

IN THE MATTER OF ESTABLISHMENT OF  
CONGRESSIONAL DISTRICTS BY THE  
NEW JERSEY REDISTRICTING  
COMMISSION,

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

Plaintiffs,

vs.

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.

SUPREME COURT OF NEW JERSEY

DOCKET NO.: 086587

PURSUANT TO ORIGINAL  
JURISDICTION OF THE SUPREME  
COURT OF NEW JERSEY UNDER  
ART. II, § II, ¶ 7 of the NEW  
JERSEY CONSTITUTION

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**BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF REPUBLICAN DELEGATION  
IN SUPPORT OF REQUESTED RELIEF AND IN OPPOSITION TO DEFENDANT  
DEMOCRATIC DELEGATION'S MOTION TO DISMISS**

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**KING MOENCH HIRNIAK & COLLINS, LLP**  
51 Gibraltar Drive, Suite 2F  
Morris Plains, New Jersey 07950

365 Broad Street, Suite 4R  
Red Bank, New Jersey 07701

973-998-6860  
973-998-6863 (facsimile)

[MCM@knhmlawfirm.com](mailto:MCM@knhmlawfirm.com)  
[MLC@knhmlawfirm.com](mailto:MLC@knhmlawfirm.com)

Attorneys for Plaintiffs

Of Counsel and On the Brief:  
Matthew C. Moench, Esq. (031462007)  
Michael L. Collins, Esq. (068092013)

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## PRELIMINARY STATEMENT

This case challenges the New Jersey Redistricting Commission's ("NJRC's") adoption of New Jersey's Congressional map for the next decade based upon Chair and Independent Member John E. Wallace, Jr.'s inexplicable determination that "fairness" required the Democrats to prevail because the Republicans "won" in the last redistricting process:

In summary, both delegations aptly applied our standards to their map. In the end, **I decided to vote for the Democratic map, simply because in the last redistricting map it was drawn by the Republicans.**

Thus, I conclude that fairness dictates that the Democrats have the opportunity to have their map used for this next redistricting cycle.

[(Da78 (emphasis added))].

Under Chair Wallace's stated reasoning, New Jersey's Congressional redistricting was reduced to an alternating possession that the Democratic party was entitled to win because they had the "redistricting possession arrow" in their favor. While alternating possession may be an acceptable way to decide jump balls in college basketball, it could not have possibly been the intent of the Legislature and people for the adoption of a Congressional map when they established the NJRC. The Democratic Delegation has filed a motion to dismiss and a supplemental brief in further support of their motion to dismiss, but in sixty pages



of combined briefing, the Democratic Delegation does not once directly address Chair Wallace's own words. This is not surprising because they know, just as the Republican Delegation has alleged, that Chair Wallace's stated reasoning and the NJRC's action cannot possibly satisfy judicial review before this Court and must be vacated.

In response to Plaintiffs' complaint, this Court requested, and Chair Wallace provided, an "amplification" (the "Amplification Statement") that is inconsistent with the record below. Its consideration by this Court would violate our Constitution's guarantee that the NJRC's redistricting decisions are made at a public meeting with public notice, not through privately drafted written submissions in response to litigation. Reliance on the Amplification Statement also violates Plaintiffs' procedural due process rights.

Even if considered, the Amplification Statement impermissibly involves deliberations after the NJRC's public meeting and relies upon data that Chair Wallace concedes was not made available to any of the NJRC's partisan members. The proper remedy is a remand so that a record can be developed before the public at a meeting with the full transparency envisioned by the Constitution.

The NJRC's adoption of a Congressional map also violated Plaintiffs' substantive due process guarantees under both the federal and state constitutions. A federal court has addressed a

legal challenge involving an independent redistricting body, and it held that the U.S. Constitution prescribes rational basis review. Even under such a deferential standard, Chair Wallace's decision fails that test and must be reversed.

Finally, Chair Wallace possessed a common law conflict of interest because his wife made a reportable campaign contribution to Congresswoman Bonnie Watson Coleman's re-election. Contrary to the Democratic Delegation's claims, this is not an isolated donation that would render any political contribution a conflict. Rather, the Congresswoman is one of the 12 members of New Jersey's Congressional delegation whose re-election fortunes are directly tied to the NJRC's redistricting decision. This Court must vindicate the public interest by determining that Chair Wallace's participation creates a perception of impropriety requiring the NJRC's actions be vacated for further proceedings with him recused.

The Republican Delegation submits this brief both in support of the relief requested in their amended complaint and in opposition to the Democratic Delegation's motion to dismiss, and for the reasons stated herein, Plaintiffs respectfully request that this Court vacate the NJRC's adoption of a Congressional map and remand the matter for further proceedings with Chair Wallace recused.

## PROCEDURAL HISTORY

On December 22, 2021, the NJRC held a public meeting in the State House Annex in Trenton at which time Chair Wallace made remarks and ultimately announced that he would be voting to approve the Democratic map out of "fairness" because the Republican Delegation "won" in the last redistricting cycle. (Da78). The Democratic map was then adopted on a 7-6 party line vote, with all Democrats and Chair Wallace voting in favor, and all Republicans voting against. (Da85-86).

On December 30, 2021, the Republican Delegation filed a three-count complaint in lieu of prerogative writs, challenging the foregoing action of the NJRC upon the pivotal tie-breaking vote of Chair Wallace. (Da95-111). This action was filed with the Supreme Court of New Jersey, pursuant to its original jurisdiction. N.J. Const. art II, § 2, ¶ 7.<sup>1</sup>

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<sup>1</sup> Plaintiffs note there are no Rules governing the initiation of a redistricting dispute with the Supreme Court under this constitutional provision.

The Democratic Delegation contends that Plaintiffs' complaint in lieu of prerogative writs is improper, and that this matter should have been filed similar to an appeal from a final agency decision under Rule 2:2-3. Plaintiffs reject this argument, as that Rule governs the limited jurisdiction of the Superior Court's Appellate Division to hear final agency appeals, and this action arises under the Supreme Court's original jurisdiction. In the absence of any Rules governing the initiation of a dispute under the Supreme Court's original jurisdiction, the initiation of this dispute by filing of a complaint was proper. See R. 4:2-2 ("A civil action is commenced by filing a complaint with the court.").

On January 4, 2022, this Court entered an order requesting that Chair Wallace “amplify” the grounds for his decision to adopt the Democratic Delegation’s map (the “Amplification Order”) (Da112-114).

On January 5, 2022, the Republican Delegation amended its complaint to add a conflict-of-interest count.<sup>2</sup> (Da118-151).

On January 11, 2022, the Democratic Delegation filed a motion to dismiss Plaintiffs’ complaint for failure to state a claim.<sup>3</sup> That day, Chair Wallace filed his Amplification Statement in response to the Court’s Amplification Order. (Pa1-6). Finally, this Court entered an order directing the terms of further briefing

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To the extent this Court finds any procedural infirmities with any of Plaintiffs’ filings, and in light of the lack of guidance provided by the Rules, Plaintiffs respectfully request leave of this Court to allow for the consideration of any and all of their submissions as valid, see R. 1:1-2(a), and that the Democratic Delegation’s procedural arguments be rejected.

<sup>2</sup> The Democratic Delegation claims that the Republican Delegation was unauthorized to amend their complaint without leave of this Court. However, Plaintiffs are permitted to amend their instant original jurisdiction complaint as of right by analogy to Rule 4:9-1. Plaintiffs further note that, even if the procedure under Rule 2:2-3 for appeal from a final agency decision applied, Plaintiffs still would have had the opportunity to raise this claim as part of their merits briefing. For these reasons, the Democratic Delegation was not prejudiced by Plaintiffs’ filing of an amended complaint and their procedural claim should be rejected as meritless.

<sup>3</sup> The Republican Delegation joins in the Democratic Delegation’s request for oral argument in this matter as set forth in their filing.

by the parties, including specifically allowing for this brief by the Republican Delegation. (Pa10-12).<sup>4</sup>

#### **STATEMENT OF FACTS**

In 2021, the New Jersey Redistricting Commission was constituted in accordance with Article II, Section 2 of the New Jersey Constitution, with six appointees of the Democratic Party and six appointees of the Republican Party. (Da123-124).

Thereafter, the NJRC reached an impasse for the selection of an Independent Member between the Republican Delegation's support for the Hon. Marina Corodemus (ret.) and the Democratic Delegation's support for the Hon. John E. Wallace, Jr. (ret.). (Da1-2). On August 6, 2021, the Court issued its selection of Justice Wallace as the Independent Member. (Da3-4).<sup>5</sup>

The fully-constituted thirteen-member NJRC held its first organizational meeting on September 1, 2021, with the Hon. John E. Wallace, Jr. recognized as Chair. (Da5-27). Following this organizational meeting, both partisan delegations spent

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<sup>4</sup> In the interest of a prompt resolution of this matter, the Republican Delegation opposes any relief from this order and requests that this matter be submitted to the Court, following oral argument if granted.

<sup>5</sup> Justice Fabiana Pierre-Louis did not participate in this order, which upon information and belief was related to a recusal due to her past clerkship for the Hon. John E. Wallace, Jr. (ret.). Plaintiffs note that the Hon. John E. Wallace, Jr. (ret.) is a named defendant to this litigation, which places his decision and actions under review.

significant time assembling their professional teams, which included attorneys, demographers, professional mapmakers, and other staff and technical assistance to provide them the information and tools to analyze the census data and help them craft a map. (Da124). Both delegations and Chair Wallace were provided with and expended public money and resources towards the Congressional redistricting process. (Da124).

Chair Wallace's counsel provided the delegations with the standards that he and his team had intended to use to evaluate proposed maps:

1. Mapmakers shall establish 12 congressional districts that shall be geographically contiguous. In counting the total population for each district to be formed, incarcerated prisoners should be counted at their prior addresses. Districts must be as equal in population as possible to the ideal district population of 774,083 (based on total NJ population of 9,288,994).
2. Mapmakers shall comply with the Voting Rights Act and all relevant Supreme Court decisions applying the Equal Protection Clause and the Apportionment Clause. The map should include sufficient numbers of minority/majority districts and provide the racial and/or language minorities with reasonable opportunity to participate in the political processes and elect representatives of their choice whether alone or in coalition with others. Furthermore, any consideration of race shall be only as necessary to avoid a violation of the Voting Rights Act and shall be narrowly tailored to satisfy the Act's requirements.
3. Political subdivision boundaries and communities of interest (cultural, ethnic, linguistic, economic, and religious) shall be respected. Mapmakers shall not split political subdivision boundaries and

communities of interest unless necessary to achieve compliance with standards 1 or 2.

4. Competitive districts are favored so long as compliance with standards 1,2, or 3 would not be significantly hindered or impaired.
5. No district may be formed solely to favor or disfavor any political party or the election of any person.
6. To assist voters in assessing incumbents and minimizing voter confusion, districts may include the cores of existing districts, provided the new district to be formed will substantially comply with all of the preceding standards.
7. All districts shall be as compact and regularly shaped as possible unless deviation is required to comply with any of the above standards.

[(Pa10-14)].

Following the completion of ten public hearings around the State between October 23 and December 9, 2021, the partisan delegations met with Chair Wallace and his team of advisors over the course of December 17 to December 20, 2021. (Da124-25). During those discussions, Chair Wallace provided feedback to both delegations, and the Republican Delegation made modifications to their maps in response. (Da125).

At the conclusion of these meetings with Chair Wallace, at his request, each delegation submitted its best and final map to him, just as one would submit a final brief or submission to a judge or arbitrator who was going to enter a judgment or ruling. (Da125). The parties made presentations and arguments, with the

hope of persuading the Independent Member to choose their submission. (Da125). The delegations did not engage with each other during this time period, nor did the NJRC ever meet as "one commission." (Da125). Instead, the delegations spent their time trying to adapt their maps to best meet the criteria laid out by Chair Wallace in his capacity as a decisionmaker - not as a co-equal member of the Commission.

The NJRC still had nearly one month prior to the New Jersey Constitution's deadline of January 18, 2022 to hold further negotiations towards the establishment of Congressional districts, to make additional changes to the map, or provide further information to Chair Wallace to aid him in his decision-making. However, no such additional information was requested by Chair Wallace. (Da125). Instead, on December 22, 2021, the NJRC held a meeting at the State House Annex in Trenton, New Jersey. The meeting lasted only 15 minutes. (Da69-87).

Chair Wallace opened the meeting by making his own remarks. (Da71-73). After indicating that both maps satisfied his criteria, Chair Wallace stated as follows:

The only area where one map pulled ahead of the other is in partisan fairness; that is, no district may be formed solely to be - to favor or disfavor any political party or the election of any person.

Both maps were evaluated by my team using various statewide tests for partisan fairness. Without getting into the details of the tests,



I simply state that the results showed that the partisan fairness would favor the Democratic's map. However, because neither delegation used these tests, I have decided not to give any weight to them in making my decision.

In summary, both delegations aptly applied our standards to their map. In the end, I decided to vote for the Democratic map, simply because in the last redistricting map it was drawn by the Republicans.

Thus, I conclude that fairness dictates that the Democrats have the opportunity to have their map used for this next redistricting cycle.

[(Da78)].

Following Chair Wallace's remarks, the NJRC adopted the Democratic delegation's map on a party-line vote, with all Democratic Commissioners and Chair Wallace voting in favor, and all Republican Commissioners voting against. (Da85-86).

This litigation follows.

#### **LEGAL ARGUMENT**

#### **I: THE NJRC'S ADOPTION OF A CONGRESSIONAL MAP UPON JUSTICE WALLACE'S ARBITRARY REASONING FAILS JUDICIAL REVIEW.**

Plaintiffs challenge the NJRC's adoption of a Congressional map upon the reasoning of Chair Wallace, who determined that "fairness" required the Democratic map to prevail because the Republicans "won" in the last redistricting cycle. As set forth herein, even when a deferential standard of review is applied, the

NJRC's action must be reversed as arbitrary, capricious, and unreasonable.

**A: The Supreme Court of New Jersey has original jurisdiction to review the NJRC's adopted map.**

This Court has original jurisdiction to hear disputes involving the NJRC's enactment of a Congressional map. Between this grant of jurisdiction and the New Jersey Constitution's general constitutional right to prerogative writ relief, this Court is obligated to provide judicial review in this matter.

Prior to the 1947 Constitution, the Supreme Court "exercis[ed] the power of the King's Bench" and possessed "general supervisory jurisdiction" through judicial review. Hill v. Collingswood, 9 N.J. 369, 377 (1952). Among other things, this power was exercised to prevent against "erroneous applications" in violation of law and to afford "equitable principles to avert a threatened injury irreparable by the processes at law." Ibid.

The 1947 Constitution afforded the New Jersey Judiciary with the power of judicial review, which is exercised through actions in lieu of prerogative writs. N.J. Const. art. VI, § V, ¶ 4. The New Jersey Constitution ordinarily affords judicial review in the Superior Court. Ibid. This Court has held that judicial review "is a matter of constitutional right in New Jersey." In re Proposed Quest Academy Charter School of Montclair Founders Group, 216 N.J. 370, 383 (2013).

As part of the State's 1991 Congressional redistricting, the New Jersey Legislature adopted a statutory redistricting commission. Brady v. N.J. Redistricting Comm'n, 131 N.J. 594, 601-02 (1992). The law provided that the Supreme Court "shall have original and exclusive jurisdiction to consider any cause" that "challeng[ed] the actions of the New Jersey Redistricting Commission." Id. at 605 (citation omitted). This Court held that provision unconstitutional, finding that the New Jersey Constitution "prohibits the Legislature from granting original jurisdiction to this Court to decide challenges to the Redistricting Commission's actions." Ibid. Nevertheless, the Court afforded appellate jurisdiction to adjudicate the plaintiffs' claims. Ibid. Addressing the merits, the Court affirmed the constitutionality of the statutory commission, and applying judicial review, affirmed the map approved by it. Id. at 611-22.

In 1993, the Legislature adopted concurrent resolutions in both chambers approving a measure to establish the NJRC under Article II, Section 2 (the "NJRC Amendment"), which was subsequently approved by voters and became part of the New Jersey Constitution. N.J. Const. art. II, § 2; ACR-25 (1993); SCR-115 (1993). The NJRC Amendment specifically provides the Supreme Court with original jurisdiction over matters involving the NJRC, abrogating this Court's jurisdictional holding in Brady. N.J. Const. art. II, § 2, ¶ 7. The NJRC Amendment affords original

jurisdiction before the Court regarding “any judicial proceeding challenging . . . any action, including the establishment of Congressional districts, by the commission or other public officer or body under the provisions of this section.” Ibid. Paragraph 9 also sets forth a procedure to be followed if an adopted map is declared unlawful. N.J. Const. art. II, § 2, ¶ 9. In such case, the NJRC is directed to “reorganize and adopt another Congressional district plan in the same manner as herein required.” Ibid.

This Court has recognized that our Constitution “was made to serve and protect the people of the State and all of its language must be sensibly construed with that uppermost in mind.” Kervick v. Bontempo, 29 N.J. 469, 480 (1959). Thus, “it is to be presumed that the words employed have been carefully measured and weighed to convey a certain and definite meaning, with as little as possible left to implication.” Gangemi v. Berry, 25 N.J. 1, 10 (1957). This Court does not support interpretations that render constitutional language as “surplusage or meaningless.” Burgos v. State, 222 N.J. 175, 203 (2015).

Plaintiffs filed the instant four-count amended complaint in lieu of prerogative writs with the Supreme Court, alleging that the NJRC’s establishment of Congressional districts must be vacated. The Supreme Court has original jurisdiction to hear these claims under the NJRC Amendment, which was adopted by the Legislature in direct response to this Court’s past holding that

the Constitution prohibited statutorily affording this Court original jurisdiction in redistricting matters.

This unique grant of original jurisdiction to the Court, coupled with the State constitutional right to prerogative writ relief, requires this Court to afford judicial review to the NJRC's enactment of a Congressional map that Plaintiffs place under review. Plaintiffs believe that a contrary holding would inappropriately render the judicial review function under Paragraph 7 of the NJRC Amendment as "surplusage or meaningless," which is an invalid means of interpreting the New Jersey Constitution.

For these reasons, Plaintiffs are entitled to, and this Court must afford, judicial review of the issues raised in Plaintiffs' complaint regarding the NJRC's adoption of a Congressional map.

**B: This Court should apply a commonplace "arbitrary and capricious" standard of review to the NJRC's actions.**

Having established that jurisdiction is proper and that this Court must exercise judicial review power over the NJRC's redistricting decisions, the next legal question is the appropriate standard of review with which to evaluate the NJRC's decisions - a question of first impression before this Court. Even if the most deferential standard of review that is customarily applied to governmental actions is applied, Chair Wallace's decision fails to meet that test.

The typical standard of review is whether a governmental action is "arbitrary, capricious, or unreasonable."<sup>6</sup> In re Veto by Governor Chris Christie of Minutes of N.J. Racing Comm'n from June 29, 429 N.J. Super. 277, 290 (App. Div. 2012).

Under that standard, the scope of judicial review of an agency's decision is restricted to four inquiries: (1) whether the agency's decision offends the State or Federal Constitution; (2) whether the agency's action violates express or implied legislative policies; (3) whether the record contains substantial evidence to support the findings on which the agency based its action; and (4) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Ibid. (quoting In re Taylor, 158 N.J. 644 (1999)); see also Grabowsky v. Tp. of Montclair, 221 N.J. 536, 551 (2015)].

Notably, this Court applied judicial review to evaluate the 1992 redistricting performed by the then-statutory New Jersey Redistricting Commission. Brady, 131 N.J. at 611-22. In relevant part, one of the plaintiffs alleged that the "Commission did not have adequate information to determine if the plan complied with the statutory mandate to ensure such protection," and that "numerous errors, omissions, and typographical errors in the data compilation demonstrate that the Commission acted on insufficient

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<sup>6</sup> This standard is also applicable to Plaintiffs' substantive due process claims. See infra Section IV.

information.” Id. at 618. This Court did not dismiss the matter as a nonjusticiable political question and reviewed the challenge on its merits. See infra Section I(E) (further discussion on political question doctrine). While it is conceded that the statutory redistricting commission’s law contained more specific standards to be evaluated regarding the Congressional map, it does not change the fact that this Court found the Commission’s adoption of a Congressional map justiciable and applied judicial review. The Brady case also presents as more pertinent authority than Davenport v. Apportionment Comm’n, 65 N.J. 125 (1974), which is promoted by the Democratic Delegation, even though it dealt with legislative apportionment, not Congressional redistricting, two decades prior.

Given the case law governing judicial review of governmental actions, and this Court’s past review of a challenge to a redistricting map on the merits, this Court should apply a deferential standard of review to the NJRC’s actions limited to a review of the public record to ensure that the approved Congressional map is adopted in a manner that is not: (1) arbitrary or capricious; (2) unsupported by competent evidence in the record; or (3) inconsistent with the New Jersey Constitution’s terms or intent. The latter factor should be applied to ensure that the NJRC does not utilize “irrelevant or inappropriate factors” in reaching a determination. In re Warren, 117 N.J. 295, 296-97 (1989).

This standard of review would protect New Jersey residents from a Congressional map being adopted on an improper basis, as in the instant case, while providing the NJRC with appropriate autonomy to resolve policy issues.

**C: Chair Wallace's decision fails to satisfy any standard of review.**

The arbitrariness of Chair Wallace's decision is clear on its face. It is even more evident when the decision is compared with the oral statements entered by past independent members of the NJRC at public meetings during the 2001 and 2011 redistricting cycles. In these previous instances, the independent member provided reasoned on-the-record explanations for their vote in favor of a Congressional map.

In the 2001 case of a consensus map, the independent member explained the virtues of the compromises that were achieved between the partisan delegations and reflected in the adopted map. At the public meeting, Chair Alan Rosenthal stated as follows:

From the point of view of the congressional redistricting plan as a product, I would say it is a very commendable product. I think we can all be proud to have adopted it. If the constitutional standard is no population deviation, this plan is essentially zero population deviation. In terms of continuity of representation, roughly 90 percent of the people in New Jersey will be living in the same congressional district or with the same congressional incumbent that they lived with before. So there's greater continuity, and



people might even know who their congressman is.

. . . .

Well, the plan not only meets legal and constitutional standards, I think it is the politically fair plan. It's fair to both political parties. And it reflects the present conditions -- the partisan conditions in the State of New Jersey. But it also allows for changes in congressional representation if the partisan distribution of the vote in the state changes. So in terms of a product, it is a fine product.

[(Da40)].

In 2011, Independent Member John J. Farmer, Jr. cast a tie-breaking vote in favor of the Republican Delegation's map. Prior to casting his vote, he stated as follows:

The map that I am prepared to support today is in every measure an improvement over the pre-existing current map. First and most important, it complies with the constitutional requirement of one person, one vote. It draws 12 districts with equal population. It complies with the mandate while splitting only 14 municipalities, and none of them more than once. The current map contains 29 municipal splits with two municipalities split among three districts.

The map also honors more completely New Jersey's diversity. It contains two majority-minority districts, and two other districts in which minorities and coalition can constitute a majority. It respects communities of interest identified for us in testimony in meetings with sitting members of Congress and in written submissions from the public. It does not strain geography to accomplish this. By every measure the districts drawn on the

map are more compact than the districts on the current map and they raise no issues of contiguity. Given the constraints posed by losing a district while having to add population to existing districts, the map also respects continuity and representation.

In short, the map I am prepared to support today is legally sound; its districts are compact, contiguous, respect communities of interest, and honor our state's diversity.

The map is a product of a process that began over the summer with an informal meeting, extended through public hearings in the fall and public input on our website, and concluded this week in four days of intense discussion in New Brunswick. This process included meetings with all members of our current delegation and numerous other interested parties from the public. I personally have been greatly assisted by counsel provided by 17 law students from Rutgers in Newark and Camden, under the supervision of former Public Advocate, current Vice Dean Ron Chen. I cannot thank them enough.

I think it is fair to say that I have exasperated all my colleagues at this table in an effort to drive points of compromise and bring the parties together. But I think the process largely worked. Although the map I am prepared to support today was proposed by the Republican members, it benefitted in fundamental ways from the close criticism offered by former Speaker Roberts, Counsel Bill Castner, and the other Democratic members. The process produced, in my view, two excellent maps.

My consideration of the political implications of redistricting was guided by two objective realities that no one can ignore: first, New Jersey is losing a Congressional seat which

will affect the current composition of seven Democrats and six Republicans. That in itself would make this a challenging task. To complicate matters further, every surviving district will have to add population ranging from 8,000 to 100,000 people. As I thought about this problem it became clear to me that the loss of a seat should be absorbed by the district with the greatest population deficit. As it turned out, three districts that had to add the greatest number of people were all in the same region and were contiguous with one another. Together those districts would have had to add some 250,000 in population. In this case, however, no one wanted to collapse the district with the greatest population deficit because that district is New Jersey's traditional majority-minority district. The next two districts in terms of population deficit were 8 and 9, represented by Congressmen Pascrell and Rothman. I became convinced that because they were contiguous and were second and third in population deficit, they should be combined. Because all three of the districts are represented by Democrats, this would mean the loss of a Democratic seat and an adjustment of the balance as we start to 6 to 6. I understood this, and I would've applied the same principle regardless of which party held the seats in question. I began the negotiations this week with that in mind and informed the parties.

The Democrats changed my mind. Speaker Roberts made a compelling argument that allowing the voters to decide which party loses a seat is fair, despite the concentration of population deficit in the Democratic Districts 8, 9, and 10. So I told the Republicans they would have to change their map fundamentally, exposing one of their members by combining Congressman Garrett's district with that of Congressman Rothman. They resisted this notion for the

reasons I mentioned earlier but, ultimately, relented. I told both parties that, balancing the equities, the new districts should be a challenging one for the Democrats to win.

At that point the points of difference started to narrow. The map respects continuity of representation for six Democratic members and four Republican members. The fifth Republican, Scott Garrett, will face a fight, albeit an uphill one, from Congressman Rothman. The 6th Republican incumbent, one-term Congressman Runyan, will face a competitive race. I was ultimately unable to bring the parties together on how competitive the Garrett-Rothman and Runyan districts should be. I was confronted with a blizzard of metrics and measures and impassioned advocacy from both sides -- who did an outstanding job. Some of the metrics, frankly, required suspension of common sense; all of them are instructive but, ultimately, manipulable. My role, as I saw it and as I see it now, was to attempt to bring the parties together and then, frankly, to make a judgment call. Because the Republican map preserves continuity representation for six Democrats, and because it exposes two incumbents -- Republican incumbents -- to a significant risk of losing and thus risks becoming an 8 to 4 map, and because it is excellent in the fundamentals of redistricting that I outlined earlier -- one person-one vote, compactness, contiguity, majority-minority and coalition districts, and communities of interest -- I decided to vote for the Republican map.

[(Da46-50)].

In 2021, Chair Wallace stated that both maps were equal as "both delegations aptly applied our standards to their map." He then stated that, "In the end, I decided to vote for the Democratic

map, simply because in the last redistricting map it was drawn by the Republicans. Thus, I conclude that fairness dictates that the Democrats have the opportunity to have their map used for this next redistricting cycle." (Da78).

Chair Wallace's own words established that his ultimate decision was based upon his consideration that "fairness" required that Democrats prevail because the Republicans "won" in the last redistricting cycle. Those are his words - not the Republican Delegation attempting to read meaning into an ambiguous statement or distort the record.

His decision was inconsistent with the intent of the Legislature and citizens of New Jersey in establishing the NJRC. By its structure, the Independent Member was intended to be a nonpartisan figure that could resolve disputes between the Democratic Delegation and the Republican Delegation, and is afforded with the extraordinary power to choose between the delegations by casting a tie-breaking vote. At the same time, if the Independent Member reaches an impasse between the delegations' proposals, the Constitution specifies a process under which the two maps receiving the greatest number of votes are certified to the Supreme Court for a selection.

New Jerseyans expect - and this Court should interpret the Constitution to require - that the State's Congressional districts are adopted based upon a record established at a constitutionally-

required public meeting. This would ensure that redistricting decisions are made in accordance with the Constitution's intent and not on an arbitrary, capricious, or unreasonable basis.

Because the Democratic Delegation cannot defend the substance of Chair Wallace's remarks (and therefore outright ignore them in their statement of facts), they attempt to argue that they were procedurally superfluous. They write that Chair Wallace was "under no obligation to explain why he selected a map," "protected from disclosing his reasoning," "free to select either map for any reasoning," and that his "reasoning should not matter." (Db32). They also claim that this Court cannot consider Chair Wallace's motives in voting to adopt the Democratic map. (Db32).

Even if one accepts the Democrats' argument that Chair Wallace was not "obligat[ed]" to and "protected from disclosing" his reasoning, this argument fails because Chair Wallace did explain his reasoning. His reasoning does "matter" because it constitutes the full understanding (or lack thereof) that New Jerseyans possess about how the State's redistricting maps were adopted for the next 10 years. The Democratic Delegation wants this Court to disregard Chair Wallace's comments so that their map can be affirmed, but those remarks will assuredly not be ignored by a concerned New Jersey citizenry that has been deprived of a constitutionally fair process for the selection of a redistricting map.

Because Chair Wallace's remarks were made and failed to satisfy any modicum of judicial review, the NJRC's adoption of a Congressional map must be vacated, and the matter remanded to the NJRC for further deliberations in accordance with Article II, Section 2, Paragraph 9 of the New Jersey Constitution.

**D: Other state courts of last resort have applied an "arbitrary and capricious" standard to redistricting and invalidated redistricting maps.**

Contrary to the Democratic Delegation's opposition, the Supreme Court of New Jersey would not be taking an unprecedented action by invalidating the NJRC's map. Rather, such an action would accord with numerous other state courts of last resort that have applied an "arbitrary and capricious" standard to redistricting maps and invalidated adopted maps on state law grounds.

Months ago, the Supreme Court of Colorado considered an original jurisdiction challenge to the Congressional map adopted by the new Colorado Independent Congressional Redistricting Commission. In re Colo. Indep. Cong. Redistricting Comm'n, 497 P.3d 493, 503 (Colo. 2021). The Colorado Supreme Court applied an "abuse of discretion" standard of review that it enunciated by citing case law from challenges to governmental action unrelated to redistricting. Ibid. (citations omitted). Under this standard, the Colorado Supreme Court held:

We must approve the Plan unless we find that the commission . . . abused its direction in applying or failing to apply the criteria in

section 44.3, in light of the record before the commission. Under this standard, the Commission abuses its discretion if it applies an erroneous legal standard or if no competent evidence in the record supports its ultimate decision, such that its decision can only be explained as an arbitrary and capricious exercise of authority. In conducting our review, we consider the record before the Commission, including any alternative maps submitted to the Commission. The ultimate question for this court is not whether the Commission adopted a perfect redistricting plan, or even the best plan among the options presented to it; rather, we examine whether the final adopted plan fell within the range of reasonable options the Commission could have selected consistent with section 44.3 and in light of the record before it.

[Ibid.]

This case demonstrates another state court of last resort reasonably administering a deferential standard to redistricting to ensure that an independent commission's decision is not arbitrary or capricious.

There are also numerous instances in which other state courts of last resort have invalidated redistricting maps. See, e.g., League of Women Voters v. Commonwealth, 178 A.3d 737, 740 (Pa. 2018) (invalidating plan adopted by legislature as a "partisan gerrymander" in violation of Pennsylvania Constitution's Free and Equal Elections Clause); Legislative Research Comm'n v. Fischer, 366 S.W.3d 905, 908 (Ky. 2012) (invalidating adopted plan because it "fails to achieve sufficient population equality" and "fails to



preserve county integrity" in violation of state constitution); In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597, 683-86 (Fla. 2012) (finding map violated state constitutional requirements requiring analysis of minority vote dilution and respect for municipal boundaries of political subdivisions); In re 2011 Redistricting Cases, 274 P.3d 466,467-68 (Alaska 2012) (rejecting redistricting plan because map-drawers ignored state law requirements in effort to comply with federal Voting Rights Act); Holt v. 2011 Legislative Reapportionment Comm'n, 38 A.3d 711, 718 (Pa. 2012) (holding that plan adopted by commission divided more political subdivisions than necessary in violation of state constitutional requirement and was insufficiently compact and contiguous); Twin Falls Cnty. v. Idaho Comm'n on Redistricting, 271 P.3d 1202, 1203 (Idaho 2012) (invalidating redistricting plan because it divided more counties than necessary in violation of state constitution); In re Reapportionment of the Colo. Gen Assembly, 332 P.3d 108, 109 (Colo. 2011) (invalidating adopted plan as "not sufficiently attentive to county boundaries" in violation of state constitution); In re Legislative Districting of the State, 805 A.2d 292, 325-29 (Md. 2002) (invalidating redistricting plan because it violated state constitutional requirement that "due regard" be given to natural and political subdivision boundaries); Hartung v. Bradbury, 33 P.3d 972, 986-87 (Ore. 2001) (invalidating state redistricting

plan because of probability it violated state constitution's equal population requirement due to Secretary of State's use of inaccurate data).

In sum, the case law from sister jurisdictions establishes and demonstrates the important role for state courts of last resort in reviewing adopted redistricting maps and vacating them if they fail judicial review. This Court should follow these other jurisdictions and apply judicial review to reverse the NJRC's arbitrary and capricious action.

**E: Plaintiffs' claims are not barred by the political question doctrine.**

This Court's power and obligation to afford judicial review of Chair Wallace's decision under an appropriate standard of review is not abated by the political question doctrine.

In the 1981 decision of Gilbert v. Gladden, this Court evaluated the political question doctrine, which it established as "primarily a function of the separation of powers." 87 N.J. 275, 281 (1981) (quoting Baker v. Carr, 369 U.S. 186, 210 (1962)). The doctrine is "a principle shared by many other states as well as the federal government" and its "purpose is to safeguard the 'essential integrity'" of each branch of government. Ibid. "Deciding whether a matter presents a nonjusticiable political question is a 'delicate exercise in constitutional interpretation' for which this Court is responsible as the ultimate arbiter of the

Constitution of this state.” Id. at 282. In Gilbert, and subsequently in De Vesa v. Dorsey, 134 N.J. 420 (1993), this Court embraced the factors that were set forth by the United States Supreme Court in the seminal Baker holding:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

[Id. at 282 (quoting Baker, 369 U.S. at 217)].

“To justify dismissal based on nonjusticiability, one of these criteria must be inextricable from the facts and circumstances of the case in question.” Ibid.

The political question doctrine does not apply to this case for three reasons. First, the NJRC Amendment does not provide that the NJRC’s decisions are political questions, while other constitutional amendments so expressly provide. Second, this Court is given a unique grant of original jurisdiction, so there is no textual commitment solely to another branch of government. Third,

this case does not involve a political question over partisan gerrymandering, but instead involves arbitrary and capricious decision making.

- i. The plain language of the NJRC Amendment does not provide that the NJRC's determinations are political questions - unlike other constitutional amendments.**

The first factor under the political question doctrine is "whether a specific constitutional provision has been textually committed to one of the political branches." De Vesa, 134 N.J. at 430. This requires a "clear textual commitment to a coordinate political branch." Ibid.

The NJRC Amendment was adopted by the Legislature in 1992. The Legislature could have - but it did not - immunize the NJRC's decisions from judicial review as nonjusticiable political questions. By comparison, during the same term that the Legislature approved the NJRC, the Legislature and voters approved the Recall Amendment to the New Jersey Constitution. SCR-51 (1992); ACR-19 (1993). It required the Legislature to enact a law allowing voters to recall any elected official in the State, and it notably prevents any judicial review of the justification for a recall: "The sufficiency of any statement of reasons or grounds procedurally required shall be a political rather than a judicial question." N.J. Const. art. I, ¶ 2(b). The interpretative statement that was placed before voters in the general election highlighted

this provision: "The amendment also provides that the reasons for a recall election shall be a political question, so that the courts cannot set aside a recall on the grounds that the reasons for it are in some way inadequate." (Pa15).

The Legislature and voters also adopted a constitutional amendment establishing the Council on Local Mandates in 1995, which was approved by voters. SCR-87 (1995). It requires the Legislature to establish a "Council on Local Mandates" to resolve disputes on whether State legislation constitutes an unfunded mandate upon municipalities. N.J. Const. art. VIII, § 2, ¶ 5(b). Notably, the constitutional provision provides that "[t]he decisions of the Council shall be political and not judicial determinations." Ibid.

These constitutional amendments demonstrate that the Legislature knew it possessed the power to immunize the NJRC's adoption of a Congressional map from judicial review by rendering its determinations as nonjusticiable political questions - but it chose not to do so. Instead, the Legislature did the opposite - by vesting this Court with original jurisdiction over redistricting, the only such provision of its kind in our Constitution.

The plain language of the NJRC Amendment - especially when evaluated alongside these two other constitutional amendments that were enacted during the same time period - demonstrate that the NJRC's adoption of a Congressional map is not immune from review under the New Jersey Constitution.

- ii. The political question doctrine has been applied when a governmental action is constitutionally entrusted to another branch of government - distinguishable from the NJRC Amendment.**

When this Court applies the political question doctrine, it relies on a provision of the New Jersey Constitution that entrusts power solely to a different branch of government. This is distinguishable from the NJRC Amendment, which specifically affords this Court with original jurisdiction over redistricting, N.J. Const. art. II, § 2, ¶ 7, and specifically allows it to invalidate the NJRC's adopted map. N.J. Const. art. II, § 2, ¶ 9.

In De Vesa, 134 N.J. at 423, this Court heard a facial challenge to the New Jersey Senate's exercise of senatorial courtesy. The Court found the challenge nonjusticiable, noting that the advice and consent power was committed to the Senate under the Constitution, and "[m]issing from the Constitution is any role for the judiciary." Id. at 430. The Appellate Division has similarly applied the political question doctrine to challenges involving the New Jersey Senate's quorum rules, recognizing the chamber's constitutional authority to "determine the rules of its proceedings," In re Gilmore, 340 N.J. Super. 303, 311 (App. Div. 2001), and the Governor's solicitation of advice from the New Jersey Bar Association on judicial nominations, in light of the Governor's sole constitutional power to nominate and appoint

judges. Loigman v. Trombadore, 228 N.J. Super. 437, 442-43 (App. Div. 1988).

The NJRC's actions are distinguishable from these past applications of the political question doctrine because the NJRC Amendment specifically affords this Court with jurisdiction to hear challenges over the NJRC's adoption of a Congressional map. In the other instances, our courts were asked to apply judicial review over sections of the Constitution that afford powers to other branches of government - and do not afford jurisdiction to this Court.

For these reasons, the NJRC Amendment's textual commitment to the judiciary of the power to review its actions demonstrates the inapplicability of the political question doctrine.

**iii. The nonjusticiability of partisan gerrymandering under the political question doctrine is not applicable to this case.**

Contrary to the Democratic Delegation's contentions, this case does not involve partisan gerrymandering, which the United States Supreme Court has held to be a nonjusticiable political question.

In Rucho v. Common Cause, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2484, 2491 (2019), the Court heard a case challenging North Carolina's and Maryland's adoption of "unconstitutional partisan gerrymanders." The case required the Court to determine "whether claims of excessive partisanship in districting are 'justiciable'—that is,

properly suited for resolution by the federal courts.” Ibid. The Court conducted a lengthy analysis about partisan gerrymandering, the different political considerations that are made in redistricting, and the different legal standards proffered by the objectors to resolve partisan gerrymandering claims. See id. at 2499-2506. The Court concluded that “partisan gerrymandering claims present political questions beyond the reach of the federal courts.” Id. at 2506. At the same time, the Court noted that claims of excessive partisan gerrymandering may still be resolved upon state statutory or constitutional grounds. Id. at 2507.

The Democratic Delegation contends that Rucho renders Plaintiffs’ claims non-justiciable. They also attempt to manufacture a political question from materials outside the pleadings, specifically referencing First Amendment-protected speech by individual members of the Republican Delegation. However, Plaintiffs’ amended complaint does not contain any cause of action alleging an improper partisan gerrymander that would allow the political question doctrine to apply. Rather, it challenges Chair Wallace’s arbitrary, capricious, and unreasonable decision to select the Democratic map out of “fairness” because the Republicans “won” in the last redistricting cycle.

Chair Wallace’s on-the-record decision was not based upon a differentiation between the Democratic and Republican proposals that may be subject to the political question doctrine. The



political question doctrine only prevents courts from resolving matters in which a legal standard cannot be discerned. The "arbitrary and capricious" legal review standard that Plaintiffs are advocating is reasonable and avoids any implication of the Court having to resolve a political question. See supra Section I(B). For these reasons, the political question doctrine is inapplicable and does not prevent this Court from adjudicating Plaintiffs' claims.

**II: CHAIR WALLACE'S AMPLIFICATION MUST BE REJECTED.**

After Plaintiffs filed the instant Complaint, this Court entered the Amplification Order. In response, Chair Wallace provided the Court and parties with his Amplification Statement. While Plaintiffs respect this Court's effort to obtain clarification of the troubling record that is under review in this action, Plaintiffs respectfully contend that it would be unconstitutional and inappropriate for this Court to consider the Amplification Statement in an effort to affirm the NJRC's actions.

**A: The Amplification Statement violates the Constitution's public meeting requirement.**

The Amplification Statement impermissibly attempts to supplement the record from a proceeding that the New Jersey Constitution requires to be public.

The Amplification Order was issued by the Court "by analogy to Rule 2:5-1(b)." The referenced Rule allows a "trial judge,

agency, or officer" to "file . . . an amplification of a prior statement, opinion or memorandum made either in writing or orally and recorded . . ." Ibid. However, unlike trial judges, agencies, or executive branch officers, who may render decisions in private, the State Constitution specifically requires the NJRC to take its action to adopt a Congressional map at a public meeting. Paragraph 3 of the NJRC Amendment provides that the NJRC's certification of Congressional districts must take place when "convened in open public meeting, of which meeting there shall be at least 24 hours' public notice." N.J. Const. art. II, § 2, ¶ 3.

This requirement is analogous to the statutory Open Public Meetings Act ("OPMA"), N.J.S.A. 10:4-6 et seq., which requires public bodies to provide "adequate notice" of 48 hours for public meetings.<sup>7</sup> The OPMA sets forth the Legislature's salutary goals that are consistent with the NJRC Amendment's public meeting requirement:

The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancement and proper functioning of the democratic process;

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<sup>7</sup> While the NJRC's bylaws state that the OPMA does not apply to it, the NJRC's bylaws nonetheless provide that any required public meeting must be conducted with public notice "in accordance with the Constitution and the 'adequate notice' provision of . . . [OPMA]." (Da31). Thus, it is appropriate to interpret the NJRC Amendment in para materia with OPMA for purposes of the NJRC's required public meeting for the adoption of a Congressional map.

that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.

[N.J.S.A. 10:4-7].

Actions that violate the OPMA's open public meetings requirement may be voided through a complaint in lieu of prerogative writs. N.J.S.A. 10:4-15. In turn, the Rules require that a complaint in lieu of prerogative writs be filed with a request to order transcripts, which constitutes the record below and "ordinarily controls." See R. 4:69-4; Pressler & Verniero, Current N.J. Court Rules, cmt. 5.2 on R. 4:69-4 (2022).

It is unconstitutional for this Court to affirm the NJRC's actions based upon the Amplification Statement. This statement was drafted by Chair Wallace in private, to the exclusion of all other NJRC commissioners and the public. This means that no commissioner had an opportunity to discuss the Amplification Statement, ask questions, or question its accuracy. It was also written in direct response to this litigation, which creates a perverse incentive to take a position that would support affirmance - whether or not the

explanation contained in the Amplification Statement accurately depicts Chair Wallace's rationale at his time of decision.

Crediting this statement would be antithetical to the Legislature's purpose of allowing the public to access public meetings "to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies." N.J.S.A. 10:4-7. If the Amplification Statement is relied upon, this Court would regrettably foster the ends that the Legislature has sought to avoid, namely "secrecy in public affairs [that] undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society." Ibid.

It would be entirely inconsistent with the NJRC's public meeting requirement - and erode the public's confidence in its institutions - if this Court affirmed the NJRC's action based in any part upon the Amplification Statement. The NJRC Amendment's public meeting requirement requires that this Court disregard the Amplification Statement and remand this matter, so that the appropriate actions may be entered at a public meeting in accordance with the New Jersey Constitution.

**B: The Amplification Statement violates Plaintiffs' federal and state procedural due process rights.**

The New Jersey Constitution required the NJRC to adopt a Congressional redistricting map at a public meeting with public

notice. Plaintiffs' procedural due process rights under both the federal and state constitutions will be violated if this Court credits the Amplification Statement, which was written outside of a constitutionally-required public meeting, in an attempt to affirm an action that was required to be taken publicly.

In Doe v. Poritz, this Court held:

The United States Constitution provides that no State shall deprive any person of life, liberty, or property, without due process of law. U.S. CONST. amend. XIV, § 1. Article 1, paragraph 1 of the New Jersey Constitution does not enumerate the right to due process, but protects against injustice and, to that extent, protects values like those encompassed by the principle of due process.

[142 N.J. 1, 99 (1995) (quotation omitted)].

"In interpreting the State Constitution, we 'look to both the federal courts and other state courts for assistance . . . [but] [t]he ultimate responsibility for interpreting the New Jersey Constitution is ours.'" Id. at 104 (quoting Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985)). "In fulfilling that responsibility, 'we have generally been more willing to find State-created interests that invoke the protection of procedural due process than have our federal counterparts.'" Doe, 142 N.J. at 104 (quoting New Jersey Parole Bd. v. Byrne, 93 N.J. 192, 208 (1983)).

The minimum requirements of due process are notice and the opportunity to be heard. Id. at 106 (citation omitted). To

determine the protections necessary, a court must examine the following factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

[Id. at 107 (quotation omitted)].

This Court has further articulated that under New Jersey law, even if strict application of a due process analysis did not operate to require a hearing, considerations of fundamental fairness would apply to require protections:

New Jersey's doctrine of fundamental fairness "serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental *procedures* that tend to operate arbitrarily. [It] serves, depending on the context, as an augmentation of existing constitutional protections or as an independent source of protection against state action."

[Id. at 108 (quotation omitted) (emphasis in original)].

Fundamental fairness is "an integral part of due process" that is "often extrapolated from or implied in other constitutional guarantees." State v. Miller, 216 N.J. 40, 71 (2013) (quotation omitted). The doctrine is an "elusive concept" and its "exact boundaries are undefinable." State v. Yoskowitz, 116 N.J. 679,

704-5 (1989). The Court further explained that "[t]his unique doctrine is not appropriately applied in every case but only in those instances where the interests involved are especially compelling. Doe, 142 N.J. at 108. Courts have also engaged in a broad review of due process and "have not been satisfied with enforcement of naked constitutional right, but have gone further to strike down arbitrary action and administrative abuse and to insure procedural fairness in the administrative process." Avant v. Clifford, 67 N.J. 496, 520 (1975); see also Byrne, 93 N.J. at 207-08.

The United States Supreme Court has held that each citizen has "a constitutionally protected right to vote, and to have their votes counted." Reynolds v. Sims, 377 U.S. 533, 555 (1964) (quotations omitted). This Court has similarly recognized that "the right to vote has taken its place among our great values. . . . It is the citizen's sword and shield. 'Other rights, even the most basic, are illusory if the right to vote is undermined.'" Gangemi v. Rosengard, 44 N.J. 166, 170 (1965) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).

Our Constitution recognizes New Jersey's solemn obligation to carry out the right to vote for federal office by drawing the State's Congressional districts, and it assigns this duty to the NJRC and this Court. Plaintiffs, along with all of the NJRC's commissioners, and this Court, play a unique role in making

decisions to uphold the right of all New Jersey citizens to vote and have equal federal representation in the House of Representatives.

If the Court were to consider the Amplification Statement at all, it violates Plaintiffs' procedural due process rights to have the NJRC's determination made "pursuant to a majority vote of the full authorized membership of the commission convened in open public meeting, of which there shall be at least 24 hours' public notice." N.J. Const. art. II, § II, ¶ 3. By crediting the Amplification Statement, it would deprive Plaintiffs of any opportunity to respond to the ultimate reasons that are utilized to affirm the NJRC's action, such as providing any responsive arguments or facts which may influence the Independent Member or Democratic Delegation members.

For these reasons, federal and state constitutional procedural due process require that the Amplification Statement not be considered by this Court.

**C: Even if considered, the Amplification Statement impermissibly contradicts the record below and demonstrates that the decision under review remains arbitrary, capricious, and unreasonable.**

Even if this Court considers the substance of Chair Wallace's Amplification Statement, it impermissibly presents new contentions that contradict the record below and introduces new standards that the NJRC's 12 partisan commissioners were told were not effective.



Thus, Chair Wallace's decision - even when "amplified" - remains arbitrary, capricious, and unreasonable.

The Court's Amplification Order requested that Chair Wallace provide a "more detailed statement of reasons" to assist the Court, by analogy to Rule 2:5-1(b). In turn, Rule 2:5-1(b) provides that that the "trial judge, agency or officer, may file . . . an amplification of a prior statement, opinion or memorandum made either in writing or orally . . ." According to a dictionary definition, "amplify" means "to expand (something, such as a statement) by the use of detail or illustration or by closer analysis." Amplify, Merriam-Webster.com Dictionary (2022).

"While a judge may correct findings previously made by way of a supplemental statement, the fact-finding obligation cannot be met merely by filing a supplemental opinion under this rule where there was no prior opinion to supplement." Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 2:5-1(b) (2022) (quotations omitted).

In In re J.R., 244 N.J. Super. 630 (App. Div. 1990), the trial judge simply struck a phrase "or should have known" from his opinion in an amplification, but did not materially alter the factual or legal findings. In In re Proposed Quest Academy Char., 216 N.J. at 390, the Commissioner provided a greater explanation beyond what was essentially a form letter, but nothing contradicted the order or opinion already issued. In Ming Yu He v. Miller, 207

N.J. 230 (2011), one of only two cases where the Court has referenced the Rule, the trial judge amplified the prior opinion to explain his finding at trial why the economic damages could not be separated from non-economic damages. The amplification explained the underlying decision; it did not add new facts or law, nor did it contradict the previous opinion.

In a recent unreported decision, Wells Fargo Bank v. Hauke, A-3366-18, 2020 N.J. Super. Unpub. LEXIS 732 (App. Div. Apr. 23, 2020), the Appellate Division upheld the use of an amplification pursuant to Rule 2:5-1(b) because the defendant "failed to identify any portion of the judge's amplification that was inconsistent with the prior oral rulings." Id. at \*5. Thus, the panel implied that if the defendant had demonstrated an inconsistency, then the amplification would have been rejected.

Such a construction is consistent with the principle that actions challenging government action pursuant to an action in lieu of prerogative writs are limited to the record below. Kempner v. Edison Twp., 54 N.J. Super. 408, 417 (App. Div. 1959); Green Acres of Verona, Inc. v. Verona, 146 N.J. Super. 468, 470 (App. Div. 1977) (governing body should review the local rent control board's decision "based upon a transcribed record made before the board" and the court should review the local action "on that record without new testimony").

Instead of explaining why the party that "won" last time was a valid reason for selecting a map, pursuant to the Court's Amplification Order, Chair Wallace instead took the opportunity to offer new reasons - which were unstated at the Public Meeting - for selecting the Democratic map. The contents of the Amplification Statement are invalid and still render Chair Wallace's decision arbitrary, capricious, and unreasonable.

First, Chair Wallace now states that he considered "Partisan Fairness" calculations that favor the Democratic Delegation, writing that, "Upon reflection, I realize I mistakenly failed to consider my team's evaluation of Partisan Fairness of the maps." (Pa6). This statement is in direct contradiction to his public statement that "because neither delegation used these tests, I have decided not to give any weight to them in making my decision." (Da78). Chair Wallace's use of the term "reflection" also demonstrates that his stated reasoning does not "amplify" his decision at the time of the NJRC's action, and is instead a new ex post facto line of reasoning that he developed. It would be improper for this Court to affirm an action that was required to be taken at a public meeting, based upon a new line of reasoning that was devised in private solely in response to litigation.

Second, Chair Wallace himself concedes that "[his] team did not inform each delegation that [his team] would use [the Partisan Fairness] tests to evaluate their maps." (Pa5-6). These included

"social science accepted" techniques, likely from the external Princeton Gerrymandering Project, which were never elaborated upon by Chair Wallace's counsel in his disclosure of the applicable standards Chair Wallace would consider. (Pa5-6, 10-14). Chair Wallace's decision remains arbitrary and capricious when evaluated based upon Partisan Fairness tests that neither delegation was informed would be used, and that Chair Wallace advised on the record should not be used, but that he retroactively decides are relevant in response to litigation. In other words, this Court cannot reasonably affirm New Jersey's Congressional districts based upon metrics that were never made available to 12 of the 13 members of the NJRC and publicly disregarded by Chair Wallace, only to be promoted by him in a written response to litigation.

Third, while it does not appear as if Chair Wallace is offering this as a separate stand-alone reason, Chair Wallace now states that he credits the Democrats' "presentation" and that it "helped to reinforce [his] decision to select their map." Again, this statement is entirely inconsistent with the record below, where Chair Wallace did not even reference any of these presentations, and instead stated that "[e]ach member has been extremely considerate throughout the process and responded positively to the many comments my team proposed in an effort to make a good map even better." (Da76). This Court cannot credit an ex post facto statement that is entirely unsupported by the record.

Fourth, Chair Wallace writes in his Amplification Statement about his reference to "fairness" because the Republicans "won" last time:

[J]ust as the principles reflected in the Republican 2011 map produced competitive elections throughout the prior decade, I believed it would be fair to allow the Democratic principles reflected in their map to attempt to do so for the coming decade.

[(Pa6)].

This statement is inconsistent with the remainder of his on-the-record decision and demonstrates the failure of Chair Wallace to articulate a consistent rational basis for his actions.

Chair Wallace states that the Republican-supported 2011 map produced competitive elections throughout the past decade. That is true. In 2012, there were six Republican and six Democrat members of Congress. Following the 2018 election, there was one Republican and eleven Democrat members of Congress. It appears that Chair Wallace now conflates the concept of partisan fairness, discussed throughout the Amplification Statement, with competitiveness, as the reason for selecting the Democratic map. Competitiveness and partisan fairness are two completely different and at times contradictory principles. Here, it is mathematically demonstrable that the Republican map produces more competitive districts than the Democratic map, as alleged in paragraph 53, and illustrated in Exhibit B to Plaintiffs' amended complaint. Therefore, if Chair

Wallace is basing his decision on the idea that the Democratic map should be selected because it will produce more competition, as requested by numerous public speakers at the NJRC's public hearings, that contention is demonstrably false and his decision would be arbitrary, capricious, and unreasonable because it is based upon a false or inconsistent rationale.

These issues demonstrate the need for Chair Wallace's Amplification Statement to be set aside and this matter remanded to the NJRC for further proceedings. A remand would allow the NJRC to reconcile newly-presented issues such as "Partisan Fairness" at an open public meeting in accordance with the Constitution, with full participation and all NJRC members able to ask questions and request copies of the subject data. Without a remand, Plaintiffs - and the people of New Jersey - are left with an Amplification Statement that opens a Pandora's box to a whole new set of data that both partisan delegations were told was not applicable - but now stands to be made applicable by judicial fiat if the Amplification Statement is utilized by this Court.

For these reasons, Chair Wallace's Amplification Statement cannot reasonably be considered by this Court, and the NJRC's redistricting map must be reversed and remanded for further proceedings as part of a transparent public process before the NJRC.

**III: THE NJRC'S ADOPTION OF THE REDISTRICTING MAP UPON CHAIR WALLACE'S FLAWED REASONING VIOLATES FEDERAL AND STATE CONSTITUTIONAL SUBSTANTIVE DUE PROCESS PROTECTIONS.**

Our courts have recognized that both the Fourteenth Amendment to the United States Constitution and Article 1, Paragraph 1 of the New Jersey Constitution provide a "substantive due process" guarantee that "protects individuals from the 'arbitrary exercise of the powers of government . . . .'" Filgueiras v. Newark Public Schools, 426 N.J. Super. 449, 469 (App. Div. 2012) (citation omitted). The NJRC's action, based upon Chair Wallace's arbitrary decision, violates these constitutional protections.

In Winters v. Ill. State Bd. of Elections, 197 F. Supp. 2d 1110 (N.D. Ill. 2001), a federal court considered a substantive due process challenge to an Illinois state constitutional amendment establishing a bipartisan Legislative Redistricting Commission. Under the challenged provision, if the eight-member bipartisan body could not select a tiebreaker, the Illinois Supreme Court was tasked with submitting two names of individuals from different political parties to the Secretary of State, who would conduct a drawing to determine which individual would serve as the tie-breaking member. Ibid.

The District Court found that the provision must be evaluated for compliance with the Fourteenth Amendment's substantive due process guarantee - and that the legal issue involved the proper standard of review to be applied. Id. at 1113. It noted that the

United States Supreme Court "now uses a 'more flexible standard' when a state election law impacts the right to vote, adjusting the rigorousness of the inquiry depending on the extent to which the challenged regulation burdens Fourteenth Amendment rights." Ibid. (citation omitted).

The Court held that the Supreme Court's "more generic substantive due process analysis" would apply, resulting in rational basis review. Id. at 1114. Under rational basis review, "substantive due process requires only that [the governmental action] be rationally related - in other words, that it not be completely arbitrary and lacking any connection - to a legitimate government interest." Ibid. Under this standard, "a state is given broad latitude, its decisions subject only to the minimum requirements of the Fourteenth Amendment that they not be arbitrary, capricious, or unreasonable." Id. at 1116. The Winters court found that the Illinois tie-breaker provision satisfied rational basis review, because it was designed to "give both political parties an incentive to compromise because neither side would want to risk losing the random drawing." Id. at 1114.

The Winters case demonstrates that the NJRC's adoption of a Congressional map under Chair Wallace's reasoning must be evaluated for compliance with substantive due process. Even when affording a deferential rational basis review, it fails that test. There was no legitimate government interest advanced by Chair



Wallace when he unilaterally decided that "fairness" required the Democratic map to prevail because the Republicans "won" last time. Regrettably, the decision was completely arbitrary, constituting a federal and state constitutional violation.

The lack of any legitimate governmental interest supporting Chair Wallace's decision is confirmed by the structure of the NJRC Amendment, which does not seek to have a political stalemate resolved by a drawing, like in Illinois. Rather, in the event of an impasse, Chair Wallace could have (and should have) abstained, which would have allowed the two partisan delegations to vote for their maps and afford this Court with jurisdiction to select "whichever of the two plans so submitted conforms most closely to the requirements of the Constitution and laws of the United States." N.J. Const. art. II, § 2, ¶ 3. There was no governmental interest served by Chair Wallace preventing a deadlock from being submitted to this Court for resolution under the foregoing standard and instead choosing the Democratic map upon an arbitrary and indefensible basis. This is especially true considering Chair Wallace himself conceded that both submitted maps satisfied his criteria.

For these reasons, the NJRC's action based upon Chair Wallace's flawed reasoning fails to satisfy rational basis review under a substantive due process analysis and must be vacated.

**IV: CHAIR WALLACE POSSESSED A COMMON LAW CONFLICT-OF-INTEREST WITH HIS WIFE DONATING TO A NEW JERSEY MEMBER OF CONGRESS SUBJECT TO THE NJRC'S REDISTRICTING DETERMINATION.**

In 2021, Chair Wallace's wife made a reportable campaign contribution to Congresswoman Bonnie Watson Coleman's re-election campaign. Because Congresswoman Watson Coleman is one of twelve elected officials whose political fortunes and job security are directly impacted by the NJRC's redistricting determinations, this Court should interpret the common law to find that Chair Wallace had a conflict of interest that prevented him from serving as the Independent Member or voting to adopt the NJRC's Congressional redistricting map under review.

In Wyzykowski v. Rizas, 132 N.J. 509, 522 (1993), this Court established that it possesses prerogative writ jurisdiction to supervise governmental tribunals and apply the common law to ensure "a fair and impartial tribunal," resulting in the common law conflict of interest. At common law, a "public official" is disqualified from participating in proceedings when "the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body." Id. at 523 (citation omitted). "The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case." Ibid. (quotation omitted). "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." Ibid. (quotation omitted).

This Court recognized several instances that require disqualification. Id. at 526. These include where a public official has an "indirect pecuniary interest," when one "votes on a matter that financially benefits one closely tied to the official, such as . . . [a] family member," and a "[d]irect personal interest," which is applicable when one "votes on a matter that benefits a blood relative or close friend in a non-financial way, but a matter of great importance." Id. at 525.

New Jersey conflict of interest case law has recognized the unique interplay between an individual and their spouse: "The relationship between spouses is normally such that one who must make a decision as an officeholder is potentially subject to the same influences and pressures, whether that officeholder or his or her spouse is financially involved in the transaction." Kenny v. Byrne, 144 N.J. Super. 243, 256 (App. Div. 1976). To this end, our State's ethics statutes - which supplement the common law - prohibit an individual from participating in matters that present a conflict to his or her spouse. See, e.g., N.J.S.A. 40A:9-22.5(d) (Local Government Ethics Law prohibits local officials from acting where "a member of his immediate family . . . has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment"

(emphasis added)); N.J.S.A. 52:13D-13 (applies State Ethics Act to spouse/domestic partner/civil union partner and children, parents, or siblings living in same household).

The Code of Judicial Conduct imposes further restrictions to prevent judges from rendering decisions in which their impartiality may be called into question. To this end, Code of Judicial Conduct Rule 3.17 requires disqualification when a judge's "impartiality or the appearance of impartiality may be questioned." (Pa18). This includes but is not limited to subsection (B) (3) (c), which provides that "[j]udges shall disqualify themselves if . . . the judge's spouse . . . has an interest in the litigation, including among other things, a financial interest in an enterprise related to the litigation." (Pa19).

Plaintiffs filed an amended complaint after learning from public news accounts that Chair Wallace's wife made a reportable campaign contribution of \$250 to Bonnie Watson Coleman for Congress.<sup>8</sup> Plaintiffs did not make the decision to amend their complaint lightly, but this was not a random donation to any political campaign as the Democratic Delegation seeks to contend. Instead, it was a campaign donation to (and thus a financial

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<sup>8</sup> The news article is appended to Plaintiffs' amended complaint as Exhibit C. (Da145). It also references a 2011 campaign contribution in the amount of \$4,500 from Hon. Watson Coleman to Ms. Wallace's campaign as a Democratic candidate for mayor.

interest in) one of New Jersey's 12 sitting representatives in the United States House of Representatives, the only people whose political prospects and job security are uniquely and directly tethered to the NJRC's redistricting decision.

In his capacity as Independent Member, Chair Wallace had the most powerful role of any New Jersey citizen with respect to the State's Congressional redistricting process. He was able to cast the tie-breaking vote in favor a redistricting plan favoring either the Democratic Party or the Republican Party. In the action under review, Chair Wallace voted for the map favoring the Democratic Party under arbitrary reasoning, which directly improved Congresswoman Watson Coleman's prospects for re-election - a cause that his wife financially supports.

It is within the province of this Court to determine if Chair Wallace's wife's donation constitutes a common law conflict of interest. Under any fair reading of New Jersey's case law, it is clear that a public official cannot participate in a matter in which they have an indirect pecuniary interest or a direct personal interest. The case law also makes clear that a spouse's activities are imputed to the individual for purposes of conflict-of-interest analysis.

Given the unique and significant role of the Independent Member, this Court's application of the common law should be informed by the Code of Judicial Conduct. This is a reasoned

interpretation, considering the Independent Member is constitutionally required to not hold public or party office for five years, and that the individual is tasked with "independent[ly]" resolving the State's redistricting between the Republican and Democratic delegations. This unique role under our Constitution is akin to serving impartially as a judge. When viewed in this context, the donation by Chair Wallace's wife to a sitting member of Congress who is subject to the NJRC's redistricting determination clearly calls into question Chair Wallace's "impartiality," and thus his participation would violate the CJC.

For these reasons, Chair Wallace possessed a common law conflict of interest by participating as the Independent Member of the NJRC, while his wife had made a campaign donation to a New Jersey member of Congress directly impacted by her husband's redistricting determinations. The NJRC's adoption of a Congressional map upon the pivotal vote of Chair Wallace must be vacated, and Chair Wallace should be recused from any further proceedings due to his conflict of interest.

On remand, the NJRC may function as a twelve-member body. The Democratic Delegation and Republican Delegation can be afforded a finite period of time to determine if they can achieve a bipartisan adoption of a Congressional map. If the parties reach an impasse, the NJRC Amendment prescribes a process by which two maps can be certified to this Court for adoption.

Finally, it should be noted that the Democratic Delegation's brief does not even attempt to defend the propriety of Chair Wallace's participation despite his wife's donation to Congresswoman Watson Coleman. Instead, the Democratic Delegation resorts to ad hominem attacks in a failed attempt to argue that "two wrongs make a right." They point to political campaign donations by members of the Republican Delegation. But the Democrats fail to recognize that none of these donations were to one of New Jersey's 12 members of Congress that are directly impacted by the NJRC's redistricting decision - nor are the partisan members of the NJRC expected to exhibit political "independen[ce]" like the Independent Member. The Democratic Delegation also raises donations by the brother of the Republican Delegation's proffered Independent Member, but an adult brother that does not live in the same household is clearly distinguishable from a spouse under conflict-of-interest law. See N.J.S.A. 52:13D-13 (State Ethics Act applies to individual's spouse and not siblings residing in a different household).

Finally, the Democratic Delegation cited cases involving the disqualification of counsel that are distinguishable. In the cited case of Chattin v. Cape May Greene, Inc., 243 N.J. Super. 590, 609 (App. Div. 1990), the Appellate Division affirmed the trial court's denial of a motion to disqualify a party's counsel because they "unduly delayed raising the issue until shortly before the retrial,

even though it was aware of the facts relevant to the alleged conflict for several years.” The panel also cited a case that denied a request to disqualify counsel “on the eve of trial.” Ibid. (citing Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201 (1988)).

These cases both involve the disqualification of counsel, which is distinguishable from litigation asserting a conflict of interest by a public official. Also, these cases involved litigants sitting on rights for an extended period of time. In this case, the parties did not enter litigation until December 30, 2021, and Plaintiffs raised the conflict-of-interest issue soon after on January 5, 2022, prior to a responsive pleading being filed. Defendants fail to mention any way that they have been prejudiced by Plaintiffs raising the conflict-of-interest issue when they did in this litigation, because they have not been impacted whatsoever.

For these reasons, Chair Wallace possessed a common law conflict of interest, requiring that the NJRC’s adoption of a Congressional map be vacated, and that this matter be remanded for further proceedings with Chair Wallace recused.

**V: THE REPUBLICAN DELEGATION HAS STANDING.**

In both of their submissions, the Democratic Delegation claims that the Republican Delegation lacks standing to bring the instant action. Their legal arguments are entirely based upon citations to federal case law, which is distinguishable from standing under New Jersey law.



New Jersey's "standing jurisprudence has always evidenced an approach that is less rigorous than the federal standing requirements." N.J. Dep't of Env'tl. Prot. v. Exxon Mobil Corp., 453 N.J. Super. 272, 290 (App. Div. 2018). "[A] liberal approach to standing to seek review of administrative actions applies in this state, an approach that is less rigorous than the federal standing requirements." In re Camden County, 170 N.J. 439, 448 (2002).

Unlike the Federal Constitution, there is no express language in New Jersey's Constitution confining our judicial power to actual cases and controversies. Nevertheless, we will not render advisory opinions or function in the abstract nor will we entertain plaintiffs who are mere intermeddlers, or are merely interlopers or strangers to the dispute.

[Id. at 448-49 (citing Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York, 58 N.J. 98, 107-08 (1971) (alterations omitted)].

"To possess standing in a case, a party must present a sufficient stake in the outcome of the litigation, a real adverseness with respect to the subject matter, and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." Id. at 449. Even when the question of standing is "debatable, the action will be permitted to proceed if resolution of the issues raised is in the public interest." Pressler & Verniero, Current N.J. Court Rules, cmt. 2.1 on R. 4:26-1 (2022) (citation omitted).

Plaintiffs are six individuals, appointed pursuant to the Constitution, who carried out their constitutional duties by spending countless hours preparing for, traveling to, and attending over a dozen public meetings that were held by the NJRC, including the Public Meeting at which the NJRC's action is placed under review. Plaintiffs are adverse to the NJRC's adoption of a Congressional map, considering it was adopted over their uniform dissent in a 7-6 vote. They have suffered harm, as they were appointed by public office and party office officials to represent the Republican Party's interests, and expended significant efforts, yet their interests were stymied by the arbitrary, capricious, and unreasonable decision making of Chair Wallace. Plaintiffs are the opposite of "interlopers" or "strangers" - instead they are the people closest to the instant dispute. And resolution of the instant dispute over New Jersey's redistricting for the next decade is well within the public interest.

Under New Jersey's "liberal" approach to standing, it is clear that Plaintiffs have standing to challenge the NJRC's actions, and the Democratic Delegation's argument must be rejected.

#### **CONCLUSION**

For the foregoing reasons, the Republican Delegation respectfully requests that: (1) the NJRC's adoption of a Congressional map on December 22, 2021 be vacated; (2) this Court

provide an appropriate period of time for the NJRC to conduct further proceedings in accordance with N.J. Const. art. II, § 2, ¶ 9; (3) Chair Wallace be recused from further proceedings due to a common law conflict of interest; (4) the Democratic Delegation's motion to dismiss be rejected; and (5) such other relief that the Court deems just and proper.

Respectfully submitted,

KING MOENCH HIRNIAK & COLLINS LLP

/s/ Matthew C. Moench

MATTHEW C. MOENCH

MICHAEL L. COLLINS

Attorneys for Plaintiffs

January 11, 2022

**Via Hand Delivery and Electronic Mail**

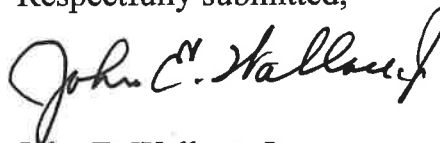
Heather J. Baker, Clerk  
Supreme Court of New Jersey  
Hughes Justice Complex  
25 W. Market Street  
P.O. Box 970  
Trenton, NJ 08625-0970

**Re: In the Matter of Establishment of Congressional Districts by the New Jersey Redistricting Commission  
Docket No. 086587**

Dear Ms. Baker:

Enclosed kindly find an original and eight (8) copies of the Amplifications of the Chairperson of the Redistricting Commission as requested in the Court's Order of January 4, 2022.

Respectfully submitted,



John E. Wallace, Jr.,  
Chair of Redistricting Commission

JEW/mw  
Enclosure

cc: All Counsel of Record (via email)  
Stephen L. Lefelt, Esquire (via email)

SUPREME COURT OF NEW JERSEY

R-3 September Term 2021

086587

**In the Matter of Establishment of  
Congressional Districts by the New  
Jersey Redistricting Commission,**

Douglas Steinhardt, in his official  
capacity as Delegation Chair and  
Member of the New Jersey  
Redistricting Commission, Michele  
Albano, in her official capacity as  
Member of the New Jersey  
Redistricting Commission, Jeanne  
Ashmore, in her official capacity as  
Member of the New Jersey  
Redistricting Commission, Mark  
Duffy, in his official capacity as  
Member of the New Jersey  
Redistricting Commission, Mark  
LoGrippe, in his official capacity as  
Member of the New Jersey  
Redistricting Commission, and Lynda  
Pagliughi, in her official capacity as  
Member of the New Jersey  
Redistricting Commission,

Plaintiffs,

v.

New Jersey Redistricting Commission,  
John E. Wallace, Jr., in his official  
capacity as Chair and Member of the  
New Jersey Redistricting Commission,  
Janice Fuller, in her official capacity as

Delegation Chairwoman and Member of the New Jersey Redistricting Commission, Iris Delgado, in her official capacity as Member of the New Jersey Redistricting Commission, Vin Gopal, in his official capacity as Member of the New Jersey Redistricting Commission, Stephanie Lagos, in her official capacity as Member of the New Jersey Redistricting Commission, Jeff Nash, in his official capacity as Member of the New Jersey Redistricting Commission, Dana Redd, in her official capacity as Member of the New Jersey Redistricting Commission, and Tahesha Way, in her official capacity as New Jersey Secretary of State,

Defendants.

**Response to Order of January 4, 2022  
Requesting Amplification of Grounds for Division**

Following the filing of plaintiff's complaint in lieu of prerogative writs on December 30, 2021, the Supreme Court issued its order on January 4, 2022, requesting the Chairperson of the Redistricting Commission amplify the grounds for his decision and present that amplification to the parties and to the Court by January 11, 2022.

This is the amplification requested by the Court. Preliminary, as I am sure the Court is aware, the New Jersey Congressional Redistricting Commission ("Commission") is a political commission. The United States Supreme Court recognized that redistricting judgments are inherently political and "politics and political considerations are inescapable from districting and apportionment". Gaffney v. Cummings, 412 US 735, 753 (1973). Thus, my vote, as Chair, on the political consideration of redistricting has no greater intrinsic weight than the vote

of the other 12 Commissioners. As such courts do not generally consider political decisions.

Prior to providing the amplification requested by the Court, I want to provide some background information.

Each delegation requested that I keep my discussions with them concerning their draft maps confidential, which I did. My team provided both delegations with extensive feedback when the Commission met over four days at a hotel in Cherry Hill. Each delegation received feedback from my team and modified their maps in an effort to earn my vote. I believe that our substantial discussions resulted in each delegation presenting a final map that satisfied the majority of my written standards.

Throughout the lengthy meetings, I sought to have the delegations share their map with each other in an attempt to reach agreement on a single map. Unfortunately, the delegations rejected my efforts to share their map and sharing never occurred.

Even so, after the four days of extensive meetings the delegations agreed to meet between themselves. I made it clear that if there were any possibility of successful discussions, I would postpone the agreed to date for the final hearing. Because those discussions were unsuccessful, the final hearing was held December 22, 2021.

The unfortunate part of how the process unfolded is that neither delegation took the opportunity to share their map with the other side. It was only my team that had the opportunity to review and evaluate both maps prior to the final hearing.

To be sure, both delegations were very kind to me as each delegation sought my vote. In particular, the Republican Chairman during the last presentation of their map began the discussion by commenting that he had undertaken background research on me and noted my reputation for fairness and impartiality.

With this background in mind, I turn now to adhere to the Court's request to amplify my comments concerning my vote on redistricting.

As noted in my comments at the final hearing, I believe both maps are constitutional. They each comply with the Voting Rights Act and each meets the standards I recommended for map evaluation.

In its order of January 4, 2022, the Court referenced my comments regarding Standard 5, “No district may be formed to favor or disfavor any political party or the election of any person”. For ease of discussion I call this Partisan Fairness. This Standard is a typical anti-gerrymandering provision. To evaluate compliance with this Standard, the competition provision, and the Plan’s overall fairness normally require an assessment of Partisan Fairness.

Although I noted in my comments that my team used various statewide test to evaluate Partisan Fairness, I did not describe those tests. I do so now.

Many tests for Partisan Fairness are accepted by the social science community. They fall into two broad categories, a category based on partisan symmetry and a category based on geography.

Tests of partisan symmetry have their roots in a simple and intuitive concept of fairness: what would happen if the tables were turned? Social scientists have overwhelmingly endorsed such a concept. For example, in the ideal case, given the same statewide electoral totals, each side should win the same number of seats. Using such mathematical tests, my team determined that the Democratic plan shows superior partisan symmetry to the Republican plan.

The second category of test is to use the natural geography of the state. Modern technology allows hundreds of thousands of alternative plans to be drawn automatically, providing a way to determine what a “natural” outcome would be if plans were drawn in a party-blind manner generally following the required redistricting standards. Such an approach is called the ensemble comparison method, and is used by state courts to evaluate partisan gerrymandering claims. My team found that the Democratic plan is closer to the average of the ensemble than the Republican plan, and therefore is more “party-blind”.

If my team had discussed with each delegation that their map would be evaluated by the social science accepted partisan evaluation techniques outlined above, I would have stated that Standard 5 for Partisan Fairness tipped the scales in favor of the Democrats’ map. However, because my team did not inform each



delegation that we would use these tests to evaluate their maps, I determined that further considerations were necessary to choose a map.

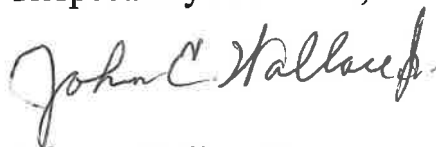
Upon reflection, I realize I mistakenly failed to consider my team's evaluation of Partisan Fairness of the maps. I should have been more concerned with the fairness to the citizens of New Jersey. Simply put, I should have stated that the Democrats' map better satisfied the standard for Partisan Fairness. I do that at this time to further support my vote in favor of the Democrats' map.

Additionally, I should have also noted that as a further reason in support of my decision in favor of the Democrats' map, I was particularly impressed in the manner and substance of the initial presentation by the Democrats of their proposed districts. Specifically, each of the six Commissioners discussed at least two proposed districts describing many of the community interest and referred to various citizen recommendations presented during the public hearings. The Republicans, on the other hand, presented their proposed districts by their experts and did not refer to public testimony to the degree the Democrats did. Thus, the Democrats' presentation helped to reinforce my decision to select their map.

In stating that I would vote for the Democrats' map because the prior map was formulated by the Republicans, I did so because just as the principles reflected in the Republican 2011 map produced competitive elections throughout the prior decade, I believed it would be fair to allow the Democratic principles reflected in their map to attempt to do the same for the coming decade.

I confirm my decision to vote in favor of the Democrats' map for the additional reasons that their map better met the standard of Partisan Fairness and the Democrats gave a more impressive presentation of the reasons for the districts, utilizing citizen testimony from the public hearings.

Respectfully submitted,



John E. Wallace Jr.,  
Chair of Redistricting Commission

Date: January 11, 2022

SUPREME COURT OF NEW JERSEY  
R-3 September Term 2021  
086587

In the Matter of Establishment  
of Congressional Districts by  
the New Jersey Redistricting  
Commission,

Douglas Steinhardt, in his official  
capacity as Delegation Chair and Member of  
the New Jersey Redistricting Commission,  
Michele Albano, in her official capacity  
as Member of the New Jersey Redistricting  
Commission, Jeanne Ashmore, in her  
official capacity as Member of the New Jersey  
Redistricting Commission, Mark  
Duffy, in his official capacity as Member of  
the New Jersey Redistricting Commission,  
Mark LoGrippe, in his official capacity  
as Member of the New Jersey Redistricting  
Commission, and Lynda Pagliughi, in  
her official capacity as Member of the New  
Jersey Redistricting Commission,  
Plaintiffs,

v.

New Jersey Redistricting  
Commission, John E. Wallace, Jr., in  
his official capacity as Chair and Member of  
the New Jersey Redistricting Commission,  
Janice Fuller, in her official capacity as  
Delegation Chairwoman and Member of the  
New Jersey Redistricting Commission, Iris  
Delgado, in her official capacity as  
Member of the New Jersey Redistricting  
Commission, Vin Gopal, in his official  
capacity as Member of the New Jersey  
Redistricting Commission, Stephanie  
Lagos, in her official capacity as Member  
of the New Jersey Redistricting Commission,

Jeff Nash, in his official capacity as  
Member of the New Jersey Redistricting  
Commission, Dana Redd, in her official  
capacity as Member of the New Jersey  
Redistricting Commission, and Tahesha  
Way, in her official capacity as New Jersey  
Secretary of State,  
Defendants.

Pending before the Court is a complaint in lieu of prerogative writs dated  
December 30, 2021, and an amended complaint dated January 5, 2022, both  
filed by plaintiffs, the Republican Party delegation of the Redistricting  
Commission, invoking the Court's original jurisdiction under Article II,  
Section 2, Paragraph 7 of the New Jersey Constitution.

Also pending before the Court is a motion to dismiss the complaint filed  
on January 11, 2022, by defendants, the Democratic Party delegation of the  
Redistricting Commission, accompanied by a forty-five-page brief.

On January 4, 2022, the Court requested that the Chairperson of the  
Redistricting Commission amplify the grounds for his decision and present  
that amplification to the parties and to the Court by January 11, 2022. The  
Court received the Chairperson's written amplification today.

It is ORDERED that the Democratic Party delegation shall serve and file  
a supplemental brief, limited to no more than fifteen pages, addressing the

impact of the Chairperson's written amplification, on or before January 14, 2022; and it is further

ORDERED that the Republican Party delegation shall serve and file an answering brief, limited to no more than sixty pages, addressing both briefs filed by the Democratic Party delegation, on or before January 21, 2022; and it is further

ORDERED that no further submissions shall be accepted unless otherwise directed by the Court.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 11th day of January, 2022.



CLERK OF THE SUPREME COURT

----- Forwarded message -----

From: **Steve Lefelt** <[leftyret1@gmail.com](mailto:leftyret1@gmail.com)>

Date: Fri, Dec 3, 2021 at 10:55 AM

Subject: Re: Invitation: Chairman Wallace, Jason Torchinsky Meeting @ Fri Dec 3, 2021 10:30am - 11:30am (EST) ([leftyret1@gmail.com](mailto:leftyret1@gmail.com))

To: <[harrisonredistricting@gmail.com](mailto:harrisonredistricting@gmail.com)>

Cc: <[jtorchinsky@holtzmanvogel.com](mailto:jtorchinsky@holtzmanvogel.com)>, John E. Wallace <[jwallace@brownconnery.com](mailto:jwallace@brownconnery.com)>

Here are the standards that we have developed. If you have any questions, please let me know. Steve

On Dec 2, 2021, at 8:48 AM, [harrisonredistricting@gmail.com](mailto:harrisonredistricting@gmail.com) wrote:

**You have been invited to the following event.**

**Chairman Wallace, Jason Torchinsky Meeting**

When Fri Dec 3, 2021 10:30am – 11:30am Eastern Time - New York

Calendar [leftyret1@gmail.com](mailto:leftyret1@gmail.com)

- Who
- [harrisonredistricting@gmail.com](mailto:harrisonredistricting@gmail.com) - organizer
  - [itorchinsky@holtzmanvogel.com](mailto:itorchinsky@holtzmanvogel.com)
  - [leftyret1@gmail.com](mailto:leftyret1@gmail.com)
  - [jwallace@brownconnery.com](mailto:jwallace@brownconnery.com)

[more details »](#)

Harrison Neely is inviting you to a scheduled Zoom meeting.

Topic: My Meeting

Time: Dec 3, 2021 10:30 AM Eastern Time (US and Canada)

Join Zoom Meeting

<https://us06web.zoom.us/j/87968716203?pwd=UnRCYTIDZXpWUINJbFd2WjRQb3o3UT09>

Meeting ID: 879 6871 6203

Passcode: 382522

One tap mobile

+13017158592,,87968716203#,,,,\*382522# US (Washington DC)

+13126266799,,87968716203#,,,,\*382522# US (Chicago)

Dial by your location

+1 301 715 8592 US (Washington DC)

+1 312 626 6799 US (Chicago)

+1 646 558 8656 US (New York)

+1 253 215 8782 US (Tacoma)

+1 346 248 7799 US (Houston)

+1 720 707 2699 US (Denver)

Meeting ID: 879 6871 6203

Passcode: 382522

Find your local number: <https://us06web.zoom.us/u/kidYQY9A0>

Going ([leftyret1@gmail.com](mailto:leftyret1@gmail.com))? [Yes](#) - [Maybe](#) - [No](#) [more options »](#)

Invitation from [Google Calendar](#)

You are receiving this email at the account [leftyret1@gmail.com](mailto:leftyret1@gmail.com) because you are subscribed for invitations on calendar [leftyret1@gmail.com](mailto:leftyret1@gmail.com).

To stop receiving these emails, please log in to <https://calendar.google.com/calendar/> and change your notification settings for this calendar.

Forwarding this invitation could allow any recipient to send a response to the organizer and be added to the guest list, or invite others regardless of their own invitation status, or to modify your RSVP. [Learn More](#).

<Mail Attachment.ics><invite.ics>

## Congressional Redistricting Standards 2021

These are the standards I suggest we pursue for the 2021 Redistricting:

1. Mapmakers shall establish 12 congressional districts that shall be geographically contiguous. In counting the total population for each district to be formed, incarcerated prisoners should be counted at their prior addresses. Districts must be as equal in population as possible to the ideal district population of 774,083 (based on total NJ population of 9,288,994).
2. Mapmakers shall comply with the Voting Rights Act and all relevant Supreme Court decisions applying the Equal Protection Clause and the Apportionment Clause. The map should include sufficient numbers of minority/majority districts and provide the racial and/or language minorities with reasonable opportunity to participate in the political processes and elect representatives of their choice whether alone or in coalition with others. Furthermore, any consideration of race

shall be only as necessary to avoid a violation of the Voting Rights Act and shall be narrowly tailored to satisfy the Act's requirements.

3. Political subdivision boundaries and communities of interest (cultural, ethnic, linguistic, economic, and religious) shall be respected. Mapmakers shall not split political subdivision boundaries and communities of interest unless necessary to achieve compliance with standards 1 or 2.

4. Competitive districts are favored so long as compliance with standards 1,2, or 3 would not be significantly hindered or impaired.

5. No district may be formed solely to favor or disfavor any political party or the election of any person.

6. To assist voters in assessing incumbents and minimizing voter confusion, districts may include the cores of existing districts, provided the new district to be formed will substantially



comply with all of the preceding standards.

7. All districts shall be as compact and regularly shaped as possible unless deviation is required to comply with any of the above standards.

1993 ELECTION RETURNS

1993 PUBLIC QUESTION

1993 QUESTION: LANGUAGE and TOTAL VOTE

Votes cast Nov. 2, 1993

Public Question No. 1

CONSTITUTIONAL AMENDMENT:  
RECALL OF ELECTED OFFICIALS

Shall Article I, paragraph 2 of the Constitution be amended, as proposed by the Legislature, to provide for the recall of elected officials?

INTERPRETIVE STATEMENT

This amendment to the Constitution permits the voters to remove elected officials, after at least one year of service, through the process of a recall election. Upon petition of registered voters, the question of whether to remove or retain an elected official may be submitted to popular vote. This applies to any elected official in this State and to the United States Senators and Congressmen elected from New Jersey. The Legislature is required to enact those laws necessary to implement the operation of this constitutional amendment. If legislation to implement this constitutional amendment is not enacted within one year of the adoption of the amendment, the Secretary of State shall, by regulation, implement the constitutional amendment, except that regulations adopted by the Secretary of State shall be superseded by any subsequent legislation consistent with this constitutional amendment governing recall elections. The amendment also provides that the reasons for a recall election shall be a political question, so that the courts cannot set aside a recall on the grounds that the reasons for it are in some way inadequate.

At present, statutory provisions make certain elected municipal and county officials subject to removal be a recall election. However, constitutional rather than statutory provisions are necessary to provide for the recall election of the Governor, members of the Legislature, U.S. Senators and Congressmen. There are presently 15 states that have a statewide recall election.

YES .....	1,326,657
NO .....	414,925

Whitman	C, (R)	3,201	887	3,324	612	3,185	798	546
Franklin Lakes		2,769	2,402	3,045	1,813	3,086	1,728	1,644
Glen Rock		4,372	2,588	4,623	1,921	4,585	1,707	1,646
Mahwah		1,817	1,014	2,102	667	2,055	647	596
Midland Park		2,883	1,779	3,353	1,129	3,187	1,164	1,126
Oakland		5,971	4,198	6,078	3,546	6,155	3,374	3,094
Ridgewood		2,103	1,830	2,345	1,371	2,292	1,286	1,217
Waldwick		2,563	1,851	2,689	1,400	2,716	1,308	1,235
Washington		5,000	1,851	2,689	1,400	2,716	1,308	1,274
Wyckoff		36,141	2,056	5,532	1,382	5,269	1,372	1,274
County Total		10,027	25,842	39,392	19,323	39,656	18,165	17,441
PASSAIC		2,780	1,645	2,697	1,358	2,720	1,332	1,307
Ringwood		1,915	1,216	1,887	872	1,877	892	873
Wanaque		5,332	2,391	5,065	1,827	5,092	1,778	1,695
West Milford		10,027	5,252	9,649	4,057	9,684	4,002	3,875
County Total		46,168	31,094	49,041	23,380	49,340	22,167	21,316
District Total								
McNair	HP, (D)	887	3,324	612	3,185	798	546	
Florida		2,402	3,045	1,813	3,086	1,728	1,644	
H.P., (D)		2,588	4,623	1,921	4,585	1,707	1,646	
O'Ron	B, (D)	1,014	2,102	667	2,055	647	596	
Felice	N.R.,	1,779	3,353	1,129	3,187	1,164	1,126	
Russo	D.C.,	4,198	6,078	3,546	6,155	3,374	3,094	
Dabr	L, (D)	5,971	2,345	2,292	2,292	1,308	1,235	
B, (D)		2,103	1,830	2,716	1,308	1,274	1,274	
Win	B, (D)	2,563	1,851	5,269	1,372	5,274	1,274	
		5,000	2,056	39,392	19,323	39,656	18,165	
		36,141	25,842	49,041	23,380	49,340	22,167	

**RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY  
CODE OF JUDICIAL CONDUCT: APPENDIX TO PART I**

Including Amendments Effective January 6, 2020

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**CANON 1**

**An independent and impartial judiciary is indispensable to justice. A judge therefore shall uphold and should promote the independence, integrity and impartiality of the judiciary**

**RULE 1.1 Independence, Integrity and Impartiality of the Judiciary**

**A judge shall participate in establishing, maintaining and enforcing, and shall personally observe, high standards of conduct so that the integrity, impartiality and independence of the judiciary is preserved. This Code shall be construed and applied to further these objectives.**

**RULE 1.2 Compliance with the Law**

**A judge shall respect and comply with the law.**

**COMMENT:**

Violations of this Code, or violations of law or court rules that reflect adversely on a judge’s honesty, impartiality, temperament or fitness constitute a failure to respect and comply with the law.

### **RULE 3.15 Responding to Judicial and Lawyer Misconduct**

**A judge has the following disciplinary responsibilities:**

**(A) A judge who receives reliable information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.**

**(B) A judge who receives reliable information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.**

**(C) Acts of a judge in the discharge of disciplinary responsibilities under this rule shall be absolutely privileged.**

**COMMENT:**

Appropriate action includes notification to the Assignment Judge, the Administrative Director of the Courts, or the proper disciplinary authority.

### **RULE 3.16 Administrative Appointments**

**(A) A judge shall not make unnecessary appointments and shall exercise the power of appointment only on the basis of merit, avoiding nepotism and favoritism.**

**(B) A judge shall not approve compensation of appointees beyond the fair value of services rendered.**

**COMMENT:**

Appointees of the judge include officials such as commissioners, receivers, guardians and personnel such as clerks and secretaries. Consent by the parties to an appointment or to the fixing of compensation does not relieve the judge of the obligation prescribed by this rule.

### **RULE 3.17 Disqualification**

**(A) Judges shall hear and decide all assigned matters unless disqualification is required by this rule or other law.**

**(B) Judges shall disqualify themselves in proceedings in which their impartiality or the appearance of their impartiality might reasonably be questioned, including but not limited to the following:**

**(1) Personal bias, prejudice or knowledge. Judges shall disqualify themselves if they have a personal bias or prejudice toward a party or a party's lawyer or have personal knowledge of disputed evidentiary facts involved in the proceeding.**

**(2) Financial interest. Judges shall disqualify themselves if they individually or as a fiduciary have a financial interest in an enterprise related to the litigation. Subject to subparagraphs (i), (ii), (iii), and (iv) hereof, a financial interest means ownership of a legal or equitable interest, however small, or a relationship as director or advisor or other participation in the affairs of a party.**

**(a) Financial interest does not include:**

**(i) ownership of an interest in securities held by a mutual fund or common investment fund, or ownership of securities held in managed funds, provided, in respect of managed funds, that no investment discretion has been retained by the judge or the judge's spouse, civil union partner, or domestic partner;**

**(ii) ownership in securities held by an educational, religious, charitable, fraternal or civic organization in which the judge holds an office;**

**(iii) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest unless there is a reasonable possibility that the value of the interest will be affected by the judge's decision;**

**(iv) ownership of an interest in government securities unless there is a reasonable possibility that the value of the interest will be affected by the judge's decision.**

**(3) Personal Relationships. Judges shall disqualify themselves if:**

**(a) the judge or the judge's spouse, civil union partner, or domestic partner, and a first cousin or more closely related relative to either of them, or the spouse, civil union partner, or domestic partner of such relative, or to the judge's knowledge, a second cousin or related relative to either of them, as defined below, or the spouse, civil union partner, or domestic partner of such relative, is a party to the proceeding or is likely to be called as a witness in the proceeding.**

**(b) the judge or the judge's spouse, civil union partner, or domestic partner, and a first cousin or more closely related relative to either of them, or the spouse, civil union partner, or domestic partner of such relative, is a lawyer for a party.**

**(c) the judge or the judge's spouse, civil union partner, or domestic partner, or any member of the judge's family residing in the judge's household has an interest in the litigation, including among other things, a financial interest in an enterprise related to the litigation.**

**(d) the judge has a social relationship with a party or the lawyer for a party of a nature that would give rise to partiality or the appearance of partiality.**

**(4) Prior Professional Relationships. Judges shall disqualify themselves based on their prior professional relationships as follows:**

**(a) In proceedings in which the judge served as a lawyer in the matter in controversy or in which the judge has been a witness or may be called as a witness;**

**(b) In proceedings in which a party was a former private client for whose matter the judge had primary responsibility, for a period of seven years from the conclusion of the representation. However, disqualification for a period of time in excess of seven years from the conclusion of the representation may be required. In making such a determination, a judge should consider, among other relevant factors: 1) the scope of the representation, including but not limited to the cumulative total of matters handled by the judge, whether a continuous fiduciary relationship existed with the client over an extended period of time, and the time that elapsed from the conclusion of the representation; 2) the duration of the representation; 3) the nature of the representation, including but not limited to whether it involved acrimonious negotiations or litigation, or whether any information relayed during the representation could cast doubt on the judge's impartiality; 4) any other serious concern arising from the representation that could cast doubt on the judge's impartiality; and 5) in respect of a corporate client, whether the principals of the entity are the same as existed during the representation.**

**(c) In proceedings in which a law firm involved in the matter previously represented the judge, the judge's spouse, civil union partner or domestic partner, for a period of three years from the conclusion of the representation. Disqualification, however, for a period in excess of three years from the conclusion of the representation may be required in certain circumstances. In making this determination, a judge should consider, among other relevant factors: 1) whether the judge, the judge's spouse, civil union partner or domestic partner maintains a professional relationship with the law firm; 2) the scope and duration of the representation; and 3) the nature of the representation, including but not limited to whether it involved acrimonious negotiations or litigation, or whether any information relayed during the representation could cast doubt on the judge's impartiality; and 4) any other serious concern arising from the representation that could cast doubt on the judge's impartiality.**

For purposes of this rule, an insurance company that had retained the judge to defend its insureds in tort actions shall not be considered a former client of the judge.

(d) In proceedings in which a party is a governmental entity that previously employed the judge:

(i) for a period of two years following judicial appointment if the judge was employed as a state government attorney, county prosecutor or assistant county prosecutor, provided, however, that prior employment as state government attorneys with broad supervisory authority shall not disqualify judges who had no actual involvement in the matter while in government service;

(ii) for a period of five years following judicial appointment if the judge represented a local government entity;

(e) In proceedings in which the judge's former law firm is involved, for a period of at least seven years following termination of the relationship or until all financial obligations from the law firm to the judge are satisfied, whichever is longer;

(f) In proceedings in which the judge's former law clerk is appearing or has signed papers, for a period of six months following the termination of the clerkship.

(5) **Post-Retirement Employment.** Judges shall disqualify themselves if the judge has initiated contact about or discussed or negotiated his or her post-retirement employment with any party, attorney or law firm involved in any matter pending before the judge in which the judge is participating personally and substantially, regardless of whether or not the discussions or negotiations lead to employment of the judge by the party, attorney or law firm;

(6) Irrespective of the time periods specified in this rule, judges shall disqualify themselves whenever the nature of the relationship to a party or a lawyer, because of a continuing social relationship or otherwise, would give rise to partiality or the appearance of partiality.

(C) A disqualification required by this rule is not subject to the parties' waiver. The judge shall, however, disclose to the parties any circumstance not deemed by the judge to require disqualification but which might be regarded by the parties as affecting the judge's impartiality.

(D) A judge shall address disqualification or issues of recusal and disqualification promptly upon recognition of grounds which would give rise to partiality or the appearance of partiality.

(E) A judge shall not be automatically disqualified upon learning that a complaint has been filed against the judge with the Advisory Committee on Judicial Conduct,

**litigation naming the judge as a party, or any other complaint about the judge by a party. If, however, after consideration by the judge whether there is a reasonable basis to question the court's impartiality, the judge may recuse himself or herself. A judge shall promptly disclose to the parties to the pending litigation that a complaint has been filed or made.**

COMMENT:

[1] Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity and impartiality of the judiciary, unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial or unpopular issues.

[2] In determining whether disqualification is necessary, the applicable standard is as follows: Would a reasonable, fully informed person have doubts about the judge's impartiality. DeNike v. Cupo, 196 N.J. 502.

[3] For purposes of this rule, as with New Jersey Court Rule 1:12-1, a "first cousin or more closely related relative" includes first cousin, aunt or uncle, niece or nephew, grandparent, grandchild, child, parent, or sibling.

A "second cousin or related relative" includes a second cousin, great aunt or uncle, first cousin once removed (e.g., a first cousin's child or a great aunt or uncle's child), great grandparent, or grandniece or grandnephew, or great grandchild.

Judges shall keep informed about their personal and fiduciary interests and make reasonable efforts to keep informed about the personal financial interests of their spouse, civil union partner, or domestic partner, and family members residing in the judge's household.

"Knowledge" means actual knowledge of the fact in question. However, knowledge may be inferred from the circumstances.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (B), or the lawyer-relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (B)(3)(c), the judge's disqualification is required.

In making such a determination, a judge should consider, among other relevant factors: (1) the degree of relationship between the judge and the relative affiliated with the firm (e.g., sister, nephew, nephew's spouse); (2) the closeness of the relationship between the judge and the relative; (3) whether the relative's affiliation with the firm was known to



the judge without counsel making the court aware of such affiliation; (4) the size of the law firm the relative is affiliated with; (5) the relative's role in the law firm (e.g., owner or equity interest holder, associate, intern); (6) the relative's relationship, if any, to the lawyer in the proceeding; (7) whether the law firm represents a named party to the action, as opposed to an entity proceeding (or seeking to proceed) as *amicus curiae*; (8) the timing of the law firm's commencement of participation in the proceeding; (9) whether the law firm is providing its services *pro bono*, if such arrangement is known by the judge; and (10) the nature of the proceedings.

Note that this comment addresses only whether a lawyer-relative renders the judge disqualified from hearing all matters involving the law firm with which the relative is affiliated. Nothing in this comment should be read to permit a judge to hear proceedings in which a lawyer in the case is related (as first cousin or closer) to the judge or the judge's spouse, civil union partner or domestic partner.

[5] In evaluating whether a judge should be disqualified from proceedings in which a party was a former private client of the judge for a period of time in excess of seven years from the conclusion of the representation, judges should be guided by DeNike v. Cupo, 196 N.J. 502.

[6] A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this rule; judges formerly employed by governmental agencies, however, should disqualify themselves in a proceeding if their impartiality might reasonably be questioned because of the association.

[7] With regard to Rule 3.17(B)(4)(c)(ii), a municipal court judge who was a former municipal prosecutor in the same municipality may preside over local ordinance violations.

[8] A judge may not initiate contact about or discuss or negotiate his or her post-retirement employment with any party, attorney or law firm involved in any matter pending before the judge in which the judge is participating personally and substantially. A matter pending before the judge includes any matter or aspect of a matter which has not been completed, even if only the performance of a ministerial act remains outstanding, such as signing a consent order or a similar order. If the subject is raised in any fashion, the judge must put a halt to the discussion or negotiation at once, rebuff any offer, and disclose what occurred on the record in the presence of all parties and counsel. The judge, all parties and attorneys on the record should then evaluate objectively whether any further relief is needed.

A judge who engages in post-retirement employment negotiations or discussions while still on the bench with any party, attorney or law firm that does not have a matter pending before the judge, must do so in a way that minimizes the need for disqualification, does not interfere with the proper performance of the judge's judicial duties, and upholds the integrity of the courts. A judge should delay starting any such negotiations or discussions

until shortly before his or her planned retirement, and should discuss post-retirement employment opportunities with the fewest possible number of prospective employers. A judge should also inform the Appellate Division Presiding Judge for Administration or Deputy Presiding Judge for Administration, his or her Assignment Judge, or the Tax Court Presiding Judge about the post-retirement employment negotiations or discussions to the extent that such negotiations or discussions will interfere with the judge's regular assignments.

A judge should not initiate contact about or discuss or negotiate his or her post-retirement employment with a party, attorney or law firm that has in the past appeared before the judge until the passage of a reasonable interval of time, so that the judge's impartiality in the handling of the case cannot reasonably be questioned. What is reasonable depends on the circumstances. For instance, it may be that an uncontested matter resolved swiftly by entry of a default judgment would not call for a lengthy interval of time. Prolonged or particularly acrimonious litigation may caution in favor of a longer delay. Actions likely to result in continuing post-judgment matters would also warrant a lengthier intervening period of time.

[9] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[10] The provision in Rule 3.17(C) is designed to avoid the possibility that a party or lawyer will feel coerced into consent.

**Note:** Adopted August 2, 2016 to be effective September 1, 2016; subparagraph (B)(4)(b) amended, new subparagraph (B)(4)(c) adopted, and subparagraphs (B)(4)(c), (B)(4)(d), and (B)(4)(e) redesignated as subparagraphs (B)(4)(d), (B)(4)(e), and (B)(4)(f) January 6, 2020 to be effective immediately.

## **CANON 4**

**A judge may engage in activities to improve the law, the legal system and the administration of justice**

### **RULE 4 Activities Related to the Judicial Function**

**A judge, subject to the proper performance of judicial duties, may engage in the following related activities if in doing so the judge does not cast doubt on the judge's capacity to decide impartially any issue that may come before the court and provided the judge is not compensated therefor:**

*Wells Fargo Bank v. Hauke*

Superior Court of New Jersey, Appellate Division

March 25, 2020, Submitted; April 23, 2020, Decided

DOCKET NO. A-3366-18T2

**Reporter**

2020 N.J. Super. Unpub. LEXIS 732 \*; 2020 WL 1950770

WELLS FARGO BANK, NATIONAL ASSOCIATION, as Trustee for Certificate Holders of Bear Stearns Asset Backed Securities I LLC, Asset-Backed Certificates, Series 2007-AC6, Plaintiff-Respondent, v. PAUL HAUKE, Defendant-Appellant, and MRS. PAUL HAUKE, his wife, and SOPHIE HENRY, Defendants.

**Notice:** NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY [RULE 1:36-3](#) FOR CITATION OF UNPUBLISHED OPINIONS.

**Prior History:** [\*1] On appeal from the Superior Court of New Jersey, Chancery Division, Ocean County, Docket No. F-015317-17.

**Counsel:** Paul R. Hauke, appellant, Pro se.

Parker Ibrahim & Berg LLP, attorneys for respondent (Ben Zev Raindorf and Robert D. Bailey, on the brief).

**Judges:** Before Judges Mayer and Enright.

## Opinion

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PER CURIAM

Defendant Paul Hauke appeals from the following: a March 16, 2018 order denying his motion to vacate default entered in favor of plaintiff Wells Fargo, National Association, as Trustee for Certificate Holders of Bear Stearns Asset Backed Securities I LLC, Asset-Backed Certificates, Series 2007-AC6 (Bank); orders dated June 8, 2018, August 3, 2018, and October 12, 2018 denying reconsideration of the March 16, 2018 order; a January 25, 2019 order overruling defendant's objection to the Bank's motion for Final Judgment; a February 15, 2019 order denying reconsideration of the January 25, 2019 order; and a February 27, 2019 Final Judgment. We affirm all orders on appeal.

The facts are undisputed. In June 2007, defendant executed a note in the amount of \$550,000. The note was secured by a mortgage on defendant's property in Point Pleasant. The Bank became an assignee of the note and

mortgage through a valid [\*2] assignment. Defendant defaulted on payments due under the note as of June 1, 2008.

The Bank mailed the required notice of intent to foreclose to defendant at the mortgaged premises and a post office box provided by defendant more than thirty days prior to filing a foreclosure action. On June 21, 2017, the Bank filed its foreclosure complaint.

The Bank claimed defendant evaded attempts to personally serve the foreclosure complaint. The Bank then served the foreclosure complaint on defendant by regular and certified mail directed to the mortgaged premises and the post office box used by defendant. The Bank filed a certification of diligent inquiry with the trial court, detailing the efforts made to personally serve the complaint upon defendant and the mailing of the documents to defendant by regular and certified mail. Because defendant failed to timely answer or respond to the Bank's foreclosure complaint, on January 23, 2018, the court entered default.

On February 12, 2018, defendant moved to vacate default.<sup>1</sup> In a March 16, 2018 order, the judge denied defendant's motion. The judge then denied defendant's three subsequent motions seeking reconsideration of the March 16, 2018 order.

In October [\*3] 2018, the Bank applied for entry of final judgment. Defendant objected to the amount the Bank claimed to be due on the note. In a January 25, 2019 order, the judge rejected defendant's objection to the amount due and owing to the Bank and returned the matter as uncontested to the Office of Foreclosure for entry of a final judgment. Defendant sought reconsideration of the January 25, 2019 order, which the judge denied. A Final Judgment was entered on February 27, 2019.

Defendant appealed. Upon receipt of defendant's notice of appeal, on May 6, 2019, Judge Francis R. Hodgson, Jr. issued a thirty-page, single-spaced amplification of his prior oral decisions pursuant to [Rule 2:5-1\(b\)](#).

The following are defendant's arguments on appeal:

*POINT I*

THE TRIAL COURT DID ERR AND ABUSE IT[S DISCRETION BY DENYING DEFENDANT'S MOTION TO VACATE THE JANUARY 2, 2018 DEFAULT.

- i. The court improperly denied [d]efendant's [m]otion[] to vacate the January 2, 2018 default.
- ii. Defendant-Appellant did demonstrate good cause under *R.J*:4:43 to justify vacating the default in this matter and reverse the Entry of Final Judgment.
- iii. Defendant-Appellant has complied with *R.J*:4:43 by fully articulating legally recognized defenses [\*4] to the underlying foreclosure action as required to justify vacating such an improperly entered default.

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<sup>1</sup> The Bank sent the notice of default by regular mail to the mortgaged premises where defendant resides.

*POINT II*

HONORABLE JUDGE HODGSON, JR. ERRED IN REGARD TO HIS "TILA"<sup>2</sup> RULING. DEFENDANT/APPELLANT'S "TILA" ARGUMENT ESTABLISHES NOT ONLY A VALID COUNTERCLAIM BUT A MERITORIOUS DEFENSE.

*POINT III*

DEFENDANT/APPELLANT DOES NOT NEED MERITORIOUS DEFENSES, EVEN THOUGH HE HAS THEM, TO REVERSE A DEFAULT WHEN DUE PROCESS IN SERVICE HAS NOT BEEN EFFECTED.

*POINT IV*

THE LEGAL STANDARD ON A MOTION FOR RECONSIDERATION AS PER *R.J.*4:49-2 HAS BEEN MET.

*POINT V*

JUDGE AMPLIFICATION IMPROPER AS IT IS FILED LATE AND NOT IN ACCORDANCE WITH *R.J.*2:5-1(b) AND IS NOT JUST AN AMPLIFICATION BUT IS A WRITTEN OPINION STATING FACTS AND CONCLUSIONS THAT ARE NOT PART OF THE RECORD. IT SHOULD NOT BE CONSIDERED.

*POINT VI*

LACHES IS A MERITORIOUS DEFENSE.

Having reviewed the record, we affirm all orders on appeal substantially for the reasons expressed in the thorough and well-stated May 6, 2019 written amplification provided by Judge Francis R. Hodgson, Jr., as well as his reasons placed on the record on March 13, 2018; June 8, 2018; August 3, 2018; October 12, 2018; January 25, 2019; and February 15, 2019. We add only the following [\*5] comments.

[Rule 2:5-1\(b\)](#) allows a trial judge to supplement a prior opinion, providing fifteen days from receipt of a party's notice of appeal to "file and mail to the parties an amplification of a prior statement, opinion or memorandum made either in writing or orally and recorded pursuant to *R[ule]* 1:2-2." Defendant contends the amplification was untimely because it was served thirteen days beyond the time period set forth in [Rule 2:5-1\(b\)](#). He also argues the judge's amplification "stat[ed] facts and conclusions that are not part of the record."

We reject these arguments. There is nothing in the Court Rules, or case law, that prevents this court from considering a trial judge's amplification filed beyond the fifteen-day timeframe. Here, defendant suffered no prejudice as a result of the brief delay in service of the judge's amplification because defendant received the letter

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<sup>2</sup> Truth in Lending Act (TILA), [15 U.S.C. §§ 1601 to 1667f](#).

several months prior to filing his merits brief. In addition, defendant failed to identify any portion of the judge's amplification that was inconsistent with the prior oral rulings.

The remainder of defendant's arguments lack sufficient merit to warrant discussion in a written opinion. *R. 2:11-3(e)(1)(E)*.

Affirmed.

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