

# 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.

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## REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR CERTIFICATION

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in Docket No. A-0356-22*

Date Submitted: May 28, 2024



GARDNER AVENUE BLOCK :  
ASSOCIATION, LINCOLN PARK :  
NEIGHBORHOOD WATCH, :  
MORRIS CANAL :  
REDEVELOPMENT CDC, :  
HARMON STREET BLOCK :  
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.* :

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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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## TABLE OF ABBREVIATION

Rb—refers to Defendants/Respondents opposition to Plaintiffs’ Petition;

Db—refers to Defendants/Appellants Brief in the Appellate Division

Pb—refers to Plaintiffs/Appellants Brief in the Appellate Division

Pbr-- refers to Plaintiffs/Appellants Reply Brief in the Appellate Division

Pa –refers to Plaintiffs/Appellants appendix in the Appellate Division.

REPLY ARGUMENT

Despite Defendants' assertion otherwise, this matter is ripe for review. The Appellate Division dismissed three of the four Counts in Petitioners'/Plaintiffs' (hereinafter, "Plaintiffs") Complaint, remanded Count One for a limited review of the Commission's basis for its finding that the Ward Map satisfied the statutory "compactness" requirement, and **did not retain** jurisdiction. Under N.J. Court Rules, the Court's order is considered final and properly before this court.

Throughout their opposition brief, Respondents/Defendants (hereinafter, "Respondents") repeat, like a mantra, that redistricting, understood as the redrawing of electoral lines, is a political process that is not appropriate for judicial review. Although federal courts have declined to exercise jurisdiction where a state legislature intentionally draws a map that disempowers one or another political party, the United States Supreme Court has directed state courts to set the appropriate standard to adjudicate partisan-driven maps. State courts are surely appropriate bodies to determine that statutory and constitutional requirements are met to ensure fair representation in map-drawing, particularly here, where interpretation of a state law, the New Jersey Municipal Ward Law ("MWL"), and its basic compactness requirement, is at issue. Numerous state courts have evaluated redistricting plans on the basis of compactness, while

others have found the lack of compactness as evidence of constitutional violations. This matter must be taken up by the Court in order to prevent real harm to the voters of Jersey City so that the municipal map may be redrawn in advance of the November 2025 municipal elections, with particular concern for the residents of Ward F and D, who now reside in geographically incoherent districts that will adversely impact their ability to elect a councilperson who can effectively represent the interests of their entire wards.

I. PLAINTIFFS SEEK CERTIFICATION OF A FINAL APPELLATE JUDGMENT CONCERNING JERSEY CITY'S 2022 WARD MAP THAT NEEDS THIS COURT'S IMMEDIATE ATTENTION.

N.J. Court Rule 2:2-5(b) reads as follows:

A judgment of the Appellate Division on an appeal to it from a final judgment shall be reviewable by the Supreme Court on certification or, when appropriate, as of right, notwithstanding the remand of the matter by the Appellate Division for further proceedings. If jurisdiction is maintained, however, the matter is interlocutory . . .

In this matter, the Appellate Division dismissed all but one of Plaintiffs' counts, which it remanded to the trial court for a limited review of the Commission's rational basis for concluding that the Ward Map satisfied the statutory "compactness" requirement. It contemplates review of the Ward Report and/or cross-examination of one or more Commissioners, but prohibits the normal scope of discovery, including presentation of expert testimony regarding compactness, consideration of objective statistical measures of compactness –



basic, quantitative measurements widely used in redistricting jurisprudence, or consideration of the relationship of compactness with communities of interest. These are probative factors which would allow for compliance with **all** the statutory requirements. The Appellate Division also prohibited review of the Commission's deliberative process, although the review of the abnormality of process is standard in voting rights challenges. Most importantly, the Appellate Division did not retain jurisdiction. In accordance with the above Rule, its decision to remand is considered final, and thus subject to this Court's review.

The legal issues raised in this litigation need to be resolved as soon as possible. Jersey City is holding its next municipal elections in November 2025, at which time representatives from each of the six wards will be elected. Plaintiffs must be allowed to develop a full record based on the normal scope of discovery, upon which the trial court can determine, with the use of objective measures of compactness, whether the new ward map is in fact compact and respects Jersey City neighborhoods that constitute geographically-based communities of interest for purposes of local affairs; and if not, are there valid principles of redistricting limited to the geography, shape and population among the wards of Jersey City (as the Appellate Court directed) that justify such irregular shapes and abysmally low scores on accepted measures of

compactness. Requiring Plaintiffs to proceed with the remand hearing prior to resolution of the parameters of that hearing defies judicial economy.

II. THIS MATTER INVOLVES LEGAL ISSUES OF PUBLIC IMPORTANCE THAT DIRECTLY IMPACT THE VOTING RIGHTS OF JERSEY CITY RESIDENTS AND, IN THE FUTURE, ALL NEW JERSEYANS WHO LIVE IN LARGER, URBAN AREAS.

A. Compactness is a Statutory Requirement That Cannot be Ignored.

In an effort to dissuade this Court from granting certification, Respondents argue that redistricting, understood as the redrawing of electoral lines, is a political process that is not appropriate for judicial review. Rb15. Redistricting plans are “accorded a presumption of legality,” *id.*, and in this case, Plaintiffs are complaining simply because they do not like the map under review. Rb14. They go as far as to assert that entertaining challenges, such as Plaintiffs’, will “increase voters’ confusion and disaffection with our democratic system.” Rb16. Though Plaintiffs have not alleged invidious racial discrimination, they have alleged that the Ward Commission failed to comply with the MWL and the Equal Protection, Speech and Association Clauses of the N.J. Constitution. These claims are substantial, raise issues of significant public import, support judicial intervention generally, and require this Court’s review specifically.

Despite Respondents’ claim otherwise, courts do determine whether redrawn maps comply with constitutional and/or statutory standards, including compactness. Compactness is a traditional concept of redistricting and has been

defined and implemented by numerous state courts over the years. *See* Pb19-20n8. Ultimately, after a full record is allowed to be created, this Court would not be able to approve the challenged map if it were to conclude that the Ward Commission abused its discretion in applying or **failing to apply** such statutory criteria.

In their Opposition to Plaintiffs' Petition, Respondents point to the need to remedy the 59% population deviation that emerged between Wards E and D over the past decade to justify its map, and the specific ward configurations therein. Rb3. In the appellate court, relying on the language in Jackman v. Bodine, 49 N.J. 406, 419 (1967) that "population equality must be distinctly paramount" to compactness, they went as far as to assert that compactness need not be considered at all. Db24. This assertion cannot be supported by the full decision in Jackman, and is undermined by Plaintiffs' production of an alternative map in their Complaint.<sup>1</sup> Plaintiffs produced such a map, not to say that such map must be adopted, but to defeat the Commission's claim that the need to remedy the population growth in Ward E somehow required it to ignore the MWL's distinct compactness requirement. Given that Plaintiffs achieved a lower population deviation than the Commission, while substantially improving

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<sup>1</sup> *See* Prb3-8 for a full response to Respondents' misuse of Jackman (1967) below.

the compactness measure of each ward, establishes that in 2022, there simply was no trade-off between the two and no need for one. (Moreover, allowing expert analysis would allow further fact determination of this question.)

What Plaintiffs are asking the Court to do is not novel: Simply require compliance with the MWL's requirement of compactness. Other state courts that have adopted, like the Appellate Division, a geographical concept of compactness based on shape<sup>2</sup> have done so.<sup>3</sup> While others have considered dismal statistical scores of compactness as evidence of unconstitutional gerrymandering. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 814, 819-21 (Pa. 2018) (noting that high compactness scores “ensure

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<sup>2</sup> Plaintiffs accept the adoption by the Appellate Division of a strictly geographic concept of compactness in contrast to a functional one; but protest its rejection of objective statistical measures of compactness and neighborhoods/communities of interest as factors to be considered as part of the trial court's compactness analysis.

<sup>3</sup> *See e.g., Schrage v. State Bd. of Elections*, 430 N.E.2d 483, 486-87 (Ill. 1981) (holding one district invalid for lack of compactness noting that subservience to equal population “should not be read . . . as a death knell to the compactness requirement,” which “cannot be ignored” or otherwise “written out” of the law, especially where it can be achieved without doing violence to such concept); *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d 784, 790-91 (Iowa) *supplemented by* 196 N.W.2d 2009 (Iowa), *amended by* 199 N.W.2d 614 (Iowa 1972) (finding the “strange shape” of several districts violative of compactness, and not necessitated by considerations of population equality or resulting from unfeasibility); *Adams v. DeWine*, 195 N. E.3d 74, 94-97 (Ohio 2022) (invalidating map where three counties were split for no reason other than partisan advantage, resulting in non-compact shaped districts with relatively low statistical compactness scores).

geographical and social cohesion of communities where people live and conduct their daily affairs,” while low scores may be evidence of gerrymandering).

Irregularity of shape – such as bizarrely designed horse shoes, claw-like tentacles and isthmuses – can no doubt be determined visually, but can one make an objective assessment of the degree of compactness employing such method? Plaintiffs urge this Court to sanction the use of standard mathematical measurements to make the concept of compactness workable. In re Senate Joint Resol. of Legislative Apportionment 1176, 83 So.3d 597, 636 (Fl. 2012); Harper v. Hall, 868 S.E.2d 499, 511-12 (N.C) *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022) (approving Redistricting Committee’s use as a guide the minimum Reock (“dispersion”) and Polsby-Popper (“perimeter) scores” when seeking to satisfy compactness criterion).

The Reock score is a standard, widely used metric developed by esteemed Rutgers University Prof. Ernest Reock, who also authored the 1982 Musto Commission Report that was part of legislative history of the MWL and informed its prescription. Professor Reock explains in his 1961 article on the Reock Score:

*Probably the best use for the [statistical] method of measuring compactness outlined here is as a tool for the courts . . . Given a statutory or constitutional directive that districts be "as compact as is practicable," the mathematical degree of compactness may be used to test the reasonableness of any districting act. In individual situations other requirements--population equality,*

contiguity, even adherence to county or municipal boundaries--may dictate the formation of a particular non-compact district. Where such considerations are not overriding, however, districts should be required to meet a reasonable standard of compactness . . . *[I]t seems reasonable to say that every district with a degree of compactness of less than 30% should be re-examined carefully. Districts having a degree of compactness below 20% should be considered suspect until proven valid.*

Ernest C. Reock, Jr., A Note: Measuring Compactness as a Requirement of Legislative Apportionment, 5 MIDWEST J. OF POL. SCI. 1, 74 (Feb. 1961) (emphasis added), *available at*: <https://www.jstor.org/stable/2109043>.

In this way, a court, when reviewing a redistricting plan, may use a statistical, objective measure rather than simply relying on the naked eye to determine whether the plan comports with the compactness requirement or sacrifices that traditional districting principle to achieve some other goal -- some valid, others not. Upon remand, if Plaintiffs were able to use the Reock score in the manner Prof. Reock suggested, i.e.: for Ward F (.1604) and Ward D (.2753), the burden would no doubt shift to the Commission to prove why it could not comply with the compactness requirement. Pa21, 84.<sup>4</sup>

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<sup>4</sup> The Reock Score is a simple measurement which operates like a compass instrument: identify the center point of a district, and draw a circle around its outermost edges. The Reock Score is the percentage of the circle occupied by the district; the higher the percentage, the more compact the district.

The purpose of constructing districts that are compact and contiguous is not only to avoid the practice of gerrymandering, understood as the manipulation of an election district, but also to "assist in maintaining communities of interest." Ariz. Minority Coal. For Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 121 P.3d. 843, 869 (Ariz. Ct. App. 2005). *See* Pb48-54. Even though the MWL does not specify communities of interest as a distinct criterion (neither do the N.J. constitutional provisions governing legislative and congressional redistricting), "communities of interest" are a basic tenet of redistricting, and like compactness, which Justice Pashman once noted was "a constitutional tool to better facilitate and guarantee that a community of interest is represented properly," it constitutes a safeguard against the evils of gerrymandering whereby the elected choose their voters rather than the reverse. Davenport v. Apportionment Comm'n, 65 N.J. 125, 149 (1974) (Pashman, J., dissenting).

Accordingly, the Appellate Division's direction to disregard "communities of interest/neighborhoods" cannot be sustained as a matter of current redistricting jurisprudence. In the context of Jersey City, there is little doubt that distinct neighborhoods with their own community-based organizations, many of them represented by the organizational Plaintiffs, constitute a geographically-based "community of interest" for purpose of advocating on local affairs and translating their vote into effective ward

representation.<sup>5</sup> In short, people who live in geographic proximity to each other face common issues and problems. Such communities of interest are the reason why wards were created in the first place, otherwise all council people could simply be “at large,” and why the MWL was enacted with particular import for urban areas. Therefore, upon remand, Plaintiffs should have been able to use statistical measures of compactness, consider neighborhoods/communities of interest, and conduct discovery as to the Commission’s reasoning in support of the new map. Since they were denied such opportunity, the Appellate Division’s limited remand must be reversed.

B. The Commission’s Deliberate Circumvention of the OPMA When Discussing Alternative Maps and Its Presentation of Only One Map to the Public Without Discussion of Reasons Requires the Entire Process To Be Redone

The nature of the redistricting process, including whether the MWL contemplates public meetings at which time the Commission would disclose its deliberations and reasons for adopting a particular map, raises a legal issue of

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<sup>5</sup> Respondents cite to Jackman and Davenport to claim that communities of interest are irrelevant to redistricting challenges. Rb16. Neither stands for such proposition. Jackman notes that communities of interest cannot justify population deviations, and Davenport rejects the county unit as a community of interest requiring preservation. Ironically, the need to include a community of interest in a district is often used to justify a lower compactness score; whereas in this case, it underscores the relative harm incurred by the residents of Ward F and D due to their respective, abysmal compactness scores.



significant public importance. Plaintiffs are not denying the right of commissioners to meet individually with staff or consultants in working sessions, as Respondents assert. Rb11. Rather, Plaintiffs contend that they cannot do so in numbers calculated to circumvent the Open Public Meetings Act (“OPMA”), and they simply cannot adopt a map at a public meeting as a “gotcha” *fait accompli* without first discussing alternative maps in public, receiving public comment, and revealing the Commission’s reasons for selecting one map over others. The Commission’s failure to hold all their meetings in public, regardless of the fact that they took official action at the one substantive meeting that they held in public, requires renewal of the entire process. South Harrison Tp. Comm. v. Bd. of Chosen Freeholders, 210 N.J. Super. 370, 378 (App. Div. 1986) (*citing Polillo v. Deane*, 74 N.J. 562, 578 (1977)). Such remedy is appropriate despite Respondents’ assertion that there is no remedy for the OPMA violations Plaintiffs claim. Rb12.

C. The Municipal Ward Law Protects Plaintiffs’ Voting Rights Thus Implicating the N.J. Civil Rights Act (“CRA”).

Whether violation of the MWL gives rise to a claim under the CRA also raises a legal issue of public importance. In an attempt to distinguish this case from Tumpson v. Farina, 218 N.J. 450 (2014), Respondents argue that a voter’s right to initiative and referendum provided under the Faulkner Act is different

from the voters' right to fair and effective representation that is guaranteed by the MWL. Rb14-5. Though the former requires action by voters to submit a petition, both statutes govern the procedures government must follow in order to protect voters' fundamental right to vote; and, thus violation of either statute should trigger the protection of the CRA. It is clear that no one would argue that a violation of any of the constitutional requirements governing legislative and congressional redistricting, including compactness, would not be covered by the CRA. Therefore, just because the compactness requirement governing municipal ward redistricting is set forth in statute rather than the N.J. Constitution does not mean that a violation of that requirement is also not protected by the CRA.

III. THIS MATTER INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS CONCERNING POLITICALLY MOTIVATED GERRYMANDERING, RETALIATION AND EQUAL PROTECTION.

Count Two of Plaintiffs' Verified Complaint sets forth in detail a claim for partisan gerrymandering and retaliation in violation of the N.J. Constitution's Speech and Association Clause. Pa35-40. Based on the extensive facts alleged, which at this stage of litigation must be assumed to be true, their claim cannot be characterized as "merely colorable." Rb7. Furthermore, because no New Jersey court has established the standard that would govern a partisan gerrymandering challenge to a ward map nor the elements of a retaliatory speech

claim instituted by an elected official (let alone in the context of redistricting), the constitutional questions raised in this petition must be considered “substantial.” See Student Pub. Int. Research Group v. Byrne, 86 N.J. 592 (1981) (where the one case interpreting the ineligibility clause in the N.J. Constitution did not resolve the issue at hand).<sup>6</sup>

First, Respondents continue to assert that Plaintiffs have not alleged a partisan gerrymandering claim simply because Jersey City holds non-partisan elections. Rb17. But all that means is that the two established political parties—the Democrats and Republicans – do not hold primaries. In fact, in all Jersey City municipal elections, candidates during the general election run with labels/slogans, which typically identify themselves with the Jersey City Democratic or Republican Committee, a known third-party or as Plaintiff Frank Gilmore ran (with a slate of candidates running for Mayor and at-large Council seats) under a label, such as “Independent Leadership You Can Trust.”

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<sup>6</sup> Similarly, no N.J. court has undertaken an analysis of whether the Commission’s failure to comply with the compactness requirements of the MWL, if severe enough, may sustain an Equal Protection violation (which Plaintiffs pled in Count I). Again, Plaintiffs have described in detail how the Commission’s map split recognized neighborhoods and buildings, ignored natural boundaries and, as a result, fractured geographically based communities of interest when drawing Wards F and D. Such facts state more than a colorable claim, and the lack of established equal protection principles in the redistricting context implicating the fundamental right to vote raises a substantial constitutional question for this Court to resolve.

Accordingly, Jersey City’s municipal elections are indeed “partisan” in the broader sense of the word.<sup>7</sup> Second, Respondents’ assertion that Plaintiffs’ failure to allege “invidious discrimination” is fatal to their claim under the Speech and Association Clause is nonsensical and frankly baseless. Rb17-18.<sup>8</sup>

With respect to Plaintiff Frank Gilmore’s retaliation claim, Respondents simply fail to engage with the facts as alleged in the Complaint; in particular, the allegation that “specific development projects for which Gilmore had been a vocal advocate opposing the lack of affordable housing options, and which were of significance to various neighborhoods in Ward F, were also carved out of Ward F.” Pa38. Instead, they simply declare that “the ward boundaries were not drawn to punish Frank Gilmore; they were redrawn because they were required by law to be redrawn.” Rb20. Such rhetorical form of argument proves nothing. It simply begs the substantial statutory and constitutional questions the Verified Complaint raises.

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<sup>7</sup> The Merriam-Webster Dictionary defines “partisan” as: “feeling, showing, or deriving from strong . . . adherence to a particular party, faction, cause, or person: exhibiting, characterized by, or resulting from partisanship.”

<sup>8</sup> Respondents cite to Farber v. City of Paterson, 440 F.3d 131, 142 (3d Cir. 2006) to support their position that voting for Frank Gilmore is not a sufficient predicate for a partisan gerrymandering claim. But all Farber holds is that political affiliation with an official, such as a Mayor, does not qualify as invidious discrimination for purposes of a conspiracy claim under the U.S. Civil Rights Act, §1985(3).

CONCLUSION

For the reasons stated herein and Plaintiffs' Petition for Certification, this Court should accept review of this matter in order to make clear the substantive standards that should govern municipal ward redistricting in order to ensure a map's validity and lawfulness, and to set forth the scope of discovery and standard of review governing such claims and a related speech retaliation claim brought by an elected official in the context of the MWL.

Respectfully submitted,

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Dated: May 28, 2024