

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK: CIVIL TERM: PART 63
3 - - - - - X
4 :
5 PAUL NICHOLS, GARY GREENBERG, and GAVIN :
6 WAX, :
7 :
8 Petitioners, :
9 :
10 - against - : INDEX NUMBER:
11 :
12 GOVERNOR KATHY HOCHUL, SENATE MAJORITY : 154213/2022
13 LEADER AND PRESIDENT PRO TEMPORE OF THE :
14 SENATE ANDREA STEWART-COUSINS, SPEAKER :
15 OF THE ASSEMBLY CARL HEASTIE, NEW YORK :
16 STATE BOARD OF ELECTIONS, and NEW YORK :
17 STATE LEGISLATIVE TASK FORCE ON :
18 DEMOGRAPHIC RESEARCH AND :
19 REAPPORTIONMENT, :
20 Respondents. :
21 - - - - - X
22 Supreme Courthouse
23 60 Centre Street
24 New York, New York 10007
25 August 24, 2022

B E F O R E :

HONORABLE LAURENCE L. LOVE,
Justice of the Supreme Court

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1 THE COURT: Good morning to all sides. We are here
2 on the matter of Nichols v. Governor Hochul, et al., Index
3 154213 of 2022. If I could first get appearances of all
4 sides, starting with counsel for petitioner.

5 MR. WALDEN: Jim Walden. Good morning, your Honor.
6 Thank you for having us.

7 MR. FARBER: Good morning, your Honor. Seth Farber
8 with the Attorney General's office for Governor Hochul.

9 MR. BUCKI: Good morning, your Honor. Craig Bucki
10 from the Law Firm of Phillips Lytle, LLP, on behalf of
11 Assembly Speaker Carl Heastie.

12 MR. HECKER: Eric Hecker from Cuti, Hecker, Wang,
13 for the Senate Majority Leader.

14 THE COURT: Good morning to all sides. I know,
15 obviously, we're here in person this morning, but I know we
16 also have the public access open, as well, for those who are
17 observing. It's nice to see everyone back, sort of, I will
18 say.

19 As everyone knows, I initially dealt with this
20 matter related to the original petition that was filed back
21 on May 12th of this year, addressing the status of the
22 assembly maps for the primary and general election. I'm not
23 going to go through, in full detail, the history, I think
24 everyone here is very well-versed in it in terms of what
25 occurred between my initial ruling, the Appellate Division,

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1 what occurred with the Court of Appeals. All of that, as
2 the parties know, resulted in the decision from the First
3 Department back on June 10th of this year, where obviously
4 they agreed with the main part of my ruling in terms of not
5 delaying the primary, which obviously occurred in June;
6 however, the Appellate Division did find that the assembly
7 map from February of 2022 was invalid based on the
8 procedural infirmity as previously determined by the Court
9 of Appeals in the related litigation.

10 Based on that, they sent the case back to me,
11 essentially, to determine the best way to move forward with
12 the redrawing of those maps following the constitutional
13 requirements, and for that new map to be put in place, at
14 the earliest, for the 2024 election cycle. So obviously our
15 timeline is now different than the timeline we were dealing
16 with when you were all before me back in May with the
17 pressure of having to do something in an extremely short
18 timeframe.

19 Additionally, I will just point out that, following
20 that decision of the Appellate Division, obviously I could
21 have theoretically just taken that decision from the Court
22 and just proceeded to issue a ruling on how I believed the
23 matter should proceed, I thought it was more appropriate to
24 hear from both sides on the record in terms of what options
25 they thought were most appropriate, and set up a schedule

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1 for that to occur with a return date for oral argument. I
2 know both sides uploaded their positions, I know respondent
3 also included, as part of that their belief, that the
4 Independent Redistricting Commission should be added as a
5 party to this matter, and we will obviously address that, as
6 well.

7 I think it goes without saying, but I will say it
8 anyway, that we're dealing with an unprecedented situation.
9 There's obviously, through redistricting fights over the
10 years, those turning into litigation is probably more of the
11 norm than the exception, but the situation that we have
12 before us, where we're dealing with just the maps for one
13 house of the Legislature that still need to be addressed, to
14 my belief, that has never occurred before, and also this is
15 the first time dealing with the cycle since the 2014
16 constitutional provisions were put in place that the Court
17 of Appeals decision had followed.

18 So with that said, I want to turn first to
19 petitioner's counsel and give you an opportunity to be heard
20 on this matter, and then we will go forward from there.

21 MR. WALDEN: Thank you, Judge Love, and I want to
22 say thank you very much for the process that you put place.
23 We are grateful for the opportunity to be heard both on
24 papers and in writing, and I will be quick, your Honor, I do
25 not think this needs to be a long argument, because the

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1 essential issue here is very clear, how to redraw the
2 assembly map.

3 Judge, a little context is important here, right?
4 Since the time of our argument, I made the point to this
5 Court, as I made it to the First Department and I wanted to
6 make to the Court of Appeals, that we're in an unprecedented
7 era in another way, as well, which is we have red and purple
8 states across the country gerrymandering and rigging maps.
9 We have New York politicians and some of the most
10 influential academic thinkers in the nation decrying that
11 effort, and we have the same thing going on here.

12 And what really surprised me, your Honor, is that
13 -- this is a pro bono case for us, we did this on our dime.
14 We hired one of the nation's leading statisticians to
15 conduct an analysis, a very detailed analysis called the
16 Extreme Outlier Test, and this is not a test that she made
17 up, although God knows she has the brain power to do it,
18 she's a triple degree holder from Duke, she's a
19 distinguished professor at the University of Colorado
20 Boulder, she's been doing this for 25 years, she has
21 reviewed this kind of analysis time and time again, but she
22 was applying a test that was embraced by none other than
23 Eric S. Lander, who's on the National Academy of Sciences,
24 the National Academy of Medicine, a professor at Harvard and
25 MIT. And their analysis is one that is proven, when you

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1 have a map that demonstrates itself to be an extreme
2 outlier, then it is a map that is rigged.

3 Her analysis comes down to the last paragraph, and
4 I will read it for the Court, as I'm sure your Honor has
5 read it. Based on the results of these analyses, I
6 considered it almost certain that the 2022 assembly plan was
7 deliberately designed in part to maximize the number of
8 districts containing a single incumbent assembly member. It
9 was the incumbent protection plan that we had labeled it all
10 along. And so this is why it's relevant, your Honor. I'm
11 getting to the point. Now your Honor has to decide how to
12 redraw the map, and in our view, it isn't unprecedented.

13 There were two maps that were declared
14 unconstitutional. One, it's an unconstitutional germander,
15 and because of the constitutional procedural illegality, and
16 one that was only declared unconstitutional for the -- and
17 we keep calling it procedural, but the process matters -- a
18 procedural violation that was dictated not just by the
19 Legislature twice, but by New York voters in amending the
20 Constitution, and there, Justice McAllister determined to
21 use a special master to redraw the map. Why? Because in
22 Justice McAllister's view, the Constitution is clear, once
23 there is a violation, the Legislature does not get a do-over
24 for any error that it can no longer correct.

25 And the respondents in this case disagreed, and

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1 they took it to the Fourth Department, and then they took it
2 to the Court of Appeals, and the Court of Appeals could not
3 have been more clear, and how the respondents time and time
4 again tried to lead you into error with the advocacy in
5 their briefs is surprising, because this is the language of
6 the Court of Appeals, it couldn't be clearer.

7 Finally, the State respondents protest that the
8 Legislature must be provided a, quote, full and reasonable
9 opportunity to correct legal infirmities in redistricting
10 legislation. That's true, that's in the Constitution. The
11 Court then goes on, the procedural unconstitutionality of
12 the congressional and Senate maps is, at this juncture,
13 incapable of legislative cure.

14 Now, if the Court of Appeals had stopped there --
15 your Honor, if I can continue for one more minute, I want to
16 be very responsive to your questions, as always.

17 THE COURT: Go ahead, counsel.

18 MR. WALDEN: If the Court of Appeals had stopped
19 there, I could understand the respondents using creative
20 advocacy in saying, well, "at this juncture" means because
21 there was an election coming up, and that's what they put in
22 their brief, that's what they want you to believe, but what
23 they did was they didn't quote the next sentence where the
24 Court of Appeals clearly identifies what it was talking
25 about. It says "the deadline in the Constitution for the

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1 IRC to submit a second set of maps has long since passed,
2 and if that wasn't clear enough, the Court of Appeals
3 dropped a footnote clarifying that the deadline it was
4 referring to was the February 28, 2022 deadline, which is
5 the last deadline to submit the second set of maps.

6 So the Court of Appeals clearly held, without any
7 ambiguity, that if there is a violation that the Legislature
8 can't cure, the appropriate remedy is judicial.

9 Now, your Honor --

10 THE COURT: Counsel, I will give you an opportunity
11 to continue, but --

12 MR. WALDEN: I have to switch glasses because I
13 can't see distance or reading, sorry.

14 THE COURT: I understand. The Court of Appeals
15 also said in that same decision, you made reference, quote,
16 that together the 2014 amendments created an exclusive
17 process of redistricting that was designed to promote
18 citizen participation, fair representation, and confidence
19 in elections, thereby pressuring in a new era of
20 bipartisanship and transparency. I know you quoted that
21 within your own papers.

22 The Court of Appeals, within their decision that
23 they were dealing with in the case that was before them
24 prior to the 2022 elections, repeatedly made reference to
25 the benefits of the Independent Redistricting Commission

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1 that was set up per the constitutional amendments that were
2 put into place, and the entire purpose behind that was to
3 try to avoid a lot of the issues that you've raised, which
4 we know have always been out there on a national level in
5 terms of concerns of potential gerrymandering or things
6 being done by others who may have been involved in the
7 redistricting process. So that entire process, which
8 obviously did not work in the 2022 cycle --

9 MR. WALDEN: Was intentionally sidestepped --

10 THE COURT: Well, counsel, I'm not going to
11 reiterate the history of what occurred with the members of
12 the Independent Redistricting Commission and the maps and
13 the timeline and what the Legislature did, and obviously the
14 Court of Appeals has already issued their rulings on all of
15 that, but I do think it would be disingenuous to not
16 acknowledge the fact that the Court of Appeals was issuing a
17 decision based on a specific timeline for the upcoming
18 election cycle, which is what they were addressing.

19 So the reality is that, now, and I agree with you
20 when I said it myself, this is an unprecedented situation, I
21 think we can all degree with that, but the Appellate
22 Division decision that sent the matter back to me is very
23 specific in stating that it should follow the constitutional
24 requirements and that this is for the 2024 election cycle.
25 So that entire compressed time pressure situation, which led

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1 to the special master being appointed and going through that
2 process with the Senate and congressional maps occurred, now
3 we have a situation where we literally have a two-year
4 window before a new map needs to be in place for an election
5 cycle.

6 And I would think, and obviously I will hear
7 further from you, but I would think there would be a
8 preference to have the maps drawn through a full Commission
9 that potentially goes through mandated hearings throughout
10 the state and goes through a full detailed process, rather
11 than having myself, potentially, through the benefit of a
12 special master that I might appoint, just arbitrarily on
13 their own create a map.

14 MR. WALDEN: Well, your Honor, first of all, as I
15 said to you when I met you for the first time back in May, I
16 like to agree as much as possible, so I agree with you that
17 the amendments to the Constitution that were twice passed by
18 the Legislature and approved by the voters of the state are
19 important, amazing policy, and if they were followed, it
20 could have been a road map for the rest of the country.
21 Unfortunately, the Legislature got cold feet and decided
22 that they wanted to sidestep, and that's why we're here.

23 And so the important part of *Harkenrider* that your
24 Honor did not focus on is the deterrent effect of the
25 judicial remedy. That's the whole reason the Senate put it

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1 in. The Senate realized, because they're in the Senate,
2 that politicians will be politicians, and right after the
3 amendments were passed, we saw gamesmanship in terms of
4 trying to move the goal post and change the rules that were
5 beaten back by the Courts, and still, despite that, we had
6 legislators who decided that their desire to protect
7 incumbents was more important than the will of the voters.

8 And that's why *Harkenrider* says very clearly, when
9 a map is determined to be unenforceable and void, it's as if
10 it didn't exist, this is the reason that there is a judicial
11 remedy, to create deterrence so that legislators won't do
12 this again.

13 And your Honor, there is no constitutional
14 mechanism that applies here. I saw this citation, and it
15 really is just a citation, in the First Department's order
16 that cross-references 5-b, I don't know if that was a
17 mistake, I don't know what they meant by that, they didn't
18 explain it, but 5-b, which is the provision of the
19 Constitution that establishes the requirements of the IRC,
20 has a dating provision. It is only applicable in two
21 circumstances; one, every ten years, which means that its
22 duties begin in February of the year ending in zero and the
23 final map has to be submitted in the year ending in two, so
24 in this year, it would be February of 2020 and February of
25 2022.

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1 *Harkenrider* said that constitutional date cannot
2 move, and so it was violated, and based on that, the IRC can
3 have no more role, A, and B, only if there's an amendment to
4 a map. The First Department did not ask this Court to amend
5 an otherwise valid map, it declared the map unconstitutional
6 and declared for it to be redrawn.

7 So from my perspective, I might as well have cited
8 the motor vehicle and traffic safety law as opposed to 5-b,
9 which doesn't apply. They don't make an argument that it
10 would apply. First of all, there is no IRC right now. The
11 Constitution requires a committee with 10 members, it only
12 has nine, we don't know what happened to the remaining one,
13 but at a minimum, it would have to be reconstituted.

14 Number two --

15 THE COURT: Counsel, I believe the Constitution
16 gives, if there's a vacancy in the IRC, it can be filled, I
17 think it's supposed to be filled within a 30-day window, if
18 necessary.

19 MR. WALDEN: All I'm saying, your Honor, is, I
20 agree with you, I think we're in agreement that the
21 Constitution requires 10, there's a process to fill a
22 vacancy, I don't know how long that vacancy has been around
23 because the gentleman disappeared, his website, or he's no
24 longer on the website, so we have an IRC that's not
25 constituted yet, they're not a party. This has been

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1 scheduled for some time, they could have made a motion, they
2 didn't make a motion, and so from my perspective, adding the
3 IRC as a necessary party is a complete charade.

4 There's no constitutional provision that they can
5 cite that says, in this circumstance, the IRC has a role.
6 But your Honor, if that's your inclination, I can make a
7 proposal to you, and it's a proposal that I made to them and
8 they rejected it, and when I tell you what the proposal is,
9 you will know exactly why, because you're a very experienced
10 person who's no stranger to the political system in New
11 York.

12 My proposal is this: You want the IRC to redraw
13 the map in the first instance, reconstitute it so that it's
14 appropriate, I will consent to them being a necessary party
15 in this, agree that the Court should have a special master
16 to evaluate the IRC's map, publish the map, go through the
17 process, it's not a constitutional process but they can
18 still hold public hearings and seek input, the respondents
19 can give input, but then submit that map to Justice Love,
20 let him consult with the special master and get briefs from
21 the parties, and then let the Court decide, as the Court
22 must under *Harkenrider*, what the appropriate map is.

23 However, in allowing the IRC to draw the map in the
24 first instance, let's agree that the Court order has to be
25 consistent with the Constitution by not allowing political

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1 gerrymandering, and there's a very easy way for you to put
2 in an order something that the IRC has to follow, and that
3 language is simple. Whatever criteria you use to redraw the
4 map, you may not consider incumbent and challenger
5 addresses, because that's what Dr. Clelland's affidavit
6 proves, what her report proves is that it was impossible,
7 literally, statistically impossible for them to have drawn
8 the map that they wanted you to rubber stamp back in May
9 without considering incumbent and --

10 THE COURT: Counsel, just to be clear, I understand
11 what your expert's affidavit states and everything it went
12 through, but at the end of the day, that map is no longer
13 under discussion.

14 MR. WALDEN: I agree, so it can't be amended, and
15 if it can't be amended, then the IRC can have no role under
16 the Constitution. We agree there.

17 THE COURT: Just to be clear, and obviously I'm
18 going to hear from respondent shortly, but if I am now in
19 the role where it's up to me to determine how to proceed to
20 come up with a new assembly map to be put in place for an
21 election that is taking place two years from now, would you
22 agree that there is more benefit to have that process take
23 place, where it is being done by an Independent
24 Redistricting Commission that holds hearings throughout the
25 state and essentially, to use your words, essentially we

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1 have a do-over of the process, and not only a do-over of the
2 process, potentially, but this time a do-over of the process
3 where all of the players involved, the IRC as well as the
4 Legislature and the Governor and everyone else involved,
5 already knows what happened the first time and knows that if
6 there was potentially a repeat of a similar situation, we're
7 all going to end up, at that point, back, in all likelihood,
8 in front of me, where there's a much shorter timeframe and
9 we're back in a similar situation where potentially there is
10 no option other than choosing a special master at that point
11 and having an assembly map put into place where it's
12 literally being done on the background and experience and
13 drawing of a map by one individual with me approving it,
14 that versus a full constitutional process that was put in
15 place.

16 MR. WALDEN: So your Honor, that would be fair to
17 the question that I think you're asking me, which is would
18 it be better to have the IRC do it as opposed to having
19 someone under the Court's direction do it.

20 THE COURT: Correct.

21 MR. WALDEN: So I just want to ask you a question.
22 Under either scenario, IRC or special master, at the end of
23 the day, regardless of what anyone else does, is the map
24 coming to you, you're going to accept expert opinion or our
25 submissions with our experts, you're going to look at the

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1 map, you're going to make changes that you think are
2 appropriate, and then you're going to issue a map, is that
3 what you mean?

4 THE COURT: Counsel, I mean, theoretically,
5 obviously, if I adopt what you are suggesting in your papers
6 and arguing here this morning, I would select a special
7 master, have that special master put together what they
8 believe is a fair map, and theoretically I would approve
9 that map. And there, in all likelihood, would be some
10 appeals of that decision, and that would be the map that
11 would be in place and could just as easily essentially go
12 back to what was supposed to be the original process that
13 was intended by the Constitution, have the IRC go through
14 the full process over again from scratch, come up with --
15 you know, present their map to the Legislature, see if the
16 Legislature approves it, sends it back for the second map,
17 goes through what was listed as appropriate, I will call it
18 tweaking of the map that's allowed under what was designed
19 as the constitutional process, and that map potentially then
20 being the one that will be utilized.

21 MR. WALDEN: Your Honor, I'm afraid maybe I didn't
22 ask my question in the appropriate way. Let's put the
23 special master aside, right, so if you want to use the IRC,
24 what I think -- it doesn't matter whether I think one's
25 better than the other, the special master is going to have

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1 public input, as well, that's what happened in Steuben
2 County, he had proceedings all over the state, he accepted
3 thousands of comments.

4 THE COURT: Counsel, with all due respect, the
5 process, and I understand the time constraints that everyone
6 was under, but to talk about that time process with how the
7 maps were ultimately put together for the Congressional and
8 State Senate was a very compressed time period, and the
9 amount of public input that actually occurred in there, I
10 think, was just limited by the realities of the timeframe.

11 MR. WALDEN: I agree, your Honor, but as you said
12 before, I agree with you wholeheartedly, you can design the
13 process, you can work with the special master, he or she
14 could have hearings throughout the state, they can do
15 exactly what the IRC did.

16 THE COURT: Counsel, I understand what your
17 question was back to the Court, is it your belief that the
18 only person that can confirm and put in place the assembly
19 maps for the 2024 election is myself, versus going through a
20 legislative process?

21 MR. WALDEN: Your Honor, if there is a juggler on
22 the table, you put your thumb on it, because that's what
23 this is all about. They want the last crack, and if you
24 look at Dr. Clelland's affidavit, you know why, because they
25 can change two percent, assuming that they don't do

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1 something else, they can change two percent, and then that
2 two percent, they can save at least 25 incumbents, according
3 to her analysis.

4 THE COURT: Counsel, here's my question: Why
5 should the people of New York not have the opportunity to
6 have the Independent Redistricting Commission and a full
7 Legislature made up of members that they have elected into
8 their roles, why should they not have the opportunity to
9 come up with the new assembly maps, versus myself or any
10 other individual judge, if it's not necessary?

11 MR. WALDEN: Because, your Honor, that's what the
12 constitutional amendments require. The Court has a role.
13 Your Honor, I think that I have a very different view of the
14 public's confidence in the Court, as opposed to the public's
15 confidence in them, based on the shenanigans that have
16 occurred in this case. I think the public would be much
17 more accepting of a map that came from a Court in these
18 circumstances.

19 And there's a second important component to that,
20 your Honor, which I don't know, I know it puts you in an
21 awkward position, I understand that we all live in the same
22 city and political circles are relatively incestuous, but
23 they brought this on themselves, and if a Court doesn't say
24 here -- this is the language of *Harkenrider*, there has to be
25 consequences to the Legislature. If you give them a

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1 do-over, all you're doing is incentivizing them to do it
2 again.

3 And your Honor, how much money have they spent of
4 the public's money defending an unconstitutional map?

5 THE COURT: Counsel, if there is a do-over, if I
6 give them the opportunity for a do-over and we end up in the
7 exact same position, then they know what the ultimate
8 results are going to be, and I'm obviously going to turn to
9 them in a moment, but I'm just trying to get clear of you,
10 you know, and I think I'm clear of what your position is,
11 that the Legislature should have no role in this, that they
12 should essentially be punished for what occurred the first
13 time, and that it's now up to the Court itself to determine
14 what the assembly lines should be.

15 MR. WALDEN: Your Honor, this is not me, this is
16 the Court of Appeals. The Court of Appeals was crystal
17 clear about this. I'm not making this up, I quoted the
18 language from the case, that language was not dependent on
19 the imminence of the election, it was a matter of
20 constitutional principal, they said it matters. But your
21 Honor, to be clear, the reason --

22 THE COURT: Counsel, I get that, but the Court of
23 Appeals also, throughout their decision, repeatedly talks
24 about what the benefits were of the Independent
25 Redistricting Commission and how everything was set up in

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1 the state through what was passed as constitutional
2 amendments and the enabling legislation, and that entire
3 process was set up for a lofty goal of doing things the
4 right way, and the best way possible.

5 MR. WALDEN: Your Honor, the right way is not
6 abiding by eight of the ten constitutional requirements.
7 *Harkenrider's* position to put its imprimatur on the special
8 master hinged on the other parts of the Constitution that
9 require court action, and they made the same argument here
10 that they made in *Harkenrider*, and it was rejected there,
11 they're claiming that it was because of the imminence of the
12 election and it wasn't. I can go back and quote the
13 language again, your Honor, but it was based on the
14 importance of the constitutional principle.

15 But understand, your Honor, I made an offer to
16 resolve this, and why did they reject it? Because if you
17 ask them point-blank, your Honor, they will say that your
18 Honor should essentially delegate this to the IRC and the
19 Legislature and let a constitutional provision that does not
20 apply in these circumstances, or if they can't make a case
21 that 5-b applies here, because it doesn't, to let that
22 process play out so that if they change the map in a way
23 that's clearly gerrymandering, and that final step of the
24 analysis that you have no authority whatsoever to either
25 take expert testimony or change the lines with the expert's

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1 help. And that's why I thought that my proposal was a very
2 elegant solution. I'm sorry that sounded completely self
3 congratulatory, I didn't it mean it that way, your Honor,
4 but I was trying to reach across the aisle here.

5 And I read *Harkenrider*, I believe in the importance
6 of a bipartisan process when it doesn't get sidestepped
7 intentionally, but I have no problem with the IRC, not in a
8 constitutional process, but in a constitutional-like
9 process, under the Court's supervision, drawing the map in
10 the first instance, having its public hearing, getting its
11 public input, having you have an expert at your side once
12 those maps come in and you get the report from the IRC,
13 having the expert then be your subject matter expert, as I
14 certainly would need if I were sitting where you were
15 sitting, in order to say, listen, you know, this is clearly
16 gerrymandering, these districts were gerrymandered or not,
17 and then the Court decides what the map looks like in
18 consultation with the special master.

19 Why doesn't that work, your Honor? That gives you
20 the constitutional bipartisan process that you're looking
21 for, but has teeth in it so that the voters know that the
22 Court is not abdicating a responsibility back to the fox who
23 robbed the hen house.

24 THE COURT: All right, counsel, I understand your
25 position, thank you.

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1 With that, let me turn to respondent's counsel and
2 give you an opportunity to be heard.

3 MR. FARBER: Good morning, your Honor. Seth Farber
4 on behalf of Governor Hochul. I will be brief.

5 As we indicated, your Honor, in the letter of
6 August 8th, we concur with the position taken by the
7 assembly speaker. We believe that Article III of the State
8 Constitution provides that matters of redistricting are in
9 the province of the Independent Redistricting Commission
10 subject to the approval of the Legislature and the
11 ultimately approval or veto of the Governor.

12 Since the issue before the Court does concern
13 elections in 2024, there's ample time to permit operation of
14 the process envisioned by the State Constitution. And
15 accordingly, we respectfully submit this that Court should
16 remand this matter to the Independent Redistricting
17 Commission for further proceedings, as your Honor indicated
18 during argument. The remedies suggested by the petitioner
19 are presently premature and inappropriate.

20 Thank you, your Honor. I will defer to co-counsel.

21 THE COURT: Thank you, counsel.

22 MR. BUCKI: Yes, your Honor. First of all, I know
23 we have people watching on the live stream, would your Honor
24 prefer, given the technology, that I sit or that I stand?

25 THE COURT: You can sit, it's not a problem. I

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1 will not be offended. Go ahead.

2 MR. BUCKI: The State Constitution provides for an
3 orderly process in this circumstance, and the process is
4 pretty straightforward. First of all, under the order that
5 was issued by the First Department on June 10th, it demanded
6 to this Court for consideration of the proper means for
7 redrawing the state assembly map in accordance with New York
8 Constitution Article III Section 5-b.

9 Now, Mr. Walden just said that this must have been
10 some mistake. We disagree. We would submit that it's now
11 law of the case from the First Department that, whatever
12 method is selected by this Court for the redrawing of the
13 map, that it needs to be in accordance with Section 5-b of
14 Article III. And what does Section 5-b of Article III
15 provide for? The Commission process that we have been
16 talking about for the entirety of this morning's hearing.

17 And indeed, under Section 5-b(a), it says on or
18 before February first of each year ending with a zero,
19 that's not this situation, and at any other time a Court
20 orders that congressional or state legislative districts be
21 amended, an Independent Redistricting Commission shall,
22 mandatory, be established to determine the district lines
23 for congressional and state legislative offices.

24 Now, Mr. Walden says that redrawing the map somehow
25 is not amending the map. We would respectfully disagree.

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1 We would submit any kind of change you make to the map,
2 whether it's a tiny change or a wholesale change, is an
3 amendment of the map, and we would submit that is the
4 circumstance that applies. And so in fact, this procedure
5 of going through the Commission and then, yes, having the
6 Legislature consider and potentially enact the proposals
7 that come from the Commission, that is the process that is
8 constitutionally prescribed.

9 And I'm glad that Mr. Walden made reference to the
10 proposal that he made yesterday that, yes, we did reject.
11 The reason why we rejected it is because that is not the
12 process that the Constitution prescribes, because what
13 Mr. Walden wants to do is cut the Legislature out of the
14 process entirely. And when one looks at Section 4 of
15 Article III, in view of Section 5-b of Article III, it
16 absolutely does provide a role for the Legislature in that
17 process.

18 Now, that does not mean that this Court would have
19 no role either. We would submit that, in fact, the Court
20 can have a role by exercising supervision over the process,
21 and that's why, for example, we suggested in our papers that
22 the Court set, even though we have approximately two years
23 until the next elections take place, that's why we suggested
24 that the Court set deadlines by which the Commission would
25 need to satisfy its charge.

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1 THE COURT: Right, and counsel, on that point I
2 think the suggested dates were, and maybe it was a typo or
3 not, but it looked like they were a pretty short timeframe
4 in terms of the suggested dates, just to raise why you're
5 suggesting such a condensed time period when we literally
6 have two years before these districts would be coming into
7 play.

8 MR. BUCKI: The reason why is no one ever knows
9 what can happen over the course of two years. One would
10 have thought that starting things off on February 1st of
11 2020 would have resulted in a timely plan that would not
12 have required imposition of a new map by a Court with the
13 assistance of a special master, but what was not foreseen is
14 the effect of a global pandemic, what was not foreseen is a
15 delay of the census results, although we now have the census
16 results. But what Mr. Walden is telegraphing today in
17 court, it could very well be that one of his clients or
18 somebody else entirely may choose to levy some challenge,
19 meritorious or not, to whatever map might happen to come,
20 and then we would be back in front of your Honor having a
21 hearing and a trial with respect to the substantive merit of
22 that map.

23 And so we have offered a relatively tightened-up
24 timeframe to afford sufficient time for the entire process
25 to play out so that one does not end up in a situation like

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1 was encountered in *Harkenrider*, whereby the Court of
2 Appeals, in its wisdom, saw no choice but to say that the
3 Court needed to impose a new map with the assistance of a
4 special master.

5 So really, the tightened-up timeframe is suggested
6 because it's impossible to know what the future will hold,
7 and we certainly anticipate that whatever this Court may
8 order concerning the proper procedure, there may be appeals,
9 and who knows how long those would take notwithstanding the
10 preference that election cases typically get on the
11 Appellate Court calendars, so that would be the reason why.

12 But as I said, this Court could retain supervision
13 and jurisdiction of the process so that, for example, if one
14 were to have a situation like happened in the last go-around
15 earlier this year, whereby there was a deadlock at the
16 Commission, it was in fact suggested by the Court of Appeals
17 that a mandamus proceeding, for example, be commenced in
18 order to compel the Commission to break its deadlock. This
19 Court would be able to retain jurisdiction so that, if there
20 is a deadlock, this Court can help to break the deadlock,
21 and so there absolutely is a role for the Court, but what
22 Mr. Walden wants to do is to cut out the Legislature. And I
23 understand that, as I said back on May 23rd, his clients
24 have differences with the Legislature, both personal
25 differences and policy differences, and so it is no wonder

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1 that they want to cut the Legislature out of the process,
2 but that is not what the Constitution provides for in this
3 circumstance.

4 So whereas they have this orderly process that the
5 Constitution prescribes, we would submit that what
6 Mr. Walden wants is chaos in contrast to order. And it's
7 the kind of chaos that we have seen in the most recent
8 congressional elections, because the special master drew the
9 entire congressional map, and so as a consequence, we had a
10 circumstance like two very senior democrats representing
11 Manhattan, who have been members of Congress since 1992,
12 pitted against each other all because the special master
13 wanted to prioritize the compactness of a district over
14 other constitutional factors.

15 And I would submit that who lost were the people of
16 the State of New York, who lost were the people of Manhattan
17 who had two senior democrats in the leadership, and who lost
18 were the people who, for example, Congressman Nadler's old
19 district, that district was intended for years to be a
20 predominantly Jewish district, and that district was
21 entirely dismantled by the special master because he had no
22 appreciation for and the respect for the history as to how
23 the core of that district was put together.

24 Another example is in the Steuben County
25 redistricting litigation, there were comments upon comments

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1 upon comments by people from the tiny city of Amsterdam, New
2 York, who've said we have had Paul Tonko as our
3 representative for decades, both at the Assembly and then
4 later at Congress, and now all of a sudden we have been
5 taken out of the congressional district that is centered
6 upon the capital region of New York State, even though we
7 have concerns that are very similar of those of Albany and
8 Schenectady and Troy, and the special master said, well, in
9 the interest of compactness, that isn't what I want to do.

10 THE COURT: Counsel, I'm sorry to jump in, but
11 obviously, if I followed along with what your papers are
12 suggesting in terms of essentially giving a do-over to the
13 Independent Redistricting Commission with, as you said,
14 myself retaining ultimate jurisdiction in a case where
15 there's a potential issue, obviously the system didn't work
16 the way it was intended to the first time around, which is
17 what ultimately resulted in the Congressional and State
18 Senate maps being drawn by the special master who did it.

19 And I certainly am not oblivious to the fact that
20 I'm sure there were many people who were very happy with
21 what the special master did, and I'm sure there were plenty
22 of people who were outraged by what the special master did,
23 he used the criteria that he used, and that's what the Court
24 approved in that situation.

25 I suspect that if ultimately this comes back to me

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1 because the Independent Redistricting Commission and
2 Legislature are unable to complete the process, per what the
3 Court of Appeals has already set out is the proper
4 methodology, if it ultimately comes back to me where I'm
5 theoretically appointing, whether it's that same special
6 master or a brand new special master, I suspect that
7 there'll be plenty of people who like what the results are
8 and hate what the results are, that's the nature of
9 redistricting, no matter what. I think it's one of those
10 situations where you certainly can't please everyone.

11 So you expressing the views that the Legislature
12 was not happy with what the special master did, I understand
13 that and I respect that position, but that's where it ended
14 up. So my concern is, if I do ultimately follow your
15 suggestion, along with the Governor's, and put this back for
16 essentially a do-over with the Commission, that I would like
17 to think that everyone would do it properly this time so
18 that it doesn't have to end up back in front of me or
19 another Court where the ultimate map is being determined by
20 a handful of people rather than the process that was
21 intended.

22 MR. BUCKI: And actually, I'm not expressing the
23 view of the Legislature concerning with what the special
24 master did. With respect to the Maloney and Nadler race,
25 that was a view expressed publicly in a statement by the

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1 League of Women Voters, a brief Mr. Walden relies upon, and
2 that was published in the New York Post just a couple of
3 months ago. And with respect to the views about taking
4 Amsterdam out of the capital region district, all of those
5 views are set forth in I would say literally hundreds of
6 letters and e-mails the special master received from the
7 people who live in and around Amsterdam.

8 So these are people who were displeased with the
9 circumstance. Now, obviously the Court of Appeals, in its
10 wisdom, decided that that was what was required, but here
11 that is not what is required and it's not what is
12 constitutionally prescribed. Mr. Walden's thesis is that
13 the judicial remedy is the only option, and that's a quote
14 directly from his papers, and we would submit, first of all,
15 the First Department established the law of the case, to do
16 the redistricting in accordance with Section 5-b of Article
17 III of the State Constitution, and that's what provides for
18 the Commission process.

19 With respect to Section 4-e, upon which Mr. Walden
20 so heavily relies on, it says, quote, the process for
21 redistricting congressional and state legislative districts
22 established by this section and sections 5 and 5-b of this
23 article shall govern redistricting, except to the extent
24 that a Court is required to order the adoption of or changes
25 to a redistricting plan as a remedy for a violation of law.

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1 And we would submit that, in Mr. Walden's argument,
2 what he does is he either leaves out or de-emphasizes the
3 key terms to the extent and required in Section 4-e of
4 Article III. So first of all, we would submit that, in
5 order for the Court to be required to impose a map, that one
6 needs to view that requirement through the prism of what
7 *Harkenrider* said, which was that no legislative fix was
8 possible at this juncture. And in fact, Justice Pitt at the
9 First Department, when we were together on June 10th, she
10 caught upon that issue right away in the argument, and she
11 confronted Mr. Walden with that language, and he didn't have
12 much of a response.

13 And further, Mr. Walden quotes a statement in
14 *Harkenrider* in his papers in which the Court said that the
15 Legislature was incapable of unilaterally correcting the
16 infirmity in the assembly map. We are not asking for a
17 unilateral correction of the infirmity, because that is not
18 what the Constitution prescribes. The Constitution
19 prescribes the Commission process to take place, and then,
20 at that point, the Legislature can act, rather than the
21 Legislature simply acting on its own without any kind of
22 guidance or assistance from the Commission or without any
23 supervision of the Court.

24 And so we would submit that, to the extent that a
25 Court is required to order the adoption, well, it isn't

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1 required for the Court to self-impose a new map at this
2 point because we have until 2024 to develop a new map, and
3 that's why the Commission process should be followed.

4 Now, Mr. Walden's response to that is, well, there
5 were deadlines for January and February, and those deadlines
6 have long passed. We would submit that those deadlines,
7 which were set forth in Article III, Section 4 of the
8 Constitution, those are deadlines that, when one looks at
9 the language in its totality, those are deadlines that apply
10 to the traditional decennial redistricting that's supposed
11 to take place every year ending in a two in the timeframe of
12 January and February after all of these different
13 redistricting hearings have taken place and after all the
14 necessary census data has been gathered. Nothing in
15 Section 4 says that that's the only time that the
16 Redistricting Commission can ever meet or can ever
17 contemplate changes, and nothing says that's the only time
18 when you can have a redistricting, and so that's why, under
19 Section 5-b, it says that there can be a time a Court orders
20 that congressional or state legislative districting be
21 amended, and then that's when the Commission can act, as
22 well.

23 So we would submit that the whole argument about
24 deadlines is a red herring, because this is a time when a
25 Court has ordered changes to the map. And when a Court

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1 orders changes to the map, particularly when the Court
2 expressively holds that Section 5-b of Article III be
3 followed, that that is the time for the Commission process
4 to be followed --

5 THE COURT: Counsel, let me bring this up at this
6 juncture, I know within part of the papers that you filed
7 you also filed papers suggesting that the Court sua sponte
8 sign off on an order to show cause to add the Independent
9 Redistricting Commission as a named party to this matter.
10 Obviously, they were not a named party in the action in
11 Steuben County or the action that was originally before the
12 Court, but I just want to be clear, why do you believe that
13 the IRC needs to be specifically added as a party to this
14 case rather than potentially the Court issue an order saying
15 X, Y, and Z is a process of proceeding with a new map?

16 MR. BUCKI: If the Court is of the view that that
17 is all that is required, we would certainly respect that.
18 At the same time, we did want to offer a proposed order to
19 show cause.

20 THE COURT: I understand, I was just curious if you
21 want to amplify why you believe they would need to be added
22 on as a named entity.

23 MR. BUCKI: The reason why we offered the order to
24 show cause was to accommodate the argument, should it be
25 made, that the Commission can only be ordered to do

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1 something if its members were parties to this proceeding and
2 had an opportunity to be heard, that it is impossible,
3 should that be argued, that an order -- that members of a
4 Commission would be compelled to do something when they were
5 not a party to the proceeding.

6 THE COURT: Counsel, let me also be clear, because
7 again, you know, it's been said several times that it's an
8 unprecedented situation, when the IRC was constituted as a
9 Commission, it was a Commission for a specific purpose for a
10 specific election cycle. I did not see anything that talked
11 about an ending for the Commission, but with that being
12 said, is it your position that it currently constitutes -- I
13 believe nine of the ten members are still actively
14 available, or technically serving on the Commission -- is it
15 your position that that existing Commission, with the
16 vacancy potentially being filled, are the ones that should
17 be serving in that role, versus an entirely new IRC
18 potentially being constituted?

19 MR. BUCKI: Unless and until those will no longer
20 be the Commissioners, we would submit that those nine
21 Commissioners would be the Commissioners. And we further
22 understand that the vacancy in the 10th position is soon to
23 be filled, if it needs to be, so that the Commission can go
24 forward with a complete complement of members at the number
25 10.

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1 THE COURT: And counsel, just so I'm clear, your
2 rationale for this Court adding the IRC as a named party is
3 because, theoretically, one or more members of the existing
4 IRC may indicate that they believe the Court has no --
5 doesn't have the power to have them do the job that they're
6 supposed to do?

7 MR. BUCKI: The purpose of offering the order to
8 show cause was to accommodate and nullify any kind of
9 argument that the Commissioners or anyone could make that
10 they can't be ordered to do anything because they would not
11 be parties to this proceeding.

12 THE COURT: I understand. You can proceed if you
13 have anything further.

14 MR. BUCKI: Sure. Another point that I think
15 really bears mentioning, again, this ties in with the theme
16 of reading language out of constitutional provisions,
17 reading language out of a judicial decision, as Mr. Walden
18 does, he states that the First Department voided the 2022
19 enactive assembly map, and so because that map is void,
20 there is no map, and so therefore there's nothing to amend,
21 and that's why Section 5-b of Article III, which speaks of
22 the Commission acting when a Court orders an amendment, does
23 not apply. And I refer the Court to what the First
24 Department actually said, which is, quote, upon the formal
25 adoption and implementation of a new state assembly map that

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1 conforms with the procedural and substantive constitutional
2 and statutory requirements, the February 2022 assembly map
3 will become void and of known fact.

4 And in fact, the 2022 assembly map, as per the
5 First Department, and the Court of Appeals did not disturb
6 that determination, that map is indeed being used for the
7 2022 elections, and the assembly members who are elected on
8 November 8th are going to be representing those 150
9 districts as they are configured under the enacting 2022
10 map.

11 So we would submit that a map is in place, it is
12 true that it needs to be changed, it is true that the
13 procedural unconstitutionality was found and that the First
14 Department directed the change, but there is a map to be
15 changed, and so the argument that somehow there is no map in
16 existence such that there can be no amendment, we would
17 submit that that argument falls apart.

18 The last area where I would like to touch upon
19 briefly is the issue of the opinions that are offered by Dr.
20 Clelland, whose affidavit Mr. Walden and his clients offer
21 for the very first time long after we had our initial
22 proceedings back on May 23rd, and I could nitpick in great
23 detail --

24 THE COURT: Well, counsel, let me just short
25 circuit it in this fashion. The expert affidavit that was

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1 offered was offered on the specific proposed assembly map
2 that, to my mind, is based on the Court of Appeals decision.
3 And specifically the First Department decision sending it
4 back to me found that that map no longer exists in terms of
5 whatever will come out of this process in terms of the
6 assembly map that would be presented for the 2024 election.

7 Now, I will say this: If the exact or almost exact
8 same assembly map comes out of the process, potentially
9 there may be a challenge made, in all likelihood first in
10 front of me and wherever it goes from there, with claims
11 that the constitutional criteria that's been set out in
12 terms of each of the areas, I know there were a number of
13 areas, that the map was supposed to take into consideration.

14 So if somebody is objecting to what that ultimate
15 map turns out to be, those exact same arguments or similar
16 ones might be before the Court, but to go through it at this
17 juncture, I think, is unnecessary, because there's no actual
18 map in front of me at this point.

19 MR. BUCKI: And actually, that was going to be my
20 first point, and we would agree wholeheartedly that this is
21 a tempest in a teapot much to do about nothing, because
22 these are opinions with respect to a map that the First
23 Department has directed to be changed. And what I think
24 really bears emphasis, so that I don't have to go into all
25 of the detail about all of the deficiencies in Professor

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1 Clelland's analysis is that, back in the petition, page 29,
2 docket number one, the petitioner sought a declaration that
3 the 2022 assembly map was, quote, void based upon the
4 constitutional flaws in its adoption previously found by the
5 Court of Appeals, unquote.

6 And then when we were all together on May 23rd, at
7 docket number 95, the transcript of that proceeding, your
8 Honor said, quote, when Mr. Walden was speaking, your Honor
9 said, quote, to be clear, I think you had said as part of
10 your argument is your only claim to strike the assembly maps
11 and to do the other items based upon the procedural
12 unconstitutionality, or are you seeking a claim that there
13 are other issues in terms of potential gerrymandering and
14 other things that have gone on, which would in all
15 likelihood require the Court to hear and potentially go
16 through a similar bench trial to what may have occurred
17 before Judge McAllister?

18 Mr. Walden answered. Quote, your Honor, to be
19 crystal clear -- and he used that same phrase earlier today
20 as well, so he likes that phrase -- again, I'm sorry if I
21 wasn't crystal clear before, the issue here is what
22 everybody here is referring to as procedural
23 unconstitutionality, end quote.

24 So either Mr. Walden was being crystal clear then
25 or crystal clear now, but it can't be both. And so we would

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1 submit that if Mr. Walden had any issue as a substantive
2 matter with the map, the time to raise it was back in May,
3 that argument is waived, and I will just give one case from
4 the First Department on that issue, *Loreley Financing*
5 *(Jersey) No. 28, Ltd. v. Merrill Lynch, Pierce, Fenner &*
6 *Smith, Inc.*, 196 AD3d 434, from the First Department of
7 2021, and we would submit that the opinions have no merit.

8 THE COURT: Again, as I said, the whole issue in
9 terms of the expert affidavit, I understand the arguments
10 that were put forward in it, but to me, all of that is
11 irrelevant at this stage of proceedings. As I said, there
12 may be a time in the future that we're addressing those
13 issues, and I suspect, if and when that occurs, there will
14 be expert affidavits from both sides, and maybe more than
15 one, so there will be plenty of time to deal with that down
16 the road, if it's necessary.

17 MR. BUCKI: And we would certainly agree to the
18 irrelevance, but I think the reason why the petitioners now
19 offer it beyond the time when we have an opportunity to
20 engage in any kind of cross examination is because they want
21 to try to bolster their argument that the Legislature should
22 simply be cut out of the process.

23 THE COURT: I understand, counsel.

24 MR. BUCKI: And we would submit that that is not
25 what the Constitution provides for, and if Mr. Walden were

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1 to say that somehow there is, to use his words,
2 gerrymandering and rigging of maps, that was not his
3 argument all the way back in May when the petition was first
4 brought, and in fact, to this date, no one has brought any
5 kind of substantive challenge to the state assembly map that
6 was enacted, which is a map that upwards of 15, even,
7 republicans from the state assembly have given affidavits
8 stating that it's fair.

9 So there is no basis for anyone to say that somehow
10 the State Legislature cannot be trusted to do its
11 constitutional duty, which is prescribed by the Constitution
12 of the State of New York to act as its authority is set
13 forth in Article III, Section 4, as a result of the
14 completion of the Commission process under Section 5-b.

15 THE COURT: Thank you, counsel. I will turn to the
16 Senate.

17 MR. HECKER: Nothing at this time.

18 THE COURT: I could understand that.

19 Mr. Walden, just to turn back to you briefly.

20 MR. WALDEN: Your Honor, I'm not going to extend my
21 impose on your graciousness, I'm going to leave it to what I
22 have to say.

23 First of all, on Clelland's affidavit, it is
24 relevant, and this is what I'd ask. Please don't sign their
25 order. I just got it. Let me mark it up, because if

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1 Clelland's affidavit counsels you to do anything, it's to
2 reserve more power and discretion if there are problems that
3 come up during this process, assuming you're going to go
4 with the IRC process. So all I'm asking for is, and this is
5 why I think Clelland's analysis is not only important, but
6 chilling, to allow --

7 THE COURT: But counsel, there's a process. My
8 overriding point is, there needs to be a map in existence
9 before someone can turn around and say there's something
10 wrong with it.

11 MR. WALDEN: I understand.

12 THE COURT: So whatever analysis was made was made
13 in reference to the 2022 map, which the First Department
14 indicated that, based on the infirmities and the findings of
15 the Court of Appeals, was in place solely for this two-year
16 window and will be replaced by whatever the new assembly map
17 is for the 2024 election.

18 So her analysis, the analysis, once there's a new
19 map, there may be similar issues that come up, and those
20 will be addressed at the time. It's just premature to go
21 through it at this point.

22 MR. WALDEN: Your Honor, I'm sorry, I'm clearly not
23 making my point clear enough, because I understand what
24 you're saying, but that was not what I was arguing. My
25 request, I will make it as simple as possible, was just let

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1 me mark up their order. That's all I want, to be able to
2 mark up their order. I just reviewed it for the first time
3 this morning --

4 THE COURT: The proposed order to show cause in
5 terms of adding the IRC?

6 MR. WALDEN: Correct, but it also outlines a
7 process, your Honor. And what's notable in it is it lacks a
8 final paragraph that says no map will be used other than one
9 that is approved by the Court. And there is another
10 important deficiency, your Honor, and I am confident that
11 what I'm about to say is something that would be acceptable
12 to this Court, which is, if you're going to allow the IRC
13 this mulligan, which again, this thing is not authorized
14 either by the First Department's order, that's not what the
15 First Department's order says, but certainly not by
16 *Harkenrider*, but if you choose to do it --

17 THE COURT: Counsel, the First Department's order
18 is very clear in stating that my role is to proceed with
19 this process, and specifically cites the constitutional
20 provisions.

21 MR. WALDEN: I understand, your Honor, but it
22 doesn't explain what it means, and there would be no role
23 for you to have. If what they meant was you have to go back
24 to the IRC, that's not what it says, but if that's what it
25 meant, the order doesn't make any sense, there's nothing to

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1 remand to. It's not as though 5-b has a process that's not
2 clear and prescribed, it is, so the First Department could
3 have said we're reconvening the IRC. They left it for you
4 to decide in the first instance, the appropriate mechanism.
5 If they meant to say that 5-b was the only appropriate
6 mechanism, which is the way they want you to read that
7 order, there would be no decision left for you to render.
8 It is in accord with 5-b to say I find that 5-b doesn't
9 apply because we're not in a zero year, and this is not an
10 amendment, it's a redraw, and so I'm going to do this other
11 process.

12 Now, you can embrace the spirit of 5-b by having
13 the IRC have a role, and I have proposed that as an
14 alternative. My only suggestion on the order, your Honor,
15 is that you make it -- if you're going to go to the IRC
16 process as opposed to the special master, is that you retain
17 a special master to guide you once you get the map. That's
18 not a big ask. And number two, that you specifically direct
19 the IRC that, whatever criteria they use, they cannot refer
20 or consider incumbent and challenger addresses. That is the
21 constitutional evil, that is the antidemocratic nature of
22 what is before you, which is they figured out where everyone
23 lived and drew the lines around them, that's what Clelland's
24 analysis shows dispositively.

25 The Constitution doesn't allow that. The 2012

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1 amendments specifically have a non-gerrymandering provision
2 that includes partisan gerrymandering. In that way, it is a
3 very robust constitutional amendment. So the only language
4 I'm asking for is language I'm sure the respondents are not
5 going to disagree with because it's in the Constitution, and
6 it will be enacted when you direct the IRC to not consider
7 incumbent or challenger addresses in drawing the lines.

8 So this is all by way of saying please let me mark
9 up the order, please consider my proposals, and that's my
10 request.

11 THE COURT: Thank you, counsel.

12 MR. BUCKI: Your Honor, we would be very much
13 opposed to that. Mr. Walden can mark up whatever he wants.
14 What's astounding to me is that he didn't review the order
15 to show cause until this morning, as he admits. But I go
16 back to the League of Women Voters brief that Mr. Walden
17 offered this Court. The League of Women Voters brief that
18 was submitted to the Fourth Department took the position
19 that the Court can order new -- that the Court, in a
20 situation such as this, needed to order the adoption of a
21 new redistricting plan.

22 So we would submit that ordering a plan is very
23 different from ordering the adoption of a new plan, and
24 ordering the adoption of a new plan, which is what the
25 League of Women Voters advocated, and which is what the

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1 Constitution would prescribe in a situation like this, would
2 contemplate that, if there are certain individuals who would
3 want to bring a challenge substantively to any new map that
4 may be enacted in the future, then that would be their
5 prerogative, but in terms of who actually adopts the map
6 when all is said and done after the Commission process, that
7 would be the Legislature, because that is the process for
8 which the Constitution provides.

9 MR. WALDEN: Your Honor, let me translate that to
10 you in two ways, your Honor. I'm sorry, I have the last
11 word, your Honor.

12 THE COURT: I have the last word, but I will give
13 you the second to last word.

14 MR. WALDEN: Let me translate the two things you
15 just heard from the speaker's counsel. Number one, they
16 want the IRC to be able to include incumbent and challenger
17 addresses when drawing the lines. Why would that happen
18 unless they were partisan gerrymandering?

19 THE COURT: Counsel, the IRC, if it is given the
20 opportunity, essentially, for a do-over, has a very clear
21 parameter set up constitutionally in terms of the criteria
22 that they are supposed to be utilizing.

23 MR. WALDEN: They're not exclusive.

24 THE COURT: Incumbency is one of those items, but
25 it is not the one and only item. There are references in

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1 terms of keeping communities together, in terms of the
2 population size of the districts. You know, there's a whole
3 litany of things that are supposed to be followed beyond
4 just the -- and I agree with you, the issue in terms of,
5 quote, protecting incumbents is one of the items that is
6 there.

7 MR. WALDEN: They should not be considering. They
8 shouldn't be changing the lines to draw challengers out the
9 way they did in this map. I'm literally asking for language
10 that comes from the Constitution. So can I have that
11 opportunity to mark it up?

12 THE COURT: Counsel, if you want an opportunity to
13 present your own proposed order to show cause on the issue
14 of whether the Court should add the IRC to this proceeding
15 as a named party, I will give you an opportunity to do so,
16 but at the end of the day, whether -- and I will make that
17 determination of whether they should be added as a named
18 party to these proceedings, but --

19 MR. WALDEN: Your Honor -- I should write this
20 down, because I believe this is the only time this happens,
21 I agree with Mr. Bucki, if you're going to go through this
22 process, you have to have the IRC before you, they have to
23 reconstitute it so it's constitutional, and the IRC has to
24 be before you, and I agree with them and I will put that in
25 writing. All I'm asking for, your Honor, is a courtesy that

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1 is very common, which is they propose their own order to
2 show cause, my request simply is that I have the opportunity
3 to mark it up. I can do it today, give you the
4 opportunity --

5 THE COURT: Counsel, I will give you the
6 opportunity if you upload something on NYSCEF by the end of
7 the day, I would say by 2 o'clock tomorrow. If you're able
8 to upload something, I will certainly take that into
9 consideration and proceed from there.

10 MR. WALDEN: Okay, thank you.

11 THE COURT: So with that said, I'm going to go
12 ahead and close the proceedings at this time. I will ask
13 counsel to order the transcript of today's proceedings and
14 we will conclude with that. Take care.

15 MR. WALDEN: Thank you, your Honor.

16 * * *

17 Certified to be a true and accurate transcript of the foregoing
18 proceedings.

19 Ashley Millan
20 ASHLEY MILLAN
21 Senior Court Reporter
22
23
24
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