In re Complaint Filed by the Franklin Township Board of Education Regarding P.L. 2020, Chapter 44. **In re Complaint Filed by the Gloucester City Board of Education Regarding P.L. 2020, Chapter 44.** **In re Complaint Filed by the Lower Township Elementary Board of Education Regarding P.L. 2020, Chapter 44.**	**STATE OF NEW JERSEY** **COUNCIL ON LOCAL MANDATES** **COLM-0001-21** **Consolidated Action**

BRIEF OF *AMICI* SENATE PRESIDENT STEPHEN M. SWEENEY AND ASSEMBLY SPEAKER CRAIG J. COUGHLIN IN SUPPORT OF THE MOTION OF RESPONDENT STATE EXECUTIVE BRANCH FOR SUMMARY JUDGMENT SEEKING DISMISAL OF THE THREE COMPLAINTS IN THIS CONSOLIDATED ACTION

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PRELIMINARY STATEMENT

By Order dated September 15, 2021, the Council on Local Mandates granted Senate President Stephen M. Sweeney and Assembly Speaker Craig J. Coughlin (hereafter collectively "the Presiding Officers") leave to appear as *amici* in this Consolidated Action. Pursuant to the Council's Order, the Presiding Officers file this *amicus* brief in support of the motion of Respondent State Executive Branch for summary judgment seeking dismissal of the three Complaints contained in this Consolidated Action.

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This matter comes before the Council by way of Complaints filed by the Franklin Township Board of Education, the Lower Township Elementary Board of Education, and the Gloucester City Board of Education (hereafter collectively "the Claimants"). Claimants challenge L. 2020, c. 44 (hereafter "Chapter 44" or "the Act") as well as a subsequent amendment to that Act, L. 2021, c. 163 (hereafter "Chapter 163"). The purpose of Chapter 44, as amended by Chapter 163 (hereafter collectively "Acts"), is to help school districts control their spiraling employee health care costs through a careful re-design of public employee health insurance plans.

Notwithstanding this purpose, Claimants contend that the Acts constitute an impermissible unfunded mandate within the meaning Article VIII, section 2, paragraph 5 of the New Jersey Constitution and the Local Mandate Act ("LMA"). Claimants contend that they have incurred additional costs in connection with the implementation of the Acts in their first year of operation.

Chapter 44 is a complex piece of legislation that applies to 584 public school districts across the State. According to a leading actuary retained by the Legislature, Chapter 44 – based on the most recent data -- is projected to save school districts and their employees over $800

million per year. In light of this substantial savings to school districts and employees, it is ironic – to say the least – that Chapter 44 is here alleged to be an impermissible unfunded mandate. Furthermore, the Legislature anticipated that at least some of these hundreds of school districts might encounter short-term transitional costs, rather than transitional savings. In recognition of this potential circumstance, the Legislature directed school districts that might encounter short-term transitional costs to enter into collective negotiations with their employee organizations in order to address these costs. This is a requirement of the statute.

As fully described herein, the Acts are an impermissible "unfunded mandate" under the New Jersey Constitution and the Local Mandate Act ("LMA"). This is so for three reasons.

First, Chapter 44, provides that "when the net cost to the employer is lower than the cost to the employer would be compared to the New Jersey Educators Health Plan, the employer and the majority representative **shall engage** in collective negotiations over the financial impact of the difference" (emphasis added). By its terms, Chapter 44 requires the school district to enter into collective negotiations with its employee organizations so that the school district would avoid such costs. Therefore, Chapter 44 is not an impermissible unfunded mandate. Notwithstanding the foregoing, Claimants at the inception of this proceeding argued that the foregoing statutory language was "ambiguous" -- in that the language purportedly did not make clear whether the mandated collective negotiations could lead to an agreement whereby the resulting insurance plan design was at variance with the standard plan design authorized by Chapter 44. In any event, even assuming, *arguendo*, that such statutory ambiguity ever existed (which is denied), on July 7, 2021 the Governor signed into law Chapter 163 -- an act that amended Chapter 44 and that added significant new language addressing the collective negotiations provision of Chapter 44 (hereafter

referred to as Section 8). Chapter 163 makes crystal-clear that: (1) the agreement reached in collective negotiations authorized by Section 8 of Chapter 44 **"may include modifications to plan level offerings or contributions for the New Jersey Educators Health Plan or the equivalent plan**, or to both plan level offerings and contributions"; and (2) "plan level offerings or contributions for the New Jersey Educators Health Plan or the equivalent plan, or both plan level offerings and contributions, **may be modified pursuant to collective negotiations required by this section.**" Ibid. (emphasis added). The amendatory language of Chapter 163 makes explicit what was already implicit in the original version of Chapter 44. In light of this amendatory language, Chapter 44, as amended, cannot possibly be deemed an impermissible unfunded mandate. See Point I, infra.

Second, although Claimants presently argue that Chapter 163 does not cure the putative statutory infirmity, Claimants' new-found argument does not withstand scrutiny. More particularly, Claimants state that Chapter 44, as amended by Chapter 163, is an impermissible unfunded mandate because "there is no mechanism for School Boards to recoup the prior financial impacts of Chapter 44, or current and continuing financial impacts while lengthy negotiations occur." However, with respect to Claimants' contention of a statutory infirmity arising from "prior financial impacts of Chapter 44" (*i.e.*, prior to the enactment of Chapter 163) -- in other words, retroactive relief -- the Council has no authority to order retroactive relief. Rather, the Council's sole power is the prospective invalidation of a statute if it determines that the statute is an impermissible unfunded mandate. That jurisdictional limitation on the Council's authority firmly disposes of this branch of Claimant's argument – even without regard to the many other substantive legal infirmities afflicting this argument. With respect to Claimants' contention that "current and

continuing financial impacts while lengthy negotiations occur," that contention fails by operation of elemental principles of statutory construction. Under the plain terms of Chapter 163, school districts are required "to substantially mitigate the financial impact of the difference" – with no limitation or restriction whatsoever with regard to the scope of mitigation. Mitigation should apply to future financial impacts as well as past financial impacts. Hence, Claimants' purported construction of Chapter 163 – as somehow precluding the parties to a collective negotiation from addressing "current and continuing financial impacts" as well as future financial impacts – is properly rejected as a matter of law as wholly unsupported by the plain meaning of Chapter 163. See Point II, infra.

Third, the Constitution and the LMA specifically exempt laws, that "repeal, revise or ease an existing requirement or mandate or [that] reapportion the costs of activities between boards of education, counties, and municipalities" from the definition of an unfunded mandate. The Acts fall squarely within the "revision" exemption to the definition of unfunded mandate. School districts have been sharing the cost of health insurance with their employees for at least half a century, in accordance with changing legislation and collective negotiations agreements between employers and employees. Chapters 44 and 163 are just the latest in a long line of statutory amendments to the SEHBP that were designed to meet the health insurance needs of covered employees and the fiscal and administrative requirements of the State's school districts. And beyond the legislative enactments, the SEHBP is also the product of countless administrative actions and determinations – as well as district-by-district modifications by way of collective negotiations between employers and employees. Thus, the Acts are nothing more than an update to an insurance system that has

existed since 1961 -- and constitutes just one change to the terms and conditions of insurance coverage wherein change is regular, constant and ongoing.

Furthermore, public employee health insurance programs are *sui generis* – and, as such, should not be regarded in the same way as other types of public expenditures for tangible goods and services. Most other products and services procured by government are readily ascertainable, easily understood, sold in clearly defined units and predictable in price. Insurance is none of these things. An insurance policy is abstract, intangible and highly variable by scope of coverages, exclusions, size and characteristics of the group and many other considerations. Moreover, some of the cost components of an insurance policy are controllable and some are not. In light of these considerations that are unique to public employee insurance and in light of the long legislative history of public employee insurance programs in this State, if the Council were to hold that Chapters 44 and 163 were not within the "revision" exemption, then it would be difficult to conceive of any statute that would *ever* be within the scope of the "revision" exemption. Hence – for this reason alone -- Chapters 44 and 163 are not an "unfunded mandate" within the meaning of the New Jersey Constitution and the LMA (and even without regard to the immunizing effect of the Acts' mandatory collective negotiation provision). See Point III, infra.

For all of these reasons – any one of which is dispositive – *Amici* Senate President Stephen M. Sweeney and Assembly Speaker Craig J. Coughlin join in support of the motion of Respondent State Executive Branch for summary judgment seeking dismissal of the three Complaints in this Consolidated Action.

STATEMENT OF FACTS

At the outset it is instructive to provide a brief description of Chapter 44 and the legislative history underlying its enactment. The Legislature's passage of Chapter 44 represented the culmination of years of planning and analysis by the key stakeholders and actuarial experts. As detailed in the accompanying certifications of Kevin Drennan and Anthony Cimino, the goal of Chapter 44 – far from shifting additional costs to school districts – was to help school districts in controlling health care costs through a careful re-design of public employee health insurance plans. See Sokol Cert., Exhibit "A" (Drennan Cert., ¶¶2-8); Exhibit "B" (Cimino Cert., ¶¶3-5). According to a leading actuary retained by the Legislature, Chapter 44 – based on the most recent data -- is projected to provide total claim savings of $865 million for a full year. See Sokol Cert., Exhibit "D" (Milliman Report, Appendix A-3, Column 6 and 8). In light of this substantial savings to school districts and employees, it is ironic – to say the least – that Chapter 44 is here alleged to be an impermissible unfunded mandate within the meaning of the New Jersey Constitution and the LMA.

The annexed Milliman Report details the substantial cost savings produced by Chapter 44, In particular, Milliman identified the following sources of cost savings for the new health insurance plans authorized by the legislation as compared to the *status quo* health insurance plans:

> The claim savings associated with a full adoption of each of these proposed plans is divided into three components… **The first savings component is a change in provider reimbursement levels resulting from a reduction in the amounts that out-of-network providers are paid**…
>
> The second claim savings component, plan design changes, encompasses two parts: 1) changes in the paid-to-allowed ratio, and 2) changes in induced utilization when moving from a current plan to the proposed plan.

> ● Paid-to-allowed ratio refers to the proportion of allowed claims paid by the health plan, on average. The members pay the remaining portion as cost sharing (deductible, coinsurance, or copays). **Thus, for members who migrate to Plan A, B, B-1, C, or D, the employers are expected to realize savings by paying a lower portion of total claims since current plans have lower member cost sharing.**
>
> ● Induced utilization refers to the influence of cost sharing parameters (deductibles, copays, coinsurance, out-of-pocket maximum) on members' utilization of services. All else being equal, the richer a plan is (higher paid-to-allowed ratio), the more services tend to be utilized. **Thus, a lower paid-to-allowed ratio is expected to "induce" lower utilization of services, resulting in lower claims being incurred, and further reducing the employer's liability.** These estimates assume that benefits are administered as designed, and that cost sharing is not reduced or waived by any providers.
>
> The third claim savings component is related to prescription drug formulary charges for which Milliman did not develop an estimate…
>
> [Sokol Cert., Exhibit "D" (Milliman Report, at 8-9) (emphasis added)]

As the legislative history establishes, the Legislature's enactment of Chapter 44 encompassed careful evaluation of cost-savings measures and years of input from key stakeholders and actuarial experts. See Sokol Cert., Exhibit "C" (Assembly Appropriations Committee, Statement to S. 2273); Exhibit "A" (Drennan Cert., ¶¶2-8); Exhibit "B" (Cimino Cert., ¶¶3-5). As previously noted, the goal – far from shifting additional costs to school districts – was to help school districts in controlling health care costs through a careful re-design of public employee health insurance plans. See id., see also Exhibit "D" (Milliman Report, at 8-9 and Appendix A-1 through A-3).

Chapter 44 is a complex piece of legislation that applies to a broad range of school districts. The requirements of Chapter 44 apply to school districts that participate in the School Employees

Health Benefits Program (SEHBP)[1] and to school districts that do not participate in the SEHBP. For both participating and non-participating school districts, Chapter 44 requires that the district adopt four statutorily mandated plan designs. These are, respectively, plans referred to as the New Jersey Educators Health Plan, the Garden State Health Plan, the NJ Direct 10, and the NJ Direct 15 plan. See L. 2020, c. 44, §§ 1, 5; Sokol Cert., Exhibit "C" (Assembly Appropriations Committee, Statement to S. 2273, at 1-3)

Under Chapter 44, all school district employees hired on or after July 1, 2020 are automatically enrolled in an NJEHP plan, unless they elect to waive coverage. See L. 2020, c. 44, §§ 2, 5. Furthermore, all school district employees hired prior to July 1, 2020, had the option to enroll in the new NJEHP plan unless they affirmatively elected to waive coverage, or affirmatively elected to remain enrolled in their prior coverage. See L. 2020, c. 44, §§ 2, 5. Again, these statutory requirements apply to both school districts that are members of SEHBP and to school districts that procure health insurance on the private market. See id.

Chapter 44's contemplates that – over time – an increasing number of school district employees will "migrate" from pre-existing plans to the new plans mandated by the Act. Notably, the Office of Legislative Services (OLS) -- in its Fiscal Impact Statement annexed to the Assembly Appropriations Committee Report accompanying the Act – stated that, in the aggregate, "[t]he greatest savings are predicated on 100 percent migration to the new plans and various plan design changes." See Sokol Cert., Exhibit "C" (Assembly Appropriations Committee, Statement to S. 2273, at 7). In other words, the OLS Fiscal Impact Statement further confirms that Chapter 44 –

[1] The SEHBP is administered by the New Jersey Department of the Treasury, Division of Pensions and Benefits.

far from imposing additional costs on school district taxpayers – will, in the aggregate, produce substantial savings to taxpayers (as well as to employees) through a reformation of the design of the health insurance plans. The OLS Statement also confirms that, in the aggregate, cost savings to school districts will increase over time as additional employees "migrate" to the new plans. See id.

There remains for discussion one additional and critical feature of Chapter 44. In enacting Chapter 44, the Legislature specifically recognized that some school districts might encounter added costs in the transition from pre-existing health insurance plans to NJEHP or NJEHP-equivalent plans.[2] As to this specific issue, Chapter 44 provides as follows:

> 8. With regard to employers that have collective negotiation agreements in effect on the effective date of this act, P.L.2020, c. 44, that include health care benefits coverage available to employees when the net cost to the employer is lower than the cost to the employer would be compared to the New Jersey Educators Health Plan, the employer and the majority representative shall engage in collective negotiations over the financial impact of the difference.
>
> [L. 2020, c. 44, §8]

In enacting Section 8 of Chapter 44, the Legislature recognized that to the extent that some school districts might encounter transitional costs – rather than transitional savings – in changing over to Chapter 44's new plan designs, those school districts were required to enter into collective negotiations with their employee organizations in order to address the transitional costs. See id. Hence, Section 8 serves as a critical statutory mechanism that provides a remedy to school in the event that they encounter transitional costs – rather than transitional savings – in changing over to

[2] Given that there are over 500 school districts in the State, it is not surprising that at least some districts might encounter transitional costs – rather than transitional savings – in changing over to Chapter 44's new plan designs

Chapter 44's new plan designs.

Against this backdrop, Claimants at the inception of this proceeding argued that the foregoing statutory language was "ambiguous" -- in that the language purportedly did not make clear whether the mandated collective negotiations could lead to an agreement whereby the resulting insurance plan design was at variance with the standard plan design authorized by Chapter 44. To the extent that such statutory ambiguity ever existed (which is denied), on July 7, 2021 the Governor signed into law Chapter 163 -- an act that amended Chapter 44 and that added significant new language addressing the collective negotiation provision of Chapter 44 (hereafter referred to as Section 8). Chapter 163 makes crystal-clear that: (1) the agreement reached in collective negotiations authorized by Section 8 of Chapter 44 **"may include modifications to plan level offerings or contributions for the New Jersey Educators Health Plan or the equivalent plan**, or to both plan level offerings and contributions"; and (2) "plan level offerings or contributions for the New Jersey Educators Health Plan or the equivalent plan, or both plan level offerings and contributions, **may be modified pursuant to collective negotiations required by this section.**" Ibid. (emphasis added). The amendatory language of Chapter 163 makes explicit what was already implicit in the original version of Chapter 44. In light of this amendatory language, Chapter 44 cannot possibly be deemed an impermissible unfunded mandate.

LEGAL ARGUMENT[3]

POINT I

BECAUSE CLAIMANTS THROUGHOUT THIS PROCEEDING HAVE RELIED ON THE PURPORTED AMBIGUITY OF SECTION 8 OF CHAPTER 44 AS THE SOLE BASIS FOR THEIR CONTENTION THAT CHAPTER 44 IS AN IMPERMISSIBLE UNFUNDED MANDATE UNDER THE NEW JERSEY CONSTITUTION AND THE LOCAL MANDATE ACT, ANY CONCEIVABLE VIABILITY OF THE COMPLAINTS HAS BEEN EVISCERATED BY THE ENACTMENT OF CHAPTER 163 – WHICH COMPLETELY ELIMINATES THE PURPORTED AMBIGUITY OF CHAPTER 44.

Prior to the recent enactment of Chapter 163, Chapter 44 provided: "when the net cost to the employer is lower than the cost to the employer would be compared to the New Jersey Educators Health Plan, the employer and the majority representative *shall engage in collective negotiations over the financial impact of the difference*." L. 2020, c. 44, §8 (emphasis added). By its terms, Chapter 44 (prior to the enactment of Chapter 163) required the school district to enter into collective negotiations with its employee organizations so that the school district would avoid such costs. Notably, the statutory language, "shall engage," is mandatory.

Notwithstanding the foregoing, it is undisputed that two of the Claimants -- Gloucester City Board of Education and Lower Township Elementary Board of Education – filed their complaints with the Council but (at the time of the filings) never bothered to enter into collective negotiations in order to address the allegedly excess costs associated with the transition to Chapter 44's new plan designs. See Complaints, 3/26/21, ¶5; see also Morlok 9/12/21 Cert., §§9, 11. That is a facial violation of Chapter 44. See L. 2020, c. 44, §8.

Claimant Franklin Township Board of Education, though its counsel, states that it has been

[3] This brief adopts, and incorporates by reference, the additional legal arguments set forth in the brief of the Attorney General.

unable "to secure a meeting with Franklin Township Education Association to mitigate the impacts of Chapter 44." Morlok 9/12/21 Cert., ¶6. However, Franklin Township *also* admits that: (1) it "**has refused** to implement Chapter 44 (such as the enrollment of new employees in the NJEHP plan)," id. ¶4 (emphasis added); and (2) it has been sued by Franklin Township Education Association relating to the Board's "refusal to implement Chapter 44," id. ¶5. It is not altogether surprising that collective negotiations in Franklin Township over the cost of school employee health benefits are not presently proceeding due to the impasse created by Franklin Township's willful and deliberate violation of Chapter 44's substantive requirements governing school employee health benefits. The failure of collective negotiations in Franklin Township is directly traceable to the Board's own willful noncompliance with the law. [4]

In short, all three Claimants have failed to satisfy a statutory mandate to enter into collective negotiations. That being so, the resulting statutory violation – by itself – precludes Claimants' claim that Chapter 44 is an impermissible unfunded mandate.

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Claimants nevertheless have asserted that they are relieved of their legal obligation under Chapter 44 to engage in collective negotiations because "there are no health care related financial

[4] Moreover, in light of Franklin Township's willful refusal to implement the requirements of Chapter 44, Franklin Township is in no position to seek affirmative relief from the Council based on Franklin Township's assertion that the collective negotiation requirements are fruitless – and are thereby properly disregarded. See Franklin Complaint, 2/18/21, ¶5. Indeed, the well-established doctrine of "unclean hands" precludes Franklin Township's own inequitable conduct from forming the very basis for the relief that it seeks. See Glasofer Motors v. Osterlund, Inc., 180 N.J. Super. 6, 13 (App.Div.1981) (The clean hands doctrine is "an equitable principle which requires a denial of relief to a party who is himself guilty of inequitable conduct in reference to the matter in controversy."). A. Hollander & Son, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 246 (1949) (holding that "a suitor in equity must come to court with clean hands and must keep them clean after his entry and throughout the proceedings.").

aspects remaining to negotiate." See Claimants' Original Complaints, ¶5. Claimants' assertion is precluded by elemental concepts of statutory construction. The flaw in Claimants' legal argument is that Claimants fail to properly harmonize Section 8 with other provisions of the Act and thereby fails to give full force and effect to the mandatory collective negotiations provision authorized by Section 8.

In any event, we need not belabor the record in connection with a detailed analysis of the various provisions of Chapter 44 because – as is the Council is aware – Chapter 44 (during the pendency of this proceeding) was amended Chapter 163. T*o the extent that Section 8 of Chapter 44 raised any ambiguity whatsoever with regard to the obligation of school districts to engage in collective negotiations with their employee organizations in order to eliminate any net cost to the school district of transitioning to a new health benefits regime, Chapter 163 removes that ambiguity.*

The following is the pertinent amendatory text of Chapter 163:

Section 8 of P.L.2020, c.44 is amended to read as follows:

> 8. With regard to employers that have collective negotiation agreements in effect on the effective date of this act, P.L.2020, c.44, that include health care benefits coverage available to employees when the net cost, which is the cost after deducting employee contributions, to the employer is lower than the cost to the employer would be compared to the New Jersey Educators Health Plan, the employer and the majority representative shall engage in collective negotiations …, that include all terms and conditions of employment, to substantially mitigate the financial impact of the difference as agreed to by the parties, which may include modifications to plan level offerings or contributions for the New Jersey Educators Health Plan or the equivalent plan, or to both plan level offerings and contributions. Notwithstanding any provision of law or regulation to the contrary, plan level offerings or contributions for the New Jersey Educators Health Plan or the equivalent plan, or both plan level offerings and contributions, may be modified pursuant to collective negotiations required by this section.

> Any school district with an increase in net cost as defined above as a result of changes by P.L.2020, c.44 (C.52:14-17.46.13 et al) shall commence negotiations immediately, unless mutually agreed upon by the employer and the majority representative to opt to substantially mitigate the financial impact to the employer as part of the next collective negotiations agreement which may include, but not be limited to, salary increases, step guides, or other terms and conditions of employment.
>
> [Chapter 163, §3 (amendatory language is underlined)]

Thus, Chapter 163 makes crystal-clear that: (1) the agreement reached in collective negotiations authorized by Section 8 of Chapter 44 **"may include modifications to plan level offerings or contributions for the New Jersey Educators Health Plan or the equivalent plan**, or to both plan level offerings and contributions"; and (2) "plan level offerings or contributions for the New Jersey Educators Health Plan or the equivalent plan, or both plan level offerings and contributions, **may be modified pursuant to collective negotiations required by this section.**" Ibid. (emphasis added).

The amendatory language of Chapter 163 makes explicit what was already implicit in the original version of Chapter 44. In light of this amendatory language, Chapter 44 cannot possibly be deemed an impermissible unfunded mandate. To use Claimants' own words (contained in their reply brief in further support of their application for preliminary injunctive relief), the amendatory language of Chapter 163 "completely fixe[s] the unfunded nature of Chapter 44."

Stated otherwise, because Claimants relied on the purported ambiguity of Section 8 of Chapter 44 as the sole basis for their contention that Chapter 44 is an impermissible unfunded mandate under the New Jersey Constitution and the Local Mandate Act, any conceivable viability of the Complaints has been eviscerated by the enactment of Chapter 163 – which completely

eliminates the purported ambiguity of Chapter 44. In light of the above – and for this reason alone -- Claimants' Complaints are properly dismissed as a matter of law.

POINT II

CONTRARY TO CLAIMANTS' ASSERTION, NEITHER "THE PRIOR FINANCIAL IMPACTS OF CHAPTER 44" (BEFORE THE ENACTMENT OF CHAPTER 163) NOR "THE CURRENT AND CONTINUING FINANCIAL IMPACTS WHILE NEGOTIATIONS OCCUR" (AFTER THE ENACTMENT OF CHAPTER 163) CONSTITUTE AN IMPERMISSIBLE UNFUNDED MANDATE UNDER THE NEW JERSEY CONSTITUTION AND THE LOCAL MANDATE ACT.

In a letter to the Council dated July 19, 2021, counsel for the Claimants state:

> A5825 [*i.e.*, Chapter 163] has not altered the position of Complainants. Section 8 now allows for meaningful terms of the healthcare plan or contributions to be altered, but there is no mechanism for School Boards to recoup the prior financial impacts of Chapter 44, or current and continuing financial impacts while lengthy negotiations occur.

See also Pl. Amended Complaints, ¶6.

There are two parts to Claimants' assertion: (1) the prior financial impacts of Chapter 44 (before the enactment of Chapter 163); (2) current and continuing financial impacts while negotiations occur (after the enactment of Chapter 163). As discussed below, neither of these alleged "financial impacts" constitute an impermissible unfunded mandate under the New Jersey Constitution and the Local Mandate Act.

A. The Council is without authority to provide relief with respect to alleged "prior financial impacts of Chapter 44" (before the enactment of Chapter 163)

As to "prior financial impacts of Chapter 44" -- in other words, retroactive relief -- the Council has no authority to order retroactive relief. The only relief that the Council can order is prospective in nature.

The Council is empowered to invalidate a law if it finds the law to be an impermissible

unfunded mandate. More particularly, N.J.S.A. 52:13H-2 provides:

> 52:13H-2 Unfunded mandate; mandatory status ceased, expiration
>
> 2. Except as provided in section 3 of this act, any provision of a law enacted on or after January 17, 1996, or any part of a rule or regulation originally adopted after July 1, 1996 pursuant to a law regardless of when that law was enacted, which is determined in accordance with the provisions of this act to be an unfunded mandate upon boards of education, counties, municipalities, or fire districts designated by municipal ordinance, because it does not authorize resources to offset the additional direct expenditures required for the implementation of the law or the rule or regulation, **shall cease to be mandatory in its effect and shall expire**. A law or a rule or regulation which is determined to be an unfunded mandate shall not be considered to establish a standard of care for the purpose of civil liability.
>
> [L.1996, c.24, §2; amended 2010, c.106, §2 (emphasis added)].

Thus, the Council's sole power is the prospective invalidation of a statute if it determines that the statute is an impermissible unfunded mandate.

Therefore, to the extent that Claimants are seeking retroactive relief from the Council, the Council is without authority to provide such relief.

B. Claimants' purported construction of Chapter 163 – as somehow precluding the parties to a collective negotiation from addressing "current and continuing financial impacts" as well as future financial impacts – is properly rejected as a matter of law as wholly unsupported by the plain meaning of the Chapter 163.

Contrary to Claimants' assertion, nothing in Chapter 163 precludes the parties to a collective negotiation from addressing "current and continuing financial impacts" as well as future financial impacts.

Chapter 163 provides, in pertinent part:

> Section 8 of P.L.2020, c.44 is amended to read as follows:
>
> 8. With regard to employers that have collective negotiation agreements in effect on the effective date of this act, P.L.2020, c.44, that include health care benefits coverage available to employees when the net cost, <u>which is the cost</u>

> after deducting employee contributions, to the employer is lower than the cost to the employer would be compared to the New Jersey Educators Health Plan, the employer and the majority representative shall engage in collective negotiations …, that include all terms and conditions of employment, to substantially mitigate the financial impact of the difference as agreed to by the parties, which may include modifications to plan level offerings or contributions for the New Jersey Educators Health Plan or the equivalent plan, or to both plan level offerings and contributions. Notwithstanding any provision of law or regulation to the contrary, plan level offerings or contributions for the New Jersey Educators Health Plan or the equivalent plan, or both plan level offerings and contributions, may be modified pursuant to collective negotiations required by this section.
>
> Any school district with an increase in net cost as defined above as a result of changes by P.L.2020, c.44 (C.52:14-17.46.13 et al) shall commence negotiations immediately, unless mutually agreed upon by the employer and the majority representative to opt to substantially mitigate the financial impact to the employer as part of the next collective negotiations agreement which may include, but not be limited to, salary increases, step guides, or other terms and conditions of employment.
>
> [Chapter 163, §3 (amendatory language is underlined)]

Under Chapter 163, school districts are required "to substantially mitigate the financial impact of the difference" – with no limitation or restriction whatsoever with regard to the scope of mitigation. Mitigation should apply to future financial impacts as well as past financial impacts.

Hence, Claimants' purported construction of Chapter 163 – as somehow precluding the parties to a collective negotiation from addressing "current and continuing financial impacts" as well as future financial impacts – is properly rejected as a matter of law as wholly unsupported by the plain meaning of the Chapter 163.[5]

[5] Indeed, this same substantive legal argument also refutes Claimants' contention of an impermissible unfunded mandate as applied to "*prior* financial impacts of Chapter 44" (i.e., financial impacts of Chapter 44 that occurred prior to the enactment of Chapter 163). Furthermore, as noted in the text above, Claimants' contention of an impermissible unfunded mandate as applied to "prior financial impacts of Chapter 44" also fails because the relief sought is not within the scope of the subject matter jurisdiction of the Council.

POINT III

IN THE ALTERNATIVE, THE COMPLAINTS SHOULD BE DISMISSED AS A MATTER OF LAW BECAUSE CHAPTER 44 AND 163 ARE A "REVIS[ION]" OF THE EXISTING SEHBP STATUTE AND IS THEREBY EXEMPT FROM THE DEFINITION OF UNFUNDED MANDATE UNDER N.J. CONST. ART. VIII, § 2, ¶ 5(C)(3) AND N.J.S.A. 52:13H-3(C).

The Constitution and the LMA specifically exempt laws, that "repeal, revise or ease an existing requirement or mandate or [that] reapportion the costs of activities between boards of education, counties, and municipalities" from the definition of an unfunded mandate. N.J. Const. art. VIII, § 2, ¶ 5(c)(3); N.J.S.A. 52:13H-3(c). The Council has narrowly construed the scope of this exemption. See, e.g., In re Complaint Filed by the New Jersey Association of Counties, March 13, 2020, at 7. Notwithstanding this narrow construction, Chapter 44 falls squarely within the "revision" exemption to the definition of unfunded mandate. Indeed, if the Council were to hold that Chapter 44 were not within the "revision" exemption, then it would be difficult to conceive of any statute that would *ever* be within the scope of the "revision" exemption.

A. Overview of the history of public employee health benefit programs in New Jersey

School districts have been sharing the cost of health insurance with their employees for at least half a century, in accordance with changing legislation and collective negotiations agreements between employers and employees. See L. 1961, c. 49 (establishing statewide School Employees Health Benefits Program). Since 1961, the SEHBP statute has been repeatedly amended. Chapter 44 is just the latest in a long line of statutory amendments to the SEHBP that were designed to meet the health insurance needs of covered employees and the fiscal and administrative requirements of the State's school districts. See e.g., L. 1961, c. 49; L. 1979, c. 391; L. 2007, c. 103; L. 2011, c. 78; L. 2020, c. 44. And beyond the legislative enactments, the SEHBP is also the

product of countless administrative actions and determinations – as well as district-by-district modifications by way of collective negotiations between employers and employees. Thus, Chapters 44 and 163 are nothing more than an update to an insurance system that has existed for sixty years -- and constitutes just one change to the terms and conditions of insurance coverage wherein change is regular, constant and ongoing. In a very literal sense, when it comes to insurance in general and the SEHBP in particular, *the only constant is change*.

B. The unique attributes of public employee health insurance programs

Equally important, public employee health insurance programs are *sui generis* – and, as such, should not be regarded in the same way as other types of public expenditures for tangible goods and services. We briefly summarize certain basic attributes of insurance that set apart public expenditures for insurance from all other types of public expenditures.

As explained by our Supreme Court, "[i]nsurance is a plan of risk management or risk sharing." Perreira v. Rediger, 169 N.J. 399, 417 (2001). Under an insurance plan or policy, "[f]or a price or premium, an insured is offered an opportunity to share the costs of a defined possible economic loss." Id. at 417. See also Am. Nurses Ass'n v. Passaic Gen. Hosp., 192 N.J. Super. 486, 491 (App. Div. 1984), aff'd in part, rev'd in part, 98 N.J. 83 (1984) (observing that "the essence of an insurance contract is the shifting of the risk of loss from the insured to the insurer.").

A plan of risk management or risk sharing can take many forms. But there are certain common threads that run through all insurance plans. Among these common attributes of insurance are the following:

> The risk management or risk sharing commonly occurs through an insurer. However, persons may choose to self-insure, or spread or 'pool' the effects of a risk through group plans. The economic loss being shared with the insurer or group is defined by a contract or policy offered by the insurer for a price or

> premium. The premium includes an assessment of initial and continuing expenses, actual and contingent, creation of a 'pool' from which to pay claims, and contribution to the insurer's investment income from which the insurer pays the cost of operation and development of business. Since the risk or loss covered by the insurance is in the future, the exact risk or loss is not known when the insurance contract or policy is issued. All who are sharing the risk, both insurers and insureds, view the risk as the probable amount of loss, and the amount of coverage and the premium for the insurance actually purchased are calculated on this unknown.
>
> [Perreira v. Rediger, supra, 169 N.J. at 417]

As the Supreme Court's analysis makes clear, a fundamental aspect of insurance programs generally is that there are numerous factors that directly and indirectly affect the cost of the premium – some of which are controllable and some of which are not. The premium is based on "an assessment of initial and continuing expenses, actual and contingent." Ibid. And since "the insurance is in the future, the exact risk or loss is not known." Ibid. Therefore, the ratio of premium to the risk of loss is constantly changing, and the fixing and adjusting of the premium is broadly analogous to striving to hit a constantly moving target.

Moreover, the cost of the premium is influenced by many other intrinsic and extrinsic factors. These factors include – but are by no means limited to -- the scope of coverage, layers of coverage, policy limits, policy exclusions, changes in risk over time, the size of the group, the characteristics of the group, changes in the group over time and changes in loss rates over time. Furthermore, the cost of the premium is also affected by the allocation of cost and risk between insurer and insured, which are implemented by way of self-insured retentions, deductibles, co-payments and coinsurance. These and other factors affect the cost of the insurance premium not only in obvious and direct ways but also in ways that involve the complex interaction of the various factors. See Perreira v. Rediger, supra, 169 N.J. at 417; see also 5 Couch on Ins. §§ 69:1 to 69:3.

Stated more broadly, the cost of insurance is distinctly different than the cost of most other products and services procured by government. Most other products and services are readily ascertainable, easily understood, sold in clearly defined units and predictable in price. Insurance is none of these things. An insurance policy is abstract, intangible and highly variable by scope of coverages, exclusions, size and characteristics of the group and many other considerations. Moreover, some of the cost components of an insurance policy are controllable and some are not. These fundamental and unique attributes of public employee health insurance properly inform the Council's analysis of Chapters 44 and 163 under the New Jersey Constitution and the LMA.

C. Chapters 44 and 163 are nothing more than an update to an insurance system that has existed for sixty years -- and constitutes just one change to the terms and conditions of insurance coverage wherein change is regular, constant and ongoing.

Against this backdrop, Claimants' bare contention (that Chapters 44 and 163 are an "unfunded mandate" within the meaning of the New Jersey Constitution and the LMA): (1) fails to properly consider and take account of the extensive history and development of New Jersey's public employee health benefits programs; and (2) fails to properly comprehend and take account of the fundamental and unique attributes of public employee health insurance. As previously noted, Chapter 44 was enacted as a direct response to the higher health care costs experienced by many school districts. These higher costs were the result – in part -- of the last major statutory revision to SEHBP – *i.e.*, L. 2011, c. 78 (hereafter "Chapter 78"). As detailed in the accompanying certification of Kevin Drennan, Chapter 44 was enacted in part to "address[] … the Chapter 78 inequities." Sokol Cert., Exhibit "A" (Drennan Cert., ¶7). In particular, Chapter 44 altered the formula for employee contributions to health insurance. Id. (Drennan Cert., ¶¶6-7). As a result of modification of the formula (among other factors), the Milliman actuarial firm estimated that

Chapter 44 would produce annual savings to all school districts (as well as employees) of over $800 million. Id. (Drennan Cert., ¶8). In light of this substantial savings to school districts and employees, it is ironic – to say the least – that Chapter 44 is here alleged to be an impermissible unfunded mandate. *But even without regard to Chapter 44's projected savings to school districts, the larger point is that the statute is unquestionably a "revision" to the SEHBP* – which is a living, evolving, and organic system that the Legislature has evaluated and updated on a continuing basis since 1961.

The effect of a ruling by the Council in favor of Claimants would be far reaching. Suffice it to say that if the Council were to adopt Claimants' wholly unworkable view of the nature of public employee insurance programs, the effect of the ruling would be to paralyze the Legislature's ability to effectively control and adjust the terms of public employee insurance programs as applied to hundreds of school districts throughout this State.

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To sum up: the record reflects a long legislative history of successive amendments to the SEHBP statute in order to achieve the proper balance of comprehensive health benefit coverage and affordability among the various stakeholders. As previously noted, if the Council were to hold that Chapters 44 and 163 were not within the "revision" exemption of the New Jersey Constitution and the LMA, then it would be difficult to conceive of any statute that would *ever* be within the scope of the "revision" exemption expressly authorized by N.J. Const., Art. VIII, § 2, ¶ 5(c)(3) and N.J.S.A. 52:13H-3(c). As such, the constitutional and statutory "revision" exemption should be construed in accordance with its plain terms and – so construed – the three Complaints fail to state a cognizable claim against Chapters 44 and 163. The Complaints are properly dismissed as a

matter of law for this reason alone and even without regard to the immunizing effect of the Acts' mandatory collective negotiation provision.

CONCLUSION

For the reasons set forth above, *Amici* Senate President Stephen M. Sweeney and Assembly Speaker Craig J. Coughlin join in support of the motion of Respondent State Executive Branch for summary judgment seeking dismissal of the three Complaints in this Consolidated Action.

Respectfully submitted,

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