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January 31, 2022

Via Electronic Filing

Honorable Robert T. Lougy, A.J.S.C.
Superior Court of New Jersey
Mercer County New Criminal Courthouse
400 South Warren Street
Trenton, New Jersey 08650-0068

Re: Sweeney v. Jones, Jr., et al.
Doc. No. MER-C-7-22

Dear Judge Lougy:

This office represents Plaintiff, Stephen M. Sweeney, in the above referenced matter. On January 30, 2022, Defendants, with the exception of Laura Matos, each submitted a response to the Order to Show Cause issued by the Court on January 27, 2022. Sweeney respectfully requests leave to file the following letter brief in reply.

1. The Appointing Authority Lacks the Power to Remove a Member of the Apportionment Committee in the Absence of Misconduct.

Jones and Way each predicate their responses on the fallacy that membership on the New Jersey Apportionment Commission (the "Commission") is for an undefined term. From that mistaken starting place, each argues that the "appointing authority enjoys the plenary power to remove an appointee." (Way Br. at 2 (referring to "default rule"); see also Jones Br. at 12 (referring to "usual rule").) As further support, each then points to the Commission's bylaws, which create a mechanism for the filling of *vacancies* and incorporate Robert's Rules of Order Revised (12th ed.), which itself "establishes the same removal rule as the default principle." (Way Br. at 7; see also Jones Br. at 7.) Their castle is built upon sand.

Membership on the Commission is for an express and fixed term. The term commences upon the certification of an individual's appointment (on or before December 1 of the year in which the census is taken, which was December 1, 2020 in this case). N.J. Const. Art 4, § 3, ¶ 1. The term then expires upon the completion of the Commission's work, which is finite by nature and governed by an express constitutional deadline. See N.J. Const. Art 4, § 3, ¶¶ 1, 4. In this

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instance, the Commission’s work—and the term of its members—will conclude on March 1, 2022.¹ N.J. Const. Art 4, § 3, ¶ 4. This express and fixed term comes directly from the text of the New Jersey Constitution and lasts, at most, one year and three months.

In light of the fixed term for members of the Commission created by the New Jersey Constitution, the so-called “default/usual rule” does not apply. See, e.g., Murphy v. Bd. of Chosen Freeholders of Hudson Cnty., 92 N.J.L. 244, 246 (Err. & App. 1918) (cited by Jones) (“A power to remove officers having a fixed term is *not* incident to the power of appointment. A power of removal is an incident to the power of appointment, *only* to those cases, where the officer is held at the pleasure of the appointing power. No such power of removal exists unless expressly given by the Legislature.”) (emphasis added); People ex rel. Corrigan v. City of Brooklyn, 43 N.E. 554, 556 (N.Y. Ct. App. 1896) (cited by Way) (the power to appoint to an office or position necessarily carries with it the power of removal “where the term or tenure is *not* defined by statute or otherwise”) (emphasis added). Neither does any gap-filler incorporated into the Commission’s bylaws from Robert’s Rules. (See Jones Br. at 13 (quoting Robert’s Rules, §§ 13:23, 50:14 (noting that appointing authority lacks power to replace where “the bylaws or other governing rules expressly provide that committee members shall serve . . . for a fixed period”))).)

The power to fill a vacancy is not the same as the power to create one.² “Vacancy” is defined as “1. The condition of being vacant or unoccupied. 2. An empty or unoccupied space. 3. A position, office, or place of accommodation that is unfilled or unoccupied.” The American Heritage Dictionary of the English Language (5th ed. 2022). Having the authority to fill a vacancy, which Jones undisputedly does under the Commission’s bylaws, requires first the existence of a vacancy. Historically, a vacancy arises from the death, disability, disqualification, or resignation of a Commission member. (See, e.g., Way Br., Ex. D (2001 resignation letter of Donald T. DiFrancesco).) None of those circumstances is present here.

¹ The constitutional deadline for completion of the Commission’s work depends on when the Governor receives the decennial census of the United States for New Jersey. If received on or before February 15 of the year ending in one, following the year in which the census is taken, the Commission’s deadline to certify its results is “within one month of the receipt by the Governor of the official decennial census of the United States for New Jersey, or on or before February 1 of the year following the year in which the census is taken, whichever date is later.” N.J. Const. Art 4, § 3, ¶ 1. If received after February 15, the Commission’s deadline to certify its results is March 1 of the year ending in two, following the year in which the census is taken. N.J. Const. Art 4, § 3, ¶ 4.

² The Van Ripper Resolution, proposed at the 1966 New Jersey constitutional convention, which is relied upon by Jones, speaks only of filling vacancies, and not of creating vacancies through the removal of Commission members. (Jones Br. at 14.)

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The only power to remove possessed by Jones as Chairman of the New Jersey Democratic State Committee comes from the terms of the Apportionment Commission Agreement (the “Agreement”) entered into by Sweeney and Jones.³ And that power is limited. (See Verified Complaint, Ex. A.) Only a “violation of this Agreement will result in my immediate removal from the Commission without any further recourse, hearing or appeal by the execution of this Agreement.” (*Id.*) There is no evidence or allegation that Sweeney has violated the terms of the Agreement. In fact, there is no evidence that Sweeney did anything between the date of his appointment to the date of his removal that warranted or justified his removal. To the contrary, he has abided by the terms of the Agreement at all times in good faith.

If the chairmen of the State committee of each of the two major political parties have the unlimited authority to remove constitutionally appointed and certified members of the Commission on the eve of certifying the establishment of new legislative districts, without cause, it would render the purpose of the Commission illusory. Redistricting would be left to the whims of the two chairmen, with only the safeguard of the Eleventh Member. The New Jersey Constitution envisioned something more.

2. The Apportionment Commission Agreement is a Binding Contract.

Jones argues that the Agreement entered into by Sweeney and the New Jersey State Democratic Chairman appointing Sweeney as a Democratic Member of the Commission is a “basic code of conduct,” not an enforceable contract, because appointments to public office are governed by statutory authority. (Jones Br. at 21.) Jones misses the mark.⁴ Sweeney does not argue that his appointment derives solely from the Agreement. His membership on the Commission, and the express and fixed term of his service, originate from Article IV, Section III of the New Jersey Constitution. The Agreement, which expressly provides that “the parties hereto agree to all of the terms and conditions set forth herein as of November 15th, 2020 and throughout the entirety of the work of the Agreement,” only layers certain commitments by its signatories on top of the constitutional framework for appointments. (Verified Complaint, Exhibit A.) Most significantly, for this case, the Agreement layers a provision for the removal of a Democratic member in limited and inapplicable circumstances, on top of the constitutional

³ The fact that the Agreement includes a provision to address removal is itself evidence that the power to remove a member is not otherwise available.

⁴ Jones asserts that the relationship between the appointing authority and the Commission members is defined by the New Jersey Constitution and the Commissions bylaws and that “a private memorandum of understanding between the Chair and Commission members cannot, as a matter of law, alter that arrangement.” (Jones Br. at 22.) Jones hypocritically argues that by “executing the Membership Agreement . . . Mr. Sweeney acknowledged that the Chairman has the authority to remove him from the Commission after November 15,” despite the lack of removal authority in the New Jersey Constitution or bylaws. Jones should not be permitted to use the Agreement as a sword and a shield.

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appointment process.

Jones also argues that the Agreement is not enforceable due to a lack of consideration. (Jones Br. at 22.) The concept of consideration, however, is not as limited as Jones suggests. Consideration is a bargained-for exchange of promises or performance that may consist of an act, a forbearance, or the creation, modification, or destruction of a legal relation.” Bernetich, Hatzell & Pascu, LLC v. Med. Records Online, Inc., 445 N.J. Super. 173, 183 (App. Div. 2016). By undertaking the duties and responsibilities of a Democratic member of the Commission, as well as by foregoing the independence that would otherwise flow from the New Jersey Constitution to members of the Commission, Sweeney provided consideration.

3. Sweeney’s Removal Undermines the Representation of Southern New Jersey’s Democratic Voters.

Jones argues that he gave due consideration to the representation of the various geographical areas of the State, as supposedly evidenced by Matos’s residence in Monmouth County, work on the Pinelands Commission, and birth in Burlington County. (Jones Br. at 17.) He further points to the fact that a Republican member of the Commission resides in Salem County. (*Id.* at 18.) However, Jones cannot dispute the fact that his unlawful removal of Sweeney leaves no Democratic member of the Commission from any of the eight counties comprising southern New Jersey.

The New Jersey Constitution charges “[e]ach State chairman” with considering “the representation of the various geographical areas of the State.” N.J. Const. Art 4, § 3, ¶ 1. Jones cannot avoid his responsibility in this regard by claiming that the Republican Chairman satisfied his responsibility.

It is also a logical fallacy to argue that Monmouth County had been previously unrepresented and that many of the other counties do not have a resident on the Commission. Consideration must be given to “geographical areas,” not necessarily counties. As currently comprised, the Democratic members of the Commission all reside in the New York City metropolitan area, with an entire half of the State unrepresented. The percentage of the State’s population that has a representative from their county also does nothing to address the “geographic areas of the State.”

4. The 2010 Removal of a Member of the Congressional Redistricting Commission by Sweeney is Distinguishable.

Jones argues that his supposed power to remove a member of the Commission “should not come as a surprise,” because Sweeney previously removed a member of the Congressional Redistricting Commission. (Jones Br. at 11.) This is disingenuous at best.⁵ The constitutional

⁵ Jones appears to rely on blog posts as “authority” for his arguments.

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provision for congressional redistricting is fundamentally different from the constitutional provision for legislative apportionment in who makes the appointments. In congressional redistricting, the constitutional provision specifically grants the President of the Senate, “with due consideration to geographic, ethnic and racial diversity,” the right to appoint two members of the commission. N.J. Const. Art 2, § 2, ¶ 1. Sweeney’s predecessor as Senate President, Richard J. Codey, appointed Eldridge Hawkins, Jr. to the Congressional Redistricting Commission more than one year before the congressional deadline for such appointments, knowing that his term as Senate President would end long before the time such appointment should be made. Faced with this improper attempt to usurp his office and the constitutional right of the Senate President to appoint two members, Sweeney properly removed Mr. Hawkins from the Congressional Redistricting Commission. That removal came *in advance* of the constitutional deadline for appointments and *before* the Commission began its work.

In this case, by contrast, Jones’s removal of Sweeney comes more than a year *after* the constitutional deadline for appointments and *after* the Commission, with Sweeney as a member, has completed a significant portion of its work. It is also noteworthy that Sweeney’s appointment was made on November 15, 2020—the last day to make appointments—making his appointment timely and proper; unlike the premature appointment of Mr. Hawkins.

5. Sweeney is Irreparably Harmed by his Removal from the Commission.

As set forth in Sweeney’s moving brief, both he and the Democratic voters of southern New Jersey will suffer irreparable harm if Jones is permitted to unlawfully remove him from the Commission. This is not a speculative harm and, with respect to the esteemed Eleventh Member of the Commission, cannot be remedied by his studied participation. The various geographic regions of the State have varied interests that are advanced best by representatives that actually live in those geographic regions. To suggest that the interests of half the State will be protected because Matos is a member of the Pinelands Commission, or the Eleventh Member is a person of integrity, diminishes the constitutional interest of Democratic voters from southern New Jersey to legislative district boundaries that speak to local concerns. Constitutional violations by themselves are generally recognized to give rise to irreparable harm. See Elrod v. Burns, 427 U.S. 347, 373 (1976); Atlantic Coast Demolition & Recycling Inc. v. Bd. of Chosen Freeholders of Atlantic Cty., 893 F. Supp. 301, 308-09 (D.N.J. 1995); see also 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948 at 440 (1973) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”). When combined with the specific harm to the representational interests of the Democratic voters of southern New Jersey, the violations of the New Jersey Constitution present here constitute irreparable harm warranting emergent relief.

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6. The Democratic Members of the Commission Do Not Have a First Amendment Right to Associate that Outweighs Sweeney's Irreparable Harm.

Jones argues that any irreparable harm suffered by Sweeney in the absence of emergent relief would be outweighed by the harm to the First Amendment associational rights of the Democratic members of the Commission if emergent relief were granted.⁶ (Jones Br. at 24.) This is mistaken. As an initial matter, the associational rights of the Democratic Party were exercised in the first instance by the ability of its Chairman to appoint members for the fixed constitutional term. Jones has cited no authority for the proposition that the associational rights of a political party can supersede the fixed term of a constitutional appointment.

Additionally, the Agreement requires the loyalty of the Democratic members of the Commission. (See Verified Complaint, Ex. A.) It expressly provides that "the delegation of Democratic members appointed to the Commission at all times will cast its entire vote as a unit as determined by majority vote, including but not limited to the final vote for certification and establishment of legislative districts." (*Id.* at ¶ 7.) Sweeney has complied at all times with obligations under the Agreement, and there is no allegation, let alone evidence, to the contrary. The associational rights of the Democratic members of the Commission would not be harmed in any way by Sweeney's reinstatement.

7. The Commission Can Most Effectively Complete Its Work Without Delay Through Sweeney's Reinstatement.

Members of the Commission oppose Plaintiff's Motion on the grounds that any delay caused by this litigation would impact the Commission's ability to do its work and certify New Jersey's final legislative map by the constitutional deadline of March 1, 2022. (Carchman Br. at 2; Democratic Br. at 2; Republican Br. at 2.) The Commission members highlight the very need for urgent relief in reinstating Sweeney to his constitutionally appointed position as a Democratic member of the Commission. Sweeney does not seek to delay the Commission's work. Rather, he seeks to promptly be reinstated to his position to continue the work he already began with the Commission in formulating New Jersey's legislative district maps. As a member of the Commission, Sweeney has participated in weekly calls, undertaken numerous public meetings, and contributed to the drawing of New Jersey's proposed maps, which are substantially complete and scheduled to be presented to the Eleventh Member of the Commission for evaluation. Given Sweeney's experience as a member of the Commission, he is better suited than Matos to continue the work of the Commission and assist in meeting the constitutional deadline.

⁶ Jones asserts that the three other Democratic members of the Commission support Sweeney's removal. (Jones Br. at 23.) However, the Democratic members of the Commission assert that they were not involved in the decision to remove Sweeney and have not taken "any prior official action with respect to same." (Democratic Br. at 2.)

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It is also worth noting, that no legislative election will take place in 2022. As a result, the potential impact of district lines being submitted late on primary elections is not present here.

* * *

For the reasons set forth in Sweeney's moving brief, as well as set forth above, Sweeney respectfully requests that he be reinstated to the Commission as soon as possible so that the Commission can complete its work.

Respectfully,
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v.

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Defendants.

**SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MERCER COUNTY**

Docket No. MER-C-7-22

Civil Action

CERTIFICATE OF SERVICE

I hereby certify that the within Letter Reply Brief to Defendants' Response to Order to Show Cause was served upon the below listed:

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