IN THE SUPREME COURT OF NEW JERSEY
Docket No. 089292

JERSEY CITY UNITED AGAINST THE NEW WARD MAP, DOWNTOWN COALITION OF NEIGHBORHOOD ASSOCIATIONS, GREENVILLE NEIGHBORHOOD ALLIANCE, FRIENDS OF BERRY LANE PARK, RIVERVIEW NEIGHBORHOOD ASSOCIATION, PERSHING FIELD NEIGHBORHOOD ASSOCIATION, SGT. ANTHONY NEIGHBORHOOD ASSOC., (*For Continuation of Appearances See Inside Cover*)	ON PETITION FOR CERTIFICATION FROM THE FINAL JUDGMENT OF THE APPELLATE DIVISION Docket Nos. A-0356-22 A-0560-22 Sat Below: Hon. Roberg Gilson, P.J.A.D. Hon. Patrick DeAlmeida, J.A.D. Hon. Avis Bishop-Thompson,J.A.D CIVIL ACTION

PLAINTIFFS-PETITIONERS' OPPOSITION TO BRIEFS OF *AMICI CURIAE* BY LEAGUE OF MUNICIPALITIES ET AL, THE NEW JERSEY ASSOCIATION OF ELECTION OFFICIALS, AND THE CITY OF JERSEY CITY AND COUNCILMAN DANIEL RIVIERA

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GARDNER AVENUE BLOCK ASSOCIATION, LINCOLN PARK NEIGHBORHOOD WATCH, MORRIS CANAL REDEVELOPMENT CDC, HARMON STREET BLOCK ASSOCIATION, CRESCENT AVE. BLOCK ASSOCIATION, DEMOCRATIC POLITICAL ALLIANCE, and FRANK E. GILMORE, in his individual and official capacity as Ward F,

Plaintiffs-Petitioners,

vs.

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

Defendants-Respondents.

JAMES CALDERON,

Plaintiff-Pettioner,

vs.

CITY OF JERSEY CITY WARD COMMISION, JOHN MINELLA, Chairman, SEAN GALLAGHER, Secretary, and Commissioners DANIEL E. BECKELMAN, PAUL CASTEKKUM HANER LARWA, and DANIEL MIQUELI,

Defendants-Respondents.

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PRELIMINARY STATEMENT

Plaintiffs-Petitioners ("Plaintiffs") offer this omnibus brief in response to the three Amicus Briefs filed by the League of Municipalities et al. ("LOM"), the New Jersey Association of Election Officials ("NJAEO"), and the City of Jersey City/Councilman Daniel Rivera ("JC"). Because these briefs, on the whole simply repeat the arguments raised by Defendants-Respondents ("Defendants") in this matter, we refer the Court to Plaintiffs' Reply Brief in Support of their Appeal, dated March 13, 2023, and Plaintiffs' Reply Brief in Further Support of their Petition for Certification, dated May 28, 2024. We endeavor to limit ourselves herein to any new arguments raised and not simply repeat ourselves. We also do not reply to issues, such as retaliation, on which this Court did not accept certification.

In their respective briefs, the three *amici* listed above take the position that the redistricting process is political, involves too much discretion and accordingly, the subject matter is nonjusticiable; that is, the courts should not involve themselves. Accordingly, both JC and the NJAEO ask this Court to dismiss the case in its entirety; whereas the LOM are willing to go forward, but on the basis of a very truncated record, with minimal, if any, scrutiny by the Court. Despite their desire for unaccountability, this Court has jurisdiction

and an obligation to determine whether the 2022 Jersey City Ward Map is unlawful or not. None of the cases offered by *amici* say otherwise.

Moreover, not unlike the Appellate Division, *amici* do not seem to appreciate the redistricting process: how it works, how application of the "compactness" standard and the concept of "communities of interest" are traditional redistricting criteria necessary to prevent voter dilution, and how courts are required to exercise heightened scrutiny when faced with redistricting plans that include significant population deviations or irregularly shaped districts bearing low compactness scores using well-accepted statistical measures. Affirming the Appellate Division's decision, as all three *amici* urge, would thus make the redistricting process unworkable for map drawers, effectively bar from relief legitimate redistricting challenges, and would fundamentally alter the way redistricting occurs in New Jersey and the way it should occur at the municipal level.

LEGAL ARGUMENT ON REPLY

I. Compactness Is Not Subordinate To Population Deviation Under the MWL; It is A Central Concern And Geographic Concept That Can Be Evaluated With Statistical Measures.

None of the three *amicus* briefs discussed in this Reply say anything significant about the central issue in this case: the definition of compactness, its application under the Municipal Ward Law ("MWL") and whether the

concept can be evaluated visually and/or with the use of statistical measures. Nor do they address Defendants' argument below (Db31-32) that satisfying the statutory population deviation requirement *ipso facto* satisfies the compactness requirement – a proposition that Plaintiffs adamantly reject. *See* JCb10(noting that the ward map meets all statutory criteria without any discussion)[1]; NJAEOb3,11(acknowledging compactness and its relationship with the shape of a district) and LOMb5(affirming Appellate Court's use of the dictionary meaning of compactness as sufficient). The LOM also characterizes this Court's decision in Jackman v. Bodine, 55 N.J. 371, 379 (1970), as "caution[ing] against reliance on computers, and necessarily the impact of computer-driven statistical measurements." LOMb5. We are now 74 years later, and Plaintiffs would state the obvious: redistricting bodies routinely rely on computers; that ship has sailed.

To properly evaluate the Appellate Division's treatment of compactness in this case, one has to focus on the MWL and its statutory

[1] In this regard, we note that the City of Jersey City, by statute, is responsible for paying the Defendant's expenses, including paying for the Commission's legal defense in this matter. As a matter of public policy, an *amicus* ought to be sufficiently independent from the party whose position it supports, which clearly Jersey City is not. The more influence and control a party exerts over an *amicus* or *vice versa*, the more likely the amicus brief is nothing more than another brief of the party in disguise.

history. First, it is clear under the statute that each ward has to be compact. Second, the law does not recognize any pre-existing political subdivisions within the municipality that must be respected. As this Court said in Jackman v. Bodine, the "concept [of compactness] is *substantially* significant only when wholly new district lines are being created *without reference to existing political subdivisions*." 49 N.J. 406, 419 (1967)(emphasis added), which is the case when creating wards within a municipality under the MWL.

Third, the importance of compactness to redistricting under the MWL is underscored by its statutory history. In 1981, the Legislature was creating one municipal ward law out of two, and the standard of compactness was specifically included in order to ensure representation of minority communities typically found in larger urban areas, "particularly when the municipality includes diverse groups of residents." Pa78. The Municipal Government Study (Musto) Commission Report, authored by a nationally recognized expert on this topic, Rutgers Professor Ernest Reock, requires careful consideration as it was not only included in some generalized legislative history of the statute, but also it accompanied the bill proposal, was recognized within the Sponsor's Statement, and was authored to guide the legislature in its passage.

The Musto Report notes that "a number of recent court decisions from other jurisdictions have indicated the desirability of wards or districts in assuring minority representation." *Id*. One can be confident that among those recent decisions to which Prof. Reock was referring was City of Mobile v. Bolden, 446 U.S. 55 (1980), occurring one year earlier, in which the U.S. Supreme Court denied a challenge under the Voting Rights Act of 1965 ("VRA") to the at-large electoral system in Mobile, Alabama because the challengers who sought the creation of a ward system could not overcome the substantial obstacle in proving smoking-gun discriminatory intent. In 1982, the VRA was specifically amended in response to Mobile to permit a "results" or "effects" test. Since that amendment, the VRA requires majority-minority districts drawn under the Act to be "reasonably compact." League of United Latin Am. Citizens v. Perry, 548 U.S.399, 430-431(2006)(noting that a state cannot remedy a §2 VRA violation through the creation of district that is not "reasonably compact.").

In this way, far from conflicting with one another, the principles of population equality and compactness both seek to prevent vote dilution and ensure adequate representation of voters. Indeed, one can also point to the fact that under the MWL, wards do not have to be drawn to be as "equal in the number of inhabitants as possible," as is the standard set forth in the N.J.

Const., Art. IV, §2, ¶3 governing state legislative redistricting, to posit that compactness, not population equality, is the central concern of the MWL. This is the case because the Ward Commission is given more flexibility to satisfying the population equality requirement (that permits the populations of the most and least populous wards a 10% deviation of the mean population) compared to the compactness standard, which is not qualified by any language. Regardless of whether one concludes that compactness is the central concern, the statutory history of the MWL underscores that compactness is a central concern of the law that cannot be ignored.

The Appellate Division's adoption of the dictionary meaning of "compactness," which is consistent with a geographic concept of the standard, also does not adequately assist mapmakers on how they should apply the standard in their work, nor assist the court in determining whether a ward map is sufficiently compact to be considered valid. Common usage of the term "compact", which refers to density, does not specify whether a mapmaker should be concerned solely with the shape of a district, the regularity of its borders, whether there are "appendages" "tentacles" or "isthmuses" and/or the distance constituents have to travel in order to meet with their representative or other voters in the district. It is the failure of the Appellate Court to provide a fulsome, practical definition that properly translates the dictionary meaning

of compactness into redistricting terms that must be addressed by this Court; *amici* provide no answers.

The Appellate Division's prohibition of using statistical measures to evaluate whether a ward is compact or not, implicitly requiring all parties including the court to simply rely on their visual impression of a ward's shape (assuming shape is the primary concern of the statute), not only makes things more difficult, but also is inconsistent with the modern redistricting process. Whether a ward is compact or not is no longer solely "within the eyes of the beholder;" subjective assessments have given way to statistical measures that permit a court to evaluate a district's degree of compactness with the same precision as it evaluates a redistricting plan's degree of population deviation. In this regard, Justice Steven's concurrence in Karcher v. Dagget, 462 U.S. 725 (1983) is notable:

> A number of state statutes and Constitutions require districts to be compact and contiguous. *These standards have been of limited utility because they have not been defined and applied with rigor and precision.* Yet Professor Reock and other scholars have set forth a number of methods of measuring compactness that can be computed with virtually the same degree of precision as a population count. It is true, of course, that the significance of a particular compactness measure may be difficult to evaluate, but as the figures in this case demonstrate, the same may be said of population disparities. In addition, although some deviations from compactness may be inescapable because of the geographical configuration or uneven population density of a particular State, *the relative degrees of compactness of different district maps can always be compared*. As with the numerical

> standard, it seems fair to conclude that drastic departures from compactness are a signal that something may be amiss.
>
> *Id*. at 756-758 n.19. (emphasis added, internal references removed).

Now, more than one-half a century after this Court in Jackman v. Bodine implicitly declared that district maps with "bizarre designs as a 'shoe lace' or 'horse shoe'" are not considered compact without first defining "compactness," statistical measures are used by redistricting commissions throughout the country, and accepted by courts as part of their compactness analysis. As the Electoral Innovation Lab ("EIL") brief makes clear, statistical measures such as the Reock and Polsby-Popper scores are part of the "standard toolkit of professional redistricting experts," EILb2, and are "automatically calculated by publicly and commercially available software packages for redistricting, including Maptitude for Redistricting, ESRI Redistricting, and Dave's Redistricting App," EILb8-9; the latter of which was used by the Jersey City Ward Commission to generate the 2022 Ward Map.

There is simply no legal or practical reason to prohibit use by Plaintiffs' (and their experts) of the Reock and Polsby-Popper scores to prove that two

of the six wards are not reasonably or sufficiently compact to pass muster.[2] Prohibiting the use of these metrics turns New Jersey's contributions to the national jurisprudence on its head and makes the redistricting process more difficult for members of the Commission, inhibits "precise and rigorous" comparison between maps – past and proposed, deprives the Court of objective measures to inform its evaluation of a map's validity, and voters of a commonsense tool used to challenge gerrymandering. This Court should sanction the use of both visual and metric measures of geographic compactness, which focus on shape, as have other state supreme courts around the country. *See e.g.*, In re Senate Resolution of Legislative Apportionment 1176, 83 So. 3d 597, 635 (Fl. 2012).

II. Communities of Interest Is A Traditional Principle Of Jurisprudence That Is Inherently Intertwined With Compactness.

In its decision, the Appellate Court held that challenges "based on general, but undefined, concepts" such as "communities of interest" or "historic neighborhoods" are not viable, simply because the Legislature did

[2] It is notable that the very redistricting expert who developed a nationally recognized quantitative metric for evaluating compactness, Rutgers Professor Ernest Reock, first published in 1961, *infra* at 18, is the same person who twenty years later authored the Musto Report guiding the New Jersey legislature in passage of the MWL in 1981 that emphasized the principles of compactness and neighborhood diversity, and whose work was acknowledged by Justice Stevens only two years later.

not include them in the MWL; though it admitted that both are clearly important to the redistricting process. 19a. Each of the *amici* echo the Court's sentiment that it is not the court's responsibility to "rewrite the statute" JCb8, but each adds their own twist. The LOM asserts that communities of interest, if read into the MWL would "actually distort the [Ward Commission's] process of creating a geographically" compact ward because it is such an "amorphous" concept. LOMb7. JC argues that introducing communities of interest into the redistricting process is simply "bad public policy," JCb7-9,[3] while the NJAEO states though it might be a good idea, it is simply impossible

[3] JC's bad public policy argument is a bit convoluted and ultimately questions the salutary purpose of creating wards in the first place. It first equates communities of interest with "packing persons who hold the same view of a particular political or social issue. . . into a single ward" to then argue that it is it is better to disperse such like-minded people into different wards. JCb8-9. It bases its conclusion on the fact that At-large Councilman Rivera is more likely to vote for things if people from different wards support it and cites McNeil v. Legislative Apportionment Comm'n, 177 N.J. 364, 383 (2003) (approving the division of Jersey City and Newark into 3 legislative districts rather than 2, in order to create an "influence district" thus avoiding a "packing" violation under the VRA) in support of his opinion. This argument turns the purpose of creating wards on its head: to empower a reasonably compact group of people with similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographical or historical identities, to have the opportunity to elect a representative who can represent those interests. To discuss creating an "influence ward" under the MWL in order to influence an at-large councilman within a municipality is simply absurd. Indeed, it is this type of argument that led to the 1982 amendment of the VRA discussed, *supra* at 5, in order to invalidate at-large ward systems which proliferated throughout the South as a means of voter suppression.

for the Ward Commissioners to execute. NJAEOb5-6. All such argument are red-herrings.

It is well-established in redistricting jurisprudence that the purpose of constructing districts that are compact and contiguous is to avoid the practice of gerrymandering and to assist in maintaining communities of interest. Ariz. Minority Coalition for Fair Districting v. Ariz. Indep. Comm'n, 121 P.3d 843 (Ariz. App. 2005); Davenport, *supra*, 65 N.J. at 149 (Pashman, J. dissenting) ("Compactness is not a political concept, but a constitutional tool to better facilitate and guarantee that communities of interest are represented properly."). Typically, keeping communities of interest together promotes compactness, which in turn determines the shape of the electoral districts.

It is not an undefined concept, but one factor that must be considered when evaluating whether a map is compact. It is considered a traditional redistricting principle routinely considered by redistricting commissions throughout the country whether it is set forth in statute or the state constitution. In New Jersey, the concept is taken into account by both the Redistricting Commission, *see* In re Establishment of Cong. Dists., 249 N.J. 561, 572-73 (2022) (enumerating factors, including communities of interest, to be considered in determining constitutionality of congressional redistricting map), and the New Jersey Apportionment Commission. *See* Statement of

Standards of Philip S. Carchman, 11th Member of the New Jersey Legislative Apportionment Commission, New Jersey Apportionment Commission at 4 (Jan. 7, 2022)("The map should recognize communities of interest, which are neighborhoods, communities, or groups of people who share common values, goals, and concerns -- such as cultural, ethnic, linguistic, economic, or religious interests, or shared infrastructure concerns, shared environmental concerns, or shared industry."). These redistricting commissions consider communities of interest, although there is no constitutional provision nor statutory text expressly requiring them to do so.

It therefore follows that the concept's absence from the MWL express text does not mean that the Jersey City Ward Commission was not required to take into account communities of interest, including those formed among residents living in clearly defined neighborhoods. Indeed, it is Plaintiffs' position that Defendants' total disregard for both compactness and communities of interest in this case renders the 2022 Ward Map invalid. "When a party challenges a legislative district based upon [the state constitution's] compactness requirement . . . , one factor to consider is the existence of communities of interest. Evidence that there has been a complete disregard for existing communities of interest is relevant in showing that, beyond a reasonable doubt, a legislative district is irrational." Parella v.

Montalbano, 899 A.2d 1226, 1255 (R.I. 2006).[4] Imagine mapmakers simply drawing regularly shaped wards throughout the City without consideration of communities of interest, natural boundaries and the geography of the City – the latter of which are similarly not expressly stated in the legislative text, but are traditional redistricting criteria informed by constitutional precepts of equal protection. There would then be no connection between the map and the MWL's goal of preventing voter dilution and protecting its citizens' right to fair and effective representation, particularly in the diverse urban communities contemplated by the legislature (as set out in the Musto Report).

In addition, if pressed, none of the *amici* would deny that the Ward Commission must comply with the VRA. *See* NJAEOb6 (admitting that a municipality is a "covered jurisdiction" under the VRA). And as noted by the U.S. Supreme Court in Bush v. Vera, when designing a majority-minority district under § 2 of the VRA, that district must be "reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries" in order to

[4] This court's statement in Jackman v. Bodine, *supra*, 49 N.J. at 406 that "other matters such as so-called community interests, partisan history, and residence of incumbents" are "wholly irrelevant to the subject and cannot support deviations of any kind," does not refute the intersection between communities of interest and compactness. "Community interests" is not the same as "communities of interest."

pass strict scrutiny. *Id., supra*, 517 U.S. 952, 977 (1996). *See also* LWVNJb5. In this way, the inherent interplay between compactness and communities of interest cannot be denied.

Perhaps, this is why the NJAEO has taken the position that considering communities of interest may be a good idea, but it is a task that is impossible for the Ward Commission to do. NJAEOb2 (mandating the Ward Commission to "consider hyper-local `communities of interest' as part of their deliberation" is a "noble theory", but it is "impossible in practice). First, NJAEO claims that the Commission does not have access to information to consider communities of interest using factors such as "geography, income, residential/industrial, housing, . . .," *Id*. at 5, and that the Census simply does not provide such data at the ward-level. *Id*. at 6n.1. These claims are simply not true. Redistricting entities around the country are tasked with drawing district lines using the very data provided by the Census, which is in fact very granular and extensive. Jersey City alone has 169,588 census blocks for which demographic information is collected including but not limited to a person's ancestry, citizen status, race, education level, employment status, poverty status, value of home, number of people living in the home, computer and internet use etc. *See* Jersey City Open Data, https://data.jerseycitynj.gov. Moreover, this is particularly so in Jersey City, where longstanding

neighborhoods are recognized and bear their own names – even informing the name given to Ward F (Bergen/Lafayette) and Ward D (the Heights) in the Ward Report. Pa63.

NJAEO also claims that "it is exceedingly rare that a ward commission receives any public input at all." NJAEOb6. But as we see in this case, the Ward Commission did not even solicit such input. There is no legal or policy impediment preventing the Commission from holding public meetings, like the Redistricting and Apportionment Commissions, at which time they would invite members of the public to give testimony as to their perceived communities of interest and to generate their own maps. Moreover, the Clerk of Jersey City, who sits on the Commission, has access to the historical knowledge behind the previous ward maps, Jersey City's Master Plan and zoning maps as well as other documents produced by the City's Planning and Housing Department that are relevant to a communities of interest analysis. Indeed, Plaintiffs' Map, which shows splits in neighborhoods, in both registered historical neighborhoods and other less formally recognized neighborhoods, was based on maps available on Jersey City Open Data, a platform created by Jersey City itself. And, it is access to such information and the narrow scope of the Commission's work that makes their task easier than the Redistricting and Apportionment Commissions, not harder.

In short, Defendants' total disregard of communities of interest is fatal to its defense of the Ward Map. The Appellate Division was simply wrong as a matter of statutory interpretation to prohibit Plaintiffs from presenting evidence establishing that disregard as part of its compactness analysis. If this Court were to affirm the Appellate Division on this matter and not require the Ward Commission to consider "communities of interest" as part of the redistricting process, such exclusion would fundamentally undermine the purpose of the MWL's compactness requirement and make New Jersey an outlier in the national redistricting community, if not a pariah.

III. Severely Noncompact Wards Should Be Presumed to Be Invalid Unless Necessitated By The Natural Boundaries or Geography of the Municipality, The Need to Meet The Statutory Population Equality Requirement or The Federal Voting Rights Act.

In its opinion, the Appellate Division correctly notes that courts are limited to determining whether a redistricting plan is "unlawful or reflects invidious discrimination." 19a (*quoting* In re Establishment of Cong. Dists., *supra*, 249 N.J. at 574). Unlawful, however, cannot be limited to constitutional deficiencies as implied by *amici*. *See* JCb10 (quoting Davenport v. Apportionment Comm'n, *supra*, 65 N.J. at 133); violation of legislative standards set forth in statute, as Plaintiffs alleges in this case, also

warrants judicial scrutiny.[5] This is especially the case in the context of redistricting where the standards of compactness, contiguity, and population equality set forth in the MWL are intended to prevent voter dilution and achieve the constitutional goal of fair and equal elections (And are the same standards as those set forth in Art. IV, §2, ¶3 of the New Jersey Constitution governing the Apportionment process).

The Appellate Division then went on to decide that unless a plaintiff claims "invidious discrimination or partisan gerrymandering,"[6] their claim would be subject to a rational basis test, where

> [a] ward need only have a rational basis for its shape, considered within the context of the shape of the overall municipality, the other wards, and the population deviation between the most and least populous wards.

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[5] Plaintiffs disagree with the Appellate Division's and *amici* LOM's assertion that that this Court's decision in In re Establishment of Cong. Dists., *supra*, 249 N.J. at 576-577 means that the Ward Commission is not subject to the normal arbitrary, capricious, unconstitutional, and unreasonable standard generally used to evaluate agency actions. In that decision, Justice Rabner merely noted that such standard of review is not "a good fit" for the Redistricting Commission, because there are no "implied or express constitutional or legislative policies" governing their actions, and all their meetings (expect the meeting at which they approve a map) are held in private and not recorded. In contrast, the Ward Commission is governed by legislative policies set forth in the MWL, all their meetings are subject to the Open Public Meetings Law, and they are required to file with the Secretary of State a report detailing the boundaries of the new ward map.

[6] It should be noted that Plaintiffs did allege impermissible political gerrymandering in Count II of their Verified Complaint, though the dismissal of that claim is not being reviewed by this Court.

19a-20a. This standard of review is deficient in many aspects. It does not tell us who has the burden of proving the rational basis; it does not tell us if a plaintiff must first prove that a map has violated the compactness standard before the inquiry into justification comes into play; it does not tell us to what level of scrutiny should a court subject the rational basis offered; nor does it tell us if any rationale will be sufficient or only those related to "the context of the shape of the overall municipality, the other wards, and the population deviation," as the Appellate Court implied. None of the *amici curiae* briefs discussed herein address this crucial issue.

Instead, JC and the LOM simply say that the Ward Commission's actions are presumed valid, and satisfy all the statutory criteria, including compactness. In this way, they beg the central questions in this litigation: what degree of irregularity in the shape of a district is required to support a factual finding of noncompactness, when will such a finding support a finding that the Ward Map is invalid, and which party has the burden of proof.

Plaintiffs posit the following answer to these questions based on Prof. Reock's analysis of compactness in his article, *A Note: Measuring Compactness as a Requirement of Legislative Apportionment*, 5 MIDWEST J. POL. SCI. 70 (1961) and the U.S. Supreme Court's decision in Karcher v. Daggett, *supra*, 462 U.S. at 740-41, where the court set forth the standard and

burden of proof that was required in order to evaluate a claim that a New Jersey congressional redistricting map did not achieve the population equality required by the federal Equal Protection Clause.

Based on his examination of a variety of districts, Professor Reock suggested that any district with a score of 0.30 or less warrants skeptical examination for possible gerrymandering, and that a score of 0.20 or less "should be considered suspect, until proven valid." A Note, *supra*, at 74. One can translate this scheme into legal terms in the following way: First, if a district's compactness score is above 0.30 it can be presumed to be valid, and a plaintiff seeking to challenge the map on the basis of compactness would have to show that the boundaries were drawn for impermissible purposes not related to other legitimate redistricting goals to prevail on a claim that the map violated the MWL. *Cf*. Gonzalez v. State Apportionment Comm'n, 428 N.J. Super. 333, 366 (App. Div. 2012)(holding that plaintiff had to show that population deviations below the 10% deviation permitted by the constitution were caused by impermissible purposes to invalidate the map). Second, if the compactness score is 0.30 or below, but above 0.20, the map receives no presumption of validity, and a plaintiff would have the burden to prove that the map does not reasonably satisfy the traditional redistricting criteria such as communities of interest, municipal and natural boundaries and could be

made more compact without sacrificing population deviation or contiguity. If they were able to do so, the burden would then shift to the Commission to show that the noncompact district was "necessary to achieve some legitimate [redistricting] goal," [7] Karcher v. Dagget, *supra*, 462 U.S. at 731, or was required by the physical geography and/or boundaries of the municipality. Third, a map with a Reock score of 0.20 or less would be regarded as a presumptive political gerrymander; the plaintiff would not have to prove anything more than the score itself, and the burden of proof would shift to the Commission to justify its map on the same grounds as it would if the score was 0.30 or less.[8]

In the latter two scenarios, the Commission would not be able to simply assert a goal without specifically connecting it to the irregularity of the shape challenged by the plaintiff. As the U.S. Supreme Court stated in Karcher:

> The State must, however, show with *some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions*. The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's

[7] There is also a question of whether any legitimate redistricting criteria can trump compactness. Plaintiffs would answer no— it must be a goal that is specifically connected to achieving political equality, as may be the case where communities of interest are not considered in the analysis.

[8] In this way, a plaintiff who alleges a violation of the MWL's compactness requirement (*i.e.*, scores of .03 or less) does not have to prove impermissible intent.

> interests, the consistency with which the plan as a whole reflects those interests, and *the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.*

Id. at 741 (emphasis added). Such a test is not the rational basis test adopted by the Appellate Division. Rather, it involves a heightened level of scrutiny that requires, when applied to the compactness standard, that the irregular shape of the district was specifically necessitated by a legitimate redistricting interest, and that there were no other alternative boundaries that could be drawn that would "vindicate those interests yet approximate [compactness] more closely." It is a standard of proof and level of scrutiny that is more in line with the goal of the MWL, which is to prevent voter dilution and to protect a voter's fundamental right to fair and effective representation, than that adopted by the Appellate Division.

The applicability of the Karcher v. Dagget standard of proof to the issue of compactness was best stated by Justice Stevens in his concurrence:

> The same kinds of justification that the Court accepts as legitimate in the context of population disparities would also be available whenever the criteria of shape, compactness, political boundaries, or decisionmaking procedures have sent up warning flags. In order to overcome a prima facie case of invalidity, the State may adduce "legitimate considerations incident to the effectuation of a rational state policy. If a State is unable to respond to a plaintiff's prima facie case by showing that its plan is supported by adequate neutral criteria, I believe a court could properly conclude that the challenged scheme is either totally

> irrational or entirely motivated by a desire to curtail the political strength of the affected political group.

Id. at 760-761.

It is Plaintiffs' belief that if they had been given the opportunity to develop a full record, such record would have revealed that the Ward Commission had no legitimate justification for drawing Wards F and D as they did, and their plan is therefore "totally irrational" or entirely motivated by impermissible political purposes. *Id*. Accordingly, claimants challenging the MWL must, at a minimum, be given the opportunity to discover all the factors the Commission considered when they drew the map and the weight or value they gave to each; there is nothing in the MWL that prohibits public access to such deliberation[9] Such a scope of discovery is standard in redistricting challenges, and this Court should provide guidance for Plaintiffs and future MWL claimants.

IV. Violation of MWL Constitutes A Violation of Plaintiffs' Fundamental Voting Rights Under the NJCRA.

This case, not unlike the situation presented in Tumpson v. Farina, 218

[9] Indeed, the MWL requires that all Commission meetings be open to the public including meetings at which Commissioners compare alternative maps, discuss what principles of redistricting they will consider and the weight they will give to any one consideration. The fact that the Ward Commission did not hold such meetings in public in this case should not restrict Plaintiffs' access to such materially relevant information.

N.J. 450 (2014), raises the issue of whether a statute that directly impacts voters' electoral rights gives rise to a substantive right that may be vindicated under the New Jersey Civil Rights Act, ("NJCRA"), N.J.S.A.10:6-1 *et seq*. *Amici* LOM and NJAEO both say "no," but for different reasons.

Amicus LOM says that Plaintiffs have not alleged a right that is substantive in nature deserving protection under the NJCRA,[10] and that the Ward Commission's duty to create a ward map is too time-sensitive, discretionary, requiring nuanced determinations, and involves too "political" of a process" to be enforced. LOMb14. [11] They simply do not discuss the right Plaintiffs have identified: their fundamental right to vote and equal protection under the law to have the opportunity to elect a representative of their choice, *i.e*., the right to fair and effective representation. They also do not explain why the Ward Commission cannot be compelled to adopt a map that satisfies the statute's objective standards, which are constitutionally grounded in the

[10] Although LOM does not deny that Plaintiffs have standing under the NJCRA, they do deny their standing under MWL. LOMb15.

[11] Though any redistricting process is "political" in nature given that it involves elections, there is strong argument that the municipal ward redistricting process is less partisan than New Jersey's congressional and state legislative redistricting process. In both the latter situations, members of the respective commissions are appointed by the two established political parties in the State or their legislative leaders. Municipal Ward Commissioners are appointed by the Governor and consist of county election officials, and the municipal clerk—local officials who are expected and tasked with administering the law in a nonpartisan and neutral manner.

Fourteenth Amendment, as well as other traditional principles of redistricting. On the other hand, *Amici* NJAEO faults Plaintiffs for seeking to hold election officials liable under the NJCRA based on "their failure to consider information that they did not have, and in nearly all cases, cannot possibly obtain." NJAEOb12.[12] This attack has been answered, *supra* at 14-15.

It is well-established that a body charged with redistricting has a duty to produce a map that meets all constitutional and/or statutory requirements, applies "adequate neutral criteria," in the words of Justice Stevens in Karcher v. Dagget, *supra*, 462 U.S at 761, and protects voters' fundamental right to fair and effective representation. Although there is discretion in execution, with different factors getting different weights, the duty to prevent voter dilution and not engage in political gerrymandering is mandated as is the requirement to consider compactness, communities of interest, natural geography, municipal boundaries, population equality and contiguity. A failure to do so results in a violation of voters' civil rights.

This civil right was clearly not appreciated by either the Appellate Court of the trial court in this matter.

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[12] The LOM has a similar concern: who pays Plaintiffs' legal fees if they were to prevail under the NJCRA? LOMb15. The MWL requires Jersey City to pay the Ward Commission's expenses. Thus, if Plaintiffs were to win on such grounds, Jersey City would be liable.

Redistricting no doubt implicates a citizen's fundamental right to vote. *See* N.J. Const., Art. II, §1, ¶3; League of Women Voters v. Commonwealth, 178 A.3d 737 (Pa.2018) (finding failure to draw compact districts violated state constitution's Free and Equal Elections Clause). In such context, courts talk about the maintenance of the voting strength of an individual by grouping them with others who share a commonality of interests so as to increase the ability of the individual, and the group, to elect a representative that reflects their choice; courts are not limited to state regulations or systems that prevent access to the ballot or place a burden on a voter's ability to cast a ballot.

Similarly, redistricting has been held to implicate the Equal Protection Clause. *See* N.J. Const., Art. I, ¶1; Harper v. Hall, 868 S.E.2d 499 (N.C. 2022)(holding that under North Carolina's equal protection clause, the right to vote on an equal basis means substantially equal voting power and equal legislative representation). In such contexts, courts note that district lines may be drawn to violate the one-person one-vote principle, but also to prevent communities of interest from exercising their political strength by not providing an equal opportunity to such voters to elect a representative of their choice. And finally, redistricting may implicate a state constitution's speech and assembly clause. Shapiro v. McManus, 203 F. Supp. 3d 579 (D. Md. 2016). In Shapiro, the court found that redistricting of the state's

congressional districts implicated plaintiffs' First Amendment rights when they alleged specific intent to retaliate against them and similarly situated voters by reason of how they voted, *i.e.,* political gerrymandering. *Id*.

Seen in this light, the MWL is designed to protect New Jerseyans' state constitutional rights to vote, equal protection and free speech and assembly by preventing voting dilution and ensuring the equal voting strength between groups of people who share common interests or identities. The statute thus confers a benefit that is protected and can be enforced by the NJCRA. Harz v. Borough of Spring Lake, 234 N.J. 317 (2018).

V. Wards that are Not Compact and Disregard Communities of Interest Gives Rise to an Equal Protection Claim.

The Appellate Division erroneously held that because maps can "only" be challenged on the basis that they violate any one of the three MWL prescripts, challenges regarding the division/cracking of communities of interest are not viable. (19a). Although the panel ignored the value of standard metrics of compactness in evaluating violations, *supra* point I, it implicitly recognized the map's lack of compactness. Had it not, the matter would not have been remanded to explore, albeit in an overly limited fashion, the Commission's rationale in compromising compactness. However, the Appellate Division's conclusion that no equal protection violation arises, even when a map is significantly noncompact, or when numerous communities of

interest – in this case, residential neighborhoods – are divided, is clearly erroneous and must be reversed; not affirmed as all *amici* urge.

The LOM piggybacks and minimizes the equal protection rights at issue, characterizing them as a "right to vote for our favorite candidate." LOMb10. Similarly, the NJAEO argues there is no constitutional right to be redistricted on the basis of communities of interest. NJAEOb11. JC is silent on how communities of interest do or do not relate to equal protection guarantees; however, it imports vote dilution terminology in arguing that recognition of communities of interest would result in "packing." JCb8; *supra* at 10n3. Ironically, the terminology of "packing" (or its converse "cracking") describes basic techniques employed to dilute voting strength, which is itself premised on equal protection principles.

The constitutional guarantee of the fundamental right to vote within the context of redistricting is principally premised on equal protection—equal and fair elections for all voters, not just racial and ethnic minorities. The LOM thus erroneously endeavors to sequester these rights to the context of "racial gerrymandering." LOMb10. The question of race is not necessary in a claim for fair maps pursuant to the Fourteenth Amendment as Reynolds v. Sims makes clear:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right

> strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Reynolds, 377 U.S. 533, 555-56 (1964). *See also* Baker v. Carr, 392 U.S. 186 (1962) (establishing that redistricting claims based on one-person, one-vote do not escape judicial review, and finding such claims justiciable pursuant to the Fourteenth Amendment). In Karcher v. Dagget, Justice Stevens makes a similar point regarding race, but broadens acceptable equal protection challenges to include political gerrymanders that dilute the voting strength of "other cognizable groups of voters" as well:

> There is only one Equal Protection Clause. Since the Clause does not make some groups of citizens more equal than others, *its protection against vote dilution cannot be confined to racial groups*. As long as it proscribes gerrymandering against such groups, its proscription must provide comparable protections for other cognizable groups of voters as well. . . 'In the line-drawing process, racial, religious, ethnic, *and economic gerrymanders* are all species of political gerrymanders.
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> *Id*., *supra*, 462 U.S. at 749 (J. Stevens, Concurring), internally referencing his concurrence in Mobile v. Bolden, *supra,* 446 U.S. at 88.

In this way, the MWL must be understood as the enforcement arm of the equal protection clause as it applies to the redistricting process within a municipality, such as Jersey City. It reaches voter dilution claims to a ward map that are based on neighborhood gerrymanders, where voters within some

neighborhoods are treated more equally than others. Whether those voters are discriminated on account of race, or whether those voters are discriminated on account of their shared interests such as the "economic gerrymanders" addressed by Justice Stevens above, or the interests shared by the core of communities or prior districts, it is the Equal Protection Clause that requires that every voter be treated equally, and that those votes, and the collective power of their votes – *i.e.*, their effective representation – not be suppressed.

The ultimate goal of redistricting is to achieve political equality with respect to the value and weight afforded to voter interests, and that goal can be subverted in a number of ways:

> [I]f population equality provides the only check on political gerrymandering, it would be virtually impossible to fashion a fair and effective remedy in a case like this. For if the shape of legislative districts is entirely unconstrained, the dominant majority could no doubt respond to an unfavorable judgment by providing an even more grotesque-appearing map that reflects acceptable numerical equality with even greater political inequality.
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> Karcher, 462 U.S. 765 (J. Stevens, concurring).

It is in this manner that the principal criteria of redistricting – population equality and compactness – serve as counterweights to each other, for a self-interested mapmaker can meet one criterion by compromising the other to sacrifice political equality. Indeed, the swan and fishhook-shaped districts described in Karcher are reminiscent of the Ward D crab claw and the Ward

F "jagged, sideways L-shape" (7a) districts that emerge in Jersey City. In both Karcher and here, the map drawers contest that they achieved population equality, although the resulting bizarre shapes and compactness variations suggest political inequality that cannot be tolerated.

Next, *amicus* LOM endeavors to split well-established federal equal protection guarantees from the state constitutional analysis governing the fundamental right to vote. LOMb9-10. However, the federal analysis sets the floor, not the ceiling. *See e.g.,* Worden v. Mercer Cty. Bd. of Elections, 61 N.J. 325 (1972) ("[W]e adopt the compelling state interest test in its broadest aspects . . . for purposes of our own State Constitution and legislation"); Robert F. Williams, THE NEW JERSEY STATE CONSTITUTION 52-53 (2012) (New Jersey courts have repeatedly recognized that the State Constitution "goes beyond federal minimum standards"). The right to vote in the state constitution holds an "exalted position." In re Att'y Gen.'s "Directive on Exit Polling: Media & Non-Partisan Pub. Int. Grps., issued July 18, 2007, 200 N.J. 283, 302 (2009), whereas the federal constitution does not affirmatively express the right. See Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 100 (2014) (observing that "the U.S. Constitution does not grant the right to vote. It instead defines the right through a negative gloss, detailing the various reasons states cannot limit the

franchise."). Moreover, the U.S. Constitution delegates to the states to define voter eligibility, including in the redistricting context. U.S. Const. Art. I, §2, cl. 1 (congressional districting); *id*. amend. XVII (adopting the same test for Senate elections). *See also* U.S. Const. Art. I, §4, cl. 1 (states to determine the times, place, and manner of holding elections).

This Court should reaffirm its landmark Worden decision that voting restrictions – even where they are not an outright denial, but where they implicate the right to make one's choice meaningful and effective – "must be stricken unless a compelling state interest to justify the restriction is shown" because of the implication of the *fundamental* right to vote, which is preservative of all rights and therefore forms the bedrock of our democracy. 61 N.J. 325 (1972); *see also* In re Absentee Ballots Cast by Five Residents of Trenton Psychiatric Hosp., 31 N.J. Super. 31, 38 (App. Div. 2000) ("As with all fundamental rights, there can be no interference with an individual's right to vote" unless the interference can withstand strict scrutiny review). *But see* Rutgers Univ. Student Assembly (RUSA) v. Middlesex Cnty. Bd. of Elections, 446 N.J. Super, 221, 234 (App. Div.) (creating an anomalous doctrinal fork by applying the federal balancing test to a right to vote challenge), *cert. den*. __ N.J. __ (2016). *Cf*. Harper v. Hall, supra, 868 S.E.2d at 499 (applying strict scrutiny to evaluate vote dilution pursuant to state equal

protection guarantees); League of Women Voters. v. Commonwealth, *supra*, 178 A.3d at 816 (explaining that the state constitutional framers intended that all aspects of the electoral process be "conducted in a manner which guarantees, to the greatest degree possible, a voter's right to equal participation in the electoral process for the selection of his or her representatives in government" and finding that "the commonality of interests shared with the other voters in the community increases the ability of the individual to elect a congressional representative for the district who reflects his or her personal preferences, which comports to the minimum standards guaranteed by the United States Constitution.)

The rights at issue here, and the applicable test, are a far cry from the rational basis standard imported by the Appellate Division and echoed by *amici*.

In sum, this Court should reaffirm in no uncertain terms the compelling state interest test it articulated over a half century ago pursuant to state constitutional analysis where the fundamental right to vote is implicated. In the context of redistricting, the lodestar must be achieving fair and effective representation. Such heightened scrutiny should be applied flexibly based on the severity of the burden alleged. Here, where compactness is 0.20 or less, the presumption is that such a district (i.e., Ward F) is suspect unless proven

valid, based on specific necessitation and the lack of alternative ways to accommodate the goal of achieving political equality. *See* discussion *supra* 18-21.

In this case, Plaintiffs have alleged that the waterfront area known as Newport Pavonia was torn asunder (including a building therein) when a discrete group of people, living in a claw-shaped area, experienced a dilution of their voting strength when they were appended to Ward D, a district known as the Heights. There is little doubt that the Heights includes neighborhoods that are substantially removed from Pavonia-Newport, both geographically as well as economically. There is also little doubt that due to location, housing infrastructure, median income and a host of other factors, these former Ward E residents are now facing substantial difficulty in electing a ward representative that will represent their interests. Similarly, Paulus Hook, a historically preserved neighborhood of brownstones and high-rise luxury towers that was also previously part of Downtown – *i.e.,* Ward E -- was split down the middle, with approximately one half of its residents placed in Ward F, primarily with people with no shared interests regarding housing development, schools, and other issues tied to their neighborhood. At the same time, a core district of Ward F --- Lafayette, the oldest Black community in Jersey City – was removed from the ward, and an additional 5,000 people

were taken out of the Bergen area of Ward F. These changes did not just dilute the voting strength of the voters who were removed from Ward F, but also diminished the strength of those who remained. A once solid majority-minority district of working-class Black and Hispanic voters has now become a ward with a substantial White and Asian population, who are wealthier, live in luxury high riser towers or historically preserved brownstones, face different development pressures and do not share the same concerns as the old Ward F residents with respect to affordable housing and remediation of brownfields.

In short, accepting Plaintiffs' factual allegations as true, it is apparent that the Ward Commission not only disregarded compactness, but also disregarded and disrupted well-established communities of interest when simply ignoring Jersey City's own map of its Neighborhoods. Ver. Compl., Exhs. J, K, L, M and R (Pa207-210; 212). It therefore follows that Plaintiffs' equal protection claim is viable and should not have been dismissed.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court reverse the Appellate Division decision, and remand this matter for a trial on Count One and Four of the Verified Complaint, or in the alternative, to remand the matter to the Ward Commission to redraw the 2020 Ward Map with the guidance of

a court approved special master in accordance with the MWL and any guidelines set forth by this Court.

Respectfully submitted,

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