

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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PAUL NICHOLS, GAVIN WAX,  
AND GARY GREENBERG,

Petitioners,

-against-

GOVERNOR KATHY HOCHUL,  
SENATE MAJORITY LEADER AND  
PRESIDENT PRO TEMPORE OF THE SENATE  
ANDREA STEWART-COUSINS,  
SPEAKER OF THE ASSEMBLY CARL  
HEASTIE, NEW YORK STATE BOARD OF  
ELECTIONS, AND THE NEW YORK STATE  
LEGISLATIVE TASK FORCE ON  
DEMOGRAPHIC RESEARCH AND  
REAPPORTIONMENT,

Respondents.  
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: Index No. 154213/2022E

: (IAS Part 63)

: (Hon. Laurence Love, J.S.C.)

**MEMORANDUM OF LAW OF RESPONDENT  
SPEAKER OF THE ASSEMBLY CARL HEASTIE  
ON THE PROPER MEANS BY WHICH TO REDRAW THE STATE  
ASSEMBLY MAP AS ORDERED BY THE APPELLATE DIVISION**

**PRELIMINARY STATEMENT**

Respondent Speaker of the Assembly Carl Heastie (the “Assembly Speaker”) respectfully submits this memorandum of law pursuant to the Order of the Court entered June 30, 2022 [NYSCEF Doc. No. 98], which directed the parties to this proceeding to submit briefs and other supporting materials “expressing their views as to the proper means by which to redraw the state assembly map as ordered by the Appellate Division.”

The Order of the Appellate Division, First Department, expressly directed that the state Assembly map should be redrawn “in accordance with NY Const., art. III, § 5-b.” Appellate Division Order, at 3 [NYSCEF Doc. No. 99].<sup>1</sup>

Article III, § 5-b provides that a redistricting plan setting “district lines for congressional and state legislative offices,” including the state Assembly, shall be prepared and submitted to the Legislature by an independent redistricting commission (the “IRC”). Section 5-b also adopts and incorporates the procedures set out in § 4 for the adoption of new district lines. Section 5-b(g) provides that “[t]he legislature shall consider and vote upon such implementing legislation *in accordance with the voting rules set forth in subdivision (b) of section four of this article.*” N.Y. Const. art. III, § 5-b(g) (emphasis added).

As explained in detail below, in order to effectuate “the proper means for redrawing the state assembly in accordance with NY Const., art. III, § 5-b,” as ordered by the Appellate Division, this Court should: (a) order that the IRC initiate the constitutional process for amending the state Assembly map based on the 2020 census data; and (b) further order that the procedures set forth in Article III, §§ 4 and 5-b be followed with respect to the adoption of such amended state Assembly map. This Court does not have to establish an IRC as it is still constituted and in effect, currently with nine of the required ten members.

### **PROCEDURAL HISTORY**

The present proceeding was commenced by the e-filing of a Petition and proposed Order to Show Cause on May 15, 2022 [NYSCEF Doc. Nos. 1-2]. The Petition sought six items of relief:

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<sup>1</sup> The Appellate Division Order is identified in the NYSCEF list for this proceeding as “Remittitur” and is identified in the NYSCEF list for the appeal (Case No. 2022-0230) as “Decision and Order” [App. Div. 1st Dep’t NYSCEF Doc. No. 15] filed June 10, 2022.

1. a declaration that “2022 State Assembly map . . . is void based upon the constitutional flaws in its adoption previously found by the Court of Appeals;”
2. appointment of “a special master to adopt a legally compliant State Assembly map;”
3. adjournment of “the primary election date for state and local elections to August 23, 2022, or, alternatively, September 13, 2022;”
4. an order opening the designating and independent nominating petition periods “with deadlines sufficient for current candidates to obtain new designating petition signatures or run independently, and for potential candidates to newly qualify for primary elections or as an independent in the general election;”
5. an order “suspending or enjoining the operation of any other state laws, or vacating any certifications or other official acts of the New York State Board of Elections or other governmental body, that would undermine this Court’s ability to offer effective and complete relief for the November 2022 elections and related primaries;” and
6. an award of “Petitioners [sic] reasonable attorneys’ fees and costs.”

Petition at 29-30 [NYSCEF Doc. No. 1].

The Petition alleged that the 2022 state Assembly map was procedurally invalid for the reasons found by the Court of Appeals in *Harkenrider v. Hochul*, \_\_\_ N.Y.3d \_\_\_, 2022 WL 1236822 (Apr. 27, 2022), with respect to the congressional and state Senate maps. Neither the Petition nor any affidavit e-filed therewith alleged that the state Assembly map was in any way substantively unconstitutional, including, for example, that it constituted partisan gerrymandering.

The Court signed an Order to Show Cause on May 19, 2022, with a return date of May 23, 2022 [NYSCEF Doc. No. 25].

The Speaker moved to dismiss the Petition—a motion that was also returnable on May 23, 2022 [NYSCEF Doc. Nos. 30-81]. Respondents Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins, Governor Kathy Hochul, and the New York State Board of Elections joined the Speaker’s motion [NYSCEF Doc. Nos. 83-85, 88].<sup>2</sup>

The Court heard oral argument from all parties on May 23, 2022 [NYSCEF Doc. No. 95].

By letter to the Court e-filed on May 24, 2022, Petitioners supplemented the opposition to the Speaker’s motion to dismiss that they had made during oral argument [NYSCEF Doc. No. 89]. The Speaker responded to Petitioners’ May 24, 2022 letter by letter e-filed on May 25, 2022 [NYSCEF Doc. No. 90].

By Decision and Order entered on May 27, 2022 (the “Order”), the Court dismissed the Petition in its entirety, declining to award any of the items of relief sought therein [NYSCEF Doc. 91]. The Order specifically noted that the state Assembly maps had not been found by the Court of Appeals in *Harkenrider* to be “substantively unconstitutional as drawn with impermissible partisan purpose.” Order at 6 [NYSCEF Doc. No. 91].

Petitioners sought to appeal the Order directly to the Court of Appeals. By Order entered on May 27, 2022, the Court of Appeals denied Petitioners’ request for a direct appeal. A copy of the Court of Appeals order is e-filed herewith as Exhibit 1 to the accompanying Affirmation of Elaine M. Reich (“Reich Aff.”).

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<sup>2</sup> Respondent Governor Hochul also filed: (i) an Answer denying the material allegations of the Petition and asserting affirmative defenses thereto; and (ii) a Memorandum of Law in opposition to the Petition [NYSCEF Doc. Nos. 86-87].

Petitioners filed a Notice of Appeal to the Appellate Division, First Department, on May 27, 2022. Copies of Petitioners' Notice of Appeal (without the annexed Order) and Appellate Division Information Statement are e-filed herewith collectively as Exhibit 2 to the Reich Aff.

By Order entered on June 10, 2022 (the "Appellate Division Order"), the Appellate Division modified this Court's Order only to the extent of declaring the 2022 Assembly map to be procedurally invalid and otherwise affirmed this Court's dismissal of the other items of relief sought in the Petition, including the request that any new map be adopted "for use in the 2022 assembly elections."

Specifically, the Appellate Division Order provided that: (a) the existing state Assembly map "is to be used in the regularly scheduled 2022 assembly elections;" and (b) any new state Assembly map shall be "for use no sooner than the 2024 regular election." Appellate Division Order at 1-2 [NYSCEF Doc. No. 99].

The Appellate Division Order further provided that "[t]he matter is remanded to Supreme Court, New York County for consideration of the proper means for redrawing the state assembly map, in accordance with NY Const., art. III, § 5-b." *Id.* at 3 [NYSCEF Doc. No. 99].

By Order entered on June 14, 2022, the Court of Appeals dismissed Petitioners' appeal and motion for leave to appeal to the Court of Appeals "upon the ground that the order sought to be appealed [*viz.*, the Appellate Division Order] does not finally determine the proceeding within the meaning of the Constitution." A copy of the Court of Appeals' Order is e-filed herewith as Exhibit 3 to the Reich Aff.

By Order entered June 30, 2022, the Court directed all parties to “submit briefs and supporting materials on or before August 8, 2022 expressing their views as to the proper means by which to redraw the state assembly map as ordered by the Appellate Division” [NYSCEF Doc. No. 98].

### **ARGUMENT**

#### **THE ASSEMBLY MAP SHOULD BE REDRAWN IN ACCORDANCE WITH THE PROCEDURE SET OUT IN ARTICLE III, §§ 4 AND 5-B OF THE NEW YORK CONSTITUTION**

Courts have long recognized that redistricting plans developed in accordance with the state’s redistricting process are favored over court-imposed plans. *E.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 416 (2006) (“[T]o prefer a court-drawn plan to a legislature’s replacement would be contrary to the ordinary and proper operation of the political process.”); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (“[I]t is . . . appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.”); *In re Orans*, 15 N.Y.2d 339, 352, 258 N.Y.S.2d 825, 833 (1965) (“[T]he Legislature is under an obligation to reapportion and . . . courts move in only as a last resort.”). *See also Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) (We have repeatedly recognized that state reapportionment is the task of local legislatures or of those organs of state government selected to perform it.”); *Wolpoff v. Cuomo*, 80 N.Y.2d 70, 79, 587 N.Y.S.2d 560, 564 (1992) (“It is not the role of this, or indeed any, court to second-guess the determinations of the Legislature, the elective representatives of the people.”).

The preference for legislative corrective action is explicitly enshrined in the New York Constitution. Article III, § 5 states:



In any judicial proceeding relating to redistricting of congressional or state legislative districts, any law establishing congressional or state legislative districts found to violate the provisions of this article shall be invalid in whole or in part. *In the event that a court finds such a violation the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities.*"

N.Y. Const. art. III, § 5 (emphasis added).

In its remand to this Court, the Appellate Division recognized the right of the Legislature to correct the procedural invalidity in enacting the state Assembly map. Instead of using the generic formula "the matter is remanded for further proceedings in accordance with this opinion," the Appellate Division explicitly directed this Court to determine the proper means for redrawing the Assembly map "in accordance with N.Y. Const. art. III, § 5-b." Appellate Division Order at 3 [NYSCEF Doc. No. 99].

The Appellate Division has thus made clear that this Court is not free to choose any available method to correct the procedural infirmity in the enacted state Assembly map, such as, for example, imposing its own corrective map with the assistance of a special master. Rather, the Appellate Division explicitly directed that Article III, § 5-b must govern the procedure for correcting the prior procedural infirmity in enacting the Assembly maps.

Section 5-b(a) of Article III of the New York State Constitution states in pertinent part:

*On or before February first of each year ending with a zero and at any other time a court orders that congressional or state legislative districts be amended, an independent redistricting commission shall be established to determine the district lines for congressional and state legislative offices.*

N.Y. Const., art. III, § 5-b(a) (emphasis added).

Since a court—the Appellate Division—has ordered that the state Assembly districts be amended, the plain language of Article III, § 5-b(a) of the Constitution mandates that the IRC initiate the constitutional process for making the Court-ordered revisions to the Assembly district

map and that the procedural steps set forth in § 5-b and § 4 be followed thereafter. Indeed, § 5-b expressly references the voting protocols of § 4 of Article III, stating:

The legislature shall consider and vote upon such implementing legislation *in accordance with the voting rules set forth in subdivision (b) of section four of this article.*

N.Y. Const. art. III, § 5-b(g) (emphasis added).

Article III, §§ 5-b and 4 set out the procedure for: (a) formulation by the IRC of proposed redistricting maps; (b) submission by the IRC of a proposed redistricting plan and implementing legislation therefor to the Legislature; and (c) adoption of the redistricting plan by legislative vote.

Accordingly, Article III, §§ 5-b and 4 govern the “proper means for redrawing the state Assembly map.”

Significantly, in *Harkenrider v. Hochul*, both the Trial Court and the Appellate Division, Fourth Department, recognized that the Legislature is required to be given an opportunity to rectify the constitutional infirmities found by those Courts with respect to the congressional and state Senate redistricting maps.

The Trial Court’s Order stated:

ORDERED, ADJUDGED, and DECREED that *the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps* to this court for review of the Congressional District Maps, Senate District Maps, and Assembly District Maps that meet Constitutional requirements; and it is further

ORDERED, ADJUDGED, and DECREED that *in the event the Legislature fails to submit maps* that receive sufficient bipartisan support by April 11, 2022 the court will retain a neutral expert at State expense to prepare said maps.

*Harkenrider v. Hochul*, 2022 WL 1819491 at \*14 (Sup. Ct. Steuben County Mar. 31, 2022) (emphases added).



Similarly, the Appellate Division, Fourth Department, ordered as follows:

[W]e conclude that *the legislature shall have a full and reasonable opportunity to correct the law's legal infirmities*. Consistent with this Court's prior order entered upon respondents' motion to stay Supreme Court's order pending this appeal, *the legislature has until April 30, 2022 to enact a constitutional replacement for the congressional map*.

*Harkenrider v. Hochul*, 204 A.D.3d 1366, 1375, 167 N.Y.S.3d 659, 667 (4th Dep't 2022)

(emphases added).

Indeed, the only reason that the Court of Appeals did not give the Legislature a first opportunity to correct the constitutional infirmities in the congressional and state Senate maps was because, by the time of that Court's decision, there was no longer sufficient time to do so in light of the impending election. As the Court of Appeals explained, "[t]he procedural unconstitutionality of the congressional and senate maps is, *at this juncture*, incapable of a legislative cure." *Harkenrider v. Hochul*, \_\_ N.Y.3d \_\_, 2022 WL 1236822 at \*12 (Apr. 27, 2022) (emphasis added).

Here, however, there is no such time pressure as compelled the Court of Appeals to bypass the Legislature with respect to the congressional and state Senate maps. The Appellate Division expressly held that: (a) the existing state Assembly map "will remain in effect for the 2022 assembly primary election to be held on June 28, 2022 and the general election to be held on November 8, 2022;" and (b) any new Assembly map is "for use no sooner than the 2024 regular election." Appellate Division Order at 1-2 [NYSCEF Doc. No. 99].<sup>3</sup>

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<sup>3</sup> The Appellate Division Order, which is unequivocal in this regard, is conclusive and binding, and it forecloses any argument by Petitioners that a new Assembly map be prepared in time for a special election in 2023.

While the Court of Appeals indicated that the procedure set out in §§ 5-b and 4 is not available when an election is close at hand and amended district lines must be developed with dispatch—as it found with the congressional and state Senate maps in the aftermath of its decision in *Harkenrider*—that is not the case here.

As previously noted, by Order of the Appellate Division, the new Assembly map shall be “for use no sooner than the 2024 regular election.” Appellate Division Order at 2 [NYSCEF Doc. No. 99]. Two years is more than ample time for the procedural steps set forth in Article III, §§ 5-b and 4 of the Constitution to play out so as to enable the Assembly map to be redrawn in time for the 2024 election. The IRC will, after all, not be working from a blank slate. It has available to it all of the “draft redistricting plans, relevant data, and related information” [*see* Art. III, § 4(c)] that were used in preparing the previously submitted first plan.

In light of the foregoing, it is respectfully submitted that the proper means for devising the new Assembly map ordered by the Appellate Division is to adhere to the constitutional procedure set forth in Article III, §§ 5-b and 4 of the Constitution.

Accordingly, to remedy the procedural invalidity of the 2022 enacted Assembly districts, the Court should order that the IRC initiate the constitutional process for amending the Assembly district map based on the 2020 census data, and that, thereafter, the procedure set forth in Article III, §§ 5-b and 4 be followed with respect to the adoption of such amended Assembly district map. To that end, and because the IRC and its members are not parties to this proceeding, it is respectfully submitted that the Court sign an Order to Show Cause directing the members of the IRC to show cause why the IRC should not be added to this proceeding as a necessary party

pursuant to CPLR 1001.<sup>4</sup> A proposed Order to Show Cause is e-filed herewith as Exhibit 4 to the Reich Aff.

It is respectfully submitted that the Court's order should impose the following suggested timetable for developing an Assembly redistricting plan in accordance with the timeframe established in the Constitution:

1. No later than September 15, 2022, or as soon as practicable thereafter, the IRC shall make widely available to the public, in print form and using the best available technology, its draft redistricting plans, relevant data, and related information.

2. Commencing 30 days after its draft redistricting plan is released, the IRC shall hold public hearings on proposals for the redistricting of state Assembly districts in each of the following: (i) cities of Albany, Buffalo, Syracuse, Rochester, and White Plains; and (ii) counties of Bronx, Kings, New York, Queens, Richmond, Nassau, and Suffolk. Notice of all such hearings shall be widely published using the best available means and media a reasonable time before every hearing.

3. On January 1, 2023, or as soon as practicable thereafter, but no later than January 15, 2023, the IRC shall submit to the Legislature that Assembly redistricting plan and implementing legislation therefor that garnered the highest number of votes in support of its approval by the IRC with a record of the votes taken. In the event that more than one plan received the same number of votes for approval, and such number was higher than that for any other plan, then the IRC shall submit all plans that obtained such number of votes.

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<sup>4</sup> Alternatively, the IRC could be added to this proceeding as a permissive party pursuant to CPLR 1002.

4. If the Legislature fails to approve the first plan and implementing legislation therefor submitted to it by the IRC, or if the governor shall veto such legislation and the Legislature shall fail to override such veto, each house or the governor if the governor vetoes it, shall promptly notify the IRC that such legislation has been disapproved.

5. Within fifteen (15) days of such of such notification and in no case later than February 28, 2023, the IRC shall prepare and submit to the Legislature a second redistricting plan and the necessary implementing legislation for such plan.

6. If the Legislature fails to approve any second redistricting plan and implementing legislation therefor submitted to it by the IRC, or if the governor shall veto such legislation and the Legislature shall fail to override such veto, each house shall introduce such implementing legislation with any amendments each house of the Legislature deems necessary. All such amendments shall comply with the provisions of Article III of the New York State Constitution. If approved by both houses, such legislation shall be presented to the governor for action.

Finally, it is also respectfully submitted that the Order should provide that the Court retains jurisdiction over this matter so that it may take such further action as the circumstances may require.

### **CONCLUSION**

For the foregoing reasons, we respectfully submit that as the proper means to remediate the constitutional infirmity of the enacted Assembly redistricting plan, the Court should order that: (a) the IRC initiate the constitutional process for amending the Assembly district map based on the 2020 census data by formulating a proposed Assembly map; (b) thereafter, the procedural

steps set forth in Article III, §§ 5-b and 4 be followed with respect to the adoption of a remedial Assembly district map; and (c) the Court retain jurisdiction over this matter to take such further action as circumstances may require.

Dated: New York, New York  
August 8, 2022

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