STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

BARBARA D. UNDERWOOD
SOLICITOR GENERAL
DIVISION OF APPEALS & OPINIONS

Telephone (518) 776-2027

April 23, 2022

Honorable John P. Asiello
Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, New York 12207

Re: *Harkenrider v. Hochul,* APL 2022-00042

Dear Mr. Asiello:

This office represents respondents-appellants Governor and Lieutenant Governor ("executive respondents") in the above matter. Executive respondents submit this letter pursuant to the letter from Deputy Clerk Heather Davis, dated April 22, 2022, inviting arguments from the parties.

By a 3-2 vote, the Appellate Division, Fourth Department, in a majority opinion by Justices Centra and Lindley joined by Justice Curran writing separately, concluded that the 2022 congressional electoral map was a partisan gerrymander in violation of the State Constitution. Four Justices, however, rejected petitioners' claim that the congressional, state senate, and state assembly maps[1] were unconstitutionally enacted by the Legislature. Justices Whalen and Winslow dissented in part, agreeing with Justices Centra and Lindley that the Legislature properly followed constitutional procedures in enacting the maps, but disagreeing that the congressional map was a partisan

[1] Petitioners argued that the assembly map was invalidly enacted, but did not seek relief with respect to that map.

gerrymander. And in a solo dissent, Justice Curran took the view that the Legislature failed to follow constitutional procedures, rendering the maps void ab initio. The three justices who found a partisan gerrymander nonetheless ordered that the matter should be remitted to Supreme Court, and the Legislature should be given until April 30, 2022, to enact a new congressional map curing the infirmities, subject to further challenge and review.

Executive respondents urge this Court to uphold the electoral maps in their entirety, and thus to (a) reverse the order of the Appellate Division to the extent it declared the 2022 congressional electoral map invalid as a partisan gerrymander; and (b) affirm the order to the extent it rejected petitioners' argument that the 2022 congressional, assembly and senate maps were unconstitutionally enacted by the Legislature. If, however, this Court were to invalidate any maps, it should give the Legislature a reasonable opportunity to correct the infirmities and extend the April 30 deadline by which to do so. And the Court should declare that any remedial map, if one is warranted and survives further court challenge, will not take effect until the following election cycle.

The case background and our arguments in support of reversal are set forth in our opening and reply briefs to the Appellate Division. We make the following additional points about the decision of the Appellate Division.

First, although the Appellate Division remitted the matter to Supreme Court for further proceedings to review any remedial congressional map enacted by the Legislature in response to its decision, the order should be deemed final for purposes of this Court's review because it will cause irreparable injury absent this Court's intervention. *See Regional Gravel Prods. v Stanton, lv denied in part,* 71 N.Y.2.d 949 (1988) (granting leave based on irreparable injury); *Matter of Christopher T., lv granted* 63 NY2d 601 (1984) (same); *Gardstein v Kemp & Beatley, Inc., mot to dismiss appeal denied,* 61 N.Y2d 900 (1984) (retaining appeal based on irreparable injury). The invalidation of a redistricting plan by a court implicates weighty separation of powers interests and the independent authority of the political branches of government. Because of the potential harm to those interests, immediate review by this Court is warranted. That is especially so because any successor map enacted by the Legislature in response to the Appellate Division's order could potentially render moot the current appeal, depriving the Governor and Legislature of an opportunity for review by this Court. Moreover, candidates

and voters alike will suffer irreparable injury unless this Court can timely settle the validity of the current congressional map and thereby dispel the uncertainty overhanging the election that stems from the possibility that the substantial steps that have already been taken preliminary to this election, including the collection of signatures and the filing of petitions, will have to be entirely redone under new congressional district lines.

Second, although the Court rejected without discussion the argument that executive respondents are not proper parties to this litigation, this Court should reverse that aspect of the decision and dismiss executive respondents for the reasons stated in our briefs below.

Third, this Court should reject petitioner's cross-appeal and affirm the order insofar as it upheld the 2021 legislation. As four justices agreed, the Legislature followed proper procedure when, in compliance with that legislation, it enacted its own electoral maps upon the failure of the Independent Redistricting Commission (IRC) to submit a second set of maps. In their plurality opinion, Justices Centra and Lindley correctly recognized the presumption of constitutionality enjoyed by statutes and the heavy burden a party bears to rebut that presumption. They further correctly concluded that "the New York State Constitution is silent as to the appropriate procedures to be utilized in the event that the IRC fails to submit a second redistricting plan to the legislature as constitutionally directed." Thus, they concluded, "the legislation used to fill the gap in that procedure is not unconstitutional" and "the redistricting maps enacted by the legislature pursuant to that legislation are not void ab initio." Dec. at 3. The plurality observed that nothing in the Constitution "expressly prohibits the legislature from assuming its historic role of redistricting and reapportionment if the IRC fails to complete its own constitutional duty." Dec. at 4. In light of this history and the Legislature's power under the 2014 amendments to reject the IRC's second redistricting plan and implement its own, the plurality held that "the legislature's exercise of its historically recognized redistricting authority upon the failure of the IRC to complete its constitutionally appointed tasks is consistent with Constitutional intent and is not a 'gross and deliberate violation of the plain intent of the Constitution and a disregard of its spirit and the purpose for which express limitations are included therein.'" Dec. at 4 (quoting *Matter of Sherrill v. O'Brien*, 188 N.Y. 185, 198 (1907)). Justices Whalen and Winslow agreed with these conclusions.

The reasoning of the sole justice who dissented on the procedural issue is flawed. Like petitioners, Justice Curran relied heavily on the statement in § 4(e) of the Constitution that "[t]he process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article shall govern redistricting in this state except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." N.Y. Const. Art. III. This provision should not be read to prescribe a judicial remedy upon a lawsuit as the only way forward after a breakdown in constitutional procedures; as explained in our briefs below, such a reading would give a four-member bloc of the IRC the power to divert redistricting to the courts simply by refusing to meet with the other IRC members—a result that could not have been intended by the two successive Legislatures that approved the amendments before they were put to the voters. And in any event, as Justice Curran recognized (Dec. at 13), § 4(e) incorporates § 5, which requires that a court give the Legislature the opportunity to cure any legal infirmities found to exist in a redistricting plan. In his dissent, Justice Curran evaded the force of that provision by finding that the Legislature's opportunity to cure under § 5 was limited to substantive violations. In particular, in his view, the "legal infirmities" referenced in § 5 are different from and narrower than the "violations of law" referenced in § 4(e): "legal infirmities" do not encompass procedural violations "that are not logically curable except by judicial intervention." Dec. at 14. But even if some violations may not be logically curable except by judicial intervention, certainly the violation here, by the IRC, *was* curable and was in fact cured by the Legislature, without judicial intervention. And the distinction between "legal infirmities" and "violations of law" drawn by Justice Curran finds no support in the constitutional text. Contrary to his view, reading the two terms synonymously does not render either one "idle"; the earlier provision says that the court has the power to modify or adopt a redistricting plan as a remedy for a violation of law, and the later provision places a condition on the exercise of that remedial power, namely, that before fashioning its own plan, a court must afford the Legislature a reasonable opportunity to correct any violation. Accordingly, this Court should affirm this part of the Order.

Fourth, for the reasons explained in the Senate and Assembly briefs submitted below and in the dissenting opinion of Justices Whalen and Winslow, petitioners failed to meet their heavy burden of demonstrating beyond a reasonable doubt a partisan gerrymander of the congressional map. The majority opinion repeatedly refers to the findings of petitioners' expert

Sean Trende concerning the number of competitive districts in the simulation maps as compared with the enacted map. The problem, however, as Justices Whalen and Winslow point out in their dissent, is that Mr. Trende's analysis suffers from basic methodological deficiencies that undermine any reliance on his opinion. As a result, even if Mr. Trende's opinion passed the threshold for admissibility at trial, it fails to provide legally sufficient evidence of a gerrymander. For this reason and those set forth in the supplemental submissions of legislative respondents, this Court should reverse the Appellate Division's decision on this claim and uphold the congressional map.

Finally, if this Court grants relief that invalidates the congressional or senate maps, it should defer the implementation of any remedial maps until the next election cycle. The Appellate Division struck Supreme Court's injunction barring respondents from administering the current election under the 2022 maps but was silent on this issue in its decision. As we explained at length in our briefs below, switching to new maps in midstream would throw the current election, with a looming June 28 primary, into chaos. It would confuse voters, candidates, and state and local officials tasked with election administration, and thus introduce error, depress voter turnout, and risk disenfranchisement. The designating petition period has now concluded, and officials are in the process of settling the primary ballot so that they can meet the federal deadline for the transmittal of military and certain absentee ballots. The imposition of new maps would require restarting this process from scratch, making it impossible to hold the primary on June 28 for the affected offices. And it is far from clear when any new maps would be ready for use: even if the Legislature is required to design new maps, petitioners would likely challenge those maps, which are subject to review by Supreme Court in any event. Accordingly, it is unlikely that even the August primary date proposed by petitioners could be accommodated. What is certain, however, is that an election that has proceeded as far as this one cannot be halted and redone under different district lines without serious harm to the electoral process.

Petitioners have repeatedly argued that unless a remedy is implemented in this election cycle, the Legislature will feel free to disregard the constitutional ban on partisan gerrymandering for the first election in any ten year cycle, knowing that it will receive a free pass. That is simply not so. A sufficiently egregious gerrymander would warrant immediate preliminary relief that would halt an election using that map before it could begin. Although petitioners sought to suspend the designating petition process early

in this proceeding, Supreme Court properly denied that relief, at that time doubtful whether petitioners could meet their burden of proof. Moreover, assuming, as petitioners have, that in the absence of an immediate remedy, the Legislature will manipulate the timing of the redistricting process so as to deprive any challengers of a remedy for the first election in the cycle is contrary to the presumption of good faith to which government officials are entitled. As Justices Whalen and Winslow aptly stated, "Legislators, like their counterparts in the executive and judicial branches, have sworn oaths to uphold the New York State Constitution and violations of those oaths should not be assumed absent strong evidence to the contrary." Dec. at 12.

For these reasons, if this Court strikes any maps, it should declare that any remedial maps will not take effect until the next election cycle.

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Respondents-
Appellants

By: 
JEFFREY W. LANG
Deputy Solicitor General

The Capitol
Albany, NY 12224
(518) 776-2025

cc: *Via Email Only*

PHILLIPS LYTLE LLP
Craig R. Bucki, Esq., Steven B. Salcedo, Esq., Rebecca A. Valentine, Esq.
Attorneys for Respondent-Appellant Speaker of the Assembly Carl Heastie
cbucki@phillipslytle.com, ssalcedo@phillipslytle.com, rvalentine@phillipslytle.com

GRAUBARD MILLER
C. Daniel Chill, Esq., Elaine Reich, Esq.
Attorneys for Respondent-Appellant Speaker of the Assembly Carl Heastie
dchill@graubard.com, ereich@graubard.com

CUTI HECKER WANG LLP
Eric Hecker, Esq., John Cuti, Esq., Alex Goldenberg, Esq., Alice Reiter, Esq., Daniel Mullkoff, Esq.
Attorneys for the Respondent-Appellant Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins
ehecker@chwllp.com, jcuti@chwllp.com, agoldenberg@chwllp.com, areiter@chwllp.com, dmullkoff@chwllp.com

TROUTMAN PEPPER HAMILTON SANDERS LLP
Bennet J. Moskowitz, Esq., Misha Tseytlin
Attorneys for Petitioners-Respondents
bennet.moskowitz@troutman.com, misha.tseytlin@troutman.com

KEYSER MALONEY & WINNER LLP
George H. Winner, Jr., Esq.
Attorneys for Petitioners-Respondents
gwinner@kmw-law.com

NEW YORK STATE BOARD OF ELECTIONS
Brian Lee Quail, Esq.
Attorneys for Respondent
brian.quail@elections.ny.gov