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By Email

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

Re: *Harkenrider v. Hochul*, APL-2022-00012

Dear Mr. Asiello:

On behalf of the Senate Majority Leader, Andrea Stewart-Cousins, we hereby offer these reply comments and arguments.

I. THE COMMISSION'S FAILURE TO ACT DID NOT EXTINGUISH THE LEGISLATURE'S AUTHORITY TO ENACT REDISTRICTING PLANS

Petitioners' submission merely rehashes the incomplete and incorrect textual arguments that they and the League of Women Voters made below. Petitioners still cannot point to any language in the Constitution that contemplates a failure by the Commission to submit a second set of plans, nor can they point to any language in the Constitution saying that if the Commission fails to do its job, the "exclusive" remedy is that the courts must "immediately" draw their own redistricting plans from scratch. Indeed, Petitioners now acknowledge that, as this Court made clear in *Orans*, the extreme remedy they urge is "unwelcome." Pet. Letter Br. at 4.

Petitioners have now appealed directly to this Court with respect to the remedy issue, which even Justice Curran declined to address because Petitioners had not cross-appealed. No justice in this case has held that the Constitution allows the judiciary to "immediately" draw redistricting plans from scratch when the Commission has failed to do its job. Even the trial court understood that doing that would violate the plain language of article III, § 5, which affords the Legislature "a full and reasonable opportunity to correct" infirmities in "any law establishing congressional or state legislative districts" found in "any judicial proceeding relating to redistricting of congressional or state legislative districts." In any event, the Court need not address the remedy issue because Petitioners' procedural argument is meritless.

Petitioners contend that declining to strike down the congressional and Senate plans would eliminate any role for the Commission in the future by

incentivizing the Legislature to ignore or even defund the Commission. This supposed concern is baseless. The Legislature created the Commission through legislation that it enacted twice in 2012 and 2013, and it relied on the Commission's work during this redistricting cycle. Sen. Opening Br. at 4-6, 16. The fact that the Legislature enacted redistricting legislation after the Commission failed to discharge its duties hardly supports the conclusion that the Legislature is going to undermine the Commission in the future or that the Commission is "a useless formality."[1]

On the other hand, crediting Petitioners' argument would create truly perverse incentives that would seriously threaten the process in the future. Under Petitioners' view, four commissioners from the minority party would have the unilateral authority to up-end the entire redistricting process merely by declining to show up to vote, thereby extinguishing the Legislature's authority and transferring plenary redistricting power to the judiciary. The record shows that that is exactly what happened here. Sen. Opening Br. at 25-26; Sen. Reply Br. at 7-8.

II. PETITIONERS FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE CONGRESSIONAL PLAN IS AN UNCONSTITUTIONAL PARTISAN GERRYMANDER

Petitioners understandably hope this Court will not decide whether they have met their heavy burden of proving that the congressional plan is unconstitutional. They therefore argue that whether they have done so is a "factual question" that is "unreviewable" by this Court. Petitioners are wrong.

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[1] Petitioners repeatedly quote a comment by an Appellate Division justice at oral argument below referring to the Commission as "window-dressing." But that was not the "underlying premise" of the Appellate Division's holding, as Petitioners falsely claim. Pet. Letter Br. at 4. Rather, the Appellate Division's underlying premise was that the "Constitution is silent as to the appropriate procedure to be utilized in the event that the IRC fails to submit a second redistricting plan," and that "the legislation used to fill the gap in that procedure is not unconstitutional" because "[n]othing in the Constitution . . . including subdivisions 4(b) and 4(e) of article III, expressly prohibits the legislature from assuming its historical role of redistricting and reapportionment if the IRC fails to complete its own constitutional duty." Order at 3-4. The Appellate Division's opinion does not call the Commission "window-dressing" or suggest anything of the sort. It merely confirms, as the only other court to consider the 2014 amendments previously recognized, *Leib v. Walsh*, 45 Misc. 3d 874, 881 (N.Y. Sup. Ct. Albany Cnty. 2014), that the Commission only makes recommendations, and that the 2014 amendments preserved the Legislature's longstanding authority to enact redistricting legislation.

Lest we lose the forest for the trees, the question in this case is whether the statute that enacted the 2022 congressional plan, 2021-2022 N.Y. Reg. Sess. Leg. Bill. S.8196 and A.9039 (as technically amended by A.9167), is unconstitutional. It is axiomatic that whether a statute is unconstitutional presents a question of law that this Court may review. *See*, *e.g.*, *Matter of Sherill*, 188 N.Y. 185, 197-98 (1907) (holding that an appeal to this Court "should be entertained . . . [w]here the question to be determined on the appeal is as to whether the Legislature has obeyed a mandatory provision of the Constitution, in which case a question of law is presented for the determination of this court").

Notably, *Sherrill* is one of this Court's seminal redistricting cases, and it lays to rest Petitioners' argument that the constitutionality of the congressional plan is "unreviewable." In *Sherrill*, this Court examined its authority to review the 1906 reapportionment, observing that the 1894 Constitution had added language to article III, § 5 stating expressly that the Supreme Court has jurisdiction to review apportionments, but that "the jurisdiction to review such an act of apportionment is not expressly given by Constitution to this court." 188 N.Y. at 195. This Court squarely held that "when it is claimed that [a redistricting] act is thus in violation of the Constitution, a question of law is presented for the determination of this court." *Id*. at 198.

Since *Sherrill*, this Court has reviewed every decennial reapportionment case that has been appealed to it, even though many of those cases presented significant factual issues. *See*, *e.g.*, *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 78-80 (1992) (rejecting petitioners' assertion that the appeal presented questions of fact that were unreviewable by this Court and examining whether "the balance struck by the Legislature in its effort to harmonize competing Federal and State requirements" was constitutional, which required the Court to closely assess the number of county splits, "a considerable amount of statistical and demographic data," and "a complex analysis of population trends and voting patterns"; after evaluating the extensive factual record, this Court concluded that "respondent has put forth more than enough evidence to support his argument that any such violation was minimized and that the district lines were drawn as they were in order to comply with Federal statutory and constitutional requirements" because "it is not appropriate for us to substitute our evaluation of the relevant statistical data for that of the Legislature"); *Schneider v. Rockefeller*, 31 N.Y.2d 420, 426-31 (1972) (examining whether the redistricting plan was a "partisan gerrymander" as evidenced by alleged departures from the constitutional requirements that "legislative districts be 'compact,' 'contiguous' 'convenient,' and cotoerminus with traditional political subdivisions," which required this Court to examine "numerous examples of allegedly non-contiguous districts" and "numerous districts [that] are challenged as being non-compact"). Petitioners cite no redistricting case in support of their effort to avoid this Court's review.

Other than their new argument that this Court should not decide this case, Petitioners largely repeat the arguments that they made in their merits brief below, which we addressed thoroughly in our reply brief below. For example, Petitioners continue to complain that Respondents supposedly made new arguments about Mr. Trende "*after* the close of evidence," Pet. Letter Br. at 9 (emphasis in original), but they conveniently ignore that it was *Petitioners* who submitted the Maryland court's decision to the trial court twelve days after the trial testimony concluded, R2330, and that we merely *responded* to Petitioners' new post-trial argument about the Maryland case by observing that the differences between Mr. Trende's methodologies in the Maryland case and this case underscore why his methodology in this case was not reliable. Petitioners also continue to claim falsely, as they did below, that Mr. Trende dramatically culled his Maryland simulations only because of Voting Rights Act issues, Pet. Letter. Br. at 9, even though neither the Maryland decision nor Mr. Trende's Maryland report says that, Sen. Reply Br. at 20.

Petitioners attempt to defend their failure to put Mr. Trende's simulations into the record – and Mr. Trende's failure even to look at them – by observing that some courts that have accepted simulations evidence have not *themselves* examined the simulated maps. Pet. Letter. Br. at 9. But as Dr. Ansolabehere testified without contradiction based on his extensive experience in redistricting cases, it is standard practice for a simulations expert to include the ensemble of simulated maps in the record for analysis and comment by opposing experts. R2881:15-24.

At the end of their letter brief, Petitioners point to alleged changes in the partisanship of various districts as measured by the Cook Partisan Voting Index ("CPVI"), contending that it is impossible that such changes could be the result of anything other than invidious intent to inflict partisan injury. In doing so, Petitioners once again ignore that a lot changed between 2012 and 2022. In the heavily-Democratic downstate region, New York City, when combined with Nassau, Suffolk, and Westchester Counties, increased in population by 773,213 people. That represented a 6.5% increase in the total population of those counties. By contrast, the 44 counties in New York with fewer than 200,000 people, most of which are Republican-leaning, lost a total of 83,403 people. R1120-22 ¶¶ 287-301. As the Assembly Speaker observed in his letter brief yesterday, Democratic voter registration increased by more than one million people statewide between April 2012 and February 2021, whereas Republican voter registration increased by less than 100,000 people during the same period. Assembly Letter Br. at 7. Given these starkly different population and registration trends, it is not at all surprising that the districts Petitioners complain about changed in the Democrats' favor.

Petitioners nevertheless focus on six Democratic-leaning districts that they insist prove their case beyond a reasonable doubt. But even using Petitioners' favored CPVI measure of partisan lean, three of those six districts shifted by only 2%, a significantly smaller shift than the one that occurred in the overall statewide

population trend or the 10-1 Democratic advantage in new active registered voters. One district – former District 22, which is new District 24 – was drawn similarly to the way both the Republicans and the Democrats on the Commission proposed drawing it, so nothing can be inferred from the fact that it happened to become a bit more Democratic-leaning. The same is true of three of the four Republican districts that Petitioners claim were "packed." Those upstate districts were heavily Republican under the 2012 plan, and they became more Republican under both the Republican and Democratic Commission plans and the enacted plan for non-partisan reasons related to population shifts and the bipartisan desire to maintain communities of interest.

It is undisputed, moreover, that Districts 1 and 2 had become significantly underpopulated and therefore needed to shift significantly to the west, R1125 ¶¶ 325-26; R870 ¶ 24, and every single one of Mr. Trende's Long Island simulations drew at least three of four districts in Districts 1-4 as Democratic-leaning, and almost all of his simulations drew all four of those districts as Democratic-leaning. R1041. As explained in our reply brief below, the net partisan shift across the Long Island districts is zero, Sen. Reply. Br. at 24, and the net effect of the enacted plan on the already Democratic-leaning Hudson Valley districts is to increase competition, *id*. at 25. And District 11 was drawn in a manner that uncracks the fast-growing Chinese-American community in South Brooklyn, which Petitioners' own expert specifically argued should be united in any redistricting plan. R2781:5-R2786:8.

Petitioners' singular reliance on the CPVI metric – without even acknowledging, much less addressing, any of the abundant evidence in the record about population and demographic changes and the specific objective reasons that justify the lines they complain about – is so myopic that it is meaningless. This Court should decline Petitioners' invitation to ignore the substantial population and demographic changes that occurred during the last decade. This Court also should decline Petitioners' invitation to ignore all of the cogent objective explanations for each of the challenged districts that have been presented, as the trial court and the Appellate Division plurality did. This Court should decide this case based on the entire record, not based on a handful of cherry-picked numbers viewed in a vacuum.

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We thank the Court for its attention to the issues raised in this reply letter.

Respectfully submitted,

Eric Hecker

cc: All Counsel of Record