

DOUGLAS STEINHARDT, in his  
official capacity as Delegation  
Chair and Member of the New  
Jersey Redistricting Commission,  
et al.,

Plaintiffs-Appellants,

v.

NEW JERSEY REDISTRICTING  
COMMISSION, JOHN E. WALLACE, JR.  
in his official capacity as  
Chair and Member of the New  
Jersey Redistricting Commission,  
et al.,

Defendants-Respondents.

SUPREME COURT OF NEW JERSEY

DOCKET NO.: 086587

CIVIL ACTION

**MOTION TO DISMISS AMENDED  
COMPLAINT IN LIEU OF  
PREROGATIVE WRITS**

*(On appeal from the  
New Jersey Redistricting  
Commission)*

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**BRIEF ON BEHALF OF DEMOCRATIC COMMISSIONER DEFENDANTS IN SUPPORT  
OF MOTION TO DISMISS THE "AMENDED COMPLAINT" PURSUANT TO R. 2:8-  
2 FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

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## PRELIMINARY STATEMENT

In a flagrant disregard of the law, Plaintiffs are requesting to undo the legitimate outcome of the bipartisan New Jersey Congressional Redistricting Commission's (the "Commission") valid majority vote to adopt a new congressional district map. Plaintiffs, the Republican Delegation to the Commission, offer no valid legal argument to undo the vote, instead relying solely on partisan hyperbole. In their Amended Complaint ("Complaint"), Plaintiffs object to situational circumstances which they were fully aware of and acquiesced to, and which existed prior to the Commission's first meeting, and all but concede that their legal claim is frivolous. While the Complaint reflects Plaintiffs' disappointment in not having their map selected by the majority, neither hindsight nor bruised egos are sufficient to overturn the adoption of the Congressional District Map (the "Map") which has a presumption of validity and, as a matter of law, is to be given judicial deference. Plaintiffs' Complaint is nothing more than thinly veiled political theatre and it should not be countenanced by this Court. As such, Defendants, the Democratic party's appointed members to the Commission (the "Democratic Delegation") move to dismiss the Complaint. For the reasons below, this Court should terminate this litigation.

First, the Complaint must be dismissed because Plaintiffs, who filed suit in their official capacities, lack standing to bring

an action against a Commission on which they serve. Next, Plaintiffs' political grievances do not give rise to a justiciable claim or any legally cognizable cause of action. For these reasons alone, in addition to non-compliance with the Rules of practice before this Court and myriad procedural deficiencies, the Complaint must be dismissed.

Furthermore, the Complaint also fails on its merits as a matter of law. To prevail on Count I, Plaintiffs carry a heavy burden of establishing that the Map is unlawful, which they have already conceded they cannot satisfy. This is for the simple, but dispositive reason that all thirteen members of the Commission have agreed that the Map is legally valid.

Counts II and III contain due process and equal protection claims which are similarly meritless because Plaintiffs have failed to set forth the required class of individuals that are being treated unequally, because no such class exists. Similarly, Plaintiffs have not and cannot allege the Map is violative of the fundamental right to vote which is a required and essential element for any claim of an Equal Protection or Procedural Due Process violation under these circumstances. As a result, the Complaint is fatally flawed and must be dismissed.

Further, Plaintiffs are now raising complaints about a Redistricting timeline and process which both parties reviewed, discussed and agreed to in advance at each stage. Similarly,

Plaintiffs' after-the-fact claim that Chair Wallace has a conflict of interest is outrageous, in addition to having no basis in fact or law. In any event, the same exact factual history existed at the time Chair Wallace was selected by this Court and engaged by Plaintiffs, as existed on the day he made his decision regarding the Map. Indeed, Plaintiffs' implication in Paragraphs 9, 98 and 99 of the Complaint that they were not aware of this widely available public information prior to any Commission meeting is nonsense. Thus, any claim regarding a "conflict" should be affirmatively rejected by this Court.

As a result, and for each of these independent and dispositive reasons, Plaintiffs' Complaint must be dismissed.

#### **STATEMENT OF FACTS**

##### **I. The Commission is Formed and Members Appointed**

The citizens of New Jersey voted in 1995 to amend the Constitution and take the decennial power to draw the State's Federal Congressional Districts out of the hands of the Legislature and vest it in a Constitutionally created New Jersey Congressional Redistricting Commission (as defined above, the "Commission"). See N.J. Const. Art. II, § II. The Commission convenes following the Governor's receipt of official population data following each decennial census. Id. at ¶ 1(a). The Commission consists of thirteen members, with six members from the two primary political

parties as appointed by certain elected and political officials.<sup>1</sup>  
See Id. at ¶ 1(b).

In addition to the twelve partisan members, there is one independent member appointed by the vote of at least seven of the previously appointed partisan members and who will serve as the Commission's chairperson. Id. at ¶ 1-2. If partisan delegations are unable to reach a consensus on the appointment of an independent member, they must provide this Court with the names of the two individuals who received the greatest number of votes. Id. at ¶ 1(c). The Court then selects the individual who it believes is "more qualified by education and occupational experience, by prior public service in government or otherwise, and by demonstrated ability to represent the best interest of the people of this State, to be the independent member." Id. The Constitution

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<sup>1</sup> The two political parties whose candidates for Governor received the largest number of votes in the previous election were the Democratic and Republican Parties and as such, they are the parties whose members make up the Commission. The President of the Senate, Speaker of the General Assembly, Minority Leader of the Senate, and Minority leader of the General Assembly each appoint two (2) members to the Commission. The Chairs of the aforementioned State political party committees also appoint two (2) members each. The "Democratic Delegation" to the 2021 Commission consists of defendants Chair Janice Fuller and Commissioners Iris Delgado, Vin Gopal, Stephanie Lagos, Jeff Nash and Dana Redd (hereinafter "Defendants" or the "Democratic Delegation"). The "Republican Delegation" consists of plaintiffs Chair Douglas Steinhardt and Commissioners Michele Albano, Jeanne Ashmore, Mark Duffy, Mark LoGrippo, and Lynda Pagliughi (as defined above, "Plaintiffs" or the "Republican Delegation").

outlines the requirements for an individual to serve as an independent member: that they must have resided in New Jersey, but not held party or elected office, for the preceding five (5) years. Id. Those who served in partisan political or elected offices are qualified, provided that they are beyond the five (5) year restriction period. Id. There is no other Constitutional qualification for one to serve as the independent member, nor any requirement that one be a registered independent, act in a non-partisan manner, or act as a tiebreaker for the two partisan delegations. See Id. The Constitution also provides that every member of the Commission receives an equally weighted vote, and that any member can vote for any proposed map, creating the opportunity for endless voting combinations between the delegations to achieve the required seven votes for adoption of a map. N.J. Const., Art. II, § II, ¶ 3.

For the 2022-2032 congressional redistricting process, the Commission could not come to a consensus for the selection of the independent member. (Da2). As a result, the Commission certified two names to the Supreme Court, with six (6) commissioners having selected former Judge Hon. Marina Corodemus (ret.) ("Judge Corodemus") and six (6) commissioners having selected former Supreme Court Justice John Wallace Jr. (ret.) ("Chair Wallace"). Id. Following its own confidential internal deliberations, the Supreme Court, based on the criteria above, selected Chair Wallace

to serve as the Commission's independent member by majority vote<sup>2</sup>. (Da3-4). On September 1, 2021, the full thirteen (13) member Commission held its first organizational meeting. (Da5). At that meeting, the Commission unanimously recognized Chair Wallace as the Chair of the Commission, Mr. Steinhardt as Chair of the Republican Delegation and Ms. Fuller as Chair of the Democratic Delegation. Id. At no point during the appointment process, nor during the entire Redistricting Commission process before the final meeting on December 22, 2021, did the Republican Delegation raise concerns about the selection of Chair Wallace as the independent member due to conflicts, party affiliation, his family or any other reason.

## **II. The Process of Creating and Adopting the New Congressional Map**

The Redistricting Commission is tasked each decade with conducting a deliberative process to design and produce a Congressional district map that is reflective of all New Jersey residents. This includes abiding by Federal and State Constitutional standards, incorporating public input, and formulating fundamental principles that each map shall abide by. See N.J. Const. Art. II, § II, ¶ 9. These legal and social science principles have been incorporated in maps drawn by the Commission,

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<sup>2</sup> Associate Justice Fabiana Pierre-Louis did not participate in the Court's decision.

and the Legislature before it, for decades. As with this cycle, the process has often consisted of both public hearings and private deliberations, presentation of principles or standards from the Independent Member to the commissioners and to the Independent Member by the partisan commissioners, discussions with the parties, and intensive map-making and map-revision sessions with the full Commission often at a hotel. (Da33-67). This historically relevant process was discussed and agreed upon at each stage by Chair Wallace and the partisan Delegation Chairs and staff. (See e.g., Da30-32, 68). For example, the parties discussed and agreed upon bylaws, the number and location of public hearings, and the timeline for map-drawing and a final meeting. Id.

#### **A. The Commission Receives Public Input**

Although the New Jersey Constitution does not require the Commission to hold more than three (3) hearings to receive public testimony, following deliberations, the Commission opted nonetheless to adopt bylaws and make public statements regarding at least ten (10) public hearing dates. (Da31). Every historical metric of public observation and participation in the Redistricting process was met or exceeded this cycle. The Commission began the process by conducting ten (10) days of public hearings, where it heard testimony from New Jersey residents both virtually and physically in locations throughout the state. The public also had the chance to provide written testimony and draft

maps via the Commission website, [NJRedistrictingCommission.org](https://NJRedistrictingCommission.org), (last accessed January 11, 2022). Public engagement was robust with testimony at hearings of approximately 190 people and an additional approximately 100 written submissions, including maps. See generally Videos and written testimony of Commission Meetings, available at [www.njredistrictingcommission.org/schedule.asp](https://www.njredistrictingcommission.org/schedule.asp).

The Commission also implemented robust public education and outreach programs and has maintained a comprehensive website of materials and information generated by the Commission and provided to it by the public. Id. For example, the Commission's website contains video and transcripts of each hearing, the Commission's bylaws, relevant portions of the Constitution, written testimony received by the Commission, maps received by the Commission and the Map adopted by the Commission on December 22, 2021 in viewable file formats, as well as detailed GIS/Shape<sup>3</sup> files for analysis. Ibid.

The public testimony provided to the Commission, in large part, provided guidance regarding the diverse communities of interest that exist all around the State. Ibid. It is irrefutable that Chair Wallace and the Commission as a whole utilized public input in creating the Map. Ibid.

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<sup>3</sup> These electronic file types allow for the public to analyze the Map down to a census block level utilizing commercial software and some public tools. The file types utilized are those most commonly used in the map-making field.

## **B. Delegation Meetings with Chair Wallace**

From the outset of his selection as Independent Member and Chair of the Commission, Chair Wallace was in communication with Democratic Delegation Chair Fuller, Republican Delegation Chair Steinhardt, the delegation's Executive Directors and legal counsel, and the Commissions' secretary and staff with the Office of Legislative Services. Through these discussions and deliberations, the Commission agreed upon its public meeting schedule, locations for public meetings, the order of business for each public meeting, agendas and notices for each public meeting, as well as the schedule for deliberations at a hotel and dates for a final meeting. (See, e.g., Da30-32, 68.)

Based on discussions, it is also clear that both partisan delegations had private meetings with Chair Wallace and his advisors to discuss map making principles and requirements. Indeed, in late November/early December 2021, Chair Wallace's team provided both delegations with a written set of standards that Chair Wallace would consider when reviewing, analyzing and assessing any proposed map, or in proposing his own map. These principles were the same ones outlined by Chair Wallace during the Commission's December 22, 2021 meeting. (Da74-76).

Specifically, Chair Wallace focused his review of the proposed maps on equal population, the Voting Rights Act, respect for subdivision boundaries and communities of interest,

competitiveness, non-political bias, continuity of representation, and compactness. Id.

While the Democratic Delegation disagreed with the descriptions and order of priority of several of the standards, Chair Wallace and his team made clear during deliberations that they would be utilizing same. As such, it was clear to the Commission - meaning both partisan delegations - that to earn Chair Wallace's vote, they would need to create a map that met or exceeded each of the legal and social science goals set forth in his stated principles. Ibid. The Democratic Delegation did just this, presenting a final map that met or exceeded the goals when compared to the Republican Delegation's final map, and thus were able to earn the votes of seven (7) commissioners including Chair Wallace. (Da84-86).

### **C. The Commission Meets in Cherry Hill to Create the Final Map**

From December 15, 2021 through December 18, 2021 both delegations personally met with Chair Wallace and his team of advisors at a Cherry Hill hotel. While there had been discussion for months with Chair Wallace and his team, the majority of map-making and revision towards a final map occurred at this time. The Commission, including both delegations and Chair Wallace and their respective teams, utilized the better part of each day and night, revising and presenting maps for deliberations within the

delegations and with Chair Wallace. Following Chair Wallace's feedback, the delegations would often labor into the night, on a revised map to present the following day.

It was clear to anyone participating that Chair Wallace did not have any pre-determinations or decisions, other than utilizing his standards for analysis. Contrary to the Plaintiffs' allegations, at no point in time did Chair Wallace indicate, nor did the Democratic Delegation believe, that Chair Wallace had made up his mind about which map he would vote for. Indeed, it was the opposite, in that Chair Wallace stated on numerous occasions that while he would be prepared to vote, he would strongly encourage both partisan delegations to engage in discussions about exchanging data or maps to see if a consensus could be reached. (Da20). On the final day of meetings with Chair Wallace, each delegation submitted a "best and final" map to him. Chair Wallace encouraged the parties to discuss a consensus map and advised that he would review and analyze the final submissions for multiple days.<sup>4</sup> While the timeline for a final meeting had been previously agreed to, Chair Wallace also indicated that he would be willing to adjourn the meeting if the partisan delegations so desired.

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<sup>4</sup> These meetings were closed to the public and all communications during the meetings are privileged per the deliberative process, attorney client privilege, and other relevant privileges.

#### **D. Final Commission Meeting**

On December 22, 2021, the Commission held its final meeting at the State House Annex in Trenton, New Jersey. Chair Wallace discussed each map and the standards that he considered completing his analysis of the map. (Da74-76). These standards were based on the principles that he provided to both delegations in advance of map-making. He first explained that both maps complied with the Constitution's Equal Population mandate with each map containing twelve districts with substantially equal population. (Da77). He then stated each map contained five majority/minority districts and satisfied the requirements set forth in the Voting Rights Act. (Da77-78). Later, he said that both maps had a similar amount of county and municipal splits, were similar in competitiveness, preservation of district cores, and compactness. Id.

Chair Wallace then explained that both maps were evaluated by his team using various partisan fairness metrics. (Da78). In performing these tests, Chair Wallace found that the Democratic map was superior to the Republican map in this regard. Id. After explaining his analysis, Chair Wallace determined that he would vote for the Democratic Delegation's map. Id. Given the amount of time and effort spent by the Commission on drafting and revising maps, Chair Wallace's comments provided some background regarding the standards applied without delving into his personal analyses and deliberative process. Id. Indeed, no other Commissioner

provided any information regarding the basis of their vote for or against the Map during the meeting, but rather simply voted for or against its adoption. (Da78-87). Chair Wallace's explanation focused on fairness and the Democrats' ability to have the social science principles embedded and reflected in the Map to be utilized over the Republicans' principles as embedded and reflected in their proposed map. (Da78).

### **III. Plaintiffs' Complaint**

Plaintiffs challenge the 2021 Redistricting Process and the adoption of the Map under the federal and New Jersey Constitutions, as well as Chair Wallace's impartiality under a common law conflict of interest. (Da118-137). Plaintiffs do not dispute that both maps submitted by the Democratic and Republican Delegations are constitutionally valid, only that Chair Wallace's reasoning for selecting the Democratic Map was "arbitrary, capricious, and unreasonable." (Da120). Furthermore, Plaintiffs fail to cite to any required constitutional or common law redistricting standard deemed non arbitrary, not capricious, or reasonable. (Da118-137). This is because there is no required reasoning for any of the thirteen commissioners to use when voting for a particular map.

Instead, Plaintiffs' chief after-the-fact complaints appear to be that they dislike the Map the Commission eventually adopted and wish they could have convinced another Commissioner to vote with them during the Commission's deliberative process. In

Plaintiffs' view, Chair Wallace should have adopted the Republican map, simply because they do not like his reasoning for his decision and despite his comments that the adopted Map exceeded Plaintiffs' on every fairness metric available. Plaintiffs handpick arbitrary statistics from their map and then purport that their map is somehow better, despite admitting that Chair Wallace explicitly stated that both maps were essentially equal under much of his evaluative criteria. (Da126). As a result of these supposed failings, Plaintiffs allege four different counts on the basis of which the Map should be invalidated. Specifically, Plaintiffs claim that Wallace's decision-making process violates the Fourteenth Amendment of the United States Constitution, various provisions of Articles I and II of the New Jersey Constitution, and the common law conflict of interest standard. Each of these claims is addressed below - none remotely meritorious.

#### **PROCEDURAL HISTORY**

On December 30, 2021, Plaintiffs filed a Complaint In Lieu Of Prerogative Writs in this Court alleging that Chair Wallace's rationale in selecting the Map failed to satisfy the standard of judicial review held applicable under New Jersey law and the United States Constitution, including being arbitrary, capricious, and unreasonable. (Da95-111). To date, Plaintiffs have not properly served the Complaint or a Summons on any of the Defendants insofar

as Part IV of the Court Rules are applicable to this matter.<sup>5</sup> Rather, the appropriate procedural mechanism would have been a notice of appeal directly to this Court filed pursuant to Part 2 of our Rules of Court. Nonetheless, Plaintiffs have based their claims against Defendants on the allegation that Chair Wallace was required to act solely as a "tiebreaker" for the partisan delegations, and that he was required to "resolve the impasse" between the two delegations or defer his decision to this Court. (Da103). Plaintiffs seek to have the Court vacate the establishment of Congressional districts approved on December 22, 2021, order that the establishment of districts be remanded to the Commission for further proceedings, order that the Secretary of State be enjoined from effectuating the Congressional districts approved on December 22, 2021 and provide any other legally permissible relief.

On January 4, 2022, this Court issued an order *sua sponte* that Chair Wallace "amplify the grounds for his decision and present that amplification to the parties and to the Court by January 11, 2022." (Da112-114).

On January 5, 2022, Plaintiffs submitted an amended Complaint including an additional count seeking to disqualify Chair Wallace

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<sup>5</sup> While the Democratic Delegation does not believe that Part IV of the Rules govern this matter (see R. 4:1), the undersigned nonetheless agreed to acknowledge service on behalf of the Democratic Delegation and requested that Plaintiffs transmit a draft acknowledgment of service for review. (Da115-116).

from further participating in the Commission's work due to an alleged conflict of interest stemming from a campaign contribution made by Chair Wallace's spouse. (Da133-136). No motion was filed pursuant to R. 2:5-1 seeking leave for this amended filing.

On January 7, 2022, Defendants sent a letter to Plaintiffs advising that the Amended Complaint was procedurally and substantively frivolous, pursuant to Rule 1:4-8, and demanding, among other things, that Plaintiffs withdraw the Amended Complaint by January 11, 2022. (Da152-156). Defendants now submit this brief in support of their motion under R. 2:8 to dismiss Plaintiffs' Amended Complaint (or initial Complaint) in its entirety for failure to state a claim upon which relief can be granted. Accord R. 4:6-2(e).

#### **STANDARD OF REVIEW**

The New Jersey Rules of Court provide that an appellate court "may at any time on its own motion or that of a party dismiss the appeal or petition for certification." R. 2:8-2. An appellee is not required to make a motion for dismissal based on the merits, but may move to dismiss an appeal or petition for certification because of procedural and technical defects. See Pressler & Verniero, Current N.J. Court Rules, cmt. 1.1 on R. 2:8-2 (2022). A party may also, however, move to dismiss a matter before the Supreme Court on the merits. See R. 2:8-3(a). While Plaintiffs' Complaint is both procedurally and technically deficient, if the

Court here chooses to decide the dispute on the merits, the Complaint must similarly be dismissed as it fails to state a claim upon which relief may be granted.

Even if Plaintiffs' Amended Complaint pursuant to Rule 4:69 is deemed to be filed correctly, a party may nonetheless move for dismissal for failure to state a claim upon which relief can be granted. R. 4:6-2(e).

Irrespective of the procedural requirements, in assessing a failure to state a claim upon which relief can be granted if the primary pleading states no basis for relief, dismissal is clearly appropriate. Camden County Energy Recovery Assocs. L.P. v. N.J. Department of Env'tl Protection, 320 N.J. Super. 59, 64 (App. Div. 1999) ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory."), aff'd, 107 N.J. 246 (2001). Indeed, "dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Reider v. State Dep't of Trans., 221 N.J. Super. 547, 552 (App. Div. 1987). In deciding a motion to dismiss, the court may "consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" Banco Popular North Am. v. Gandi, 184 N.J. 161, 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 222, n.3 (3d Cir. 2004), cert. denied, 543 U.S. 918 (2004),

abrogated on other grounds by Bell Atlantic Co. v. Twombly, 550 U.S. 544, 553-63, (2007)).

## LEGAL ARGUMENT

### POINT I

**THE COMPLAINT MUST BE DISMISSED AS A MATTER OF LAW PURSUANT TO RULE 2:8 BECAUSE PLAINTIFFS DO NOT HAVE STANDING TO BRING THIS SUIT IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE REDISTRICTING COMMISSION.**

Plaintiffs have filed this action<sup>6</sup> in their official capacities as members of the Commission. They have not alleged, and are unable to demonstrate, any injury that is *personal* to them - rather, the relief sought is *institutional*. Therefore, Plaintiffs do not have standing to bring this action, and it must be dismissed. To demonstrate standing, a party must show that it has a genuine stake in the relief sought because it has personally suffered (or will suffer): (1) a concrete and particularized and actual imminent injury-in-fact; (2) that is traceable to the

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<sup>6</sup> Procedurally, the Plaintiffs have not filed the required motion for leave to amend the complaint they filed on December 30, 2021. Plaintiffs incorrectly cite to Rule 4:9-1, as granting them leave to file an amended pleading as of right. However, Rule 4:1 states that all rules in Part IV, including Rule 4:9-1, only apply to trial level courts. Cf. R. 2:1 (Part II Rules apply to practice before the Supreme Court). Furthermore, even if Rule 4:9-1 does apply, the Court entered an order on January 3, 2022, inviting Chair Wallace to "amplify the grounds for his decision and present that amplification" to the Court by January 11, 2022, thereby effectively setting a return date on the Court's calendar, and thus prohibiting the submission of an amended pleading without leave of Court under a fair reading of Rule 4:9. For this reason alone, Plaintiffs' Complaint should be dismissed.

allegedly unlawful actions of the opposing party; and (3) that is redressable by a favorable judicial decision. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); see also Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 4:26-1 (2022) (“Standing requires that a litigant have a sufficient stake in the matter and real adversariness, with a substantial potential for real harm flowing from the outcome of the case.” (citing In re New Jersey Bd. of Public Utilities, 200 N.J. Super. 544, 546 (App. Div. 1985))). Here, Plaintiffs cannot satisfy this standard in their capacities as certified members of the Commission, and as such this action must be dismissed.

At its core, Plaintiffs’ claim here relates to their votes against action approved by the public commission on which they serve, where the outcome was the result of a procedurally and legally proper vote. There is no standing for such claims to be pursued by these parties in court. Indeed, Federal Courts have examined this very circumstance and rejected claims of such institutional standing.

For example, in Coleman v. Miller, plaintiffs, individual members of the Kansas legislature, sued the Kansas Secretary of the Senate and others, to invalidate a resolution ratifying the Child Labor Amendment to the U.S. Constitution. 307 U.S. 433 (1939). The plaintiffs specifically challenged the fact that the Kansas lieutenant governor, who passed the deciding vote, should

not have been permitted to vote on the matter. While no majority opinion resulted from this case, the Court stated that the plaintiffs had an "adequate interest to invoke the court's jurisdiction because the senators' votes would have been sufficient to defeat ratification if they had been right that the lieutenant governor's vote was invalid." Id. at 438. Ultimately, the Court found that the plaintiffs had standing but only because, but for, the lieutenant governor's vote, the "twenty senators, whose votes against ratification have been overridden" could have defeated ratification if their votes were not essentially nullified. Id. In other words, the Court found that the plaintiffs had a *personal* stake in the outcome. See also Powell v. McCormack, 395 U.S. 486 (1969) (holding that a congressman who challenged the constitutionality of his exclusion from the House of Representatives to have standing because the alleged injury was personal to him).

The Supreme Court of the United States has since further refined this standard, and the difference between an institutional and a personal action. In Raines v. Byrd, individual members of Congress brought an action challenging the constitutionality of the Line Item Veto Act. 521 U.S. 811 (1997). The Court held that these plaintiffs had "not been singled out for specially unfavorable treatment as opposed to other Members of their respective bodies. Their claim is that the [Line Item Veto] Act

causes a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress and both Houses of Congress equally.” Raines v. Byrd, 521 at 821. Similar to the Plaintiffs here, the plaintiffs did not claim that they were deprived of something to which they were *personally* entitled. Id. Instead, their claim was “based on a loss of political power, not loss of any private right, which would make the injury more concrete.” Id. The Court distinguished Coleman by stating, “[t]here is a vast difference between the level of vote nullification at issue in Coleman and the abstract dilution of institutional legislative power that is alleged here.” Id. at 826. See also Baird v. Norton, 266 F.3d 408 (6<sup>th</sup> Cir. 2001) (“[f]or legislators to have standing as legislators . . . they must possess votes sufficient to have either defeated or approved the measure at issue.”).

The personal/institutional standard has been applied in redistricting cases as well. In a recent case emanating from Virginia, the Court determined that the lower house of the Virginia legislature lacked standing to appeal a lower court’s conclusion that its legislative map was the product of racial gerrymandering. Virginia House of Delegates v. Bethune Hill, 139 S. Ct. 1945 (2019). In its attempt to demonstrate that it had standing, the Virginia House of Delegates emphasized that it was the legislative body that actually redrew the redistricting plan, and thus should

be permitted to defend it. The court compared the case to Coleman and Raines, and concluded that Coleman stands "at most" for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified. Id. at 1954; cf. Arizona State Legislature v. Arizona Independent Redistricting Comm'n, 135 S. Ct. 2652 (2015) (finding that the Arizona legislature had standing to challenge a referendum that gave redistricting authority exclusively to an independent commission, thereby usurping the legislature's authority).

Here, Plaintiffs allege an institutional injury against fellow members of their institution - the New Jersey Redistricting Commission. They have not filed this claim alleging any sort of personal injury, because no such injury exists. The mere fact that Plaintiffs could not obtain the seven votes required to certify a map, without demonstrating that they had the ability to win the vote, is not enough to show injury, and thus, they cannot demonstrate standing. Indeed, Plaintiffs have not even shown that their proposed map would receive any votes, since no motion was made to vote upon their map, and there is no allegation that seven or six commissioners would vote for same. Suppose a faction of a town council brought suit against the council as a whole or members

"on the other side of the aisle" simply because that legislative body, as a whole, approved of an ordinance that they disagreed with. That is precisely what is being alleged related to the Commission's December 22, 2021 vote, and permitting such a suit to proceed is untenable.

## POINT II

### **PLAINTIFFS' COMPLAINT MUST BE DISMISSED AS A MATTER OF LAW BECAUSE THIS CASE PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.**

This case presents a nonjusticiable political question on which the Court may not weigh in. At the heart of Plaintiffs' Complaint is their disappointment that the Map does not favor their apparent interests. Congressional Redistricting, by its very nature, is a political process. Indeed, even the manner in which the bi-partisan members are appointed demonstrates how it is a political process. See N.J. Const., Art. II, § II, ¶ 7. Because the Map is constitutional and legal in every sense, the Court should not upend this political process.

Our Constitution permits this Court to exercise original jurisdiction over certain cases concerning the New Jersey Redistricting Commission, but certainly not in a case where some members of the Commission simply disagree with the rationale provided by one or more of the other members for why they voted in a way on Commission business. Indeed, the New Jersey Constitution states that "notwithstanding any provision to the contrary of this

Constitution and except as otherwise required by the Constitution or laws of the United States, no court of this State other than the Supreme Court shall have jurisdiction over any judicial proceeding challenging the appointment of members to the New Jersey Redistricting Commission, or any action, including the establishment of Congressional districts, by the commission or other public officer or body under the provisions of this section.” N.J. Const., Art. II, § II. ¶ 7. This provision does not say that every claim filed with regard to the redistricting process *must* be heard by the New Jersey Supreme Court. Rather, it means that the New Jersey Supreme Court, as opposed to the State’s lower courts, shall have original jurisdiction, *for the filing of such actions, while maintaining its discretion of which cases qualify for review.* Because this matter presents a nonjusticiable political question, it should not.

“The nonjusticiability of a political question is primarily a function of the separation of powers.” Gilbert v. Gladden, 87 N.J. 275, 281 (1981) (quoting Baker v. Carr, 369 U.S. 186 (1962)). Deciding whether a matter presents a nonjusticiable political question is a “delicate exercise in constitutional interpretation.” Id. (quoting Baker v. Carr, 369 U.S. at 210). Prominent on the surface of any case held to involve a political question is (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, (2) a lack of

judicially discoverable and manageable standards for resolving it, (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion, (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government, (5) an unusual need for unquestioning adherence to a political decision already made, or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Id. (quoting Baker v. Carr, 369 U.S. at 217).

In Rucho v. Common Cause, the United States Supreme Court applied this standard to the redistricting process. 139 S. Ct. 2484 (2019). Rucho held that an expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process." Id. (quoting Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (opinion of Kennedy, J.)). Ultimately, the Court held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." Id.; cf. League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006) (Kennedy, J.)

(holding, in part, that one of the redrawn Texas Congressional districts violated the Voting Rights Act).

Here, the New Jersey Constitution clearly vests Congressional Redistricting authority with the Commission, the composition of which is chosen by members of the State Senate, General Assembly, State political party committees and one independent member, which is selected by a majority of the Supreme Court from a list of two individual proposed by the partisan Commission members. N.J. Const., Art. II, § II, ¶ 1. It is an explicitly political process, and there is no judicially discoverable and manageable standard that the Court can apply to this intentionally partisan process. Plaintiffs do not claim, as in League of United Latin American Citizens, that either the map, or the process by which the map was adopted, is unconstitutional or otherwise illegal. Rather, they merely filed a meritless complaint that they do not understand Chair Wallace's reasoning for why he chose the Map they voted against. This is simply a case of Republicans disagreeing with Democrats, which should be ignored by the Court.

POINT III

**PLAINTIFFS' COMPLAINT MUST BE DISMISSED AS A  
MATTER OF LAW BECAUSE THE COURT'S STANDARD OF  
CONSTITUTIONAL REVIEW IS LIMITED TO THE  
CONTENT OF THE MAP ITSELF.**

Under New Jersey law a redistricting map which has been approved by the relevant commission has a presumption of legality and validity. Davenport v. Apportionment Com., 65 N.J. 125, 135 (1974).

The judicial role in reviewing the validity of such a plan is limited. Reapportionment is essentially a political and legislative process. **The plan must be accorded a presumption of legality with judicial intervention warranted only if some positive showing of invidious discrimination or other constitutional deficiency is made.** The judiciary is not justified in striking down a plan, otherwise valid, because a "better" one, in its opinion, could be drawn.

[Davenport, 65 N.J. at 135 (emphasis added) (citing Gaffney v. Cummings, 412 U.S. 735, 750-51 (1973)).]

It follows that the Court, if only able to review a map for a constitutional deficiency, may review the reasoning of the Commissioners' votes only insofar as it relates to any alleged Constitutional defects in the map. This principle, while not explicitly stated, is apparent in how this Court has consistently stayed away from examining the motives of any voting commissioners. See Davenport, 65 N.J. at 135 (examining the map only for violations of State or Federal constitutional standards); see also

McNeil v. Apportionment Commission, 177 N.J. 364, 383 (2003) (noting that the Voting Rights Act doesn't require that commissioners choose one method over another when making hard choices as to minority districting) (quoting Thornburg v. Gingles, 478 U.S. 30, 89 (1986)). Indeed, the motives of legislative or political bodies, absent a showing of an established Constitutional deficiency, are simply not relevant to the Constitutional analysis of the final product, whether it be a piece of legislation or an apportionment map. See e.g., Application of Forsythe, 91 N.J. 141, 150-51 (1982) (declining to examine the motives of the proponents of a redistricting statute, focusing solely on the Constitutional issue).

Additionally, it is well established that the Court does not and will not undertake a review for the purpose of determining if a better map could be drawn. Davenport, 65 N.J. 125, 135 (1974) (quoting Gaffney v. Cummings, 412 U.S. 735, 750-51 (1973)). Again, the narrow focus of the Court in reviewing redistricting maps is the constitutionality of the actual product voted on and approved by the commission. This is a logical limitation insofar as asking if a "better" map could exist is not only extremely subjective, but would cause the redistricting process to be never-ending as an arguably "better" map may always exist. Further, determining if a "better" map exists would imply an examination by the Court as to why the voting commissioners disregarded the "better" map or why

they thought the map they voted on was the best possible map. That is, to examine topics like the superiority of a particular map requires examining the motives/reasoning of those who picked the map. This is not an appropriate inquiry for the Court to undertake, because reviewing the motives of commissioners would be functionally equivalent to examining if a map was "better" or if there is "better" reasoning for voting a certain way.

Examining the motives of a single commissioner would also force the question: what motives are "acceptable" or "unacceptable" for any member voting any particular way? Further, if the Court chooses to link the constitutionality of the map to the reasoning of a *single* member, it would provide precedent to both question the motives of *all* voting commissioners, as well as open the door to question the legality of not only any future redistricting map, but potentially any statute or law. There will always be arguments challenging any commissioner's or legislator's reason to vote a certain way. Such an inquiry would not only be an unprecedented intrusion into a purely political and legislative process but would open a Pandora's box which will haunt redistricting commissions long into the future. Asking this Court to review the Complaint would set a dangerous precedent, thereby allowing for the review of matters which do not have an applicable judicially discoverable and manageable standard, and inhibiting or putting at risk the deliberative process protections necessary for

such work to take place. Put simply, expanding the standard of review to include the motives of the commissioners would be opening an untenable can of worms.

The standard of review regarding the adopted Map's Constitutionality is just that, a Constitutional analysis as to a political/legislative product. When examining this issue, the Court must give proper deference to the map as presumptively valid, focus on the legality of the map under the Constitution, and not delve into the reasoning of any Commissioner.

#### POINT IV

**PLAINTIFFS' COMPLAINT MUST BE DISMISSED  
BECAUSE CHAIR WALLACE'S REASONING IN SELECTING  
THE DEMOCRATIC MAP IS ROOTED IN A VALID  
RATIONALE PROTECTED BY THE DELIBERATIVE  
PROCESS PRIVILEGE.**

Plaintiffs' criticism and complaint of Chair Wallace's justification in selecting the Map is not only meritless, but it is also improper. As a member of a body involved in a legislative process (see Gonzalez v. State Apportionment Comm'n, 428 N.J. Super. 333, 350 (App. Div. 2012)), the commissioners and their reasoning in selecting a map is subject to the deliberative process privilege. In consideration of this privilege, any challenge to the Map's adoption based on a commissioner's individual consideration (or in conjunction with other members of the Commission) is inappropriate absent evidence of wrongdoing.

The deliberative process privilege "permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 81 (2000) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, (1975)). The purpose behind the privilege is protect communications in governmental agencies:

Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.

[Educ. L. Ctr. v. New Jersey Dep't of Educ., 198 N.J. 274, 286, (2009) (quoting Kaiser Aluminum & Chem. Corp. v. U.S., 157 F. Supp. 939, 945-46 (1958).]

In order to for a document to be afforded protection under the deliberative process, two criteria must be met: (1) it must be pre-decisional, meaning that it was generated before the adoption of an agency's policy or decision; and (2) it must be deliberative

in nature, containing opinions, recommendations, or advice about agency policies. Integrity Ins. Co., 165 N.J. 75, 84-84 (2000).

Having previously been recognized by the courts as a body performing a legislative-style function, the Commission is also entitled to protection under the deliberative process privilege. Chair Wallace, as an equal member of the Commission, is under no obligation to explain why he selected a map - and, in fact, is protected from disclosing his reasoning - beyond to confirm it is Constitutionally compliant. Importantly, and fatal to Plaintiffs' Complaint, is that no one is refuting that the Map selected by the majority of the Commission (including Chair Wallace) is constitutionally and legally compliant. Apart from establishing this compliance, Chair Wallace was free to select either map for any reason. And while his reasoning should not matter, it was appropriate under the circumstances. Just as in prior decades, Chair Wallace found both maps presented to him to be legally valid, strong and satisfying his pre-released map-making standards. In addition, Chair Wallace advised that the selected map exceeded Plaintiffs' map on the partisan fairness criteria. In other words, there was a distinction between the two, with the selected map being more desirable via objective criteria. However, Plaintiffs are attempting to unjustifiably challenge the subjective reasoning, alleging that it somehow taints an irrefutably valid and objectively better map. This Court should not allow itself to

be used as a tool for furthering Plaintiffs' baldly political efforts.

**POINT V**

**COUNT ONE SHOULD BE DISMISSED BECAUSE  
PLAINTIFFS HAVE FAILED TO PROVIDE A VALID  
BASIS FOR THE SUPREME COURT TO HEAR THIS  
MATTER.**

In Count One, Plaintiffs allege they, as members of the Commission, have the right to challenge the Democratic map pursuant to the original jurisdiction of the Supreme Court vested by Article II, Section II, Paragraph 7 of the New Jersey Constitution. The pertinent Constitutional provision provides as follows:

Notwithstanding any provision to the contrary of this Constitution and except as otherwise required by the Constitution or laws of the United States, no court of this State other than the Supreme Court shall have jurisdiction over any judicial proceeding challenging the appointment of members to the New Jersey Redistricting Commission, or any action, including the establishment of Congressional districts, by the commission or other public officer or body under the provisions of this section.

Plaintiffs aver that this provision permits them to challenge the individual rationale behind Chair Wallace's rationale about picking between the Democratic Map and the Republican Map. Not only is there no legal support for such a position, but it is also belied by the entirety of Article II, Section II when viewed in complete context.

Article II, Section II of the New Jersey Constitution was adopted to formally create the Redistricting Commission as a constitutional entity, rather than what was merely a product of statutory creation. See N.J.S.A. 19:46-6 (expired, effective January 1, 2001). Since its addition to the Constitution in 1995, no court has interpreted the specific language of Article II, Section II of the New Jersey Constitution.<sup>7</sup> Previous case law dealing with congressional and legislative redistricting has solely dealt with the constitutionality of the map adopted by the Commission. See generally, Davenport v. Apportionment Comm'n, 65 N.J. 125 (1974); Brady v. New Jersey Redistricting Comm'n, 131 N.J. 594 (1992); McNeil v. Legislative Apportionment Comm'n of State, 177 N.J. 364 (2003); Gonzalez v. State Apportionment Comm'n, 428 N.J. Super. 333 (App. Div. 2012). The dearth of case law scrutinizing the reasoning behind a commissioner's vote for or against a map is resultant from the lack of any Constitutional authority to do so.

It is equally important to evaluate the language of Article II. Nothing in Article II specifically allows this Court to delve into any Commissioner's reasoning. Plaintiffs rely upon the

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<sup>7</sup> Defendants are only aware of a single court decision that cites Article II, Section II, Paragraph 7. See In re Senate Joint Resol. of Legislative Apportionment 1176, 83 So. 3d 597, n. 16 (Fla. 2012) (listing states in which the State Supreme Court has original jurisdiction to hear matters challenging maps adopted by a redistricting commission).

language "or any action [of the Commission]" in a brazen attempt to shoehorn their claim. As a preliminary matter, this language has been read, as evidenced by the case law referenced *supra*, to challenge the Commission's selection of a Congressional map, which is its sole Constitutional purpose. Plaintiffs have provided no basis to support their expansive reading of Paragraph 7 to permit inquiry into any action of the Commission. Taking this interpretation to its logical extreme, an "injured party" could seek legal recourse from the state's highest court for holding a meeting at inconvenient times. There is no way to interpret this constitutional provision to allow for such abuse of the judicial system. Simply stated, and as our courts have done until this point, Paragraph 7 was a vehicle created to challenge the constitutionality of a congressional map directly to this Court - nothing more. For this Court to give a more expansive meaning to Paragraph 7 would potentially flood the docket of this Court every decade, an impractical and unnecessary result here, that would run afoul of the tradition of obtaining relief from this Court in only significant matters of public or legal importance.

POINT VI

**COUNTS TWO AND THREE SHOULD BE DISMISSED  
BECAUSE PLAINTIFFS HAVE FAILED TO ALLEGE A  
VIOLATION OF THE NEW JERSEY CONSTITUTION OR  
THE EQUAL PROTECTION OR DUE PROCESS CLAUSES OF  
THE UNITED STATES CONSTITUTION.**

In Counts II and III, Plaintiffs allege Chair Wallace's reasoning in adopting the Map violates both Article I, Paragraph I of the New Jersey Constitution, and the Due Process and Equal Protection Clauses of the United States Constitution. These Counts are duplicative because Article I, Paragraph I of the New Jersey Constitution has been interpreted to confer rights analogous to equal protection and due process rights under the Fourteenth Amendment. See Doe v. Poritz, 142 N.J. 1 (1995); Greenberg v. Kimmelman, 99 N.J. 552 (1985). Both claims lack merit.

Article I, Paragraph I of the New Jersey Constitution provides that, "All 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." Article I, Paragraph 1, like the Fourteenth Amendment of the United States Constitution, "seeks to protect against injustice and against the unequal treatment of those who should be treated alike." Greenberg v. Kimmelman, 99 N.J. 552, 563 (1985). Plaintiffs have failed to set forth a class of individuals that

are being treated unequally, nor do they allege the Map is violative of the fundamental right to vote.

As an initial matter, Plaintiffs' own recitation of facts undermines their claims. Plaintiffs acknowledge that the Commission held ten public meetings, and that the Commission not only considered the map that Plaintiffs submitted, but offered feedback and criticism to improve it. Plaintiffs allege that Chair Wallace's rationale in ultimately choosing the Democratic Map violated this provision, as well as the Due Process and Equal Protection provision of the United States Constitution. It is unclear, however, how this could be the case. But, even taking Plaintiffs' allegations as true, there is no right under any of these Constitutional provisions to have a state Congressional Commission provide a thorough rationale for why one map was chosen over the other.

As to Plaintiffs' Fourteenth Amendment claim, the Federal Constitution "guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups." Vieth v. Jubelirer, 541 U.S. 267, 288, (2004) (plurality opinion). As a member of the Commission - independent or expressly affiliated with a political party - Chair Wallace is permitted to use whatever rationale he deems appropriate in selecting a Congressional map, so long as the map conforms to all necessary laws, including the Voting Rights Act. This model has been upheld

consistently both across the country, as well as by the United States Supreme Court. See e.g., People ex rel. Scott v. Grivetti, 50 Ill. 2d 156, 160, 277 N.E.2d 881, 884 (1971), cert. denied, 407 U.S. 921, (1972) (rejecting claim that Constitutional provision establishing legislative redistricting commission was "violative of the first amendment and the equal protection clause of the fourteenth amendment to the constitution of the United States in that it places control over the redistricting process in the hands of the major party leaders and excludes any participation by representatives of other political parties or independent voters."). In both the congressional and legislative contexts, this structure has been viewed as "'evenhanded restriction[] that protect[s] the integrity and reliability of the electoral process,'" Crawford v. Marion Cnt. Election Bd., 553 U.S. 181, 189-90 (2008) (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 n.9, (1983)), and therefore permissible under the Fourteenth Amendment.

Plaintiffs' consternation with their strategically extracted sentence from Chair Wallace's rationale that he chose the Democratic map over the Republican map because of the 2011 redistricting cycle, is that this statement (in a vacuum) appears politically motivated and influenced, and "pre-determined". There is no evidence of political influence or bias, nor can Plaintiffs prove such influence or bias, because none exists. The record of

the Commission's work makes clear that nothing was "pre-determined".

Nonetheless, political implications are inherent and permitted in the redistricting process if that was the rationale. Courts have previously held that political considerations are permissible in drawing district boundaries considering "[p]olitics and political considerations are inseparable from districting and apportionment" as the framers of both the United States and New Jersey Constitutions plainly intended. Rodriguez v. Pataki, 308 F. Supp. 2d 346, 353 (S.D.N.Y. 2004), summarily aff'd, 543 U.S. 997, (2004) (quoting Gaffney v. Cummings, 412 U.S. 735, 753, (1973)).

Notwithstanding the permissibility of political decision making, the months-long record of efforts of Chair Wallace and the Commission as a whole is direct evidence of the outrageous nature of Plaintiffs' allegations. Despite personally knowing the time, effort and pain taking by Chair Wallace to engage with both partisan delegations, provide feedback on their maps, and strongly encourage discussions between the parties to attempt compromise, Plaintiffs instead have orchestrated a coordinated public attack to impugn the reputation of a universally-respected public servant for their own political gain. The record is clear - Chair Wallace made his decision based on a variety of factors, and while it was close, the map proposed by the Democratic Delegation better fit

his personal notions of fairness, equity and progress for the coming decade. For these reasons, Plaintiffs' claims have no merit and must be dismissed.

**POINT VII**

**COUNT FOUR SHOULD BE DISMISSED BECAUSE PLAINTIFFS HAVE FAILED TO ALLEGE FACTS WHICH WOULD GIVE RISE TO A CONFLICT OF INTEREST, NOR CAN SUCH A CONFLICT OF INTEREST EXIST.**

In Count Four, Plaintiffs essentially argue that the New Jersey Constitution prohibits the Independent Member from having any sort of political affiliation whatsoever based on the Independent Member not being permitted to hold party or political office in the five-year preceding their appointment. Plaintiffs are wrong on the law and wrong on the facts.

Plaintiffs attempt to liken the position of the Independent Member to that of a member of the judiciary, invoking the Code of Judicial Conduct. Plaintiffs then attempt to present Chair Wallace as someone politically involved by stating that his spouse made a contribution to a current Member of the House of Representatives from New Jersey. This claim is nothing more than a poorly veiled attempt to besmirch Chair Wallace's character and integrity because Plaintiffs disagreed with his vote. It is a deplorable tactic that demonstrates the meritless and desperate nature of Plaintiffs' filing.

First, Plaintiffs' claim fails based on a direct reading of the Constitution. The inclusion of language disqualifying those who held party or political office for a five-year look back period, demonstrates that the framers contemplated that individuals who previously held political or party office would be nominated by the partisan delegations as the independent member. Indeed, if the framers intended the independent member to actually be independent, they could have simply stated that such an individual could not have ever held political or party office. This claim is further diminished by the fact that General John Farmer, Jr. - who served in a variety of political offices, including as Attorney General and even Acting Governor (for a *short* time) - served in this role one decade ago. The clear language of the Constitution and history of the role alone support dismissal of this claim.

The law also supports dismissal of Plaintiffs' belated attempt to disqualify. "The decision as to whether a particular interest is sufficient to disqualify is necessarily factual and depends upon the circumstances of the particular case. No definitive test can be devised." Van Itallie v. Borough of Franklin Lakes, 28 N.J. 258, 268 (1958). "A conflicting interest arises when a public official has an interest not shared in common with the other members of the public." Wyzykowski v. Rizas, 132 N.J. 509, 524 (1993) (citing Griggs v. Borough of Princeton, 33

N.J. 207, 220-21 (1960)). "The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty." Van Itallie, 28 N.J. at 268.

Plaintiffs' attempt to, at the eleventh hour, raise an issue of conflict is the pinnacle of hyperbole and evidence of their duplicity. Chattin v. Cape May Greene, Inc., 243 N.J. Super. 590, 609 (App. Div. 1990), aff'd, 124 N.J. 520 (1991) (denying to disqualify counsel where the moving party was aware for years of the conflict which served as the basis for the disqualification); cf. Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 219 (1988) ("an order disqualifying counsel on the eve of trial would do more to erode the confidence of the public in the legal profession and the judicial process than would an order allowing the firm to continue its representation of plaintiff."). During the nomination process, and throughout the past several months of work, not one Plaintiff ever questioned Chair Wallace's ability to be an impartial member of the Commission, presumably because his reputation, credentials and work ethic are impeccable. Now, however, their allegations include demonstrably false statements of fact about the discussions of the parties, deliberations and conduct of the Commission. Nonetheless, the issues raised herein could have been raised at any time since Chair Wallace's appointment in August 2021, and not simply as part of a public and

political smear campaign after failing to design a map that would gather seven supportive votes. Only now, when they have not gotten their way, do Plaintiffs cry conflict. What is all the more telling is that Plaintiffs' nominee to serve as the Independent Member and Chair of the Commission - Judge Marina Corodemus (ret.) - would be similarly conflicted under Plaintiffs' own absurd "standards".

While Judge Corodemus's party affiliation is unknown, her brother served as a member of the New Jersey State Legislature as a Republican and was a Republican candidate for Congress. Judge Corodemus herself donated to Republican fundraising platform WINRED on June 30, 2021 and her brother donated to Republican Congressman Jeff Van Drew and Republican Congressional candidate Tom Kean Jr. in 2020. (Da157-159). It strains credulity to say that Judge Corodemus would not have had "party affiliations" under the very standards Plaintiffs now say are impermissible. Of course, if this were the standard applicable to members of the Commission, then the vast majority of the Commissioners (from both parties) would be disqualified, including at least three members of the Republican Delegation<sup>8</sup>, for making donations to Congressional Candidates in 2020. That is to say nothing of who spouses or relatives of the Commissioners contributed to. Chair Wallace, on

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<sup>8</sup> Chair Steinhardt, Commissioner Ashmore, and Commissioner Pagliughi donated to New Jersey Congressional Republican Candidates during the 2020 Cycle. Commissioner Duffy made multiple donations to WINRED during the 2020 cycle. (Da169-178.)

the other hand, does not appear to have donated funds to any federal candidates. (Da160.)

Notwithstanding the factual folly of their own contributions, Plaintiffs' claims of a conflict of interest on the part of Chair Wallace is nothing but a retroactive attempt to disqualify him because they did not earn his vote. If Plaintiffs had true concerns about a conflict, they should have attempted to resolve that issue months ago and withdrawn the appointments of their conflicted members or challenged Chair Wallace's appointment, before any Commission meetings took place. Chair Wallace is not conflicted from serving on the Commission, nor was he ever conflicted, and the Court should affirmatively reject this claim in its strongest terms.

#### **CONCLUSION**

The map adopted by the Redistricting Commission on December 22, 2021 represents the completion of a fair and just process that was agreed to by both parties. Both sides submitted lawful maps for Chair Wallace and his team to perform a thorough evaluation. In the end, the adopted map satisfies traditional redistricting criteria, the federal Voting Rights Act, and New Jersey's state and federal charters more so than the Republican's map. Despite not having standing and raising a non-justiciable controversy, Plaintiffs' claims fail to state a claim upon which relief can be granted.

For the foregoing reasons, Defendants respectfully ask that Plaintiffs' Complaint be dismissed in its entirety, with prejudice, for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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