# Superior Court of New Jersey

**APPELLATE DIVISION**
**DOCKET NO. A-003621-21T1**

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| STATE OF NEW JERSEY,<br><br>Plaintiff-Respondent,<br><br>v.<br><br>ALBERT FRENCH,<br><br>Defendant-Appellant. | CRIMINAL ACTION<br><br>On Appeal from a Final Order of the Superior Court of New Jersey, Law Division, Hunterdon County<br><br>Sat Below:<br>Hon. Angela F. Borkowski, J.S.C. |

## BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT THE STATE OF NEW JERSEY

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## COUNTER STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

On April 7, 2020, at approximately 4:24 p.m., Patrolman William Musacchio of the Clinton Township Police Department observed an individual — later identified as the defendant, Albert French — walking westbound on Route 22 in the eastbound lanes and carrying a posterboard which depicted the word "phuck[.]" (1T10:2-10; 1T11:17 to 12:12; 1T16:21-24; 1T17:22 to 18:5; 1T21:17-23; 1T27:22 to 28:8).[2] At this time, Governor Phil Murphy had recently declared a state of emergency and instituted Executive Order No. 107 ("EO 107"),[3] which was otherwise known as the stay-at-home order. (1T13:11

[1] The State combines its Counter Statement of Procedural History and Counter Statement of Facts for the Court's convenience.

[2] "1T" refers to the Transcript of Hearing before the Honorable Eric M. Perkins, J.M.C. on March 25, 2021.
"2T" refers to the Transcript of Trial before the Honorable Eric M. Perkins, J.M.C. on March 25, 2021.
"3T" refers to the Transcript of Municipal Appeal before the Honorable Angela Borkowski, J.S.C. on June 15, 2022.
"Db" refers to defendant-appellant's brief.
"Da" refers to defendant-appellant's appendix to his brief.

[3] Exec. Order No. 107 (Mar. 21, 2020), 52 N.J.R. 554(a) (Apr. 6, 2020). On June 4, 2021, through Executive Order No. 244, Governor Murphy terminated the public health emergency in New Jersey, which effectively superseded EO 107. On January 11, 2022, through Executive Order No. 280, Governor Murphy declared a new public health emergency due to a surge in COVID-19 cases. On March 4, 2022, through Executive Order No. 292, Governor Murphy again terminated the public health emergency, which remains in effect as of the date of this brief.

to 14:5). Patrolman Musacchio's attention was therefore drawn to defendant's behavior. (1T19:24 to 20:5).

Patrolman Musacchio observed defendant raise the posterboard towards both passing motorists and Patrolman Musacchio. (1T20:6-10). Defendant eventually crossed Route 22 and turned and faced the highway, after which he grabbed his genitals over his clothing and shook them at passing motorists. (1T20:15-25; 1T23:3-25). Patrolman Musacchio further observed defendant gesture the middle finger to passing motorists. (1T24:3-13).

Patrolman Musacchio decided to arrest defendant for violating EO 107 and for engaging in disorderly conduct. (1T25:11-24). Defendant became irate when Patrolman Musacchio made contact with defendant to detain him. (1T27:2-10; 28:23 to 29:2). Defendant stated that he qualified as an essential worker[4] and, while continuing to behave "in a very loud and boisterous manner[,]" he began to distance himself from Patrolman Musacchio and a supervising officer who recently arrived on scene. (1T30:12-16). Defendant disregarded Patrolman Musacchio's instructions not to leave. (1T30:17-22).

[4] Defendant claimed he was an "essential worker at a job[,]" but he did not articulate where he worked. (1T57:21 to 58:2). Defendant also confronted Patrolman Musacchio about whether he questioned if defendant was an essential worker. (1T58:3-6). Notably, the area at which the incident occurred included several businesses which may or may not have been open due to the state of emergency. (1T60:10-20). Patrolman Musacchio did not observe defendant approach any of those local businesses. (1T60:21-24).

Patrolman Musacchio nonetheless decided that the most prudent course was not to pursue defendant because of COVID-19 and defendant's heightened emotional state. (1T30:25 to 31:6). Instead, Patrolman Musacchio issued summonses against defendant, which charged him with violating EO 107, disorderly conduct, municipal ordinance violations, and improper crossing. (1T31:15-22). See also (Da 39).

Approximately one month later, on May 6, 2020, at about 4:21 p.m., Sergeant Jeffrey Glennon of the Clinton Township Police Department responded to the area of Route 31 and Route 513 on a report of an individual who was walking in the roadway and holding a sign. (2T5:10-12; 2T8:19 to 9:6). When Sergeant Glennon arrived, he observed an individual holding a sign who he identified as defendant and with whom he was familiar from past interactions. (2T9:7-12; 2T10:23 to 11:18). Defendant was walking north on the southbound side of Route 31 in the direction of oncoming traffic. (2T10:7-16).

Sergeant Glennon exited his vehicle and attempted to speak to defendant, who immediately began yelling that he was an essential employee while gesturing towards the Rita's Ice shirt he wore. (2T11:22 to 12:25). Defendant avoided Sergeant Glennon's inquiries into what defendant was doing and instead acted irately and yelled. (2T13:3-7). Sergeant Glennon

observed that defendant possessed a two-sided sign that depicted the phrase, "slow down police ahead[,]" and on the reverse, "phuck[.]" (2T13:8-24). Defendant became "really agitated" with Sergeant Glennon and advised that he was rightfully protesting, was an essential employee, and did not "want to be a part of [Sergeant Glennon's] investigation anymore." (2T14:2-15). Sergeant Glennon could not communicate with defendant because he behaved so erratically and out of control. (2T22:6-13). For these reasons, Sergeant Glennon questioned defendant's mental health. (2T22:14-16; 2T23:18-23).

Defendant appeared to have no legitimate reason for being out in public in violation of EO 107, yet he again indicated that he was working. (2T23:24 to 24:13; 2T32:18 to 33:3). Sergeant Glennon's supervising officer instructed defendant to leave, after which defendant proceeded to walk backwards while giving the officers the middle finger. (2T24:14-17). Defendant eventually left the scene by walking with the flow of traffic down the Route 513 jughandle at the Route 31 intersection, and then properly crossing the road towards a small business plaza where his vehicle was parked. (2T26:4-23; 2T32:6-17).

Sergeant Glennon learned that defendant did not reside in or anywhere near the commercial plaza — the businesses in which may or may not have

been open — and that he did work at Rita's Ice[5] until his 4:00 p.m. shift concluded that day. (2T26:24 to 27:24; 2T28:3 to 29:7; 2T41:12-24). With the guidance of an assistant prosecutor, Sergeant Glennon issued summonses against defendant for violating EO 107, disorderly conduct, a municipal ordinance violation, and improper walking. (2T31:12 to 32:5) See also (Da 40-45).

On March 25, 2021, defendant appeared before the Honorable Eric M. Perkins, J.M.C. for trial on all of the charges issued from the April 7, 2020 and May 7, 2020 incidents. (1T; 2T). Regarding the April 7, 2020 incident, Judge Perkins heard the testimony of Patrolman Musacchio and found defendant guilty of violating EO 107 and one count of disorderly conduct for grabbing his genitalia for passing motorists to see. (1T7:21 to 78:19). He dismissed the remaining disorderly conduct count, the municipal ordinance violations, and the improper crossing summons. (1T78:20 to 80:5). Judge Perkins imposed a $500.00 fine and $33.00 in costs for the EO 107 conviction, and a $250.00 fine and $158.00 in mandatory penalties for the disorderly conduct conviction. (1T78:7-8; 79:1-3).

With regard to the May 6, 2020 incident, Judge Perkins heard the testimony of Sergeant Glennon and found defendant guilty of violating EO 107

[5] The Rita's Ice was located approximately one mile north of the area where police encountered defendant. (2T27:24 to 28:2; 2T29:8-11).

and improper walking. (2T5:3 to 55:25). He dismissed the disorderly conduct charge and the municipal ordinance violation. (2T54:15 to 55:6). Judge Perkins deferred sentencing until the Municipal Prosecutor and defense counsel could provide more information to the court concerning defendant's background. (2T56:16 to 57:8).

On April 28, 2021, Judge Perkins sentenced defendant for the violation of EO 107 to a one-year period of probation, a fourteen-day suspended jail term, a $500.00 fine, and $33.00 in costs. (Da 17). He further imposed a $103.00 fine for the improper walking conviction. (Ibid.).

Defendant appealed his municipal court convictions to the New Jersey Superior Court, Law Division, which subsequently conducted a trial de novo. (3T; Da 7-38). On June 15, 2022, the Honorable Angela F. Borkowski, J.S.C. found defendant guilty of violating EO 107 on both April 7, 2020 and May 6, 2020, and for improper walking on May 6, 2020. (Da 5; 3T36:25 to 37:4; 3T41:4 to 43:10; 3T45:22-25; 3T46:4-6). Judge Borkowski acquitted defendant of disorderly conduct for grabbing his genitalia for passing motorists to see. (Da 5; 3T37:5 to 41:3; 3T46:7-8). She imposed substantially the same sentences Judge Perkins ordered below. (Da 6; 3T46:9-17).

This appeal follows.

## LEGAL ARGUMENT

### POINT I

### THE LAW DIVISION JUDGE CORRECTLY FOUND THAT DEFENDANT VIOLATED EO 107 ON APRIL 7, 2020 AND MAY 6, 2020.

Defendant argues that his conduct on both April 7, 2020 and May 6, 2020 did not violate EO 107. (Db 9). The State submits that the Law Division judge committed no error in finding that defendant's behavior on both occasions violated EO 107. This Court should not disturb that decision.

An appellate court's review of a municipal appeal to the Law Division is limited. State v. Adubato, 420 N.J. Super. 167, 175-76 (App. Div. 2011). See also R. 3:23-8(a)(2). While the Law Division judge must decide the matter de novo on the record, State v. Monaco, 444 N.J. Super. 539, 549 (App. Div. 2016) (citing R. 3:23-8(a)(2)) — which requires making independent factual findings about witness credibility, giving "due" but "not necessarily controlling" weight to the municipal judge's credibility determinations, State v. Heine, 424 N.J. Super. 48, 58 (App. Div. 2012); Adubato, 420 N.J. Super. at 176 — the Appellate Division does not decide facts de novo. See also State v. Johnson, 42 N.J. at 146, 157 (1964). "Under the two-court rule, appellate courts ordinarily should not undertake to alter concurrent findings of facts and credibility determinations made by two lower courts absent a very obvious and

exceptional showing of error." State v. Locurto, 157 N.J. 463, 474 (1999) (citing Midler v. Heinowitz, 10 N.J. 123, 128-29 (1952)). See also Johnson, 42 N.J. at 161-62 (the Appellate Division decides whether the Law Division judge's factual findings were supported by "sufficient credible evidence."); State v. Robertson, 228 N.J. 138, 155 (2017) (where both the municipal judge and the Law Division judge have found a witness credible, appellate courts owe particularly strong deference to the Law Division judge's credibility findings).

On the other hand, the Law Division judge's legal conclusions and the legal consequences that flow from established facts are reviewed de novo on appeal. See State v. Goodwin, 224 N.J. 102, 110 (2016). See also Manalapan Realty, L.P. v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995) (citing State v. Brown, 118 N.J. 595, 604 (1990)) (appellate courts owe no deference to conclusions of law made by the trial court); State v. Handy, 206 N.J. 39, 45 (2011) (the Appellate Division exercises plenary review of the judge's legal conclusions that flow from established facts).

Here, defendant maintains that he did not violate EO 107 because he was engaged in several categorical exceptions during each incident. (Db 10). In particular, defendant argues that he was engaged in the expressly permitted acts of walking, political protest, and essential work. (Db 10-11).

"[D]ue to the increase of confirmed COVID-19 cases nationally and in [New Jersey], and based upon the CDC's advice," Governor Murphy issued EO 107 on March 21, 2020, "which 'established statewide social mitigation strategies for combatting COVID-19[.]'" Mac Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 11 (App. Div. 2022) (quoting EO 107). EO 107 generally required individuals to stay at home with certain exceptions, including:

> 1) obtaining goods or services from essential retail businesses, as described in Paragraph 6; 2) obtaining takeout food or beverages from restaurants, other dining establishments, or food courts, pursuant to Paragraph 8; 3) seeking medical attention, essential social services, or assistance from law enforcement or emergency services; 4) visiting family or other individuals with whom the resident has a close personal relationship, such as those for whom the individual is a caretaker or romantic partner; 5) reporting to, or performing, their job; 6) walking, running, operating a wheelchair, or engaging in outdoor activities with immediate family members, caretakers, household members, or romantic partners while following best social distancing practices with other individuals, including staying six feet apart; 7) leaving the home for an educational, religious, or political reason; 8) leaving because of a reasonable fear for his or her health or safety; or 9) leaving at the direction of law enforcement or other government agency.
>
> [EO 107 at ¶ 2. See also Branchburg Hosp. LLC v. Twp. of Branchburg, 32 N.J. Tax 546, 556 n.5 (Tax 2022) ("EO 107 order[ed] all New Jersey residents to remain home unless engaging in certain specified activities such as grocery shopping, obtaining medical attention, or reporting to work").]

The stay-at-home requirement of EO 107 applied to the entire population of New Jersey — it was not targeted at certain individuals. See EO 107 at ¶ 24

("It shall be the duty of every person or entity in this State or doing business in this State . . . to cooperate fully in all matters concerning this Executive Order."). A violation of EO 107 — which included, among of things, refusals to obey the lawful orders of, or cooperate with, authorized emergency enforcement personnel — qualified as a disorderly persons offense. Id. at ¶ 25; N.J.S.A. App. A:9-49.

At the trial de novo on the charges stemming from April 7, 2020, Judge Borkowski found that the initial investigatory stop by the Clinton Township Police Department was proper because "[t]he officers were justified in making contact with [defendant] in order to determine whether or not he was in compliance with [EO 107]." (Da 31). Indeed, EO 107 had only been in effect for a few weeks, and "without making initial contact with an individual, law enforcement [would] not know why an individual [wa]s out and not at home." (Ibid.). Judge Borkowski found that defendant refused to cooperate with EO 107 and its penalty provisions in N.J.S.A. App. A:9-49 by becoming immediately combative; saying that he "will not be part of this investigation"; disregarding the officers' instructions not to leave; and repeatedly ordering the officers to get into their vehicle. (Ibid.). Defendant behaved this way in spite of the officer's performance of their legal duties during a declared state of emergency that resulted in the lethal spread of a dangerous disease, during

which they compromised their own safety when they responded to defendant. (Ibid.).

Judge Borkowski further determined that defendant "was not engaged in a traditional recreational activity[,]" but was rather "protesting on the side of the road" — "a high conflict activity with a much greater chance of resulting in interpersonal activity than jogging around one's neighborhood or taking a solitary walk." (Da 32).

Judge Borkowski also found that Patrolman Musacchio's testimony "and the presence of a sign bearing misspelled profanity weigh[ed] against the possibility that [defendant] was returning from work." (Da 33). And even assuming that he was returning from work, "there c[ould] be no doubt that under the [O]rder, essential workers could leave their residences to go to work, and to go home from work[;] not to leave work, engage in a disallowed activity for a period of time, and then continue on the way home." (Ibid.).

Additionally, Judge Borkowski determined that defendant's political protesting behavior contradicted the categorical exception that permitted "leaving the home for an educational, religious, or political reason." (Ibid.) (quoting EO 107 at ¶ 2). In other words, "[w]hen read with the purpose of the [Order] in mind, it is clear that individuals were to leave their residences, perform the educational, religious, or political purpose of their leaving in as

efficient and socially-distanced a manner as possible, and then go home[,]" none of which defendant did here. (Da 33-34).

Accordingly, Judge Borkowski convicted defendant of violating EO 107 on April 7, 2020. (Da 34).

In a similar vein, at the trial de novo on the charges relating to the May 6, 2020 incident, Judge Borkowski found that defendant "was not engaged in recreational outside activity" — "[h]e was in an unusual place" during a time of emergency; he was standing in an area on the road very close to where other vehicles would be driving; and he was holding a sign and walking backwards on the wrong side of the road. (Da 36). For these reasons, "the officers were justified in approaching [defendant] to determine why he was standing on the shoulder of the road holding a sign, and to ascertain whether he followed the [E]xecutive [O]rder." (Ibid.). When approached by Sergeant Glennon, defendant "became combative"; turned his back; began to yell; made "emphatic hand gestures"; interrupted the officers; demanded a lawyer; stated that he did not want to participate in the investigation any longer; and referred to an officer as a "tyrant." (Ibid.). In short, Judge Borkowski determined that defendant was "hostile and combative towards officers who were carrying out their lawful duties during a time of emergency, and in doing so, he violated [EO] 107[.]" (Ibid.).

Judge Borkowski was also not persuaded by defendant's contentions that he was returning from work and engaging in political protesting behavior, notwithstanding that he wore a Rita's Ice shirt and his employer confirmed that his shift concluded approximately twenty minutes prior to the police encounter. (Da 37). Simply put, "walking backward[s] while holding a sign is simply not a part of commuting to and from work in an efficient and socially distanced manner." (Ibid.).

In the face of these detailed findings of fact and reasoned legal conclusions, which were based on ample credible evidence in the record below, defendant asks this Court to vacate his convictions of, and dismiss the charges for, violating EO 107 on April 7, 2020 and May 6, 2020 because he was engaged in the categorical exceptions of walking, protesting, and working. (Db 10-11, 20). Applying this Court's limited standard of review, Judge Borkowski's decisions should stand.

Defendant was not simply walking on both occasions. (Db 10). Rather, the record reflects that he was holding a sign that contained selective language aimed at police while walking on the side of busy roads during a declared public health emergency, which social distancing and minimal unnecessary outdoor exposure were required to effectively combat. Furthermore, assuming arguendo that defendant did engage in political activity, (Db 10-11), EO 107

expressly provides that the exception only applies to those who leave their home for a political reason. The record here shows that defendant was, at best, returning from work to engage in political protest — not leaving his home. Finally, the record does not reflect that defendant was "engaged in an essential activity" or "involved in the essential activity of commuting from his job." (Db 11). Defendant protested on the side of busy roads away from both his place of employment and his vehicle. It strains credulity to believe that defendant's behavior here constituted "reporting to, or performing, [his] job[,]" as plainly articulated in the exception. EO 107 at ¶ 2.

Notably, defendant did not violate EO 107 based solely on his conduct above. EO 107 mandates that "every person . . . cooperate fully in all matters concerning" the Order. Id. at ¶ 24. And a person violates EO 107 if he, among other things, refuses to obey the lawful orders of, or refuses to cooperate with, a "person who is duly authorized to perform any act or function" during, or in connection with activities during, "the threat or imminence of danger or any emergency[.]" N.J.S.A. App. A:9-49f, g. Here, the record demonstrates that defendant became immediately combative with the officers during the encounter; disregarded the officers' orders; yelled; interrupted; called the officers names; made emphatic hand gestures and motions; and unequivocally stated that he was unwilling to cooperate with the

officers' investigations. Stated simply, defendant's behavior individually and collectively contravened the Executive Order and its penalty provisions. Accordingly, Judge Borkowski correctly determined that defendant violated EO 107 on April 7, 2020 and May 6, 2020.

## POINT II

## EO 107 WAS NOT UNCONSTITUTIONALLY VOID FOR VAGUENESS.

Defendant raises for the first time on appeal that the Law Division judge's interpretation of EO 107 renders it unconstitutionally vague because it required defendant to read EO 107 "'with the purpose of the act in mind' rather than the plain language of the" Order. (Db 13-14) (quoting Da 33). Defendant suggests that the trial court contrived an interpretation of EO 107 and the Disaster Control Act[6] to convict defendant of engaging in expressly permitted activities, which consequently rendered EO 107 unconstitutionally vague because defendant could not have been on notice that such activities were contemplated by the purpose of EO 107. (Db 14).

"Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below." State v. Galicia, 210 N.J. 364, 383 (2012). "[A]ny error or omission shall be disregarded by the

[6] N.J.S.A. App. A:9-30 et seq.

appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result[.]" Id. at 386; R. 2:10-2. See also State v. Witt, 223 N.J. 409, 419 (2015) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)) ("For sound jurisprudential reasons, with few exceptions, 'our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available.'"); Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (quoting Robinson, 200 N.J. at 20) (appellate courts will ordinarily not address an issue on appeal that the parties have not raised before the trial court, absent concerns involving "the jurisdiction of the trial court" or "matters of great public interest.").

Here, defendant failed to raise to both the municipal court and the Law Division judge his constitutional challenge to EO 107 under the void-for-vagueness doctrine. Guided by the standards above, and in the absence of a concern involving a matter of great public interest, this Court should decline to consider defendant's contention. However, even if defendant's constitutional challenge was ripe for review, EO 107 was not unconstitutionally void for vagueness, and there was no plain error by the Law Division judge worthy of disturbing defendant's convictions and sentences.

Similar to how an appellate court "review[s] a statute de novo, owing no deference to the trial court's interpretation, . . . it follows that [it] will interpret

the meaning of a valid executive order de novo. Talmadge Village LLC v. Wilson, 468 N.J. Super. 514, 517 (App. Div. 2021) (citing State v. Pinkston, 233 N.J. 495, 507 (2018)). "Executive orders, when issued within their appropriate constitutional scope, are an accepted tool of gubernatorial action." Communications Workers of America, AFL-CIO v. Christie, 413 N.J. Super. 229, 254 (App. Div. 2010). To be sure, a valid executive order is the functional equivalent of a statute enacted by the Legislature. Talmadge Village LLC, 468 N.J. Super. at 517 (citing 37 N.J. Practice, Administrative Law and Practice § 3.22 (Steven L. Lefelt, Anthony Miragliotta, and Patricia Prunty) (2d ed. 2000)). Nevertheless, "[a]n executive order is invalid if it usurps legislative authority by acting contrary to the express or implied will of the Legislature." Communications Workers of America, 413 N.J. Super. at 259. "Therefore, an executive order will be construed to conform with applicable statutory enactments if it is reasonably susceptible to such a construction." In re Highlands Master Plan, 421 N.J. Super. 614, 625 (App. Div. 2011) (citing Worthington v. Fauver, 88 N.J. 183, 194-201 (1982); Bullet Hole, Inc. v. Dunbar, 335 N.J. Super. 562, 575 (App. Div. 2000)).

"The constitutional doctrine of vagueness 'is essentially a procedural due process concept grounded in notions of fair play.'" State v. Borjas, 436 N.J. Super. 375, 395 (App. Div. 2014) (quoting State v. Emmons, 397 N.J.

Super. 112, 124 (App. Div. 2007)). "A law is void if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." Twp. of Pennsauken v. Schad, 160 N.J. 156, 181 (1999) (citations and internal quotation marks omitted). To withstand a void-for-vagueness challenge, a penal law "must define the offense 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" State v. Clarksburg Inn, 375 N.J. Super. 624, 633 (App. Div. 2005) (quoting State v. Golin, 363 N.J. Super. 474, 482-83 (App. Div. 2003)).

Governor Murphy invoked certain emergency powers conferred upon him through "the Constitution and statutes of the State of New Jersey, particularly the provisions of N.J.S.A. 26:13-1 et seq., N.J.S.A. App. A:9-33 et seq., N.J.S.A. 38A:3-6.1, and N.J.S.A. 38A:2-4[,]" when he entered EO 107 to, among other things, "mitigate community spread of COVID-19" by "limit[ing] the unnecessary movement of individuals in and around their communities and person-to-person interactions[.]" EO 107. In so ordering, the Governor reasonably recognized that certain enumerated activities should fall outside of the general mandate that "[a]ll New Jersey residents shall remain home or at their place of residence[.]" Id. at ¶ 2. But notwithstanding the exceptions to the stay-at-home order, every person was still required to "cooperate fully in

all matters concerning" EO 107. Id. at ¶ 24. And any failures to do so would be met with penalties imposed under N.J.S.A. App. A:9-49, id. at ¶ 25, which established a disorderly persons offense for, among other things, violating EO 107, or refusing to obey the lawful orders of, or cooperate with, authorized emergency enforcement personnel.

The foregoing summarizes the relevant, express text of EO 107. The plain language and, consequently, the plain meaning of EO 107 are very clear. Defendant violated EO 107 on both April 7, 2020 and May 6, 2020 when he behaved contrary to the express provisions of the Order and the referenced penalty provisions in N.J.S.A. App. A:9-49. Judge Borkowski found similarly. She did not, as defendant claims, convict defendant "based on an 'underlying purpose' of a statute instead of the [E]xecutive [O]rder's plain language." (Db 13).

The text of EO 107 did not invite guessing at its meaning and differing as to its application. To contrary, the face of EO 107 clearly described what was required, what was prohibited, what was permitted, and what would result if a violation occurred. While it is true that "[w]alking and political activity were expressly permitted by the plain language of" EO 107, (Db 14), for the reasons already explained, defendant was not simply walking on April 7, 2020 and May 6, 2020; nor was he engaging in political protesting behavior in the

manner plainly permitted by EO 107. In short, the record before Judge Borkowski permitted her to find that defendant violated EO 107, which outlined what was proscribed and what was permitted with sufficient definiteness for an ordinary person, like defendant, to understand.

Although not directly analogous, a void-for-vagueness challenge was similarly addressed in State v. Congdon, 76 N.J. Super. 493, 496 (App. Div. 1962), in which this Court reviewed a conviction for a violation of N.J.S.A. App. A:9-49f. The defendant-students at Drew University in Madison, New Jersey, refused to participate in and comply with a "take cover" exercise as part of the Governor's proclamation of a civil defense practice drill, which was scheduled to take place on April 28, 1961. Id. at 496-97. Several days prior to the execution of the drill, the University notified the student body that participation in the exercise applied to all students, and that failure to participate could result in a disorderly persons conviction, which carried incarceration and monetary penalties. Id. at 497. The defendant-students orchestrated a peaceful protest by circulating a leaflet, which articulated the plan and "the penalties imposed by law for failing to take cover[.]" Id. 497-98. On the day of the drill, the defendant-students "refused to take cover when specifically requested to seek protection in a nearby building by Drew University's civil defense and disaster control co-ordinators." Id. at 499. A

municipal court convicted them of violating N.J.S.A. App. A:9-49f and g. Ibid. On appeal, the Law Division judge convicted the defendant-students of only violating subsection f. Ibid.

This Court entertained the defendant-students' contention that "the Disaster Control Act and the orders issued pursuant to that act are so vague as to constitute a denial of due process[.]" Id. at 504. In rejecting that constitutional challenge, this Court described with particularity the notice Drew University provided to its students, which warned that a failure to take cover during the drill "may result in your being adjudged a disorderly person and punished by imprisonment . . . for a term not exceeding one year or by fine not exceeding . . . $175.00 . . . or both[.]" Ibid. (internal quotation marks omitted). The notice went on to offer students access to the Disaster Control Act and "a more complete statement of the law and penalty" in the University library and student union building. Ibid. "Under these circumstances," this Court found, "it is difficult to see how defendants can now claim that they did not have notice of the penalties involved. Their very actions belie any such claim. The [leaflet] they distributed expressly mentioned the penalties involved[.]" Ibid.

Here, there can be no question that New Jersey residents were aware of Governor Murphy's proclamation of EO 107 during the commencement of the

public health emergency in March 2020. The Order was a novel, yet necessary exercise of the Governor's emergency powers, which drew a variety of responses from the public. Equally true is that the express text of EO 107, like the warning notice in Congdon, sufficiently advised defendant and all New Jersey residents of what behavior was subject to penalties. Indeed, defendant's own invocations, albeit incorrectly, of the political-protest and essential-worker exceptions when confronted by police demonstrated his awareness of the provisions of EO 107. And any person of common intelligence understands that leaving from work to engage in political protesting behavior does not equate to leaving from home for a political reason or "reporting to, or performing, their job[.]" EO 107 at ¶ 2. Likewise, an ordinary person is aware that the "duty . . . to cooperate fully in all matters concerning" EO 107 does not translate into behaving irately and disobediently towards police officers who are authorized to perform their duties during the public health emergency. Id. at ¶¶ 24, 25; N.J.S.A. App. A:9-49f, g, h.

For these reasons, this Court should reject defendant's constitutional challenge and find that EO 107 was not void for vagueness.

## POINT III

## EO 107 AND THE DISASTER CONTROL ACT, AS APPLIED, DID NOT UNREASONABLY LIMIT DEFENDANT'S FIRST AMENDMENT RIGHT TO PROTEST.

Defendant argues next, and for the first time on appeal, that the Law Division judge's application of EO 107 and the Disaster Control Act infringed on his right to protest as guaranteed by the First Amendment to the United States Constitution. (Db 14). Defendant alleges that the Law Division judge's conviction violates his free speech rights because he was engaged in "protected political speech[.]" (Ibid.). And, curiously, without citing any authority in support, defendant maintains that Judge Borkowski was required to sua sponte analyze whether defendant's municipal court conviction violated his constitutional rights. (Ibid.).

This Court should decline to consider defendant's conclusory arguments here due to his failure to raise them before both lower courts and because they are not of such a nature as to have been clearly capable of producing an unjust result. Galicia, 210 N.J. Super. at 383, 386. However, even if defendant's constitutional challenge was appropriately raised before this Court, EO 107 and the Disaster Control Act did not unreasonably limit defendant's right to protest, and there was no plain error by the Law Division judge worthy of disturbing defendant's convictions and sentences.

Defendant conveniently disregards that our First Amendment jurisprudence permits reasonable regulations on speech-connected activities in carefully restricted circumstances.

> [T]he right to free speech is not absolute and is subject to reasonable limitations. A governmental entity may impose reasonable time, place, and manner restrictions on speech in a public forum so long as the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.
>
> [Besler v. Board of Educ. of West Windsor-Plainsboro Regional School Dist., 201 N.J. 544, 570 (2010) (internal citations and quotation marks omitted).]

Here, EO 107 imposed very reasonable restrictions on protesting during the public health emergency. Defendant unfairly characterizes the intent and effect of both EO 107 and the Disaster Control Act as serving to "completely ban political protest[.]" (Db 14). Indeed, the text of the Order and the record below simply provide otherwise. As previously stated, EO 107 literally permits "leaving the home for a[] . . . political reason[.]" EO 107 at ¶ 2. And on both April 7, 2020 and May 6, 2020, the purpose of the officers' encounter with defendant was not to prevent him from protesting or to chill his speech, but to ascertain whether he was complying with EO 107. (Da 31, 36).

Accordingly, this Court should reject defendant's constitutional challenge and find that EO 107 and the Disaster Control Act, as applied, did not unreasonably limit defendant's First Amendment right to protest.

## POINT IV

## EO 107 AND THE DISASTER CONTROL ACT, AS APPLIED, DID NOT VIOLATE DEFENDANT'S FOURTH AMENDMENT RIGHTS.

For the first time on appeal, defendant contends that the Law Division judge's application of EO 107 and its penalty provisions infringed on his right to freedom of movement and violated the Fourth Amendment to the United States Constitution because police lacked reasonable suspicion or probable cause to detain him. (Db 15). Defendant argues that EO 107 effectively served to "blanket[ly] prohibit all citizens from walking outside of their homes." (Ibid.). Defendant boldly asserts that "stopping him at all was a violation of his constitutional rights." (Db 16) (emphasis in original).

This Court should again decline to consider defendant's arguments here due to his failure to raise them before both lower courts and because they are not of such a nature as to have been clearly capable of producing an unjust result. Galicia, 210 N.J. Super. at 383, 386. However, assuming these issues were ripe for review by this Court, defendant waived his Fourth Amendment

challenge, and even if he did not, application of EO 107 and the Disaster Control Act did not violate his rights. There was no plain error by the Law Division judge worthy of disturbing defendant's convictions and sentences.

Rule 7:5-2 prescribes the procedures that must be followed in the municipal court if a criminal defendant argues that he has been aggrieved by an allegedly unlawful search or seizure of evidence. Subsection (d) of that rule clearly explains the consequences of a defendant's failure to file a timely application to suppress such evidence:

> Unless otherwise ordered by the court for good cause, defendant's failure to make a pretrial motion to the municipal court pursuant to this rule shall constitute a waiver of any objection during trial to the admission of the evidence on the ground that the evidence was unlawfully obtained.
>
> [R. 7:5-2(d) (emphasis added).]

This subsection requires that Fourth Amendment challenges be resolved in advance of the trial, so that both parties know whether the contested evidence will be admissible.

Analogously, the waiver provision set forth in Rule 3:5-7(f) — which applies in the Superior Court, Law Division — has been frequently enforced by our courts. See, e.g., State v. Martin, 87 N.J. 561, 566-67 (1981); State v. Johnson, 365 N.J. Super. 27, 33-34 (App. Div. 2003); State v. Cox, 114 N.J. Super. 556, 559-60 (App. Div. 1971). This Court should similarly enforce the

waiver provision in Rule 7:5-2(d) here due to defendant's failure to timely contest the alleged unlawful seizure in the municipal court.

However, even on its merits, defendant's argument fails. If defendant's position is to be taken to its logical conclusion, there would be no instance in which EO 107 could be enforced. See (Db 16). That would be an absurd result which flies in the face of our Fourth Amendment jurisprudence.

Courts have recognized three types of encounters between police and citizens which elevate in their restrictions to individual liberty and thereby require increased levels of justification for each: a field inquiry, an investigative detention, and an arrest. An investigative detention is the second most intrusive police-citizen encounter on the spectrum; it is a seizure in constitutional terms. State v. Rosario, 229 N.J. 263, 272 (2017); State v. Stovall, 170 N.J. 346, 356 (2002). "A police officer may conduct an investigatory stop if, based on the totality of the circumstances, the officer had a reasonable and particularized suspicion to believe that an individual has just engaged in, or was about to engage in, criminal activity." Stovall, 170 N.J. at 356 (citing Terry v. Ohio, 392 U.S. 1, 21 (1968)). "[R]easonable and particularized suspicion" should be "based on the totality of the circumstances." Ibid.

During the declared public health emergency when Governor Murphy invoked his emergency powers to enact EO 107, New Jersey residents were required to stay at home unless an enumerated exception applied. What that meant is that if a person — including defendant — decided to depart from the stay-at-home order, they better have had a recognized reason for doing so. And in order for EO 107 to achieve its purpose of mitigating community spread of COVID-19, authorized emergency enforcement personnel — including the police officers here — could not reasonably be expected to assume that an individual who was holding a sign that contained selective language aimed at police while walking on the side of busy roads during a public health emergency was complying with the Order. To hold otherwise would allow the exceptions to swallow the rule and effectively eliminate the function of EO 107. In short, the totality of those circumstances provided the officers with reasonable articulable suspicion to stop defendant on April 7, 2020 and May 6, 2020.

As a result, this Court should reject defendant's constitutional challenge and find that EO 107 and the Disaster Control Act, as applied, did not violate defendant's Fourth Amendment rights.

## POINT V

### THE STATE AND THE COURTS BELOW DID NOT ENGAGE IN IMPERMISSIBLE BURDEN SHIFTING.

Defendant argues next that the State failed to prove that he was not engaged in any of the categorical exceptions to EO 107, and that the municipal court "impermissibly shift[ed] the burden of proof to . . . [d]efendant to show that he was engaged in a permissible activity[.]" (Db 16). Defendant maintains that it was incumbent on the officers to ascertain that defendant "was not engaged in any of the permitted activities[,]" and to hold otherwise impermissibly shifts the burden of proof.[7] (Ibid.) (emphasis in original). The State submits that the burden of proof remained with the State throughout municipal court trial and the trial de novo before the Law Division, and neither court below shifted that burden to defendant.

> The defendant on trial is presumed to be innocent and unless each and every essential element of an offense charged is proved beyond a reasonable doubt, the defendant must be found not guilty of that charge.

[7] Defendant engages in inconsistent pleading here by asserting in Point IV that any stop whatsoever by the police violated his constitutional rights, while conversely arguing in Point V that the police had the responsibility to ascertain that defendant's behavior did not fall into an enumerated exception. It is unclear to the State how the police would be able accomplish what defendant suggests in Point V without stopping him to determine the nature of his business.

> The burden of proving each element of a charge beyond a reasonable doubt rests upon the State and that burden never shifts to the defendant. The defendant in a criminal case has no obligation or duty to prove his/her innocence or offer any proof relating to his/her innocence.
>
> The prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty.
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. . . .
>
> [Model Jury Charges (Criminal), "Criminal Final Charge: Presumption of Innocence, Burden of Proof, Reasonable Doubt" (rev. Sept. 1, 2022).]

As noted previously, the penalty provisions of EO 107 are contained in N.J.S.A. App. A:9-49, which states, in relevant part: "Prosecution for the imposition of a penalty pursuant to this section shall be commenced in the municipal court of the municipality wherein the offense is alleged to have occurred. The State shall be required to prove all elements of the offense beyond a reasonable doubt in order to obtain a conviction."

Judge Perkins determined that the State proved beyond a reasonable doubt that defendant violated EO 107 on April 7, 2020, finding, in pertinent part, that:

> He was out in a public place along the highway with a sign. Whether that was a political sign or not, is irrelevant in the Court's view. It could have been a sign for any purpose but he should not have been there under the [E]xecutive [O]rder. And there's no good reason cited for him being there. That, in and of itself, in the

> Court's mind, is enough to establish a violation of the [E]xecutive [O]rder.[8]
>
> [(1T76:22 to 77:5) (emphasis added).]

At the trial de novo on the charges relating to the April 7, 2020 incident, Judge Borkowski found that the municipal court record did not show that Judge Perkins "engaged in impermissible burden shifting by requiring that [defendant] prove he was engaging in one of the exceptions to" EO 107. (Da 33). Rather, Judge Perkins "listened to the evidence presented, evaluated the evidence, and was persuaded beyond a reasonable doubt by the State that [defendant] violated" EO 107. (Ibid.).

There was no error by either court below, and, applying the applicable standard of appellate review, this Court should find similarly. Here, the State did prove that defendant's conduct did not fall within a categorical exception to EO 107. The record of both incidents shows that defendant was walking alone on busy roadways in the late afternoon after his work shift and away from his vehicle and residence; holding a posterboard that contained arguably political material; asserting that he was an essential worker; and behaving irately and uncooperatively. Inferentially, therefore, defendant did not engage in any of the enumerated exceptions to EO 107 and was consequently in

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[8] Defendant takes issue with this emphasized portion of Judge Perkins' decision. See (Db 16-17).

violation of it based on his behavior. To be sure, the record does not reflect that he was (1) obtaining goods or services; (2) obtaining takeout food or beverages; (3) seeking emergency assistance; (4) visiting family or close friends; (5) reporting to, or performing, his job; (6) walking while following best social distancing practices; (7) leaving his home for an educational, religious, or political reason; (8) leaving his home because of a reasonable fear for his health or safety; or (9) leaving his home at the direction of law enforcement.

When Judge Perkins found that there was "no good reason cited for [defendant] being there[,]" (1T77:2-3), he was merely commenting on how the evidence established that no exception existed in fact. And as Judge Borkowski similarly held, that comment did not amount to impermissible burden shifting.

For these reasons, this Court should find that neither court below engaged in impermissible burden shifting.

## POINT VI

DEFENDANT'S STATEMENTS AND NON-TESTIMONIAL BEHAVIOR WERE PROPERLY CONSIDERED BY THE LAW DIVISION JUDGE AS EVIDENCE TO CONVICT HIM.

Defendant next argues, and for the first time on appeal, that the Law Division judge convicted him based on his speech and conduct, which were otherwise constitutionally protected. (Db 17).

This Court should decline to consider defendant's arguments here due to his failure to raise them before both lower courts and because they are not of such a nature as to have been clearly capable of producing an unjust result. Galicia, 210 N.J. Super. at 383, 386. However, even if these issues were properly raised before this Court, defendant's statements and non-testimonial behavior on April 7, 2020 and May 6, 2020 were properly considered by the Law Division judge as evidence to convict him of violating EO 107. There was no plain error by the Law Division judge worthy of disturbing defendant's convictions and sentences.

Defendant characterizes select statements and conduct he made on both incidents as being constitutionally protected. See (Db 17-18). He further challenges the admission of those statements and conduct for the first time on appeal. As a preliminary matter, therefore, this Court should enforce the waiver provision in Rule 7:5-2(d) due to defendant's failure to timely move to suppress both those statements and conduct at the trial level.

However, even on their merits, defendant's arguments fail. The State did not prosecute him for, nor did the courts below convict him of, engaging in

protected speech or conduct. Like every resident of New Jersey, defendant was subject to EO 107 and was required to cooperate with it or risk being penalized. If defendant was actually engaging in essential work, leaving his home for a political reason, or simply walking on both occasions — thereby implicating exceptions to the EO 107 — he would not have been charged with, and certainly would not have been convicted of, violating the Order.

But that is not the case here. Judge Borkowski considered the credible evidence in the record below — which included defendant's own statements, see N.J.R.E. 803(b)(2), and his non-testimonial behavior — and found that defendant violated EO 107 because he behaved in a manner proscribed by the Order and its penalty provisions.

Accordingly, this Court should find that Judge Borkowski committed no error when she considered otherwise admissible evidence to convict defendant of violating EO 107.

## POINT VII

THE LAW DIVISION JUDGE CORRECTLY FOUND THAT DEFENDANT WAS GUILTY OF WALKING WITH TRAFFIC[9] ON MAY 6, 2020.

[9] The record below refers to this offense as improper walking.

In his final point, defendant argues that the State failed to prove that defendant was guilty of walking with traffic, and that the Law Division judge incorrectly interpreted the relevant statute. (Db 19). The State submits that the Law Division judge committed no error in finding defendant guilty of walking with traffic on May 6, 2020. Applying this Court's standard of review, Judge Borkowski's decision should not be disturbed. Johnson, 42 N.J. at 161-62; Goodwin, 224 N.J. at 110.

N.J.S.A. 39:4-34, the statute of which defendant was convicted by Judge Borkowski, provides:

> Where traffic is not controlled and directed either by a police officer or a traffic control signal, pedestrians shall cross the roadway within a crosswalk or, in the absence of a crosswalk, and where not otherwise prohibited, at right angles to the roadway. It shall be unlawful for a pedestrian to cross any highway having roadways separated by a medial barrier, except where provision is made for pedestrian crossing. On all highways where there are no sidewalks or paths provided for pedestrian use, pedestrians shall, when practicable, walk only on the extreme left side of the roadway or its shoulder facing approaching traffic.
>
> Where sidewalks are provided it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway.
>
> [(Emphasis added). See also (Da 29) (quoting the emphasized portion of N.J.S.A. 39:4-34 above).]

At the trial de novo on the charges stemming from May 6, 2020, Judge Borkowski found that Sergeant Glennon "provided evidence beyond a reasonable doubt to convict" defendant of walking with traffic. (Da 37).

Sergeant Glennon's credible testimony in the record showed that defendant was walking on the extreme right of the road against traffic and, at one point, he "turned around and began to walk in the direction of traffic." (Ibid.). Judge Borkowski determined that Sergeant Glennon's testimony, in conjunction with relevant video footage admitted into evidence, were "sufficient evidence to conclude that [defendant] did turn around at some point, creating further support for th[e] conviction." (Ibid.).

The above credibility findings by Judge Borkowski were supported by sufficient credible evidence in the record and are therefore entitled to deference by this Court. Likewise, Judge Borkowski's determination that defendant was guilty of walking with traffic based on her factual findings should not be disturbed by this Court under plenary review. In short, Judge Borkowski committed no error in finding defendant guilty of walking with traffic on May 6, 2020.

## CONCLUSION

Based on the foregoing reasons and the authorities cited in support thereof, the State respectfully requests that this Court affirm defendant's convictions and sentences for violating EO 107 on both April 7, 2020 and May 6, 2020, and for improper walking on May 6, 2020.

Respectfully submitted,

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OF COUNSEL AND ON THE BRIEF

Dated: January 3, 2023

c: Dana Wefer, Esq.