

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)*

**SUPPLEMENTAL BRIEF ON BEHALF OF DEMOCRATIC COMMISSIONER
DEFENDANTS IN FURTHER SUPPORT OF MOTION TO DISMISS**

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PRELIMINARY STATEMENT

The Court has requested that the Democratic Delegation provide a supplemental brief "addressing the impact of the Chairperson's written amplification." The "Amplification" explained what Defendants already knew - Chair Wallace selected a map more aligned with his objective and subjective criteria and personal sense of fairness. There is no legal or factual basis to reconsider the votes of the majority of commissioners including Chair Wallace.

Of course, Plaintiffs' arguments are predicated on their unsupported belief that Chair Wallace's analysis of both maps had them so close that a decision was impossible. But Plaintiffs mistook Chair Wallace's professionalism, politeness and December 22 expression of respect for the process, as evidence of equivalency between the proposed partisan maps.

There were no equals here. Per Chair Wallace, the Map adopted by the Commission satisfied both objective and subjective criteria in substantially and significantly distinctive ways from Plaintiffs' proposal. For this reason, the effect of the Amplification is that it is dispositive to the claims Plaintiffs seek to pursue in this action. No attempts to impugn Chair Wallace or the work of the Commission will diminish this conclusion.

STATEMENT OF FACTS AND CONCISE PROCEDURAL HISTORY

Defendants¹ rely upon the Statement of Facts and Procedural History set forth in their January 11, 2022 Initial Brief in Support of the Motion to Dismiss.² In response to the Court's January 4, 2022 Order (Da112-114) and shortly before the filing of the Initial Brief, Chair Wallace submitted a "Response to Order of January 4, 2022 Requesting Amplification of Grounds for Division" (the "Amplification" or "Ampl."). Chair Wallace provided additional context for his vote and background on the Commission's "inherently political" process. Ampl. at 2; see Point II. B, infra.

Following submission of the Initial Brief, the Court issued an Order directing Defendants to file this Supplemental Brief and providing Plaintiffs an opportunity to respond to Defendants' filings.³ For the reasons set forth below, the Amplification renders Plaintiffs' claims moot, to the extent they are even legally cognizable. As such, the Complaint must be dismissed.

¹ Unless otherwise noted, all capitalized/defined terms used herein shall be ascribed the same meaning as in the Initial Brief.

² Defendants' Initial Brief in Support of the Motion to Dismiss hereinafter referred to as the "Initial Brief" or "DIB"

³ Should the Court accept the Complaint as filed under R. 4:69, Defendants' respectfully reserve the ability to seek leave to file a reply as set forth in R. 4:6-2(e).

LEGAL ARGUMENT

POINT I

**CHAIR WALLACE'S AMPLIFICATION IS FATAL TO THE
ENTIRETY OF PLAINTIFFS' CLAIMS**

Chair Wallace's Amplification provides additional and unprecedented insight into his objective criteria, subjective opinions and thought process regarding why the adopted Map earned his support. This reasoning, including his description of standards, goes well beyond the limited public explanations provided by the Commission's prior Independent Members. (Da40-41, 46-50).

As the Court is aware, Plaintiffs' Complaint focuses myopically on alleged defects in Chair Wallace's reasoning, arguing that there must have been an "impasse" requiring this Court's intervention (Da103, 126-128), and that Chair Wallace's decision fails "to satisfy any standard of judicial review applicable to the Commission" (Da105-107, 130-132).

In fact, each of Plaintiffs' claims are based upon the foundational allegation that Chair Wallace did not have sufficient reasons to vote for Defendants' proposed map. While this argument was not supported by the Commission's (then existing) record, the Amplification does nothing less than demolish the house of cards which Plaintiffs' claims are built upon.

For example, Count I of the Complaint seeks to assert that Chair Wallace's reasoning in voting for the Map was "arbitrary and

capricious.” (Da104-106, 129-131) As discussed in detail infra in Point III, the Amplification sets forth well-reasoned and historically significant social science principles and subjective standards that formed the basis of Chair Wallace’s vote. Plaintiffs have not and cannot establish by clear and convincing evidence that this reasoning should be disturbed or invalidated.

Counts II and III of the Complaint similarly allege that Chair Wallace’s reasoning violates the equal protection and due process clauses of both the New Jersey and Federal Constitutions. While the relief Plaintiffs seek is not available as a matter of law, the Amplification nonetheless renders these claims as moot. This is because Plaintiffs’ claims are predicated on an allegation that Chair Wallace’s reasons for his vote fail to “satisfy any modicum or standard of judicial review that may be applicable under the [Constitution’s] equal protection and due process guarantees.” (Da130). While Plaintiffs do not identify the applicable “standard of judicial review”, the Amplification’s confirmation that the Map is legally valid, and its explanation of the objective and subjective reasoning for Chair Wallace’s vote is dispositive of these moot. Accord Vieth v. Jubelirer, 541 U.S. 267, 288, (2004) (plurality opinion); Davenport v. Apportionment Com., 65 N.J. 125, 135 (1974) (a map cannot be invalidated simply because another map is better). As such, the Complaint must be dismissed.

POINT II

**THE AMPLIFICATION CONFIRMS THAT DEFENDANTS'
MOTION TO DISMISS THE COMPLAINT MUST BE
GRANTED**

Chair Wallace's Amplification provides independent and dispositive support for the dismissal of Plaintiffs' Complaint because: (a) Plaintiffs lack standing and (b) have requested that this Court wade into a non-justiciable political controversy. For the reasons set forth in the Initial Brief, Amplification, and as set forth below, either of these independent reasons warrant dismissal of the Complaint.

A. Plaintiffs Still Do Not Have Standing to File this Action in Their Official Capacity as Members of the Redistricting Commission.

Plaintiffs, who filed suit in their official capacity as members of the Commission, do not have standing to maintain this action. As explained set forth in the Initial Brief, parties must demonstrate personal, rather than institutional injury to maintain a claim for relief in law or equity. See PIb18-22 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 4:26-1 (2022); cf. Coleman v. Miller, 307 U.S. 433 (1939)).

In his Amplification, Chair Wallace clearly noted that his role and "vote, as Chair" had "no greater intrinsic weight than the vote of the other 12 Commissioners." Ampl. at 2-3. Chair Wallace also provided background regarding the Commission's

operations, including meetings and discussions among the Commissioners, requests regarding confidentiality, his encouragement regarding information sharing, and issues regarding the scheduling of the final map adoption meeting. Id. at 3.

This unremarkable information from Chair Wallace rejects the very tenet of Plaintiffs' allegations which overlook the Commission's extensive work to support Plaintiffs' outrageous claim that Chair Wallace's vote was pre-determined. (See Da101). In addition to rejecting their factual omission, the Amplification also confirms that Plaintiffs' claims directly arise from their roles as Commissioners, and do not relate to any alleged personal injury.

The Amplification also affirms the indisputable fact that there was no instance in which Plaintiffs' map would have received seven (7) votes. Cf. Coleman, supra. Rather, Chair Wallace further reinforced his decision to vote for the Democratic Map, eliminating Plaintiff's ability to demonstrate injury. As such, Plaintiffs do not have standing to pursue this action and the matter must be dismissed.

B. Chair Wallace Concurs that Plaintiffs are Attempting to Obtain Judicial Review on a Non-Justiciable Political Question.

The Amplification also independently and fatally impacts Plaintiffs' desperate attempt to have this Court adjudicate a

nonjusticiable political question. The Court should reject Plaintiffs' impermissible overture.

As noted in the Initial Brief, the factors for determining whether a matter presents a nonjusticiable political question are analyzed in Gilbert v. Gladden, 87 N.J. 275, 281 (1981). In fact, this Court and others throughout the nation have noted that redistricting is an intentionally political process involving partisan members. See, e.g., Davenport v. Apportionment Comm'n, 65 N.J. 125, 134 (1974) ("Politics and political considerations are inseparable from districting and apportionment.").

The Amplification explains Chair Wallace's sound judgment on this foundational matter and confirms his view that the Commission's work and all thirteen Commissioners' votes inherently involved political considerations. See Ampl. at 2-3 (citing Gaffney v. Cummings, 412 U.S. 735, 753 (1973)). Chair Wallace's opinion is further supported by the politicization of his vote and this litigation by Plaintiffs and their political benefactors. Indeed, the media torrent and smear campaign against Chair Wallace began with a public statement issued less than thirty minutes after the December 22, 2021 Commission meeting which started: "Republicans were never given a real chance to win Chairman Wallace's support." See Wildstein, D., "Statement of Republican members of the Congressional Redistricting Commission", New Jersey

Globe, Dec. 22, 2021, (last accessed Jan. 14, 2022)) (available at [https://newjerseyglobe.com/\[hyperlinked\]](https://newjerseyglobe.com/[hyperlinked])).

This was followed with social media postings within hours⁴:



Plaintiffs' politicization continued even after Plaintiffs filed this action:



⁴ Plaintiffs' publicly available social media statements referenced herein are electronically linked herein and available at <https://twitter.com/DSteinhardtEsq> (last accessed Jan. 14, 2022); See Banco Popular North Am. v. Gandi, 184 N.J. 161, 183 (2005) (public records may be considered on motions to dismiss).

No determination was issued by this Court finding this suit “meritorious” or noting that Chair Wallace “failed to offer any reasoning” that this “Court could possibly affirm”. Nonetheless, hours later, the selection of Chair Wallace itself was politicized:



To be clear, no such “protest” or allegation of conflicts of Chair Wallace was raised by Plaintiffs to this Court or in any other forum. Indeed, in the Amplification, Chair Wallace noted that Republican Delegation Chair Steinhardt began a “discussion by commenting that he had undertaken background research on [Chair Wallace] and noted [Chair Wallace’s] reputation for fairness and impartiality.”⁵ See Amplification at 3.

⁵ Although frivolous on its face, Plaintiffs’ after-the-fact allegation of a conflict for Chair Wallace is belied by their having undertaken “background research” on him in advance of the Commission’s deliberations. If their research did not include a review of contributions to political candidates then Plaintiffs have only themselves to blame, and if such information was discovered, then any so-called concerns should have been raised at that time. See generally PIB Point VII.

Plaintiffs' public politicization of this matter continued online with multiple messages, including at least one political statement following submission of the Amplification two days ago:



These clippings are but a fraction of Plaintiffs' public political effort following the adoption of the Map. Thus, it is irrefutable that the Commission's work is part of a political process which continues during the pendency of this suit, and as such, the controversy presented is not and cannot be justiciable.

POINT III

PLAINTIFFS HAVE NOT AND CANNOT DEMONSTRATE CHAIR WALLACE'S REASONING IN SELECTING THE MAP WAS ARBITRARY, CAPRICIOUS, OR UNREASONABLE.

As noted above, Counts I, II and III of Plaintiffs' Complaint allege that Chair Wallace's reasoning in deciding his vote and the act of him casting a vote violated unidentified "standards of judicial review" including being "arbitrary and capricious". Even

if this standard of review applies to the Commission - which it should not - Plaintiffs have not and cannot satisfy their burden.

As set forth at length in the Initial Brief, the Commission is a Constitutionally created political body and not a governmental agency whose decisions are subject to appellate review.⁶ But even if the Commission were subject to such a review, Plaintiffs' claim here must fail as a matter of law.

As noted above, "an appellate court reviews agency decisions under an arbitrary and capricious standard." Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019). The agency's determination "will be sustained unless there is a **clear showing** that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Saccone v. Bd. of Trs., Police & Firemen's Ret. Sys., 219 N.J. 369, 380 (2014) (emphasis added) (internal quotations omitted) (quoting Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). "[I]f substantial evidence supports the agency's decision, 'a court may not substitute its own judgment for the agency's even though the court might have reached a different result'." In re Carter, 191 N.J. 474, 483 (2007) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)); Application of Holy Name Hosp., 301

⁶ The sole avenue for judicial review of the Commission's actions are if an adopted map is constitutionally or legally infirm. See Davenport, 654 N.J. at 135 (examining the map only for violation of Federal or State constitutional standards).

N.J. Super. 282, 295-96 (App. Div. 1997) (citing Worthington v. Fauver, 88 N.J. 183, 204-05 (1982)) (if the administrative decision is reasonable it should not be disturbed). Plaintiffs cannot satisfy this significant burden here. Accord In re J.S., 431 N.J. Super. 321, 329 (App. Div.), certif. denied, 216 N.J. 365 (2013); see also In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 482-83 (2007)) (outlining limitations on appellate review of administrative action); See In re License Issued to Zahl, 186 N.J. 341 (2006) (deference to be given to administrative decision absent substantial showing).

The Amplification is dispositive and renders Plaintiffs' claims invalid as a matter of law. Chair Wallace goes to great lengths to expound upon his reasoning in selecting the Map over the one proposed by Plaintiffs. Among the many factors he considered in making his final decision, Chair Wallace highlighted that Partisan Fairness was of primary concern in his thought process. Indeed, in his original explanation for picking the Map, Chair Wallace noted that the Map better exemplified partisan fairness than the Republican map. (Da78). The Amplification explores the two main tests for partisan fairness, which are widely accepted in the social science community: partisan symmetry and state geography. (Da58); Ampl. at 4-5 (explaining mathematical tests used to analyze the maps). The resulting conclusions are (a) that the adopted Map was superior to the Plaintiffs' submission,

and (b) Chair Wallace's reliance on objective mathematical principles, and accepted social science, are antithetical to a claim that his decision or vote was arbitrary or unreasonable. In other words, Plaintiffs cannot reasonably claim that it was arbitrary, capricious, or unreasonable for Chair Wallace to rely upon objective data that demonstrated the Map was in better accord with a generally accepted scientific principle he relied upon.

The same conclusion is reached in reviewing portions of the Amplification where Chair Wallace outlines his reliance on technology and raw data to find that the Map better comported with the natural geography of our State. See Ampl. at 4 (noting an analysis of both maps using the ensemble comparison method to conclude that the Map was more "party-blind" and closer to the average ensemble than Plaintiffs' map).

The Court here should not disturb Chair Wallace's decision in selecting the Map. If it was not clear before, it is certainly clear now that Chair Wallace and his team employed accepted social science methods in evaluating each map, and employed objective tests and modeling, utilizing experts in law, technology, and mathematics. In the context of evaluating agency decisions, as Plaintiffs contend should be the standard of judicial review here, appellate courts defer to an administrative agency's "technical expertise, its superior knowledge of its subject matter area, and its fact-finding role." Messick v. Bd. of Rev., 420 N.J. Super

321, 325 (App. Div. 2011). In the event an agency's decision or findings of fact are "supported by sufficient credible evidence, courts are obliged to accept them." Ibid. (quoting Self v. Board of Review, 91 N.J. 453, 459 (1982)). There can be no doubt that this is the case here. The partisan delegations and Chair Wallace all employed technical experts to draw and evaluate maps. The Amplification confirms that Chair Wallace, along with the other Commissioners, consulted his team to reach a rational and reasonable conclusion that the Map better satisfied objective and subjective criteria and therefore was worthy of seven votes. Because this reasoning is not arbitrary, capricious or unreasonable and is entitled to due deference, Plaintiffs claims must be dismissed. Accord In re Herrmann, 192 N.J. 19, 28 (2007) ("Deference controls even if the court would have reached a different result in the first instance.").

It is also important to note that Chair Wallace put great value in Defendants' presentation of the Map and their focus on citizen recommendations regarding communities of interest made at public hearings. See Ampl. at 5. Chair Wallace's reasoning that the Map is better reflective of the testimony and desires of the hundreds of residents who participated in the Commission's public process, is not only reflective of the Constitution's mandate regarding public input, but an independent basis to reject any

claim of arbitrariness in the adoption of the Map.⁷ See N.J. Const., Art. II, § II, ¶ 4. By choosing a map that more so considered the voice of the people, Chair Wallace was adhering the one of the important intents of the Commission's Constitutional construction.

Based on the foregoing, Chair Wallace's amplified reasoning further demonstrates that his selection of the Map with neither arbitrary, capricious, nor unreasonable, and that Plaintiffs cannot meet the very standard they claim applies here.

CONCLUSION

For the each of the reasons set forth above and in Defendants' Initial Brief, the Court must Dismiss Plaintiffs' Complaint for the simple, yet dispositive reason that the Map adopted by the Redistricting Commission on December 22, 2021 represents the completion of a fair and just political process. No public relations argument will change that, nor does the law support the extraordinary and belated relief requested here.

Respectfully submitted,

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⁷ Indeed, it is evident from the statutory origins of the Commission that public input was to be considered in the redistricting process. See N.J.S.A. 19:46-6, et seq. (expired).

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