

Supreme Court of New Jersey

Docket No. 089292

JERSEY CITY UNITED AGAINST	:	CIVIL ACTION
THE NEW WARD MAP,	:	ON PETITION FOR
DOWNTOWN COALITION OF	:	CERTIFICATION FROM
NEIGHBORHOOD	:	THE FINAL JUDGMENT
ASSOCIATIONS, GREENVILLE	:	OF THE SUPERIOR COURT
NEIGHBORHOOD ALLIANCE,	:	OF NEW JERSEY
FRIENDS OF BERRY LANE	:	APPELLATE DIVISION
PARK, RIVERVIEW	:	DOCKET NOS. A-0356-22
NEIGHBORHOOD	:	A-0560-22
ASSOCIATION, PERSHING	:	
FIELD NEIGHBORHOOD	:	Sat Below:
ASSOCIATION, SGT. ANTHONY	:	HON. ROBERT GILSON P.J.A.D.
NEIGHBORHOOD ASSOC.,	:	HON. PATRICK DEALMEIDA,
	:	J.A.D.
<i>(For Continuation of Appearances</i>	:	HON. AVIS BISHOP-THOMPSON,
<i>See Inside Cover)</i>	:	J.A.D.

PETITION FOR CERTIFICATION AND APPENDIX

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Date Submitted: April 11, 2024



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ASSOCIATION, CRESCENT
AVENUE BLOCK ASSOCIATION,
DEMOCRATIC POLITICAL
ALLIANCE, and FRANK E.
GILMORE, in his individual and
official capacity as Ward F
Councilman,

Plaintiffs-Petitioners,

vs.

JERSEY CITY WARD
COMMISSION and JOHN
MINELLA, in his official capacity
as Chair of the Commission

Defendants-Respondents.

JAMES CALDERON,

Plaintiff-Petitioner,

vs.

CITY OF JERSEY CITY WARD
COMMISSION, JOHN MINELLA,
Chairman, SEAN J. GALLAGHER,
Secretary, and Commissioners
DANIEL E. BECKELMAN, PAUL
CASTELLI, JANET LARWA, and
DANIEL MIQUELI,

Defendants-Respondents.

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STATEMENT OF THE CASE

This is a case of first impression brought under the New Jersey Municipal Ward Law (“MWL”) and the Speech and Association and Equal Protection clauses of the New Jersey Constitution. The case has major implications for local elections in New Jersey: are local officials across New Jersey allowed unchecked power to rig their election maps to punish voters and the candidates whom they elect if those candidates are not aligned with the status quo? Plaintiffs-Appellants (“Plaintiffs”) submit that the answer should be a firm “no.” Maps should be drawn in accordance with the MWL, and established constitutional principles, and Plaintiffs thus respectfully request this Court to accept this appeal to correct the errors made below and to clarify the standards that are required when local ward maps are drawn.

Plaintiffs are thirteen (13) community-based organizations, representing all six wards of Jersey City, and a newly elected independent Councilman, Frank E. Gilmore; together they challenge the Jersey City Ward Commission’s (the “Commission”) 2022 Ward Map, which creates ward boundaries for purposes of electing ward representatives to the Jersey City Council. In their underlying Complaint, Plaintiffs painstakingly detail how the Commission drew a gerrymandered ward map that, among other things, violates the MWL by outright ignoring the statute’s “compactness” requirement. The map splits up

historic neighborhoods, ignores natural boundaries, relies on expiring election districts rather than the norm of census tracts and, creates two wards – D and F – with abysmal scores on two of the most commonly used statistical measures of “compactness.” Indeed, both wards exhibit grossly irregular shapes; one of which, Ward F, visually resembles the Massachusetts district whose irregular shape in 1812 inspired the invention of the term “gerrymandering” in the first place! All of these flaws result in real harm to the voting rights of the residents of those wards. Compactness, a standard redistricting requirement, is universally regarded as an anti-gerrymandering standard and a tool to guarantee that communities of interest are properly represented. It is thus an essential factor to be considered especially in the context of municipalities, such as Jersey City, where neighborhoods and development patterns define very diverse communities of interest.

Plaintiffs also alleged in factual detail the unlawful reason the Commission drew such a warped ward map: the Commission, at the behest of unidentified persons, sought to dilute the strength of the voters of Ward F, who had elected Councilman Gilmore, the only nonincumbent candidate to win election. The Commission was also using its powers to retaliate against Councilman Gilmore and his voters for opposing certain development projects within his ward that he believed did not include sufficient, if any, affordable

housing.

Despite these well-pleaded allegations and New Jersey's liberal pleading standards that require factual allegations must be accepted as true at the motion-to-dismiss stage, the trial court and then the the appellate court dismissed all of Plaintiffs' constitutional claims and the count under the New Jersey Civil Rights Act ("CRA") without allowing for *any* discovery and without conducting the relevant legal analysis necessary to determine if the Complaint had stated viable claims. The lower courts were unwilling to entertain Plaintiffs' claims, even though they arise under clear statutory and constitutional provisions and similar clams have been repeatedly permitted by state courts across the country.

The single statutory claim that the the Appellate Division did not dismiss, alleging a lack of "compactness" under the MWL, was remanded in such a way as to render the claim and the statute meaningless. The Division directed the trial court to consider whether the Commission had a rational basis to adopt the bizarre configurations of Wards D and F, but preemptively denied Plaintiffs the right to pursue *any* discovery or to present *any* expert testimony as to common statistical measures of compactness, and evidence of split neighborhoods and diluted communities of interest. In so doing, the Appellate Division ignored the MWL's legislative history (which clearly shows the Legislature's desire to protect "diverse communities"), decisions of numerous highest courts in other

states, as well this Court’s prohibition against “bizarre designs” in Jackson v. Bodine (1967) and an appellate court’s focus on the perimeter of a district to measure compactness in Davenport v. Apportionment Comm., (1973).

To make matters even more egregious, Plaintiffs’ claim under the Open Public Meetings Act (“OPMA”) was dismissed. Contrary to precedent, the Appellate Division upheld the right of the Commission to hold discussions of alternative maps in private working sessions that had less than a quorum as a way to *circumvent* the OPMA. The Division also held that the Commission could approve a ward map without disclosing any of its prior deliberations or any of its reasons for adopting such map instead of any other proposed maps. These holdings are antithetical to the OPMA as well as good, transparent government and severely restrict the public redistricting process contemplated by the MWL.

Suffice to say, the lower courts erred when they refused to permit Plaintiff to maintain their well-pleaded claims challenging the Commission’s rigged process for adopting the 2022 Jersey City Ward Maps as well as the substance of the rigged map that resulted from that unlawful process.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs adopt and incorporate the allegations in their Verified Complaint as fully set forth herein and provide the following procedural history. After the

Governor promulgated the decennial census data on September 16, 2021, the Commission held its initial meeting on December 15, 2022. (Pa15) A second meeting was scheduled for January 14, 2022, but prior to that meeting a proposed ward map was shared with certain Jersey City Council members and published online via social media. (Pa16) Public outrage across the City ensued because several distinct neighborhoods were negatively impacted. *Id.* The January 14, 2022 meeting was cancelled due to the inability of the Commission to fix a “technical” problem that limited the number of people who could participate by Zoom; and the meeting was rescheduled for January 22, 2022, at which time the Commission adopted the challenged ward map, which is substantially different from the map that was publicly released. *Id.* At the January 22, 2022 Commission meeting *only one map* was presented; it was described as “represent[ing] the least amount of change, both geographically and demographically, while lowering the deviation to the lowest possible percentage of 1.8 percent.” (Pa137) Public comment followed with no response by the Commissioners. Five Commissioners approved the map without stating their reason for doing so, one abstained, and a single commissioner, Gallagher, stated his support because it met “all the criteria set forth in the MWL.” (Pa174-175)

On February 3, 2022, the Commission filed with the Municipal Clerk and Secretary of State its mandated Report, which contained information about the

process conducted and a textual description of the ward boundaries, in addition to a certified copy of the new Jersey City Ward Map. (Pa17) Two days later, on February 5, 2022 the Municipal Clerk published a notice of the ward boundaries in the Jersey Journal. *Id.* Visually, the map that was filed represents a significant departure from previous Jersey City Ward Maps that were promulgated after prior censuses, with the irregular shapes of Ward D and Ward F standing out in particular. (Pa53) Ward F snakes through Jersey City from the newly developed high-rise luxury apartments on the waterfront into the heart of the historical black community, known as Lafayette, in a salamander-like figure, with numerous jagged edges. (Pa19) Ward F is not “compact” based on two statistical tests that courts across the United States employ as accurate measures of how centralized, dispersed or compact a voting district is. (Pa20) These statistical measures of compactness are also automatically generated by the software used by the Commission to create its ward map.¹

The Report that the Commission sent to the Secretary of State indicates the Commission did not *at all* consider the “compactness” of the 2022 Jersey City Ward Map. (Pa40) It also revealed that there were several meetings held between

¹The map approved by the Commission indicates that it was created using Dave’s Redistricting software. <https://davesredistricting.org/maps#viewmap::f76373d1-6e30-4f19-b053-aef871784101> (this was the link provided by the Commission for the 1/22/2022 map, which is no longer live).

Commission members after the cancelled January 14, 2022 meeting, during which Plaintiffs allege that private discussions took place among the Commissioners as to changes to be made, apparently in response to some of the criticism leveled at the original map released. (*Id.*) When the single map was presented to the public, then, deliberations had already occurred and the proposed map was a *fait accompli*.

On Monday, March 21, 2022, Plaintiffs filed a Verified Complaint in Lieu of Prerogative Writ, which includes for illustrative purposes an alternative Jersey City Ward Map that “achieves much better population deviation, is significantly more compact, splits many less neighborhoods and historic districts, does not split buildings, preserves communities of interest, respects natural boundaries and topography, relocates approximately 15,000 less residents from their ward boundaries, and otherwise better adheres to traditional principles of redistricting” than the Commission’s adopted 2022 ward map. (Pa30-31)

On May 13, 2022, Defendants moved to dismiss the Complaint, and Plaintiffs opposed on July 14, 2022. Notwithstanding that Defendants submitted certifications and exhibits along with their motion, the trial court did not convert the motion to dismiss to a motion for summary judgment, as required. The Court

heard oral argument on August 5, 2022 and issued its decision dismissing the Verified Complaint in its entirety on August 25, 2022.

Plaintiffs appealed this decision on October 7, 2022. (Pa1-2) The Appellate Division rendered its decision on March 12, 2024. (1a) Plaintiffs filed a Notice of Petition for Certification on April 1, 2024, which was amended on April 11, 2024 pursuant to court directive.(30a)

QUESTIONS PRESENTED

1. Did the Appellate Division’s “limited remand” on “compactness” unlawfully restrict Plaintiffs’ ability to pursue discovery and to present expert testimony as to the statistical measurements and evidence regarding communities of interest and neighborhood, which are all needed to decide if the 2022 Jersey City Ward Map actually complies with the requirements of the MWL?
2. Did the Plaintiffs state a claim at the motion-to-dismiss stage for violations of the OPMA when they pleaded factual allegations establishing that the Ward Commission’s deliberations about the 2022 Jersey City Ward Map occurred solely in closed meetings that had less than a quorum of commissioners to deliberately circumvent the OPMA? Also, did the Plaintiffs stat an OPMA claim when they pleaded that the Commission did not provide the public with reasons why it selected the map they approved over others?
3. Did Plaintiffs state a claim at the motion-to-dismiss stage under the Equal Protection Clause of the New Jersey Constitution, as well as under the CRA when they pleaded factual allegations establishing that the 2022 Jersey City Ward Map violates the “compactness” requirement of the MWL?
4. Did the Plaintiffs -- namely, the former and current residents of Ward F – state a claim at the motion-to-dismiss stage for partisan gerrymandering when they pleaded factual allegations demonstrating that Ward F was

gerrymandered on the basis of their voting history and has a highly irregular shape?

5. Did Plaintiff Councilman Frank E. Gilmore state a claim at the motion-to-dismiss stage for retaliation when he pleaded factual allegations confirming that the Ward Commission drew a map designed to punish him?

REASONS TO GRANT THE PETITION/COMMENTS ON THE APPELLATE DIVISION’S RULING

I. The N.J. Supreme Court Has Yet to Interpret the Compactness and Public Meetings Requirements of the MWL, and It Should Provide Needed Guidance Now.

a. Substantive Challenge based on “Compactness”

The crux of Plaintiffs’ substantive challenge to the 2022 Jersey City Ward Map is the failure to draw “compact” wards, as required by the MWL. Indeed, the map creates, at minimum, two bizarre-shaped wards. The map tears apart long-standing historic neighborhoods, ignores natural boundaries (such as the Palisades Cliffs), and even splits buildings in half. In doing so, Plaintiffs allege that the Commission unnecessarily divided established “communities of interest” that have congealed over the years based on historical development patterns and common concerns arising from a shared neighborhood or locale.

The lower courts shied away from answering important questions that need to be answered as to what the Legislature meant when it added the term “compactness” in the MWL as a distinct requirement, which was not previously included in the prior General Ward Law, what interests the Legislature intended

to protect; and how the Legislature intended the concept to be operationalized. The trial court simply declared, without citation to any authority, that a ward of any shape may be compact. The Appellate Division did something similar, characterizing compactness as an “elusive concept,”² and offering the Merriam-Webster’s dictionary definition of “units closely packed or joined” as its sole source of meaning. (17a) Both the trial court and Appellate Division declined to look at the statutory history of the MWL, which shows that the Legislature specifically sought to provide effective representation to “diverse groups of residents” residing in distinct neighborhoods typically found in large urban municipalities. The lower courts also declined Plaintiffs’ invitation to look at the approximately twenty Supreme Court cases from other states that have spelled out their respective understanding of “compactness” as a concept concerned with preventing irregular or grotesque shapes, ensuring geographical and social cohesion where people live, or maintaining “closely united” districts by taking into consideration existing neighborhoods, topography and transportation options. (Pa19-20 n.8) The lower court also declined to acknowledge this Court’s focus on shape in Jackson v. Bodine, 49 N.J. 406, 419 (1967)(rejecting

² Davenport v. Apportionment Comm., 65 N.J. 125, 133 (1974). *But see* Judge Pashman’s dissent stating “Compactness is not a political concept, but a constitutional tool to better facilitate and guarantee that a community of interest is represented properly.” *Id.* at 149.

“extreme” cases where redistricting “yield[s] such bizzare designs as a ‘shoe lace’ or ‘horse shoe’) and the Appellate Division’s focus on the perimeter of a district in Davenport v. Apportionment Comm., 124 N.J. Super. 30, 43 (App. Div. 1973) (“Technically, we interpret the requirement of compactness to mean that between two districts of equal area the one with the smaller perimeter is the more compact.”) *quoted in Davenport*, 65 N.J. at 147.

Most importantly, the Appellate Division failed to delineate how a ward redistricting commission should evaluate and measure whether a map satisfies the “compactness” requirement, especially since it prohibited the use of the Polsby-Popper Measure or the Reock Measure that are commonly accepted statistical measures of “compactness” (and which were generated by the very software that was used by the Commission to create its map)³ or consideration of neighborhoods or communities of interest. (20-1a) With no more than a dictionary definition of compactness, the Appellate Division remanded Plaintiffs’ statutory claim under the MWL to the trial court for limited determination, based on either cross-examination of the Commissioners or their 2022 Report, of whether the Commission had a rational basis for finding each

³ See Davenport, *supra*, 65 N.J. at 150-1, noting that all redistricting criteria including compactness “can be translated into practical instructions for computer analysis. See *O’Rourke, Reapportionment: Law, Politics, Computers* (1972).”

ward to be compact.

The Appellate Division’s “limited remand” effectively vacates the MWL’s mandatory requirement of “compactness” of its meaning and functional import despite the profound implication on Plaintiffs’ fundamental right to vote. Compactness is no doubt a traditional redistricting principle designed to prevent gerrymandering and ensure effective representation of the jurisdiction delimited.⁴ It is thus the obligation of this Supreme Court to set clear standards as to what it means for a ward to be “closely packed or joined;” what is the compactness requirement meant to achieve in the context of a municipality such as Jersey City; and how it should be operationalized. Only then should the matter be remanded for a full hearing with the opportunity for Plaintiffs, after discovery, to present expert testimony as to the statistical measures of compactness, and provide evidence that will prove that the Commission failed to consider the compactness of each ward and had no valid basis for creating two grossly irregularly-shaped wards that split neighborhoods, and diluted the

⁴ See e.g., Ansolabehere and Palmer, *A Two Hundred-Year Statistical History of the Gerrymander*, 77 OHIO ST. L.J. 741 (2016); Polsby and Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POLICY REV. 301 (1991); Schwartzberg, *Reapportionment, Gerrymanders, and the Notion of Compactness*, 50 MINN. L. REV. 443 (1966); Ernest C. Reock, Jr., *A Note: Measuring Compactness as a Requirement of Legislative Apportionment*, 5 MIDWEST J. OF POL. SCI. 1, 70-74 (Feb. 1961). Prof. Reock’s analysis is notable since he authored the Musto Commission Report, which was part of the legislative history of the MWL.

voting strength of communities of interest based on local development concerns, especially in Ward F, in violation of the MWL.

b. Substantive Procedural Challenge Based on Anemic Public Process

Another aspect of Plaintiffs' challenge to the 2022 Jersey City Ward Map is that it was the product of closed-door deliberations among Commission members, which Plaintiffs alleged were designed to circumvent the requirements of the OPMA,⁵ thus violating the MWL's requirement that *all Commission meetings shall be public*. Unlike in congressional and legislative redistricting, ward redistricting by the Commission under the MWL is subject to the OPMA, N.J.S.A. 10:4-6 to -21. *See* N.J.S.A. 10:4-7 (explicitly exempting Apportionment Commission while not exempting municipal ward commissions from OPMA); *N.J. Const.* Art. II, §2, ¶¶4,5 (providing Redistricting Commission meetings may be closed, except at meeting when certification is approved, and requiring public hearings designed to facilitate public input). Therefore, the Appellate Division's holding that the Commissioners' right to consult with a surveyor, an engineer or other assistants "to aid them in the discharge of their duties," sanctions private working sessions among Commissioners designed to be just short of a quorum cannot be sustained by the

⁵ *See* N.J.S.A. 10:4-11 ("No...public body shall fail to invite a portion of its members to a meeting for the purpose of circumventing the provisions of this act.")

OPMA and its case law. (26a) Permitting Plaintiffs' access to the Commissioner's decisions and deliberations with respect to alternative maps just short of formal action does not "invade the province of the Commissioners." (*Id.*) Instead, it makes public what the Legislature intended to be public when requiring all Commission meetings to be subject to the OPMA.

The OPMA provides that the public has the right "to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies," such as the Commission. N.J.S.A. 10:4-7. Indeed, contrary to the Appellate Division's finding that there was no violation simply because no formal action was taken at such private meetings, the OPMA applies to a public body's gathering "[e]ven though the purpose of a meeting is to discuss and not to vote on public business." South Harrison, Tp. Comm. v. Bd. of Chosen Freeholders, 210 N.J. Super. 370 (App. Div. 1986); *see also* In re Distribution of Casino Simulcasting Special Fund, 398 N.J. Super. 7, 17 (App. Div. 2008) ("vot[ing] at a public meeting and ultimately explain[ing] the result does not cure the problem of private deliberations" and would contravene OPMA's purpose by ironing out negotiations or policies in private and then only giving off an appearance of open government). Accordingly, the "actions" that Plaintiffs are challenging, which consist of discussions or decisions short of adoption of the final map,

must be governed by the Act and publicly disclosed. *Cf. In re 2021 Redistricting Cases Matanuska-Suitna Borough*, 528 P.3d. 40 (Alaska, 2023)(requiring alternative maps to be discussed at public redistricting meetings).

When enacting the MWL, the Legislature clearly intended the Ward Commission to operate similar to a municipal council, where council deliberations regarding an ordinance are made on the record and public comment is permitted at such time to enable the public to influence the decision. The failure of the Ward Commission in this case to discuss alternative maps in public, and to invite members of the public to submit alternative maps and express their concerns prior to the final meeting of the Commission created an anemic, non-transparent process that was not contemplated by the Legislature when it subjected all Commission meetings to the OPMA. And for sure, they did not intend that there would be only one substantive meeting, at which time only one map was presented and approved as a *fait accompli*, without any discussion as to why this map was selected over others. Accordingly, the Appellate Division puts at risk the open and transparent public process that the Legislature intended to govern ward redistricting at the time it enacted the MWL.⁶

⁶ When deciding not to exempt the Commission from the OPMA, “actual or perceived corruption” was the target because, as Woodrow Wilson stated, “corruption thrives in secret places and avoids public places. . . .” P.L. 2006, c.70, §1 (legislative history of the 2006 amendments).

II. The N.J. Supreme Court Has Yet to Explore the Relationship between the MWL, the Equal Protection Clause, and the CRA, and It Should Provide Needed Guidance Now.

The Appellate Division opinion is fundamentally misaligned with well-established redistricting jurisprudence, which widely recognizes “communities of interest” as a traditional districting criterion that must be complied with alongside compactness, contiguity, and preservation of geographic boundaries of counties and other political subdivisions. *See* cases cited at Pb49-50. Though conceptually distinct, “communities of interest” is a standard that is directly related to compactness, and both are informed by fundamental rights connected to the right to vote, equal protection, and effective representation. As the Pennsylvania Supreme Court has noted:

[T]he use of compactness, [and] contiguity . . . maintains the strength of an individual’s vote in electing a . . . representative. When an individual is grouped with other members of his or her community in a . . . district for purposes of voting, the commonality of the interests shared with the other voters in the community increase the ability of the individual to elect a . . . representative for the district that reflects his or her personal preferences It simply achieves *the constitutional goal of fair and equal elections*. (Emphasis added.)

League of Women Voters v. Commonwealth, 178 A. 3d 737, 816 (Pa 2018).

In their Verified Complaint, Plaintiffs, set forth numerous factual allegations that establish an inextricable link between compactness (understood geographically), communities of interest based on localized, socio-economic

development issues, and effective representation. (Pa21-26; Pb50-52) It is this indivisible link, in the Jersey City context, that supports their claim under the Equal Protection Clause, which rests on *the Commission's failure to draw compact maps leading to the unnecessary fracturing of established neighborhoods as well as their associated communities of interest, and diminishment of their voting rights.*

The Appellate Division rejected such claim first by holding that compactness, in the context of ward redistricting, has nothing to do with communities of interest, and cannot be considered because the Legislature did not include such standard in the MWL. (19a) Neither conclusion is accurate. *First*, it is certain that New Jersey Courts have considered communities of interest in congressional and legislative redistricting, when such principle is not included in the relevant constitutional provisions.⁷ (*See* Pb50) *Second*, the U.S. Supreme Court has found that the Voting Right Act's §2 "compactness inquiry" requires consideration of "traditional districting principles such as maintaining communities of interest and traditional boundaries." Abrams v. Johnson, 521 U.S. 74, 91-92 (1997). This directive to include communities of interest in the

⁷ It should be noted that neither *N.J. Const.* Art. II, §2, governing congressional redistricting, nor Art. IV, §2, ¶3, governing state legislative redistricting, explicitly requires consideration of communities of interest. The former has no standards, and the latter contains a requirement for assembly districts to be "as nearly compact and equal in number of inhabitants. . . ."

compactness analysis is consistent with the statutory history of the MWL, which ties effective representation to maintaining communities of interest, “particularly when a municipality includes diverse groups of people.” (Pa78)

Once it erroneously jettisoned the connection between compactness, communities of interest and fair representation, the Appellate Division was then able to find that Plaintiffs had not alleged “any class of people who were treated differently by the Commission as compared to another class of people” to sustain an Equal Protection claim. (22a) However, consistent with redistricting jurisprudence, Plaintiffs have alleged such class: residents of Ward D and F were treated differently than residents in the other four wards. With respect to both wards, the Commission violated the compactness standard; in Ward F, several neighborhoods were split, and in both wards, new neighborhoods representing different communities of interest were added resulting in fractured and incoherent communities of interest. Accordingly, the failure of the Commission to draw compact maps for each ward denied residents of Ward D and F an equal opportunity to elect representatives of their choice compared to residents living in the other four wards. Such is the constitutional harm Plaintiffs have alleged; not just that people were moved to different wards, as stated by the Appellate Division. (22a)

The failure of the Appellate Division to connect compactness with

effective representation and Plaintiffs’ fundamental right to vote also led the Appellate Division to dismiss Plaintiffs’ CRA claim, even though it did not dismiss their claim under the MWL. Accordingly, before this Court is also the question of whether the MWL itself, even if no equal protection or other constitutional claim is established, confers protections from the deprivation of rights secured by the laws of this State pursuant to the CRA, and therefore permits shifting attorney fees and costs.

Plaintiffs say yes; the Appellate Division implicitly said no, but did not undertake any analysis. In Tumpson v. Farina, 218 N.J. 450, 486 (2014), the N.J. Supreme Court held, for the first time, that a statutory right, such as the rights of initiative and referendum, may be deemed a civil right deserving of protection under the CRA. Indeed, the court held that the initiative and referendum provisions found in the Faulkner Act were the quintessential substantive “rights-creating” statutes that would entitle a plaintiff to injunctive relief under the CRA.

Since 2014, the Supreme Court has further clarified Tumpson to state:

In Tumpson, we applied the three-part Blessing test, albeit without the Gonzaga refinement, and found that the Faulkner Act conferred on the plaintiffs the substantive right of Petition—the right to place a recently enacted rent control ordinance before the voters for their approval or disapproval. Tumpson, 218 N.J. at 477-78. . . . In applying the Blessing test, we held: first, the Legislature, through the Faulkner Act, clearly intended to confer the right of Petition on the plaintiffs and voters of Hoboken; second, the right as enunciated

in the statute was neither “vague” nor “amorphous,” and its application was straightforward; and third, the Clerk was unambiguously required to accept and file the petition. *Id.* 218 N.J. at 477-78. Moreover, because the Clerk’s failure to file the petition gave rise to a cause of action, we determined that “by definition, the right of Petition is substantive in nature.” *Id.* 218 N.J. at 47.

Harz v. Borough of Spring Lake, 234 N.J. 317, 333-34 (2018); *see also* DeSanctis v. Borough of Belmar, 455 N.J. Super. 316, 333-34 (quoting Harz).

Applying the Blessing test in this case, it is clear that the MWL confers on the Plaintiffs, and the voters and residents of Jersey City, the right to reside in a ward that consists of compact territory - a safeguard designed to preserve their communities of interest and guarantee them fair representation, impacting their fundamental right to vote; second, the requirement that each ward be comprised of “contiguous and compact territory” and have a population deviation of only 10% is explicitly required in the statute, N.J.S.A 40:44-14, and is not vague, with its application relatively straightforward; and finally, the Commission is unambiguously required to meet all three requirements, and because its failure to even consider the issue of “compactness” (let alone satisfy such requirement) gives rise to a cause of action under the MWL, the right to reside in a compact district to ensure effective representation, by definition, is substantive in nature and constitutes a civil right to be protected.

III. The NJ Supreme Court Has Yet to Set Forth Elements of a Partisan Gerrymandering Claim Under the New Jersey Constitution and It Should Provide Needed Guidance Now.

Although the Appellate Division cited Davenport, *supra*, 65 N.J. at 134, to affirm the impermissibility of partisan gerrymandering in New Jersey, it simply stated that Plaintiffs did not assert such claim because they “have not alleged gerrymandering based on political party,” (Op16) and have made “no showing” that the Commission “purposely dilute[ed] the votes of certain identifiable groups.” (Op24) It appears that the Appellate Division selectively read the Complaint in this matter. It also ignored Plaintiffs’ briefs and the case law set forth therein regarding partisan gerrymandering prior to and since the U.S. Supreme Court decision in Rucho v. Common Cause, 139 S.Ct. 2484 (2019).

It is accurate to say that the Complaint does not state a claim of gerrymandering based on affiliation with an established political party. However, “partisanship” is typically defined to be broader than simple affiliation with a party, and includes adherence to a particular “faction, cause, or person.” Indeed, it is Plaintiffs’ speech and associational activity in support of Frank E. Gilmore, including their vote for him, that constitutes the predicate of their claim of “partisan” gerrymandering. *See* (Pb32-35). The Complaint also identifies that this claim was brought on behalf of the Plaintiff groups that represent the voters of Ward F and formerly Ward F, and explicitly sets forth allegations of associational harm sufficient to make a showing of purposeful dilution at this

stage of the litigation. (Pa39) *See generally* Pb29-35.

The Appellate Division had an obligation to articulate the standards that would govern a partisan gerrymandering challenge to a municipal ward map and then apply them to the facts alleged in the Complaint to determine whether Plaintiffs have stated a cause of action. It, like the trial court, failed to do so, requiring this court to step in.⁸

IV. **The N.J. Supreme Court Has Yet to Set Forth the Elements of a Speech Retaliation Claim for Elected Officials, and It Should Provide Needed Guidance Now.**

The Appellate Division stated that because redistricting involves movement of residents among wards, residents of old Ward F have no right to vote for Gilmore and he in turn has no right to be elected by the same voters (24-5a); but that is not the harm that either he or the Plaintiffs alleged. The Panel also stated that Gilmore’s claim of retaliation was “speculative” (28a); however, that too is not a basis to reject such claim on a motion to dismiss. Rather, the Panel should have, but did not, address Gilmore’s well-pleaded evidence of retaliation (Pb40-42) nor the well-pleaded harm he did plead—which, according

⁸ Plaintiffs offered the three-prong standard set forth in Shapiro v. McManus, 203 F. Supp. 3d 579, 596-598 (D. Md. 2016) to support their claim that the Commission penalized them because of their associational activity in support of Frank E. Gilmore and, specifically, how they voted in the previous November municipal elections. (Pb31-32) The trial court rejected this standard because it was not formulated by a New Jersey court; the Appellate Division did not address the issue.

to case law dealing with retaliation against elected officials, requires them to establish that the actions taken against them “interfere[d] with their ability to perform their elected duties.” Werkheiser v. Pocono Twp., 210 F. Supp. 633, 641 (W.D. Pa. 2016) *aff’d*, Pocono Twp. Bd. of Supervisors, 2017 U.S. App. LEXIS 14772 (3d Cir. Pa. Aug. 10, 2017); King v. City of New York, 581 F. Supp. 3d 559 (S.D.N.Y. 2022)(action interfered with council member’s ability to represent the voters who elected them). Most importantly, the Appellate Division did not flesh out each of the elements of a retaliatory speech claim instituted by an election official, as did Plaintiffs (Pb39), nor take Councilman Gilmore’s factual allegations in support of each element of his claim seriously. (Pa37-39) The lack of any legal analysis, especially in a published decision on such an important constitutional issue must be addressed by this Court.

CONCLUSION

This first-of-its-kind complaint in New Jersey raises significant legal issues and poses serious constitutional harms concerning the right of Jersey City voters to fair and effective representation. The judiciary has an obligation to protect the voters from the abusive maneuvering alleged, which causes serious harm to the social and political fabric of the City. The fact that no New Jersey court has dealt with the the “compactness” or “public process” requirements embedded in the MWL or constitutional claims alleging partisan

gerrymandering and retaliation was no excuse for the Appellate Court to abdicates its responsibility to the residents of Jersey City. Its reasoning, which upholds a rational basis review of the compactness requirement of the MWL, without the exploration of further evidence such as standard measures of compactness, handicaps the express intent of the MWL to protect democracy on the local level. This Court should grant Plaintiffs' Petition for Certification in order to make clear the substantive standards that should govern municipal ward redistricting in order to ensure a map's validity and lawfulness.

Respectfully submitted,

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Dated: April 11, 2024

CERTIFICATION OF COUNSEL

The undersigned counsel for the petitioner hereby certifies that this petition presents a substantial question and is filed in good faith and not for the purposes of delay.

/s/Renée Steinhagen
Renée Steinhagen, Esq.

Dated: April 11, 2024