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., Gardner Avenue Block Association, Lincoln Park Neighborhood Watch, Morris Canal Redevelopment CDC, Harmon Street Block Association, Democratic Political Alliance, and Frank E. Gilmore, in his individual and official capacity as Ward F Councilman,

Plaintiffs-Petitioners,

v.

Jersey City Ward Commission and John Minella, in his official capacity as Chair of the Commission,

Defendants-Respondents.

On Petition for Certification from Final Judgment of the Superior Court of New Jersey, Appellate Division
Docket Nos.: A-0356-22
A-0560-22

Sat Below:
Hon. Robert Gilson, P.J.A.D.
Hon. Patrick DeAlmeida, J.A.D.
Hon. Avis Bishop-Thompson, J.A.D.

James Calderon,

Plaintiff-Petitioner,

v.

Jersey City Ward Commission and John Minella, Chairman, Sean J. Gallagher, Secretary, and Commissioners Daniel E. Beckelman, Paul Castelli, Janet Larwa, and Daniel Miqueli,

Defendants-Respondents.

BRIEF AND APPENDIX OF *AMICUS CURIAE* NEW JERSEY ASSOCIATION OF ELECTION OFFICIALS

PARTICIPATION IN ORAL ARGUMENT REQUESTED

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STATEMENT OF INTEREST OF *AMICUS CURAIE*

The New Jersey Association of Election Officials ("NJAEO") is comprised of New Jersey election officials, including but not limited to Superintendents of Elections, Commissioners of Registration, County Board of Elections Administrators and Supervisors, and County Board of Elections Commissioners. Under the New Jersey Municipal Ward Law, N.J.S.A. 40:44-1 to 18 ("MWL"), NJAEO members, specifically Ward Commissioners, will need to implement any changes resulting from this litigation and will also be bound by this Court's decision. Of New Jersey's 564 municipalities, 128 are divided into wards under the MWL, spread through 19 of 21 counties, and so the result of this case is critical to the NJAEO and its members.

PRELIMINARY STATEMENT

Yogi Berra is often apocryphally claimed to have said, "in theory, there is no difference between theory and practice. In practice, there is." Whether or not Berra actually said those words, the distinction between theory and practice is real and profound, and understanding the practical implications of Petitioners' demands is essential to this Court's consideration of the questions before it.

Petitioners seek to mandate that the various Ward Commissions consider hyper-local "communities of interest" as part of their deliberation, and that knowledge of those communities guide the hands of those charged with drawing new municipal ward maps every ten years. It is a noble theory. But that is all that it can be under the New Jersey State Constitution and New Jersey Municipal Ward Law. Not only do these laws simply not require this type of consideration, but it is not possible in practice. Election officials lack the tools, financial (and other) resources, and time to gather the information that would be required to implement this consideration.

And yet, under the Petitioners' requested relief, these same election officials could be held personally liable for money damages if a Court reached a different conclusion regarding communities of interest and found officials' failure to consider same is a violation of the New Jersey Civil Rights Act. That is not a tenable solution, and so the Court should deny the application and hold: (a) that there is no Equal Protection or Civil Rights Act claim available to individual voters based on Ward Commission's failure to consider communities of interest in the ward redistricting process; and (b) that the Appellate Division correctly applied long-standing New Jersey law regarding "compactness" and the other requirements of the MWL.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The NJAEO incorporates by reference the facts and procedural history in Respondents' Opposition to Petition for Certification of Petitioners, filed on May 24, 2024. As required by Rule 1:13-9, the NJAEO filed its Motion for Leave to Appear as *Amicus Curiae* on November 11, 2024.

ARGUMENT

1. The Court Can Only Impose a "Communities of Interest" Requirement by Adding Words to the Municipal Ward Law That the Legislature Chose Not to Include

a. Ward Commissioners Have Broad Latitude in Determining the Map

The MWL requires that the Ward Commissioners "fix and determine" the ward boundaries of "compact and contiguous territory." N.J.S.A. 40:44-14. That is the only guidance provided to the Ward Commissioners and are the only elements that must be weighed. Ibid. Notably absent from this statute are the words "communities of interest," or any equivalent consideration. Nowhere in N.J.S.A. 40:44-14 are Ward Commissioners **required** to evaluate the demographic composition of individual communities, either broadly or on a building-by-building basis, as Petitioners ask this Court to impose. Nowhere in N.J.S.A. 40:44-14 are Ward Commissioners required to create wards that are as compact as possible. In fact, most of the relevant statute is focused on population deviation, which must have a mean differential of no more than 10% based on the most recent federal decennial census. Ibid.

The Legislature apparently intended to provide significant leeway within the MWL, which can be demonstrated by contrasting its language to the laws that govern other times of redistricting and reapportionment. For example, the New Jersey Constitution provides that legislative districts are to be "as nearly compact and equal in the number of inhabitants as possible." N.J. Const. art. IV, § 2, ¶ 3. In terms of congressional redistricting, the United States Supreme Court has acknowledged a similar '"as nearly as practicable"' standard for population variances. Karcher v. Daggett, 462 U.S. 725, 730 (1983) (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 530-

531 (1969)). In contrast, the MWL does not require that the Ward Commissioners adopt the most compact or the most equal districts that it can possibly create. The Legislature's decision to exclude more demanding language requiring districting to be drawn in the most compact or most equal possibility shows that they did not intend to impose such exacting requirements.

Here, the Ward Commissioners have reduced the population deviation from 59% to 1.8%, well within the MWL's 10% limitation. (Db19). It is irrelevant that Petitioners' comparative ward map has a lower deviation since there is no requirement that the deviation here be as little as possible, so long as it complies with the 10% limitation. If the ward map complies with the 10% population deviation and is generally compact and contiguous, as it does here, the MWL has been satisfied.

b. Adopting a "Communities of Interest" Requirement Would Be A Practical Impossibility for Ward Commissioners Under the MWL

While the NJAEO appreciates the intellectual benefit of the discussion of the issues in this case, Petitioners' requested relief would impose a practical impossibility. That is because, while Petitioners may have noble intentions, Ward Commissioners cannot realistically consider communities of interest in the manner sought by Petitioners in all but the rarest situations. Petitioners ask this Court to require election officials to redistrict based on communities of interest using factors such as, "geography, income, residential/industrial, housing, pollution, etc." (Compl., ¶ 49). However, in nearly all instances, the Ward Commissioners do not have that information on the granular scale that would be required to satisfy Petitioners' demands.

Unlike congressional redistricting or legislative apportionment, it is exceedingly rare that a ward commission receives any public input at all. See Certification of Beth Thompson, ¶ 9. Ward Commissioners do not have information showing income brackets for individuals within a certain ward on a molecular level. Id. at ¶ 6. They do not know the gender or race breakdown on a street-by-street basis. Id. at ¶ 6. Moreover, it is incorrect to assume that voters of a particular race or gender vote alike. They do not know about residents' races on a ward-level, nor do they know what languages are spoken.[1] Id. at ¶ 6. They do not know whether residences are subject to pollution remediation. Id. at ¶ 8. They do not know which buildings are residential, commercial, industrial, or otherwise, Id. at ¶ 8, and such information would likely prove unhelpful since not all residents of a building are necessarily members of the same community of interest.[2] Census data cannot be broken down

1. Section 203 of the Voting Rights Act requires multilingual ballots in any state or political subdivision where the Director of the Census determined that: (i) either (a) more than five percent, or (b) more than 10,000, of resident citizens of voting age are members of a language minority and have limited English proficiency; and (ii) the citizens of the language minority group have illiteracy rates higher than the national rates. See 52 U.S.C. § 10503(b)(2); 52 U.S.C. § 10303(f)(3). Typically, this occurs on a county-wide basis (e.g., Bergen County), but can, at most, be designated for municipalities. See United States v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110, 120 (1978) (holding that a municipality was a "covered jurisdiction" under the Voting Rights Act, even though it was not nominally covered under that section). The Census simply does not provide data at the ward-level necessary to be helpful to a Ward Commission.

2. Petitioners argue that gerrymandering occurred in this case because residential buildings were split in half, thereby dividing cohesive communities of interest. See Compl., ¶ 75. From this assertion, it appears Petitioners are not merely advocating for all residential buildings to remain in the same ward. Instead, it appears Petitioners want election officials to redistrict using building-specific information on who comprises a community of interest.

on such a granular level, and the information included within the Statewide Voter Registration System ("SVRS") is incomplete and would require a household-by-household search that is unrealistic. Id. at ¶ 7.

Moreover, Ward Commissioners do not have the resources to find out this information. They have just thirty days following their initial meeting to adopt a map, N.J.S.A. 40:44-15, and have limited funds to do so. In fact, they are only authorized to obtain the services of a "surveyor or engineer and such other assistants as shall be necessary to aid them in the discharge of their duties." N.J.S.A. 40:44-12. In other words, they do not have a limitless budget, and the Legislature plainly intended a narrow staff sufficient to do the bare minimum, and nothing more. Moreover, Municipal Ward Commissioners are called upon to complete all the work required of them within 30 days. N.J.S.A. 40:44-15. Taking Jersey City's Ward Commission as an example, that means that six of the seven Commissioners—those who serve on the Hudson County Board of Elections—are required to re-draw the ward lines in seven municipalities,[3] meeting at least twice in each municipality, all within the same 30-day period. The NJAEO believes this lack of resources, combined with the absence of ward—and neighborhood—specific data of the sort Petitioners believe is necessary to consider, helps explain why the MWL provides less stringent requirements as compared to congressional redistricting and legislative

3. In Hudson County alone, Bayonne, Harrison, Hoboken, Jersey City, Kearny, Secaucus, and Weehawken are divided into wards. Each has its own Municipal Ward Commission, which is comprised of the same six members of the County Board of Elections along with their respective Municipal Clerk.

reapportionment, especially given the typically significant drop-off in public interest and participation at this level.

The concept of communities of interest, as presented by Petitioners, would also require election officials to know how individuals self-identify with a particular community-based issue. For example, Petitioners suggest that election officials should redistrict based on communities of interest, using factors such as individuals' interest in building public housing or their support or opposition to a particular political candidate. Specifically, Petitioners allege the Ward Commission's map was redistricted so that Jersey City's Ward F, which comprised a community of individuals concerned with affordable housing, was gerrymandered and split into Ward A with affluent individuals who might be uninterested in affordable housing issues. (Complaint, ¶ 65-69). But for election officials to know who in a community is concerned with affordable housing (or other subjects) requires either input from the community or a ward-specific survey. But, as stated, it is extremely rare that a ward commission receives any public input at all. Most municipalities with wards are not Jersey City, and do not have a Jersey City level of public involvement, and Petitioners do not draw a distinction between Jersey City and, say, Dover.

Absent that type of public input, Ward Commissioners would need to conduct their own ward-specific census. This is impractical given the time and financial limitations of the Ward Commission, as stated. As such, it is not practical or reasonable to require Ward Commissions to consider "communities of interest" for their maps to survive scrutiny under the MWL.

2. Recognizing a Substantive Right to Have Communities of Interest Considered Would Have a Chilling Effect on Election Officials

The New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c), provides in relevant part that "[a]ny person who has been deprived of . . . any substantive rights, privileges or immunities secured by the Constitution or the laws of this State . . . by a person acting under color of law" may bring an action for damages. N.J.S.A. 10:6-2(c). Petitioners ask this Court to find violations of the CRA based on a constitutional equal protection argument as well as based on alleged statutory rights under the MWL. More specifically, Petitioners believe they have a statutory right to have communities of interest considered in the ward redistricting process by connecting it to the requirement that the wards be compact. However, the CRA does not recognize such rights based on a communities of interest theory.

a. Failure to Consider Communities of Interest Does Not Constitute an Equal Protection Violation

The Appellate Division was correct in finding that Petitioners have not sustained a viable equal protection claim. (22-23a). Petitioners, in their petition for certification, ask this Court to find that the ward map violates the Equal Protection clause of the New Jersey Constitution based on "the Commission's failure to draw compact maps leading to the . . . diminishment of their voting rights." (Pb17). The Complaint alleges an Equal Protection violation based on Article 1, paragraph 1 of the New Jersey Constitution. (Complaint, ¶ 60-62).[4]

4. Petitioners did not assert a violation under Article II of the New Jersey Constitution. See N.J. State Conference NAACP v. Harvey, 381 N.J. Super. 155, 158 (App. Div. 2005) ("The right to vote in New Jersey is granted and limited by Article II of the state Constitution . . . .").

Petitioners assert that "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." (Pb18). However, unlike a claim for racial gerrymandering, Petitioners instead suggest that an equal protection claim arises because residents of individual buildings concerned with affordable housing, or who have different incomes, were moved into different ward districts with individuals who do not share those traits. As an example, Petitioners argue that the Commission's map split Paulus Hook so Ward F, comprising of new high-rise apartments and commercial buildings, is placed into part of the historic district with brownstones and small townhouses. (Complaint, ¶ 70).

As the Appellate Division has noted, "[o]ur State Constitution does not contain an equal protection clause." Teamsters Local 97 v. State, 434 N.J. Super. 393, 421 (App. Div. 2014) (citing State v. Chun, 194 N.J. 54, 101 (2008)). Instead, "the concept of equal protection is implicit in Article I, Paragraph 1." Ibid. (citing McKenney v. Byrne, 82 N.J. 304, 316 (1980); Guaman v. Velez (Guaman I), 421 N.J. Super. 239, 267 (App. Div. 2011)). "In analyzing equal protection challenges under the state constitution, our courts have rejected the federal multi-tiered analysis (strict scrutiny, intermediate scrutiny, rational basis), and employ a more flexible balancing test that considers three factors: '(1) the nature of the right asserted; (2) the extent to which the statute intrudes upon that right; and (3) the public need for the intrusion.'" Guaman, 421 N.J. Super. at 267 (quoting State v. O'Hagen, 189 N.J. 140, 164 (2007)). While "the federal and state tests are different, they 'weigh the same

factors and often produce the same result."' Ibid. (quoting Sojourner A. v. N.J. Dep't of Human Servs., 177 N.J. 318, 333 (2003)).

Here, there is no recognized Equal Protection right that individual voters have to be redistricted based on an asserted "community of interest." The extent to which the ward map splits communities of interest is done pursuant to the MWL. And the MWL requires Commissioners to redistrict when, as here, the U.S. Census reveals population deviation between wards that triggers the statutory requirement and allows wards to be re-shaped and relocated to remain in compliance with the statute's three requirements of contiguity, compactness, and population deviation. The Commissioners' act of redistricting Jersey City's wards in 2022, based on the significant population deviations, was tied to the legitimate government purpose of ward redistricting. It is that simple.

b. The MWL Does Not Confer a Statutory Right to Consider Communities of Interest in the Ward Redistricting Process

Petitioners ask this Court to recognize a statutory right for communities of interest to be considered in the ward redistricting process even in the absence of allegations of invidious racial discrimination.[5] Petitioners assert that "it is clear that the Municipal Ward Law 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 . . . ." (Pb20). On the contrary, it is far from clear that there is a

5. It is undisputed that there are no allegations of invidious discrimination. "As already pointed out, however, the CO plaintiffs acknowledge that the Commission did not engage in any form of invidious discrimination, including discrimination based on race, in redrawing the City wards." (Pb22).

substantive right to have communities of interest preserved, at least under the MWL. And, to return to the Yogi Berra aphorism, Petitioners' claims are theory that ultimately collides with practice: in nearly all situations relevant to the MWL, it is impossible for Ward Commissioners to obtain the information required to do what Petitioners are demanding.

That is why Petitioners' requested relief is difficult to comprehend and would necessarily have a chilling effect on election officials. See Abella v. Barringer Res., 260 N.J. Super. 92, 101 (Law Div. 1992) (finding that "[a]uditors do not have any obligation and are indeed ill-equipped to conduct a hearing or render legal judgments [and to hold otherwise would] instill a chilling effect upon the accounting profession to fulfill its heretofore standard duties"); see also Timber Props. v. Chester, 205 N.J. Super. 273, 291 (Law Div. 1984) (exposing a municipality or its officials to anti-trust liability, including treble damages, would cause a chilling effect on the adoption of desirable zoning regulations). Petitioners seek to hold election officials liable under the CRA based on their failure to consider information that they did not have, and in nearly all cases, cannot possibly obtain. Even worse, Petitioners' requested relief could potentially hold election officials personally liable for a substantive, statutory right that cannot be found anywhere in the text of the statute.[6] See Gormley v. Wood-El, 218 N.J. 72, 85 n.3 (2014). This is not a case of invidious discrimination. Petitioners are seeking liability for failure to consider something that no statute or court has ever said they must consider.

6. The Jersey City United Plaintiffs indicate that their lawsuit was filed against Defendant Minella only in his official capacity. Plaintiff Calderon does not draw a distinction between the multiple defendants' individual and official capacities.

Importing a communities of interest consideration requirement into the compactness element of the MWL cannot be based on the statutory text itself. "If the plain language leads to a clear and unambiguous result, then the interpretive process should end, without resort to extrinsic sources." State v. D.A., 191 N.J. 158, 164 (2007). Courts will "neither rewrite a plainly-written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language." O'Connell v. State, 171 N.J. 484, 488 (2002). Indeed, as noted, the Legislature's decision not to have the MWL include language that appears in other statutes and Constitutional provisions for political line-drawing, should be respected rather than treated as error. It inappropriately expands personal liability for election officials simply doing their job, and simultaneously makes it impossible to comply. As such, the Court should consider the chilling effect Petitioners' requested relief would have on the profession and should therefore decline to expand Petitioners' statutory rights as they demand.

CONCLUSION

For the above reasons, the NJAEO requests the Court affirm the Appellate Division's decision and dismiss both matters in their entirety.

Respectfully submitted,

/s/ Scott D. Salmon, Esq.
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