing. As described at length above, bonds issued under the emergency exception of the Debt Limitation Clause do not need to comply with the single object requirement of subparagraph 3(a). See pp. 41-43, supra; see also N.J. Const. art. VIII, § 2, ¶ 3(e). Finally, prior to the issuance of the Emergency GO bonds at issue here and prior to their transfer to the General Fund, the Executive Branch "shall transmit" to the Select Legislative Commission "a report . . . describing the bonds proposed to be issued." See Act at § 6. .

Sixth, Plaintiffs' contention that the Bond proceeds may only make up for revenue deficiencies that were "unforeseen" or "unanticipated," see Pb26, is without merit. Preliminarily, this notion is at odds with the multi-year nature of GO bonds and historical practice during the Civil War and Great Depression, both of which were multi-year endeavors. See pp. 60-66, supra. Further, Plaintiffs' notion is textually unsupported. Subparagraph (e) of the Debt Limitation Clause does not contain any requirement that the emergency bond proceeds may be used only to offset revenue deficiencies that are unanticipated. Even if

the need for an "unexpected" revenue deficit could be inferred from other portions of the Debt Limitation Clause, subparagraph (e) "notwithstanding" the entirety of the Clause. See pp. 43-44, supra. Finally, the notion that the revenue deficit must be unanticipated could lead to results that are absurd at best and catastrophic at worst. Under Plaintiffs' theory, the State would be able to make up for revenue deficits in the year a disaster struck, even if those lost revenues supported non-essential expenditures. Conversely, the State would not be able to make up for lost revenues in the subsequent fiscal year, even if the very same disaster persisted and the revenues were now needed to support essential services.

Seventh, not only do the proceedings of the 1947 constitutional convention and historical practice confirm the State's position, common sense does as well. By definition, an emergency is an unexpected and dangerous situation that requires urgent intervention to protect against harm, prevent a worsening of the situation, and address critical needs. As this Court has stressed, "'the Constitution is not a suicide pact'" and "it permits courts to consider exigency and public safety." State v. Golatta, 178 N.J. 205, 221 (2003) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963)). If the State can validly borrow money to respond to an emergency, it would make little sense for the Constitution to prevent the State from spending that money

as part of the very whole-of-government response the Framers expected. Plaintiffs' contrary view that the Constitution serves as a fiscal straitjacket in times of emergency, see Pb26-27, defies not only logic, but the express intention of the Framers to provide flexibility to meet an economic emergency. See pp. 36-38, supra.

In short, for each of the independent reasons discussed at length above, see pp. 53-61, supra, the Constitution permits the State to use General Obligation Bond proceeds to offset revenue deficiencies, up to one percent in normal times, and to a greater degree during times of emergency like this one.

B. Under the Constitution, the State may Use the Proceeds of GO Bonds for Non-Capital Projects and General Expenses.

Again notwithstanding Plaintiffs' crabbed view of the Appropriations Clause, ample evidence exists to show that General Obligation bonds issued under the Debt Limitation Clause may be used to fund general expenses. Cf. Lance, at 603-04 (LaVecchia, J., dissenting) (noting that historically "GO bonds have been authorized for distinctly non-capital projects").

First, through Amos Tilton's instructive monograph "Constitutional Limitations on the Creation of State Debt" ("Monograph"), the Framers of the 1947 Constitution were thoroughly educated about the State's debt history. See II Proceedings of the 1947 Constitutional Convention 1708-28. Tilton traced the State's indebtedness from colonial times, when the State

issued debt "to cover deficits in ordinary expenses"; through the Civil War, when the State, "without the need of a public referendum," authorized General Obligation "war bonds" totaling \$4 million¹³; to the aftermath of World War I, when the State issued General Obligation bonds in the amount of \$12 million to fund bonuses for veterans¹⁴; to the Great Depression, when the State issued General Obligation bonds for the "purpose of financing unemployment relief"¹⁵ and providing "educational aid."¹⁶ Id. at 1708-13. These purposes are more aptly categorized as general expenses rather than capital projects.

Second, the voters who authorized these General Obligation bonds understood that the proceeds would be used for such expenses. For example, in 1939, before the adoption of the emergency provision of the Debt Limitation Clause, the Legislature had to put to the voters the question of whether to issue emergency

¹³ See L. 1861, c. 8 (\$21 million); L. 1863, c. 250 (\$1 million); L. 1864, c. 433 (\$1 million). These amounts were many multiples of the annual budget. See R.M. Smith, Report of the State Treasurer (March 11, 1863) (noting that in 1862 the State's annual revenues totaled \$278,157.57, while the estimated revenues for 1863 totaled \$354,362.50).

¹⁴ See L. 1920, c. 159 (\$12 million).

¹⁵ See L. 1932 c. 251 (\$20 million for unemployment relief); L. 1933, c. 398 (\$5 million for unemployment relief); L. 1934, c. 255 (\$10 million for unemployment relief); L. 1939, c. 329 (\$21 million for unemployment relief).

¹⁶ See L. 1933, c. 387 (\$7 million for school relief, including teacher salaries).

bonds for unemployment relief. The issue was vigorously debated in the newspapers, but those on both sides of the debate agreed that the bond proceeds would be used for operating expenses. See, e.g., "Relief Only Half Solved," Trenton Evening Times (Aug. 20, 1939) at p. 6 (noting that debate centered on whether bonds should be issued to "meet[] governmental costs, especially current expenses") (Da852); "No Excuse for New Bonds," Trenton Evening Times (June 5, 1939) at p. 6 (taxpayer association complaining that State should not be "bonding for current operating costs") (Da851). The voters ultimately approved the issuance of General Obligation bonds for unemployment relief, just as they had three times previously. See p. 63, supra.

Third, aware of Tilton's Monograph, see II Proceedings of the 1947 Constitutional Convention 1328, and of these vigorous debates only eight years prior, the Framers, took no action to prohibit the issuance of General Obligation bonds for operating expenses. Indeed, within two years of the adoption of the 1947 Constitution, the Legislature again sought to issue General Obligation bonds for operating expenses. See L. 1949, c. 240 (authorizing issuance of \$105 million in General Obligation bonds to fund bonuses for World War II veterans). As this Court has held, "[i]n order to determine the intent of the constitutional language, it is appropriate to consider the statutory enactments that were adopted virtually contemporaneously." Atl. City Racing

Ass'n v. Attorney Gen., 98 N.J. 535, 548 (1985); see also State Dep't of Civil Serv. v. Clark, 15 N.J. 334, 340 (1954) (explaining that "contemporaneous construction" is "of substantial importance in weighing the issues where there is a debatable question" of what constitutional provision allows). But if Plaintiffs were right about the meaning of the Constitution, even if the 1949 bonds were approved by the voters, the State would not have been able to expend the proceeds.

For all the foregoing reasons, the State may expend the GO Bond proceeds at issue here to "meet" the fiscal emergency the COVID-19 disaster has caused. "Meeting" the emergency includes using the monies for general expenses or revenue replacement.

C. Under the Constitution, the State may Expend the Bond Proceeds Across Multiple Fiscal Years.

Contrary to Plaintiffs' claims, nothing about the above analysis changes simply because the bond proceeds are spent for a variety of purposes over a multi-year cycle. That is true once again based on text, history, and practice.

First, and most notably, the Debt Limitation Clause does not have any durational limits with regard to when emergency bond proceeds may be spent. That is to say, the Clause does not mandate that the bond proceeds only be used to meet emergency needs in the first fiscal year of a fiscal crisis. Indeed, such a limitation on "meeting" the emergency would be contrary to the very nature of

emergencies, which are not in the habit of abiding by the niceties of artificial constructs such as fiscal years. Further, limiting the expenditure of bond proceeds to the year of issuance would be counter to the actual practice of the State when it faced multi-year emergencies during the Civil War and the Great Depression.

Second, the uses of which war monies were put in the Civil War is especially telling. While a casual observer might assume the funds were used only for weapons and other military equipment, see Amended Complaint, Exh. A at 3, a detailed investigation reveals a much broader use of funds, covering nearly every aspect of society. As Governor Parker put it in his Inaugural Address, the "expenses incident to war are enormous." 1863 Inaugural Address of Governor Parker at 4.

For example, the "sudden and unexpected call of the President for 600,000 men, in the months of July and August [1862], found the different bureaus of the federal government unprepared to supply the articles requested without considerable delay, for so great a number of troops." Lewis Perrine, Quartermaster General's Report (January 1, 1863) at 3. New Jersey, therefore, was "obliged to provide, at the expense of this State, such articles as were required for immediate use." Id. at 3. New Jersey was faced with "providing and issuing supplies of every kind pertaining to the recruiting, subsisting, clothing, arming, equipping, and transporting 16 full regiments of infantry,

mustered into the service of the United States." Id. at 3. This included renting "suitable grounds" to muster the men; erecting "112 barracks in the shortest possible time"; entering contracts for "fresh beef, fuel, straw, and stationary"; procuring blankets and utensils that "could not be supplied, in any reasonable time, except by purchase"; making "garments at the clothing department at the Arsenal"; providing "medical services"; opening up a State hospital in Jersey City "to receive and take care of the wounded and sick" after the Battle of Roanoke; opening up another hospital in Newark as casualties began to mount and exceed existing hospital capacity; arranging for the delivery of "a large number of packages of hospital" supplies that concerned companies and citizens had donated; "arresting deserters"; "transporting troops to Washington"; paying for "freight"; paying the salaries of lay "machinists, carpenters, clerks, and laborers" needed for the war effort; and "advancing pay to recruits." Id. at 8-12.

But, the State's expenses did not end there. As Governor Parker eloquently put it, the "brave and patriotic" New Jerseyans engaged in war "should feel assured that absent ones dependent on them do not suffer from want of the comforts of life." Inaugural Address at 4. The State therefore paid a monthly "bounty" of \$6 per month to the "families or dependent widowed mothers" of the State's 12,143 soldiers to ensure that these loved ones were able to survive. R.F. Stockton, Jr. Adjutant General's Report (1863)

at 16. This cost the State "\$746,856 per annum." Ibid.

Finally, confining the expenditure of emergency bond proceeds to the year of issuance would be contrary to the nature of General Obligation bonds themselves. GO bonds are routinely issued for purposes or projects that stretch across many years. For example, in August 2012, the Legislature passed the "Building Our Future Bond Act," authorizing issuance of up to \$750 million in General Obligation bonds. See L. 2012, c. 41. The next year, 2013, the Legislature appropriated \$715,706,303 of this money. See L. 2013, c. 96. Four years later, the Legislature appropriated the remaining \$34,293,697. See L. 2017, c. 32. This multi-year feature is hardly unusual. See Kanef Cert. at ¶ 8. Da160. Rather, it is the hallmark of GO bonds, the proceeds of which are routinely expended across multiple fiscal years. Id. at ¶ 9. Da160.

D. Longstanding Practice Confirms This Reading Of The Debt Limitation Clause and the Appropriations Clause.

As the above discussion shows, if the Framers permitted the bonds to be issued, it follows that the Framers permitted the proceeds to be spent. Text, structure, and history all confirm as much. So does a consistent course of practice. See New Jersey Ass'n on Correction v. Lan, 80 N.J. 199, 213-15 (1979) (noting that "where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time it will be regarded as of great importance in arriving" at the "proper construction"

and "interpretation" of the constitution) of constitutions of governments") (citation and quotation marks omitted); N.L.R.B. v. Noel Canning, 573 U.S. 513, 533 (2014) (stating that "three-quarters of a century of settled practice is long enough to entitle a practice to great weight in a proper interpretation of the constitutional provision").

Under our constitutional framework, only two ways exist to expend bond proceeds, either on-budget or off-budget, i.e., either in the annual Appropriations Act or through a stand-alone chapter law. The Act uses both. Under the on-budget mechanism, "[a]mounts on deposit" in the Emergency Fund "shall be withdrawn by the State Treasurer for deposit into the General Fund or the Property Tax Relief Fund as needed to support appropriations made by the Legislature in the Fiscal Year 2021 Appropriations Act, and such amounts shall constitute State revenues." Act at § 14. Da 521. The Act also contains an off-budget mechanism for expending Bond proceeds. See Kanef Cert. at ¶ 43 (Da167-68); Muoio Cert. at ¶¶ 103, 04 (Da21). Specifically, the "balance of amounts on deposit in the COVID-19 Fund [i.e., those amounts remaining after proceeds are transferred to the General Fund for appropriation in the annual Appropriations Act] shall be subject to appropriation by the Legislature." See Act at § 14; see also Kanef Cert. at ¶ 143. Da167-168. The differences are formal: in function, both

forms allow the Legislature to make appropriations to fund expenses through Bond proceeds.

And there is a significant practice of using the latter mechanism, a practice that has existed for decades without raising any questions under the 1947 Constitution. This method is known as a "debt limitation appropriation" and has been a consistent feature in GO bond acts for over half a century. See Muoio Cert. at ¶¶ 103-108. Da021-022. Although debt limitation appropriations have taken several forms over the decades, see Muoio Cert. at ¶¶104-107 (Da021-022) (providing examples), one feature is common to them all: they are appropriated in a stand-alone chapter law that is separate and apart from the annual Appropriations Act and supplements thereto. Muoio Cert. at ¶¶ 104. Da 021. Because they are appropriated outside of the annual Appropriations Act, debt limitation appropriations are necessarily outside of the balanced budget requirement of the Appropriations Clause. Further, it is precisely because they are "off-budget" that they are not listed in the Governor's revenue certification under the Appropriations Clause as revenues on hand or anticipated to meet appropriations in the annual budget. Muoio Cert. ¶ 109. Da022.

Notably, Plaintiffs do not object to this off-budget mechanism for expending GO Bond proceeds. Nor could Plaintiffs object, given that the State has used such appropriations consistently from at least as early as the 1960s right up until

the present day. See Muoio Cert. at ¶ 103. Da021. In fact, debt limitation appropriations go back beyond the modern constitutional era to the Civil War and Great Depression, where the State expended General Obligation bond proceeds out of a stand-alone War Fund Account and a stand-alone Emergency Relief Account, respectively, both of which were outside of the annual appropriations act. See R.M. Smith, Report of the State Treasurer (March 11, 1863) at 85; L. 1932, c. 251; see also, L. 1938, c. 313 (FY1939 Appropriations Act). The undisputed practice of debt limitation appropriations - prior to 1947 and for decades since - thus further disproves Plaintiffs' claims that the proceeds of GO bonds may not be used to fund general expenses. Whichever of the two mechanisms the State uses - a different of form rather than substance - the State may expend the GO bond proceeds at issue here to meet its expenses during a fiscal emergency caused by disaster.

E. First Principles Only Bolster This Reading Of The Debt Limitation Clause and the Appropriations Clause.

The consequences of Plaintiffs' interpretation offer yet more evidence that their view cannot be the right one, and would lead to results never intended by the Framers. Plaintiffs' point is that this Court should prevent the State from engaging in any deficit spending (notwithstanding the times the State has done so in war and in fiscal emergencies) to avoid any debt being passed to future generations. The problem, however, is that the Framers

themselves would never have contemplated such a bright line rule in times of war or fiscal emergency.

Then, as now, while there was significant dispute among economists regarding the virtues and vices of deficit spending in ordinary times, there was significant agreement on the need to do so in the midst of an economic crisis or in wartime. In the years immediately preceding the Convention, prevailing wisdom regarding spending beyond available revenues during periods of economic crisis had shifted dramatically. In the late 1920s and early 1930s, as the country plunged into an unprecedented Depression, President Hoover continued to preach the shibboleths of classical economics: balanced budgets and a faith in the market's ability to self-correct. Balanced budgets, Hoover insisted, were the "most essential factor to economic recovery" and "the foundation of all public and private financial stability." John Kenneth Galbraith, The Affluent Society 14 (Houghton Mifflin Co., 40th anniversary ed., 1998) (1958). By the late 1930s, however, the Great Depression and the New Deal had given rise to new economic orthodoxies - among them the necessity of spending beyond available tax revenues to rejuvenate an ailing economy.

No economist was more pivotal to this transformation than John Maynard Keynes, who argued that economic downturns were born of a collapse in demand for goods and services. John Maynard Keynes, The General Theory of Employment, Interest and Money 381

(1936). Under such conditions, Keynes maintained, balanced budgets and fiscal austerity would only perpetuate this vicious cycle of wilting demand and disinvestment. "The boom, not the slump, is the right time for austerity at the Treasury," Keynes argued. John Maynard Keynes, The Collected Writings of John Maynard Keynes 390 (Palgrave Macmillan, Vol. 21, 1983) (1937). It thus fell to government to invest and stimulate consumer demand, even if it meant borrowing for the duration of the downturn. See John Maynard Keynes, Essays in Persuasion 88 (Classic House Books 2009) (1931) ("Government borrowing of one kind or another is nature's remedy . . . for preventing business losses from being, in so severe a slump as the present one, so great as to bring production altogether to a standstill.").

New Deal economic policy-making reflected Keynes's conception of borrowing as an essential tool for lifting economies out of a depression. As President Roosevelt explained in 1936, "[t]o balance our budget in 1933 or 1934 or 1935 would have been a crime against the American people. . . . [T]his vicious tightening circle of our declining national income simply had to be broken." FDR: From Budget Balancer to Keynesian, Franklin D. Roosevelt Presidential Library and Museum, <https://www.fdrlibrary.org/budget> (last visited July 21, 2020). In 1937, hoping that the nadir of the Depression had passed, the Roosevelt administration began to roll back its spending programs.

Id. The result vindicated Keynes - the economy sputtered once more, producing a recession within the depression that Roosevelt's critics dubbed the "Roosevelt Recession." Id. The administration promptly reverted to Keynesian economic stimulus and never looked back. Id. Borrowing continued throughout the New Deal's later years and World War II. Id. "The acceptance by the Roosevelt administration of what became known as Keynesianism established the precedent of using deficit spending as a vehicle for promoting economic recovery in times of national fiscal crisis." Id. "The conventional insistence on the balanced budget under all circumstances and at all levels of economic activity was in retreat." Galbraith, Affluent Society, at 15.

Deficit spending during emergencies thus was not only a concept with which the Depression-era Framers would have been familiar when they added the emergency exception to the Debt Limitation Clause, debt limitation appropriation was also the dominant - and successful - economic paradigm for resolving the fiscal crisis from which they had just emerged. That remains true to this day: deficit spending is the paradigm the federal government and governments around the world are using to meet the fiscal emergency the COVID-19 health disaster has caused.¹⁷

¹⁷ See Alan Rappeport and Jim Tankersley, Monthly U.S. Budget Deficit Soared to Record \$864 Billion in June, New York Times (July 13, 2020), <https://www.nytimes.com/2020/07/13/us/politics/budget->

Indeed, even so-called "deficit hawks" have called for governments to engage in such practices to overcome a fiscal emergency, especially the one we are currently confronting.¹⁸ During an

deficit-coronavirus.html (reporting that "United States budget deficit grew to a record \$864 billion for June as the federal government pumped huge sums of money into the economy to prop up workers and businesses affected by the coronavirus"); Bjarke Smith-Meyer, EU ministers suspend deficit limits to fight coronavirus slump, Politico (March 23, 2020), <https://www.politico.eu/article/eu-ministers-suspend-deficit-limits-to-fight-coronavirus-slump/> (noting that "[f]inance ministers approved a suspension of the EU's deficit limits . . . so treasuries can boost spending in a bid to stop the coronavirus from cratering the economy"); Andrew Atkinson, U.K. Budget Deficit Swells to Record on Coronavirus Stimulus, Bloomberg (July 21, 2020), <https://www.bloomberg.com/news/articles/2020-07-21/u-k-budget-deficit-swells-to-record-in-june-on-virus-stimulus> (stating that "U.K. government borrowed over twice as much last quarter than it did in the whole of the previous year, amid the towering cost of supporting the economy through the coronavirus crisis"); Julie Gordon and Kelsey Johnson, Canada to post largest deficit since WWII on COVID-19 Spending, Reuters (July 8, 2020), <https://www.reuters.com/article/us-canada-economy/canada-to-post-largest-deficit-since-wwii-on-covid-19-spending-idUSKBN2492UQ> (noting that "Canada's budget deficit is now forecast to hit C\$343.2 billion (\$253.4 billion), the largest shortfall since the Second World War, amid record emergency aid spending in response to the COVID-19 pandemic"); Takaya Yamaguchi and Tetsushi Kajimoto, Japan approves fresh \$1.1 trillion stimulus to combat pandemic pain, Reuters (May 26, 2020), <https://www.reuters.com/article/us-health-coronavirus-japan-stimulus-idUSKBN2323D3> (reporting that "Japanese Prime Minister Shinzo Abe's cabinet approved on Wednesday a new \$1.1 trillion stimulus package that includes significant direct spending, to stop the coronavirus pandemic pushing the world's third-largest economy deeper into recession[,] and that "[t]o fund the costs, Japan will issue an additional 31.9 trillion yen in government bonds").

¹⁸ "A legion of economists, Federal Reserve officials and even some of the most outspoken proponents of deficit reduction" all agree that more government debt is necessary "to prevent a long-term

economic emergency, when it is harder than ever to raise revenues, and when slashing public services would have unusually grave consequences, the fear that officials simply avoid hard choices in times of plenty gives way to the fear that they will not have the ability to fully protect the populace in times of crisis.

Plaintiffs read the Constitution to strip New Jersey of its ability to make these same economic choices in times of war and times of economic crisis, but all the evidence suggests that the Framers intended just the opposite. The fact they specifically amended the Debt Limitation Clause to account for emergencies - not just to borrow during emergencies, but obviously to spend the resultant proceeds to get out of them - proves as much. Rather than limit the State's ability to make the economic choices so desperately need during this crisis, or during war, the Framers - reflecting the milieu from which they came - did just the opposite.

collapse in business activity and prolonged joblessness." <https://www.nytimes.com/2020/05/16/business/deficits-virus-economists-trump.html>. The economic fallout caused by the pandemic is threatening to become so severe that "many economists are now urging lawmakers to spend more" beyond the original CARES Act stimulus "in order for America to survive the recession and minimize the damage." Id. Both liberal and conservative economists agree that borrowing is necessary to combat falling tax revenues "amid a pandemic that has shuttered business activity." Id. "Other economists who have long championed deficit reduction have, in this moment of crisis, called for higher and effectively targeted spending. They include R. Glenn Hubbard, a Columbia University economist who was a top adviser to President George W. Bush, and Maya MacGuineas, the president of the Committee for a Responsible Federal Budget, who has spent years advocating deficit reduction." Id.

F. Nothing In Lance Is To The Contrary.

Against all of this - the 1% cap in the Debt Limitation Clause; the lifting of the cap during emergencies; the history of deficit spending in wartime and in the Great Depression, including spending on general expenses rather than just capital projects; the longstanding practice of debt limitation appropriations; and the principles that justify the Framers' approach - Plaintiffs' rely almost entirely on Lance v. McGreevey, 180 N.J. 590 (2004). But that decision does not stand for the propositions for which Plaintiffs cite it, because the case did not involve Debt Limitation Clause debt at all, and so the issue of the interplay between the two Clauses was left deliberately unresolved.

The only question before this Court in Lance was whether, in balancing the Appropriations Act that the Legislature and the Governor negotiate year after year, these branches could resort to contract bonding whenever they failed to reach a compromise. See id. at 596 (concerned about budget process that takes place "each fiscal year"); id. at 603 (LaVecchia, J., concurring in part) ("I too believe that the type of borrowing proposed here, if allowed to be repeated, has the potential to harm the public fisc." (emphasis added)).¹⁹ Said another way, Lance asked only whether

¹⁹ Indeed, even Plaintiffs acknowledge that Lance "only sets forth the purpose of the appropriations clause generally" and "concerned the State's issuance of appropriations-backed bonds and the Court

contract bonding could become an established, ordinary, annual tool of budget balancing. The Lance Court explicitly confined its decision to contract bonds: “[W]e hold that contract bond proceeds used to fund general expenses in the State budget do not constitute ‘revenue’ for purposes of Article VIII, Section 2, paragraph 2 of the New Jersey Constitution (the Appropriations Clause).” Id. at 593 (emphasis added). Justice LaVecchia dissented, but likewise confined her decision to contract bonds. Id. at 600 (LaVecchia, J. dissenting) (“I disagree with the majority’s determination that certain contract bond proceeds do not constitute ‘revenue’ under the Appropriations Clause”) (emphasis added).

The Lance Court was explicit as to the limits of its holding. Indeed, adhering to “the principle that courts should address only those constitutional provisions that are necessary to dispose of a matter on appeal,” Lance declined to address a “number of interesting questions” concerning “the Debt Limitation Clause.” Lance, 180 N.J. at 599. Likewise, in her dissent, Justice LaVecchia raised a number of questions regarding the Debt Limitation Clause, and was “not prepared to decide these questions” without “additional briefing and argument.” Id. at 603-04 (LaVecchia, J. dissenting); see also id. at 602 (noting that it

did not address general obligation bonds issued under the emergency exception to the debt limitation clause.” Pl. OTSC Br. at 2-3. (“Pl. OTSC Br.” refers to Plaintiffs’ letter brief filed on July 16, 2020 in support of their proposed Order to Show Cause.)

was still an open question whether the majority considered "General Obligation" bonds to be "on the same footing as contract debt"). Indeed, in language that could scarcely be more relevant, Justice LaVecchia ventured that since General Obligation bonds were subject to the strictures of the Debt Limitation Clause, "[t]here is a ready argument" for "treating contract debt differently" from General Obligation debt.²⁰ See id. at 604. The State is making just such arguments here, which is why the decision in Lance cannot control.

Perhaps most notably, the parties in Lance, including the legislative challengers, actually agreed that the proceeds of General Obligation bonds could be used to make up for revenue deficiencies. Distinguishing contract debt from GO bonds, they concluded: "Thus, the State may only use bond proceeds to offset appropriations if these bonds are issued in accordance with the Debt Limitation Clause, i.e., are general obligation debt

²⁰At the time of the Lance decision, only General Obligation debt was subject to the Debt Limitation Clause. It was not until 2009, in response to the Lance decision, that the Legislature proposed and the voters ratified an amendment to the Debt Limitation Clause that has colloquially become known as the "Lance amendment." See Senate Concurrent Resolution 39 (2008) (amending Debt Limitation Clause to require voter approval when new laws are enacted authorizing State independent authorities to issue subject-to-appropriation contract bonds). Moreover, General Obligation bonds differ from contract bonds because the former have an inherent self-balancing mechanism. That is to say, there is thus a closed circuit of proceeds, expenditure, and guaranteed pay-off that does not exist with contract bonds.

submitted to the voters for approval." See Reply Br. of Appellants in Lance v. McGreevey, 180 N.J. 590 (2004) at 7. Da664. That the Lance plaintiffs included the phrase "submitted for voter approval" is irrelevant to the present question of whether GO bond proceeds can be used to offset appropriations; all that matters is whether debt validly issued in accordance with the Debt Limitation Clause (which can be with voter approval or pursuant to the emergency exception) may be considered revenue for purposes of balancing the budget. GO bond proceeds are either revenue or they are not. And the Lance plaintiffs conceded that they are. See ibid. (noting, as general matter, that "it is reasonable to conclude that the Debt Limitation Clause should be read as an exception to the Balanced Budget Clause"); see also Lance, 180 N.J. at 602 (LaVecchia, J., dissenting) (highlighting that "plaintiffs here conceded that the proceeds of GO borrowings constituted revenue"). Not that this was in any way a surprising litigation position; as discussed above, OLS too had confirmed that the State could issue General Obligation bonds to make up for revenue deficiencies. See Da674-684

There are good reasons why Debt Limitation Debt and the contract debt at issue in Lance must be treated differently. Most obviously, the two types of debt have different constitutional roots and a different historical pedigree. Lance was thus free to forbid the use of contract bonds proceeds in this manner without

calling into question the well-established 1% cap, or the spending in which the State had engaged in the Civil War and the Great Depression. In other words, Lance did not cast any doubt on the entire analysis above because it had no reason to do so.

Perhaps even more importantly, the animating concerns behind Lance have no application here. In that case, the Court raised the specter that the Legislature and the Governor would, going forward, simply use contract debt to balance budgets as an "ordinary" measure to avoid hard political choices, precisely as it appeared was happening. Lance, 180 N.J. at 596. But that is not possible for debt under the Debt Limitation Clause - which only allows for creation of debt (and thus use of proceeds) up to a 1% cap, or with voter approval, or to deal with emergencies, wars, and the like. And this case provides a perfect contrast with Lance. The Emergency Bond Act authorizes General Obligation debt to meet expenses during a staggering international economic crisis that is unprecedented in our lifetimes and has caused revenues to fall off a cliff." See Muoio Cert. at ¶¶ 34-48. Da7-11. Entire sectors of the economy lie dormant. See EDA Cert. at ¶ 9. Nearly 1.4 million New Jerseyans - more than 10 percent of the State's population - have filed for unemployment benefits since the start of the pandemic. See Hirsch Cert. at ¶ 13. This collapse of economic activity has cut off the State's chief sources of revenue at the very moment the State needs to marshal all of its

resources to combat the fiscal emergency. See Muoio Cert. at 1. These are hardly the "ordinary" times with which the Lance Court was fairly concerned.

Given that text, structure, history, practice, and first principles all provide clear guidance as to the interplay between the Appropriations and Debt Limitation Clauses, Plaintiffs have a heavy burden to meet to prove that Lance shows otherwise. Given the limits of that decision, the concessions the Lance plaintiffs themselves made, and the distinctions between that case and this one, Plaintiffs cannot clear that high bar.

G. To The Degree This Court Perceives Conflict between the Clauses Or Ambiguity Concerning their Interrelationship, The State Still Prevails.

For the reasons above, there is only one way to read the Appropriations Clause and Debt Limitation Clause together, and it supports the State's position. But even if this Court believes that what the Debt Limitation Clause allows conflicts with what the Appropriations Clause forbids, or if there is any ambiguity on that score, then the Court must still rule for the State.

There are two reasons why any purported conflict has to be resolved in the favor of the State. First, "[i]f there is a conflict between a general and a . . . specific provision in a constitution, the special or specific provision must prevail in respect of its subject matter, but the general provision will be

left to control in cases where the special or specific provision does not apply." 16 Am. Jur. 2d (Constitutional Law) § 68 (2020). This Court has long utilized this canon of construction. See, e.g., New Jersey Transit Corp. v. Borough of Somerville, 139 N.J. 582, 591 (1995) ("It is a well established precept of statutory construction that when two statutes conflict, the more specific controls over the more general"); Kingsley v. Wes Outdoor Adver. Co., 55 N.J. 336, 339 (1970) ("When there is a conflict between a general and a specific act on the same subject, the latter shall prevail."). While the above-cited examples concerned statutory construction, this Court has made clear that canons of statutory construction "are also appropriate in the context of constitutional interpretation." Vreeland v. Byrne, 72 N.J. 292, 311 (1977).

Here, the Appropriations Clause is broad and general. Apart from fiscal-year change, it does not explicitly mention any special circumstances. By contrast, the Debt Limitation Clause addresses the specific circumstance with which we are dealing: an emergency (i.e., the revenue deficiencies that make up the emergency) caused by a disaster (i.e., the COVID-19 pandemic). The latter should control.

Second, when presented with an "apparent conflict between two provisions" of the Constitution, this Court found dispositive the "history and purposes" of the provisions as well

as the "paramount focus of the Constitutional Convention." New Jersey State League of Municipalities v. Kimmelman, 105 N.J. 422, 424 (1987). The Court then "accord[ed] primacy" to one of the clauses based on the results of this historical analysis. Ibid. As explained at length in Point II, supra, the history and purpose of the Debt Limitation Clause make clear that it was intended to permit unlimited emergency debt. And, as explained above, see pp. 35-38, supra, the "paramount focus of the Constitutional Convention" was to promote legislative flexibility, especially in fiscal emergencies. Thus, if the Debt Limitation Clause and the Appropriations Clause do conflict, the Court should accord "primacy" to the Debt Limitation Clause.

The result would be the same even if the Court were to determine that the Constitution is silent or ambiguous with regard to whether the Legislature was permitted to respond to the fiscal emergency in the way it has. Once again, two independently sufficient reasons mandate that result.

First, the "Constitution's silence" on an issue "does not help" a challenger overcome its "heavy burden of proof." Buckner, 223 N.J. at 15, 17. Here, "[n]owhere does the plain language of the Constitution forbid" the State from using the proceeds of General Obligation bonds to make up for revenue deficits during a fiscal emergency. See id. at 5. Unless "prohibited by the Constitution," the "Legislature has the power

to take any action or course reasonably necessary or incidental to the operation of government." N.J. Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 18 (1957). "Viewed another way, the Legislature is invested with all powers not forbidden." Buckner, 223 N.J. at 15.

Second, when the Constitution is ambiguous or the interplay of its provisions is uncertain, Courts should defer to the Legislature's reasonable interpretation. As Justice LaVecchia explained in Lance, "In other contexts, when we have addressed ambiguities in constitutional text, we have deferred to the legislature's conclusion where it is reasonable." Lance, 180 N.J. at 603 (LaVecchia, J. dissenting). Legislation "should not be set aside unless there is no reasonable basis for sustaining it." N.J. Ass'n of Correction v. Lan, 80 N.J. 199, 219-20 (1979). "[A]ll the relevant New Jersey cases display faithful judicial deference to the will of the lawmakers whenever reasonable men might differ as to whether the means devised by the Legislature to serve a public purpose conform to the Constitution." New Jersey Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 8 (1972). Here, the Legislature has reasonably interpreted the emergency provision of the Debt Limitation Clause to permit the State to respond to a multi-year fiscal upheaval. The Court should defer to the Legislature's interpretation.

H. In the Alternative, the State Prevails Because the

Appropriations Clause Permits the Legislature to Make "Necessary Provision" when there is a Change in Fiscal Year.

For all of the reasons explained exhaustively above, the State may use the proceeds of General Obligation bonds issued under the emergency provision of the Debt Limitation Clause to make up for revenue deficits in order to pay for operating expenses over multiple fiscal years. If the Court agrees, there is no need to examine the issue further. If, however, the Court disagrees, the State still prevails because the Appropriations Clause permits the Legislature to make "necessary provision" during a change in fiscal year. Specifically, the Framers adopted and the voters ratified an amendment to the Appropriations Clause which provided that "when a change in the fiscal year is made, necessary provision may be made to effect the transition." New Jersey Const., art. VIII, § 2, ¶ 2 (emphasis added). This "necessary provision" clause permits the Legislature to use General Obligation bond proceeds to address revenue deficiencies, operating expenses, and other fiscal disruptions attributable to a change in fiscal year.

First, neither the Appropriations Clause itself nor the Proceedings of the 1947 Constitutional Convention explain the meaning of the phrase "necessary provision." This is unsurprising. As the Supreme Court explained at length in Buckner, the Framers focused on keeping the Constitution simple because they wanted to maximize legislative flexibility. See Buckner, 223 N.J. at 26-27

(2015); see also IV Proceedings of the 1947 Constitutional Convention 113 (“[I]f there is anything that needs to be borne in mind in the Constitution it is not to put in too much. . . . Don’t, therefore, lay down a hard and fast elaborate scheme”); id. at 134 (Chief Justice Clarence E. Case urging that Constitution should allow Legislature “adequate discretion”). As the Buckner Court concluded, the Constitution “omits discretionary details.” Buckner, 223 N.J. at 27.

The Framers also knew that a change in fiscal year might disrupt the State’s finances and usual processes, but the Framers were not prophets who knew how much disruption would occur or what remedial action would be necessary. Accordingly, the Framers drafted broad language, leaving it to the Legislature to determine whatever “provision” would be “necessary” to meet the needs occasioned by a change of fiscal year.

Second, it was a fiscal upheaval of unprecedented proportions that necessitated the change in fiscal year. See Muoio Cert. at ¶¶ 18,-69; see also L. 2020, c. 19 (statute changing fiscal year entitled “An Act mitigating the fiscal impact of the Covod-19 pandemic”). The invisible enemy - that spread silently amongst us and forced a virtual shutdown of the State economy - does not abide by man-made constructs such as fiscal years. Therefore, the financial crisis, chaos, and complications that the pandemic caused did not abruptly halt on June 30, 2020 (the normal

end of the fiscal year) and will not abruptly halt on September 30, 2020 (the end of extended-FY20), but will spill into shortened-FY21 as well. See Muoio Cert. at ¶¶ 40, 69. Da9, Da14. Indeed the COVID-19 Fiscal Mitigation Act that changed the fiscal year recognized this, ordering the Treasurer to submit on May 22, 2020 a "report on the financial condition of the State budget for State Fiscal Years 2020 and 2021, as altered by" the change in fiscal year. See L. 2020, c. 19, § 5(b)(3). Likewise, the Legislature ordered the Governor to submit on August 25, 2020, a "revised budget message for State Fiscal Year 2021, as altered by" the change in fiscal year. Id. at § 6.

Because of this two-year financial fallout, it was "necessary" for the Legislature to make "provision" for both the extended year and the shortened year. In an effort to ensure that the State fulfilled the constitutional mandate to have a balanced budget on June 30, 2020, and on September 30, 2020, the State deferred into shortened-FY21 many payments that would have otherwise been made in June through September. While these deferred payments are discretionary, see Camden v. Byrne, 82 N.J. 133, 148 (1980); Burgos v. State, 222 N.J. 175, 183-84 (2015), not making them in shortened-FY21 would have devastating repercussions on the economy, on municipalities, and on the residents of the State. See Muoio Cert. at ¶ 30. Da7. In short, the deferral helped ensure compliance with the balanced budget mandate for

extended-FY20, but exacerbated the fiscal crisis for shortened-FY21. See Muoio Cert. at ¶ 84. Da18.

Exercising its constitutionally-permissible discretion, the Legislature therefore authorized the issuance of General Obligation bonds, the proceeds of which could address revenue deficiencies in shortened-FY21. Indeed, issuing General Obligation bonds to generate revenue for FY21 in order to pay operating expenses may be “necessary” in the most literal, existential sense. See Muoio Cert. at ¶ 112. Da24. As the Civil War and Great Depression taught, sometimes the budget cannot be cut enough to accommodate both essential services and emergency needs. See pp. 57-58, supra; see also Muoio Cert. at ¶¶119-21. Da25. If the Framers designed the Appropriations Clause to permit the Legislature to make “necessary provision” during an ordinary change of fiscal year, how much more so in a change of fiscal year that was caused by a fiscal emergency. The Framers intended this safety valve in the Appropriations Clause to allow for exactly the type of flexible response that the Legislature crafted here.

POINT IV

EVEN IF THE COURT WERE TO FIND THE EMERGENCY BOND ACT UNCONSTITUTIONAL, THE COURT SHOULD EXERCISE ITS EQUITABLE POWERS WHEN FASHIONING A REMEDY.

“Public fiscal stability is at issue.” Salorio v. Glaser, 93 N.J. 447, 465 (1983). These six words – at once sobering and pragmatic – uttered by this Court nearly four decades ago have

served as a guiding light for numerous courts in times of crisis. Here, the State firmly believes for all of the reasons explained in detail above, see pp. 40-88, supra, that it should prevail on the merits. If the Court were to find otherwise, however, it should craft an equitable remedy that does not plunge the State into even greater fiscal chaos.

First, this Court has exercised its equitable powers to fashion a remedy even in those cases where it has held that the State's actions violated the Constitution. For example, in Salorio, the State had enacted the Emergency Transportation Tax Act ("EET"), which levied a tax on the New Jersey-derived income of New Yorkers who commuted to work in the Garden State. Salorio, 93 N.J. at 449. The Court held that the ETT violated the federal Privileges and Immunities Clause and issued a declaratory judgment to that effect. Id. at 463. The Court next addressed whether plaintiffs were entitled to reimbursement for the taxes they had already paid. Ibid. Noting that "reimbursement would have a substantial effect on the State's existing financial" condition and "[p]ublic fiscal stability" was at stake, the Court refused to order the State to "surrender ETT receipts." Id. at 465-66.

Finally, the Court considered when its decision would become effective. "Many factors that justify our refusal to grant reimbursement are equally applicable in determining the effective date of our opinion," the Court noted. Id. at 467. Citing

"budgetary constraints," the fact that the State intended to expend ETT receipts on matters related to "the public welfare," and the pragmatic consideration that it was "unrealistic" to expect the Legislature and Governor to come up with an alternate solution to the revenue deficit problem, the Court permitted the State to collect the tax for another six months. Id. at 467-68. "There is no question," the Court concluded, that the judiciary is "empowered and justified in confining the effect of a decision of first impression or of novel or unexpected impact to prospective application." Id. at 465.

Further, in Lance, the Court held that its decision "should be given prospective effect only" because the "resulting disruption to the State government could be great" if the Court's opinion were to have immediate effect. Lance, 180 N.J. at 593. The budget for the fiscal year at issue in Lance had already been passed and balanced by contract bond proceeds by the time the case reached the Court. Here, while the extended-FY20 budget was passed without reliance on bond proceeds, the budget was premised on the notion of deferred payments of core obligations that would be paid in shortened-FY21 with bond proceeds. See Muoio Cert. at ¶ 115. Da24. Moreover, in addition to currently known needs, given the volatility of the economy and the disastrous effects States that have re-opened too soon have experienced, there is no telling what may happen in the State over the remaining two months of extended-

FY20 that will necessitate the use of bond proceeds just to survive. With this pandemic, developments occur daily and two months is literally a lifetime. The State must have the tools necessary to be able to respond in real time.

As for shortened-FY21, a practical alternative to the use of bond proceeds simply may not exist. In September, the Legislative-Plaintiffs and their compatriots in both houses will join with the Governor in looking for budget items that may be cut, taxes that can be raised, CARES Act funds that they can convince the federal government to loosen the restraints on, and the efficacy of novel ideas for bringing extra money into the State's coffers. See Muoio Cert. at ¶ 119. Da25. But if - as appears very likely - even all of these tools taken together are not enough to meet the fiscal emergency, then the State will need another tool in its toolbox: borrowing. See Muoio Cert. at ¶ 112. Da24. Finally, prudence demands that the State have the borrowing tool at hand for the duration of FY21, especially if the State is overwhelmed by an expected second surge of the virus in the Fall or Winter. See Muoio Cert. at ¶ 69. Da14. It is not enough for the State budget to be balanced on a pin at the start of FY21. The State needs fiscal flexibility to fight the inevitable battles ahead with a pernicious, resurgent enemy.

Accordingly, even if the Court finds the State's legal conclusions to be "erroneous," see Lance, 180 N.J. at 508, the

Court should exercise its equitable powers and give prospective-only effect to its decision.

Second, courts have given prospective effect to their decisions when much lesser monetary amounts were at stake than the multiple billions at stake here. For example, in Neptune v. Avon, Avon's entire beach receipts were less than \$150 thousand. Borough of Neptune City v. Borough of Avon-By-The-Sea, 61 N.J. 296, 302 (1972). Even though the Court determined that Avon's practice of charging higher beach fees to nonresidents was "illegal," the Court refused to give retrospective effect to its decision because "Avon very likely has operated its budget and financial affairs on the basis of the beach user fees expected to be collected under the present schedule." Id. at 310-11. In Fishman, only \$20 million was at stake, but the Court made its ruling prospective-only because forcing the State to have to forego this amount would "cause disruption" of "ongoing fiscal responsibilities." New Jersey Hosp. Ass'n v. Fishman, 283 N.J. Super. 253, 267 (1995). Finally, in Gruzen, the Court did not even bother trying to quantify how much money was potentially at stake, finding sufficient the mere fact that the State relied upon it. See N.J. Educ. Facilities Auth. v. Gruzen P'ship, 125 N.J. 66, 68-9 (1991). At issue in Gruzen was whether a general statute of limitations runs against the State when it asserts a contract claim. The Court answered in the affirmative, but made its ruling prospective in

order to "avoid disruptions of governmental fiscal affairs." Id.
at 69.

Here, it is not an unknown amount that is at stake, it is not a mere \$20 million, and it is not a fraction of a municipal budget. Rather, it is the State budget - a budget on which every citizen and political subdivision relies. And at issue are billions of dollars in lost revenues and the essential functions that these revenues support. The pandemic is a still-present enemy whose tentacles have left no segment of society unscathed and that threatens to erupt again. Delicately balanced on the fulcrum of the Court's decision is the "fiscal stability" of the entire State during this time of catastrophic fiscal emergency.

CONCLUSION

The Court should rule for the State.

Respectfully submitted,

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