

Affirmation of Steven B. Salcedo

Exhibit A

1 STATE OF NEW YORK COUNTY OF STEUBEN

2 SUPREME COURT

3 -----X

4 TIM HARKENRIDER et al., : Index No.

5 Petitioners, : E2022-0116CV

6 -vs- :

7 :

8 GOVERNOR KATHY HOCHUL et al., :

9 Respondents. : Special Proceedings

10 ----- X

11 Hall of Justice

12 Bath, New York

13 March 3, 2022

14 BEFORE:

15 HON. PATRICK F MCALLISTER

16 Acting Supreme Court Justice

17 APPEARANCES:

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20 New York, New York 10022

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23 REPORTED BY:

LAURA BLISS POWER
24 Official Court Reporter
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Harkenrider et al. - v - Governor Hochul et al.

1 THE COURT: This is the matter of Tim
2 Harkenrider, et al. Versus Governor Kathy Hochul, et al.
3 Just a word before we start today, I see everybody has
4 got their mask on. Masks are still required in the state
09:31:41 5 courtrooms. When you move outside the courtroom, that's
6 the county and they don't have a mask requirement, but
7 when you're in here, all masks are required. The only
8 exception to that is if the attorneys are speaking at the
9 podium I'll allow them to take down their masks to speak.
09:32:03 10 I'm a little hard of hearing, I'm going to ask you all to
11 speak up, and we'll use the podium for argument. This is
12 being simulcast, and that way people will be able to see
13 you.

14 Let's find out who's here today. Do we have
09:32:20 15 any of the Petitioners here?

16 *(No indication.)*

17 THE COURT: Not present, but their attorneys
18 are. I'm going to ask the attorneys to put their
19 appearances on the record. We'll start with Petitioners.

09:32:38 20 MR. MOSKOWITZ: Bennet Moskowitz; Troutman
21 Pepper.

22 THE COURT: Thank you, Mr. Moskowitz.

23 MR. TSEYTLIN: Misha Tseytlin; Troutman,
24 Pepper.

09:32:47 25 THE COURT: Misha Tseytlin. Am I saying that

Harkenrider et al. - v - Governor Hochul et al.

1 correctly?

2 MR. TSEYTLIN: Yes, Your Honor.

3 MR. WINNER: George H Winner Junior,

4 Petitioner.

09:32:56 5 THE COURT: Mr. Winner.

6 All right on behalf of Governor Kathy Hochul,

7 attorneys?

8 MS. MCKAY: Heather McKay of The New York State

9 Attorney General's Office.

09:33:06 10 THE COURT: Was that Heather McKay?

11 MS. MCKAY: Yes.

12 MS. CRANE: Michele Crane from the New York

13 State Attorney General's Office.

14 THE COURT: What's the name again?

09:33:14 15 MS. CRANE: Michele Crane.

16 THE COURT: Michele Crane.

17 MS. HALLIYADDE: Muditha Halliyadde for

18 Attorney General's Office.

19 THE COURT: I'm sorry?

09:33:28 20 MS. HALLIYADDE: Muditha Halliyadde.

21 THE COURT: Thank you.

22 On behalf of the Senate Majority Leader?

23 MR. HECKER: Eric Hecker from Cuti, Hecker,

24 Wang.

09:33:42 25 THE COURT: Eric Hecker?

Harkenrider et al. - v - Governor Hochul et al.

1 MR. HECKER: Yes.

2 MR. CUTI: John Cuti from Cuti, Hecker, Wang.

3 THE COURT: John, what's the last name?

4 MR. CUTI: Cuti.

09:33:54 5 MR. GOLDENBERG: Alexander Goldenberg for Cuti,
6 Hecker, Wang.

7 MS. REITER: And Alice Reiter from --

8 THE COURT: Alex Reiter?

9 MS. REITER: Alice Reiter.

09:34:14 10 THE COURT: Alice Reiter.

11 Are the same attorneys here on behalf of the
12 Speaker of the Assembly?

13 MR. BUCKI: No, Your Honor, I'm here on behalf
14 of Speaker Heastie. My name is Craig Bucki, last name
09:34:24 15 spelled, B-U-C-K-I from The Law Firm of Phillips Lyte in
16 Buffalo.

17 THE COURT: Thank you, Mr. Bucki.

18 Anyone else here on behalf of the Speaker of
19 the Assembly?

09:34:36 20 MR. BUCKI: No.

21 THE COURT: Is there anyone here on behalf of
22 The New York State Board of Elections? Is there anyone
23 here on behalf of the New York State Legislative Task
24 Force on Demographic Research and Reapportionment?

09:34:52 25 MR. HECKER: Your Honor, each house of the

Harkenrider et al. - v - Governor Hochul et al.

1 legislature has two appointees to Lot 4, so collectively
2 the attorneys for the Senate Majority Leader and the
3 Assembly Speaker effectively represent Lot 4.

4 THE COURT: Very good, thank you.

09:35:11 5 We have several matters on this morning. We're
6 going to start with the motion to dismiss brought by the
7 Governor and Lieutenant Governor. Which attorney for the
8 Governor/Lieutenant Governor would like to present that?

9 MS. MCKAY: Heather McKay, Your Honor.

09:35:32 10 THE COURT: Okay, Ms. McKay, please proceed.

11 MS. MCKAY: Good morning, Your Honor.

12 THE COURT: Good morning.

13 MS. MCKAY: I don't want to -- there's been
14 extensive briefing on our motion to dismiss. I don't
09:35:50 15 want to belabor the points. I'm sure that Your Honor is
16 familiar with our arguments as detailed in those papers.
17 I want to touch on a couple of highlighting points here,
18 and I'm happy to answer any questions that Your Honor may
19 have. First, I want to discuss the jurisdictional defect
09:36:10 20 that we've raised in our papers. The retroactive service
21 attempts do not in fact cure the jurisdictional defect,
22 and I believe our papers make abundantly clear that no
23 email service occurred, nor was it actually agreed to by
24 the Governor and Lieutenant Governor --

09:36:33 25 THE COURT: But they did receive notice, did

Harkenrider et al. - v - Governor Hochul et al.

1 they not?

2 MS. MCKAY: Notice -- we certainly are able --
3 we're able to access the papers, those are publicly filed
4 documents. So to the extent that we can access NYSEF, we
09:36:46 5 certainly have access to it. However these rules are in
6 place for very important reasons, and that's how the
7 Court obtains jurisdiction over the Respondents and with
8 respect to any discussion of waiver, the docket makes
9 abundantly clear that the Executive Respondents did not
09:37:05 10 appear until the time of our filed motion in which
11 obviously we were raising the issue. With respect to the
12 Lieutenant Governor it appears the Petitioners have
13 abandoned any purported claim against him by failing to
14 address that in their opposition papers to our motion.
09:37:27 15 With respect to the Governor herself there's still no
16 competent evidence. Our memo of law cites extensive
17 cases that establish that in a proceeding such as this, a
18 special proceeding, the Petitioners have a burden of
19 providing competent proof, and here there's absolutely no
09:37:50 20 proof whatsoever with respect to Governor Hochul's
21 involvement.

22 THE COURT: But, Ms. McKay, doesn't the law
23 require the Governor and the Lieutenant Governor to be
24 served in this type of matter?

09:38:01 25 MS. MCKAY: Yes, absolutely.

Harkenrider et al. - v - Governor Hochul et al.

1 THE COURT: How do I let them out? They're
2 necessary parties, aren't they?

3 MS. MCKAY: Well, I don't believe that's what
4 Unconsolidated Laws 4221 says. That provision is
09:38:11 5 indicating that service need to be made on them, amongst
6 many others, and not all of those entities are named in
7 this action because that provision does not pertain to --
8 it doesn't establish a basis for bringing a legal claim
9 against any of them individually. And here there's
09:38:34 10 nowhere -- there's no allegations as to her involvement
11 in the actual drawing of redistricting lines.

12 THE COURT: She had to approve it.

13 MS. MCKAY: Sure.

14 THE COURT: Correct?

09:38:43 15 MS. MCKAY: Absolutely. The Governor pursuant
16 to the Constitution does play a role the same way that
17 she does with any legislative act that she signed it into
18 law, and she certainly did. So here however what we're
19 left with then is a quasi-legislative act that's entitled
09:39:04 20 to absolute legislative immunity. So that's why she
21 should be released from this case. The first cause of
22 action fails as a matter of law the attempts at having
23 the -- that the IRC needs to take the first and second
24 attempts at creating a plan. The fact that that shall be
09:39:29 25 the redistricting process does not automatically equate

Harkenrider et al. - v - Governor Hochul et al.

1 to failure of the IRC agreeing, then transforms what is a
2 fundamental legislative function and always has been into
3 a -- frankly a judicial one. The legislature -- that the
4 legislature has the authority to draw the maps is
09:39:51 5 absolutely clear and unambiguous even after the 2014
6 amendments and even if there were an ambiguity in the
7 constitutional provisions, including the 2014 amendments,
8 Petitioners' suggested interpretation of intent behind
9 the 2014 amendment to take that quintessential
09:40:14 10 legislative function and remove it entirely leads to
11 absurd results. Certainly the 2021 legislation is
12 permissible because it doesn't contradict anything in the
13 2014 amendment. So obviously all these arguments are
14 very intertwined. If you buy into the concept that
09:40:39 15 Petitioners are advocating here that the legislature in
16 first proposing the 2014 amendments and then the people
17 in approving them -- if you buy into the concept that
18 that meant that the legislature no longer has the
19 authority, and that the IRC can essentially hold everyone
09:41:01 20 hostage, at which point it has to be now drawn by a
21 Court, then you're necessarily going to find that the
22 2021 legislation did not fill in a gap that's there. So
23 these things really rise and fall together.

24 THE COURT: Did the 2021 legislation pass
09:41:22 25 basically what was proposed and voted down in the

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Harkenrider et al. - v - Governor Hochul et al.

1 constitutional amendment?

2 MS. MCKAY: Well I'm glad Your Honor asked
3 about that because the arguments that Petitioner's make
4 on this are -- they're borderline misleading. First, the
09:41:39 5 2021 legislation was fully approved by both houses of the
6 legislature in June of 2021, so that predates the failure
7 of Ballot Proposal 1. In addition to that, while Ballot
8 Proposal 1 did contain language that clarified this issue
9 of an IRC stalemate, it was only one tiny part of that
09:42:05 10 overall ballot proposal which is why I've included the
11 ballot proposal in our papers from the Board of
12 Elections' public website which shows that there were
13 numerous matters in that proposed ballot initiative that
14 would absolutely have required constitutional amendment.
09:42:25 15 Changing quorum requirements, changing timing, those are
16 things that would truly have changed the terms in the
17 2014 amendments, and therefore did absolutely need a
18 constitutional amendment approved by the voters. This
19 aspect of the IRC stalemate, which essentially just
09:42:45 20 clarified what was already the process, was not something
21 that actually needed to be in a constitutional amendment,
22 it would be great if it was, but it could be accomplished
23 by legislation.

24 Finally, as to the second and third causes of
09:43:05 25 action, the Governor doesn't have an expansive amount of

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Harkenrider et al. - v - Governor Hochul et al.

1 arguments to present in that, other than indicating that
2 Petitioners really have not satisfied their extremely
3 high burden of demonstrating a con -- that the maps are
4 unconstitutional beyond a reasonable doubt. Given the
09:43:28 5 Governor's extremely minimal role -- excuse me -- in just
6 merely signing the maps, we are not prepared -- excuse me
7 one moment.

8 THE COURT: You're fine.

9 MS. MCKAY: We would primarily rely on the
09:43:48 10 arguments of our Co-Respondents in terms of the
11 substantive maps as they've been drawn.

12 And finally, as to the motions to amend, I'm
13 happy to address those now. We have very minimal --
14 primarily we would rely on our papers. Again these were
09:44:02 15 extensively briefed, and unless Your Honor has any
16 questions for us --

17 THE COURT: In regards -- I'd like to go back
18 to the legislative immunity. I mean, isn't that really
19 qualified immunity under the Pataki and Cuomo cases?

09:44:21 20 MS. MCKAY: No. It is right conferred under
21 the Constitution in New York State, and it's not -- it
22 is -- in fact the cases that we've cited do indicate that
23 it is an absolute right with respect to the -- especially
24 the particular tasks that are alleged here by Governor
09:44:40 25 Hochul. Just in terms of signing, it's very limited, the

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Harkenrider et al. - v - Governor Hochul et al.

1 actual factual allegations against her, and given that
2 very limited nature this can be a basis for dismissal,
3 not just obviously a basis for opposing discovery
4 requests and all of that, which here you couldn't
09:45:01 5 envision much more broad discovery demands than we have
6 here. But that's why that's included in our motion is
7 because given the limited nature of the factual
8 allegations against the Governor, those are absolute
9 immunity she's entitled to under the cases that we've
09:45:18 10 provided.

11 THE COURT: Thank you.

12 MS. MCKAY: Thank you, Your Honor.

13 THE COURT: I may call you back up, Ms. McKay,
14 on the motion to amend. We'll deal with that separately.

09:45:27 15 MS. MCKAY: Okay, thank you.

16 THE COURT: Who'd like to answer this on behalf
17 of the Petitioners?

18 MR. TSEYTLIN: Thank you, Your Honor.
19 Misha Tseytlin on behalf of the Petitioners.

09:45:43 20 First, briefly on the service issue. As we
21 pointed out in our papers, service of a petition is
22 governed by CPLR 403 not 2214, that was reflected in this
23 Court's order to show cause, which directed us to serve
24 in the manner of a summons, that's docket 18 -- docket
09:46:05 25 11. We followed that to a T. To the extent my friends

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Harkenrider et al. - v - Governor Hochul et al.

1 wanted the papers at the Rochester office for some reason
2 we did serve them their as a courtesy. They received
3 services in their reply brief filed last night. Their
4 only objection to that was while they claimed that that
09:46:23 5 was violative of this Court's order to show cause, the
6 initiating one, again that's docket 11, that orders us to
7 deliver the -- to serve it consistent with a summons, not
8 under 2214. So the issue is not only frivolous, but it's
9 also moot. Further, Counsel for the Governor did in fact
09:46:45 10 waive this entire issue by participating in the court
11 ordered meet and conferral process. I think almost
12 every --

13 THE COURT: Didn't they bring a motion to
14 dismiss? Isn't that -- the motion to dismiss for lack of
09:46:55 15 jurisdiction and proper service right off the bat cover
16 that?

17 MR. TSEYTLIN: They participated in that
18 conference before they filed that. I think almost every
19 attorney here was on that call. Counsel for the Governor
09:47:08 20 participated and quite aggressively making multiple
21 points that a conferral occurred consistent, and by the
22 direction of this Courts on its order to show cause.
23 Finally under the controlling O'Brien case any defect
24 here is a technical defect under CPLR 2001 and so there
09:47:33 25 is no jurisdictional defect at all with regard to

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Harkenrider et al. - v - Governor Hochul et al.

1 O'Brien. The service there wasn't made at all on the
2 Governor at all, not to the claim drawing office. And
3 yet the fourth division said that because that case --
4 the Board of Elections was represented, there was no
09:47:54 5 prejudice, no substantial rights were violated under
6 2001. Here of course the Board of Elections represented
7 by separate counsel, all the legislative respondents
8 represented by separate counsel, Governor's counsel
9 appearing here, no prejudice. So if there was some sort
09:48:12 10 of error, which absolutely clearly there wasn't, it would
11 be just a technical issue that is not jurisdictional at
12 all under 2001. Unless Your Honor has any questions
13 about that I would move on to the other points.

14 THE COURT: Go ahead.

09:48:29 15 MR. TSEYTLIN: With regard to the Governor as a
16 Defendant -- and the only thing I would add to Your
17 Honor's question is the Governor has been a Respondent or
18 a Defendant in virtually every single redistricting
19 challenge in the state's history, that's because not only
09:48:42 20 does the Governor sign the maps, the Governor also is
21 above the Board of Elections, which needs to administer
22 the elections. Now of course I agree with my friends
23 that because we did in fact name the Board of Elections,
24 if the Governor was dismissed including on this by
09:49:00 25 submission -- frivolous service issue, the case could

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Harkenrider et al. - v - Governor Hochul et al.

1 fully go on and we could have binding injunction
2 prohibiting the Board of Election represented by separate
3 counsel from administering the elections on any of these
4 unconstitutional maps.

09:49:14 5 THE COURT: Doesn't there have to be some
6 allegations against the Governor and Lieutenant Governor
7 to hold it in there?

8 MR. TSEYTLIN: First of all, we do have an
9 allegation against the Governor that she promised to do
09:49:25 10 the very egregious gerrymandering that occurred.

11 THE COURT: Which they say was taken out of
12 context.

13 MR. TSEYTLIN: I leave it to Your Honor to lead
14 that article and see if that is a credible articulation
09:49:36 15 of what she said. But in any event, for example, the
16 Board of Elections, we don't have any allegation that
17 they did anything wrong, but there's no gainsaying that
18 they can be named as a respondent here because we need
19 them here to obtain effective relief. We are seeking an
09:49:51 20 injunction against administering elections under
21 unconstitutional maps. So the Board of Elections is a
22 proper Respondent because we need them for full relief,
23 they're a necessary party. The Governor is in this case
24 for the same reason. Now, again, because we did name the
09:50:10 25 Board of Elections, the Governor is not an essential

Harkenrider et al. - v - Governor Hochul et al.

1 party, but it is entirely appropriate to name the
2 Governor because she oversees the Board of Elections, and
3 an injunction stopping elections from happening under
4 these unconstitutional maps should certainly bind both
09:50:28 5 the Board of elections and the Governor.

6 Now moving on to the procedural argument and
7 the substantive argument. I don't know to the extent
8 that Your Honor would like me to fully opine on why we
9 think we are not only -- defeat their motion to dismiss,
09:50:44 10 but in fact on the papers before Your Honor, Your Honor
11 should with respect today enter a judgment in our favor
12 and injunction in our favor on the procedural argument.
13 Now --

14 THE COURT: Well Ms. McKay covered it somewhat.
09:50:57 15 So you can respond.

16 MR. TSEYTLIN: Okay the text of the
17 Constitution is clear and my friends don't engage with it
18 at all. It says that the process shall govern
19 redistricting. The process involves two rounds of maps
09:51:12 20 coming out from the IRC and the legislature voting on it,
21 only thereafter does the legislature get to enact a map.

22 THE COURT: It's not a complete process, is it?
23 It's part of the process?

24 MR. TSEYTLIN: The process, there's definite --

09:51:27 25 THE COURT: That's in the Constitution, but --

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Harkenrider et al. - v - Governor Hochul et al.

1 MR. TSEYTLIN: Right.

2 THE COURT: But it is not the complete process,
3 is it?

4 MR. TSEYTLIN: The --

09:51:35 5 THE COURT: It still takes the Governor and the
6 legislature to pass it.

7 MR. TSEYTLIN: Your Honor, that's also in the
8 Constitution.

9 THE COURT: That is.

09:51:43 10 MR. TSEYTLIN: And the problem for them is the
11 process wasn't followed. They don't engage with that
12 cautious language. To the extent I think I understand
13 the argument -- it's hard to follow -- is what they're
14 saying is if that process isn't followed, we get to
09:52:00 15 default to a different process, the process used before
16 2014, but that's not what the Constitution says. The
17 Constitution could have said if this process doesn't work
18 then go to the pre-2014 process, that is not what it
19 says. In fact, what the Constitution says -- I'll read
09:52:20 20 this language, it's very short and I think it settles
21 this issue and it's so straight forward that I think both
22 Congressional and Senate maps should be struck down to
23 short order. Quote, "The process for redistricting
24 congressional and state legislatures shall be established
09:52:42 25 by this section and section 5, and it shall govern

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Harkenrider et al. - v - Governor Hochul et al.

1 redistricting in the state except to the extent that a
2 court is required to order the adoption or changes to a
3 redistricting plan as a remedy". So what does that mean?
4 There is one exclusive process. The process there is one
09:53:00 5 and only one exception when courts order a fix. There is
6 no off-ramp for a different process, if the IRC doesn't
7 pass the map such that the legislature can't enact any
8 maps. The legislature understood this, which is why they
9 attempted to put this ballot measure before the People.
09:53:23 10 I heard my friend for the Governor say, well there were
11 other provisions in that, fair enough, but why do they
12 put that provision in there before the People --

13 THE COURT: But is your argument that the
14 Commission absolutely has to send a first set of maps?
09:53:39 15 If they're turned down they have to submit a second set
16 of maps? Is that the argument?

17 MR. TSEYTLIN: That's exactly --

18 THE COURT: That's the procedural argument.

19 MR. TSEYTLIN: That's exactly --

09:53:47 20 THE COURT: What if in good faith they can't
21 come to an agreement on that? We don't have an election?

22 MR. TSEYTLIN: That's right, Your Honor. That
23 it could be the same as if the Governor and the
24 legislature couldn't agree on a map. You know if --
09:54:02 25 let's say you had -- in good faith the Assembly can't

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Harkenrider et al. - v - Governor Hochul et al.

1 agree to a replacement map with the Senate or the
2 Governor, that happened in the last cycle, in the 2012
3 cycle with regard to the Congressional maps. So what
4 happens then? The old map still governs, if the old map
09:54:18 5 is still constitutional. Let's say there weren't any
6 population changes, you can hold an election under the
7 old map. If the old map is now unconstitutional because
8 it's mal apportioned then it becomes the duty of the
9 courts to correct this. This is not unusual. Again,
09:54:32 10 when the mandatory constitutional process for enacting a
11 new map fails and the old map is unconstitutional, the
12 courts always step in. But again, the old map is still
13 the law of the lands, the one that was enacted in 2012.
14 And an election can be held under that map unless someone
09:54:52 15 challenged that map in court. We have challenged those
16 maps in court.

17 THE COURT: I see that.

18 MR. TSEYTLIN: So both the 2012 map is
19 unconstitutional because it's mal apportioned and the
09:55:02 20 2022 map is unconstitutional because they didn't follow
21 the exclusive process in the same way as if they can't --
22 under the old system if they didn't follow the process of
23 getting by cameralism of presentment. It's just an ultra
24 vires act, and it becomes the duty of the courts to enjoy
09:55:20 25 any actions under that act, and then a court will need to

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Harkenrider et al. - v - Governor Hochul et al.

1 adopt a remedial map. In -- and the reason the Court
2 needs to adopt a remedial map is because the Constitution
3 provides the legislature with the opportunity to -- a
4 reasonable opportunity to fix any errors. But when the
09:55:35 5 error is procedural, there's no way that error can be
6 fixed. It would be as if the legislature -- only one
7 house of the legislature passed a new map. That before
8 2014 was the exclusive process for enacting redistricting
9 legislation. One house didn't pass it or two houses
09:55:53 10 passed it, but the Governor vetoed, that was an ultra
11 vires law. In the same way if the commission does not do
12 a necessary step in the exclusive redistricting process,
13 the output is an ultra vires act, which is not the law of
14 the lands. The law of the lands currently is the 2012
09:56:13 15 maps, but again we have challenged those as
16 unconstitutional, and my friends have not argued to the
17 contrary, they have conceded by silence that those maps
18 are now unconstitutional even though they were
19 constitutional when a federal court adopted the 2012
09:56:28 20 congressional map and a legislature with the Governor's
21 signature adopted the Senate map.

22 THE COURT: Are you claiming that the 2021
23 legislation is unconstitutional?

24 MR. TSEYTLIN: It is absolutely
09:56:39 25 unconstitutional. We put that in our briefs and we put

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Harkenrider et al. - v - Governor Hochul et al.

1 that in our petition. The reason for that is it attempts
2 to create an additional process. Again the Constitution
3 provided that there's only a single process for adopting
4 replacement redistricting maps, and it provides only one
09:56:56 5 exception, a textual exception where a court can order
6 some change. What they attempted to do with Section 633
7 was create an additional process, and again I will
8 emphasize, they knew that this couldn't be done without
9 constitutional amendment which is why they also passed
09:57:17 10 the constitutional amendment and put it before the People
11 because they knew they were changing the process, the
12 process that was exclusive in the Constitution. Now of
13 course if the constitutional amendment had passed, then
14 the legislation -- then it would be under a different
09:57:31 15 constitutional footing. There's all kind of legislation
16 that's passed that reenforce constitutional amendments.
17 In fact they have legislation that codifies the 2014
18 process. But upon -- but because the People rejected
19 that amendment resoundingly, the legislation that they
09:57:52 20 drafted in view of that amendment is unconstitutional.

21 THE COURT: Anything further?

22 MR. TSEYTLIN: I do have obviously extensive
23 arguments on the substantive aspect of our challenge.
24 However, Counsel for the Governor only addressed that
09:58:07 25 briefly, so perhaps I'll reserve that until --

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Harkenrider et al. - v - Governor Hochul et al.

1 THE COURT: How about legislative immunity or
2 qualified immunity?

3 MR. TSEYTLIN: Your Honor, do you mean with
4 regard to the Governor being a Defendant or with regard
09:58:19 5 to discovery?

6 THE COURT: Well, both.

7 MR. TSEYTLIN: With regard to the Governor
8 being a Defendant, again we have explained -- and I've
9 explained this morning that the Governor is a Defendant
09:58:33 10 in large part for the same reason the Board of Elections
11 is a Governor -- is an enforcer of the elections in the
12 state. Again, the Board of Elections is the primary
13 enforcer, but the Governor, she sits above the Board of
14 Elections and there's no legislative immunity to not be
09:58:49 15 enjoyed, not to enforce unconstitutional law. The
16 Governor is sued all the time. There was a pretty big
17 case maybe about a year ago where Governor Cuomo was sued
18 to not enforce certain restrictions on places of worship.
19 You know, he was sued because he would have been
09:59:07 20 enforcing those restrictions. This kind of thing
21 happened all the time. Now with regard to legislative
22 privilege, as Your Honor pointed out, that's a qualified
23 privilege. What we're seeking here is the -- and we've
24 quoted case law from New York that says that the New York
09:59:25 25 Speech and Debate Clause is parallel to the Federal

Harkenrider et al. - v - Governor Hochul et al.

1 Speech and Debate Clause. We now have many years of
2 experience with the federal courts treatment of
3 legislative immunity in the partisan gerrymandering
4 context. What the Federal courts have said is this is a
09:59:41 5 qualified privilege and there's five factors that need to
6 be determined whether to set aside. Those factors are
7 readily satisfied in partisan redistricting cases,
8 because a significant portion of the evidence of a
9 partisan gerrymandering -- of gerrymandering purpose is
10:00:00 10 exclusively in the hands of the legislature or the
11 Governor, and the need for it is great. The issues are
12 very serious and because partisan gerrymandering is
13 unconstitutional, it wouldn't have any sort of chilling
14 affect. So the New York Speech and Debate Clause is
10:00:17 15 parallel to the Federal one, and all the Federal cases
16 that have been cited to Your Honor apply this five factor
17 test, only thing we're asking is for the very standard
18 form of discovery that's always given to Plaintiffs in
19 partisan gerrymandering cases here -- Petitioners, things
10:00:34 20 like did they look at political data which could be
21 unconstitutional, did they speak --

22 THE COURT: I won't have you get into the
23 discovery because we'll cover that soon.

24 MR. TSEYTLIN: Yes, Your Honor. So that's the
10:00:45 25 extent of what I'll say on that.

Harkenrider et al. - v - Governor Hochul et al.

1 THE COURT: All right, thank you.

2 MR. TSEYTLIN: Thank you.

3 THE COURT: With regard to the Governor and
4 Lieutenant Governor's motion to dismiss for lack of
10:00:59 5 proper service and not mentioning anything in the
6 paperwork, there's some -- as regards to Governor,
7 nothing that I saw as regards to Lieutenant Governor.
8 I'm still denying the motion for the following reasons.

9 The New York Unconsolidated Law Section 4221 requires
10:01:17 10 service of the petition on the Governor and the
11 Lieutenant Governor. I believe they're necessary
12 parties. CPLR 403 is controlling, it doesn't specify
13 service upon the nearest office of the Attorney General,
14 and while CPLR 2214 does refer to services of an order to
10:01:38 15 show cause upon the nearest Attorney General's office,
16 that is specifically in reference to motions and not the
17 commencement of an action which we have here. In
18 addition, the Governor and Lieutenant Governor admit they
19 received notice, and I've heard no argument that anyone
10:01:56 20 was prejudiced by it. So that's my ruling on that
21 motion.

22 And that's going to move us to the Petitioner's
23 order to show cause to add the New York Senate
24 redistricting to the action. Who will be arguing that on
10:02:16 25 behalf of the Petitioner? Mr. Tseytlin?

25

Harkenrider et al. - v - Governor Hochul et al.

1 MR. TSEYTLIN: Yes, Your Honor. I'm going to
2 be very brief on this. Leave to amend is freely granted,
3 there's really two considerations, one; whether it would
4 basically be so insubstantial as to be dismissed. I've
10:02:40 5 already explained why our procedural argument is not only
6 substantial, but sure to win. We also have a substantive
7 argument and the procedural argument applies to the same
8 extent to the Congressional and Senate, they use the same
9 procedure.

10:02:58 10 With regard to the substantive arguments we
11 haven't developed those this morning, but Your Honor can
12 see in the papers that the process that was used was
13 justice partisan, which is a major consideration in
14 substantive partisan gerrymandering allegations and our
10:03:15 15 experts methodology which is wildly accepted by courts
16 around the country including most recently by the Ohio
17 Supreme Court showing that the senate map was more
18 pro-democrat than 5,000 computer generated maps, is
19 powerful evidence of substantive gerrymandering. We also
10:03:33 20 have an expert based specific discussion about specific
21 senate districts that were gerrymandered to favor the
22 Democrats. So we can discuss those things in more
23 detail, but that certainly survives that low barrier for
24 it's so insubstantially dismissed.

10:03:49 25 The only other inquiry on the motion on an

Harkenrider et al. - v - Governor Hochul et al.

1 amendment is prejudice. There's clearly no prejudice
2 here. We filed our initial petition within a couple of
3 hours of the Governor signing the maps. We filed the
4 motion to amend, I think three business days later. The
10:04:08 5 reason we did that is during the legislative process they
6 revealed the Congressional map first, so we had more time
7 to analyze it. The Senate map didn't get put out to the
8 world until a little bit later, so we needed more time to
9 look at it. There was absolutely no prejudice to anyone
10:04:27 10 by the way that we did this.

11 THE COURT: Are you saying the Senate map came
12 out after the Congressional maps?

13 MR. TSEYTLIN: Yes, it came out to the world.
14 They were signed together, but it came out to the world
10:04:38 15 later. And given the complexity of how many districts
16 there are, we needed a couple more days to analyze.
17 There was absolutely no prejudice. The procedural
18 arguments are entirely identical, so there's no -- you
19 know, those rise and fall together. With regard to the
10:04:52 20 substantive arguments, you know, we have the Trende
21 Report which applies the same methodology to both. They
22 presumably have the same critique of the Trende Report
23 with regard to the Senate and the Congressional. In
24 fact, in their opposition to leave to amend, they just
10:05:13 25 repurposed our expert criticism of the Trende approach to

Harkenrider et al. - v - Governor Hochul et al.

1 the Senate map.

2 So now -- and then the only other aspect is the
3 discussion of the specific Senate districts. They chose
4 not to put anything in writing responding to that, but I
10:05:31 5 will note that even when they contemplated[sic] to contest
6 the specific congressional districts, they didn't put in
7 any competent evidence to rebut our showing. They put in
8 an expert report from this Harvard professor from
9 Mesiti[sic], looks like he may have never been to the
10:05:48 10 State of New York, let alone certainly had no expertise
11 in New York to be able to talk about New York's district.
12 So even if they had responded to the Senate specific
13 districts, they presumably would have put in the same
14 expert who has no ability to testify on New York
10:06:06 15 communities of interest and that sort.

16 In any event the Court can strike down the
17 Senate districts today on the procedural arguments and
18 during remedial process they can be given the opportunity
19 to make any supplemental submission to the substantive
10:06:21 20 challenges to the Senate districts which would permit
21 this whole case to wrap up within the 60-day window that
22 the Constitution provides.

23 THE COURT: Thank you.

24 On behalf of the Governor?

10:06:36 25 MS. CRANE: Good morning, Your Honor.

Harkenrider et al. - v - Governor Hochul et al.

1 THE COURT: Good morning.

2 MS. CRANE: I'm Michele Crane from the Attorney

3 General's Office, Your Honor. The jurisdictional

4 argument which we raised with regard to the motion to

10:06:50 5 dismiss was also raised with respect to this motion to --

6 for leave to amend, the petition and given the fact that

7 this is a motion and that they made a motion to amend

8 their original pleading, then we would say that the CPLR

9 provision 2214 does apply here, and therefore they do not

10:07:09 10 have jurisdiction over the Governor or Lieutenant

11 Governor. I know you've already discussed this in

12 detail, and I think you're familiar with the arguments,

13 so I just want to make the distinction here with respect

14 to that issue. We also raised in this motion or our

10:07:23 15 opposition to the motion to amend the legislative

16 immunity and non-justiciability arguments, we'd like to

17 reiterate those to the Court. I think the Court is

18 familiar with those and lastly, Your Honor, we do believe

19 that allowing this amendment to occur would significantly

10:07:40 20 interfere with the election cycle and in the declaration

21 of Mr. Brown from our office, he specifically sets forth

22 the dates upon which everything needs to be accomplished,

23 and I would really ask the Court to look at those dates.

24 THE COURT: I did.

10:07:54 25 MS. CRANE: And to consider the impact that

29

Harkenrider et al. - v - Governor Hochul et al.

1 this amendment may have. The Attorney General's Office
2 on behalf of the Governor and Lieutenant Governor have
3 not responded or answered the petition yet. We would
4 need time to do that. If the Court allows discovery
10:08:06 5 there would be a --

6 THE COURT: You've had it for 20 days or so,
7 haven't you?

8 MS. CRANE: Well, we still need to put --

9 THE COURT: I understand.

10:08:13 10 MS. CRANE: It needs to be approved by Counsel
11 and the Governor's office before we submit, Your Honor,
12 we didn't really have this. There's a dispute about how
13 this was served obviously, and our office was not
14 assigned to represent the Governor and Lieutenant
10:08:27 15 Governor until fairly late in the game. Our focus was on
16 the papers that are before you today. We have not spent
17 the time answering the petition, so we will need time to
18 accomplish that.

19 THE COURT: The amended petition?

10:08:42 20 MS. CRANE: Yes, the amended petition. And so
21 that will need to be done. If the Court allows
22 discovery, that will need to be done, and all of this
23 now -- these cases are in jeopardy for this election
24 cycle to occur. So based on that, we would ask the Court
10:08:57 25 to deny the motion to amend the petition.

Harkenrider et al. - v - Governor Hochul et al.

1 THE COURT: Thank you, Ms. Crane.

2 MS. CRANE: Thank you.

3 THE COURT: On behalf of the Senate Majority

4 Leader will you be speaking on behalf of the Senate

10:09:08 5 Majority Leader and Senate Minority Leader there?

6 MR. HECKER: Assembly Speaker

7 there(indicating), Senate Majority Leader.

8 THE COURT: Very good.

9 MR. HECKER: Good morning, Your Honor, Eric

10:09:20 10 Hecker from Cuti, Hecker, Wang for the Senate Majority

11 Leader. I'll be very brief because I expect our

12 discussion to be extensive when we get to the petition

13 itself.

14 As we said in our papers we acknowledge

10:09:33 15 generally speaking that leave to amend is granted

16 liberally in a usual case. This is an unusual case for

17 three reasons. First of all, they've put in expert

18 testimony that fatally undermines their theory.

19 Mr. Trende has shown unmistakably and unequivocally that

10:09:53 20 in literally every single one of his thousands of

21 simulations, there are more Republican majority districts

22 in the Senate plan than in the enacted Senate plan --

23 THE COURT: He disputes that in the reply

24 though, doesn't he?

10:10:08 25 MR. HECKER: He doesn't actually. We can get

31

Harkenrider et al. - v - Governor Hochul et al.

1 into all that. I would respectfully suggest when we get
2 into the petition, but suffice it to say, we have that
3 futility argument.

4 Also as the Attorney General's Office is
10:10:20 5 arguing, we have a significant time problem. There is no
6 amended petition. Your Honor, we've been working very
7 hard on this case, we haven't taken days off in weeks,
8 it's taken everything we have to rebut the evidence both
9 statistically and also in terms of actually how the lines
10:10:40 10 were drawn. And if we have to go back and amend the
11 answer, the amended petition -- which we certainly will
12 if we're directed to, it's going to take time. And then
13 beyond that, as the Attorney General also emphasized, the
14 election season is already underway. The designating
10:10:56 15 petition period started two days ago. It would sew
16 confusion in the extreme for this Court to enjoin
17 anything, which is why in almost every case where there's
18 ever been a really bona fide argument of
19 unconstitutionality at this stage of the process, you
10:11:18 20 stick with what you've got, and you address whatever
21 arguments there are for the next cycle. So for those
22 three reasons, we think there's no reason to grant the
23 amended petition, and I look forward to addressing the
24 merits of the petition when we get to that motion.

10:11:32 25 THE COURT: But there has been a time crunch

Harkenrider et al. - v - Governor Hochul et al.

1 for you, for them, the Petitioner, for everybody. I
2 mean, the maps just got passed here, what? Three
3 weeks -- a month ago?

4 MR. HECKER: Correct, and we've now burned half
10:11:45 5 of the 60 days that Your Honor has jurisdictionally
6 because they didn't bother to challenge the Senate map
7 when they could have. They were passed together. The
8 Congressional map was announced 24 hours before the
9 Senate map, several days before they were enacted
10:12:00 10 simultaneously. They didn't bother to put it in their
11 petition, and we lost a month. Thank you, Your Honor.

12 THE COURT: Thank you.

13 Assembly Leader?

14 MR. BUCKI: Good morning, Your Honor, we would
10:12:23 15 second the arguments that were put forth by Counsel for
16 the Senate Majority Leader. We would agree with the
17 futility of the amendment, and in particular what I would
18 note from the evidence that is before the Court, in
19 particular the expert reports, is that typically when you
10:12:39 20 would do all of these various simulations, which
21 Mr. Trende did 5,000 simulations, we would submit
22 pursuant to the experts that we've offered that in fact
23 50,000 simulations would be a more appropriate sample
24 size, specifically in order to draw any kind of
10:12:58 25 conclusions concerning these maps. But what would

Harkenrider et al. - v - Governor Hochul et al.

1 specifically be expected, given the Partisan makeup of
2 the voters of the State of New York, is that you would
3 have a map with 63 senate districts with between 51 and
4 53 being more likely to elect a Democrat to the State
10:13:18 5 Senate. And in fact when you look at the map, only about
6 49 of the districts could be expected to have an
7 advantage for a democrat. So as our experts, both from
8 the Assembly side and the Senate side have demonstrated,
9 actually there is a Republican advantage to these maps
10:13:36 10 rather than a Democratic vantage. So we would submit
11 that given that evidence that we provided to the Court,
12 given the expertise that we've offered from our
13 experts -- I would note that in particular Mr. Trende is
14 a graduate student, he's never published anything that's
10:13:51 15 been subject to peer review. Mr. LaVigna is well -- very
16 much an expert in the field of communications, he worked
17 in communications for the State Senate, but he doesn't
18 claim to be a statistician, he doesn't claim to have any
19 kind of particular background that would give him the
10:14:08 20 authority to be able to give a proper statistical opinion
21 as to the propriety of these maps because when you get
22 down to it, evaluating these maps is a matter of social
23 science and a matter of evaluating mathematically whether
24 in fact there is an unfair partisan advantage that's been
10:14:28 25 given to one party or another. So we would submit that

Harkenrider et al. - v - Governor Hochul et al.

1 the petition is lacking in merit. The proposed amended
2 petition is lacking in merit.

3 The other thing I'd like to say, and I'm going
4 to touch on it briefly now, but I do anticipate
10:14:41 5 discussing it in greater detail later on if we do get to
6 argument on the merits of the actual petition, is the
7 issue of standing. We only have a limited number of
8 Petitioners in this case and there is no proposal to add
9 any Petitioners in the amended petition. And we would

10:15:00 10 submit that the law is clear both from the United States
11 Supreme Court as it's been put forth in the Gill versus
12 Whitford case which Mr. Tseytlin had the opportunity to
13 argue before the Supreme Court. This is true under the
14 Hays versus United States case, and in the State of New
10:15:16 15 York. It's true under the Bay Ridge Community Council
16 versus Carey case from the mid 1980's, is that in order
17 to challenge the lines of a particular district the
18 Petitioner needs to have standing, and the person who
19 would have standing is a person who actually lives in
10:15:34 20 that district. There are 63 Senate districts that are
21 proposed in this redistricting plan from throughout the
22 State of New York, and many fewer petitioners than 63.
23 And what the Court will find is that the vast majority of
24 districts are not represented by any Petitioner in the
10:15:53 25 amended petition.

Harkenrider et al. - v - Governor Hochul et al.

1 THE COURT: Let me ask you something.

2 MR. BUCKI: Yes.

3 THE COURT: The case law seems to indicate that
4 prior to predating the 2014 constitutional amendment that
10:16:06 5 required a Petitioner to be a resident of the district
6 before he would have standing, but wasn't that changed by
7 the constitutional amendment? Doesn't anyone have the
8 standing to challenge it?

9 MR. BUCKI: No, it was not, and I'm glad Your

10:16:20 10 Honor brought this up because we looked into this
11 yesterday, and in preparation for today. And in
12 particular the key case is the Bay Ridge Community
13 Council case that determined that in order to have
14 standing you need to live, for state constitutional
10:16:34 15 purposes, in a district. And the language that
16 Mr. Tseytlin cites from the state Constitution that says
17 any citizen may challenge a map, that very language was
18 not added to the Constitution in the 2014 amendment. In
19 fact, that language was in the state Constitution as it
10:16:55 20 existed in the mid 1980's when Bay Ridge Community
21 Council was decided. So as a consequence, just because
22 it says any citizen may challenge a map -- it's true any
23 citizen may challenge a map, but there's an additional
24 requirement that's unstated expressly in Article 3 of the
10:17:13 25 Constitution. But that is a requirement that comes to us

Harkenrider et al. - v - Governor Hochul et al.

1 from the tradition of the common law which is that in
2 order for a citizen to challenge, that citizen needs to
3 have standing. So that language was in the Constitution
4 in the mid 1980's, and not with understanding that -- Bay
10:17:29 5 Ridge Community Council at the Supreme Court level, as
6 affirmed by the appellate division, as affirmed by the
7 Court of Appeals on the decision that are rendered by the
8 Appellate Division, determined that there was no standing
9 on part of a gentleman who I believe lived in Long Lake
10:17:44 10 in Hamilton County who was trying to allege that somehow
11 there was an improper gerrymander on racial grounds in
12 Queens, and the Supreme Court said a person in Long Lake
13 cannot challenge what goes on in terms of how a map is
14 drawn in Queens. And that was true even though the state
10:18:06 15 constitution said then as it does now that any citizen
16 can make a challenge. So we would submit that with
17 respect to the amended petition, the vast majority of
18 Senate districts are unrepresented by the Petitioners,
19 and so as a consequence, the amended petition would lack
10:18:21 20 merit in that the vast majority -- in that the
21 Petitioners themselves cannot challenge the vast majority
22 of the districts that have been put forth in the Senate
23 map.

24 And then of course we would second the
10:18:35 25 contentions made by the counsel for the Senate Majority

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Harkenrider et al. - v - Governor Hochul et al.

1 Leader with respect to the prejudice if this amendment
2 were to be granted, in that, for example, there are
3 deadlines with respect to issuing ballots under the
4 UOCAVA, U-O-C-A-V-A statute that are coming upon us as
10:18:55 5 soon as the middle of May, not to mention the fact that
6 this proceeding needs to be completed by April 4th. And
7 so for all of those reasons, we oppose the motion for
8 leave to amend.

9 THE COURT: Thank you, Mr. Bucki.

10:19:07 10 Is there anyone else I haven't called on yet?

11 *(No response.)*

12 THE COURT: The issues in both the petition and
13 the amended petition seem to be the same. The parties
14 are the same, the requested relief is almost identical.
10:19:36 15 I don't see any prejudice. I'm going to grant leave to
16 amend the petition to add the New York State Senate
17 redistricting. I'm directing that the answer to the
18 amended petition be filed by March 10th which is
19 Thursday. That brings us to the Petitioner's order to
10:20:03 20 show cause for expedited discovery, and it's been touched
21 upon, but let's revisit it. Who will be arguing that on
22 behalf of the petitioner? Mr. Tseytlin?

23 MR. TSEYTLIN: Thank you, Your Honor, I did
24 touch upon this earlier. What we've requested here is
10:20:29 25 the standard discovery that partisan gerrymandering

Harkenrider et al. - v - Governor Hochul et al.

1 Plaintiff's do readily obtain in cases around the
2 country. The only case they've cited that denied the
3 discovery, only did so after there was already a holding
4 that the case was lacking in merit. Now just to be clear
10:20:48 5 on our procedural argument, which I think can be ruled
6 upon today or as soon as Your Honor is able, we do not
7 need discovery in our procedural argument. That is just
8 a matter of straight constitutional text. We are -- on
9 our substantive argument, we do think we have put before
10:21:06 10 Your Honor more than sufficient evidence for us to
11 prevail. Having said that, just because we put enough
12 evidence for us to prevail doesn't mean we're not
13 entitled to the full scope of evidence including --
14 because I'm sure that one way or the other this matter is
10:21:19 15 going to get appealed.

16 THE COURT: Subject to qualified privilege?

17 MR. TSEYTLIN: Sorry?

18 THE COURT: Subject to qualified --

19 MR. TSEYTLIN: Of course, Your Honor. If Your
10:21:29 20 Honor things this aspect of our request is overbroad or
21 subject to that privilege, we would certainly be open to
22 a narrowing of our discovery request.

23 THE COURT: Well, your request seemed a little
24 overbroad to me. It was just sort of open ended.

10:21:45 25 Anything relating to the redistricting, that's pretty

Harkenrider et al. - v - Governor Hochul et al.

1 broad.

2 MR. TSEYTLIN: If Your Honor thinks that's too
3 broad, Your Honor, we would not oppose Your Honor
4 narrowing that or striking that paragraph.

10:21:57 5 The primary thing that we do want is to find
6 out what political data -- what political information
7 they looked at and what communications that they had with
8 the IRC or other third parties which are all deeply
9 relevant to when we get to the substantive aspect of our
10:22:16 10 petition. The courts are -- around the country look at
11 three categories of information when deciding whether
12 there was partisan intent, which is the only thing that
13 would be -- that we need to prove. We don't need to
14 prove some sort of other things, partisan intent. So
10:22:34 15 they look at statistical evidence of partisan bias, we've
16 talked about that. If you look at the individual
17 specific lines and see which communities of interest have
18 been broken up for what. Don't necessarily need
19 discovery on that, but they also look at the process.

10:22:51 20 Did the map drawers look at political data? Had -- did
21 they consult with a third party? Did they get
22 behind-the-scenes directions from the state party?

23 THE COURT: I assume you're looking for
24 something that shows somebody directed the Commission not
10:23:07 25 to make any decisions on this thing? Am I right?

Harkenrider et al. - v - Governor Hochul et al.

1 MR. TSEYTLIN: That would certainly be a
2 relevant consideration in determining whether the process
3 was directed towards the goal of drawing a partisan map.
4 Under standard intent case law the overall process --

10:23:28 5 THE COURT: Wouldn't that be relevant if that's
6 what you were seeking? Wouldn't that be relevant to your
7 procedural argument?

8 MR. TSEYTLIN: I think it would be more
9 relevant to our substantive argument because even if they
10:23:39 10 hadn't attempted to break the process -- which you know
11 with discovery will reveal if they did -- the bottom line
12 is they just didn't follow the exclusive process. So
13 certainly that kind of evidence would show why their
14 argument must be wrong. That the ability to tell those
10:24:00 15 that you appoint, don't pass anything so we can go back
16 to doing the business exactly how we did in 2014, you
17 know, that is an absurd result of what they're arguing,
18 but we don't need to prove that in any way to prevail in
19 our procedural argument. The reason for that is that's
10:24:17 20 just like -- because the commission didn't pass out a
21 second set of maps, that's just like under the prior
22 system if the assembly didn't pass out a map. It's just
23 a necessary part of the law making process that did not
24 occur. However if they did act to undermine the
10:24:35 25 committee the commission process in service of a map that

41

Harkenrider et al. - v - Governor Hochul et al.

1 left, right and center, everyone -- I mean, I heard my
2 friend say, this is a Pro-Republican, that's silly.
3 Left, right and center. Everyone recognizes this is an
4 egregious partisan gerrymandering. If in service of that
10:24:55 5 they told the IRC, don't pass anything because we don't
6 want to have the political accountability of rejecting a
7 Commission map because we want to jam through this
8 egregious gerrymandering to fulfill the Governor's
9 promise to advance the interest of the national
10:25:12 10 democratic party to fulfill the -- one of the Democratic
11 leaders point that they wanted to gerrymander New York or
12 they did gerrymander New York to get revenge for what
13 Republicans are doing in Texas and North Carolina
14 allegedly in service of that, they communicated with
10:25:33 15 those individuals, they communicated with the IRC, that
16 would be relevant evidence of partisan intent, which is
17 what's illegal. Intent is a fact specific inquiry.
18 While we do have overwhelming evidence of it already,
19 certainly those kind of communications would further
10:25:49 20 bolster our showing of partisan intent. And that's why
21 it's deeply irrelevant under the five-part test that
22 courts use to analyze the qualified Speech and Debate
23 privilege. But again, I will reiterate, if Your Honor
24 thinks some of those later requests we have in our five
10:26:09 25 requests are overbroad, anything to do with

Harkenrider et al. - v - Governor Hochul et al.

1 redistricting, you know we certainly would welcome Your
2 Honor narrowing that to get to the nub of what we're
3 really trying to get to, which is the political data they
4 looked at, and the communications they had with third
10:26:22 5 parties about the obvious gerrymander -- the obvious
6 embarrassing gerrymander they've imposed on the state of
7 New York.

8 THE COURT: Thank you, MR. TSEYTLIN.

9 On behalf of the Governor?

10:26:32 10 MS. MCKAY: Yes, Your Honor. Heather McKay,
11 again.

12 First of all, I want to emphasize that as our
13 papers made clear, this kind of a special proceeding
14 which Petitioners themselves have selected here,
10:26:56 15 generally disfavors discovery. And that in particular in
16 order to justify discovery in a case such as this one
17 that it makes them -- it even more necessary that the
18 demands that they need to obtain a court order for, need
19 to be appropriately narrow, and it's not Your Honor's job
10:27:20 20 to narrow those. The requests are completely overbroad,
21 and should therefore be denied in the sense that
22 Petitioner's have to obtain this is different than a
23 regular preliminary action. Petitioners have to obtain a
24 court order to get their discovery and what they've
10:27:37 25 provided to Your Honor is vastly overbroad and again,

Harkenrider et al. - v - Governor Hochul et al.

1 it's not Your Honor's job to narrow the scope of those
2 demands. With respect to the first cause of action,
3 Petitioners have conceded that they are raising a purely
4 legal question. I do want to touch just briefly though
10:28:00 5 upon the fact that they continue to insist that they need
6 a discovery with respect to the IRC process. That's
7 absolutely untrue. They need to justify that as relevant
8 material and necessary to prove their claims. And given
9 that all parties agree on the facts surrounding the
10:28:22 10 evidence in the IRC, the IRC could not reach an agreement
11 that's undisputed. They don't need to do a pointless
12 fishing expedition into the IRC process. And that's just
13 one example of how vastly overbroad these are, as
14 presented. And it's the Petitioners' obligation to
10:28:42 15 appropriately narrow any of their requests they've --

16 THE COURT: Wouldn't it be relevant if someone
17 did touch base with the Commission or any member of that
18 Commission to say, you know, then you're doing your job,
19 but don't come up with a set of maps?

10:29:00 20 MS. MCKAY: To be honest, Your Honor, I'm not
21 entirely sure it would be particularly relevant here. We
22 obviously have Democrats and Republicans pointing the
23 finger at each other saying --

24 THE COURT: Wouldn't that sort of tend to
10:29:12 25 indicate someone intentionally not following the process?

Harkenrider et al. - v - Governor Hochul et al.

1 MS. MCKAY: Well, I think the only relevance
2 that it could have would be establish that the breakdown
3 of communications -- which again is undisputed between
4 all the parties, they couldn't reach an agreement, so
10:29:28 5 their argument says that necessarily the legislature no
6 longer has any role in the redistricting process and has
7 to completely turn to the judicial branch, and our
8 argument is that of course that's preposterous. If they
9 have the ability to freely change or amend the maps, that
10:29:45 10 would be passed by the IRC in the first place, then
11 obviously they have the ability to create maps when
12 there's an IRC stalemate. As to the second and third
13 causes of action, again our arguments fall back on the
14 principles that we've already covered which is that these
10:30:09 15 claims are not implicating the Governor and now they're
16 essentially admitting here in court that she's named in
17 the same way that the Board of Elections is named, to
18 obtain the relief that they're seeking. Well, now
19 they've completely eviscerated any claims of necessity of
10:30:26 20 discovery from the Governor. They're not seeking any
21 discovery from the Board of Elections, and we've also
22 already -- my colleague has gone into the issues of
23 timing, in particular this motion is where that's
24 relevant because the discovery demands, the document
10:30:47 25 demands, and the number of depositions that they're

Harkenrider et al. - v - Governor Hochul et al.

1 proposing to hold of very high ranking statewide
2 officers, would significantly delay the proceedings and
3 not allow resolution within the constitutional confines.
4 And finally I think that we've covered a lot on
10:31:09 5 privileges today, so I'm not going to get further into
6 that, but obviously we're reserving our rights to raise
7 specific privileges as to specific demands, if any are in
8 fact served. Those are absolutely going to bar the
9 discovery in the first place which will mean that we've
10:31:26 10 delayed only to come to that conclusion, and they will
11 not have access to the materials that they're seeking
12 because of the importance of the legislative process and
13 the executive's need to be able to do her job. Thank
14 you.

10:31:46 15 THE COURT: Thank you, Ms. McKay.

16 On behalf of the Senate Majority Leader?

17 MR. CUTI: Thank you, Your Honor, John Cuti.

18 THE COURT: Good morning.

19 MR. CUTI: Good morning. A lot to cover.

10:32:05 20 Let's start with CPLR 408. The standard is not
21 relevance, as Your Honor's questions reflected, it is
22 whether discovery should be allowed in, and the standard
23 for that is whether it's essential. Now Petitioner's
24 counsel has gotten up here today and said that Your Honor
10:32:23 25 should enter judgment on the merits today on their

Harkenrider et al. - v - Governor Hochul et al.

1 procedural claim. So obviously discovery is not
2 essential for that claim even on their view. He just
3 told you a few minutes ago, counsel for Petitioner, that
4 they have with respect to their second claim the
5 substantive claim, overwhelming evidence already. So if
6 they already have overwhelming evidence, then discovery
7 by definition is not essential, for that reason alone you
8 should deny leave. Related to another reason to deny
9 leave is the inevitable delay. Now, no discovery
10 requested have yet been propounded. The issue before you
11 is whether they should be allowed to, and as Your Honor
12 noted, they're rather dramatically overbroad. So one
13 assumes if leave is granted they would serve some sort of
14 narrowed requests. But then -- and here I want to talk
15 about absolute legislative privilege. There is going to
16 be intensive litigation both here and depending on Your
17 Honor's rulings interlocutory in the Fourth Department.
18 Now Petitioner's counsel either misunderstands the law of
19 the Speech or Debate Clause or he mislead, Your Honor.
20 The federal cases that apply a qualified privilege do not
21 involve the Speech or Debate Clause. Let me just take a
22 few minutes to unpack that. The United States
23 Constitution has a Speech or Debate Clause. And there's
24 a long line of decisions beginning in the 1940's and
25 running through the 80's where the court in opinion after

Harkenrider et al. - v - Governor Hochul et al.

1 opinion stresses that the privilege is absolute based on
2 the plain language of the clause. The Members of the
3 House and Senate shall not be questioned in any other
4 place with respect to their legislative conduct. Now,
5 New York's Constitution has a virtually verbatim clause
6 and the New York Court of Appeals has held in Ohrenstein
7 that the New York Speech or Debate Clause provides at
8 least as much protection as the Federal clause does to
9 members of the Federal Congress, and that privilege is
10 absolute. The law is crystal clear that members of the
11 legislature cannot be questioned about their motives or
12 their intentions or their work they do at the
13 subcommittee or anything that is directly related to the
14 legislative process. Drawing maps is a quintessential
15 legislative function, and the case law from the Supreme
16 Court -- and again there are cases cited in our papers
17 that make clear that the Federal cases construing the
18 Speech or Debate Clause are persuasive authority. The
19 privilege doesn't just apply to the elected members, but
20 to their aides, even to consultants, anyone who is
21 performing legislative functions. It's a functional
22 analysis, it doesn't turn only to the title of the
23 person.

24 And so where does the notion of a qualified
25 privilege come from? I'll explain. There are many

Harkenrider et al. - v - Governor Hochul et al.

1 redistricting litigations where state maps are challenged
2 in cases filed in Federal Court. Now one of the main
3 reasons there are two main foundations for the absolute
4 nature of the Speech or Debate Clause privilege, one is
5 respect for the independence of the legislator and
6 legislature, and relatedly respect for the separation of
7 powers. The executive and judiciary are not permitted
8 ever to question what members are doing with respect to
9 their legislative conduct. But when a Federal Court has
10 state legislators before it, there are no separation of
11 powers concerns, it's two different governments. The
12 Federal Court isn't telling a Federal legislator what she
13 can do. There are federalism concerns, but that cuts in
14 favor of the federal government because of supremacy
15 clause. And so when those federal district courts and
16 circuit courts are talking about a qualified privilege,
17 they're not applying the speech or debate clause at all.
18 How could they? The Federal Speech or Debate Clause
19 doesn't apply to state legislators, it says Senators or
20 representatives. A Federal District Court is not going
21 to apply the New York Constitution or the Pennsylvania
22 Constitution. What they do in all the cases, including
23 in every single case they cite for the proposition
24 applies what's called the Federal common law. The
25 Federal common law has long respected legislative

Harkenrider et al. - v - Governor Hochul et al.

1 privilege, but when a Federal court's applying the
2 Federal common law, they're bound by Federal Rule Civil
3 Procedure 501, and that rule says; we respect common law
4 privileges, but you must construe them narrowly. The
10:37:34 5 Speech or Debate jurisprudence is the polar opposite,
6 case after case from the Supreme Court says it must be
7 broadly construed to protect the independence of
8 legislators. So this is -- the five-factor test is not
9 applicable at all, not even for illustrative purposes.
10:37:54 10 The cases that matter are cases like Eastland and Graves
11 and Brewster and Helstoski, all Supreme Court cases that
12 stress the privilege is absolute and the core of the
13 privilege protects the motivations and the intentions of
14 legislators. There is what Justice Harlan said in
10:38:17 15 Johnson that is precisely what the Speech or Debate
16 privilege protects. And so yes, intent can be an issue,
17 but it can be proved in many ways. It can be proved by
18 objective evidence. We all know that to prove murder in
19 the second degree in New York you have to prove intent,
10:38:36 20 and while motive is not an element, it's certainly
21 relevant. But you can't ask the Defendant what he
22 intended because he has an absolute privilege, but you
23 can still try to prove the case. Now they say they've
24 already proved their case, so they don't need this
10:38:52 25 discovery at all, but even were they allowed to seek

Harkenrider et al. - v - Governor Hochul et al.

1 discovery, they can't have Your Honor order legislators
2 to answer questions or produce documents about their
3 correlative functions. You don't have the power to do
4 that under the Constitution. And for them to tell you
10:39:09 5 that it's a qualified privilege is either really a poor
6 reading of the law or something worse. So if Your Honor
7 has any questions, I'm happy to answer them.

8 THE COURT: Thank you. Thank you. Appreciate
9 it, sir.

10:39:22 10 Mr. Bucki?

11 MR. BUCKI: Thank you, Your Honor. Of course
12 we would agree with counsel for the State Senator
13 Majority as to the absolute nature of the privilege, and
14 as much as it would apply to State Senators it would also
10:39:43 15 apply to Members of the Assembly. We would further agree
16 that just by the nature of the papers that have been
17 offered by the Petitioners, they have offered statistical
18 evidence, they have offered evidence of so called public
19 statements by the Governor. And as Mr. Cuti said, there
10:40:00 20 are other ways to prove partisan intention with the
21 Petitioners' claim is their objective, and I would submit
22 that a good synonym for the word intent -- and this
23 phrase partisan intent comes directly from their motion
24 for leave to engage in discovery. A synonym for intent
10:40:18 25 is motive. And matter of Maron versus Silver from the

51

Harkenrider et al. - v - Governor Hochul et al.

1 Court of Appeal from about a decade ago is clear, that
2 there is no place to require state legislators to answer
3 for their motivations in terms of how it is that they
4 come to enact a certain piece of legislation. And we
10:40:37 5 would agree that enacting a new proposed map for the
6 congressional lines and State Senate lines is
7 quintessentially a legislative act. Where I would like
8 to focus is with respect to the reply papers that were
9 served by the Petitioners on Tuesday, March 1st which we
10:40:57 10 did not have an opportunity to respond to in writing.
11 And in response to the ample authority that demonstrates
12 the absolute nature of the legislative privilege, the
13 Petitioners offer several cases wherein they claim that
14 in fact the privilege is not absolute, and I think it's
10:41:18 15 really important to go through each one of those cases to
16 demonstrate the distinctions such that the argument that
17 the Petitioners' offer does not have merit.

18 So first of all they cite to a case called
19 Larabee versus Governor of the State of New York which
10:41:34 20 eventually went up on appeal under the matter of Maron
21 versus Silver case. They said Larabee demonstrates that
22 in fact the privilege is not absolute. That's not the
23 case. What Larabee was about was the issue of
24 legislative immunity, because there -- what was alleged
10:41:51 25 was that the state legislators had violated their

Harkenrider et al. - v - Governor Hochul et al.

1 constitutional requirement to raise the pay of the judges
2 in the State of New York, and the response that was given
3 by state legislators is, well, we cannot be held to
4 account for that on account of legislative immunity. And
10:42:09 5 in fact what eventually was held, in matter of Maron
6 versus Silver was that while legislators could not be
7 required to pay out of their own pockets for additional
8 amounts to be allocated for salaries for judges, a
9 declaratory judgment to be issued such that it could be
10:42:25 10 held that in fact the Constitution had been violated in
11 as much as under the separation of powers doctrine, the
12 legislature had not done its job to give proper
13 compensation to the State Court Judges. So they could do
14 their job. But on appeal when the Larabee case went up
10:42:44 15 with Matter of Maron versus Silver, Maron versus Silver
16 was clear when it got to a paragraph talking about the
17 privilege issue rather than the immunity issue as to the
18 absolute nature of the legislative privilege because
19 under the Speech or Debate Clause in the State
10:43:00 20 Constitution, it could not be more clear, that for any
21 speech or debate in either House of the Legislature, the
22 members shall not be questioned in any other place. And
23 over time this clause has been construed by the courts.
24 And in particular I would note the campaign for fiscal
10:43:19 25 equity case, that was a case where the person who was

Harkenrider et al. - v - Governor Hochul et al.

1 being deposed was a staffer at The State Education
2 Department. And that staffer in the deposition was
3 starting to be asked, well what is the nature of your
4 communications with folks in the State Legislature with
10:43:34 5 respect to school funding. And so we would submit that
6 that's a very similar kind of inquiry that the
7 Petitioners are looking to pursue with respect to, oh
8 legislators, what were the nature of your communications
9 that you had with members of the Independent
10:43:50 10 Redistricting Commission and there in campaigned for
11 fiscal equity. The Court said this privilege is so broad
12 that it isn't simply a privilege that can be invoked by
13 state legislators. It can be invoked by the staff, by
14 the people who work with them, by the consultants, by
10:44:06 15 people who work for other state agencies with respect to
16 the interface that takes place with state legislators
17 both orally and in terms of their written communications
18 as well. And we would submit that that same privilege
19 applies, and no matter how much Petitioners may say that
10:44:22 20 they could try to make their request a bit more narrow,
21 and as much as they make -- they offer that invitation to
22 the Court, we would submit that the privilege issue would
23 still apply and we could continue to raise it such that
24 none of -- that no discovery demand that the Petitioners
10:44:41 25 could ever create as to the motivations or partisan

Harkenrider et al. - v - Governor Hochul et al.

1 intent could ever be countenanced under the absolute
2 legislative privilege. And Your Honor made a point, well
3 isn't it relevant that in fact say a State Legislator had
4 some communication with a member of the Independent
10:45:00 5 Redistricting Commission, and I would say that under the
6 law, privilege has superiority over relevance all the
7 time. So for example, if an attorney is counseling a
8 polluter with respect to bad documents that exist in the
9 polluter's files about some kind of toxic tort
10:45:22 10 allegations, documents that would not be helpful if they
11 were to see the light of day, that document -- that memo
12 is subject to attorney/client privilege.

13 THE COURT: And your example though, could they
14 get that information from the member of the Commission?
10:45:36 15 If they talked with the legislator?

16 MR. BUCKI: I would submit that a member of the
17 Commission is the same -- is in the same position as --

18 THE COURT: They're not legislators --

19 MR. BUCKI: -- as the education department
10:45:48 20 employee who was being deposed in the campaign for fiscal
21 equity case. There it was in the middle of a deposition
22 and that employee was being asked questions about her
23 interface with the legislature. That employee was being
24 represented by someone from the State Attorney General's
10:46:05 25 Office who raised an objection on the basis of privilege,

55

Harkenrider et al. - v - Governor Hochul et al.

1 and it had to go to State Supreme Court and actually went
2 up to the First Department in 2009. And the person who
3 was taking the deposition said this is someone who works
4 for State Ed, this is someone who works for a state
10:46:21 5 agency, this isn't somebody who's a legislator. But not
6 withstanding, the privilege was so broad that the Court
7 was clear that that person could not be questioned with
8 respect to those communications.

9 THE COURT: Isn't it supposed to be an
10:46:35 10 Independent Redistricting Commission?

11 MR. BUCKI: Well, actually there was a case
12 that went before Albany County Supreme Court, the Leib
13 case wherein it was supposed to be on the ballot in part
14 of the syllabus that was presented to the voters that
10:46:49 15 this was an Independent Redistricting Commission. And in
16 fact the Court held you can't call it an Independent
17 Redistricting Commission in terms of ballot proposal, not
18 withstanding the fact that in the parlance that's
19 developed since then they have called themselves
10:47:03 20 independent, but likewise if somebody committed murder
21 and then goes to their priest for confession and says I
22 confess that I committed this murder, absolutely that
23 would be relevant, but there's an absolute priest
24 penitent privilege in the State of New York. And so
10:47:18 25 likewise, just because something is relevant doesn't mean

Harkenrider et al. - v - Governor Hochul et al.

1 that it isn't privilege, and the privilege trumps the
2 relevance every single time. With respect to the
3 Ohrenstein case, they say that's another case that
4 demonstrates the privilege isn't really absolute. That
10:47:33 5 was a case that involved allegations of bribery. There
6 are no allegations of bribe or money changing hands or
7 anything of that nature. And then in fact where I'd like
8 to focus also is on a case that they cite from Illinois
9 which is Burton versus Corn Products Refining Company
10:47:51 10 from 1918. And little more recently from the appellate
11 division in the late 1950's; Reformed Church of Mile
12 Square. And they say here are instances where not
13 withstanding a Speech or Debate Clause, the legislators
14 were brought in and required to testify concerning the so
10:48:10 15 called purpose of legislation. I think it could be
16 argued that intent and purpose could be two totally
17 different things. But setting that aside, what's
18 important to see about those cases is these are cases
19 that involved municipal legislators. So in the Reform
10:48:27 20 Church of Mile Square case, that concerned the prospect
21 of getting discovery from persons who served on the City
22 Council in the City of Yonkers, and with respect to the
23 Burton case that was a case that involved getting
24 discovery from people who served on a City Council in
10:48:42 25 Granite City, Illinois -- I had to look up where that is,

Harkenrider et al. - v - Governor Hochul et al.

1 it's just outside of St. Louis -- but what's important is
2 in neither case does it talk about getting discovery from
3 members of the State Legislature or people who interface
4 with members of the State Legislature, and there's a
10:49:02 5 reason for this, because as the Humane Society case that
6 the Petitioners also rely upon makes clear, there is a
7 difference between the jurisprudence that exists with
8 respect to the privilege that -- the legislative
9 privilege that state legislators receive, versus the
10:49:20 10 jurisprudence that exists with respect to the privilege
11 that local legislators receive such as members of a city
12 council or a town board in the State of New York or
13 county legislator. So that is a common law privilege
14 that has been set forth from the courts, and there can be
10:49:36 15 exceptions to the common law privilege. Whereas the
16 privilege for state legislators is an absolute privilege
17 that exists under the State Constitution. And so the
18 bottom line is none of the authorities that the
19 Petitioners, my friends on the other side, have offered
10:49:53 20 in reply would support anything other than an absolute
21 legislative privilege. And if the Petitioners did not
22 want there to be an absolute legislative privilege
23 applied, they could have brought this case prospectively
24 in Federal Court. They talk about the various five
10:50:11 25 factor tests that are applied. That may be true in

Harkenrider et al. - v - Governor Hochul et al.

1 Federal court, but we're not in Federal court for the
2 western district of New York, we're not in the United
3 States Supreme Court, we are in the Supreme Court for New
4 York State, Steuben County, and in Steuben County Supreme
10:50:26 5 Court we would submit like anywhere else in New York
6 State Court, there is an absolute privilege that
7 attaches.

8 The last thing I would like to say -- actually
9 two more things. First of all, with respect to the
10:50:39 10 burden.

11 THE COURT: With respect to what?

12 MR. BUCKI: With respect to the burden. Much
13 has been said about the burden by my colleague Mr. Cuti,
14 but I would like to emphasize that if there were to be
10:50:52 15 any kind of discovery demands simply the task of putting
16 together copious privilege logs, not to mention the task
17 of having to search for all the different documents that
18 could potentially be responsive to a request that would
19 eat up the remaining time that we have, this proceeding
10:51:11 20 needs to be decided within one month from tomorrow, and
21 authorizing discovery which the Petitioners acknowledge
22 in saying this petition can be granted today, they're
23 basically acknowledging that they don't really need it.
24 But even if this discovery were to be authorized, simply
10:51:30 25 the litigation that would happen on appeal in terms of a

Harkenrider et al. - v - Governor Hochul et al.

1 notice of appeal, the fact that there would be an
2 automatic stay of the discovery under CPLR 5519(a)(1),
3 the fact that then we'd have to go before a special
4 session of the Fourth Department to have to sort this
10:51:44 5 out, every day that goes by is another day that this
6 proceeding is not going to be decided on the merits,
7 which it needs to by April 4th. And so we would submit
8 that the materiality and the necessity that would require
9 not only under CPLR 408 but also CPLR 3101 simply is not
10:52:05 10 there.

11 And the last thing I'll say at this juncture is
12 in as much as the Petitioners say this petition can be
13 granted today, I wanted to make absolutely clear that now
14 that the petition has been amended, it's impossible to
10:52:19 15 grant the petition today. It would be possible to deny
16 the petition today, but to grant it, no, and the reason
17 for that is that the Respondents have not had an
18 opportunity to answer for every petition. There needs to
19 be an answer. And the case on this point is matter of
10:52:36 20 Kickertz, K-I-C-K-E-R-T-Z, versus New York University.
21 It's from the Court of Appeals from about a decade ago,
22 that if the petition is granted without an opportunity
23 for the respondents to answer, then that's going to be
24 overturned on appeal because as a matter of due process
10:52:54 25 the Respondents need an opportunity to answer to -- we

Harkenrider et al. - v - Governor Hochul et al.

1 would submit that to take that step of granting a
2 petition at this time, as the Petitioners would invite
3 this court to do, simply is not something that can happen
4 at this juncture.

10:53:06

5 THE COURT: Thank you, Mr. Bucki.

6 MR. BUCKI: Thank you.

10:53:28

7 THE COURT: The Constitution provides both
8 legislative immunity and legislative privilege, however
9 the Courts have found the state legislators do not have
10 an absolute right to legislative privilege. In 2003 in
11 the case of Rodriguez versus Pataki the Court laid out a
12 balancing test to determine what information should be
13 disclosed and what needs to be protected because of the
14 chilling affect it would have on the legislature if the
15 information was disclosed. The Rodriguez court adopted a
16 five-factor test. Under the five prong test the Court
17 finds the request to discovery is relevant, that the
18 relevant discovery is not otherwise available, that the
19 issue of this -- the issues of this case are very
20 serious, and that the Government's role in the case is
21 huge. Further, that limited discovery will not have the
22 potential of chilling legitimate legislative actions in
23 the future. Since this Court only has until April 4th to
24 decide this matter, the Court will grant expedited
25 discovery, however short time period that may be. All

10:53:46

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61

Harkenrider et al. - v - Governor Hochul et al.

persons asked to provide discovery are to give this his
or her highest priority, and to set aside other matters.
The Court will permit discovery of legislative
respondents as to whether or not the map drawing process
was directed and controlled by one political party or the
legislative leaders of one political party. This would
include whether the Respondents without Republican input
directed and/or controlled the map drawing process. The
Court will also permit discovery of the legislative
Respondents as to any public remarks or statements made
by them, any public testimony he or she gave about the
redistricting process and/or maps, and any inquiries from
and responses to the public or media about the
redistricting process and/or maps. This would include
public comments made by the Respondents about the
Independent Redistricting Commission, and the IRC's
action or lack of action. This would include any
communication between the Respondent's and third parties
about advancing a partisan agenda or any efforts to
undermine the constitutional process of having the IRC
produce a viable map and/or viable second map. This
would also include all documents and communications
concerning the work of the Commissioners of the
Democratic caucus of the IRC, which documents and
communications were received from third parties. Any

Harkenrider et al. - v - Governor Hochul et al.

1 discovery from non-legislative persons is not so
2 restricted. The Governor and Lieutenant Governor are not
3 to be considered as non-legislative members. Discovery
4 is to be completed by March 12th, and I know that's
10:56:27 5 tight. I'll be posting an order to this fact and
6 uploading it to NYSEF. Does anyone else wish to be heard
7 on the argument of lack of standing? I know it's been
8 touched upon. Does anybody else need to respond to that?

9 MR. HECKER: I would like to, Your Honor.

10:56:55 10 THE COURT: On behalf of the Senate Majority
11 Leader?

12 MR. HECKER: Hello, again Your Honor, Eric
13 Hecker; Cuti, Hecker and Wang for the Senate Majority.

14 Just very briefly, the case that they rely
10:57:15 15 upon, the Humane Society case from the third department
16 is a case in which the Court denied standing for every
17 Petitioner but one. And the only Petitioner who was
18 allowed to proceed in that case was allowed to proceed
19 precisely because she lived next door to the foie gras
10:57:40 20 farm at issue that she alleged was contaminating her
21 water. Here they put no evidence in when they filed
22 their petition, none. They put belatedly some evidence
23 of where Petitioners live in reply which appellate courts
24 have held you can't do in a special proceeding, period.
10:58:01 25 It can't be cured in reply. But more to the point, there

Harkenrider et al. - v - Governor Hochul et al.

1 is still no evidence in the record at all that anybody in
2 this case lives in Long Island, and this is exactly the
3 kind of generalized non-specific claim made by
4 Petitioners with no injury in fact, who are not within
10:58:24 5 the zone of interest. We are in District 23.

6 THE COURT: Is an adjoining district that might
7 be affected by another district, is that in the zone of
8 interest?

9 MR. HECKER: Perhaps. There are many many
10:58:35 10 districts between District 23 and Districts 1, 2 and 3 on
11 Long Island. There's nobody within striking distance of
12 standing. So they have a technical problem that they
13 created by failing to put in any evidence with their
14 petition to establish standing, which my friend
10:58:58 15 Mr. Tseytlin successfully argued before the Supreme
16 Court, it's fatal, and the end of the story, and you
17 can't cure it in reply in the State of New York, but even
18 if you could, this court has no basis to be judging any
19 district based claims in Long Island when nobody in this
10:59:15 20 case lives within striking distance of Long Island.

21 Nobody from one, nobody from two, nobody from three,
22 nobody from four, nobody from five, nobody from six,
23 nobody close to Districts 1 and 2. Just wanted to make
24 that point, Your Honor.

10:59:33 25 MR. TSEYTLIN: May I be heard on standing?

Harkenrider et al. - v - Governor Hochul et al.

1 THE COURT: Pardon me?

2 MR. TSEYTLIN: May I be heard on standing?

3 THE COURT: Go ahead, Mr. Tseytlin.

4 MR. TSEYTLIN: A couple of things standing,

10:59:45 5 Your Honor. First of all, with regard to our procedural
6 claim that would knock out the entire map, there's no way
7 to divorce that knockout from any particular district.
8 So with regard to at least a procedural claim there's not
9 even a colorable standing argument. Any person can raise
11:00:02 10 that, that would knock out that.

11 With regard to their reference to the Gill
12 versus Whitford case of the US Supreme Court, I did in
13 fact argue they should not be allowed to cure by having
14 additional plaintiffs, the argument was rejected by the
11:00:19 15 US Supreme Court. The Us Supreme Court sent the case
16 back down to the lower court to allow them to add more
17 plaintiffs, that was way later then what happened here,
18 which is -- we correctly submitted under the
19 constitutional language that any citizen can challenge
11:00:32 20 the map, that's the constitutional language. It was not
21 addressed in the Bay Ridge decision, which was a trial
22 court decision in any event, and it was not addressed.
23 So any citizen language we relied on that to the extent
24 they raised some objections. We then put in sworn
11:00:51 25 affidavits from citizens throughout the state who are

Harkenrider et al. - v - Governor Hochul et al.

1 Petitioners, all of the districts are interlinked. If
2 Your Honor strikes down the districts that the
3 Petitioners are in on substantive grounds, the other
4 districts will need be to be changed in creating the
11:01:11 5 remedial map, a partisan interest cannot be advanced as
6 it was in Long Island.

7 Finally with regard to standing, again, I will
8 reiterate that for our procedural claim, there is no
9 colorable argument, and on the others we have citizens
11:01:30 10 all over the state who have submitted competent evidence
11 timely before the return date, which is all the rules
12 require. Thank you.

13 THE COURT: Thank you. Is there anyone else
14 who wishes to be heard on that?

11:01:42 15 MS. MCKAY: Your Honor, may we seek
16 clarification with respect to the discovery ruling, as
17 applied to the Governor and Lieutenant Governor, please?

18 THE COURT: They're considered part of the
19 legislative, so they have the privilege to the extent
11:01:56 20 that I said.

21 MS. MCKAY: Okay, and with respect to Your
22 Honor's rulings as to legislative Respondents need to
23 provide discovery, are you including the Governor and
24 Lieutenant Governor in --

11:02:10 25 THE COURT: Yes.

Harkenrider et al. - v - Governor Hochul et al.

1 MS. MCKAY: Thank you for the clarification.

2 THE COURT: Mr. Bucki, I saw you start to get
3 up. Is there anything you wanted to address on the
4 standing issue?

11:02:23 5 MR. BUCKI: I already had the opportunity to
6 talk quite a bit about standing, I just want to second
7 what Mr. Hecker says which is that vast swaths of
8 territory within the State of New York are not
9 represented by any Petitioner, and he mentioned Long
11:02:38 10 Island as a really good example. So even if it could be
11 argued and countenanced, which I don't think it can be,
12 that somehow as long as you live in the district next
13 door that you have standing to challenge the way the
14 district next door is created, well in a lot of cases
11:02:57 15 there is nobody in the district, and there's nobody next
16 door. And so as a consequence this really is in the --
17 more in the nature of a generalized political grievance
18 rather than a situation where the individuals at issue
19 would have standing to challenge the entirety of the map
11:03:16 20 as they claim to do. And with respect to that -- any
21 citizen language the Bay Ridge Community Council case
22 that talked about it in detail about the standing of the
23 person in Long Island -- I should say the lack of
24 standing of that person with respect to challenging the
11:03:29 25 way a district map looks in Queens, that was later

Harkenrider et al. - v - Governor Hochul et al.

1 affirmed in a detailed decision from the Appellate
2 Division and then later affirmed on the basis of the
3 Appellate Division opinion at the Court of Appeals. So
4 we would submit that this is more than just a
11:03:45 5 miscellaneous case, this is a case that went all the way
6 up to the Court of Appeals, and the Court of Appeals
7 would agree with the Federal courts from Gill versus
8 Whitford and Hays versus United States that in order to
9 have standing to challenge your district lines, you need
11:03:57 10 to live in the district, and the vast majority of the
11 Petitioners simply do not.

12 THE COURT: But the Petitioners are challenging
13 the map in general, they want everything thrown out.
14 Doesn't any citizen have the right to standing to bring
11:04:12 15 the petition?

16 MR. BUCKI: We would submit that if you have a
17 challenge to your particular district you need to live in
18 the district, and that is the position of the Speaker,
19 and I think that's the position of the Senate Majority
11:04:24 20 Leader as well. And then, second of all, the other
21 reason I was about to rise is I just have a question with
22 respect to the discovery in terms of how things are going
23 to go. I would anticipate once the order is entered that
24 there is going to be a notice of appeal filed certainly
11:04:38 25 on behalf of the Speaker, I would anticipate on behalf of

68

Harkenrider et al. - v - Governor Hochul et al.

1 the Senate Majority Leader. We would submit -- and I'd
2 like to put it on the record now that simply the filing
3 of that notice of appeal stays the discovery order and
4 that's the position that we take. And I leave it to the
11:04:52 5 Petitioners to determine how it is that they're going to
6 respond to that opportunity, so CPLR 5519. But further I
7 would have a procedural question as to when we can expect
8 the transcript to be ready so that that could be included
9 in any record on appeal that could be provided to the
11:05:11 10 Fourth Department.

11 THE COURT: I'll ask for it to be done ASAP.

12 MR. BUCKI: Very well, Your Honor.

13 THE COURT: Thank you, Mr. Bucki.

14 Have I listened to everyone on the standing
11:05:22 15 issue?

16 MR. HECKER: Yes, Your Honor.

17 THE COURT: The motion to dismiss for lack of
18 standing is denied, the amended Constitution gives every
19 citizen the right to commence this action and allege that
11:05:39 20 the maps were drawn with a gerrymandering intent. The
21 case law that predates the 2014 constitutional amendment,
22 which required a Petitioner to be a resident of a
23 particularly aggrieved district is no longer a guide to
24 determining standing because of the additional revision.
11:05:59 25 Petitioners have provided additional affidavits to verify

Harkenrider et al. - v - Governor Hochul et al.

1 that in fact these Petitioners encompass a number of
2 districts, and of course any district that abuts their
3 district would also be impacted by any change the Court
4 may make in the dimensions of the district. That's my
11:06:16 5 ruling on that.

6 That brings us now to just the petition, the
7 original petition itself. Honestly, I don't know if I
8 need to hear argument on that today, and I'll tell you
9 why. The Petitioners requested that I stay the election
11:06:41 10 or the current petition gathering process until this
11 matter can be decided. The Court understands that the
12 Petitioners' experts claim the currently enacted maps are
13 the most egregious display of gerrymandering of any of
14 the 5,000 or 10,000 maps that were drawn allegedly in a
11:07:04 15 non-partisan way. It's a serious allegation. However,
16 the Respondents' experts paint an entirely different
17 picture. I've decided that a hearing will be necessary
18 to be conducted to determine where the truth lies between
19 the Petitioners' experts and the Respondents' experts.
11:07:29 20 Until I have heard this testimony I'm not in a position
21 to know whether or not to strike down these maps or
22 uphold these maps. I'm not inclined at this point in
23 time to void the maps simply because the IRC failed to
24 submit a second map. I do not intend at this time to
11:07:53 25 suspend the election process for the following reasons;

Harkenrider et al. - v - Governor Hochul et al.

1 Petitioners have an extremely high level of proof to be
2 able to prove that the Respondents acted in an
3 unconstitutional way in creating the Congressional and
4 Senate maps. That proof is beyond a reasonable doubt
11:08:19 5 with the Respondents enjoying a presumption of
6 constitutionality. Two; even if I find the maps violated
7 the Constitution and must be redrawn, it is highly
8 unlikely that a new viable map could be drawn and be in
9 place within a few weeks or even a couple of months,
11:08:44 10 therefore striking these maps would more likely than not
11 leave New York State without any duly elected
12 Congressional delegates. I believe the more prudent
13 course would appear to be to permit the current election
14 process to proceed and then if necessary to require new
11:09:05 15 elections next year if the new maps need to be drawn.
16 I'm not ruling on the Petitioners' procedural argument
17 today. I believe I'm not going to make any rulings on
18 anything until the discovery is done. And I know it's a
19 very short time period for discovery, but we're all under
11:09:35 20 the gun. As I said before, the answer to the amended
21 petition is going to be due by March 10th. Expert
22 testimony is to start on March 14th, and whatever other
23 testimony you wish to present. I'm unavailable
24 March 21st through the 28th and my decision is due by
11:10:03 25 April 4th. Naturally I reserve the right to make a

71

Harkenrider et al. - v - Governor Hochul et al.

1 decision on what I have before me at the time. I think
2 everybody here would love to have a lot more time to
3 pursue this and go through extensive discovery and trial,
4 but we're faced with the fact that we're under a
11:10:30 5 deadline. Any future court hearings here will be also
6 simulcast using the same link and the same password just
7 so everyone knows, so we don't get a multitude of calls
8 about whether there's still the same link or a different
9 link. Is there anything else that needs to be discussed
11:10:55 10 today?

11 MR. BUCKI: Your Honor, if I may just clarify?
12 So then is it true what I'm hearing that testimony from
13 experts is scheduled to commence here on Monday,
14 March 14th?

11:11:08 15 THE COURT: Yes, at 9:30.

16 MR. BUCKI: 9:30 a.m.?

17 THE COURT: And in my mind I'm not telling you
18 how to present your case, but I'd like to hear your main
19 experts. That's important to me. You call it the way
11:11:24 20 you see it, and I don't know if discovery will yield
21 anything or not. We really don't know.

22 MR. BUCKI: So to clarify further, Your Honor,
23 not withstanding what may happen on appeal with respect
24 to the discovery order, the testimony from experts will
11:11:42 25 regardless commence on March 14th no matter what?

Harkenrider et al. - v - Governor Hochul et al.

1 THE COURT: Yes.

2 MR. BUCKI: Thank you.

3 THE COURT: Mr. Bucki raised a very good point

4 when he was standing at the podium that, you know and I

11:11:55 5 envision that one side or the other would appeal and

6 they're saying they're going to appeal my decision on the

7 discovery issue which may put a stay on everything here.

8 So I mean I'll leave it to the parties to discuss how you

9 want to deal with that. All I can tell you is my

11:12:14 10 decision is by law due by April 4th, and that's where we

11 are. I'll upload a decision on the discovery issue

12 today, and I'll see everyone on the 14th. Thank you.

13 Certified to be a true and accurate transcript.

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11:12:26

15 Laura Bliss Power

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