JERSEY CITY UNITED AGAINST THE NEW WARD MAP, DOWNTOWN COALITION OF NEIGHBORHOOD ASSOCIATIONS, GREEN-VILLE NEIGHBORHOOD ALLIANCE, FRIENDS OF BERRY LANE PARK, LAFAYETTE 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 CRESCENT AVENUE BLOCK ASSOCIATION, DEMOCRATIC POLITICAL ALLIANCE, and FRANK E. GILMORE, in his individual and official capacity as Ward F Councilman, Plaintiffs, -vs.- JERSEY CITY WARD COMMISSION and JOHN MINELLA, in his official capacity as Chair of the Commission, Defendants.	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, HUDSON COUNTY DOCKET NO. HUD-L-960-22 Civil Action

PLAINTIFFS' BRIEF IN OPPOSIITON TO DEFENDANTS' MOTION TO DISMISS

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Dated: July 14, 2022

PRELIMINARY STATEMENT

This case involves a map created by the Jersey City Ward Commission in connection with the redistricting of wards in Jersey City following promulgation of the most recent Census figures. Despite New Jersey's liberal pleading standards, Defendants have brought a motion to dismiss asking this Court to ignore the detailed allegations contained in Plaintiffs' Complaint and to essentially rubber stamp the Jersey City Ward Commission's adoption of a new ward map without serious consideration of statutory and constitutional violations, substantive harms to residents and communities of interest, and the illegal and underhanded manner in which the map was adopted. Plain and simple, the map itself, as well as the manner in which it was adopted, are in violation of law.

The map creates bizarre-shaped wards that tear apart long-standing neighborhoods, ignore natural boundaries, and even split buildings in half. In doing so, it divides communities of interest so as to significantly hinder the ability of residents who share common characteristics and concerns to achieve effective representation. One of the key statutory safeguards to prevent against the evils inherent in this kind of gerrymander is "compactness," a requirement that is expressly mandated in the Municipal Ward Law and applied to each ward created. Dead in the water with respect to their failure to draw compact wards, and faced with a Municipal Ward Law that explicitly requires compact wards, Defendants try to convince this Court to ignore this mandatory requirement. Their careless approach results in substantive representational harm to residents and would require the Court to write the express language right out of the statute. Such erroneous method of interpretation is in direct contravention to the legislative history of the Municipal Ward Law and indicates no regard for the unique role that wards play with respect to accommodating local concerns and

providing effective representation for the voters residing in the diverse communities of interests found in large municipalities.

Defendants have no real response to the allegations in the Complaint which demonstrate – through a review of the shapes and physical properties of the wards and application of commonly-used objective statistical measures – that the wards fail to comply with the requirement that each ward be compact. Nor do Defendants have any direct response to the allegations in the Complaint that Defendants relied on arbitrary, capricious, and unreasonable criteria, including the preservation of transitory election districts and imposition of the least amount of demographic change, which was not applied in a rational and consistent manner. These impermissible considerations and irrational applications came at the expense of compactness and other valid redistricting principles and resulted in a map that violates the Municipal Ward Law.

Even beyond the substantive ways in which the map violated the law, the Complaint alleges circumstances surrounding its adoption which constitute further unlawful conduct. The Commission held secret, unannounced private meetings to conduct their business, in violation of the Open Public Meetings Act ("OPMA"). Therein, the Commission excluded the public from having the opportunity to view their discussions of various maps and the consideration of factors leading to their rejection/acceptance, which ultimately manifested in the selection of a single map presented to the public. Worse, certifications provided by Defendants in support of their Motion to Dismiss strongly suggest that Defendants deliberately circumvented OPMA and attempted to thwart its purposes to allow the public to view all phases of their deliberations. At the same time that the public was shut out of the Commission's meetings and shielded from learning the reasons behind the adoption of the map, Defendants made changes to a map which the Commission previously circulated after engaging with various stakeholders behind closed doors.

Additionally, Defendants cite the wrong standard and resort to unwarranted "hyperbole" in response to serious separate allegations in the Complaint that Defendants violated the New Jersey Constitution's speech and association provisions by retaliating against the voters of Ward F that supported the candidacy of Councilman Frank Gilmore – the one independent candidate who ousted an incumbent on the Mayor's team of candidates at the ballot box – as well as Councilman Gilmore himself for his speech and advocacy around housing and development issues. Finally, Defendants urge the Court to adopt and apply statute of limitation accrual dates that are not grounded in the particular statutory violations at issue, and in the OPMA context, to begin the accrual period prior to Plaintiffs even having the opportunity to learn of the secret meetings, which were held without knowledge and participation of the public.

When Defendants' aggressive rhetoric is brushed aside, their arguments fail to provide any basis in law for dismissing the various claims set forth in the Complaint. By contrast, Plaintiffs' Complaint alleges facts, which adequately plead valid causes of action, and thus entitle them to survive this motion to dismiss and to proceed to discovery in this matter.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs adopt and incorporate the allegations in the Complaint as the statement of facts and provide the following procedural history. On or about September 16, 2021, the Governor promulgated the decennial census data. See Compl., at ¶ 35. On December 15, 2021, the Jersey City Ward Commission held an initial meeting. See id. On January 22, 2022, the Commission adopted the current ward map. See id. at ¶ 42. On February 3, 2022, the Commission filed the Report of the Jersey City Ward Commission, including the Commission's Map. Id. at ¶ 44. On February 5, 2022, the municipal clerk, Sean J. Gallagher, published a notice of the ward boundaries in the Jersey Journal. On March 21, 2022, Plaintiffs filed a Verified Complaint in Lieu of

Prerogative Writ. See generally id. On May 13, 2022, Defendants filed a Notice of Motion to Dismiss the Complaint, with accompanying certifications, brief, and proposed order. Plaintiffs now submit this Brief in Opposition to the Defendants' Motion to Dismiss.

STATUTORY FRAMEWORK

This matter is primarily governed by the Municipal Ward Law, N.J.S.A. 40:44-9 to -18.[1] The statute sets forth the exclusive method under which municipal ward boundaries are to be fixed and determined uniformly throughout the state. Separate and distinct from congressional and legislative redistricting requirements, which are set forth in the New Jersey Constitution, the municipal ward statute sets forth procedural and substantive requirements that render it unique, though like other redistricting methods it is guided by principles of equal protection and effective representation.

The Municipal Ward Law, as it remains today, emerged in 1981 as a product of the County and Municipal Government Study (Musto) Commission, which recommended in its report, *Forms of Municipal Government in New Jersey*, that then "existing ward laws be updated and consolidated into a single, uniform ward statute." Sponsor's Statement to Senate, No. 3157 (1981), Compl., Ex. D. Several statutes were repealed and the General Ward Law ("GWL") and the Optional Municipal Charter Law ("OMCL"), which generally governs Jersey City, were effectively merged with specific features present in the OMCL, but lacking in the former, included in the final bill.

[1] Plaintiffs also assert claims under the Equal Protection provisions of the New Jersey Constitution, N.J. CONST., art. I, ¶ 1; the Speech and Association clauses of the New Jersey Constitution, N.J. CONST., art. I, ¶¶ 6, 18; the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21; and the New Jersey Civil Rights Act, N.J.S.A. 10:6-2. These provisions will be discussed infra.

The Municipal Ward Law explicitly constitutes the "exclusive method" by which ward boundaries, or other "similar representation districts," in all New Jersey municipalities are "fixed and determined." N.J.S.A. 40:44-10. The body that conducts the redistricting is the ward commission, which is constituted by "the members of the county board of elections of the county in which the municipality is located, together with the municipal clerk. N.J.S.A. 40:44-11. The nonpartisan nature of the ward commission sets it apart from the Apportionment Commission in state legislative redistricting and the Congressional Redistricting Commission in congressional redistricting, both of which are appointed by various political actors strictly on a partisan basis.[2] Defendants are forced to acknowledge this important feature. See Defendants' Brief, at p. 4 ("Because the Commission's membership is set by state law, there is no political jockeying or horse-trading for membership."); see also N.J.S.A. 40:44-13 ("the ward commissioners shall meet and, having first taken and subscribed, before an officer authorized to administer oaths, an oath to faithfully and *impartially perform their duties*") (emphasis added).

The Municipal Ward Law has no requirements as to the number or nature of the meetings that the commission must hold; it does, however, set strict time parameters. First, the commission must meet "within 3 months following the receipt by the Governor of each federal decennial census . . . and proceed to make such adjustments in ward boundaries as shall be necessary to conform

[2] N.J. CONST., art. IV, sec. 3, ¶ 1 provides for legislative redistricting of state senate and assembly seats to be carried out by an Apportionment Commission of 10 members, with the State Committee Chairs of the Democratic and Republican Parties each appointing five members. Provision is made for the appointment by the Chief Justice of the Supreme Court of New Jersey of an independent eleventh member in the event that the Commission fails to act in time. See N.J. CONST, art. IV, sec. 3, ¶ 2. Similarly, N.J. CONST., art. II, sec. 2, ¶ 1 provides for congressional redistricting to be carried out by a Redistricting Commission of 13 members, with members appointed by the President of the Senate, the Speaker of the General Assembly, the minority leaders of the Senate and General Assembly, and the State Political Party Committee Chairs, with only one nonpartisan, independent member.

them to the requirements of th[e] act." Id. On the other side of the timeline, the commissioners must finish their work "[w]ithin 30 days following their initial meeting." N.J.S.A. 40:44-15. Given this relatively short period of time, the ward commission is likely to meet frequently depending on the complexity of its task. Moreover, unlike the Apportionment Commission for state legislative redistricting, ward commission meetings are not exempt from the Open Public Meetings Act ("OPMA"), which thus requires their deliberations and work to be carried out in a transparent manner so as to encourage public participation in the process, ensure impartiality and protect voters' interests in their communities and neighborhoods.

Most importantly for purposes of this litigation is the Municipal Ward Law's explicit requirement that each ward be comprised of "contiguous and compact" territory. N.J.S.A. 40:44-14. ("The ward commissioners shall fix and determine the ward boundaries so that each ward is formed of compact and contiguous territory"). The legislative history of the Municipal Ward Law demonstrates a desire on the part of the Legislature to include a compactness requirement separate and apart from population deviation insofar as such requirement was included in the OMCL, but not the General Ward Law, and it was deliberately maintained in the consolidated bill. See Compl., at ¶¶ 47-48, Ex. D; see also N.J.S.A. 40:44-12 (noting commission's authority to hire the technical assistance of a "surveyor or engineer," which implicitly acknowledges the statute's focus on compactness, a geographical concept, distinct from population equality). This inclusion of compactness also poses a contrast to congressional redistricting and state senate redistricting, which both have no "compactness" requirement listed in the New Jersey Constitution,[3] and instead,

[3] Although N.J. CONST., art. IV, sec. 2, ¶ 3, providing for the composition of the state General Assembly, does have a compactness requirement, some portions of such section have been found to be invalid, and more recently, Assembly districts are now coterminous with Senate districts that do not have a compactness requirement. See N.J. CONST., art. IV, sec. 2, ¶ 1 (no requirement that Senate districts be compact). Moreover, the explicit mandate for compact districts under the

is consistent with the acknowledged need to divide larger municipalities into wards to ensure effective representation of diverse communities and interests living within the jurisdiction, who want to have a voice in local affairs. Compl., Ex. D, at p. 57.

Finally, the Municipal Ward Law makes no special mention of the meeting at which time the commissioners must adopt a specific municipal ward map. Rather, the law specifies that the "ward commissioners shall file their report, certified by at least three of their signatures, setting forth and properly describing the ward boundaries fixed and determined" with the office of the county clerk, with copies filed with the Secretary of State and the office of the municipal clerk. N.J.S.A. 40:44-15. A map of the municipality with the ward boundaries clearly marked thereon must be annexed to the report, and in accord with a provision found in the OMCL, but not in the GWL, see Compl., Ex. D, the municipal clerk must publish "notice of the ward boundaries as fixed and determined in the report" within 2 weeks immediately filing the certified report in "at least one newspaper generally circulating in the municipality." N.J.S.A. 40:44-16. And it is upon publication of the notice of ward boundaries by the municipal clerk that the new map is effective. Id. ("Upon completion of the publication, the former wards, if any, shall be superseded.").

LEGAL ARGUMENT

POINT I

PLAINTIFFS' COMPLAINT ALLEGES FACTS THAT ARE SUFFICIENT TO DEMONSTRATE A LEGAL BASIS UPON WHICH TO GRANT THEM RELIEF.

Municipal Ward Law was enacted in 1981 (effective in 1982), and therefore post-dates judicial decisions, cited by Defendants, discussing the diminishing import of compactness in the legislative redistricting context in New Jersey for reasons that are inapplicable to municipal ward redistricting. See, e.g., Jackman v. Bodine, 49 N.J. 406 (1967); Scrimminger v. Sherwin, 60 N.J. 483 (1972); Davenport v. Apportionment Commission, 65 N.J. 125 (1974).

When deciding a Motion to Dismiss based upon R. 4:6-2(e), the "court should assume that the nonmovant's allegations are true and give that party the benefit of all reasonable inferences." NCP Litig. Tr. v. KPMG LLP, 187 N.J. 353, 365 (2006). A complaint can only be dismissed on these grounds if the allegations, taken as true, fail to set forth a claim which provides a legal basis for relief. See Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005). Motions to dismiss for failure to state a claim "should be granted in only the rarest of instances." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989). A complaint "must be searched in depth and with liberality to determine if a cause of action can be gleaned even from an obscure statement, particularly if further discovery is taken." PRESSLER & VERNIERO, CURRENT N.J. COURT RULES Comment R. 4:6-2(e) (GANN). As compared to a motion for summary judgment, a motion to dismiss for failure to state a claim "is based on the pleadings themselves," see id., and thus the inclusion of extraneous documents outside of the pleadings cannot serve as a basis for dismissal at this stage. For the reasons set forth below, Plaintiffs easily satisfy these pleading standards, and the allegations in the complaint adequately allege claims upon which relief can be granted.

POINT II

PLAINTIFFS' COMPLAINT ADEQUATELY ALLEGES A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER THE MUNICIPAL WARD LAW.

Plaintiffs allege facts sufficient to demonstrate that Defendants violated both the spirit and intent of the Municipal Ward Law in the following three ways: (1) by failing to meet the law's explicit requirement that each district be comprised of compact territory; (2) by failing to adhere to various other traditional redistricting principles; and (3) by relying on arbitrary, capricious, and unreasonable considerations in drawing the new ward boundaries.

A. Relevant Provisions of Municipal Ward Law

The Municipal Ward Law governs the manner in which the ward boundaries are "fixed and determined." See N.J.S.A. 40:44-10. The wards are to be redrawn by a ward commission made up of the county board of elections where the municipality is located and the municipal clerk. See N.J.S.A. 40:44-11. In determining the boundaries, each ward has to be "formed of compact and contiguous territory." See N.J.S.A. 40:44-14. Additionally,

> [t]he population of the most populous ward so created shall not differ from the population of the least populous ward so created by more than 10% of the mean population of the wards derived by dividing the total population of the municipality by the number of wards created. The most recent Federal decennial census shall be used as the population determinant.

Id. The Commission must sign a certified report describing the new ward boundaries and must file the report and the map clearly demarcating the new boundaries of the ward with the county clerk, with copies sent to the Secretary of State and municipal clerk. See N.J.S.A. 40:44-15(a). After filing the certified report, within the next two weeks, the municipal clerk must publish a notice of the ward boundaries in a newspaper that is generally circulated in that municipality, whereupon the prior wards officially become superseded such that any officers elected at a future election at the ward level must be elected to represent the new ward. N.J.S.A. 40:44-16.

As set forth in the Complaint, the Commission was required to redraw the wards in Jersey City in light of the fact that there was a 59% population deviation between Ward E and Ward D. See Compl., at ¶ 36. On January 22, 2022, the Commission voted to adopt the current ward map ("Commission's Map"), id. at ¶ 42,[4] and filed its Report of the Jersey City Ward Commissioners

[4] See id. at ¶ 42, Exhibit A, Commission's Map ("Ex. A").

("Commission Report") on February 3, 2022, id. at ¶ 44.[5] The municipal clerk published notice of the ward boundaries in the Jersey Journal two days later on February 5, 2022. Id. at ¶ 45.

B. Compactness is a Mandatory Requirement under the Municipal Ward Law.

At once, Defendants attempt to argue that its redistricting plan is immune from any challenge under the Municipal Ward Law so long as it satisfies three statutory criteria, but then would have this Court read one of those criteria out of the very same law. This contention is simply incorrect, and the simultaneous assertion of both "sides of the coin" sheds light on the disingenuous and flawed nature of their arguments.

The express provisions of the Municipal Ward Law, at a bare minimum, require that (1) the statute's population deviation requirements be adhered to, (2) that each ward's boundaries be contiguous, and (3) that each ward be compact. See N.J.S.A. 40:44-14. Of particular importance to this matter is the express statutory requirement that "*each* ward" be compact. Id. (emphasis added). Perhaps in light of the fact that the Commission Map includes districts which are not compact, Defendants resort to erasing the importance of this important statutory requirement and would have this Court read the compactness requirement right out of the statute. See, e.g., Defendants' Brief in Support of Motion to Dismiss, at pp. 6-7 (claiming that satisfying the population deviation threshold is the definition of achieving compactness despite the fact that N.J.S.A. 40:44-14 of the Municipal Ward Law clearly treats these concepts as two separate requirements in separate sentences). However, for a variety of reasons, including the text of the statute, the legislative history, and public policy considerations, Defendants position has no merit, and the Court must strike down a map created under the Municipal Ward Law, such as the Commission Map's, which does not meet this requirement.

[5] See id. at ¶ 44, Exhibit B, Commission Report ("Ex. B").

Starting with the text of the statute, as set forth above, among the three express statutory requirements in the Municipal Ward Law is compactness. See N.J.S.A. 40:44-14. Specifically, the statute provides, in relevant part, as follows: "The ward commissioners shall fix and determine the ward boundaries so that each ward is formed of compact and contiguous territory." Id. Through use of the word "shall," it is clear the statute speaks in the imperative and that the Legislature intended that this compactness requirement be mandatory. See id. Additionally, through use of the word "each," the Legislature makes clear that the compactness requirement applies to every single ward in the municipality, thus calling for close consideration, in particular, of the least compact wards to ensure compliance with the compactness requirement. See id.

Turning to the legislative history, the Municipal Ward Law was created based on a recommendation from the Musto Commission, which was tasked with reviewing and making recommendations with respect to various forms of government in the state. See generally Compl., at ¶ 47, Exhibit D, Legislative History of Municipal Ward Law ("Ex. D"). Significantly, the Musto Commission considered various provisions of two of the most popular forms of government as they related to ward redistricting: (1) the General Ward Law ("GWL"); and (2) OMCL. See Exhibit D. As between the two, the GWL did not have a specific requirement that the wards be compact, whereas the OMCL did. See id. In deciding to implement the Musto Commission's recommendation of consolidating the existing ward laws into a single uniform statute, the Legislature chose to base the Municipal Ward Law largely off the OMCL, and expressly included an affirmative requirement that each ward be compact and contiguous. See id.

Public policy considerations further support the importance of a compactness requirement specifically related to the redistricting of wards pursuant to the Municipal Ward Law. The Musto Commission recognized the reason behind the need for wards in the first place, finding that the

use of wards was most justified with respect to larger municipalities, where there are often distinct groups of residents who have diverse backgrounds and interests tied to their location in the municipality, as compared to smaller municipalities where the justifications for wards would be weakest and would likely "fragment the community unnecessarily." See Compl. at ¶ 48. As set forth in the Complaint, when a large municipality has many groups with diverse interests, having an at-large council would lead to a situation where many of the different areas and neighborhoods within the municipality – be it based on physical location, socioeconomic status, housing and industrial issues, environmental concerns, etc. – would not have sufficient representation to protect their diverse interests. See id. at ¶ 49. Thus, the need for a structure of government that involves wards in such municipalities is directly related to the need to give effective representation to communities of interests in various neighborhoods in order to address their unique local concerns and common issues.

Additionally, municipal government is uniquely situated to address issues that are local in nature such that there is an increased importance in having compact wards to ensure various communities of interest and neighborhoods can address issues unique to those residents who share common concerns and characteristics. See id. at ¶¶ 49-50. Among other items, municipal governments are tasked with resolving issues pertaining to streets, traffic, parks, development, housing, pollution, etc. See id. at ¶ 49. Having compact wards allows for representation of neighborhoods and communities of interest which are impacted by decisions related to such physically based items and who share common interests with respect to same. See id. at ¶ 50.

Despite the clear requirement for compactness in the express text of the statute, the clear legislative history demonstrating a choice by the Legislature to include such a requirement, and the clear public policy reasons in the specific context of ward redistricting in municipalities,

Defendants argue that compactness need not be considered by the Court, so long as another one of the express requirements in the Municipal Ward Law, population deviation, is met. See generally Defendants' Brief, at pp. 6-7. This position is entirely contradictory with the Defendants' own assertion that N.J.S.A. 40:44-14 "only requir[es] compactness, contiguity, and the 10% rule." See Defendants' Brief, at p. 19. In fact, Defendants appear to conflate the two concepts entirely. See, e.g., id. at p. 6 ("[The wards] are also compact, which allows them to satisfy population deviation requirements."); id. at p. 7 (claiming that achieving a population deviation in the Commission's Map that was below the statutory threshold meets "the very definition of compactness"); id. (claiming that a low population deviation created compactness). However, the explicit inclusion of both a population deviation requirement and a compactness requirement belies any suggestion that they are one in the same. See N.J.S.A. 40:44-14.

Common sense also dictates that the population deviation requirement, which is set forth in the Municipal Ward Law, involves a comparison of the number of people in the least and most populous wards, while the definition of compactness, even as set forth in the source cited to by Defendants, concerns the extent to which the wards are "'joined or packed together; closely and firmly united.'" See Defendants' Brief, at p. 7 n.5 (quoting the definition from dictionary.com); see also Merriam-Webster Dictionary, Definition of "Compact," *available at* merriam-webster.com/dictionary/compact (last visited June 24, 2022) (including among the definitions of "compact," the following: (1) "having a dense structure or units closely packed or joined," and (2) "occupying a small volume by reason of efficient use of space."); The Britannica Dictionary, Definition of "Compact," *available at* britannica.com/dictionary/compact (last visited June 24, 2022) (including among the definitions of "compact" the following: "using little space and having parts that are close together."). Indeed, one could imagine a non-compact district, such as the one

which gave birth to the terminology "gerrymander," that has minimal, if any, population deviation. On the other hand, it is possible for a district to be compact, but have massive population deviation. The two concepts are related for purpose of evaluating redistricting efforts, but are clearly distinct.

See History, *Where Did the Term "Gerrymander" Come From?* SMITHSONIAN MAGAZINE (July 20, 2017) available at: https://www.smithsonianmag.com/history/where-did-term-gerrymander-come-180964118/ (last accessed July 13, 2022). *See also* Compl., Exhibit E, Image and Explanation of Original Gerrymander ("Ex. E").

Defendants resort to Jackman v. Bodine, 49 N.J. 406 (1967) for the proposition that "population equality must be distinctly paramount" to compactness. See Defendants' Brief, at p. 7 (citing Jackman, 49 N.J. at 419). However, this cherry-picked sentence from the opinion is taken entirely out of context. In Jackman, the court reviewed amendments to the New Jersey Constitution, including provisions concerning the apportionment of state senators and assemblymen, substantial portions of which were subsequently found to violate the U.S. Constitution, and which arose in the context of legislative redistricting rather than ward redistricting under the Municipal Ward Law. See generally Jackman, 49 N.J. at 409-11. There, the court considered population discrepancies among assembly districts where a state constitutional amendment called for assembly seats to be allocated within each senate district (2

assemblymen to 1 senator), without consideration of an "equal-proportions method of allocation," thereby "accentuat[ing] any disparity which exists in the Senate." See id. at 416. The Court found this state constitutional provision to violate the federal constitutional principle of one-person, one vote, and held that the assemblymen "must be apportioned among the Senate districts according to the equal-proportions method and without reference to the apportionment of the Senators." Id. at 417.[6]

The court then turned to the issue raised by the plaintiffs that the districts could have been arranged so as to be closer to the ideal population size, to which the Apportionment Commission responded that despite such fact, the districts which the Apportionment Commission drew were more compact. See id. at 418. However, the court found compactness to be of limited usefulness in this context because the districts were being drawn with "reference to existing political subdivisions." See id. at 419. By contrast, the court held that compactness would be "substantially significant" when "new district lines are being created without reference to existing political subdivisions." See id. In other words, at the time, senate and assembly districts were drawn so as to include whole counties without splitting them, compactness had little relevance because they had to preserve the county borders. In such instances, the court found that principles of equal population were more important than that of compactness. See id. Moreover, the court nevertheless, even in this highly distinguishable context, held that compactness would undoubtedly

[6] It should be noted that the relevance of this case is further undermined by the fact that the provisions at issue in Jackman also existed at a time when state senators were apportioned such that no county would be split between two different senate districts, which was also subsequently found to violate the Federal Constitution. See McNeil v. Legislative Apportionment Comm'n, 177 N.J. 364, 374-83 (2003) (explaining in-depth history of case law surrounding constitutional challenges to legislative apportionment provisions in New Jersey Constitution).

"be a material factor" if preserving political subdivisions "would yield such *bizarre designs* as a 'shoe lace' or 'horse shoe." See id. (emphasis added).

At best for Defendants, this decision is extremely distinguishable, if not highly irrelevant in the context of the Municipal Ward Law. At worst, it undermines Defendants' arguments and is supportive of Plaintiffs' position. As set forth above, this case from over 50 years ago arises in the context of an amendment to the State Constitution with respect to an apportionment provision portions of which were subsequently found to be invalid. See McNeil v. Legislative Apportionment Comm'n, 177 N.J. 364, 374-83 (2003) (explaining in-depth history of case law surrounding constitutional challenges to legislative apportionment provisions in New Jersey Constitution). Contrary to Defendants' contentions, the court specifically said that compactness was "not irrelevant," but found that principles of equal population were more important in situations where district lines were being drawn "with[] reference to existing political subdivisions." See Jackman, 49 N.J. at 419. Here, there is no requirement that ward boundaries be drawn "with reference to existing political subdivisions." Thus, even in the eyes of the Jackman court, the concept of compactness would be "substantially significant." See id.[7]

[7] In attempting to undermine the importance of compactness in municipal ward redistricting, Defendants also make parenthetical references to McNeil, 177 N.J. at 380-81 and Davenport, 65 N.J. at 133-34. See Defendants' Brief, at p. 18. To the extent that such cases rely on the Jackman case, they are distinguishable for the same reasons. See McNeil, 177 N.J. at 380-81 (citing Davenport, 65 N.J. at 133-34 (citing Jackman, 49 N.J. at 419)); Davenport, 65 N.J. at 133-34 (citing Jackman, 49 N.J. at 419). Thus, to the extent Jackman is distinguishable as set forth above, so too are the cases like McNeil and Davenport which rely on Jackman. In fact, just as in Jackman, the court in McNeil expressly stated that compactness considerations in the legislative redistricting context were only reduced because it presented a situation where districts were drawn based on existing political subdivisions. See McNeil, 177 N.J. at 380-81. The court in Davenport relied on the same reasoning, noting further that in the context of legislative redistricting, compactness was limited based on "odd configurations" of the state's municipalities, and acknowledging that "[i]t has never been held to constitute an independent federal constitutional requirement. See Davenport, 65 N.J. at 133-34 (internal citations omitted). As set forth above, municipal ward redistricting is not constrained by the need to preserve existing municipalities to the extent

Moreover, the court in Jackman faced a situation where compactness and equal population were pitted against one another such that the Apportionment Commission tried to defend a map that had less equal population on the grounds that it had greater compactness. See id. at 418-19. In that context, the court found that "compactness may not be relied upon to justify an appreciable deviation," given the importance of equal population. Id. at 419. Here, in stark contrast, Plaintiffs have provided one example (among many) of a map that achieves a population deviation that is over two times smaller than the Commission Map while simultaneously scoring much higher on various objective and other measures of compactness (in addition to various other traditional principles of redistricting). See generally Compl., at ¶¶ 107-26. Therefore, even if population deviation was comparatively more important than the statutorily required mandate of compactness – a proposition which cannot be found anywhere in the Municipal Ward Law – the Commission's Map does not present a situation where compactness had to be sacrificed in order to achieve a more optimal population deviation. See id.

For the foregoing reasons, compactness, as found in the Municipal Ward Law, is a mandatory requirement, and to the extent that Plaintiffs have set forth factual assertions sufficient to allege that any ward failed to be comprised of compact territory, the Court must deny Defendants' motion to dismiss.

C. The Commission's Map Contains Wards which are Not Compact.

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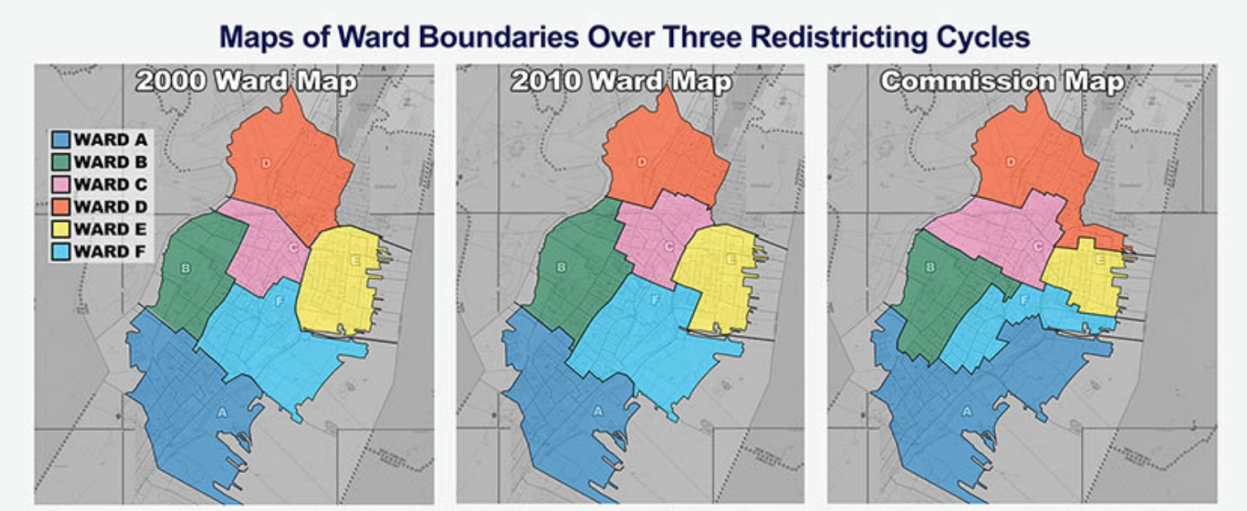
possible, nor by any restraints related to drawing districts based on existing political subdivisions. *Moreover, while compactness may not have been considered an independent requirement in the context of legislative redistricting, for all the reasons set forth above, it was expressly included in the Municipal Ward Law and is a mandatory consideration with respect to municipal ward redistricting. In fact, the Municipal Ward Law was passed in 1981, effective in 1982, which was after the Jackman and Davenport legislative redistricting cases were decided, and nevertheless included an express requirement for compact districts.*

Plaintiffs have sufficiently alleged a claim for lack of compactness under the Municipal Ward Law upon which relief can be granted. Among other allegations, Plaintiffs have asserted that a number of Jersey City's six wards under the Commission's Map are not compact, including but not limited to Wards F and D. See Compl., at ¶ 51. Plaintiffs based their allegation, *inter alia*, on the shape of the wards, the nature and physical properties of the wards and the lines demarcating the ward boundaries, and commonly-used objective formulas used to measure compactness. See generally id. at ¶¶ 52-59.

Perhaps in an attempt to avoid serious discussion and attention paid to the more objective measures of compactness, Defendants' main response to the Complaint's various allegations that the wards are not compact, is to suggest that the Court take "a cursory look at the Ward Map adopted by the Commission to reveal that the wards therein are indeed compact . . . ." See Defendant's Brief, at p. 19. While Defendants utterly fail to address the various allegations in the Complaint that demonstrate the non-compactness of the wards, as an initial matter, Plaintiffs also invite the Court to consider the actual shapes of the wards in the Commission's Map, which will reveal that they are not all compact as required by the Municipal Ward Law. See Compl., at ¶ 42, Ex. A.

As set forth in the Complaint, Ward F, in particular, presents itself in a crooked shape, eerily similar to the shape of the salamander from which the very term "gerrymandering" was derived over 200 years ago. See id. at ¶ 52 & n.4, Ex. E; see also image, supra. Ward F does not have a central core, it has portions of its 37-sided figure branching off in random directions, and an "L" shape is formed between the Southeast and Northwest boundaries. See id. at ¶¶ 53-54. Indeed, it appears to be engulfing or taking a bite out of Ward A:



Excerpt of Compl., Ex. P, Map of Ward Boundaries Over Three Redistricting Cycles.

Ward D is also extremely odd-shaped, with what looks like a tentacle and crab-like claw drooping down into the Southeast portion. See Ex. A. The shapes of the wards can be compared with the shapes of such wards before and after the 2010 redistricting of the wards, and with the shapes of the wards in Plaintiffs' Map, all of which are considerably more compact. See Compl., at ¶ 108, Exhibit P, Map of Ward Boundaries Over Three Redistricting Cycles ("Ex. P"). Local democracy is not a game of Pac-Man or Tetris; yet the Commission Map creates shapes that suggest otherwise.

While the shapes and physical properties of the wards are themselves revealing, Plaintiffs have sufficiently alleged that other commonly used measures of compactness demonstrate abysmal scores in certain wards under the Commission's Map. See generally id. at ¶¶ 55-59. Two of these measures include the Polsby-Popper Measure – which compares the ratio of the district's area to the area of a circle whose circumference equals the perimeter of the district – and the Reock Score – which compares the ratio of the area of a district to the area of the smallest (minimum bounding) circle that encloses the entire district's shape. See id. at ¶ 56, Exhibit F, Image and Explanation of Polsby-Popper Measure ("Ex. F"); ¶ 58, Exhibit H, Image and Explanation of Reock Score

("Ex. H"). Under both measures, the scale is between 0 and 1, with scores falling closer to 1 indicating a more compact district. Id. Dave's Redistricting Map also scores these measures on a scale between 0 and 100, with scores falling closer to 100 indicating a more compact district. See id. at ¶¶ 57, 59 nn.5-6.

Under the Polsby-Popper Measure, the wards under the Commission's Map contain an average score of 0.4006, and a minimum score of 0.2089 for Ward F (Ward D was 0.2576). Id. at ¶ 57, Exhibit G, Chart of Population and Compactness Statistics ("Ex. G"). Dave's Redistricting App scored the compactness of Ward F under Polsby-Popper Method as 27 out of 100 (Ward D was 39 out of 100). Id. at ¶ 57 n.5. Under the Reock Score, the wards under the Commission's Map contain an average score of 0.3447, and a minimum score of 0.1604 for Ward F (Ward D was 0.2753). Id. at ¶ 59, Ex. G. Dave's Redistricting App scored the compactness of Ward F under the Reock Score as 0 out of 100 (Ward D was 10 out of 100). Id. at ¶ 59 n.6. These compactness scores are extremely low, and can be compared with the Polsby-Popper and Reock scores after the 2010 redistricting of the wards and the scores of the same measures with respect to Plaintiffs' Map as set forth in the below chart. See generally id. at ¶ 108, Ex. P; id. at ¶¶ 111-14 & nn.11-12.

Measure/Score	Commission Map	Plaintiff's Map	2010 Map
Average Reock	0.3447 (DRA 43.83)	0.4279 (DRA 70.67)	0.5019
Minimum Reock	0.1604 (DRA 0)	0.3551 (DRA 42)	0.3097
Average Polsby Popper	0.4006 (DRA 72.83)	0.5124 (DRA 93)	0.5368
Minimum Polsby-Popper	0.2089	0.3979	0.4248

	(DRA 27)	(DRA 74)	
DRA Combined Compactness Rating	57/100	86/100	

The extremely low scores in the Commission's Map demonstrate poor compactness. This is especially and most obviously the case with respect to Ward F (and also Ward D), where the compactness scores are abysmal. The minimum scores are directly relevant to the Municipal Ward Law's requirement that *each* ward be comprised of compact territory. See N.J.S.A. 40:44-14. Based on the foregoing, and for that reason alone, Plaintiffs have sufficiently alleged that, at bare minimum, Ward F (and also Ward D) are not compact, and therefore Plaintiffs have alleged facts sufficient to support a claim for relief.

D. Drawing Non-Compact Districts Manifested in a Failure to Adhere to Traditional Principles of Redistricting, Hindering the Achievement of Effective Representation.

The impact of drawing non-compact districts is exacerbated by the resultant failure to adhere to traditional principles of redistricting, which courts regularly consider in redistricting matters. See Compl., at ¶ 63. As set forth in the Complaint, "[t]he Commission's Map splits apart historic neighborhoods and districts, splits buildings in half, fails to respect natural boundaries and topography, and otherwise breaks apart communities of interest in Jersey City." Id. at ¶ 64, Exhibit I, Commission Map with Neighborhood Boundaries ("Ex. I"). While these traditional redistricting criteria are considered in various redistricting contexts, even where not explicitly enumerated in the respective governing constitutional and/or statutory provisions, cf. Matter of Congressional Districts by New Jersey Redistricting Com'n, 249 N.J. 561, 572 (2022) (independent member of congressional redistricting commission, who served as chair, included among the criteria he would take into consideration, *inter alia*, not splitting municipalities or communities of interest unless

required to comply with the VRA), they take on an increased importance in the context of ward redistricting.

As set forth above, the need for wards in the first instance is tied to the need for effective representation in large municipalities containing residents with diverse characteristics and interests. While a neighborhood split or the breaking apart of a community of interest, by itself, may not be sufficient to constitute a violation of the Municipal Ward Law, here the Commission's failure to draw compact wards manifested in a map which tears apart communities of interest, undermining their ability to have effective representation for their unique local needs. See, e.g., id. at ¶ 73 n.8. The fact that the Commission's Map unnecessarily splits neighborhoods and communities and otherwise violates traditional principles of redistricting further informs the extent to which Defendants failed to comply with the spirt and intent of the compactness requirements in the Municipal Ward Law.

The Complaint details how Jersey City's historic Lafayette neighborhood, one of the oldest African-American communities in the state, was decimated under the Commission's Map. See generally id. at ¶¶ 65-69. Plaintiffs described the various economic, housing, and environmental interests that bound the community together. See id. Lafayette consisted largely of working class individuals and families, had fought for brownfield redevelopment programs for decades after the neighborhood was deemed toxic in need of remediation, and banded together to support candidates who advocated for affordable housing in relation to specific development projects in Ward F and who opposed luxury high rise apartments without affordable housing options. See id. Prior to redistricting, the entire community had resided in Ward F, but the Commission's Map struck through the heart of the neighborhood, tearing apart 5,832 residents who were moved into Ward A. See id. at ¶ 69, Exhibit J, Commission Map: Lafayette, McGinley Square, Greenville Splits

("Ex. J"). The Commission's Map infused into Ward F more affluent residents who were largely white and Asian from the Downtown section of Jersey City, and who did not share common interests and characteristics with the Lafayette neighborhood. See id. It also split a natural boundary, Berry Lane Park, into two different wards. See id. The carving up of the old Lafayette neighborhood dilutes their influence and makes it more difficult for the community's common interests to be represented.

The Complaint details other neighborhoods that were split, such as Paulus Hook, one of the oldest neighborhoods in Jersey City, splitting the historic district in half, while maintaining one half in Ward E, and placing the other along with several blocks of high rise luxury housing in Ward F. The Commission's map also cuts the four-cornered Paulus Hook Park such that two corners of the park fall in one ward and the other two corners fall into a different ward. See id. at ¶ 70, Exhibit K, Commission Map: Paulus Hook and Van Vorst Park Splits ("Ex. K"). The Commission's Map further split the Van Vorst Park Neighborhood, carving out additional portions of the Downtown area, including portions of the historic district and numerous high-rise apartments, and placing them in Ward F which does not have high rise apartments. See id. at ¶ 71, Ex. K. Similarly, McGinley Square and the Greenville neighborhood were also split. See id. at ¶¶ 72-73, Ex. J; id. at ¶ 78, Exhibit M, Commission Map: Greenville and West Side Splits ("Ex. M").

As set forth in the Complaint, the integrity of the communities in Ward F was decimated from all angles: (1) it lost a core component of its residents in the South and East to Ward A by splitting Lafayette; (2) it further lost a core component of its residents in the West to Ward B by splitting McGinley Square; (3) residents with entirely different characteristics and housing interests were added from the North and East from Ward E; and (4) it lost additional residents in

the South and West by splitting Greenville. See id. at ¶ 73 n.8. Moreover, what was left of Ward F was essentially fractured portions of neighborhoods that no longer have a cohesive identity and do not have unity of interests, making it extremely difficult to have effective representation on City Council to protect unique local interests of the communities. See id.

The Complaint also details a failure to respect natural boundaries and the splitting of actual buildings into multiple wards. See generally id. at ¶¶ 74-79. For example, the Complaint asserts that portions of Newport that have virtually all new construction into high rise apartments were engulfed into Ward D, which is associated with the Heights section, an older neighborhood with little new construction and with few high-rise apartments. See id. at ¶ 74, Exhibit L, Commission Map: Newport and Building Splits ("Ex. L"). The Heights and Newport are separated by a natural boundary of steep cliffs, the Palisades, where the Heights sits 150 feet higher in altitude than Downtown Jersey City; yet, the Commission's Map fails to respect this natural boundary and intermingles these two starkly different communities into the same ward. See id. Additionally, the Commission's Map even split at least three buildings in half, including AquaBlu, The Shore, and Parkside West, such that, depending on which apartment unit one lives in, they could find themselves represented by different councilpersons. See id. at ¶¶ 75-77, Ex. L.

E. Defendants Acted in an Arbitrary, Capricious, and Unreasonable Manner in Creating and Adopting the Commission's Map.

Defendants acknowledge that the Commission's Map should be struck down if the Commission's actions were arbitrary, capricious, or unreasonable. See Defendants' Brief, at p. 16. Nevertheless, Defendants fail to address the allegations set forth in the Complaint that the Commission's use of preserving election districts and purported attempt to impose the least amount of demographic change was arbitrary, capricious, and unreasonable. The allegations in the Complaint make clear that Defendants' conduct related to the substance of its considerations in

redrawing the ward boundaries, the manner in which that was carried out, and the procedural circumstances surrounding its actions were arbitrary, capricious, and unreasonable.

i. Reliance On Preserving Preexisting Elections Districts.

The Complaint details how the failure to create compact districts and the failure to adhere to various traditional principles of redistricting were created and/or exacerbated by the Commission's attempt to preserve existing soon-to-be-outdated election districts in creating the ward boundaries. See generally id. at ¶¶ 82-97. Almost all of the existing election districts were preserved and used to create ward boundaries, with only a handful of rare exceptions. See id. at ¶ 83, Exhibit N, Commission Map with Election Districts ("Ex. N") (handful of instances where census blocks were used for boundary instead of election districts indicated in yellow). As set forth in the Complaint, the use of election districts broke with precedent and was highly problematic because election districts, which contained an average of 1,620 residents, are much more highly-populated than census blocks, which contained an average of only 195 residents. See id. at ¶¶ 81, 84. In fact, one election district alone contained 9,634 residents. See id. at ¶ 84. Due to the larger population and size/geography, the use of election districts makes it much more difficult to draw compact districts, to preserve neighborhoods and communities of interests, to adhere to traditional principles of redistricting, and to minimize population deviation, without having to sacrifice some of these criteria more than the Commission would otherwise have to had it used the smaller and more traditionally-used measure of census blocks. See id. at ¶ 85. Thus, here, as set forth in the Complaint, the Commission preserved election districts when creating the ward boundaries in such a manner that (1) neighborhoods/historic districts and natural boundaries were split between two wards along the boundaries of existing election districts; (2) buildings were

split along election district lines; and (3) non-compact wards were created with jagged edges and odd shapes along existing election district boundaries. See id. at ¶¶ 86-88.

The use of this much larger unit to create ward boundaries in order to preserve election districts is even more arbitrary, capricious, and unreasonable in light of the fact that it cannot be tied to any rational and permissible goal. For example, unlike a potential goal of preserving municipalities or other political subdivisions (when possible in light of equal protection requirements) in congressional or legislative redistricting, here preserving election districts makes absolutely no sense because election districts are not fixed and permanent, but instead are transitory and subject to change. See id. at ¶¶ 89, 93. Indeed, after the ward boundaries are created, the county board of elections is required by statute to create new election districts. See N.J.S.A. 19:14-10 to -18; see also N.J.S.A. 19:4-15 (deadline for creating new election districts is 75 days before the primary, which was March 24, 2022). In other words, Defendants failed to create compact wards and failed to adhere to various traditional principles of redistricting, all in order to preserve existing election district boundaries which, as a result of the ward redistricting, would no longer remain intact. See Compl., at ¶ 94. This is truly a case of the tail wagging the dog. Preserving election district boundaries in order to create wards which will then require new election district boundaries is totally backwards, and serves as a textbook example of arbitrary, capricious, and unreasonable action.[8]

ii. Reliance On Imposing the Least Amount of Demographic Change.

[8] While preserving election districts serves no rational, permissible goal, it must be noted that using election districts, as compared to Census blocks, is a much more convenient unit of measure through which to easily consolidate together or break apart voters based on their voting history. See infra Point IV (discussing retaliation against Councilman Frank Gilmore and his supporters).

As set forth in the Complaint, the Commission's Report stated that Defendants used race in an attempt to "impose the least amount of demographic change to each ward." See id. at ¶¶ 98-99, Ex. A. As an initial matter, it is unclear if the Commission was trying to preserve prior racial demographic makeups that existed based on the prior 2010 Census figures or based on the current demographic makeups in the most recent Census figures. Either way, Defendants' use of race in this manner was impermissible, and the Defendants' actions were thus arbitrary, capricious, and unreasonable. Like a guilty conscience, Defendants repeat *ad nauseum* the fact that Plaintiffs chose not to bring a VRA claim. See Defendants' Brief, at pp. 8-9, 11, 22-23. However, Defendants have either ignored or failed to understand how race factors into Plaintiffs' claims. Plaintiffs are not alleging a violation of the Voting Rights Act, but rather demonstrating how the use of race to redraw the ward boundaries was arbitrary, capricious, and unreasonable and otherwise not related to a rational, consistently-applied policy. See generally Compl., at ¶¶ 98-106; see also id. at ¶ 100 n.10. Thus, the fact that Plaintiffs brought this claim in state court and are not asserting violations of the VRA is entirely irrelevant and in no way precludes Plaintiffs from pursuing this claim.

If the reliance on imposing the least amount of demographic change was based on maintaining racial demographics from the 2010 Census figures, then the Commission's actions were arbitrary, capricious, and unreasonable because they are contrary to the purposes of redistricting. Redistricting needs to occur because there are population shifts which, over time, change the population and makeup of the various wards. Therefore, while redistricting is supposed to be reflective of population shifts as indicated in the most recent Census data, the Commission's goal of drawing ward boundaries that "represent[] the least amount of change demographically" does the opposite. In essence, as set forth in the Complaint, rather than reflect changes in

population and makeup, the Commission sought to preserve "prior racial demographics at a fixed point in the past." See id. at ¶ 104. This is not a legitimate basis upon which to redraw ward boundaries.

Moreover, the Commissions' choice to rely on prior racial demographics, when it appeared not to take anything else into consideration, is a curious and improper one. Not only did the Commission rely upon this arbitrary, capricious, and unreasonable criteria in creating the ward boundaries, but in doing so, it also inevitably prioritized such illegal and improper criteria at the expense of other mandatory and/or valid considerations. See id. at ¶ 105. As set forth in the Complaint, relying on such criteria came at the expense of the statutory requirement of compact wards and at the expense of various traditional principles of redistricting, all of which were wholly ignored or otherwise sacrificed to accommodate this impermissible goal. See id. For the foregoing reasons, the assertions in the Complaint that the Commission's attempt to preserve prior racial demographics was arbitrary, capricious, and unreasonable is sufficient to allege a cause of action upon which relief can be granted.

In the alternative, if the reliance on imposing the least amount of demographic change was based on maintaining racial demographics from the most recent Census figures, then the Commission's actions were arbitrary, capricious, and unreasonable due to their failure to apply a rational, consistently-applied policy. While Defendants in the Commission Report claimed to have "concluded that the proposed new ward boundaries . . . represented the least amount of change demographically," see Compl., Ex. A, the chart included in the very same Commission Report belies such assertion and indicates that such criteria was not applied throughout all of the wards. For example, the percentage of the Black population in every ward except Ward F was increased, including by as much as 8% in Ward A, but the percentage of the Black population in Ward F

decreased by 4%. See id. Similarly, the largest percentage decrease in the Latino population is also found in Ward F, which decreased by 8%. See id. By contrast, while changes in the percentage of the White population ranged from 0% to 3% in all of the other wards, by far the largest shift was again in Ward F, where the percentage of the White population increased by 11%. See id. Similarly, the largest percentage shift in the Asian population was in Ward F, where the 6% increase doubled the next highest percentage shift. See id. *In short, Ward F saw the greatest shift in percentage away from Black residents and Latino residents by a significant margin, and saw the greatest shift in percentage toward White residents and Asian residents by a significant margin.* See id. Clearly, when it came to Ward F, the Commission strayed from its policy of imposing the least amount of demographic change in a manner that is arbitrary, capricious, and unreasonable.

Furthermore, this failure to adhere to its own criteria is exacerbated by the fact that the Commission relocated approximately 15,000 residents more than it needed to, see infra Point II.F, and tore apart neighborhoods and communities of interest in doing so, all while failing to draw compact districts in violation of the Municipal Ward Law. Thus, to the extent that the Commission relied on racial demographics in a context that was wholly divorced from consideration of compactness, communities of interest, the number of residents displaced, and other traditional redistricting considerations, and did so in a manner that was not rational or consistently-applied across the wards, clearly demonstrates that the Commission's prioritization of this consideration was arbitrary, capricious, and unreasonable, and was applied at the expense of other mandatory and/or valid considerations which were sacrificed to accommodate this improper criteria. For the foregoing reasons, the assertions in the Complaint that the Commission's attempt to impose the

least amount of demographic change was arbitrary, capricious, and unreasonable is sufficient to allege a cause of action upon which relief can be granted.

iii. Procedural Context in which Defendants Discussed, Approved, and Adopted the Commission's Map

The procedural context in which the Commission's Map came to be adopted further contributes to the arbitrary, capricious, and unreasonable nature of Defendants' conduct. As set forth below, despite the fact that their meetings are subject to the Open Public Meetings Act, Defendants held unannounced private meetings which were closed to and not disclosed to the public, where Commission members discussed various maps and deliberated on the considerations involved in ultimately selecting a single map for presentation to the public at the expense of others. See infra Point V.

In addition to these secretive proceedings, the Complaint alleges additional suspect circumstances surrounding the adoption of the Commission's Map. For example, the Complaint alleges that the Commission had previously presented a different map to the public which it planned to adopt at a public meeting. See Compl., at ¶ 43. However, that public meeting had to be canceled at the last minute "due to a technical problem." See id. The Complaint further alleges that, even though the meeting was only canceled for technical problems, various changes were subsequently made to the map that was eventually adopted "based upon lobbying from a select assortment of connected stakeholders." See id. To the extent that the Commission did not adhere to mandatory and permissive considerations, but rather conducted its business upon the whims of politicians and power brokers, such conduct is arbitrary, capricious, and unreasonable. Furthermore, when combined with the secret unannounced private meetings from which the public was excluded, Plaintiffs should be entitled to obtain discovery to gather evidence about the nature and extent of such improper and impermissible discussions and considerations.

F. Plaintiffs' Map Serves as One Helpful Tool to Understand How and Why Defendants' Map Violates the Municipal Ward Law.

Perhaps because they did not and could not attack Plaintiffs' claims with respect to the lack of compactness, failure to adhere to traditional principles of redistricting, and the arbitrary and capricious nature of the Commission's actions, or perhaps to try to awkwardly fit this square case into the round hole of existing precedent, Defendants make feeble attempts at recharacterizing Plaintiffs' argument as merely claiming entitlement to relief solely because they created a better map. See Defendant's Brief, at p. 10 (claiming without substantiation and contrary to the Complaint itself that "Plaintiffs' allegations in Count One are based solely on their contention that they have developed a better map than the Ward Commission."). In doing so, they turn a fundamental principle on its head: while the presentation of a better map cannot be the sole basis upon which to strike down the Ward Commission's Map, Defendants have twisted this principle to try to convince this Court that the Complaint should dismissed merely because Plaintiffs included a better map.[9] For obvious reasons, this contention misses the mark from both a legal and factual perspective.

[9] Defendants' repeated reference to City of Newark v. Newark Ward Commission, Civil Docket No. 12-258, 2012 U.S. Dist. LEXIS 169114 (D.N.J. Nov. 28, 2012), in this regard, is nothing short of peculiar and misplaced. Defendants assert that in Newark, which was the only case they could find on Westlaw involving the Municipal Ward Law, the plaintiffs challenged ward redistricting and provided two other alternative maps, but their claims were ultimately dismissed for failure to state a claim. See Defendants' Brief, at pp. 21-22. Therefore, Defendants assert that the same conclusion must apply here. See id. However, citation to Newark for comparative purposes is highly disingenuous. Indeed, a quick read of the Newark case reveals that (1) the action was removed to federal court; (2) the federal court only considered federal claims under the Voting Rights Act and federal constitutional claims; (3) the maps submitted by the plaintiffs did not indicate the racial composition of the other districts involved and thus were unhelpful in resolving federal race-based claims; and (4) after dismissing the federal claims, the court declined to exercise supplemental jurisdiction over the remaining state law claims. *Thus, the only case that Defendants found that involved municipal ward redistricting never actually said anything at all about any claim under the Municipal Ward Law*. Moreover, this case did not call for absolute deference in the context of ward redistricting, nor did it diminish in any way the use of a map as a helpful

Plaintiffs' Map was offered, not as the sole basis upon which to strike down the Commission's Map, but rather as an aid for comparative purposes to (1) shed light on areas where the Commission's Map fell short; (2) provide but one example of how using traditional Census blocks, rather than using the arbitrary criteria of preserving existing election districts, could have avoided the creation of non-compact districts and could have allowed for adherence to various traditional principles of redistricting; and (3) demonstrate that the typical tradeoffs between equal population, compactness, and other traditional principles of redistricting were not a zero-sum game based off of the Commission's Map, but all could have been improved without sacrificing one over the other. See Compl., at ¶ 108 ("Plaintiffs' Map can be used for comparative purposes vis-à-vis the Commission's Map."). Indeed, Plaintiffs' reference to the 2010 Map serves some of the same comparative goals. See id. at ¶ 108, Ex. P; id. at ¶ 114, Ex. G. Moreover, Plaintiffs' Map was never meant to be considered in a vacuum. As set forth in the Complaint, and as set forth above, Plaintiffs have sufficiently alleged a cause of action under the Municipal Ward Law based on independent facts concerning lack of compactness based on the shape and physical properties of the wards, as well as multiple commonly-relied on objective measures of compactness, see generally id. at ¶¶ 51-59, and further supported this with independent facts related to the failure to adhere to traditional principles of redistricting, see generally id. at ¶¶ 63-78. The Complaint further alleges that the Commission's actions were arbitrary, capricious, and unreasonable, based on impermissible considerations related to the preservation of election districts and imposing the least amount of demographic change. See generally id. at ¶¶ 80-105.[10] Therefore, while the Plaintiffs'

comparative aid to assist in demonstrating a violation of the Municipal Ward Law, which is the context in which it is offered in the case at hand.

[10] To the extent that Plaintiffs' Complaint demonstrates that the Commission's map was unlawful by alleging an actual failure to comply with the mandatory statutory requirement of compactness, failure to adhere to traditional principles of redistricting, and use of impermissible considerations

Map absolutely should be considered as a helpful aid in providing a context for the areas upon which the Commission's Map should be struck down, its mere existence, especially when combined with all of these other allegations, simply cannot be a basis upon which to grant Defendants' motion to dismiss.

Moreover, it should be noted that Plaintiffs' Map indicates that it goes well-beyond just being "better" than the Commission's Map at the margins. See, e.g., id. at ¶ 109 ("Plaintiffs' Map achieves much better population deviation, is significantly more compact, splits many less neighborhoods and historic districts, does not split buildings, preserves communities of interest, respects natural boundaries and topography, relocates approximately 15,000 less residents from their prior ward boundaries, and otherwise better adheres to traditional principles of redistricting."). Defendants appear to try to justify their terrible compactness scores and failure to adhere to various traditional principles of redistricting by pointing to population deviation, and then calling it paramount to such other considerations. See, e.g., Defendants' Brief, at pp. 6-7, 18-19. However, Plaintiffs' Map demonstrates just one example of a map that achieves a population deviation that is *over two times lower* than that of the Commission's Map. See Compl., at ¶ 110, Ex. G. It further demonstrates just one example of how that could be accomplished while simultaneously achieving compact districts which score much higher on objective measures of compactness, including a minimum Polsby-Popper Measure score that is *almost twice as high* as

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that were arbitrary, capricious, and unreasonable, in addition to the broader argument distinguishing municipal ward redistricting from legislative and congressional redistricting, the cases relied on by Defendants are highly distinguishable. See Defendants Brief, at pp. 10-11 (relying on cases for the proposition that "it is not the judiciary's role to weigh competing maps") (citing McNeil v. Legislative Apportionment Comm'n, 177 N.J. 364, 381 (2003); Steinhardt v. New Jersey Redistricting Commission, No. 086587, R-3 Sept. Term 2021 (N.J. Feb. 3, 2022) (slip op. at 5)); see also id. at pp. 19-20 (citing McNeil; Davenport v. Apportionment Comm'n, 65 N.J. 125, 135 (1974); Steinhardt).

the Plaintiffs' Map and a minimum Reock Score that is *over twice as high* as the Plaintiffs' Map. See id. at ¶¶ 111-12, Ex. G; id. at ¶ 113. The 2010 Map demonstrates similar disparities where the minimum Polsby-Popper Measure score and Reock Scores on compactness are *twice as high and/or almost twice as high* as the corresponding scores in the Plaintiffs' Map. See id. at ¶ 114, Ex. G.

Plaintiffs' Map further demonstrates just one example of how population deviation could be over twice as low and compactness could be approximately twice as high as the Commission's Map, while minimizing neighborhood splits, preserving the integrity and cohesiveness of communities of interests, not creating any new splits in historic districts, respecting natural boundaries and topography, not splitting buildings, and otherwise adhering to traditional principles of redistricting. See id. at ¶¶ 115-19. Plaintiffs' Map further demonstrates just one example of how all of these factors could be achieved while relocating approximately 15,000 less residents. See id. at ¶ 121. Furthermore, Plaintiff's Map demonstrates just one example of how every one of the above metrics could have been achieved had the Commission not acted arbitrarily, capriciously, and unreasonably in trying to preserve existing election districts and/or irrationally and inconsistently applying other criteria such as trying to impose the least amount of demographic change. See id. at ¶¶ 120, 122-24.

Moreover, it is important to emphasize that this is not a situation where the Commission's discretion should be relied on in making hard judgments about tradeoffs between population deviation, compactness, and traditional principles of redistricting. Indeed, such criteria are often pitted against one another such that a smaller population deviation might require less compact wards, or vice-versa, more compact wards might require a larger population deviation. However, the comparative example of the Plaintiffs' Map demonstrates just one of many maps that achieve

better scores and better results on essentially every category, minimizing the justifications for, among other items, creating non-compact wards. See id. at ¶¶ 109, 122-24. As set forth in the Complaint and above, Plaintiffs' Map does not only score better on the margins, but scores significantly higher in essentially every category while maintaining the integrity and cohesiveness of neighborhoods and communities to a much greater extent. See id.

Boiled down to its essence, Defendants are asking this Court to dismiss Plaintiffs' Complaint and in doing so declare that as long as a ward commission maintains a population deviation within the statutory 10% threshold, the ward commission's map is, for all intents and purposes, impenetrable of review by the Court under the Municipal Ward Law. They ask the Court to blind itself from the specific context in which municipal ward redistricting arises and the pertinent legislative history which accompanies passage of the Municipal Ward Law. They maintain this view regardless of allegations and specifically-asserted facts that the wards are not compact and thus fail to meet one of the other expressly enumerated requirements of the statute, regardless of allegations and specifically-asserted facts that the Commission's Map failed to adhere to various traditional principles of redistricting, and regardless of allegations and specifically-asserted facts that the Commission acted in an arbitrary, capricious, and unreasonable manner with respect to the factors it took into consideration in designing the map. Under these circumstances, and in this context, Defendants' position is simply untenable, and the Court must deny the motion to dismiss the Complaint.

POINT III

PLAINTIFFS' COMPLAINT ADEQUATELY ALLEGES A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER THE EQUAL PROTECTION PROVISIONS OF THE NEW JERSEY CONSTITUTION.

Without repeating at length the arguments set forth above, for similar reasons and based on the same assertions, the allegations in the Complaint demonstrate a separate claim under the New Jersey Constitution.[11] Article I, Paragraph 1 of the New Jersey Constitution provides that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." This provision has been construed so as to serve "as the basis of our [state] Constitution's equal protection guarantees." See Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 79 (1978). Such provision guarantees equal protection rights that are at least analogous to or superior than the protections provided by the federal equal protection clause. See id. at (collecting cases); see also Philadelphia v. Wheeler, 192 N.J. Super. 616, 623 (Law Div. 1983) (recognizing that the equal protection rights implied by and guaranteed under New Jersey's State Constitution can be "even more demanding" than protections in the Federal Constitution) (citation omitted). The essence of the equal protection guarantees are "that persons situated alike should be treated alike," and these "guarantees seek to ensure equality

[11] Defendants' suggestion that it was improper to plead a violation of the Municipal Ward Law and the New Jersey Constitution, as well as their reliance on Lipman v. Arfield, 33 A.2d 703, 704 (N.J. Sup. Ct. 1943) is misplaced. See Defendants' Brief, at p. 10 n.8, This case from 79 years ago pre-dates even New Jersey's current state constitution and discusses prior court rules no longer in effect. See Lipman, 33 A.2d at 703. Furthermore, unlike Lipman, Plaintiffs herein plead common facts which are sufficient to support each claim. See Lipman, 33 A.2d at 704. Moreover, even in Lipman, the Plaintiffs were permitted leave to amend the Complaint to address multiple deficiencies and in so granting such leave the court permitted Plaintiffs to replead the two claims as separate causes of action. See id. As the claims for violation of the Municipal Ward Law and of the New Jersey Constitution are based on the same common set of facts, and as the allegations address violations of each, Plaintiffs maintain that it would be a waste of judicial resources to replead with a separate cause of action that simply adopts and reincorporates the same paragraphs and allegations in the Municipal Ward Law claim. Nevertheless, Plaintiffs are happy to file an amended complaint if the Court so desires.

of right by forbidding arbitrary discrimination between persons similarly situated." See Wheeler, 192 N.J. Super. at 623 (citation omitted).

As explained above, effective representation lies at the very heart of municipal ward redistricting. By placing residents of certain wards, such as Ward F and Ward D in non-compact districts, when residents of other wards are placed in compact districts, Defendants failed to treat similarly situated residents alike, thereby diminishing their ability to achieve effective representation. In the specific context of municipal ward redistricting, compactness is not only required by statute, but essential for the effective representation of constituents upon which the very need for division into wards is premised in the first instance. Therefore, to deprive certain residents of the right to reside in a compact district – a right bestowed by the Municipal Ward Law upon all residents of Jersey City – is to deprive them of effective representation, and to treat them differently than other residents of Jersey City that are similarly situated. This is particularly true of residents within communities of interest such as the historic Lafayette neighborhood, which were decimated, cracked, and otherwise diluted under the commission map.

This unequal treatment is accentuated by the manner in which Plaintiffs' non-compact districts were drawn and the manner in which their effective representation was denied. Cf. League of Women Voters v. Commonwealth, 178 A.3d 737, 817 (Pa. 2018) (interpreting state constitutional provision related to free and fair elections in the context of redistricting) ("[T]he use of compactness, contiguity, and the maintenance of the integrity of the boundaries of political subdivisions maintains the strength of an individual's vote in electing a . . . representative. When an individual is grouped with other members of his or her community in a . . . district for purposes of voting, the commonality of the interests shared with the other voters in the community increase the ability of the individual to elect a . . . representative for the district who reflects his or her

personal preferences."). Failing to draw non-compact districts led to the unnecessary splitting of neighborhoods and communities of interest in Jersey City. See Compl., at ¶ 61.

As set forth above, the Complaint alleges common interests related to housing, income, history, environmental concerns, etc., of various neighborhoods and communities of interest that were nevertheless torn apart such that their residents were needlessly separated from one another. As an example, the Complaint sets forth the shared history and common interests and concerns of the Lafayette neighborhood, which was a core community within Ward F. See id. at ¶¶ 65-69. Lafayette is one of the oldest African-American communities in the state, a working class area that persisted through remediation of environmental hazards, and banded together to voice opposition to high rise apartments without affordable housing options, including opposition to specific development projects around which the community rallied to support Frank Gilmore. See id. Despite the shared history and common concerns of this neighborhood, and notwithstanding the fact that Ward F was already extremely close to the ideal population for the ward, see id. at ¶ 73 n.8, the Commission nevertheless split Lafayette, tearing away 5,832 residents into a different ward, where they will be represented by a different councilperson, see id. at ¶ 69.

In place of these and other residents who were displaced into other wards, Ward F was injected with residents from other wards who do not share their common interests and concerns. In fact, many of the areas that were split and infused into Ward F contain residents that are more affluent and/or consist of high rise apartments and commercial buildings, such that the income and housing disparities between residents make it extremely difficult if not impossible to achieve effective representation on high-priority matters of local concern. See id. at ¶¶ 69-73. Among other examples, 5,714 residents from the historic Paulus Hook district, which the Commission split in half horizontally, along with numerous high rise apartment and commercial buildings, including

the Goldman Sachs building, as well as 940 residents from Van Vorst Park, including high rise residential buildings characteristic of the Downtown area, were placed into Ward F. See id. at ¶¶ 70-71. As set forth in the Complaint, "[w]hat remains is a Ward F consisting of fractured neighborhoods which lacks a cohesive identity and unity of interests rendering effective representation of the wards' residents difficult if not impossible to achieve." See id. at ¶ 73 n.8. The same holds true for those residents in neighborhoods like Lafayette who were displaced from fellow residents into separate wards, destroying the integrity of these communities of interest and their ability to achieve effective representation for their common concerns and priorities. See id.

Similar barriers to effective representation plague the residents of other neighborhoods and affect other wards as the result of the drawing of non-compact districts which fail to take into consideration various traditional principles of redistricting. For example, the Complaint alleges that 3,435 residents of Ward E were siphoned away from the rest of Newport and stuffed into the portion of Jersey City associated with the Heights in Ward D. See id. at ¶ 74. In doing so, Defendants ignored natural boundaries including a 150-foot cliff along the Palisades separating different communities, intermingled a community in Jersey City which was comprised of virtually all new construction of high rise apartments with an older neighborhood with an entirely different housing makeup, and even split multiple buildings in half. See id. at ¶¶ 77. As with the other examples, the residents of these fractured communities are deprived of effective representation in violation of their equal protection rights. Cf. League of Women Voters, 178 A.3d at 817 (finding that "neutral criteria" including compactness and contiguity, equality of population, and minimizing splits of political subdivisions "provide a 'floor' of protection for an individual against the dilution of his or her vote in the creation of such districts").

Furthermore, as set forth above, the Complaint alleges that the failure to draw compact districts, and in turn, to provide effective representation, stems from Defendants' reliance on impermissible considerations which are arbitrary, capricious, and unreasonable, and which prioritize such irrational considerations at the expense of mandatory requirements. See id. at ¶¶ 95-97, 104-06. This includes, among others, the preservation of existing election districts, see id. at ¶¶ 82-88 which is entirely irrational based on the fact that such election district boundaries are temporary and are required to be redrawn following completion of municipal ward redistricting, see id. at ¶¶ 89-94. Cf. Secure Heritage, Inc. v. City of Cape May, 361 N.J. Super. 281, 301 (App. Div. 2003) ("Irrational legislation is similarly barred by the [Equal Protection principles of the] State Constitution."). It also includes reliance on imposing the least amount of demographic change, see Compl., at ¶¶ 98-99, which was not rationally or consistently applied throughout the wards, see id. at ¶ 100 n.10. Among other examples, Plaintiffs' Map demonstrates but one example of how the use of such arbitrary, irrational, and impermissible criteria prevented Defendants from ensuring the creation of compact districts, thereby depriving Plaintiffs and various other residents of effective representation in violation of the equal protection guarantees under the New Jersey Constitution. See id. at ¶¶ 122-26; cf. League of Women Voters, 178 A.3d at 817 (holding that under state constitutional provisions, even other generally permissible redistricting criteria such as "preservation of prior district lines, protection of incumbents, or the maintenance of the political balance which existed after the prior reapportionment" are subordinate to "neutral criteria" and thus compactness could not be subordinated by such "extraneous considerations" regardless of the intention of the body that redrew the districts).

Redistricting is premised on the guarantee for equal protection under law – that the redistricting process will be fair, and that the outcomes will be fair, such that individuals can

maintain faith in their elected government with respect to their representation and voting power. These are fundamental equal protection guarantees, secured within the state and federal constitutions, which underlay and animate the codification criteria of compactness, population equality, and contiguity described above.

For the foregoing reasons, Defendants' adoption of the Commission's Map violates the Equal Protection provisions of the New Jersey Constitution.

POINT IV

PLAINTIFF ORGANIZATIONS WHOSE MEMBERS RESIDE IN THE "OLD" WARD F AND COUNCIMAN GILMORE HAVE STATED A CLAIM FOR VIOLATION OF THEIR SPEECH & ASSOCIATION RIGHTS UNDER THE NEW JERSEY CONSTITUTION.

In their opposition papers, Defendants seek to defeat Count II of Plaintiffs' Complaint by simply declaring this claim to be "truly bizarre." Defendants' Brief, at p. 26. Rather than engaging with the factual allegations in Plaintiffs' Complaint, Defendants cite to irrelevant case law[12] and repeat irrelevant legal standards regarding content-based and time, place and manner speech restrictions only to conclude that Plaintiffs "[h]ave not alleged any form of protected speech which has been restricted by the Commission's adoption of the ward map," id. at 27, because "the Ward Commission's actions are not novel, they are mandated by statute and must occur every ten years." Id. at 28. This is not a serious legal argument.

A review of the Complaint indicates that this count is brought on behalf of two classes of Plaintiffs: (1) Organizational Plaintiffs representing the voters of Ward F and those formerly of

[12] E.g., Farber v. City of Paterson, 440 F.3d 131, 142 (3d Cir. 2006) (finding that the Civil Rights Act, §1985(3) does not provide a cause of action for individuals who are allegedly injured by conspiracies motivated by discriminatory animus directed toward political affiliation with a former Mayor and holding that political affiliation does not qualify as invidious discrimination for purposes of such a conspiracy claim).

Ward F, and (2) the Individual Plaintiff Frank E. Gilmore. Compl., ¶ 153. The claims of the two classes are related insofar as the Organizational Plaintiffs, consisting of certain neighborhood and block associations in Ward F, banded together with individual residents in Ward F to support the election of independent candidate Frank E. Gilmore and his stance on affordable housing and development, id. at ¶ 136; however, the retaliation claims of such organizations, which are based on their recent electoral activity, are separate and distinct from Mr. Gilmore's claim of retaliation for his speech and advocacy. Though both are based on violations of the New Jersey Constitution speech and association clauses, they must be analyzed by this Court using different legal standards: the former, standards used by the courts when dealing with partisan gerrymandering claims, including retaliation claims, brought by disenfranchised voters is appropriate, and with respect to the latter, standards used to assess retaliation claims brought by elected officials who have taken certain disfavored positions on behalf of their constituents is applicable.

A. Organizational Plaintiffs, Their Members, and the Residents they Represent have Stated a Claim for Retaliation for Speech and Association Activities.

The First Amendment rights to freedom of association and speech protect both an individual's ability to exercise political influence by joining with like-minded others, and the right of expressive associations to be free from discrimination based on the political viewpoint of the group with which individuals choose to affiliate. See e.g., Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357 (1997) (Central to the right of association is "the advancement of common political goals and ideas."); Citizen United v. Federal Election Commission, 558 U.S. 310, 340-41 (2010) (citing long line of precedent holding that government discrimination against disfavored viewpoints or speaker contravenes the First Amendment). The U. S. Supreme Court has long recognized the relationship between expressive association and voting, applying the same standard to association claims under the First Amendment and right-to-vote claims under the Fourteenth

Amendment. See Anderson v. Celebrezze, 460 U.S. 780, 788-90 (1986); Burdick v. Takushi, 504 U.S. 428, 433-34 (1992).[13]

The Court's patronage cases similarly recognize that the right of association protects both the individual interest in collaborating with like-minded others and the collective interest in "the free functioning of the electoral process." Elrod v. Burns, 427 U. S. 347, 356 (1976). See also Rutan v. Republican Party of Illinois, 497 U.S. 62, 74-76 (1990); Branti v. Finkel, 445 U.S. 507, 518 (1980). These cases limit government consideration of political party affiliation, and stand for the principle that all government action must maintain viewpoint-neutrality, especially when such action might affect the electoral process. In this way, the First Amendment right of association implicates both the systemic interest in a fair electoral process and the individual interest in furthering one's beliefs, such as here, where residents in Ward F affiliated with the political campaign of an independent candidate, Frank E. Gilmore, and, as a direct result of their concerted efforts, elected him; thus, translating that association into political power through their speech at the ballot.

More recent than the above patronage cases, the U. S. Supreme Court recognized that political gerrymandering implicates First Amendment associational rights. As Justice Kennedy stated in Vieth v. Jubelirer, 541 U.S. 267 (2004),

> First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering that means that First Amendment concerns

[13] Art. 1, Paragraph 6 of the New Jersey Constitution (speech) and Art. 1, Paragraph 18 (right to associate) set forth affirmative rights similar to those protected by the First Amendment, and in some instances provide even greater protection. See Mazdabrook Commons Homeowners' Ass'n v. Khan, 210 N.J. 482, 492 (2012)(expanding free speech protections as applied to private person); Green Party v. Hartz Mt. Indus., 164 N.J. 127 (2000)(more expansive associational rights than under the Federal Constitution).

> arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

Vieth, 541 U. S. at 314 (Kennedy, J. concurring). Although the Supreme Court later held in Gill v. Whitford, 138 S. Ct. 1916 (2018), that plaintiffs in that case had not established an injury-in-fact, and, ruled one-year later in Rucho v. Common Cause, 139 S. Ct. 2484 (2019) that federal courts cannot review such allegations (as they present nonjusticiable questions outside the remit of such courts), state courts have been and are now left grappling with partisan gerrymandering under their own state constitutions. However, nothing said by the Court in Rucho makes case law decided prior to that decision under the U.S. Constitution any less persuasive.[14] See e.g., League of Women Voters of Michigan v. Johnson, 352 F. Supp. 3d 777 (E.D. Mich. 2018) (finding plaintiffs had stated a justiciable claim under the three-part intent, injury and causation test as to their First Amendment association and representation claims); see also League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania, 178 A.3d 737 (Pa. 2018) (holding 2011 Congressional apportionment plan unconstitutional under Article I, Section 5 of Pennsylvania Constitution entitled "Elections," interpreting that clause to be broader than the protections embodied in the First Amendment).

Therefore, in the context of redistricting, the appropriate question for this Court is not only to determine whether political classifications were improperly used – supporters of Frank E. Gilmore vs. supporters of incumbent candidates – but whether such classifications were used by

[14] The case was one of three heard in the 2018 term dealing with issues related to partisan gerrymandering used in the districting plans of states. It was combined with Rucho v. League of Women Voters of North Carolina, see Common Cause v. Rucho, 318 F. Supp. 3d 777 (M.D.N.C. 2018) (consolidating the two cases) and its decision included the Court's judgement on Lamone v. Benisek, 348 F. Supp. 3d 493 (D. Md. 2018), a partisan gerrymandering case from Maryland. The 5–4 decision left in place North Carolina's congressional districts, which favored the Republican Party, and Maryland's congressional districts, which favored the Democratic Party.

the Ward Commission to burden Plaintiffs' representational (*i.e.*, voter dilution) or associational rights (*i.e*., diminishing the ability of plaintiffs to associate in furtherance of their shared aims). See Benisek v. Lamone, 348 F. Supp. 3d 493, 514-22 (D. Md. 2018), vacated and remanded by Rucho v. Common Cause. 139 S. Ct. 2484 (2019). This is the case, because under the U.S. Supreme Court's freedom of association case law, a redistricting plan, such as the Commission's Map in the context of ward redistricting, that imposes discriminatory burdens or injures people with a particular viewpoint – such as, the independent-minded voters in Anderson v. Calebreze or the supporters of Frank E. Gilmore, who was an independent challenging an incumbent who was running as a member of the Mayor's team – violates the First Amendment. The violation occurs in this case, because such 2022 plan violates the associational rights of citizens based on their political affiliation with Mr. Gilmore's campaign, their expression of support for his views regarding development, displacement, and affordability, and their affirmative vote in his favor.

The practice of purposefully diluting the weight of certain citizens' votes to make it more difficult for them to achieve electoral success or to separate them from other like-minded individuals, including their representative, in order to hinder their ability to achieve their common advocacy goals "implicates the First Amendment's well-established prohibition against retaliation, which prevents the State from indirectly impinging on the direct rights of speech and association by retaliating against citizens for their exercise." Shapiro v. McManus, 203 F. Supp. 3d 579, 596-598 (D. Md. 2016). Because there is no redistricting exception to the well-established First Amendment retaliation jurisprudence, the Maryland District Court found that the fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment speech and association rights "thus provides a well-understood structure for claims challenging the constitutionality of a State's redistricting legislation – a discernable and

manageable standard." Id. at 596. It is the objective standard set forth in McManus – specific intent to injure because of political affiliation and voting history; plaintiffs have suffered a "tangible and concrete adverse effect; and the retaliatory intent was a "but-for" cause of their injury – that applies to the claims brought by the Organizational Plaintiffs representing those residing in the old Ward F, not the standards set forth in Defendants' brief. Defendants' Brief, at p. 29.

An analysis of the allegations set forth in the Complaint pursuant to the McManus retaliation standard indicates that the Organizational Plaintiffs have stated a viable cause of action for retaliation requiring this Court to deny Defendants' Motion to Dismiss. Before conducting the analysis, however, one must note that this matter differs from typical partisan gerrymandering cases in two significant ways: first, in the typical partisan gerrymandering situation, the plaintiffs are alleging injury due to their affiliation with one of the two established political parties. In this matter, *Jersey City holds nonpartisan elections*, and Plaintiffs are thus alleging affiliation and support of an independent candidate who challenged, and defeated, an incumbent running on the Mayor's team. Second, residents of Ward F are not alleging retaliation based on their historical voting record over the years; rather, they are claiming that the retaliation was a direct response to their support for and the election of Frank E. Gilmore with significant support coming from voters located throughout the Ward.

In the Complaint at ¶ 151, Organizational Plaintiffs Greenville Neighborhood Alliance, Friends of Berry Lane Park, Gardner Avenue Block Association, Morris Canal Redevelopment CDC, Harmon Street Block Association, Crescent Avenue Block, and the Ward F members of the Democratic Political Alliance and Jersey City United Against the New Ward Map allege as follows:

> By drawing Ward F so as to not be comprised of compact territory, by splitting neighborhoods (including the historical Lafayette

> neighborhood and Paulus Hook District), by removing large portions of residents who, as a "community of interest," banded together to vote out an incumbent candidate and replace him with a candidate who sought to more closely represent their views on issues of critical importance to them, and by replacing such residents with the residents from entirely different neighborhoods, with different interests, different racial makeups, and different levels of income, the Commission's Map deprived Plaintiffs . . . of their constitutionally protected associational and speech rights to elect a candidate of their choice, thus stripping them of their effectiveness in holding their representatives accountable through the ballot box.

In paragraph 147, relying on Exhibit T, Plaintiffs allege that Ward F lost 8,964 residents to Ward A and 5,917 residents to Ward B, while replacing such residents with 14,712 higher income residents, who previously had been located in Ward E. The complaint notes that a critical issue in the Ward F council election revolved around affordable housing and development, Compl., at ¶ 136, issues that did not receive the same attention in the council ward elections occurring in Ward A and B, and for sure, were not the focus of the respective campaigns of the incumbents, who won both those elections and were identified with the Mayor's team. In particular, many of the neighborhood and block associations as well as individual residents in Ward F banded together in support of Frank E. Gilmore and his stance on affordable housing and development, id. at ¶¶ 138, 142, and the voters of Ward F successfully elected Gilmore to be their advocate with respect to several controversial developments, including but not limited to "Sci-Tech" and "Steel Tech." Id. at ¶ 136.

Mr. Gilmore was the only challenger to defeat an incumbent in any of Jersey City's ward council races, id. at ¶ 139; and in direct return, 14,881 residents were peeled off from Ward F, splitting the Lafayette neighborhood apart and the neighborhood around McGinley Square, along with development projects in those two neighborhoods, taking them out of the reach of Councilman Gilmore's influence. See id. at ¶ 141 (alleging an accepted policy and practice in

Jersey City that the Mayor and Council defer to the expressed interests and recommendations of the councilmember in which a development project occurs). On the other hand, 14,712 higher income white and Asian residents, primarily living in recently built luxury high-rise housing, with some townhouse developments/upgrades in a historically preserved district, were introduced into Ward F, effectively reducing the political clout of the remaining 33,599 residents, many of whom are Black and Hispanic with lower incomes than those coming into Ward F from Ward E. Simply put: the voters of Ward F elected an independent challenger over an incumbent favored by City Hall, only to have their ward grossly disfigured with neighborhoods and communities of interests torn asunder, and their own interests in fighting displacement and gentrification seriously harmed. See also Compl., at ¶¶ 149-150 (alleging that the Commission's Map, particularly with respect to Ward F, is not the result of any permissible, rational and consistently applied policy, but instead, "amounts to an attempt to nullify the end-product of the democratic election process.")

These allegations, which must be assumed to be true, constitute a viable claim for First Amendment retaliation in the context of redistricting. First, Plaintiffs have sufficiently alleged that the Ward Commission redrew the lines of Ward F with the specific intent to impose a burden or inflict a harm on the members of the Organizational Plaintiffs and similarly situated citizens of Ward F because of how they voted in the last council election and for their support of the independent Gilmore campaign. Second, Plaintiffs have alleged that the redrawn map creates a tangible and adverse effect on them that is not *de minimis*: Almost 15, 000 residents have been removed from Ward F, and no longer have Frank Gilmore to protect their interests. These displaced voters now find themselves represented by two incumbent council members who have not taken a critical stance on the development occurring in their respective wards; and instead, they have been thrown into a ward with other voters who have not organized around the issues of

affordable housing to the same degree as their previous Ward F neighbors diminishing their collective ability to advocate for effective representation. On the other hand, the remaining residents in Ward F have been put together with approximately 14,700 new residents who do not share their concerns, thus diminishing such voters' ability to organize ward residents around a shared agenda. In short, Plaintiffs have established concrete representational and associational harms that are a direct effect of the redrawn ward map. Finally, Plaintiffs have adequately alleged the "but-for" causation element of a retaliation claim insofar as the Ward Commission's redrawing of Ward F cannot be explained or justified by reference to Jersey City's geography, its communities of interest or any other legitimate redistricting criteria. Indeed, the gross lack of compactness of Ward F – a mandatory safeguard contained in the Municipal Ward law to prevent against the evils of gerrymandering – underscores the Commission's intent to disfavor and punish the voters of Ward F for their constitutionally protected conduct to campaign and vote for Frank E. Gilmore.

B. Plaintiff Frank E. Gilmore has Stated a Claim for Retaliation for his Advocacy Regarding Affordable Housing, Gentrification, and Redevelopment.

In their papers, Defendants fail to acknowledge any of the factual allegations set forth in the Complaint regarding Plaintiff Gilmore's advocacy regarding proposed redevelopment projects in Ward F, either during his campaign or after his election. See Compl., at ¶¶ 136-37, 140. They then fail to acknowledge the factual allegations, also delineated in the Complaint, constituting the Commission's acts of retaliation in response to such speech. See Compl., at ¶¶ 143-44, 148, 152. Rather than identify the standard courts use to analyze an elected official's claim of "First Amendment" retaliation, they implicitly deny that Mr. Gilmore's advocacy regarding

"gentrification, displacement and redevelopment more generally," constitutes protected speech,[15] and characterize Plaintiff Gilmore's speech and association claim as a "baseless, hysterical claim that must be dismissed." Defendants' Brief, at p. 30. See also Defendants' Brief, at p. 37-40 (treating Gilmore's retaliation claim as retaliation for political affiliation, not speech; and applying the retaliation standard for a public employee, not an elected official).[16] This argument has no merit.

For many years, courts have been treating retaliation claims brought by elected officials *sui generis*: more like public citizens than public employees; but, unlike public citizens, who must prove that a person of "ordinary firmness" would be deterred from speaking (not actual deterrence)[17], public officials must establish that the actions taken against them "interfere[d] with their ability to perform their elected duties" in order to sustain a First Amendment retaliation claim.

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[15] But see Van De Yacht v. City of Wausau, 661 F. Supp. 2d 1026, 1033 (W.D. Wisc. 2009) (where defendants conceded that, as a general matter, a councilwoman's political speech on behalf of her constituents was constitutionally protected).

[16] In support of their claim that Plaintiff Gilmore has not alleged a claim for retaliation based on his speech, Defendants cite to two New Jersey cases that deal with alleged retaliation for political affiliation of public employees. Lapolla v. County of Union, 449 N.J. Super. 288, 303 (App. Div. 2017) (where plaintiff failed to identify any "expressive exercises or beliefs" such as support for any particular candidate and, instead alleged that he was "discriminated against because his brother was a member of a faction of the Democratic Party") and Communications Workers of Am. v. Whitman, 335 N.J. Super. 283 (App. Div. 2000) (where union members failed to allege any retaliation for their political affiliation with the Democratic Party, and their termination was the result of a change in public policy implementing privatization of motor vehicle agencies). Neither are relevant; however, the court's opinion in Lapolla indicates that New Jersey courts when faced with speech and association claims brought under the New Jersey Constitution will look to analogous case law developed under the First Amendment.

[17] O'Connor v. City of Newark, 440 F. 3d. 125, 128 (3d Cir. 2006) ("deterrence threshold" for First Amendment retaliation claim "is very low" and a cause of action is supplied by all but truly *de minimis* violations" (citing Suppan v. Dadonna, 203 F.3d 228, 235 (3d. Cir. 2000)). cf. Heffernan v. City of Paterson, 578 U.S. 266 (2016) (holding that retaliation for perceived First Amendment activity rather than actual activity triggers violation of the First Amendment, because retaliatory action against one employee inhibits protected belief and association of all employees, thus obviating the need to prove that a plaintiff or other employees have been coerced into changing their political allegiance).

Werkheiser v. Pocono Twp. 210 F. Supp. 633, 641 (W.D. Pa. 2016). A review of the case law applied to the facts alleged in the Complaint indicates that Councilman Gilmore has stated a viable retaliation claim.

The genesis of First Amendment retaliation claims brought on behalf of elected officials can be traced to Bond v. Floyd, 385 U.S. 116 (1966). In that case, the Supreme Court established that, at least with respect to political speech, elected officials have First Amendment rights equivalent in scope with the First Amendment rights of citizens. Finding that the Georgia House of Representatives violated the First Amendment when it excluded an elected Representative from membership because of statements criticizing federal policy regarding Vietnam and Select Service laws, the Court rejected a proposed distinction between "citizen-critics" and legislators:

> The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators. Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.
>
> Id. at 136-37.

Since Bond, the U.S. Supreme Court has reiterated the importance of elected officials' free speech rights. See Wood v. Georgia, 379 U.S. 375 (1962) ("The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of public importance."); Republican Party of Minnesota v. White, 536 U.S. 765, 781-82 (2002) (same). Moreover, consistent with the Supreme Court's finding in Waters v. Churchill, 511 U.S. 661 (1994) that government's interest in regulating the speech of public employees in order to promote efficient operation does not apply to the speech of an elected official, a majority of federal courts have found that the standard governing public employees does not apply to elected

officials. See Werkheiser v. Pocono Twp., 210 F. Supp. 3d. 633, 637-40 (W.D. Pa. 2016) (discussing whether the U.S. Supreme Court's decision in Garcetti v. Caballos, 547 U.S. 410 (2006) regarding public employees applied to elected officials, and noting that the Third Circuit had not directly ruled on the issue), *aff'd*, Pocono Twp. Bd. of Supervisors, 2017 U.S. App. LEXIS 14772 (3d Cir. Pa. Aug. 10, 2017).

However, as the Third Circuit noted in Thomas v. Independence Twp., 463 F. 3d. 285 (3d. Cir. 2006) not all retaliation violates the First Amendment. Specifically, nine years later, the Third stated that there is "nothing in Bond that suggests the Court intended for the First Amendment to guard against every form of political backlash that might arise out of the everyday squabble of hardball politics." Werkheiser v. Pocono Twp. 780 F. 3d 172, 181 (3d Cir.), *cert. denied sub nom*, Werkheiser v. Pocono Twp., Penn., 136 S. Ct. 404 (2015); see also Zilich v. Longo, 34 F.3d 359, 363 (6th Cir. 1994) ("The First Amendment is not an instrument designed to outlaw partisan voting or petty political bickering through the adoption of legislative resolutions."). Rather, federal courts, including the Third Circuit in Werkheiser have made the distinction between "the type of retaliation at issue in Bond which impedes elected officials' ability to serve as effective representatives," and where an elected official is adversely impacted by actions that do not interfere with his or her role as an elected official; the former is impermissible while the latter does not violate the First Amendment. Werkheiser, 780 F.3d at 183; see also Blair Bethel Sch. Dist., 608 F. 3d 540, 545 n.4 (9th Cir. 2010) (explaining that retaliatory acts by elected officials against other elected officials may be unlawful if their effect is "deleterious to democracy, of nullifying a popular vote" or "depriv[ing] [an elected official] of authority he enjoyed by virtue of his popular election.").

Similarly, courts have drawn a distinction between permissible speech, including pursuing investigations, holding hearings, launching a smear campaign etc. undertaken by legislators against their colleagues, and impermissible actions that are deemed retaliatory because they directly interfere with council members' ability to represent the voters who elected them. King v. City of New York, 2022 U.S. Dist. LEXIS 7729, 2022 WL 138009, at *13 n.13 (S.D.N.Y. Jan. 13, 2022) (listing other circuits that have taken a similar approach to the Second Circuit's rule regarding First Amendment speech retaliation claims brought by elected officials); cf. Monteiro v. City of Elizabeth, 436 F. 3d 397, 404-06 (3d Cir. 2006) (holding that ejection of a council member from a council meeting and thus preventing him from speaking and voting on a matter may violate the First Amendment). In short, federal courts have not only required the plaintiff elected official to establish that they engaged in protective speech, that there is a causal connection between the adverse action and the speech, but also that the retaliatory action must substantially hinder the official's ability to represent the interests of the voters who elected them.

Outside the public employee context, "[i]n order to plead a retaliation claim under the First Amendment, a [New Jersey citizen] must allege: (1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising their constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action." Thomas, 463 F. 3d. at 296 (citing Mitchell v. Horn, 318 F. 3d 523, 520 (3d Cir. 2003). Based on the analysis presented above, Plaintiff Gilmore has to allege sufficient facts to establish all three prongs of this test, with the second prong modified to require that the retaliatory action taken by the Ward Map Commission effectively deprives him of his ability to represent the voters in Ward F, including the approximately 15,000 residents who elected him but were moved out of the Ward (without consideration to the "compactness" of Ward F, its

communities of interest and its recognized neighborhoods). A review of the Complaint indicates that he has met his burden to overcome, Defendants' Motion to Dismiss.

First, the Complaint alleges the protected speech he engaged in, as well as alleges that "[o]nce elected Gilmore . . . held several town halls to discuss [the issues of affordable housing and redevelopment] including a 200 or so in person meeting held on December 6, 2021, in which the developers for Sci-Tech and Steel Tech were invited to talk with the community." Compl., at ¶ 140, Exhibit U, Ward F Town Hall Meeting Flyer ("Ex. U"). Accordingly, Plaintiff Gilmore has satisfied the first prong of the relevant test.

Second, the Complaint alleges that because the Commission removed the entire federal opportunity zone from Ward F, including specific development projects such as the Sci-Tech and Steel Tech projects (in addition to "two luxury residential projects located in the election districts removed from Ward F and given to Ward B", Compl., at ¶ 148) and removed almost 15,000 of his constituents who will be directly impacted by development in that opportunity zone or the areas moved to Ward B, such actions can sustain a First Amendment retaliation claim. Id. at ¶¶ 143-44, 148, 152. This is the case, because in their Complaint, Plaintiffs also allege that "[i]t is accepted policy and practice in Jersey City, that the Mayor and Council defer to the expressed interests and recommendations of the councilmember in which a development or redevelopment project occurs." Id. at ¶ 141. Accepting this factual allegation as true, Plaintiff Gilmore has alleged sufficient facts for a plausible finding that he will no longer be able to represent the interests of the voters who will be directly impacted by these developments and who elected him, primarily because of his stance on affordable housing and development. For sure, the Commission did not have the authority to deny him this customary privilege of influence granted to each council member. Instead, they did what was in their control; they removed the very development projects

on which Gilmore had taken a position, as well as all future development projects in the opportunity zone, from within his jurisdiction or influence. In this way, Gilmore has been prevented from fulfilling the very commitments he made to the voters of Ward F, and in particular to the 15,000 residents who were unnecessarily removed from the ward.

Finally, Plaintiff Gilmore's allegations in the Complaint are sufficient to make a plausible link between the protected activity (i.e., speech on identified topics and development projects) and the alleged retaliatory conduct. See Compl., at ¶ 143 ("Less than three months after electing the candidate of their choice, and less than one month after Gilmore took office, the Commission tore apart large blocks of voters, split neighborhoods that were instrumental in electing him, and removed almost the entire federal opportunity zone that ran between Garfield Avenue and the New Jersey Turnpike from Ward F."). Causation can typically be inferred from timing alone where an adverse government action follows on the heels of protected activity. Cf. Bell v. Clackamas Cty., 341 F. 3d 858, 865-66 (9th Cir. 2003) ("Temporal proximity between protected activity and an adverse employment action can by itself constitute sufficient circumstantial evidence of retaliation in some cases."). The fact that candidate and then Councilman Gilmore spoke out about identified issues, followed by the Commission's alleged conduct, is sufficient to "raise a reasonable expectation that discovery will reveal evidence" that Defendants acted in retaliation against Plaintiffs' speech. Great Western Mining & Mineral v. Fox Rothschild LLP, 615 F. 3d. 159, 177 (3d. Cir. 2010). Furthermore, the motivating factor in a retaliation case is a question of fact typically inappropriate for resolution on a motion to dismiss. Muti v. Schmidt, 118 Fed. Appx. 646, 649 n.1 (3d. Cir. 2004). It therefore follows that Plaintiff Gilmore has also pled sufficient facts to survive Defendants' motion to dismiss on the causal link prong of his First Amendment retaliation claim.

In short, the relevant Organizational Plaintiffs and Plaintiff Gilmore have sufficiently pled their respective speech and association retaliation claims to withstand Defendants' Motion to Dismiss; their claims are well-grounded in law, and potentially explain the Commission's decision to ignore compactness and grossly gerrymander Ward F. Count II thus states a serious, real, and substantial claim that, at this stage of the litigation cannot be dismissed.

POINT V

PLAINTIFFS' COMPLAINT ADEQUATELY ALLEGES A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER THE OPEN PUBLIC MEETINGS ACT.

Unlike in legislative redistricting, ward redistricting by the Commission under the Municipal Ward Law is subject to the Open Public Meetings Act, N.J.S.A. 10:4-6 to -21 ("OPMA"). See N.J.S.A. 10:4-7 (explicitly exempting Apportionment Commission while not exempting municipal ward commissions from OPMA). OPMA sets forth various rules and procedures regarding the conduct of public bodies at public meetings. The Commission is a public body which consists of multiple members who are empowered to determine the boundaries of the wards, and thus are subject to OPMA and not otherwise exempt. See id. 10:4-7. OPMA generally applies to "meetings" which are defined as follows:

> [A]ny gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to *discuss or* act as a unit upon the specific public business of that body. Meeting does not mean or include any such gathering (1) attended by less than an effective majority of the members of a public body, or (2) attended by or open to all of the members of three or more similar public bodies at a convention or similar gathering.

N.J.S.A. 10:4-8(b) (emphasis added).

The public body must provide "adequate notice" of their meetings, as defined by statute. See N.J.S.A. 10:4-9.1. Unless a specific exception applies, "all meetings of public bodies shall be open to the public at all times." See N.J.S.A. 10:4-12. Even where an exception applies, the public cannot be excluded from those portions of the meetings where the exception applies unless a resolution is first adopted which states the general subject matter being discussed and the time and circumstances under which any closed session discussions can be disclosed to the public. See N.J.S.A. 10:4-13. Public bodies must keep minutes of their meetings. See N.J.S.A. 10:4-14. OPMA allows any person to file an action in lieu of prerogative writ if a public body takes an action which does not conform with OPMA's provisions, and if the action does not comply with OPMA, the Court must declare it to be void. See id. at 10:4-15. "[A] public body may take corrective or remedial action by acting *de novo* at a public meeting." Id. (emphasis added).

A. The Purpose and Significance of OPMA

The importance of the OPMA with respect to transparency, trust in government, effective democracy, and promotion of citizen participation is set forth in the legislative findings declaration found in N.J.S.A. 10:4-7. For example, OPMA provides that the public has the right "to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies." Id. OPMA further recognizes that the public "is vital to the enhancement and proper functioning of the democratic process," and "that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society." Id. As set forth in the OPMA, the Legislature expressly disfavored constructions of its provisions that would circumvent its purpose, specifically "declar[ing] it to be the public policy of this State to insure that the aforesaid rights are implemented pursuant to the provisions of this act *so that no confusion, misconstructions or*

misinterpretations may thwart the purposes hereof." Id. (emphasis added)[18]. As compared to meetings that are open to all members which intend to discuss or act on the business of the public body, "typical partisan caucus meetings and chance encounters of members of public bodies" are not covered. See id. Furthermore, OPMA expressly prohibits schemes that attempt to circumvent its provisions, providing that "[n]o person or public body shall fail to invite a portion of its members to a meeting for the purpose of circumventing the provisions of this act." See N.J.S.A. 10:4-11. Moreover, the statute itself expressly provides that "[t]his act shall be liberally construed in order to accomplish its purpose and the public policy of this State as set forth in section 2." See N.J.S.A. 10:4-21.

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[18] The importance of the OPMA's goals were further set forth in the legislative history of the 2006 amendment to the OPMA, to rename the statute after Senator Byron M. Baer:

> *BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:*
>
> 1. The Legislature finds and declares that:
>
> WHEREAS, It has long been recognized that openness in government promotes citizen participation in public affairs, increases public confidence in government, and makes public officials more accountable to the electorate; and
>
> WHEREAS, The founders of our nation acknowledged the need for public access in the development of public policy, a concept expressed by James Madison who observed that popular government without popular information is "a Prologue to a Farce or a Tragedy; or perhaps both;" and
>
> WHEREAS, Openness in the conduct of government affairs helps to prevent actual or perceived corruption because, as Woodrow Wilson stated, "corruption thrives in secret places and avoids public places;" . . .

See P.L. 2006, c. 70, § 1.

B. Defendants Engaged in Unannounced Private Meetings to Discuss Public Business and Excluded the Public in Violation of the OPMA.

Against this backdrop, the Complaint alleges that there was an initial meeting of the Commission held on December 15, 2021, see Compl., at ¶ 167, followed by one or more unannounced private meetings[19] with staff from the Board of Elections, see id. at ¶ 168, Ex. B. The Complaint further alleges, upon information and belief, that the unannounced private meetings were attended by a quorum of Commissioners, and that at these meetings, the Commissioners (1) drafted proposals for various maps; (2) discussed considerations related to these maps, including criteria required by the Municipal Ward Law, such as compactness, contiguity, and population deviation; (3) used mapping software to compare ward boundaries with Census block data; (4) discussed the extent to which each map would "impose the least amount of demographic change to each ward" as well as lowering the population to the lowest possible percentage; and (5) selected a map to present to the public, thereby deciding to exclude presentation of the other maps they were considering from the public. See id. at ¶ 170. Upon information and belief, the Complaint alleges that the unannounced private meetings were open to all Commission members, attended by an effective majority, and intended to discuss or act collectively on the public business of the Commission to redraw ward boundaries. See id. at ¶ 171. The Complaint further alleges that the Commission excluded the public from such unannounced private meetings, did not provide adequate notice of the meetings, and did not take minutes of such meetings. See id. at ¶¶ 172-74.

[19] That Plaintiffs do not identify specific dates of such nonconforming meetings is irrelevant for purposes of the motion to dismiss, as Plaintiffs first learned of such meetings upon reading the Commission Report which references them. If anything, it speaks to the secretive nature of such meetings and to the unwarranted exclusion of the public. This knowledge as to the dates and substance of those unannounced private meetings is in the exclusive control of Defendants, and needs to be explored further in discovery.

The Complaint alleges that another public meeting that was supposed to be held on January 14th was aborted, and subsequent concerns were raised with the initial map presented by the Commission. See id. at ¶ 175. The Complaint further alleges that the Commission appears to have met between January 14 and January 22, 2022 (which is the date it voted to approve the Commission's Map) to discuss various maps and that Commissioners also communicated with various individuals who lobbied them for specific changes, but the public was left in the dark as to the Commission's deliberation and the maps that it considered during that period of time. See id. ¶¶ 43 and 175.

The allegations concerning the violation of OPMA pertain to the unannounced private meetings. On their face, they allege a clear violation of the OPMA. Specifically, the Complaint alleges that the Commission's meetings were subject to OPMA, the unannounced private meetings were open to all members, were attended by effective majorities, were intended to and did in fact discuss the Commission's public business, were not adequately noticed, did not have minutes recorded, and excluded the public from participation without an express reason for doing so and without following any procedures for doing so. See generally id. at ¶¶ 170-76. In essence, the Commissioners excluded from public view and participation, crucial discussions as to the Commission's business so as to prevent them from witnessing "all phases of the deliberation, policy formulation, and decision making of public bodies." See N.J.S.A. 10:4-7. As set forth in the Complaint, among other items, the public were shut out of the ability to see what other maps were being considered by the Commission, and discussions about why one map was chosen over another, any of the bases for comparing different maps, and the reasons behind which one map was ultimately selected and why each other map was ultimately rejected. See Compl., at ¶ 178;

see also N.J.S.A. 10:4-8(b) (applying provisions of OPMA to "meetings" where members intend "to *discuss or* act as unit upon the specific public business of that body).

In an attempt to avoid the implications of their blatant exclusion of the public, Defendants try to recharacterize their unannounced private meetings as "working sessions" and then awkwardly try to lump them together with "typical partisan caucus meetings" which are specifically exempt from OPMA.[20] See Defendants' Brief, at p. 32; N.J.S.A. 10:4-7 ("typical partisan caucus meetings and chance encounters of members of bodies are neither covered by the provisions of this act, nor are they intended to be so covered"). However, Defendants' unannounced private meetings are neither "typical partisan caucus meetings" nor "chance encounters of members of bodies," as made clear in the very cases cited by Defendants themselves. See Defendants' Brief, at p. 32.

In Mountain Hill L.L.C. v. Twp. of Middletown, 399 N.J. Super. 486 (App. Div. 2008), the Appellate Division discussed this exception. At issue there was whether a township committee violated OPMA when some of its members discussed a controversial development project at a closed political caucus meeting held by the political party chairman prior to adopting land use ordinances related to same. See id. at 488-89, 491-92. The court found that the meeting that took

[20] In fact, Defendants' apparent under-the-radar attempt to lump the phrase "working sessions" in with "caucus meetings" not only obfuscates the fact that "working sessions" are not exempted from OPMA, but also attempts to significantly broaden the actual scope of the exemption by including any "caucus meeting" when the statute specifically applies only to "typical *partisan* caucus meetings". See N.J.S.A. 10:4-7 (emphasis added). In fact, even Defendants' use of explanatory parentheticals with respect to the two cases relied on by Defendants for this proposition, the Mountain Hill and Witt cases, both refer to either "party" caucus meetings or "partisan" caucus meetings, and neither refer to "working sessions." See Defendants' Brief, at p. 32. Moreover, Defendants' suggestion that a provision in the Municipal Ward Law which permits ward commissions to retain professionals in carrying out their duties can somehow be construed to exempt their meetings from OPMA, see id. (citing N.J.S.A. 40:44-12), is at odds with common sense and with the fact that such alleged exemption is not found in OPMA itself.

place was exempted from OPMA as a "typical partisan caucus meeting" because the purpose of the meeting was "to determine their position as a political party on issues affecting Middletown and its residents." See id. at 506. The court noted that they only discussed general political ramifications of the development project as it related to the party for political purposes, the ordinances at issue were not the only topics discussed, and land use experts and the Township planner were not in attendance. See id. Furthermore, the court found that "the group of Republicans that attended the political caucus meetings did not *intend to discuss* or act on the Township Committee's business." See id. at 507 (emphasis added). Rather, because the project was very important to the Township, it had consequential political implications, and any discussion was limited to the significance of the project in terms of how it affected the party electorally. See id. The court noted that there was no discussion of how the Township Committee members were going to vote nor any predetermination of the Township Committee's position, but instead they only discussed the general position of the party on such issues. See id.

In holding that what took place were "typical partisan caucus meetings" which were exempt from OPMA, the court went out of its way to thoroughly distinguish South Harrison, Township Committee v. Board of Chosen Freeholders, 210 N.J. Super. 370 (App. Div. 1986). See generally id. at 504-06. There private meetings were held first between environmental consultants and Democratic freeholders and then between environmental consultants and Republican freeholders. See id. at 504 (citing South Harrison, 210 N.J. Super. at 373). At those private meetings, the only issue discussed was the site for a landfill in Gloucester County, and no one knew about the meetings until after a vote was taken on the site for the landfill. See id. at 504-05 (citing South Harrison, 210 N.J. Super. at 374-75). The court thus held that the private meetings violated OPMA and were not cured by subsequent meetings as "the public did not know about the

prior meetings." See id. at 505 (citing South Harrison, 210 N.J. Super. at 375). The court noted that at the private meetings, the Board discussed important public business, and the fact that they only intended to discuss public business, rather than vote on it, did not render OPMA inapplicable, but rather fell well within the legislative purpose and policy of OPMA to ensure "that important public discussions are to be held in the open." See id. (citing South Harrison, 210 N.J. Super. at 375-76 (internal quotation marks and citation omitted). Therefore, the court concluded that "'these meetings [could not] by any stretch of the imagination be called 'typical partisan caucus meetings' or 'chance encounters' excepted from the [OPMA].'" See id. at 505-06 (citing South Harrison, 210 N.J. Super. at 376) (citation omitted); cf. In re Consider Distribution of Casino Simulcasting Special Fund (Accumulated in 2005), 398 N.J. Super. 7, 17 (App. Div. 2008) ("vot[ing] at a public meeting and ultimately explain[ing] the result does not cure the problem of private deliberations" and would contravene OPMA's purpose by ironing out negotiations or policies in private and then only giving off an appearance of open government and transparency by allowing the public to observe formal adoption of the policy).

Unlike in Mountain Hill and just like in South Harrison, here the Complaint alleges that meetings were held specifically to discuss the Commission's public business of creating a new map, see Compl., at ¶¶ 170, 175, 178, and that Plaintiffs did not know about such meetings until after the map was adopted (specifically not until after the Commission Report was issued), see id. at ¶ 169. As in South Harrison, whether the Commission intended to only *discuss* public business rather than *act* on it at those unannounced private meetings is a distinction without a difference, and regardless represents a clear violation of OPMA. Additionally, such unannounced private meetings simply cannot be considered "typical partisan caucus meetings" as they were not meetings held by political parties, were not limited to party members, and were directed at

conducting the Commission's business, rather than a general discussion of the political ramifications of issues that so happened to be related to the Commission's business. Compare Witt v. Gloucester County Bd. of Chosen Freeholders, 94 N.J. 422, 431 (1983) (acknowledging the Department of States' 1975 Guidelines on the Open Public Meetings Law which recognized that "a political caucus is only open to one party"), with N.J.S.A. 19:6-17 (requiring that county boards of election – which accounts for 6 of the 7 commissioners on the Jersey City Ward Commission – be comprised of bipartisan members). Indeed, the Commission's Report itself makes clear that these meetings between the Commissioners were scheduled in order "to begin drafting proposals for the new ward boundaries" and that during such private meetings the Commissioners "utilized proprietary mapping software" which allowed the Commissioners to "test various options" (even though only the map attached to the Report was "presented to the public" by the Commission). See Compl., Ex. B. Thus, as in South Harrison, the unannounced private meetings at issue here could not "by any stretch of the imagination" be considered "typical party caucus meetings," but rather were subject to OPMA and could "not [be] cured by subsequent meetings 'as the public did not know about the prior meetings.'" See Mountain Hill, 399 N.J. Super. at 505-06 (citing South Harrison, 210 N.J. Super. at 375-76).

C. The Certifications Submitted by Defendants with their Motion to Dismiss Demonstrates Further Violation of OPMA and Warrants Discovery.

Perhaps aware that Plaintiffs' Complaint clearly states a claim for relief under the OPMA, Defendants attempt to introduce, as part of their Motion to Dismiss, certifications from the individual Commissioners regarding attendance and other events occurring at the unannounced private meetings, thereby introducing extraneous items to try to demonstrate that OPMA should not apply because there allegedly was not a quorum at these unannounced private meetings. See Defendants' Brief, at p. 33 (citing to certifications of various ward commissioners). However, as

an initial matter, such considerations are not permissible on a motion to dismiss; rather, for purposes of this motion, the allegations in the Complaint must be deemed to be true.

"The primary distinction between a motion under R. 4:6-2(e) and R. 4:46 is that the former is based on the pleadings themselves." PRESSLER & VERNIERO, CURRENT N.J. COURT RULES Comment R. 4:6-2(e) (GANN). R. 4:6-2 provides that, if, on a motion to dismiss for failure to state a claim, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable notice of the court's intention to treat the motion as one for summary judgment and a reasonable opportunity to present all material pertinent to such a motion." Here, although the Defendants have submitted documents outside of the pleadings in connection with their motion to dismiss the OPMA claim, the court should not convert this case to a summary judgment matter and thus, all documents extraneous to the pleadings should be excluded. And if this case were to be decided as a motion for summary judgment, i.e. based upon evidence submitted and pursuant to a standard that there is no genuine issue of material fact, Plaintiffs should at least be given the opportunity to conduct discovery to demonstrate that there are genuine issues of material fact. In general, "summary judgment is inappropriate prior to the completion of discovery." Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App.Div.), *certif. denied,* 177 *N.J.* 493 (2003) (quoting Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div. 2012)).

Nevertheless, even if the certifications were considered to support Defendants' contention that there was not technically a quorum of Commissioners at any one given time during the unannounced private meetings, the certifications themselves suggest – and discovery would shed light on – the extent to which the numerous and successive communications between the

Commissioners violated the spirit and intent, let alone the letter itself, of OPMA. In other words, even if the Court were to consider the certifications of the Commissioners submitted in support of their Motion to Dismiss, they clearly suggest the need for discovery to further probe the extent to which the Commissioners may have deliberately attempted to circumvent the requirements of the OPMA, especially since the public was excluded from and were not aware of such meetings.

Indeed, the certifications, taken together, indicate that the Commissioners engaged in a series of conversations with one another, by phone, email, and in person, to discuss various drafts produced at the unannounced private meetings, but that none of these conversations ever included more than three Commissioners "at a time," (conveniently just one short of a quorum) presumably to skirt around the requirements of the OPMA that would attach if there was a quorum. See Certification of Daniel E. Beckelman, at ¶ 12; Certification of Paul Castelli, at ¶ 9; Certification of Sean J. Gallagher, at ¶ 8; Certification of Peter E.K. Horton, at ¶ 13; Certification of Janet Larwa, at ¶ 9; Certification of John Minella, at ¶ 11; Certification of Daniel Miqueli, at ¶ 9. The certifications, taken together, beg the question as to whether such conversations were unscrupulously carried out in a calculated manner so as to effectively constitute a meeting subject to the OPMA, notwithstanding attempts to use such dubious and deceitful tactics to exclude the public from participation in direct contravention to the purposes of the OPMA.

Such conduct would not only fly in the face of OPMA's command that its provisions be "be liberally construed in order to accomplish its purpose," see N.J.S.A. 10:4-21, but also contravenes statutory anti-circumvention provisions, which guard against interpretations that "may thwart the purposes [of OPMA]," see N.J.S.A. 10:4-7. Moreover, such conduct would fall directly within the express statutory prohibitions of N.J.S.A. 10:4-11, which provides that "[n]o person or public body shall fail to invite a portion of its members to a meeting for the purpose of

circumventing the provisions of this act."[21] Indeed, the Certifications contain admissions that strongly suggest that Defendants willfully and illegally attempted to circumvent the OPMA.

For similar reasons, holding a final public meeting on January 22, 2022, where the Commission voted to adopt a map that was already pre-selected at these unannounced private meetings from which the public had been excluded, cannot be sufficient to cure or remedy the deficiency. In South Harrison, the court found that a public body's holding of a subsequent meeting to take formal action with respect to the site of a landfill was not sufficient to cure its illegal actions at prior secretive meetings from which the public was excluded. See South Harrison, 210 N.J. Super. at 378. The court explained that the corrective or remedial action contemplated by N.J.S.A. 10:4-15, required the public body to act *de novo*, and held that the Board's actions at its subsequent meetings could not be considered *de novo* within the meaning of OPMA "because the Board never made the private meetings or their agendas known to the public before the public meeting and vote" at the subsequent meeting where it took formal action. See id. Rather, the court drew on its prior precedent from the Supreme Court of New Jersey to explain that allowing such actions at a subsequent meeting under those circumstances would circumvent the intent of OPMA to allow the public to view the real negotiations and policy discussions while simultaneously giving off "an appearance of open government." See id. at 379 (quoting Pollilo v. Deane, 74 N.J. 562, 578 (1977)). Thus, as for the remedy, the court required the public body "'to embark again upon its task of considering an appropriate' landfill site." See id. (quoting Pollilo, 74 N.J. at 580); see also Pollilo, 74 N.J. at 579-80 (requiring similar remedy and invalidating

[21] For these reasons, even if the Court were to convert Defendants' Motion to Dismiss into a Motion for Summary Judgment with respect to this count of the Complaint, Plaintiffs have clearly demonstrated that there would be material issues of fact in dispute and are entitled to discovery with respect to same.

meetings at which formal action was taken "and the antecedent meetings at which the Commissioners deliberated and reached their conclusion" even when the public body at issue was in substantial compliance with OPMA, such that (1) there was public notice and wide participation at the non-compliant meetings, (2) there was no attempt to meet secretly and exclude the public, (3) the meetings where formal votes/action were taken did in fact comply with OPMA, and (4) the violations of OPMA were merely technical such that "the spirit of the Open Public Meetings Law was not seriously undermined").

The public policy considerations and the holding in South Harrison apply equally here. As in South Harrison, here it is not just the decision to adopt a map that was shielded from public view and participation, but all of the deliberations that went into such decision that constitute the nonconforming acts. See Compl., at ¶ 178. Such violations are particularly egregious in light of the importance of having a transparent redistricting process and the role that the public can play in providing critical input into the need for preservation of communities of interest. As set forth in the Complaint, to enable the Commission to blatantly disregard OPMA and then consider the presentation and adoption of a single map at a public meeting to be a sufficient cure would sanction a grave injustice not only upon Plaintiffs but also to the public more generally, would inflict serious damage to the spirit and intent of OPMA, and stand in direct odds with its statutory requirement that OPMA "be liberally construed in order to accomplish its purpose and the public policy of this State as set forth in [N.J.S.A. 10:4-7]." See id. at ¶ 181 (quoting N.J.S.A. 10:4-21). Similar to South Harrison, here the alleged cure/remedial action is not sufficient to constitute *de novo* action in light of the fact that the Commission did not make its unannounced private meetings as well as their agendas known to the public prior to adopting the Commission's Map at a subsequent

meeting. As in South Harrison, the remedy must be to start the process over to carry out its public business in a manner that is in conformity with the provisions of OPMA.[22]

For the foregoing reasons, Plaintiffs have alleged facts sufficient to support a claim for relief under the Open Public Meetings Act.

POINT VI

PLAINTIFFS HAVE SATISFIED THE 45-DAY STATUTE OF LIMITATIONS GOVERNING ACTIONS IN LIEU OF PREROGATIVE WRIT.

In their brief, Defendants take the position that because Plaintiffs seek review of the Ward Commission's 2022 Redistricting Map, their prerogative writ action accrues on the day on which the Commission adopted the new map – i.e., January 22, 2022. Defendants Brief, at pp. 13-14.

[22] The citations on page 33 of Defendants' Brief to McGovern v. Rutgers, 211 N.J. 94 (2012) and to Gandolfi v. Town of Hammonton, 367 N.J. Super. 527 (App. Div. 2004), for the proposition that the court cannot void an action where no formal action was actually taken, are inapposite, irrelevant to the matter at hand, and/or highly distinguishable. The McGovern case dealt with a situation where the public body was found to have violated OPMA because it failed to give adequate notice of the reasons for going into closed session with respect to the extent to which the agenda was known. See McGovern, 211 N.J. at 111. However, the court found no remedy was available because the Board never took any formal action at all resulting from that closed session, so there was literally nothing to void. See id. at 112, 113-14. Here, by contrast, the Commission took formal action at the January 22, 2022 meeting when it adopted the Commission Map, which it ultimately filed along with the Commission Report on February 3, 2022 and published in the Jersey Journal on February 5, 2022. See Compl., at ¶¶ 42, 44-45. In Gandolfi, the court noted that no action was taken at the meeting following a closed session discussion where the violation took place, and even if any subsequent actions may have been taken, the Board has subsequently held multiple additional executive sessions to discuss entry into a consent agreement to settle a legal matter, adopted a resolution to pursue the consent order, and held public hearings substantively sufficient to constitute *de novo* actions so as to cure any potential violations that the court deemed to be "technical." See Gandolfi, 367 N.J. Super. at 540. By contrast, here (1) there is no question that subsequent formal action was taken, (2) the violations are highly substantive and not technical because they involve the exclusion of the public from the very deliberations that laid at the heart of the Commission's public business, and (3) the Commission did not take adequate steps sufficient to constitute *de novo* action so as to cure the violations, for the reasons set forth and explained at length above, including but not limited to the fact that the public continues to remain unaware of what discussions and deliberations took place, what maps were considered, rejected, and for what reasons, etc.

They make this assertion without any reference to the Municipal Ward Law, N.J.S.A. 40:44-9 to -18, which makes no mention of the public meeting at which the Commission formally approves a new map. Rather, the Municipal Ward Law specifically delineates the Commission's obligation to file a certified report, with a map fixing the ward boundaries annexed thereto, to various officials, followed by the publication of notice of such ward map "in at least one newspaper generally circulating in the municipality." N.J.S.A. 40:44-16. It is Plaintiffs' position that, like prerogative writ actions brought to review board decisions issued under the Municipal Land Use Law ("MLUL") , it is the date of publication that triggers the 45-day statute of limitations – *i.e.*, February 5, 2022. R. 4:69-6(b)(3); see also Davis v. Plan. Bd. of City of Somers Point, 327 N.J. Super. 535, 539 (App. Div. 2000)(45-day accrues from publication under the MLUL)

Similarly, Defendants analysis of the date of accrual of Plaintiffs' claim under the OPMA suffers from the same failure to refer to the statute. Defendants' Brief, at p. 30. The policy and purpose of the OPMA requires the 45-days to accrue from the date at which time the public became aware of the private meetings that they claim violate the Act – i.e., the earliest date that a member of the public could become aware of such meetings is the date the Commission Report was filed, February 3, 2022. Because Plaintiffs filed their Complaint on a Monday, 46 days after February 3, their prerogative writ action and claim under OPMA are both timely whether the court finds that their action accrued on the date the certified report and map were filed or the date on which the clerk published notice of such filing. See R.1:3-1.[23]

[23] R. 1:3-1 states as follows: "In computing any period of time fixed by rule or court order, the day the act or event from which the designated period begins to run is not to be included. The last day of the event of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday in which the event runs until the end of the next day which is neither a Saturday, Sunday or legal holiday." (emphasis added).

Pursuant to R. 4:69-6(a), "[n]o action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right of review, hearing or relief claimed, except as provided by paragraph (b) of this rule." It is well-understood that the rule itself does not by its terms define when rights "accrue to trigger the 45-day period; that is determined by substantive law." PRESSLER & VERNIERO, Current N.J. COURT RULES, Comment R.4:69-6 (GANN).

A. Municipal Ward Law

A review of the Municipal Ward Law reveals that it has no requirements as to the number or nature of the meetings that the Commission must hold. It does not require that the Commission adopt a new ward map at a specific meeting (though such requirement is implicit) nor does it specify how many members of the Commission must approve the map or whether stakeholders are permitted to speak and provide evidence at such meeting. The statute merely sets forth when the Commission's work must commence and by when it must end. It states that,

> Within 30 days following their initial meeting . . ., the ward commissioners shall file their report, certified by at least three of their signatures, setting forth and properly describing the ward boundaries fixed and determined. There shall be annexed to the report a map of the municipality with the ward boundaries clearly marked thereon.
>
> The report so certified shall be filed in the office of the county clerk, and copies shall be filed with the Secretary of State and in the office of the municipal clerk.
>
> N.J.S.A. 40:44-15.

Further, pursuant to N.J.S.A. 40:44-16, "[w]ithin 2 weeks immediately following the filing of the certified report by the ward commissioners, the municipal clerk shall cause to be published at least once in at least one newspaper generally circulating in the municipality a notice of the ward boundaries as fixed and determined in the report." It therefore follows that the right to review the Commission's adoption of a new map accrues either when the certified report (which sets forth

the Commission's reasons) and map are filed with the county clerk, Secretary of State and municipal clerk (and subject to the Open Public Records Act) – in this case, February 3 – or the date of publication, when the public is assumed to have received notice of the filing – i.e., February 5. In either case, Plaintiffs filed their Complaint on a timely basis.

While Plaintiffs' case is timely either way, Plaintiffs nevertheless contend that this Court should find that a prerogative writ action to review the validity of the Commission's adoption of new ward map accrues from the date of publication. This is the case, because even an interested member of the public, who attended the meeting on January 22, 2022, would not fully appreciate the Commission's reasoning or know the exact boundaries of the new ward map until they read the report and have the certified map in front of them; and, for sure, such person would not know when that report and map, certified by three members of the Commission was actually filed (and thus available for them to secure) until they received notice of such filing in the newspaper. Indeed, that surely must be the purpose for having a publication requirement in the first instance.

Plaintiffs assume that such policy reasoning also imbues the specified accrual date set forth in R. 4:69-6(b)(3), concerning determinations made by planning and zoning boards. Like the situation herein, planning and zoning boards hold a vote to approve or disprove of a site plan or variance application at a public meeting, which is only then put into a formal resolution stating the board's factual findings and legal conclusions and signed Yea or Nay by the individual board members at a later date. That memorializing resolution (like the report, certified by three members of the Ward Commission) is then approved by the relevant board, but a member of the public will not necessarily know when that resolution was approved and available for them to obtain through an OPRA application until notice thereof is published in a local newspaper. In this way, "the interests of justice" are served when the 45-days accrues from publication, not the night the board

makes its determination or the date on which he approves its memorializing resolution. R. 4:69-6(c).

In addition to this reasoning, as explained in the Statutory Framework section, supra, the notice of filing publication requirement was a feature of the OMCL that was not originally in the General Ward Law. The Legislature thus deliberately adopted it, and, in fact, made the publication date, the date on which the new map would become effective. N.J.S.A. 40:44-16. As a matter of law and public policy, it is therefore follows that the appropriate date from which a prerogative writ action accrues is the publication date of the notice of filing the certified report and map.

B. Open Public Meetings Act

As discussed in Point V, supra, the OPMA "makes explicit the legislative intent to ensure the public's right to be present at public meetings and to witness government action." Kean Fed'n of Teachers v. Morell, 233 N.J. 566, 570 (2018) (citing N.J.S.A. 10:4-7). The statute is to be liberally construed to "favor openness," Burnett v. Goucester Cty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 233 (App. Div. 2009), and accordingly, a person does not have to challenge "an action" taken during a meeting held in violation of the OPMA until that action becomes public. OPM-Dolente v. Borough of Pine Hill, 313 N.J. Super. 410 (App. Div. 1998) (citing to N.J.S.A. 10:4-15, which provides that a challenge under OPMA "may be brought by any person within 45 days after the action sought to be voided has been made public"). As the Appellate Division noted:

> It would, in a situation such as the present, clearly subvert the purposes of the OPMA to count the forty-five day period in which to challenge a municipal action from the date of a meeting whose existence had not been disclosed and whose results were not published. To do so would only encourage silence after noncompliance.

OPM-Dolente, supra, 313 N.J. Super. at 418.

It is important to note that New Jersey courts have consistently held that OPMA applies to a public body's gathering "[e]ven though the purpose of a meeting is to discuss and not to vote on public business." South Harrison, Township Committee v. Board of Chosen Freeholders, 210 N.J. Super. 370 (App. Div. 1986) (citing Allan-Deane Corp. v. Twp. of Bedminster, 153 N.J. 114, 119 (App. Div. 1977)). In this way, the "actions" that Plaintiffs are challenging consist of discussions, deliberations, or decisions short of adoption of the final map that Plaintiffs allege occurred at secret meetings held between December 15, 2021 and January 22, 2022. See In re Consider Distribution of Casino Simulcasting Special Fund (Accumulated in 2005), 398 N.J. Super. at 17 ("vot[ing] at a public meeting and ultimately explain[ing] the result does not cure the problem of private deliberations" and would contravene OPMA's purpose by ironing out negotiations or policies in private and then only giving off an appearance of open government). It is clear from their Complaint that Plaintiffs were unaware of any of these meetings prior to reading the Commission Report. It therefore follows that they have comported with R. 4:69-6's 45-day statute of limitations with respect to their OPMA claim as well.[24]

POINT VII

DEFENDANTS HAVE RAISED SEVERAL TECHNICAL ISSUES REGARDING PLAINTIFFS' COMPLAINT THAT ARE NOT SIGNIFICANT OR BASELESS.

A. All the Organizational Plaintiffs and their Members have Standing to Bring this Litigation.

Defendants correctly note that only an "unincorporated organization or association, consisting of 7 or more people and having a recognized name may sue or be sued in any court of

[24] It should be noted that the statute of limitations governing Plaintiffs' claim under the New Jersey Civil Rights Act is two years. Lapolla v. Cnty. of Union, 449 N.J. Super. 288, 298 (App. Div. 2017).

this state by such name in any civil action affecting its common property, rights and liabilities . . . as if the action were prosecuted by or against all the members thereof." N.J.S.A. 2A:64-1. They are wrong, however, to conclude that it would be appropriate to dismiss the eight unincorporated coalitions or block associations at this stage of the litigation simply because Plaintiffs did not allege that each had 7 or more members.

As the descriptions of the eight unincorporated organizations[25] that are set forth in the Complaint indicate, it can be inferred that they are all long-standing organizations, some of which have city-wide membership, while others have members who themselves are incorporated 501(c)(3) entities (*i.e.*, the Downtown Coalition of Neighborhood Associations). As explicitly indicated in the Complaint, they all have a formal structure with an officer or chair properly identified in the Complaint, who can attest to the actual number of members existing in each group, and the mission and activities of the group, including the shared values of its members and their interest in this litigation.

In short, all these organizations in reality, and not just on paper, have membership lists in the double-digits; and the Complaint actually lists some of the members of the one newly formed organization – the lead plaintiff, Jersey City United Against the New Ward Map – which, like the older and more established associations, has numerous members, but only thirteen of whom were willing to have their names identified in the Complaint. See Compl., at ¶ 4. As a result, it is inappropriate to dismiss such organizations simply due to an oversight by counsel. Furthermore,

[25] The unincorporated organizations include the following: Jersey City United Against the New Ward; the Downtown Coalition of Neighborhood Associations, Greenville Neighborhood Alliance, Gardner Avenue Block Association, Lincoln Park Neighborhood Watch, Harmon Street Block Association, Crescent Avenue Block Association; and the Democratic Political Alliance.

Plaintiffs will amend the complaint to add a paragraph that states that all the unincorporated associations named as parties herein have 7 or more members if deemed necessary by this court.

B. Plaintiffs have Stated a Cause of Action under the New Jersey Civil Rights Act by Virtue of their Allegations of Substantive Statutory and Constitutional Violations.

In support of their Motion to Dismiss Count IV of Plaintiffs' Complaint asserting a cause of action under the New Jersey Civil Rights Act ("NJCRA"), N.J.S.A. 10:6-2, Defendants argue that Plaintiffs have not alleged a violation of a substantive statutory right nor any constitutional violations. They arrive at their own misguided conclusion by ignoring all the factual allegations set forth in Counts I (Violation of Municipal Ward Law, New Jersey Constitution, Equal Protection) and II (Violation of New Jersey Constitution, Speech and Association) of the Complaint, and positing their own litigation theory as if it were Plaintiffs'. Specifically, they state that "[t]here is no constitutionally protected nor statutorily protected right for the public to have a direct hand in the redrawing of ward maps, neither under the Municipal Ward Law nor under the State Constitution." Defendants Brief, at p. 37. Nowhere in the Complaint have Plaintiffs made such a nonsensical argument.

First, Plaintiffs agree with Defendants that in order to state a cause of action under the NJCRA, a plaintiff must allege a deprivation of "any substantive due process or equal protection rights, privileges or immunities . . . secured by the Constitution or laws of this State." N.J.S.A. 10:6-2(c). Plaintiffs disagree with Defendants insofar as we assert that we have alleged sufficient facts to support such substantive violations in Count I and II of the Complaint.[26]

Second, Plaintiffs reject Defendants' claims, as addressed in their attempt to dismiss Plaintiffs NJCRA claims, that Councilman Gilmore's claims of retaliation "are not only

[26] Plaintiffs note that they have pleaded Count IV to preserve their right to attorneys' fees and costs under N.J.S.A. 10:6-2(f) should they prevail with respect to Count I and/or II of their Complaint.

unsupported, but also irrational and seemingly designed to be incendiary." Defendants' Brief, at p. 38. Plaintiffs do so for the reasons set forth in Point IV.B, supra, and will not repeat their reasons herein. Similarly, Defendants' attempt to characterize the Commission's work as "apolitical," "broad-based," "thankless yeoman's work," to avoid Plaintiffs' allegations of unconstitutional retaliation must fail. This is the case because, as Plaintiffs explained in Point IV, supra, whether the Commission was motivated by hostility to Gilmore's advocacy on redevelopment, as Plaintiffs have alleged, or whether they treated Gilmore and the voters and residents of Ward F in an impartial, nondiscriminatory manner is a factual issue left open to discovery; it cannot be resolved on a motion to dismiss.

Finally, Defendants do not present a legal argument that undermines Plaintiffs' allegations that the Commission "deprived Plaintiffs of their "substantive rights of equal treatment guaranteeing them fair representation" or "substantive rights to reside in a ward that consists of compact territory that preserves their communities of interest," as provided by the Municipal Ward Law, N.J.S.A. 40:44-9 to -18. Compl., at ¶¶ 185-86. Rather than subjecting these allegations to the proper legal test to determine whether the Municipal Ward Law is a "rights-creating statute" that would entitle Plaintiffs to injunctive relief under the NJCRA, Defendants ramble on for several pages accusing Plaintiffs of their failure to present their "allegedly superior-in-every way map at the January meeting" and of their pursuit of "headlines with this Complaint and the baseless and hyperbolic accusations contained therein." Defendants' Brief, at pp. 37-38.

In Tumpson v. Farina, 218 N.J. 450, 486 (2014), the New Jersey Supreme Court held, for the first time, that a statutory right, such as the rights of initiative and referendum found in N.J.S.A. 40:69A-184 and -185, respectively, may be deemed a civil right deserving of protection under the NJCRA. Indeed, the court held that the initiative and referendum provisions found in the Faulkner

Act were the quintessential substantive "rights-creating" statutes that would entitle a plaintiff to injunctive relief under the NJCRA, N.J.S.A. 10:6-2(c).

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

> In Tumpson, we applied the three-part Blessing test, albeit without the Gonzaga refinement, and found that the Faulkner Act conferred on the plaintiffs the substantive right of Petition—the right to place a recently enacted rent control ordinance before the voters for their approval or disapproval. Tumpson, 218 N.J. at 477-78. . . . In applying the Blessing test, we held: first, the Legislature, through the Faulkner Act, clearly intended to confer the right of Petition on the plaintiffs and voters of Hoboken; second, the right as enunciated in the statute was neither "vague" nor "amorphous," and its application was straightforward; and third, the Clerk was unambiguously required to accept and file the petition. Id. 218 N.J. at 477-78. Moreover, because the Clerk's failure to file the petition gave rise to a cause of action, we determined that "by definition, the right of Petition is substantive in nature." Id. 218 N.J. at 47.

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

Applying the Blessing test in this case, it is clear that the 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; second, the requirement that each ward be comprised of "contiguous and compact territory" and have a population deviation of only 10% is explicitly required in the statute, N.J.S.A 40:44-14, and thus is not vague, with its application relatively straightforward; and finally, the Ward Commission is unambiguously required to meet all three requirements, and because its failure to even consider the issue of "compactness" (let alone satisfy such requirement) gives rise to a cause of action under the Municipal Ward Law, the right to reside in a compact district, by definition, is substantive in nature.

For all the foregoing reasons, Plaintiffs have stated a cause of action under the NJCRA and Defendants' motion to dismiss Count IV must be denied.

C. The Question of Whether an Individual Government Defendant has Qualified Immunity Pertains only to Claims for Monetary Relief.

In Lapolla v. County of Union, 449 N.J. Super at 304, cited by Defendants, the Appellate Division succinctly explains:

> The qualified immunity doctrine is an affirmative defense that "shields government officials from a suit for civil damages when "their conduct does not violate clearly established statutory or constitutional rights of which a person would have known." Gormley v. Wood-El, 218 N.J. 72, 113, 93 A. 3d 344 (2014) (quoting Harlow v. Fitzgerald, 457 U.S. 800. 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982)). The defense is available when a plaintiff asserts a claim for money damages under the NJCRA. Ramos v. Flowers, 429 N.J. Super. 12, 24, 56 A. 3d 869 (App. Div. 2012).
>
> (Emphasis added.)

A review of the Complaint reveals that Plaintiffs are not seeking monetary damages, but only injunctive relief. Accordingly, John Minella was named in his official capacity as Chair of the Commission in order to ensure that any injunctive relief that would be issued would be properly implemented. Because Plaintiffs are not seeking monetary relief, including Councilman Gilmore with respect to his retaliation claim, it was not necessary for the Complaint to include allegations that he knew that "his actions violated established statutory or constitutional rights of which a reasonable person would have known." Id. It therefore follows that he should not be dismissed from this action.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss must be denied in its entirety.

Respectfully submitted,

Dated: July 14, 2022

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