NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

BARBARA GONZALEZ, individually and as founder of the Bayshore Tea Party Group; ROBERT A. GORDON, individually and as Chairman of the Bayshore Tea Party Group; CONNIE J. SHERWOOD, CLARK SHERWOOD, NANCY PETERSON and TED PETERSON, individually and as leaders of the Ocean County Citizens for Freedom; DARYL BROOKS, JOSEPH ABBRUSCATO, ANTOINETTE DELGUIDICE, FRANK GONZALEZ, LYNN GORDON, BRIAN HEGARTY, HELENE HENKEL, SHELLY KENNEDY, CHARLES DRAKE MEASLEY, WILLIAM HANEY, DEBBIE SUTTON, PETER MICHAEL CARROLL, JIM LESKOWITZ, KELLY ANN HART, ADRIANNE S. KNOBLOCH, VINCENT AVANTAGIATO, PAUL ALBANESE, AL FRENCH, LINDA SHUTE, MICHAEL PIERONE, DANIEL BIRINGER, CATHERINE V. GIANCOLA, EDWARD J. SIMONSON, FRANK COTTONE, MICHELE TALAMO, CAROL J GALLENTINE, DOUGLAS SALTERS, MARY LOGAN, EDWARD AUWARTER, SUSAN LORD, JOHN ANDREW YOUNG and BRENDA ROAMES,

Plaintiffs,

and

RICHARD J. McMANUS, ESQUIRE

Plaintiff/Intervenor,

v.

STATE OF NEW JERSEY APPORTIONMENT COMMISSION; NILSA CRUZ-PEREZ, JOHN CRYAN, SHEILA OLIVER, ALAN ROSENTHAL, PAUL SARLO, JOHN WISNIEWSKI, in their official Capacity as Members of the State of New Jersey Apportionment

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MERCER COUNTY

DOCKET No.:MER-L-1173-11

CIVIL ACTION

OPINION

Commission; KIM GUADAGNO, in her official capacity as Secretary of State of the State of New Jersey; PAULA DOW, in her official capacity as Attorney General of the State of New Jersey, ROBERT F. GILES, in his official capacity as Director, Division of Elections of the State of New Jersey

Defendants.

Decided: August 31, 2011

Russell E. Cote, for the plaintiffs (Mr. Cote, on the brief).
John W. Wopat, III, for the plaintiff/intervenor (Efros & Wopat, attorneys; Mr. Wopat, on the brief).

Genova, Burns & Giantomasi, The Law Offices of William J. Castner, Jenner & Block, LLP, for the defendants the State of New Jersey Apportionment Commission, Nilsa Cruz-Perez, Joseph Cryan, Sheila Oliver, Paul Sarlo and John Wisniewski (Angelo J. Genova, Celia S. Bosco, William J. Castner and Michael DeSanctis, on the brief).

Paul M. Smith (Jenner & Block, LLP) of the Washington, D.C. bar, admitted pro hac vice, attorney for the defendants the State of New Jersey Apportionment Commission, Nilsa Cruz-Perez, Joseph Cryan, Sheila Oliver, Paul Sarlo and John Wisniewski (Mr. Smith, on the brief).

Paula T. Dow, Attorney General, for the defendants Secretary of State Kim Guadagno, Attorney General Paula T. Dow and Robert F. Giles, Director of the New Jersey Division of Elections (George N. Cohen, D.A.G., of counsel and on the brief).

Ronald K. Chen, for the defendant Dr. Alan Rosenthal (Constitutional Litigation Clinic, Rutgers School of Law, attorneys; Mr. Chen, on the brief).

FEINBERG, A.J.S.C.

I.

INTRODUCTION

This matter comes before the court on an order to show cause and a verified complaint brought by multiple registered voters in various counties throughout the State of New Jersey—many of whom are either members of the Ocean County Citizens for Freedom or involved with the Tea Party[1]—against the State of New Jersey Apportionment Commission and other defendants.[2] Plaintiffs challenge the legislative apportionment map approved

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[1] Plaintiffs are: Barbara Gonzalez; Robert A. Gordon, Connie J. Sherwood, Clark Sherwood, Nancy Peterson, Ted Peterson, Daryl Brooks, Joseph Abbruscato, Antoinette Delguidice, Frank Gonzalez, Lynn Gordon, Brian Hegarty, Helene Henkel, Shelly Kennedy, Charles Drake Measley, William Haney, Debbie Sutton, Peter Michael Carroll, Jim Leskowitz, Kelly Ann Hart, Adrianne S. Knobloch, Vincent Avantagiato, Paul Albanese, Linda Shute, Miachael Pierone, Daniel Biringer, Catherine V. Giancola, Edward J. Simonson, Frank Cottone, Michele Talamo, Carol J. Gallentine, Douglas Salters, Mary Logan, Edward Auwarter, Susan Lord, John Andrew Young, Brenda Roames (collectively, "plaintiffs"). According to the verified complaint, filed on May 11, 2011, among the plaintiffs are Democrat, Republican, Third-Party (such as the Tea Party), and unaffiliated voters.

[2] Defendants are: the State of New Jersey Apportionment Commission (the Commission); Nilsa Cruz-Perez, John Cryan, Sheila Oliver; Alan Rosenthal; Paul Sarlo; and John Wisniewski—all in their official capacity as members of the Commission—Kim Guadagno, in her official capacity as Secretary of State of the State of New Jersey; Paula Dow, in her official capacity as Attorney General of the State of New Jersey; and Robert F. Giles, in his official capacity as Director of the Division of Elections of the State of New Jersey.

by the Commission by a 6-5 vote on April 3, 2011 (hereinafter "Commission map"). According to plaintiffs, the Commission and the Map violate the Federal and New Jersey Constitutions.

Essentially, plaintiffs claim Commission Democrats engaged in unlawful "gerrymandering a map that will lock in one-party control of the New Jersey Legislature for the next decade." (Pls. Br. in Support of Amended Order to Show Cause ("Pls. Support Br.") at 4-5, filed May 11, 2011.) This allegedly resulted in dilution of votes which effectively "nullifies the votes of the entire Southern half of the State as well as New Jersey's two largest municipalities, Newark and Jersey City." (Id. at 5.)

In response, defendants assert: (1) the Commission's process for weighing the many factors in developing and approving the Map fully complied with all applicable Federal and State constitutional and statutory requirements; (2) the Map itself is completely devoid of any constitutional or other legal infirmities; and (3) plaintiffs' objection is premised on the Map's alleged failure to recognize unaffiliated or third-party voters. The Commission defendants have filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Co-defendant Rosenthal filed a separate brief joining that motion.

On June 27, 2011, Richard J. McManus, Esq. ("McManus"), filed a motion to intervene as a plaintiff in this matter. In the certification submitted in support of that motion, McManus argues his interests are not adequately represented by existing plaintiffs in two ways. First, he claims plaintiffs should have brought this action under R. 4:69 (actions in lieu of prerogative writs) as was done in prior challenges to Commission decennial plans, rather than under R. 4:52 (verified complaint and order to show cause seeking temporary restraints). Second he argues "nothing in [the Daveneport line of cases] or in [Schrimminger v. Sherwin, 60 N.J. 483 (1972)] . . . prevent[s] the Commission from considering a redistricting plan, such as the "People's Plan" for state legislative elections," which was submitted to the Commission by Tea Party members.

Defendants filed an opposition to the motion to intervene and McManus filed a reply.

II.

BACKGROUND

A. THE COMMISSION AND THE 2011 REAPPORTIONMENT MAP

The state Legislature has exercised its authority to delegate the responsibility to redraw New Jersey's State legislative districts. Article 4, Section 3, Paragraphs 1-3 of the New Jersey Constitution, provides for the creation of a

legislative Apportionment Commission and sets forth the parameters for the Commission's operation. Those constitutional provisions state as follows:

> 1. After the next and every subsequent decennial census of the United States, the Senate districts and Assembly districts shall be established, and the senators and members of the General Assembly shall be apportioned among them, **by an Apportionment Commission consisting of ten members, five to be appointed by the chairman of the State committee of each of the two political parties whose candidates for Governor receive the largest number of votes at the most recent gubernatorial election. Each State chairman, in making such appointments, shall give due consideration to the representation of the various geographical areas of the State . . .** The Commission, by a majority of the whole number of its members, shall certify the establishment of Senate and Assembly districts and the apportionment of senators and members of the General Assembly to the Secretary of State . . . .
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> **2. If the Apportionment Commission fails so to certify such establishment and apportionment to the Secretary of State on or before the date fixed or if prior thereto it determines that it will be unable so to do, it shall so certify to the Chief Justice of the Supreme Court of New Jersey and he shall appoint an eleventh member of the Commission. The Commission so constituted, by a majority of the whole number of its members, shall, within one month after the appointment of such eleventh member, certify to the Secretary of State the establishment of Senate and Assembly districts and the apportionment of senators and members of the General Assembly.**

> **3.** Such establishment and apportionment shall be used thereafter for the election of members of the Legislature and shall remain unaltered until the following decennial census of the United States for New Jersey shall have been received by the Governor.
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> [N.J. Const., art. IV, § 3, ¶¶ 1-3 (emphasis added).]

In the present case, the Republican and Democrat candidates received the most votes in the last New Jersey gubernatorial election. Thus, five members of the Commission in question were Republicans and five were Democrats. Because the Commission reached an impasse on or about March 4, 2011, it certified that fact to Chief Justice Stuart Rabner of the New Jersey Supreme Court. Pursuant to Article 4, Section 3, Paragraph 1 of the New Jersey Constitution, Chief Justice Rabner then appointed Dr. Alan Rosenthal, as the eleventh member of the Commission. Dr. Rosenthal's name was the only name that appeared on the three-person nomination lists submitted by the Democrat and Republican delegations. (Compl. ¶ 62.)

On April 3, 2011, defendants Nilsa Cruz-Perez, Joseph Cryan, Sheila Oliver, Paul Sarlo, and John Wisniewski—all Democrats—joined Rosenthal in voting to adopt the Map. On that same date, the five Republican members of the Commission——Jay Webber, Kim Asbury, Geroge R. Gilmore, Kevin O'Toole, and Bill Palatucci——voted against adopting the legislative Map. Thus, the

Map in question was approved by a 6-5 vote. On April 3, 2011, the New Jersey Apportionment Commission approved a legislative redistricting Map based on the results of the 2010 decennial U.S. Census.

Article VI, Paragraph 1 of the Commission's by-laws requires the Commission to hold a minimum of three public meetings before approving a redistricting map.[3] In the present case, the Commission held seven public meetings. Four of the meetings were held prior to the appointment of Rosenthal as the eleventh member; three were held after Rosenthal's appointment.

In addition to those public meetings, the Commission also held several private meetings at the Heldrich Hotel in New Brunswick, New Jersey. After Rosenthal was appointed, the Democrat and Republican delegations to the Commission each submitted several proposed maps to Rosenthal during such private meetings.

The Bayshore Tea Party Group sent Rosenthal a letter requesting a meeting. In this communication, they expressed concerns regarding the input of non-partisan voters in New Jersey in the Commission's consideration process. It also represented that the Bayshore Tea Party Group would be

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[3] Pursuant to N.J.S.A. 10:4-7, the Apportionment Commission is exempt from the requirements of the Open Public Meetings Act.

submitting a proposed redistricting map for the Commission's review.

In a letter dated March 17, 2011, Rosenthal denied the request for a private meeting. Instead, in the letter, Rosenthal thanked the group for its invitation and stated that: "[a] public process has been established by the commission in order to give all members of the public the same opportunity to bring their input and concerns to the commission's attention."

Plaintiffs allege that:

> certain individuals and/or groups, not members of the Apportionment Commission, were selectively provided access to the private meetings at the Heldrick and/or provided draft maps for review. The Bayshore Tea Party Group was not provided such access or provided draft maps for review. Upon information and belief, not all members of the public were provided "'the same opportunity' to bring their in their input and concerns to the Commission's attention.'"
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> [(Compl. ¶ 73.)]

According to plaintiffs, the Commission, "both in its structure and application," failed to provide any representation to the 45 percent of New Jersey voters who are unaffiliated or third-party voters. (Id. at ¶ 74.)

III.

PROCEDURAL HISTORY

On April 21, 2011, plaintiffs filed a verified complaint and order to show cause seeking preliminary and final injunctive relief in Ocean County Superior Court, Chancery Division. The case was subsequently transferred to Mercer County Superior Court – Law Division.

On April 28, 2011, plaintiffs filed a verified complaint and order to show cause seeking preliminary and final injunctive relief. An amended verified complaint was filed on May 11, 2011 and on May 26, 2011, plaintiffs filed an amended order to show cause seeking interim restraints, as well as preliminary and final injunctive relief.

On May 26, 2011, the court held a telephone conference with all the parties to consider plaintiffs' application for temporary restraints and injunctive relief. After considering the submissions and arguments of counsel, consistent with the standards set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), on the same date, the court entered an order: (1) denying plaintiffs' application for temporary restraints; (2) ordering that defendants submit an opposition brief to plaintiffs' order

to show cause by June 24, 2011; and (3) setting August 19, 2011 for the order to show cause hearing.[4]

On August 18, 2011, this court heard arguments from counsel regarding: (1) the order to show cause or injunctive relief; (2) the defendants' motion to dismiss; and (3) the motion to intervene brought by McManus.

The court rejected the notion that the interests of McManus were not adequately represented by the existing plaintiffs. See R. 4:33-1 (intervention as of right). Instead, the court held that McManus satisfied the standard for permissive intervention. It noted that: (1) no objection was made to permissive intervention; and (2) McManus's participation would be limited to the same arguments set forth in the complaint.

The court denied preliminary injunctive relief, finding that based on the allegations in the complaint: (1) plaintiffs were not likely to succeed on the merits for many of the same reasons the court denied temporary restraints in the May 26, 2011 order to show cause; (2) the absence of irreparable harm; and (3) in weighing the respective equities, defendants interests in proceeding with the election process outweigh the

[4] At the request of the parties and with the court's permission, the order to show cause hearing was rescheduled for Thursday, August 18, 2011.

interests of plaintiffs. See Crowe v. DeGioia, 90 N.J. 126 (1982).

While the court recognized the presumption of validity afforded the determination by the Commission, the court also noted that it must give every reasonable inference of fact to the allegations set forth in the complaint, as required in the context of a motion to dismiss. Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1980).

Due to the number of counts, the court provided counsel the opportunity to present their arguments on each count of the complaint, on a count-by-count basis.[5]

A. PLAINTIFFS' CHALLENGES TO THE COMMISSION'S MAP

Plaintiffs raise the following challenges to the Commission's map:

- Count 1: Article II, Section IV, Paragraph 3 of the New Jersey Constitution allegedly violates the Freedom of Association and Equal Protection Clauses of the First and Fourteenth Amendments to the United States Constitution. It purportedly does so by providing that the chairmen of the parties whose candidates received the two highest vote totals for the

[5] Importantly, after reviewing a map of the borderlines between the municipalities in Essex County, New Jersey (particularly, East Orange and Montclair) on the government website cited in defendants' brief in support of their motion to dismiss, plaintiffs withdrew Count Eight of the complaint, which raised the contiguousness claim.

preceding gubernatorial election appoint the Commission members. Because this only provides for selection by two parties for any given Apportionment Commission—in this case, Democrats and Republicans—it purportedly violates the U.S. Constitutional rights of the 45% of New Jersey voters who are unaffiliated or third-party voters, by denying such voters representation on the Commission.

Therefore, plaintiffs request: (1) a judgment declaring Article II, Section IV, Paragraph 3 of the New Jersey Constitution unconstitutional under the U.S. Constitution, particularly the Supremacy Clause, and the Freedom of Association and Equal Protection Clauses of the First and Fourteenth Amendments; (2) an injunction to restrain defendants and their employees from distributing ballots for the 2011 primary and general elections based upon the Commission Map; and (3) a judgment declaring the Commission Map unconstitutional.[6]

- Count 2 - The Commission violated the rights of plaintiffs and all unaffiliated and thirty-party voters of the State of New Jersey by depriving them the privilege and immunity of exercising their right to vote, which allegedly runs afoul of the U.S. Constitution and 42 U.S.C. 1983.

- Count III - The Commission Map violates the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, as interpreted in Reynolds v. Sims, 377 U.S. 533 (1964), which provides that "an individual's

[6] Because each count of the verified complaint requests essentially the same relief, the court describes the relief requested one time, but need not repeat it for each count.

right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."

- The Commission Map also allegedly violates McNeil v. Apportionment Commission, 177 N.J. 364 (2003), by removing two legislative districts from Newark and Jersey City, thereby over-populating districts in the Southern half of the state, specifically Districts 1 - 13 and 30. Plaintiffs claim McNeil held that Newark and Jersey City must be split into exactly three legislative districts each. (Pls. Support Br. 9.)

- In the present case, the over-packing of districts in these over-populated areas allegedly represents a total population deviation of 18.48 percent from the ideal population for those 14 districts. Plaintiffs claim an 18 percent deviation is prima facie discriminatory and much higher than the "minor deviation" of up to ten percent discussed in Brown v. Thomson, 462 U.S. 835, 842 (1983). Similarly, the Commission Map allegedly resulted in over-populating the 26 most northern districts in the State, deviating from the ideal district population by 18 percent. According to plaintiffs, the net effect was intentional dilution of the votes of those voters in the aforementioned Southern districts,

thereby violating their Equal Protection rights.

- Count 4 - The Commission Map allegedly violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by not only diluting the votes of voters in the Southern districts as discussed in Count 3, but also by complete nullification of such votes by alleged intentional gerrymandering in an attempt to lock in incumbent legislators. This violates the one-person, one-vote ("OPOV") principle established in Reynolds, supra, 377 U.S. 533.

- Count 5 - The Commission allegedly violated Article I, Paragraph 2.a of the New Jersey Constitution by vesting political power in the Democrat and Republican members of the Commission in applying purportedly "self-serving," unofficial factors when considering whether the Map was consistent with all constitutional requirements. Therefore, the Commission purportedly violated the provision in Article I, Paragraph 2.a of the New Jersey Constitution, which provides that "[a]ll political power is inherent in the people."

- Count 6 - The Commission purportedly violated Article I of the New Jersey Constitution, which provides that "people have the right [to freely assemble], consult for the common good, and make known their opinions to their representatives, and to petition for redress of grievances." Because the Commission in general, and its eleventh member, Alan Rosenthal, in particular, provided access for and held meetings with Democrat and Republican voters, while denying unaffiliated and third-party voters the same opportunity, it allegedly

violated Article I of the New Jersey Constitution.

- Count 7 - The Commission Map allegedly violates the **compactness** requirement in Article IV, Section 2, Paragraph 3 of the New Jersey Constitution, because it allowed numerous county over-splits. Specifically, plaintiffs allege the Commission Map violates the prohibition set forth in Davenport v. Falcey, 65 N.J. 125 (1974) against "carving out bizarrely-shaped districts for partisan advantage" and "tortured configurations" which "result[] in a horrendous hodgepodge." Davenport, supra, 65 N.J. at 134, 150 (Pashman J., dissenting). According to plaintiffs, the Commission Map has numerous bizarrely-shaped districts caused by over-splitting counties 31 times. More specifically, plaintiffs allege:

> Sixteen of New Jersey's 21 counties . . . are over[-]split, with seven counties over-split once, five counties over-split twice, two counties over-split three times, and two counties over-split four times . . . [and] fifteen districts . . . are divided by two counties, nine by three counties, and three by four counties. The Commission Map has several instances where districts are barely contiguous, if at all, and completely obliterates the very concept of compactness.
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> [(Pls. Support Br. 8.)]

  Plaintiffs contend the Commission should have considered the proposed map submitted by plaintiffs, which allegedly has far less county

over-splits and less bizarrely-shaped districts. (Ibid.)

- Count 8 – The Commission Map allegedly violates the **contiguousness** (contiguous territory) requirement in Article IV, Section 2, Paragraph 3 of the New Jersey Constitution, because East Orange and Montclair purportedly do not share a border, and Fieldsboro and Burlington are allegedly separated by Mansfield. (Compl. at ¶ 143.)

- Count 9 – The Commission Map violates Article IV, Section 2, Paragraph 3 of the New Jersey Constitution, because it allegedly creates 31 county over-splits, but fails to provide reasons to demonstrate why those county over-splits were "necessary" to meet the "foregoing [constitutional] requirements." See N.J. Const. art. IV, § 2, ¶ 3.

- Count 10 – The Commission violated N.J.S.A. 19:34-29—which prohibits interfering with a voter's right to freely exercise of the elective franchise—by 31 intentional county over-splits, "intentionally removing a district each from Newark and Jersey City, colluding among themselves to draw legislative district lines for partisan advantage and the protection of incumbents, and by engaging in other unlawful and constitutional practices . . . ."

Many of the counts of the complaint are based on comments by members of the Commission during the seven public meetings it held before approving the Map. The following is a list of statements from those meetings and the legal claims they allegedly support:

- At the final public hearing on April 3, 2011, at which the Map was adopted, Rosenthal stated that "New Jersey is essentially a Democrat[ic] state" and that he voted to adopt a map he believed "reflected the current distribution of partisan preferences in New Jersey."

  - Plaintiffs claim these statements demonstrate that Rosenthal engaged in partisan gerrymandering and purposefully excluded and ignored the purported 45% of New Jersey voters who are unaffiliated or third-party voters. This also denied plaintiffs their right to have the political power vested in the people, rather than in political leaders. (See Compl. ¶¶ 66-67.)

- Commission member Senator Kevin O'Toole also stated at the April 3, 2011 public meeting that "some of what you see in the Commission is very public and some of what you see is not very public."

  - Plaintiffs claim this, coupled with the denial of its request for private meetings with Rosenthal, demonstrates that there was an additional level of access provided to some people, but denied to plaintiffs and others, thereby violating plaintiffs' Equal Protection rights. (See Compl. ¶¶ 70–73.)

- At the March 10, 2011 public meeting at the Statehouse Annex in Trenton, New Jersey, Rosenthal outlined the standards to be used to guide the Commission's decision-making process regarding the redistricting. He stated that "[s]ome of these standards are specified in the

New Jersey Constitution, Article IV, Paragraph II . . . [and] [o]thers are in Section 2 of the Federal Voting Rights Act and decisions of the United States Supreme Court. A few are not legally specified but make sense from the standpoint of what I think the public interest is.”

He further stated:

> I will strive for districts that are as equal as possible, perhaps a 5% deviation – 2.5% above and 2.5% below the average district, if we can make it. No single district, I would hope, would deviate more than 10% from the norm.
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> Secondly, the New Jersey Constitution requires that there be no division of municipalities, that they – municipalities reside in one district or another and that Newark and Jersey City – which are larger in population than a single legislative district – be divided no more than . . . in[to] two parts. And that, too, I think we are generally agreed on.
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> The third standard is contiguity: that each district not be scattered in several pieces, that it be connected with itself, allowing for an occasional body of water that separates a district, like Long Beach Island. The districts we come up with will be – will meet the standard and be contiguous.
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> The fourth standard is compactness: as compact like as square, a circle,

or a rectangle as possible. Although the whole town requirement of the Constitution makes perfect compactness from district to district impossible, we will strive for as much compactness as we can reasonably get.

The fifth standard, although not specified in the New Jersey Constitution, applies to communities of interest. That's also a standard that I will be guided by. Insofar as possible in drawing district lines, we'll try to recognize social, cultural, ethnic, and economic communities of interest.

The sixth standard, also not specified in the New Jersey Constitution, is . . . continuity of representation. That means that a substantial proportion of the district's population from the old district continues in the new one. Again, if it does not conflict with more important standards, it is useful to foster as little disruption as necessary.

Seven: competitiveness is another standard that is not constitutionally or legally prescribed, and yet there is agreement on the Commission, I believe, that the apportionment should attempt to establish a number of competitive districts, recognizing that most districts, because of where partisans tend to reside, will not be competitive. My own view is that we should absolutely not reduce the

number of competitive districts and, perhaps increase the number a bit.

The eighth standard relates to Section 2 of the U.S. Voting Rights Act, which requires that minority communities be afforded an equal opportunity to participate in the political process. The Voting Rights Act, as interpreted by the Federal courts, spells out prohibitions. States have discretion as to just how they apportion, as long as they do not violate the standards laid down by Federal law and its interpretation.

. . .

[The standard] that is mainly the responsibility of the 11th member is partisan fairness. Given the Constitutional provision in New Jersey that establishes the Apportionment Commission in the process, it is clear that a major, if not the major role of the 11th member is to help resolve differences between Republican and Democratic Commissioners and arrive at a settlement that is fair to both sides. My goal is to help the Democrats and Republicans, the Commissioners, each reach agreement on a single map – I hope – that meets the standards just specified . . . .

Either way, we will all be striving to produce a plan that is constitutional, that fairly represents the populations in New

Jersey, and that makes sense as a public policy. I'll have the special job of ensuring partisan fairness that neither party comes out ahead of the other party in this enterprise. (Compl. ¶¶ 77-80.)

- Plaintiffs claim these statements demonstrate that the Commission ignored the New Jersey Constitutional provision prohibiting county splits. They also claim that the Map ultimately approved was built upon "academic principles" which were allowed to trump the redistricting requirements of the New Jersey Constitution. (Compl. ¶ 81, ¶ 85.)

- Also on April 3, 2011, Chariman Weber stated that "we have a population deviation problem in the map. Twelve of the [fourteen] southernmost districts in this map are overpopulated. [Fourteen] of the [twenty] districts in the north were under-populated. Again that means . . . when voters to go polls this year, the votes cast by people in the northern part of the State will count for more than the votes cast by the voters in the southern part of the State." (Compl. ¶ 95.)

  - Plaintiffs make this exact argument as one of the counts of their complaint.

B. **MOTION TO DISMISS**[7]

On July 5, 2011, defendants, the Commission, Nilsa Cruz-Perez, Joseph Cryan, Sheila Oliver, Paul Sarlo, and John Wisniewski, filed a cross-motion to dismiss the complaint for failure to state a claim, pursuant to R. 4:6-2(e). They also filed a brief in opposition to plaintiffs' order to show cause and in support of their cross-motion to dismiss.

On August 5, 2011, plaintiffs filed a brief in opposition to defendants' motion to dismiss and in further support of their order to show cause. It reiterates many of the arguments raised by plaintiffs in their prior submissions and discusses how the present case is similar to Larios v. Cox, 300 F. Supp.2d 1320 (N.D. Ga. 2004), aff'd Cox v. Larios, 542 U.S. 947 (2004).

On August 12, 2011, Commission defendants filed a letter brief in reply to plaintiffs' opposition to the motion to dismiss. It states that: (1) defendants rest on their previous briefs in support of the motion to dismiss and in opposition to the motion to intervene; (2) plaintiffs continue to fail to

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[7] In a letter dated May 18, 2011, Glenn Paulsen, who served as local counsel to the Republican Delegation to the Commission, informed the court that because "the entire Republican Delegation voted against the adoption of the map approved by a majority of the Commission," he would not be defending the Map in the present litigation, even though the entire Commission is named as a defendant.

allege facts that support any cognizable federal or state legal claim; and (3) plaintiffs' reliance on Larios, supra, 300 F. Supp.2d 1320, is misplaced for various reasons.

On June 24, 2011, the Attorney General's office submitted a letter brief on behalf of defendants, Secretary of State Kim Guadagno, Attorney General Paula T. Dow, and Robert F. Giles, Director of the New Jersey State Division of Elections (collectively, "Attorney General defendants," whereas the Commission and the legislators are collectively referred to as "Legislative defendants" and Dr. Alan Rosethenal is referred to as "Rosenthal"). The brief states that: (1) the Commission Map is entitled to a presumption of validity; (2) plaintiffs' claims lack merit; and (3) plaintiffs' misinterpret the current state of the law regarding the New Jersey Constitutional provisions with respect to county splits and municipal splits (particularly as to Newark and Jersey City).

C. MOTION TO INTERVENE

On June 27, 2011, Richard J. McManus, Esq. filed a motion to intervene as a plaintiff in this action. In the certification submitted in support of that motion, McManus stated intervention should be granted because his interests in the outcome of the litigation are not adequately represented by current plaintiffs, and because he would be adversely affected

if plaintiffs' claims are denied and they decide not to appeal, leaving McManus with no mechanism to appeal such a decision.

On August 10, 2011, Legislative defendants (i.e., the Commission, apart from Rosenthal), filed an opposition brief to the motion to intervene. In general, they contend McManus has failed to demonstrate he is entitled to intervention as of right.[8]

On August 16, 2011, McManus filed a reply brief reaffirming that he should be allowed to intervene in this litigation for many of the same reasons discussed in his original brief.

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[8] The arguments set forth in the opposition brief can be summarized as follows: (1) McManus has failed to establish his burden of showing he is entitled to intervention as of right, pursuant to R. 4:33-1; (2) existing plaintiffs adequately represent McManus' interests in this litigation, particularly because McManus' primary argument is that the Commission Map violates the constitutional prohibition on county splits, which is essentially the same claim raised by Count 9 of plaintiffs' complaint; and (3) well-established precedent makes clear that "the literal language in our State Constitution with respect to political boundaries for counties . . . has to be breached based on the Supremacy Clause in order to comply with federal law." McNeil, supra, 177 N.J. at 364, 380-82 (quoting Davenport II, supra, 65 N.J. at 129 (it is not possible to adhere to county lines in legislative redistricting because of the overriding goal of "substantial equality of population among legislative districts."))

Ultimately, at the August 18, 2011 oral argument, the court granted McManus permissive intervention.[9]

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[9] The New Jersey Court Rules provide two bases for intervention: intervention as of right and permissive intervention. The standard governing permissive intervention is as follows:

> [u]pon timely application[,] anyone may be permitted to intervene in an action if the claim or defense and the main action have a question of law or fact in common . . . In exercising its discretion[,] the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
>
> [R. 4:33-2.]

Comment 1 to R. 4:33-2 provides that:

> [t]he factors to be considered by the trial court in deciding an application for permissive intervention include promptness of the application, whether or not the granting thereof will result in further undue delay, whether [it] . . . will eliminate the probability of subsequent litigation, and the extent to which the grant thereof may further complicate litigation which is already complex.
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> [R. 4:33-2, Comment 1 (citing Asbury Park v. Asbury Park Towers, 388 N.J. Super. 1, 12 (App. Div. 2006).]

IV.

ANALYSIS

A. MOTION TO DISMISS

A motion to dismiss for failure to state a claim is governed by R. 4:6-2(e). R. 4:6-2 provides:

> Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses, unless otherwise provided by R. 4:6-3, may at the option of the pleader be made by motion, with briefs: . . . (e) failure to state a claim upon which relief can be granted . . . . If a motion is made raising any of these defenses, it shall be made before pleading if a further pleading is to be made. No defense or objection is waived by being joined with one or more other defenses in an answer or motion. Special appearances are superseded.
>
> [R. 4:6-2.]

Comment 4.1.1 to R. 4:6-2 provides further detail as to the standard for a motion to dismiss for failure to state a claim. It states that "the test for determining the adequacy of a pleading . . . [is] whether a cause of action is "suggested" by the facts." Comment 4.1.1. to R. 4:6-2 (quoting Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1980)). In Printing Mart, the Supreme Court explained that "[i]n reviewing a complaint dismissed under Rule 4:6-2(e), [the court's] inquiry

is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. Printing Mart, supra, 116 N.J. at 746 (citation omitted). The complaint must be searched "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned from an obscure statement of claim, opportunity being given to amend if necessary." Ibid.

The Court further stated that "at this preliminary state of the litigation, the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint." Ibid. (citations omitted). Rather, "for purposes of analysis[,] plaintiffs are entitled to every reasonable inference of fact." Ibid. (citations omitted).

Moreover, the Comment states that "a complaint should not be dismissed under [R. 4:6-2(e)] where a cause of action is suggested by the facts and the theory of actionability may be articulated by amendment of the complaint." Comment 4.1.1. to R. 4:6-2(e) (citing Printing Mart, supra, 116 N.J. at 746; citing Lederman v. Prudential Life Ins., 385 N.J. Super. 324, 349 (App. Div.), certif. den. 188 N.J. 353 (2006)). A motion to dismiss for failure to state a claim is usually "without prejudice," and "the court has the discretion to permit the plaintiff to amend the complaint to allege additional facts in

an effort to state a cause of action." Comment 4.1.1. to R. 4:6-2(e) (citations omitted).

"Clearly, however, if the complaint states no basis for relief and discovery would not provide one, dismissal of the complaint is appropriate." Comment 4.1.1. to R. 4:6-2(e) (citing Energy Rec. v. Dep't of Env. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999), aff'd o.b. 170 N.J. 246 (2001)).

B. STANDARD OF REVIEW

When reviewing a redistricting plan certified by the Commission, the role of the court is strictly defined and narrow. The New Jersey Supreme Court explained the limited role of the court in Davenport v. Apportionment Comm'n, 65 N.J. 125 (1974):

> The judicial role in reviewing the validity of such a plan is limited. Reapportionment is essentially a political and legislative process. **The plan must be accorded a presumption of legality with judicial intervention warranted only if some positive showing of invidious discrimination or other constitutional deficiency is made. The judiciary is not justified in striking down a plan, otherwise valid, because a "better" one, in its opinion, could be drawn.**
>
> [Davenport, supra, 65 N.J. at 135 (citing Gaffney v. Cummings, 412 U.S. 735 (emphasis added)).]

In Davenport the court recognized that "reapportionment is

essentially a political and legislative process," and, as such, courts must apply a deferential standard of review. Ibid. Against this backdrop, any challenges to a redistricting plan must be examined by the court using this standard of review, and the court may only intervene in the "legislative process" of creating the plan when invidious discrimination or constitutional deficiency has been proven. Importantly, the burden is on the plaintiff to establish "some positive showing of invidious discrimination or other constitutional deficiency" before the court may invalidate any portion of the plan. Davenport, supra, 65 N.J. at 135 (citations omitted).

In the present case, as set forth fully below, plaintiffs have failed to meet this burden. Even giving plaintiffs "every reasonable inference of fact," Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (citation omitted), no cause of action is "'suggested' by the facts," Comment 4.1.1. to R. 4:6-2 (quoting Printing Mart, supra, 116 N.J. at 746). Therefore, the court grants defendants' motion to dismiss the complaint for failure to state a claim and upholds the validity of the Map approved by the Commission on April 3, 2011. See Reider v. State Dept' of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (regardless of the liberal construction generally applied to complaints, "dismissal is mandated where the factual

allegations are palpably insufficient to support a claim upon which relief can be granted.”)

Plaintiffs raise ten challenges to the Commission Map based on the U.S. and New Jersey Constitutions as well as New Jersey statutes. The court addresses each of those challenges in turn below.

C. COUNT ONE

Plaintiffs allege that Article II, Section IV, Paragraph 3 of the New Jersey Constitution, establishing the Commission, violates the Freedom of Association and Equal Protection Clauses of the First and Fourteenth Amendment of the U.S. Constitution vis-à-vis unaffiliated and third-party voters in this State.[10] Inasmuch as Article IV, Section 3, Paragraph 1 of the New Jersey Constitution is inconsistent with the Federal Constitution, plaintiffs argue the state provision is invalid pursuant to the Supremacy Clause of the U.S. Constitution. Plaintiffs challenge both the establishment of the Commission as provided in that state constitutional provision, and also separately challenge the way in which the Commission functioned in this particular case.

[10] Plaintiffs incorrectly cite Article II. It should be Article IV, Section 3 and Paragraph 1.

i. <u>The Commission's Formation Does not Violate Equal Protection</u>

The court notes from the outset that in the decades of litigation over reapportionment plans, Article IV, Section 3, Paragraph 1 of the New Jersey Constitution has never been deemed unconstitutional with respect to the Commission's formation. Article IV, Section 3 of the New Jersey Constitution provides:

> 1. After the next and every subsequent decennial census of the United States, the Senate districts and Assembly districts shall be established, and the senators and members of the General Assembly shall be apportioned among them, **by an Apportionment Commission consisting of ten members, five to be appointed by the chairman of the State committee of each of the two political parties whose candidates for Governor receive the largest number of votes at the most recent gubernatorial election. Each State chairman, in making such appointments, shall give due consideration to the representation of the various geographical areas of the State . . .** The Commission, by a majority of the whole number of its members, shall certify the establishment of Senate and Assembly districts and the apportionment of senators and members of the General Assembly to the Secretary of State . . . .
>
> **2. If the Apportionment Commission fails so to certify such establishment and apportionment to the Secretary of State on or before the date fixed or if prior thereto it determines that it will be unable so to do, it shall so certify to the Chief Justice of the Supreme Court of New Jersey and he shall appoint an eleventh member of the Commission. The Commission so constituted, by a majority of the whole number of its members, shall,**

> **within one month after the appointment of such eleventh member, certify to the Secretary of State the establishment of Senate and Assembly districts and the apportionment of senators and members of the General Assembly.**
>
> **3.** Such establishment and apportionment shall be used thereafter for the election of members of the Legislature and shall remain unaltered until the following decennial census of the United States for New Jersey shall have been received by the Governor.
>
> [N.J. Const., art. IV, § 3, ¶¶ 1-3 (emphasis added).]

The language of Paragraph 1 itself belies plaintiffs' contention that the constitutional provision which establishes the creation of Commission violates Equal Protection. The clear language of the Constitution does not exclude the "45 percent of New Jersey voters who are unaffiliated and third-party voters"[11] from Commission membership.

Commission membership is not limited to any political party. To the contrary, "the chairman of the State committee of each of the two political parties whose candidates for Governor receive the largest number of votes at the most recent gubernatorial election." N.J. Const., art. IV, § 3, ¶ 1. Nowhere is there any mention of Democrat, Republican, or any other specific political party. Nowhere does the Constitution

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[11] (See Compl. ¶ 110.)

forbid the Tea Party or any other party from Commission membership, should such groups obtain the requisite number of votes in the most recent gubernatorial election. Any two parties whose gubernatorial candidates win the most votes in the election immediately before reapportionment are entitled to Commission membership.

Case law supports this proposition. For instances, this exact issue was raised in People ex rel. Scott v. Grivetti, 277 N.E.2d 881, 884 (Ill. 1971), cert. denied, 407 U.S. 921 (1972). In that case, respondents challenged an Illinois state legislative redistricting plan on grounds that it violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by vesting power to redistrict in the hands of major party leaders to the exclusion of representatives of other political parties or independent voters. In upholding the adoption of the redistricting plan, the court held the state constitutional provision, similar to the provision at issue in the present case, "neither restricts membership to the Commission to particular political parties or person claiming particular interests nor does it exclude them." (Ibid.)[12]

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[12] The Illinois Constitution provides that the entire state legislature be initially responsible for redrawing legislative lines, and a redistricting commission should be constituted if the legislature fails to do so within the constitutional timeframe. Although the New Jersey Constitution provides for

In the present case, the court reaches a similar conclusion to that of the Grivetti Court. The facially neutral language in Article IV, Section 3 of the New Jersey Constitution in no way excludes plaintiffs or their organizations from membership or participation in the Commission. As was the case in Grivetti, plaintiffs:

> [have made] no showing . . . of how the provisions in question have any legally harmful effect on [them] . . . [they] imply that unless they take part in the selection of the Legislative Redistricting Commission their interests will not be represented on the Commission with the result that any redistricting plan adopted by the Commission inevitably will discriminate against them. This argument is highly speculative and abstract and . . . does not provide any basis for a legal remedy. If every group having particular political viewpoints or alleging particular interests was required to be directly involved in the selection of the Commission or directly represented on the Commission itself, it is obvious that the group selecting the Commission and the Commission itself would reach almost boundless and unworkable proportions.
>
> [Ibid.]

That the Commission was designed to expressly recognize and reflect "the present reality of the two-party system as an organizing principle of the political process in this country,"

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the establishment of a redistricting commission from the outset, the court nonetheless finds the reasoning and similar nature of the case in Grivetti persuasive.

does not render the provision establishing the formation of the Commission discriminatory. Although plaintiffs' real complaint seems to be that the Commission's design was based upon the two-party system, rather than a totally non-partisan system, the U.S. Supreme Court has acknowledged that "reasonable election regulations . . . may . . . favor the traditional two-party system," and the fact that such regulations do so, does not render them discriminatory. Timmons v. Twin Cities Area New Party, 520 U.S. 351, 367 (1997).

ii. The Commission's Operation Does Not Violate the First or Fourteenth Amendments to the U.S Constitution

The court also rejects the argument that the Commission's actual operation violated the U.S. Constitution. Without belaboring this point, plaintiffs themselves acknowledge in the complaint that the Commission provided public meetings and reviewed the proposed map submitted by the Bayshore Tea Party Group. (See Compl. ¶ 102.) Suffice it to say, the court rejects plaintiffs' argument on this issue for the following reasons:

- The New Jersey Constitution does not require that the Commission conduct any public meetings.

- Despite this, the Commission's by-laws provide that the Commission hold three public meetings.

- In the present case, the Commission held seven public hearings: four before the appointment of Rosenthal, and three after his appointment and also allowed members of the public to submit comments via the Commission's website.

  - During those meetings, the Commission heard from hundreds of members of the public who offered comments and voiced their concerns. Among the members of the public to offer comments were the Bayshore Tea Party, and counsel for plaintiffs himself. Counsel for plaintiffs "addressed the Commission on behalf of the Bayshore Tea Party three times, on February 13, March 10, and March 16—among the most of any organizational spokesperson." (Defs. Br. at 4.)

- Plaintiffs acknowledge that the Commission by-laws do not require that the Commission review written redistricting plans or maps submitted by members of the public. (Compl. ¶ 102.) In contrast, plaintiffs cite the Article V, Paragraph 1 of the Commission Bylaws, which states "[t]he Commission **may, subject to constraints of time and convenience,** review written plans for the establishment of legislative districts submitted by members of the public." (See ibid. (emphasis added).)

- Nowhere in the Bylaws is there a requirement that the Commission consider any of the submissions from members of the public, let alone an obligation to devote exactly the same amount of time and attention to all members of the public.

- It is undisputed that the Apportionment Commission is expressly exempt from the requirements of the Open Public Meetings Act

pursuant to N.J.S.A. 10:4-7; 10:4-8; see Compl. ¶ 68.

- The U.S. Constitution "does not grant to members of the public generally a right to be heard by public bodies making decisions of policy. Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 284 (1984). No law, and particularly not the U.S. Constitution, "require[s] all public acts to be done in town meeting or an assembly of the whole." BiMetallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

- The Commission is vested with the discretion to limit public access to its meetings, and is also entitled to conduct private meetings. Therefore, it is clear that plaintiffs, who had ample opportunity to voice their concerns with the rest of the public, were not excluded or discriminated against, particularly when compared against similarly situated groups.

- The Commission did not exceed its discretion. To the extent some individuals or groups had additional "private" access to Rosenthal or the Commission, whereas plaintiffs' may not have, that was also within the Commission's discretion and does not constitute a violation of Equal Protection. Plaintiffs fail to point to any valid law or case to support their claim that despite providing everyone access to voice their concerns, failure to provide "equal time" or "equal access" violates Equal Protection principles.

- The Supreme Court stated in a plurality opinion in Vieth v. Jubelirer, 541 U.S. 267, 288 (2004), that the U.S. Constitution "guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups."

- Contrary to plaintiffs' arguments, it is well established that the Constitution "grants States broad power to prescribe the times, places, and manner of holding elections for Senators and Representatives. U.S. Constit., art. I, § 4, cl. 1.

For all these reasons, the court finds there was no violation of any of plaintiffs' Equal Protection rights under the Fourteenth Amendment to the Constitution.

For similar reasons, the court reaches the same conclusion as to plaintiffs' allegations that the Commission violated its First Amendment rights. Rather, the court agrees with defendants:

> Underlying plaintiffs' claim in Count One is an implicit assumption that, if plaintiffs had been afforded equal access to members of the Commission, the Commission would have been more responsive to their concerns. However, "nothing in the first Amendment or in [the Supreme Court's] case law interpreting it suggests that the right to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." Knight, 465 U.S. at 285.
>
> [(Defs. Br. at 15.)]

Moreover, the court is particularly persuaded by the following fact:

- In the last gubernatorial election, the two top finishers won a combined 93.5% of the vote,

> notwithstanding the presence of a viable third party candidate.

Thus, the court finds that Count One of the complaint lacks merit and should be dismissed.

D. COUNT TWO

Count two alleges that the Commission violated the right to freely and fairly vote guaranteed to plaintiffs and similarly situated unaffiliated and third-party voters in New Jersey by the Privileges and Immunities Clause of the Fourteenth Amendment to the U.S. Constitution.

It is well-established that all eligible voters "have a constitutionally protected right to vote, and to have their votes counted." Reynolds v. Sims, 377 U.S. 533, 544 (1964).

Plaintiffs' argument on this issue is meritless. The Commission did not prevent anyone, whether unaffiliated, third-party, Tea Party, Republican, or Democrat from voting in any elections. To the extent this count of the complaint overlaps with the claim that the approved Map dilutes the votes of those living in Districts 1 - 13 and 30, the dilution argument is dealt with separately in Section Four (entitled "Count Two") below.

Quite simply, nobody's right to cast a vote who should be able to vote has been impeded. Nobody has been forced to vote for a candidate whom they did not support, nor otherwise coerced

when exercising the franchise. **Because nobody who was eligible to vote had his or her right to vote interfered with or eliminated, no violation of the Privileges and Immunities Clause has occurred.**

Plaintiffs' claim under 42 U.S.C. § 1983 fails for the same reasons. That statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .
>
> [42 U.S.C. 1983.]

Because the court finds plaintiffs' privilege and immunity rights vis-à-vis exercising the right to vote have not been violated, a Section 1983 action is inappropriate: no rights were violated for which a Section 1983 action is required in order to provide redress to any party that allegedly had its rights deprived.

Accordingly, Count Two is dismissed.

E. COUNTS THREE AND FOUR[13]

Plaintiffs' claims in Counts Three and Four of the complaint are based on the right to exercise the franchise and to have their votes fully counted instead of diluted in comparison to other voters elsewhere in New Jersey.

In Count Three, plaintiffs claim the Map establishes voter dilution for certain voters in the majority of the southern districts (districts 1-13, and 30), which violates the One-person, One-vote ("OPOV") right which the U.S. Supreme Court has read into the Federal constitutional right to vote. Plaintiffs also allege that any such dilution is a violation of diluted voters' Equal Protection rights. From there, plaintiffs further argue the Map unconstitutionally splits Jersey City and Newark in violation of the New Jersey Supreme Court's ruling in McNeil v. Apportionment Commission, 177 N.J. 364 (2003).

In Count Four, plaintiffs allege the Map's "unconstitutional impairment of plaintiffs' right to exercise the franchise by intentionally gerrymandering districts for partisan gain . . . [which amounts to] vote nullification, [an offense that is] far more insidious than vote dilution."

[13] Counts Three and Four are nearly indistinguishable. Therefore, the court will treat them together in this section.

During the August 18, 2011 oral argument, plaintiffs also argued that Rosenthal allowed the secondary policy considerations to trump the constitutional requirements, resulting in voter dilution in the over-packed southern districts. Defendants argued: (1) plaintiffs failed to allege any facts to establish a cognizable legal claim; (2) plaintiffs' calculations were improper; (3) the population deviation was minor, and therefore presumptively constitutional; and (4) this case is completely distinguishable from Larios for numerous reasons.

In response, counsel for plaintiffs stated: (1) "the numbers are the numbers . . . it is what it is;" (2) the numbers are correct and demonstrate intentional invidious partisan gerrymandering; and (3) this case is exactly the same as Larios, and therefore, this case should result in a similar outcome.

i. The Map Does Not Violate OPOV Requirements

In Reynolds, supra, 377 U.S. at 544, the U.S. Supreme Court made clear that the U.S. Constitution protects not only an eligible citizen's right to vote, but also their right to have that voted counted. The Court further held that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in substantial

fashion diluted when compared with votes of citizens living in other parts of the State." Ibid.

In the present case, plaintiffs claim the Commission Map violates the OPOV right discussed in Reynolds, because the Map dilutes the votes of those in the southern districts in New Jersey. Specifically, plaintiffs' claim: (1) 12 of the 14 southern districts (1-13 and 30) are over-populated by an aggregate total of 40,648 people, or approximately 18.48% of the ideal population for a single district; (2) The 26-most northern districts in the State are under-populated by a total of 40,574, or 18.48% of the total ideal population for those 26 districts; and (3) the over-packing of the southern districts was an intentional effort to dilute the votes of voters in the southern portion of the State.

The court disagrees. For the reasons that follow, the court finds there was no voter dilution or any other violation of plaintiffs' right to vote or the OPOV standard.

First, plaintiffs' calculation for the population deviation is flawed. They claim districts 1-13 and 30, which are 12 of the 14 total southern districts, are overpopulated by an aggregate total of 40,648, or 18.48% of the ideal population for a single district. (See Compl. ¶¶ 119-21.) The proper analysis, however, requires one to determine the population

deviation from the ideal mean for each district. Engaging in that analysis, it is clear that no district on the Map deviates from the ideal mean by more than 2.66%. Thus, the Map's total deviation, derived by finding the difference between the most and least populous districts, is approximately 5.2%. That overall population deviation for this Map is one of the lowest in decades. In addition, the Map has an *average deviation*[14] of 1.55% for the entire Map and 1.59% for all fourteen southern districts (1-13 and 30).

Plaintiffs applied the aggregate total overpopulation of the southern districts of 40,648 and divided it by the number the population for a single district. Quite simply, the formula is mathematically incorrect. The proper formula is to divide 40,648 by the total population of the entire southern half of the state (all 14 southern districts), which is 3,077,158. That formula yields an aggregate population deviation for the southern districts of 1.3%.[15]

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[14] The average deviation is the average percentage deviation for all the districts.

[15] At the August 18, 2011 oral argument, when defendants argued that plaintiffs relied upon erroneous mathematical calculations and should have relied on the calculations the court has just explained above, plaintiffs retorted that their numbers "are what they are" and that Larios was exactly the same situation as in this case.

Also, comparing the number between the Commission's Map and that submitted by plaintiffs (Exhibits D and E of the complaint, respectively), plaintiffs calculated the aggregate population deviation based on only 12 of the 14 southern districts. That calculation should have included all 14 southern districts as the Commission's Map does. If plaintiffs' calculation included districts 14 and 15, instead of looking only at districts 1-13 and 30, it would have had almost the exact same deviation as that yielded by the Commission's Map for those southern districts.

Moreover, there are forty (40) districts in New Jersey. The complaint states that 20 of those districts are overpopulated and 20 are under-populated. Twelve (12) of the overpopulated districts are in the southern part of the State and eight (8) are in the north. The Constitution does not require that 10 of the over-populated districts fall in the northern part of the State and 10 in the south. In fact, the present distribution is near-perfect——i.e., a ratio of 12-to-8 is just one step away from a perfect ratio of 10-to-10. This claimed over-packing is not evidence of rampant disparate treatment between the north and south as plaintiffs allege.

The court notes that only citizens in overpopulated districts have standing to bring an OPOV claim under the U.S.

Constitution, because only they have suffered any actual vote dilution. See Wright v. Dougherty County, 358 F.3d 1352, 1355 (11th Cir. 2004). Citizens in under-populated districts have not suffered voter dilution. Therefore, the court rejects any arguments raised by plaintiffs that citizens in the northern districts, which were allegedly under-populated, have suffered any voter dilution or any violation of their OPOV rights.

As set forth fully below, the court finds meritless the arguments regarding the purported population deviation statistics that plaintiffs rely upon for their claims of voter dilution, nullification, and violation of OPOV and plaintiffs' right to vote.

The Constitution does not require absolute population equality. Rather, a State must only make a "good faith effort" to "construct districts . . . as nearly of equal population as is practicable." Reynolds, supra, 377 U.S. at 577. The Constitution only prohibits "substantial" voter dilution in state legislative districts based on where the voters live. Ibid.

In contrast, minor deviations are allowed, when needed to further "legitimate considerations incident to the effectuation of a rational state policy." Id. at 579. The United States Supreme Court made clear that a total deviation of under ten

(10) percent is deemed "minor," Brown, supra, 462 U.S. at 842, and that such under-ten-percent minor deviations are "presumptively constitutional." Rodriguez v. Pataki, 308 F. Supp. 2d 346, 365-66 (S.D.N.Y. 2004). In Brown, the Supreme Court held that a total deviation over ten (10) percent is presumptively discriminatory, whereas a deviation of between one and ten percent is deemed a minor deviation. Brown, supra, 462 U.S. at 842. A three-judge panel in the District of Maryland reached a similar conclusion, where it upheld a total population deviation of 9.48% as constitutional. Marylanders for Fair Representation, Inc. v. Schaefer, 849 F. Supp. 1022, 1032 (D. Md. 1994).

The following deviations are nowhere near that needed to support a cognizable legal claim for voter dilution and violation of OPOV and/or the Equal Protection Clause: (1) 1.3 percent total deviation for all of the districts in the south combined; (2) 2.66% deviation from the ideal mean for any single district on the Map; (3) 5.2% total population deviation—the difference between the most and least populous districts); and (4) 1.55% average deviation for the entire Map and 1.59% average deviation for the fourteen southern districts. None of these

are anywhere near over ten percent deviation. Thus, under Brown and Rodriguez, they are presumptively constitutional.[16]

Moreover, in the context of a motion to dismiss, plaintiffs would have to show not only that a deviation exists that is greater than a mere "minor"—and thus constitutional—deviation, but also that such deviation was caused by "impermissible considerations," as opposed to other legitimate redistricting goals. Rodriguez, supra, 308 at 368.

At the public meeting on April 3, 2011, Rosenthal set forth the Constitutional criteria for the Map and also discussed discretionary policy considerations for the redistricting. All such discretionary considerations are legitimate factors for the Commission to consider in redrawing the district lines, as long as the constitutional factors are met.

One such factor, promoting and maintaining communities of interest, has been sustained as a legitimate consideration. See League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 433 (2006). The U.S. Supreme Court has even held that a State is "free to recognize communities that have a particular racial makeup, provided its action is directed toward some common

[16] This issue is discussed even further, infra, in the context of Larios, supra, 300 F. Supp.2d 1320.

thread of relevant interest." Miller v. Johnson, 515 U.S. 900, 920 (1995).

Another factor is requiring continuity of representation. The New Jersey Supreme Court has stated that "[p]rotect[ing] . . . incumbents serves a valid purpose and is a relevant factor to be taken into account in creating a legislative districting plan." Davenport, supra, 65 N.J. at 135 (internal citations omitted). The U.S. Supreme Court reached a similar conclusion, going even further to say that protecting existing political boundaries has been recognized as a consideration of such importance that it can justify more significant district population deviations than would normally be tolerated under OPOV standards. See Mahan v. Howell, 410 U.S. 315, 325 (1973). In Mahan, the Court clarified that protecting political boundaries cannot be based on racial or discriminatory motives.[17] Ibid.

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[17] Plaintiffs do not even allege racial discrimination as a motive for any deviation here. Although they make the bald assertion that defendants engaged in invidious discrimination, they do not support that with any factual basis, and as set forth fully in this opinion, they have not alleged more than partisan gerrymandering the districts to favor the north over the south. Though that claim is not supported by mathematically sound facts, the court has already stated that it does not violate the any constitutional provision to engage in partisan or bi-partisan gerrymandering as long as the other constitutional requirements for the Map are met.

Avoidance of partisan bias, competitiveness, and responsiveness, along with minimizing voter disruption, are other factors that have been held to be valid permissive considerations for the Commission to evaluate, while ensuring all constitutional requirements are satisfied. Robertson v. Bartels, 148 F. Supp. 2d 443, 457 (D.N.J. 2001).

Similarly, these permissive factors have been upheld as a legitimate basis for permitting minor deviations. Rodriguez, supra, 308 F. Supp. 2d at 351; see Karcher v. Daggett, 462 U.S. 725, 740 (1983). Drawing district lines in recognition of a bi-partisan political system or for other such political considerations does not run afoul of any constitutional provision. Rodriguez, supra, 308 F. Supp. 2d at 353 (citations omitted) (because geography frequently correlates with political affiliation, political considerations are often expect to drive minor population deviations in various regions).

In the present case, plaintiffs have not, and cannot, demonstrate that the claimed deviations were caused by impermissible redistricting considerations. Plaintiffs make bald assertions that Rosenthal allowed these permissive considerations to trump the constitutional requirements for the Map. They rely on some statements made by various Commission members during several of the public meetings the Commission

held. The majority of those statements are set forth in the Background Section above.

Without repeating those statements here, they make clear the Commission in general, and Rosenthal in particular, did realize the obligatory nature of the constitutional requirements and that the permissive factors could also be considered, as long as the Map met all constitutional criteria. (See Compl. ¶¶ 66-95.) Rosenthal stated that as long as the Map complied with all Federal and State law requirements, then if the Commission could simultaneously satisfy some of the so-called permissive policy factors, the resulting map would be that much better and more fair.

For similar reasons, the court finds that plaintiffs have likewise failed to set forth sufficient facts to support an Equal Protection claim. The court addressed many aspects of plaintiffs' Equal Protection arguments in the section above dealing with Count One. To the extent plaintiffs attempt to raise an Equal Protection argument in tandem with their voter dilution claim vis-à-vis the southern districts disadvantaged to the benefit of the northern districts, the court notes that the southern districts encompass a huge and diverse geographic area, from the border with Philadelphia to Atlantic City and Cape May. This overall region includes large urban areas such as Camden,

rural areas such as Hammonton, and suburban areas. It also includes Democrats, Republicans, third-party voters, and unaffiliated voters. It includes a variety of socioeconomic classes and races. Plaintiffs have not alleged sufficient facts to demonstrate there is any type of invidious discrimination to disadvantage this group of communities in the southern portion of the State relative to others such that would offend Equal Protection principles.

ii. *Larios* is Inapplicable

In Larios v. Cox, 300 F. Supp.2d 1320 (N.D. Ga. 2004), aff'd Cox v. Larios, 542 U.S. 947 (2004), a three-judge panel of the District Court for the Northern District of Georgia struck down a total population deviation of 9.98 percent. Defendants argue, and plaintiffs do not dispute, that Larios is the only case that deemed a total population deviation for an entire Commission Map of under ten (10) percent as unconstitutional. However, the Larios court did not strike down the redistricting plan as unconstitutional based on the population deviation percentage alone. Rather, there were various factors it looked at which demonstrated "deliberate and systematic regional" bias. Larios, supra, 300 F. Supp. 2d at 1327.

Specifically, the Larios Court noted:

i. The apportionment plan enacted by the Georgia Legislature in Larios under-

populated every single Senate and most House districts into two distinct regions, rural South Georgia and inner-city Atlanta. Inner-city Atlanta was under-populated and was heavily democratic, while all the rural farmland south of Atlanta, which was predominantly African American was also under-populated. Meanwhile, the suburban areas between South Georgia and inner-city Atlanta were predominantly Republican. Those suburban areas were overpopulated such that by packing Republicans in those areas, Republican votes would be diluted. Id. at 1341-42;

ii. The plan in Larios evidenced a partisan democratic gerrymander such that Republican incumbents were pitted against one another in the same districts, while the same was not done to incumbent Democrats. This was another mechanism demonstrating an attempt to empower Democrats by intentionally diluting Republican votes. Id. at 1342; and

iii. The plan in Larios did not comply with traditional redistricting requirements. See id. at 1331-49. Specifically, the difference in the over-and-under-populations could not be justified by any traditional redistricting criteria, because the map in Larios was less compact than its predecessor, not more, it was less contiguous than the prior map, and pitted more Republican incumbents against one another compared with Democrat incumbents. Ibid. The district lines: (a) did not make an attempt to adhere to all political subdivisions; (b) did not make much effort to maintain the political cores of prior districts; (c) relied on water touch-point contiguity; and (d) established districts that were far below the accepted norms for compactness. Id. at 1331-33.

The Larios Court looked at all these factors in conjunction with the 9.98 percent population deviation in reaching its decision to strike down the redistricting plan in that case as unconstitutional, determining that under such circumstances the constitution could not tolerate such deviations.

Larios is clearly distinguishable from the present case. First, the total deviation for the entire Map here is 5.2%——which is far less than the 9.98% found offensive to the Constitution in Larios. In fact, the 5.2% deviation in this case is the lowest in decades in New Jersey.

Second, unlike the facts of Larios, here plaintiffs have presented no evidence that the Commission has over-packed districts to force incumbents of any party——whether Democrat, Republican, or otherwise——to compete against incumbents of their own party to intentionally artificially increase the success of the incumbents of the competing political parties.

Third, despite plaintiffs' bald assertions, they have not provided anything more than a defective mathematical calculation in support of the proposition that any over-populating was done for partisan gain. This is totally different from the "deliberate and systematic" overpopulating for partisan gain in certain areas of Georgia as occurred in Larios.

Fourth, plaintiffs have not even alleged any racial discrimination in this case, whereas there was clear evidence of a disparity among communities of interest in Larios. In that case, the suburban Republic strongholds surrounding Atlanta were overpopulated to dilute their votes, to the benefit of the Democratic strongholds in the rural areas south of Atlanta and the urban areas in inner-city Atlanta.

Finally, unlike in Larios, the Map in this case is more compact, more contiguous and contains a lower population deviation than its predecessors. In fact, unlike the 14 southern districts in this case—which encompass mixed areas of Republicans, Democrats, and other voters, as well as urban, suburban, and rural regions—the Republicans and Democrats in Larios were geographically concentrated in the manner described above.

Because plaintiffs have not established any constitutional violation or invidious discrimination with the Map in question here, the court cannot simply pick a different map because it is allegedly more compact, or contiguous. See Davenport, supra, 65 N.J. at 135. Accordingly, any of plaintiffs' claims based on Larios are dismissed.

iii. The Split of Newark and Jersey City, Respectively, Does Not Violate the Constitution or *McNeil*

Plaintiffs claim the Map "unconstitutionally and in violation of McNeil v. Apportionment Commission, 177 N.J. 364 (2003), removes two legislative districts from Newark and Jersey City, and as a result, the 14 most Southern Districts 1 through 13 and 30 are over-packed thus diluting the relative strength of the votes of citizens in those districts." (Compl. ¶ 119.)[18]

Reliance on McNeil is misplaced. Article IV, Section 2, Paragraph 3 of the New Jersey Constitution provides as follows:

> Unless necessary to meet the foregoing requirements, no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the State, and no county or municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the State.

This language would essentially require that a legislative apportionment plan could not divide a municipality into more than two districts (i.e., could not split a municipality more

[18] The court has addressed the dilution of the southern districts above, and need not repeat that analysis here. This section will therefore focus entirely on the McNeil decision as it relates to the provision in the New Jersey Constitution prohibiting splitting municipalities.

than once). For the reasons set forth below, in McNeil, the New Jersey Supreme Court rejected a challenge that the legislative reapportionment plan violated the State Constitution because it divided Jersey City and Newark into more than two districts.

McNeil provides in pertinent part:

> the common and unanimously agreed-upon understanding of this Court, and the legal and political communities of this State as well, is that **the two-district limitation for Newark and Jersey City must be ignored. The municipal boundary requirement for Newark and Jersey City has been silently superseded by this Court for more than a quarter of a century in order to preserve the one-person, one-vote mandate. This Court must continue to depart from the narrow interpretation of the challenged constitutional provision in favor of a contemporaneous and practical construction of the language. For nearly forty years, the division of Newark and Jersey City into three or more districts has gone unquestioned.**
>
> [McNeil, supra, 177 N.J. at 392 (emphasis added).][19]

[19] Interestingly, plaintiffs themselves cite this paragraph in their brief in opposition to defendants' cross-motion to dismiss. This is significant because plaintiffs claim McNeil stands for the proposition that Jersey City and Newark must each be split into exactly three districts each. In direct contradiction to plaintiffs' claim, plaintiffs acknowledge through citing the above passage that: "the two-district limitation for Newark and Jersey City must be ignored" and that "[f]or nearly forty years, the division of Newark and Jersey City into three or more districts has gone unquestioned." Ibid. Further, when the court repeatedly asked counsel for plaintiffs at the August 18, 2011 oral argument to quote and cite the

The Court went on to address whether Newark and Jersey City are always required to be split "as two-district maximums." Ibid. The Court stated:

> **Our view is that Bodine VII, Scrimminger, and Davenport II so discredited the constitutional scheme that once the apportioners were freed, by reason of the size of Newark and Jersey City, from the municipal-boundary preservation, they *reasonably* regarded themselves as free to apply well-accepted general apportionment principles, not the two-district limitation, to those cities.** Given the totality of the circumstances, that decision was entirely justified by what had to be a legitimate question as to how much of the constitutional dictate continued to apply after Bodine VII, Scrimminger, and Davenport II. When the decision of the Commission is viewed within the framework of the contemporaneous and practical construction doctrine, and the totality of [*393] the circumstances as required by the VRA, it becomes clear that **to construe strictly the language of Article IV, Section 2, Paragraph 3 would result in inequalities due to the packing of minorities into fewer districts. Packing, in turn, would dilute minorities' ability to elect representatives of their choice and thus would violate Section 2 of the VRA. Under the Supremacy Clause, the New Jersey State Constitution must yield to federal law.**
>
> [Id. at 392-93 (emphasis added).]

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portion of our Supreme Court's decision in McNeil that requires the splitting of Newark and Jersey City into a three districts each, he was unable to quote any such language.

This court acknowledges that the McNeil decision upheld the splitting of Jersey City and Newark into three legislative districts each in order to satisfy the "one person, one vote" mandate. However, the language in McNeil makes clear that the Court was not mandating that every future reapportionment plan must split these two municipalities into three legislative districts each. Rather, the Court rejected the challenge to the 2001 Plan, holding that the plan did not have to be in literal compliance with Article 4, Section 2, Paragraph 3 of the New Jersey Constitution, which provides that legislative apportionment plans cannot divide a county or municipality into more than two legislative districts. Essentially, McNeil rejected the notion that a legislative apportionment plan violated the State Constitution because it divided Jersey City and Newark into more than two districts.

Similarly, in Scrimminger v. Sherwin, 60 N.J. 483 (1972), the Court held that the 1972 reapportionment plan was unconstitutional because some of the legislative districts deviated from the ideal district population by up to 28.83 percent. Though Scrimminger was primarily concerned with county splits, it also provided some insight on splitting of municipalities. Scrimminger went on to note that:

> Municipalities are thus appropriate building blocks for the creation of districts. **The**

> **boundaries of the larger municipalities will of course have to be breached, and in this regard, the Commission may have to depart from the direction in Article 4, Section 2, Paragraph 3 [of the New Jersey Constitution], concerning the division of a municipality.**
>
> [Id. (emphasis added).]

After the Scrimminger decision, the 1971 plan was revised and upheld by the New Jersey Supreme Court in Davenport v. Apportionment Commission, 65 N.J. 125. The approved plan upheld by the Court provided for division of Jersey City into three legislative districts **and division of Newark into four legislative districts. Despite this, the Court held the plan did not violate any Federal or State constitutional requirements.** Davenport, supra, 65 N.J. at 135 (emphasis added).

Relying on Scrimminger and Davenport, the McNeil Court held that all constitutional standards were met by a plan that split Jersey City and Newark into three legislative districts each to satisfy the OPOV requirement. The McNeil Court stated that the municipal split provision in the New Jersey Constitution can be abandoned in order to comply with Sections 2 and 5 of the Federal Voters Rights Act, and such result must occur, because that is read into the U.S. Constitution, which must trump any conflicting State Constitutional provision pursuant to the

Supremacy Clause in the Federal Constitution. This court is bound by the New Jersey Supreme Court's decision in McNeil, which did not require that every future reapportionment plan split these two municipalities into three legislative districts each. Accordingly, plaintiffs' arguments based on McNeil and the provision in the New Jersey constitution regarding the prohibition on municipal splits are dismissed as meritless.

iv. Plaintiffs Fail to Demonstrate How Any Alleged Partisan or Bi-Partisan Gerrymandering in this Case Violates the Constitution

As with plaintiffs' other claims, the court finds meritless the argument that the Map was in fact the result of intentional political gerrymandering for partisan gain, and that as such, it violates plaintiffs' constitutional right to exercise the franchise and the OPOV standard. (See Compl. ¶ 125.)

In Gaffney v. Cummings, the U.S. Supreme Court expressly held that bipartisan gerrymandering does not violate the Constitution. 412 U.S. 735, 752-53 ("[t]he reality is that districting inevitably has and is intended to have substantial political consequences" such as efforts to strengthen the two-party system). Cummings involved a redistricting plan admittedly drawn with the intent to create a districting plan that would retain the political strongholds of the Democrat and Republican parties. Id. at 752.

The decision in Cummings logically follows upon analysis of the establishment and function of the Commission in New Jersey. As discussed above, the New Jersey Constitution provides for the formation of a redistricting commission in recognition of the traditional two-party system in this country, and the U.S. Supreme Court held this is not unconstitutional. See Timmons, supra, 520 U.S. at 367.

Again, as discussed above, Commission membership is not limited to any political party. To the contrary, "the chairman of the State committee of each of the two political parties whose candidates for Governor receive the largest number of votes at the most recent gubernatorial election." N.J. Const., art. IV, § 3, ¶ 1. Thus, the establishment of the Commission is premised on an expression of the people's will, as manifested through their vote for gubernatorial candidates in the election immediately prior to the redistricting. The people's will can then be manifested by the setting of bipartisan gerrymandering as long as the Map ultimately approved otherwise complies with the U.S. and New Jersey Constitutions.

In other words, it is almost implicit in the structure of the Commission that whichever parties are the highest vote-earners in the gubernatorial election, are entitled to benefit from that expression of the people's will, and will draw

district lines that roughly approximate the strongholds of those two political parties, thereby echoing the people's will. The allegation that the two major parties cooperated to create districts for mutual partisan gain does not amount to a constitutional violation. See Cummings, 412 U.S. at 752-53. Thus, bipartisan gerrymandering does not violate the Constitution. Ibid.

Just as plaintiffs' bipartisan gerrymandering claim is without merit, plaintiffs fail to allege sufficient facts to sustain a cognizable legal cause of action for partisan gerrymandering. As explained above, there is nothing unconstitutional about apportioning legislative districts with an eye toward political considerations, because redistricting is at its core, a political process. As Justice Kennedy stated in his concurring opinion in Vieth, supra, 541 U.S. at 307:

> [A] "determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an **invidious** manner or in a way unrelated to any legitimate legislative objective."
>
> [(emphasis added).]

Further, "[t]he mere fact that a particular apportionment scheme makes it more difficult for a particular group . . . to

elect the representatives of its choice does not render that scheme constitutionally infirm." Davis v. Bandemer, 478 U.S. 109, 131 (1986).

In the case at bar, plaintiffs do not allege that political classifications were applied in an invidious manner by the Commission. Rather, they rely on unfounded and/or erroneous statistics to try to show the northern legislative districts were favored to the disadvantage the southern districts, and that somehow that alone is sufficient evidence of geographic and/or intentional invidious discrimination and partisan gerrymandering. Quite simply, the facts alleged do not support such a claim.

Moreover, the Commission itself is created to ensure equal representation of the leading two political groups in New Jersey, as reflected in the most recent gubernatorial election. Given the results of that election, the Commission contained five Democrats and five Republicans, with an independent eleventh member appointed to help the party factions resolve any impasse in reapportioning the legislative districts. That composition was specifically designed by the framers of the New Jersey Constitution to ensure that the party in control of the Legislature could not act in an invidious manner.

For these reasons, Count Four is dismissed.

F. COUNT FIVE

Plaintiffs assert the 2011 redistricting process violates Article 1, Paragraph 2a of the Constitution. That provision guarantees that "[a]ll political power is inherent in the people." Plaintiffs allege the political power has been taken from the people and has been usurped by political leaders. Plaintiffs argue this occurred because the Commission acted upon partisan political interests and other impermissible considerations instead of Constitutionally-prescribed redistricting requirements. (Compl. ¶¶ 87-96.)

As defendants correctly point out, Article 1, Paragraph 2a was adopted in 1844 and is purely an affirmation of the basic democratic principle that the people retain the right to change their form of government by constitutional amendment. Jackman v. Bodine, 43 N.J. 453, 479-71 (1964).

This provision sets forth fundamental principles of government substantially similar to those expressed in the Declaration of Independence. Such principles were intended to establish a limitation upon the capacity of the sovereign and to make clear that the people are the master, and the sovereign the servant. Franklin v. N.J. Dept. of Human Services, 225 N.J. Super. 504, 523-24 (App. Div.) (quotations omitted), aff'd, 111 N.J. 1 (1988). Article I, Paragraph 2a was not intended to

confer any constitutional rights upon individuals, and was especially not meant to provide a private cause of action for voters who are displeased with the reigning political tides in this country at any given time. See id. supra, 225 N.J. Super. at 523.

Thus, even assuming arguendo, plaintiffs have a claim that defendants disregarded Constitutional redistricting criteria and intentionally and systematically gerrymandered for partisan organizational gain, Article I, Paragraph 2a does not provide plaintiffs with an independent private cause of action to redress that harm.

As such, Count Five of the complaint is dismissed.

G. COUNT SIX

Plaintiffs allege the Commission violated Article One, Section 18 of the New Jersey Constitution, which guarantees the rights to freely assemble together, consult for the common good, and make known their opinions to their representatives.

No one has been denied the right to peaceably assemble as a group in public places to discuss matters affecting their welfare. Plaintiffs do not demonstrate any fact to support the assertion that they were denied the right to assemble to discuss matters affecting their welfare.

Moreover, there can be no claim that plaintiffs were denied an opportunity to make their opinions known to their representatives. The Commission held seven public meetings, during which members of the public were given substantial opportunity to voice their concerns to the Commission. In fact, plaintiffs acknowledge that counsel for plaintiffs addressed the Commission on three occasions during those meetings. This was among the most of any organizational spokesperson. Further, all members of the public, including plaintiffs, were provided an opportunity to submit any comments or concerns to the Commission via the Commission's website.

This claim is essentially the same claim brought in Count One under the U.S. Constitution, which the court rejected above. The court holds that Count Six fails for many of the same reasons set forth at length above in Count One, namely:

- The Commission is expressly exempt from the Open Public Meetings Act;
- No public hearings are required under the Constitution;
- However, under the Commission's Bylaws – three public meetings are required;
- The 10-member Commission held four public hearings, and then three more public meetings were held after Dr. Rosenthal was appointed as the eleventh member;

- Hearings were held in northern, central and southern parts of New Jersey;

- The Commission considered testimony from hundreds of citizens;

- Citizens had a chance to provide input through website;

- Plaintiffs' counsel addressed the Commission on February 13, 2011, March 10, 2011, and March 16, 2011 (among the most of any organizational speaker);

- Plaintiffs themselves acknowledge they submitted maps to the Commission;

- A large-scale copy of the "People's Map" submitted by plaintiffs was hung on wall of Commission meeting room. (See Compl. ¶¶ 101-03) ("A large scale blow up of [the People's Map I] was hung on the wall in a Commission meeting room at the Heldrich hotel, as seen in a still picture extracted from a video from Channel Nine news.");

- Nowhere is there any requirement that all members of the public be given equal access to the public officials on the Commission. Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271, 284 (1984);

- Here, the Commission had thirty days to make a decision;

- Plaintiffs are 38 out of a total of 8.7 million residents; and

- Plaintiffs acknowledge that the Commission by-laws do not require the Commission to review written redistricting plans or maps submitted by members of the public. (Compl. ¶ 102.) In contrast, plaintiffs cite the Article V, Paragraph 1 of the Commission by-laws, which states "[t]he Commission **may, subject to**

constraints of time and convenience, review written plans for the establishment of legislative districts submitted by members of the public." (See ibid. (emphasis added).)

- Nowhere in the by-laws is there a requirement that the Commission consider any of the submissions from members of the public, let alone an obligation to devote exactly the same amount of time and attention to all members of the public.

H. COUNT SEVEN

Plaintiffs alleged the Commission unconstitutionally failed to draw compact legislative districts in violation of **Article Four, Section Two, Paragraph Three**, which provides, "that Assembly Districts be as nearly **compact** as possible." (emphasis added). Essentially, plaintiffs claim the Commission drew "bizarrely-shaped districts" "solely for the purpose of protecting incumbent legislators." See Davenport, supra 65 N.J. at 133. For the reasons set forth below, the court rejects this claim.

In Davenport, supra, the New Jersey Supreme Court recognized that compactness is an "elusive concept." Id. at 133 (emphasis added). The New Jersey Supreme Court has made clear that compactness is not an absolute and independent requirement, but rather a factor that inherently must be balanced against,

and indeed subordinated to, other countervailing factors.[20] Davenport, 65 N.J. at 133-34; McNeil, 177 N.J. 364, 381 (2003). The Davenport Court stated that "population equality is distinctly paramount to [compactness] and that where districts are created on the basis of existing political subdivisions, compactness becomes a "much reduced factor." Davenport, supra, 65 N.J. at 134 (citing Jackman v. Bodine, 49 N.J. 406, 419 (1967)).

The Court went on to say:

> [p]olitical considerations are inherent in districting. In [Gaffney, supra, 412 U.S. at 753] . . . the United State Supreme Court said:
>
> > The very essence is to produce a different – a more "politically fair" result than would be reached with elections at large in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment.
>
> While the carving out of bizarrely-shaped districts for partisan advantage will not be

[20] While the Constitution requires that districts be as compact as possible, Dr. Rosenthal noted that the whole town requirement makes perfect compactness impossible. Basic geometry makes clear that perfectly compact districts are impossible to achieve, because that would require drawing districts in perfect circles, but the shape of New Jersey and the way in which the population has settled do not constitute perfect circles.

tolerated, the creation of balanced political districts serves a valid apportionment purpose.

. . .

This concept of “political fairness” has been approved as a relevant factor which may be taken into consideration in state legislative districting. [See Cummings, 412 U.S. at 752-53].

. . .

No contention is made that the Commission plan does not strike a fair political balance. No issue of racial or minority representation is presented. It is conceded that population-wise the rate of deviation is extremely low. Aside from the alleged dilution of county voting strength, the only other attack made on it is the alleged lack of compactness of a few of the districts alleged to result from efforts to protect incumbents. It would appear that a plan with more compact districts could be prepared. However, that is not the only test to be applied here. Providing protection of incumbents serves a valid purpose and is a relevant factor to be taken into account in creating a legislative districting plan.

. . .

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

> [Davenport, supra, 65 N.J. at 133-35 (citations omitted).]

In the present case, plaintiffs have not alleged facts to demonstrate the plan fails to "strike a fair political balance." They do not allege the Map was intentionally drawn to disadvantage racial minorities. To the extent they allege the Map disadvantages unaffiliated and third-party voters to the benefit of Republicans and Democrats, as the language from Davenport quoted above and the court's very detailed analysis of relevant case law throughout this opinion make clear, the Commission is entitled to favor Republicans and Democrats, because the people voiced their preference for those parties by giving the most votes to those parties' candidates in the last gubernatorial election. Moreover, the court has already addressed that plaintiffs' voter dilution claim is meritless, because the approved Map has one of the lowest population deviation rates in decades.

Thus, as was the case in Davenport, plaintiffs' only remaining constitutional argument is that the Map lacks sufficient compactness, instead creating bizarrely-shaped districts to protect incumbents. However, our Supreme Court squarely held in Davenport that "protect[ing] incumbents serves a valid purpose and is a relevant factor to be taken into account in creating a legislative districting plan." Id. at 135

(citations omitted). Even if a different plan could draw "more compact districts" or the court opined that a "better" map could be drawn, "the judiciary is not justified in striking down a plan otherwise valid" for such reasons, especially given the "presumption of legality" accorded the Commission's Map. Ibid.

Even looking at the specific facts of this case, plaintiffs' claim fails. Essentially, plaintiffs argue: (1) the number of county over splits in the Map is excessive; and (2) a visual examination of plaintiffs' two alternative maps demonstrates greater compactness in comparison to the Commission's Map.

As to the first argument, Scrimmenger and Davenport make abundantly clear that the prohibition on county splits in Article IV of the New Jersey Constitution "has been declared to be in violation of the Federal Constitution under the [OPOV] principle." Id. at 132. In Davenport, the New Jersey Supreme Court expressly held that the "whole county" concept "must be abandoned" and that "adherence to county lines to the extent possible, i.e., placing as many Senate districts as possible within whole counties" is no longer constitutionally required. Ibid. The Court stated as follows:

> we think it is clear that attempting to preserve some semblance of county voting strength would create a plethora of constitutional problems. Were dilution of

> county voting strength a required consideration in applying [OPOV], the degree of dilution would have to be considered and equalized along with population, a difficult if not impossible take to perform.
>
> We are satisfied that once the use of counties as building blocks was declared unenforceable, as it had to be under the demographic pattern shown by the 1970 census, the county concept ceased to have any viability in the creation of Senate districts.
>
> [Id. at 132-33.]

Plaintiffs erroneously conclude that the above language means the Commission must try to adhere to the prohibition on county splits, and if unable to, must explain why it was forced to abandon that constitutional provision in favor of some more important constitutional imperative pursuant to Article IV, Section 3, Paragraph 3 of the New Jersey Constitution. The clear language of the Court's decision belies this, however.

The Court explained that "attempting to preserve county voting strength would create a plethora of constitutional problems" and that "once the use of counties as building blocks was declared unenforceable . . . the county concept ceased to have any viability in the creation of Senate districts." That last phrase quoted did not limit the abandonment of the county split prohibition to any particular Map. Rather, it stated that county split prohibition "ceased to have any viability in the

creation of senate districts," period. Because division of counties is permitted as a tool for achieving compactness, merely alleging the presence of county over-splits alone is neither sufficient nor relevant to plaintiffs' compactness claim.

As to plaintiffs' second argument, plaintiffs rely on nothing more than a "visual examination" of the Commission's Map and its own maps. Yet a visual examination does not provide a judicially reviewable measure of compactness, because compactness must be measured quantitatively. The two standard measures for compactness are: (1) the perimeter to area score – which compares the relative length of the perimeter of a district to its area; and (2) the smallest circle score which compares the ratio of space in the district to the space in the smallest circle that could encompass the district. A mere visual inspection of the maps does not satisfy the mathematical standard for measuring compactness needed to demonstrate evidence of illegal gerrymandering. See Karcher, supra, 462 U.S. at 755 (Stevens, J. concurring).[21]

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[21] Further, the court notes that the Commission was under no obligation to consider plaintiffs' map. Under its by-laws, it could consider the map submitted by plaintiffs, "subject to constraints of time and convenience." Plus, plaintiffs themselves acknowledge in the complaint that the Commission hung its map up. Therefore, the court would assume that the Commission actually did consider it and chose to adopt a

For these reasons, Count Seven is dismissed.

I. COUNT EIGHT

Plaintiffs claim that two of the 40 districts include non-contiguous territories. The New Jersey Constitution requires that "[t]he Assembly districts shall be composed of contiguous territory." N.J. Const. art IV, Sec. 3, Para. 2. Plaintiffs claim that East Orange and Montclair, both within District 34 of the Map, do not share a border, in violation of the contiguity requirement. (Compl. ¶ 143.)

The official map of Essex County makes clear that both municipalities share a border and are contiguous. During the oral argument on August 18, 2011, counsel for plaintiffs examined the Essex County map on the government's website and withdrew this claim. As such, this claim is now moot.[22]

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different map. Plaintiffs cannot point to any evidence to the contrary. As noted in Davenport, "the judiciary is not justified in striking down a plan, otherwise valid, because a better one in its opinion could be drawn." Davenport, supra, 65 N.J. at 135 (citations omitted).

[22] To the extent plaintiffs also raise a contiguity argument as to Fieldsboro and Burlington, because they are allegedly separated by Mansfield, (comPls. ¶ 143), the 2011 Map attached to the complaint shows they are geographically connected through Bordentown and Florence, illustrating that Mansfield does not bifurcate the district. The court notes this is confirmed by the official municipal map NJDEP GIS published for Burlington County, available on the Government's website. Therefore, any remaining contiguity claim related to these municipalities that was not withdrawn by counsel for plaintiffs is hereby dismissed.

J. COUNT NINE

In Count Nine, plaintiffs challenge the Map for allegedly violating the prohibition on county splits in Article IV of the New Jersey Constitution. This issue was addressed comprehensively in Count Seven above. Suffice it to say here that the New Jersey Supreme Court has made clear that splitting counties is no longer a basis to invalidate a map. Further, the court notes that the demographic pattern discussed in Davenport for abandoning the county split provision, remains the case in the 2010 census showing county populations ranging from 66,083 in Salem to 905,116 in Bergen.

For all of these reasons, Count Nine is dismissed.

K. COUNT TEN

Plaintiffs claim that the Commission violated N.J.S.A. 19:34-29. That statute provides as follows:

> No person shall by abduction, duress or any forcible or fraudulent device or contrivance whatever, impede, prevent or otherwise interfere with the free exercise of the elective franchise by any voter; or compel, induce or prevail upon any voter either to vote or refrain from voting at any election, or to vote or refrain from voting for any particular person or persons at any election.
>
> [N.J.S.A. 19:34-29.]

The complaint is utterly devoid of any facts to support a claim that the Commission violated N.J.S.A. 19:34-29.

The court begins its analysis of this Count by noting that a criminal statute does not imply a private cause of action. See R.J. Raydos Ins. Agency, Inc. v. Nat'l. Consumer Ins. Co., 168 N.J. 255, 271 (2001). Further, any alleged criminality in the Commission's otherwise constitutionally required conduct (as this court has found above), contradicts the presumption of validity accorded the Commission's Map. See Davenport, supra, 65 N.J. at 135.

Anyway, the plain language of N.J.S.A. 19:34-29 is unrelated to plaintiffs' claim. The statute makes it a crime to impede or interfere with an eligible voter's exercising their right to freely vote, but only when the act is by "abduction, duress or any forcible or fraudulent device or contrivance whatever." Plaintiffs provide no support or fact to explicate how the Commission's redistricting pursuant to its Constitutional mandate constitutes such "abduction, duress, or forcible or fraudulent device or contrivance whatever."

Accordingly, Count Ten is dismissed.

V.

CONCLUSION

For the reasons stated above, the court dismisses the complaint in its entirety.[23] Counsel for defendants shall prepare and submit an order consistent with this opinion.

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[23] The court's decision is similar to that taken by the trial court in Brady, which was affirmed by the Supreme Court in Brady v. The New Jersey Redistricting Commission, 131 N.J. 594 (1992). In that case, plaintiffs "challenged certain aspects of the . . . Commission's actions as violative of equal-protection principles." Id. at 605. The trial court refused to issue an injunction and granted a motion to dismiss for failure to state a claim. Ibid. Interestingly, in stark contrast to plaintiffs' claims in the present case that Rosenthal was biased toward the Democrats, Rosenthal also served as the eleventh member of the Commission in Brady, and ultimately "found the Republican plan 'politically fairer' and a more accurate reflection of the State's political tendencies." Id. at 604. Also, with respect to Brady's Equal Protection challenges, the Court held that "[q]uite simply, plaintiffs have failed to point to any classification at all that excluded them from participation . . . [and] therefore . . . plaintiffs' equal-protection claims [lacked] merit." Id. at 611.