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April 24, 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:

On behalf of executive respondents, we submit the following response to the April 23, 2022 letter submission by petitioners. Most of the points raised in petitioners' letter have been thoroughly addressed in the supplemental submissions and Appellate Division briefs filed by executive and legislative respondents. We write only to address petitioners' novel claim that this Court lacks jurisdiction to review that portion of the Appellate Division's order affirming Supreme Court's declaration that the congressional map is an unconstitutional partisan gerrymander. (Pet. Letter at 7-9.)

As a preliminary matter, it would be remarkable if petitioners were correct that this Court is without power to review the Appellate Division's ruling on their partisan gerrymander claim. The result would leave a gaping hole in the Court's jurisdiction and prevent it from hearing a legal issue of the utmost statewide importance. Petitioners' argument fails, however, because this part of the order does not present a question of fact, but a question of law.

Executive respondents have taken an appeal as of right based on C.P.L.R. 5601(b), because the order appealed from finally determines an action where there is directly involved the construction of the State Constitution, and based on C.P.L.R. 5601(a), because there is a two-justice dissent on a question of law. These conditions for an appeal as of right are satisfied because a portion of the order affirmed a declaration of the trial court that the congressional map—a legislative enactment—is constitutionally invalid. Whether a statute is constitutionally valid is a quintessential question of law and constitutional construction which is reviewable by this Court. The Court has generally described a challenge to the validity of a statute as a “pure question of law.” *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 635 (2010). This context—a declaration striking a state law—makes all the difference. Petitioners simply ignore it, and cite cases that involved ordinary factual determinations, such as whether a child was neglected by his parents, *Matter of Hofbauer*, 47 N.Y.2d 648, 654 (1979), whether the value of a partnership included a goodwill component, *Congel v. Malfitano*, 31 N.Y.3d 272, 294 (2018), or whether a driver acted negligently and proximately caused a car accident, *Humphrey v. State of New York*, 60 N.Y.2d 742 (1983). By contrast, the Appellate Division here affirmed the trial court’s legal conclusion invalidating entire statutes.

Nor does it matter that the assessment of facts and experts informed Supreme Court and the Appellate Division’s legal conclusions concerning the validity of the congressional map. In some cases, factual issues around the government’s intent in passing a law bear directly on a law’s constitutionality. *See Church of the Lukumi Babula Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-34 (1993) (laws neutral on their face yet whose object or purpose is to suppress religion are invalid unless narrowly tailored to advance a compelling interest); *Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 276 (1979) (upholding a Massachusetts law granting civil service preferences to veterans against an equal protection challenge where the totality of the record did not demonstrate that the Massachusetts Legislature intended to discriminate against women). The presence of subsidiary factual issues does not transform the overarching question of a law’s validity into an unreviewable question of fact.

Indeed, redistricting challenges often involve factual questions, yet this Court has never declined to review such cases based on its limited jurisdiction to review questions of fact. Thus, in *Schneider v. Rockefeller*, 38 A.D.2d 495 (3d

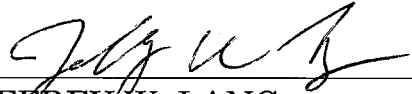
Dep't 1972), Supreme Court, Albany County, rejected a redistricting challenge to assembly and senate districts. The Appellate Division, Third Department, affirmed, finding that, in complying with the equal population requirement of *Reynolds v. Sims*, 377 U.S. 533 (1964), the redistricting did not unnecessarily divide counties. Nor did the plan violate the compactness and contiguity requirements of the State Constitution. 38 A.D.2d at 499-500. Petitioners appealed, and this Court decided the appeal, holding that where "the Legislature has made a good-faith effort to comply with the mandate of the equal-population principle (as evidenced by the near equality of population in the legislative districts), and has not unduly departed from our State constitutional command that the integrity of counties be preserved, the legislative plan ought to be upheld." 31 N.Y.2d 420, 428. The Court also affirmed the Appellate Division's holdings regarding compactness and contiguity. *Id.* at 896-97. Despite the relevance of facts to the trial court's affirmed conclusions regarding county-integrity, compactness, and contiguity, this Court decided the appeal and did not suggest that it was without power to review the question of whether the districts satisfied constitutional requirements. *See also Wolpoff v. Cuomo*, 80 N.Y.2d 70 (1992) (reversing the trial court's conclusion that a senate redistricting plan violated contiguity, compactness, and county-integrity requirements, where the majority leader "marshaled a considerable amount of statistical and demographic data to support his contention that these districts were drawn in a good faith effort" to comply with *Reynolds v. Sims* and the Voting Rights Act).

This Court should therefore reject petitioners' argument that the Appellate Division's ruling on the congressional map is insulated from review as a question of fact, and it should decide that issue and reverse the decision of the Appellate Division.

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April 22, 2022  
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Respectfully submitted,

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