

EXECUTIVE ORDER NO. 73

WHEREAS, on March 5, 2019, I fulfilled my duty as Governor by delivering my budget recommendations for Fiscal Year 2020 to a joint session of the New Jersey State Legislature, proposing a responsibly balanced budget plan, along with recommended supporting legislation, designed to make New Jersey stronger and fairer for all residents, not just a select few, and to continue the progress we made last year together with my respected partners in legislative leadership for the benefit of the State; and

WHEREAS, in recognition of my constitutional obligations to faithfully execute New Jersey's laws and manage the fiscal affairs of our State in a prudent and responsible manner, my budget recommendations included a realistic proposal to fund our important, shared priorities in a comprehensive way while, at the same time, growing the State's inexcusably inadequate fiscal surplus, which under recent budgets had irresponsibly dwindled to as little as one percent of budgeted spending; and

WHEREAS, in making my budget recommendations, I sought to improve New Jersey's notoriously poor and widely recognized national fiscal standing compared to other state governments in preparedness for a national economic downturn, a natural disaster, or other unexpected occurrence negatively affecting revenue collections during the fiscal year; and

WHEREAS, throughout the spring, the State Treasurer repeatedly highlighted the need for a dramatically enhanced undesignated closing fund balance for New Jersey in Fiscal Year 2020, as well as a robust contribution to our Surplus Revenue Fund, first established in 1990 and more commonly known as our "Rainy Day Fund," which would be the first contribution in 11 years and would be made, as required by law, based on the higher than anticipated revenues collected near the end of Fiscal Year 2019; and

WHEREAS, my recommendations included a limited number of commonsense recurring revenue-raising measures, including a modest increase on annual taxable income exceeding \$1 million, a fee on the manufacturers and distributors of opioids to help offset the costs of crucial programs to battle the opioid epidemic in New Jersey, a fee on companies that irresponsibly deny health benefits to their employees, costing the State millions annually, a small fee increase for hunting and killing bears, and an increased fee for gun ownership that has not been increased since the 1960s, to help continue to pay for all of the spending initiatives included in the Fiscal Year 2019 budget, plus the costs of new programs, services, and benefit levels enacted into law throughout the fiscal year since July that were not included in the Fiscal Year 2019 budget, plus any new or additional spending included by the Legislature for Fiscal Year 2020, while appropriately growing the State's undesignated fund balance and our Rainy Day Fund; and

WHEREAS, throughout the Fiscal Year 2020 budget process, legislative leadership continued to disregard the need to build and maintain a responsible surplus, instead declaring that a Rainy Day Fund contribution would not be appropriate this year, while at the same time proposing significantly increased spending for Fiscal Year 2020 and not taking any actions to amend or supplement the Rainy Day Fund law to eliminate the statutory requirement that a contribution be made for Fiscal Year 2019; and

WHEREAS, in 1984, Governor Kean enacted P.L.1984, c.213 to establish a New Jersey State and Local Expenditure and Revenue Policy Commission ("Commission") for the purpose of conducting a systemic and comprehensive review of our State and local tax structure and recommending corrective actions to ameliorate imbalances in that structure, in particular by building upon the strength of New Jersey's economy and diverse workforce; and

WHEREAS, among several budget reforms recommended by the Commission to improve fiscal planning and control in New Jersey was a recommendation that the State create a Rainy Day Fund, separate from other funds that support ordinary State spending, including the General Fund and the Property Tax Relief Fund, in order to accomplish three distinct, but related, goals: (1)

create a responsible cushion to cover any cash flow problems that the State might experience during the course of a fiscal year; (2) maintain a reasonable reserve against unforeseen events, such as natural disasters; and (3) provide countercyclical assistance by setting aside unexpected surplus revenues during times of prosperity and statutorily restricting such revenues for use only during an unanticipated economic slowdown; and

WHEREAS, on June 27, 1990, Governor Florio enacted Senate Bill No. 1 (1990) ("[S1](#)") into law, P.L.1990, c.44, creating the Rainy Day Fund in what the Governor described as "an historic moment for New Jersey;" and

WHEREAS, Governor Florio's public remarks at the bill signing event for [S1](#) included the following hopeful, but unfortunately rather prescient, observations: "The Rainy Day Fund gets us off the financial roller coaster. A ride that has left us breathless, unable to plan for our future. A ride that common sense tells us we can't continue The [Surplus Revenue] Fund sets aside excess revenues. They can't be touched by the Governor or the Legislature. They can only be used if an economic downturn leads to a budget deficit – as was the case this year, when I came into office facing a \$600 million budget deficit. . . . It's mindboggling to consider how we became a fiscally precarious state. We had some good economic times in New Jersey. The sad thing is we spent every penny we made and then some. The State government was like a family that bought a Porsche before putting away for the kids' education. We spent money we shouldn't have; and then we spent money we didn't have;" and

WHEREAS, in those same public remarks, Governor Florio questioned the wisdom and fairness displayed by certain contemporary legislators who "tried to stop progress because they like the status quo," more particularly because they opposed the establishment of a recurring revenue source; in that case they "like[d] a system where millionaires pay the same tax rates as a family of four trying to get by on \$50,000 a year. I think that's unfair;" and

WHEREAS, Governor Florio's wise sentiments from nearly three decades ago remain equally true today; and

WHEREAS, at the time when the Rainy Day Fund was created, the State of New Jersey's bond rating was AAA, as compared with its current general obligation bond rating of A-, three levels above junk bond status, which among other detrimental effects makes it more costly to borrow money when necessary; and

WHEREAS, a report, released by Moody's Investors Service ("Moody's") on May 20, 2019, noted that 48 states are either "strongly" or "moderately" prepared for a recession because of their healthy reserve levels and fiscal flexibility; unfortunately, New Jersey was one of only two states that Moody's identified as having "weak" recession preparedness due to its large future obligations, such as pensions and health benefits, inadequate recurring revenues, and insufficient surplus; and

WHEREAS, New Jersey's regrettable experiences during the Great Recession of 2008-2009 starkly illustrate the wisdom displayed by Governor Florio and the responsible legislators of the early 1990s, who foresaw the dire financial circumstances that were likely to confront New Jersey in the event of a future recession: in the Great Recession, State revenues in Fiscal Year 2009 fell by \$3.6 billion, or 11 percent, below forecasts and by nearly \$1.8 billion, or 5.9 percent, in Fiscal Year 2010, prompting draconian cuts to services and threatening the benefits relied upon by the State's most vulnerable residents; and

WHEREAS, prior to the outset of the Great Recession, in Fiscal Year 2007, the State enjoyed an undesignated fund balance (commonly referred to as the "surplus") of nearly \$2.104 billion and a Rainy Day Fund balance of \$484.6 million, which both were fortunately available to cushion the blow to taxpayers and vulnerable residents as the State spent the Rainy Day Fund down to zero in just two years' time; and

WHEREAS, since the complete depletion of our Rainy Day Fund in Fiscal Year 2009, the Legislature has regrettably failed to enact an annual appropriations act with an undesignated fund balance above two and a half percent of spending, despite reducing several taxes including the Sales and Use Tax, which, for example, was lowered in 2016 in a manner unnoticeable to most taxpayers but which has cost the General Fund nearly a billion dollars, while at the same time constantly increasing expenditures; and

WHEREAS, New Jersey's relatively meager undesignated fund balance lags far behind those of our peer states which, according to the National Association of State Budget Officers ("NASBO"), presently maintain an average state surplus of 10 percent of budgeted spending; and

WHEREAS, the Legislature's dangerous policy of conflating true reserves, which thanks to the wisdom of Governor Florio and past legislators are statutorily required to be placed in the Rainy Day Fund and are capable of being used only in the event of a fiscal emergency like a recession, with undesignated fund balances, which lawmakers may freely appropriate as part of the annual State budget without regard for responsible fiscal management or future preparedness, has made New Jersey one of a small number of states in the nation with a Rainy Day Fund requirement that has absolutely no current balance in its Rainy Day Fund; and

WHEREAS, during Fiscal Year 2023, the first fiscal year in which our current, temporary Corporation Business Tax ("CBT") surcharge will be completely phased out, the State also will reach the end of a ten-year plan to phase in our full, actuarially determined annual contribution to the State-administered pension funds, a payment from the State budget and from the Lottery that is expected to exceed \$6.5 billion; and

WHEREAS, like our multi-year pension phase-in plan, the statutory plan for increasing funding in support of public schools is likewise being phased in over the next half-decade, increasing annual State spending obligations by hundreds of millions of dollars each and every fiscal year for the foreseeable future; and

WHEREAS, many credible sources have raised nearly identical concerns about the likelihood of the United States entering a pronounced recession in the foreseeable future, including, for example, a June 2019 report from Morgan Stanley to its clients warning that prudent investors should brace for market turmoil over the next 12 months as Morgan Stanley shifted its cyclical indicator, which aggregates economic and financial market data, from "expansion" to "downturn" in light of weakening credit issuance, consumer confidence, and manufacturing gauges over recent months, and a recent Duke University / CFO Global Business Outlook survey finding that over four-fifths of corporate chief financial officers believe that a recession will begin in the first quarter of calendar year 2021, meaning it is possible that the State will be in the midst of a recession at the exact time one of the State's primary revenue sources will be sunseting and a State contribution of over \$6.5 billion to the pension system will be expected; and

WHEREAS, instead of enacting a reasonable budget that pays for current expenses with recurring revenues, maintains a responsible surplus, and contributes to the Rainy Day Fund, the Legislature has merely paid lip service to fiscal responsibility as it embraced a budget that relies on some of the grossest forms of exaggerations, assumptions, and other gimmicks to support increased spending in Fiscal Year 2020 while failing to acknowledge the statutory obligation to put hundreds of millions of dollars in the Rainy Day Fund; and WHEREAS, the budget crafted by the Legislature is regrettably lacking in new, sustainable, recurring revenues to support new spending, and instead relies in substantial part on unexplained overperformance by current revenue sources, including both a historically unpredictable tax, the CBT, and the temporary surcharge on net business income in excess of \$1 million that, as noted, will decrease from 2.5 percent to 1.5 percent in 2020 and disappear entirely in 2022; and

WHEREAS, during the May revenue update formally presented to the legislative budget committees, the State Treasurer testified that anticipated Fiscal Year 2020 CBT revenues are expected to be \$3.164 billion, while the non-partisan Office of Legislative Services ("OLS")

published a substantially more conservative estimate of \$3.037 billion, or \$126.8 million below the Executive Branch's estimate; and

WHEREAS, between OLS's testimony on May 15, 2019 and the introduction of the appropriations act on June 17, 2019, the estimate for the CBT relied upon by the legislative majority increased by over \$200 million above the Executive Branch's estimate, and by over \$300 million above OLS's forecast, to \$3.372 billion; and

WHEREAS, following inquiries, the legislative majority indicated a belief, apparently not shared by OLS, that the State would receive an additional \$100 million through the "delayed" taxation of repatriated dividends and would pay out \$130 million less in CBT tax credits and \$45 million less in Insurance Premium Tax credits during the upcoming fiscal year, all of which run counter to the estimates, methodology, and testimony of the legislative branch's own nonpartisan revenue forecast during the May update; and

WHEREAS, although New Jersey has enjoyed unexpectedly strong CBT collections in recent weeks, that overperformance is unrelated to delayed taxation of repatriated dividends or unclaimed tax credits; and

WHEREAS, in addition to unrealistic CBT revenue assumptions that far exceed the estimates published by OLS, the budget passed by the Legislature is also reliant on other exaggerated revenues, including an unexplained doubling of the revenue estimate associated with my Administration's recommended suspended business restoration initiative and an indiscriminate use of OLS revenue estimates only where they are higher than Treasury's, as well as multiple nebulous "savings" initiatives, several of which appear to be of dubious legality, see, e.g., *Communications Workers of America v. Florio*, 130 N.J. 439 (1992), and are not grounded in reality; and

WHEREAS, in order to appear to pay for its spending plan, the Legislature also has effectuated ill-advised and needless cuts to important educational programs, some of which will inevitably have harmful impacts on individuals and communities, including cutting about half of the funding I proposed for the transformative Community College Opportunity Grant ("CCOG") program while, at the same time, affirming its value by significantly expanding program eligibility; and

WHEREAS, in addition, the legislative budget plan includes a scheme to cut \$25 million from the State's planned Fiscal Year 2020 pension contribution, replacing those dollars with "decoupled debit" legislation that creates a shortfall in the ten-year pension payment phase-in plan by failing to provide for the full planned pension payment in Fiscal Year 2020, and I conditionally vetoed this legislation to ensure the full planned payment is made; and

WHEREAS, the cumulative effects of these and other irresponsible budgeting practices have resulted in a legislative budget that more closely resembles budgets approved during the prior administration, which resulted in 11 credit downgrades, than the responsible budget I recommended, setting the stage for continued chaos and fiscal uncertainty in future fiscal years; and

WHEREAS, in order to continue the progress we have made in improving the State's economic footing and preparedness for inevitable contingencies or worse, including a major economic downturn as predicted by many prominent experts and economists, it is imperative that we build and maintain a robust surplus that includes a substantial contribution to our Rainy Day Fund; and

WHEREAS, I am advised that, after appropriate mathematical and accounting treatment, the closing undesignated fund balance under the legislative majority's budget will be far less than the \$1.41 billion they suggest; and

WHEREAS, more specifically, I am advised that the current Rainy Day Fund statute, which has not been amended or supplemented to allow the Legislature to divert balances in the Rainy Day Fund for nonstatutory uses, requires a payment of approximately \$401.4 million to the Rainy Day

Fund, which payment is reflected in the revenue certification I signed today along with this Order, significantly lowering the legislative majority's projected undesignated fund balance; and

WHEREAS, my revenue certification also reflects other changes, including correcting the legislative CBT estimates to restore greater consistency with the figures published by both OLS and my administration and adjusting for the Legislature's mixing and matching of OLS and Treasury numbers to achieve more realistic levels; and

WHEREAS, while I do not have the legal authority to increase appropriations in those areas, such as unrealistic Corrections consolidation, exaggerated salary lapses, speculative procurement and audit savings, and other cuts like school aid and emergency 9-1-1 telecommunications upgrades, where the Legislature anticipated implausible savings, or simply underfunded its own spending additions such as personal care assistants, school choice, pretrial services, and Work First New Jersey benefits totaling as much as \$235 million, failing to appropriate money to pay for these purposes does not eliminate the need to pay for them; and

WHEREAS, the Legislature also passed a number of supplemental appropriations concurrently with the budget, violating both the letter and the spirit of the New Jersey Constitution which requires a single annual appropriations law that includes all foreseeable spending for the fiscal year rather than intentional piecemeal budgeting, totaling approximately \$12.4 million not accounted for in calculating the overall legislative surplus; and

WHEREAS, this is not the first time in recent years that the Legislature's penchant for including highly dubious "savings" initiatives in its budget, forcing the administration to attempt to achieve such savings even in the absence of a realistic or even articulable plan, and at the risk of depleting the surplus if the full amount of the savings fails to materialize, has generated a disagreement between the Legislature and the Governor; and

WHEREAS, in June 2016, Governor Christie confronted a very similar situation involving \$250 million in speculative "savings" embedded in the Fiscal Year 2017 legislative budget that were determined to be highly at risk of non-achievement and therefore threatened the maintenance of core government programs and the maintenance of a responsible undesignated closing balance; and

WHEREAS, more specifically, in Executive Order No. 209 (2016) ("EO 209"), Governor Christie temporarily placed into reserve an equal amount of spending calculated to match the amount of savings that were realistically determined to be at risk of non-achievement based on the information available at the time the budget was enacted, pending the actual attainment of savings; and

WHEREAS, I am advised that as much as \$235 million contained in the Fiscal Year 2020 legislative budget is so questionable as to be designated by the Office of Management and Budget, after thorough review in consultation with the affected departments and agencies, as reasonably warranting "at risk" status; and

WHEREAS, like Governor Christie, I would like to take my legislative partners at their word that these "at risk" items are realistically achievable during Fiscal Year 2020 as budgeted; and

WHEREAS, while Governor Christie in EO 209 ordered the placement in reserve of "all legislative additions" to the Governor's recommended budget, as well as "half of the appropriation for Transitional Aid to Localities," which supports financially distressed cities throughout New Jersey including Trenton and Camden, I believe a more thoughtful and focused analysis should be undertaken in determining amounts to be temporarily reserved to effectuate the purposes of this Order; and

WHEREAS, the facts and circumstances described above and more fully manifested in the legislative majority's budget documents unfortunately prevent me from accepting their spending

plan or certifying their suggested revenues in their entirety, and while I cannot add spending to their plan, Treasury and I are authorized to take some necessary actions to ensure that our shared spending priorities are met while much-needed surplus funds are not diverted away from the Rainy Day Fund or misguidedly spent down in Fiscal Year 2020 in anticipation of savings that may never arrive; and

WHEREAS, the New Jersey State Constitution requires the Governor to take care that the laws of this State be faithfully executed, N.J. Const. (1947) Article V, Section I, Paragraph 11, including ensuring compliance with the constitutional mandate that a balanced State budget be maintained, N.J. Const. (1947) Article VIII, Section II, Paragraph 2; and

WHEREAS, additionally, the New Jersey Constitution assigns to the Governor alone the authority and responsibility to certify annual State revenues, as well as the ability to disapprove individual items of appropriation, subject to potential legislative override, under the line-item veto power; and

WHEREAS, during the course of a fiscal year, the Director of the Division of Budget and Accounting ("Director") may take steps to freeze State spending by placing certain funds in reserve in order to ensure that the State's budget remains balanced and to protect against and meet emergencies that may arise during the fiscal year pursuant to N.J.S.A. 52:27B-26, and the Governor also may enjoin expenditures and prescribe the terms on which such expenditures may be made, if at all, pursuant to N.J.S.A. 52:27B-31 to ensure that appropriations are not used to support waste, mismanagement or extravagance in a time of potentially diminished fiscal resources; and

WHEREAS, failure to exercise these powers now, at the outset of the fiscal year, risks the State potentially lacking resources necessary to maintain a responsible fund balance throughout the year, including sums in the Rainy Day Fund, while it must make statutorily required quarterly pension payments and provide for essential State services and basic operations of State government for Fiscal Year 2020, potentially causing immediate adverse impacts on the residents of the State;

NOW, THEREFORE, I, PHILIP D. MURPHY, Governor of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Statutes of this State, do hereby ORDER and DIRECT:

1. In light of the facts and circumstances described above, the Director is hereby ordered immediately to identify and place into reserve items of appropriation, pursuant to N.J.S.A. 52:27B-26, in an amount sufficient to ensure that the State budget remains in balance while maintaining a responsible anticipated closing fund balance of \$875 million in addition to making a deposit required by the Rainy Day Fund law of \$401 million into the Rainy Day Fund attributable to Fiscal Year 2019. The amounts immediately reserved shall be determined by the Director in consideration of the factors and criteria set forth herein, based on information and materials available to the Department of the Treasury, in consultation with the affected departments and agencies, with respect to each such item. Items of appropriation that shall not be considered for reservation pursuant to this Order shall include items supporting current Stateadministered programs, services, and benefit levels, particularly items that relate to the health, safety, or welfare of State residents, all as determined by the Director. As to other items of appropriation, the Director shall consider relevant factors including, but not limited to, the amount of the item of appropriation, its intended purpose, recipients, and intended beneficiaries, the likely statewide or localized impact of the item, the history of State support for the item, the timing during the fiscal year of any payment(s) in support of the item, the ability to delay payment until later in the fiscal year while monitoring overall budget performance, and such other factors as the Director determines to be relevant in fairly and evenhandedly evaluating items of appropriation for reservation in order to effectuate the purposes of this Order while minimizing disruption to ongoing programs, services, and benefit levels. In determining the most appropriate items of appropriation for reservation pursuant to this Order, the Director shall not be limited to legislative

additions to my recommended budget, but rather shall consider all items of appropriation. The Director shall notify the State Treasurer and the Governor immediately of the list of items placed into reserve. The State Treasurer shall monitor savings actually achieved with respect to each savings initiative identified as at risk of non-achievement and, in consideration of monthly revenue collections and other factors, including usage and enrollment trends, legislative activity, and other factors directly affecting fund balances, shall take such actions as are necessary to ensure that the estimated closing undesignated fund balance plus the balance for Fiscal Year 2020 in the Rainy Day Fund, when added together, total at least \$1.276 billion. The State Treasurer and the Director of the Division of Budget and Accounting are hereby authorized and directed to supplement the list of items of appropriation reserved pursuant to this Order throughout the fiscal year so long as the conditions that necessitate this Order persist.

2. The State Treasurer shall periodically notify the Governor as necessary with respect to the status of these surplus balances. Thereafter, upon receiving notification from the State Treasurer that amounts in excess of the targeted fund balance are anticipated to be available for expenditure, the Director may release from reserve, pursuant to N.J.S.A. 52:27B-26, items of appropriation in consideration of those circumstances.

3. All State officials and agencies shall cooperate fully in the implementation of this Order.

4. This Order shall take effect immediately and shall remain in full force and effect until rescinded, modified, or supplemented by me.

GIVEN, under my hand and seal this 30th day of June, [seal] Two Thousand and Nineteen, and of the Independence of the United States the Two Hundred and Forty-Third.

/ s / Philip D. Murphy
Governor

Attest:

/ s / Matthew J. Platkin
Chief Counsel to the Governor