

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
R-3 Sept. Term 2021
Docket No. 086587

CIVIL ACTION

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

**REPLY BRIEF IN RESPONSE TO POINT II OF PLAINTIFFS' OPPOSITION
AND IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS**

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PRELIMINARY STATEMENT

The Court has requested that the Democratic Delegation reply to Point II of Plaintiffs' opposition brief to the pending motion to dismiss. Plaintiffs, in Point II, argue that the Open Public Meetings Act, read *in pari materia* with Article II, Section II of the Constitution, imposes public facing obligations on the Commission that were not satisfied here, and as such, any review (by the Court) of the Amplification would violate the law. Plaintiffs are simply wrong. Their arguments fail because they are contrary to the Constitution, New Jersey statutes and case law. For the reasons set forth below and in Defendants' initial and supplemental briefs¹, the Amplification may be utilized by the Court, and this action must be dismissed.

LEGAL ARGUMENT

POINT I

THE COURT MAY REVIEW THE AMPLIFICATION

A. The Court Must Reject Plaintiffs' Obfuscation of the Commission's Public Meeting Requirements

While Plaintiffs concede that the Open Public Meetings Act, N.J.S.A. 10:4-8 ("OPMA") is not applicable to the Commission, they nonetheless argue its "relevance" to an unambiguous Constitutional requirement that the Commission adopt a final map in a public meeting. Because there is no public meeting obligation that would

¹ Defendants utilize the defined terms set forth in their Initial and Supplemental Briefs herein.

be violated if the Court were to consider the Amplification, Plaintiffs' argument fails.

1. The Constitutional Requirements for the Commission's Map Adoption Meeting are Clear and Unambiguous.

The legal standard for interpretation of a Constitutional provision is well established. "In ascertaining the intent of a constitutional provision, a court must first look to the precise language used by the drafters. If the language is clear and unambiguous, the words used must be given their plain meaning." State v. Trump Hotels & Casino Resorts, Inc., 160 N.J. 505, 527 (1999) (citing Gangemi v. Berry, 25 N.J. 1, 10 (1957)); see also State v. Buckner, 223 N.J. 1, 14 (2015). "The polestar of constitutional construction is always the intent and purpose of the particular provision." State v. Apportionment Commission, 125 N.J. 375, 382 (1991). Absolute deference is given to clear and unambiguous Constitutional language. Trump Hotels, 160 N.J. at 527 ("The language speaks for itself, and where found in our State Constitution the language is the voice of the people.") (quoting Vreeland v. Byrne, 72 N.J. 292, 302 (1977)). Here the language of the Constitution is absolute and the sole source of legal authority for the Commission's obligations. See Const., Art. II, Sect. II.

The language of Article II, Section II, Paragraph 3 of the Constitution related to the Commission's **notice for holding** the

public meeting² for adoption of a final district map is clear and unambiguous:

The commission shall certify the establishment of districts pursuant to a majority vote of the full authorized membership of the commission convened in open public meeting, of which meeting there shall be at least 24 hours' public notice.

See Const., Art. II, Sect. II, par. 3. This excerpt clearly states that the Commission must: (1) hold a meeting where it *adopts* a final district map, (2) that is open to the general public, (3) that is publicly noticed with at least 24 hours advanced notice and (4) where any adoption vote requires at least seven of the thirteen commission votes (majority of the full authorized membership). These provisions are clear and unambiguous and must be ascribed their plain meaning. There is also no question that the Commission complied with each of these specific notice requirements during and for the December 22, 2021 map adoption meeting. As such, Plaintiffs cannot claim that the notice for holding the meeting or public manner of the meeting, forms the basis of any claim that requires the Court to reject the Amplification.

² While not relevant here, Article II, Section II, Paragraph 4 is the only other provision related to the Commission's public meeting obligations. That Paragraph sets forth that the Commission must have at least three public hearings related to its work. This cycle, the Commission had ten hearings around the State and virtually.

The remainder of Article II, Section II, Paragraph 3 is similarly clear regarding the process for the Commission's adoption of the final district map:

Any vote by the commission upon a proposal to certify the establishment of a Congressional district plan shall be taken by roll call and shall be recorded, and the vote of any member in favor of any Congressional district plan shall nullify any vote which that member shall previously have cast during the life of the commission in favor of a different Congressional district plan.

See Const., Art. II, Sect. II, par. 3. In other words, at the duly noticed public meeting for map adoption, the Commission can only properly adopt and certify a final district map by:

- (1) voting on a proposal to establish a district plan,
- (2) where the vote is by roll call,
- (3) where the vote is recorded, and
- (4) where the vote is final and overrides any prior votes for a different district plan.

Again, this Constitutional language regarding the Commission's process at the map adoption meeting is expressly clear and unambiguous. Plaintiffs even seemingly acknowledge this fact. See Pb35 (noting that the Constitution requires the Commission to "adopt" a map at a public meeting). Nonetheless, the transcript of the December 22, 2021 map adoption meeting demonstrates that each of these clear Constitutional requirements for adoption and certification of a final district map have been fully satisfied. At that meeting, the Commission members each voted for their preferred map. (Da85-86). After the Democratic map received the

requisite seven votes, Chair Wallace stated, "The motion carries. The democratic map is adopted for the next redistricting cycle." (Da86). As such, the Commission satisfied its Constitutional obligations with respect to the public map adoption meeting. Thus, Plaintiffs' claim that the Court's consideration of the Amplification outside of that meeting would result in violation of Article II, Section II of the Constitution must be rejected.

What is also self-evident from the language of Article II, Section II is the absence of any express or implied obligation to engage in deliberations, discussions, explanations, opinions or justifications in front of the public or at a publicly noticed meeting. In fact, the Constitution contemplates that much work of the Commission, including commissioners' discussions about testimony or proposed maps, would occur outside of the full public view, as similar to other deliberative legislative processes. See Const., Art. II, Sect. II, par. 5 (noting that all meetings other than the adoption meeting and public hearings may be closed to the public); accord New Jersey Republican State Committee v. Murphy, 243 N.J. 574, 592 (2020) (noting that Courts must avoid constitutional interpretations that lead to absurd results) (quotations omitted); see also Buckner, 223 N.J. at 42 (Albin, J., dissenting) (noting that the "absence of any language" in the Constitution could "end the constitutional analysis"). In the face of the clear and unambiguous language of Art. II, Sect.

II of the Constitution, Plaintiffs' argument, without any legal support, that use of the Amplification would be violative of the Constitution must be rejected.

2. Plaintiffs' Open Public Meetings Act Argument is a Red Herring.

Even if the Court were to believe that the language of Article II, Section II of the Constitution is ambiguous, the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-8, et seq. ("OPMA"), are irrelevant to the issues here. This is for the simple and dispositive reason that the work of legislative branch constitutional commissions, such as this Commission and the Apportionment Commission, are specifically excluded from OPMA's statutory mandate and its legislative intent. See N.J.S.A. 10:4-8; see also S. 3227 (1981) ("This bill amends the Open Public Meetings Act to make clear the legislative intent in the enactment of that act only include as public bodies those created under *statutory* law and not the Constitution"). Plaintiffs themselves confirmed this point in their unanimous adoption of the Commission's bylaws. See (Da18-19) (confirming "OPMA's inapplicability to the Commission). As such, Plaintiffs' OPMA argument must be rejected.

Plaintiffs attempt to argue that the Amplification is similar to a judicial determination under R. 2:5-1(b)³, but unlike judges, the Constitution requires Commission related deliberations be made in public and not private, and as such OPMA is instructive. However, not only is the premise - that the Constitution requires deliberations or decisions be made in public - incorrect, but Plaintiffs' application of OPMA also misses the mark.

First, the Amplification, which is a written document that expands and 'amplifies' Chair Wallace's reasoning, was not a document subject to public review until after it was filed because its creation was internal to Chair Wallace and part of his deliberative process. See DIb30-32; see also Brady v. New Jersey Redistricting Comm'n, 131 N.J. 594, 609 (1992). Much like legislators casting a vote for a particular bill, each commissioner must vote to adopt a particular map. Individual legislators are not required to hold an open public meeting⁴ to discuss their rationale for every vote taken.

³Notably, while relying on R. 2:5-1(b), Plaintiffs ignore that the judicial branch of government is specifically excluded from OPMA. See also N.J.S.A. 10:4-8.

⁴Nor could the creation of the Amplification constitute a "meeting" under OPMA. See, e.g., Neu v. Planning Bd. of Union, 352 N.J. Super. 544, 554 (2002) (finding that a public meeting subject to OPMA did not occur when two of nine members of a board because the statutory definition of "meeting" excludes "any gathering attended by less than an effective majority of the members of a public body").

Next, although it set deadlines for filing of the Amplification, the Court did not remand the matter to the Commission to reconvene to discuss its request for amplification, any commissioner's rationale, or other objectives. (Da112-114). Rather, the Court required that Chair Wallace alone provide a written amplification of his prior statement in a manner similar to R. 2:5-1(b). Id. Thus, because Chair Wallace was responding to a request from the Court for a document that the Court requested to assist its analysis of this action, any claim that the Amplification's private creation is a violation of OPMA must be rejected.

B. The Court's Consideration of the Amplification Does Not Violate Plaintiffs' Procedural Due Process Rights

Plaintiffs' procedural due process arguments also lack merit. Although unclear, Plaintiffs' focus appears to revolve around the notion that this Court's consideration of the Amplification would create a due process violation, notwithstanding that the Court itself requested the Amplification. See Pb38 (rights "will be violated if this Court credits the Amplification); Pb41 ("If the Court were to consider the Amplification Statement at all . . .").

It is black letter New Jersey law that litigants are entitled to a fair hearing with the protections of due process. D.N. v. K.M., 429 N.J. Super. 592, 602 (App. Div. 2013), certif. denied 216 N.J. 587 (2014). In litigation, fundamental due process

requires that a party be given adequate notice and a reasonable opportunity to be heard. Doe v. Poritz, 142 N.J. 1, 106 (1995). This includes "notice defining the issues and an adequate opportunity to prepare and respond." McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 559 (1993) (citing Nicoletta v. North Jersey Dist. Water Supply Comm'n, 77 N.J. 145, 162 (1978)).

Any claim that this Court did not provide Plaintiffs with notice and an opportunity to be heard would be frivolous. Indeed, Plaintiffs filed this action in lieu of prerogative writs and sought relief from this Court. The Court, *sua sponte*, requested the Amplification, and provided all parties with ample opportunity to respond to same. R. 2:5-1(b), which the Court invoked, does not create an expectation that any litigant is entitled to provide feedback to an amplification other than through the judicial proceedings. Simply stated, this Court requested the Amplification, and provided Plaintiffs with the ability to respond to same in advance of any decision. This opportunity more than satisfies any procedural due process requirement. As a result, Plaintiffs' procedural due process argument must be rejected.

C. No Procedural Requirements of the Commission's Work Were Violated Or Give Rise To A Cognizable Due Process Claim.

The only other potential procedural due process argument implied in Point II of Plaintiffs' brief is based on the premise that Plaintiffs, in their official capacity as Commissioners, have

procedural due process rights related to their work on the Commission that the Court has violated in requesting the Amplification. Again, Plaintiffs are wrong.

First, and as set forth in Defendants' opening brief, Plaintiffs' allegations of institutional injury against a commission they serve on does not confer standing to bring this action. DIb18. Additionally, Plaintiffs' claims are entirely political in nature, waged against a lawful map and thus are a nonjusticiable political controversy that should not be adjudicated by this Court. DIb23.

However, even if Plaintiffs were able to overcome these significant infirmities, which they cannot, the fact that they do not have any procedural due process rights in their official roles as commissioners is fatal to their argument. Accord Doe v. Poritz, 142 N.J. at 99 (the first step in a procedural due process analysis is assessing whether a liberty or property interest has been interfered with by the State). There is a myriad of federal case law analyzing whether a property interest exists in holding public *elected* office, including finding that "public offices are mere agencies or trusts, and not property." Taylor v. Beckham, 178 U.S. 548, 577 (1900); see also Harris County Commissioners Court v. Moore, 420 U.S. 77 (1975); Bell v. Burson, 402 U.S. 535, 539 (1971); Snowden v. Hughes, 321 U.S. 1, 7 (1944); Dodge v. Bd. of

Ed., 302 U.S. 74, 79 (1937); Wilson v. North Carolina, 169 U.S. 586, 595 (1898); cf. Board of Regents v. Roth, 408 U.S. 564 (1972).

The principal New Jersey case on an elected official's procedural due process rights related to their official role is Errichetti v. Merlino, 188 N.J. Super. 309 (Law Div. 1982). The court in Errichetti held that a state senator's procedural due process rights were not violated when he was denied a year's worth of salary without a hearing, after he effectively abandoned the duties of his office due to a prolonged absence. 188 N.J. Super. at 335 (1982). While the court's decision turned on the issue of payment for the Senator's service, which could constitute a property right, the fact that the plaintiff had notice and the opportunity to be heard, both procedurally and via judicial review, was fatal to his procedural due process claim. Id.

Both Errichetti and the federal cases are similarly dispositive of Plaintiffs' procedural due process claims here. First, Plaintiffs - who have filed this action in their official capacities - do not have any liberty or property interests here. They are members of a political commission who are Constitutionally prohibited from receiving compensation for their work and therefore can have no property interest in their appointed roles. And, even if the Court were to find that Plaintiffs do have a

cognizable property right in their votes⁵, then their ability to seek internal procedural relief pursuant to Robert's Rules of Order during the December 22, 2021 adoption meeting, call for another meeting pursuant to Article IV, Section II of the Commission's Bylaws (Da31), and seek judicial relief (such as through this action) is fatal to any procedural due process violation they claim.

Plaintiffs' hail mary "fundamental fairness" argument also fails. This Court has noted that fundamental fairness is "a doctrine to be sparingly applied" in "rare cases where not to do so will subject the defendant to oppression, harassment, or egregious deprivation." Doe v. Poritz, 142 N.J. at 108 (quoting State v. Yoskowitz, 116 N.J. 679, 712 (1989)). No such harm is even alleged to have occurred here. Even in the very case relied upon by Plaintiffs, State v. Miller, the Court did not find a violation of fundamental fairness. State v. Miller, 216 N.J. 40, 72 (2013).

Here, because they were able to advocate for their proposal, and the fact that the Amplification is merely supplementary in nature, Plaintiffs have not, and cannot, establish that the rarely

⁵ Plaintiffs' generic references to the "right to vote" and citations to cases regarding suffrage rights of private citizens are inapposite, as is their attempt to conflate citizen voting rights with the Constitutional requirement that the Commission adopt a district map at a public meeting by roll call vote.

used doctrine of fundamental fairness should apply here. Chair Wallace, as all other Commissioners, had no obligation to provide any grounds for his vote in favor of the Map, and therefore consideration of the Amplification does not deprive Plaintiffs of a fair process even under the tortured legal framework they claim applies.

For each of these reasons, consideration of the Amplification by this Court would not violate procedural due process, just as the underlying reasoning of Chair Wallace did not.

D. The Amplification is a Noncontradictory Elaboration on Previously Explained Reasoning

Plaintiffs' final argument of Point II asserts that the Amplification contradicts Chair Wallace's statement at the December 22, 2021 adoption meeting. This argument is based on the fallacy that Chair Wallace served as a judge or in a quasi-judicial capacity on the Commission. This is simply untrue and contrary to the Commission's historic work.

As noted in Defendants' prior briefs, Chair Wallace was merely one vote of thirteen potential votes on the Commission. He had no obligation to identify the basis for his vote, just as the other twelve commissioners. Nonetheless, he did provide summary reasons⁶

⁶ Independent members have traditionally provided non-extensive explanations in support of the work of the Commission as a whole and in reflection upon their votes. (Da40-41, 46-50).

including identifying the concept of fairness as one distinguishing factor that resulted in his choice. (Da77-78).

While this alone was sufficient under the Constitution, Commission bylaws, and as a matter of law, an amplification was requested by the Court *to assist the Court* in its analysis of Plaintiffs' claims. R. 2:5-1(b), which was referenced by analogy by the Court in its request, permits amplifications to not only include issues raised in a decision or order, but also address any issue that a party has raised on appeal. See, e.g., Scheeler v. Atlantic County Mun. Joint Ins. Fund, 454 N.J. Super. 621, 625 n.1 (App. Div. 2018) (affirming court's order based on the trial court's R. 2:5-1(b) amplification that "thoroughly and correctly addressed" legal challenges to the order raised on appeal).

In other words, it was reasonable for Chair Wallace to consider that the Court wanted additional information that supplemented his brief comments at the December 22, 2021 meeting, to address issues raised by Plaintiffs in the action they sought to file. There is nothing arbitrary, capricious or unreasonable in complying with a directive of this Court or the requirements of a Rule of Court referenced by this Court in seeking to adjudicate a matter.

In addition, the Amplification itself is not arbitrary, capricious or unreasonable because it shares objective and subjective thoughts of Chair Wallace in his deliberation about his

vote. Thus, in the Amplification, Chair Wallace provided context on his initial statements, and rebutted factually false arguments made by Plaintiffs that their proposed map⁷ was superior when compared to the adopted Map. As such, and for this additional but independent reason, Plaintiffs' argument that the Court cannot review the Amplification it requested fails.

CONCLUSION

For each of the reasons set forth above and in Defendants' Initial Brief and Supplemental Brief, the Court must Dismiss Plaintiffs' Complaint in its entirety.

Respectfully submitted,

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⁷ It is important to note that while Plaintiffs included purported analyses of their proposed map as part of their Complaint, they have never shared the GIS/Shape file of their proposed map with Defendants and, upon information and belief, have not authorized Chair Wallace to share same with Defendants. Indeed, Plaintiffs' proposed map is not part of the Commission's official public record maintained by the Commission Secretary. In contrast, a complete copy of the adopted Map as presented by Defendants is available to the public via the Commission's website and can be downloaded as a GIS/Shape file. Plaintiffs' continued refusal to share a version of their map renders any claims based upon same - including any argument that their proposal was superior - as non-justiciable. See e.g. Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 2:5-4(a) (2021) ("It is, of course, clear that in their review the appellate courts will not ordinarily consider evidentiary material which is not in the record below by way of adduced proof, judicially noticeable facts, stipulation, admission or a recorded proffer of excluded evidence.")

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