Phillips Lytle LLP

Via Electronic Submission April 23, 2022

Hon. John P. Asiello
Clerk and Legal Counsel to the Court
New York Court of Appeals
20 Eagle Street
Albany, New York 12207-1095

Re: *Matter of Harkenrider, et al. v. Hochul, et al.* (APL-2022-00042)
Opening Position Letter of Speaker of the Assembly Carl Heastie

Dear Mr. Asiello:

With co-counsel Graubard Miller (C. Daniel Chill and Elaine Reich, Esqs., Of Counsel), we represent Speaker of the New York State Assembly Carl Heastie (the "Speaker"), an Appellant in this appeal, which I, Craig R. Bucki, Esq., shall argue before the Court of Appeals on April 26, 2022, at 11:00 a.m. on behalf of the Speaker. We offer this letter on jurisdiction and the merits in response to the letter of Deputy Clerk Heather Davis dated April 22, 2022.

Jurisdiction

Appeal as of Right

This Court has jurisdiction to hear this appeal under two independent provisions: CPLR 5601(a) and CPLR 5601(b)(1). Both afford the Speaker an appeal as of right.

First, CPLR 5601(a) authorizes appeals as of right "in an action originating in the supreme court … from an order of the appellate division which *finally determines the action*, where there is a *dissent by at least two justices* on a question of law in favor of the party taking such appeal" (emphasis added). The Fourth Department's Memorandum and Order entered on April 21, 2022 (the "Fourth Department Order"), satisfies these requirements, including the finality and two-dissent requirements.

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Finality is a "complex" concept "that cannot be exhaustively defined in a single phrase, sentence or writing." *Burke v. Crosson*, 85 N.Y.2d 10, 15 (1995). In general, however, an order is final if it "disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters." *Id.*; Karger, Powers of the NY Court of Appeals § 4:1. That is the situation here. The Fourth Department Order resolves Petitioners' claims of substantive and procedural unconstitutionality with respect to New York's redistricting maps enacted in February 2022 (L.2022, c. 13 & 14), leaving no issues for Supreme Court to resolve.[1]

The Speaker's appeal also satisfies the two-dissent requirement. The memorandum of Fourth Department Justices Lindley and Centra, which Justice Curran joined in part (the "Plurality Opinion"), strikes down the Congressional map based on their erroneous conclusion that it violates Article III, § 4(c)(5), of the New York State Constitution. Presiding Justice Whalen and Justice Winslow dissented from that determination, from which the Speaker appeals.[2]

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[1] Even if the Fourth Department Order were not final, it qualifies for the irreparable-injury exception to the finality requirement. *See* Karger, Powers of the NY Court of Appeals § 5:2; Court of Appeals, Civil Jurisdiction and Practice Outline § VI(C)(4) (Sept. 2020). Specifically, by invalidating the Congressional map during an ongoing election cycle, the Order has sown chaos and confusion: (1) among election officials, who would need to begin their 2022 Congressional election preparations on an expedited timeframe pursuant to new district maps that do not yet exist; (2) among candidates who, having collected designating petitions in reliance upon the Congressional map enacted in February, now face uncertainty as to how they will qualify for the June 28 primary ballot in new and unknown districts; and (3) among voters, whose districts, Congressional candidates, and polling places will now be subject to sudden change only weeks before the scheduled primary. Speaker's Brief dated April 13, 2022 ("Speaker's Br."), at pp. 56-58; *accord*. R. 126-27, 2318-25. The Fourth Department Order would also force the Legislature to enact a remedial map by April 30, 2022, lest a special master draw a remedial map in Steuben County.

[2] Presiding Justice Whalen and Justice Winslow did not address standing in their opinion. But if this Court therefore determines the Speaker cannot appeal the standing determination as of right under CPLR 5601(a), or under CPLR 5601(b)(1), the Speaker respectfully requests discretionary leave to appeal that determination.

This Court also has jurisdiction under CPLR 5601(b)(1), which authorizes an appeal as of right "from an order of the appellate division which *finally determines* an action where there is *directly involved the construction of the constitution* of the state" (emphasis added). For the reasons described *supra*, the Fourth Department Order satisfies the finality requirement. It also satisfies the constitutional-construction requirement, in that the Speaker's appeal directly involves the proper construction of State Constitution Article III, § 4(c)(5).

Discretionary Appeal

Even if the Speaker could not appeal as of right, this Court has jurisdiction to authorize a discretionary appeal under CPLR 5602(a). Under that provision, this Court may grant permission to appeal "in an action originating in the supreme court … from an order of the appellate division which finally determines the action and which is not appealable as of right." CPLR 5602(a)(1)(i).

To the extent this Court concludes the Speaker has no right to appeal under CPLR 5601, it should grant the Speaker leave to appeal under CPLR 5602 because the issues presented are of profound statewide importance, *viz.*, how New York will configure its Congressional districts statewide for the next ten years, and particularly for the 2022 election in which the primary is scheduled to take place only two months from now.

The Merits

As relevant here, the Plurality Opinion concluded that: (1) Petitioners had standing to bring a gerrymandering claim challenging every Congressional district, even though they reside in only a handful of districts; and (2) Petitioners demonstrated, beyond a reasonable doubt, that the Legislature enacted the Congressional map with unconstitutional partisan intent. The Plurality Opinion erred on both fronts and should be reversed.

Petitioners lacked standing to challenge most of New York's enacted 2022 Congressional districts.

The Speaker urged the Fourth Department that, "for most challenged districts, particularly downstate, no Petitioner has standing." Speaker's Br. p. 16; *accord*, Speaker's Reply Brief dated April 18, 2022 ("Speaker's Reply Br."), at p. 4. The Speaker contended, in essence, that a resident of one Congressional district cannot challenge the boundaries of another Congressional district. The Plurality Opinion erroneously rejected this argument. Plurality Opinion ("Plurality Opn."), at p. 3.

The Plurality Opinion relied on *Wright v. County of Cattaraugus*, 41 A.D.3d 1303 (4th Dep't 2007), Plurality Opn. p. 3, but that case is inapposite. The plaintiff there successfully challenged the re-sizing and distribution of weighted votes among members of the entire Cattaraugus County Legislature, because this was the Legislature's second restructuring within a ten-year period, in violation of the New York Municipal Home Rule Law. *Wright*, 41 A.D.3d at 1303-04. It did not involve a substantive challenge to the boundaries of any particular district, so it is irrelevant to whether Petitioners here have standing to assert a statewide gerrymandering claim.

The Plurality Opinion also relied on Article III, § 5 of the State Constitution, which allows "any citizen" to initiate judicial review of a redistricting plan. But as the Speaker explained (Speaker's Br. pp. 18-19, Speaker's Reply Br. pp. 5-6), the "any citizen" language was already incorporated in the State Constitution when this Court affirmed the decision in *Bay Ridge Community Council v. Carey*, 115 Misc. 2d 433 (Sup. Ct. Kings County 1982), *aff'd*, 103 A.D.2d 280 (2d Dep't 1984), *aff'd*, 66 N.Y.2d 657 (1985). And *Bay Ridge* held the petitioner lacked standing because, among other reasons, he did not live in the challenged district. 115 Misc. 2d at 443. The Plurality Opinion does not cite *Bay Ridge*. Nor does it cite *Gill v. Whitford*, in which the United States Supreme Court agreed with Misha Tseytlin, Esq.—Petitioners' counsel here—that plaintiffs in gerrymandering cases "cannot sue to invalidate the whole State's legislative districting map; such complaints must proceed 'district-by-district.'" 138 S. Ct. 1916, 1930 (2018) (quoting *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1265 (2015)).

Specifically, in his Brief to the United States Supreme Court in *Gill*, Mr. Tseytlin contended the plaintiffs "lack[ed] standing to challenge" a statewide redistricting in Wisconsin "because they could only possibly suffer concrete, particularized harm in their specific districts .... where [they] live[ ] and vote[ ]." Brief of Misha Tseytlin, Esq., *et al.*, for Appellants to the Supreme Court of the United States in *Gill*, 2017 WL 3485551, at *22 (July 28, 2017). The Speaker agrees wholeheartedly with that assertion, which Mr. Tseytlin made to the Supreme Court less than five years ago. Hence, because none of the Petitioners lives or votes in Districts 1 through 9, 12 through 15, 20, 21, or 24 through 26, they lack standing to challenge the boundaries of those districts. *See* Speaker's Br. p. 19.

Petitioners failed to satisfy their burden to prove the unconstitutionality of New York's enacted 2022 Congressional districts beyond a reasonable doubt.

The Plurality Opinion (at p. 8) determined Petitioners proved, beyond a reasonable doubt, that the Legislature enacted the Congressional map with unconstitutional partisan intent. It relied on three conclusions—none of which, in its view, was sufficient standing alone: (1) the Legislature enacted the map through a "largely one-party process," (2) fewer Republicans are likely to win Congressional seats under the 2022 map compared to the 2012 map; and (3) Mr. Trende's analysis "corroborated" this evidence. Plurality Opn. pp. 5, 8. Reasonable doubt pervades these conclusions, both individually and collectively, and they cannot support the Plurality Opinion's determination.

The Process

First, the Legislature did not draw the Congressional map through a "one-party process." Republican members of the Independent Redistricting Commission, for example, submitted a proposed map to the Legislature on January 3, 2022. Speaker's Br. p. 7. And the Legislature's enacted map largely mirrors the Republican Commissioners' submission in some regions, particularly "north of Westchester"—as Justice Lindley observed during oral argument on April 20, 2022. *Id.* at 55.

Further, the alleged lack of input and support from Republican State Legislators for New York's enacted 2022 Congressional map is weak evidence at best. *Contra* Plurality Opn. p. 5. In accordance with Article III, § 14 of the State Constitution, the Legislature's Congressional redistricting bill "aged" for three days before the Governor signed it into law. During this time (or earlier), Republican Legislators could have introduced their own redistricting bill, or they could have introduced an amendment to the Legislature's bill. They did neither. Instead, they were likely planning to commence this lawsuit in Steuben County. *See* Speaker's Reply Br. pp. 1-2. And the redistricting legislation's failure to garner Republican votes, while unfortunate, is not necessarily evidence of partisan intent by Democratic Legislators—it could instead reflect (and did reflect) Republicans' unilateral refusal to compromise or negotiate. The Plurality Opinion did not consider this possibility.

Perhaps most troublingly, the Plurality Opinion weakened the beyond-a-reasonable-doubt standard because, in its view, it claimed Legislators are predisposed to gerrymander. Plurality Opn. p. 8. But as Presiding Justice Whalen and Justice Winslow noted in their dissent ("Whalen/Winslow Opn."), this watering-down of the standard is exactly backwards—courts must instead "afford legislative enactments 'a strong presumption of constitutionality.'" Whalen/Winslow Opn. p. 11 (quoting *Schulz v. State*, 84 N.Y.2d 231, 241 (1994)). Nor should Courts "impermissibly presum[e] an intent to pass an unconstitutional act." Whalen/Winslow Opn. p. 12 (citation and quotation marks omitted).

Comparison of the 2012 and 2022 Congressional Maps

Second, the Plurality's comparison of the 2012 and 2022 Congressional maps was erroneous. The Plurality assumed the 2022 map is less favorable to Republicans than the 2012 map (Plurality Opn. p. 5), but that is not true (Speaker's Reply Br. pp. 15-17). More important, even if it were true, it proves nothing. Since the 2010 census, New Yorkers moved into the State, moved out of the State, moved within the State, passed away, reached voting age, and changed party affiliation. Speaker's Reply Br. pp. 17-18. Republican-leaning rural areas lost population, while Democrat-leaning urban areas gained population. *Id.* In fact, whereas 19 of 27 districts in New York's 2012

Congressional map had Democratic registration pluralities in April 2012, 22 of those 27 districts had Democratic registration pluralities in February 2021. Districts 2, 19, and 24 flipped from Republican to Democratic registration advantages in less than nine years as New York's statewide active Democratic registration increased by more than 1 million, compared with only a 96,375 increase in active Republican registrants during the same time period.[3] The State's changing political geography, not unconstitutional gerrymandering, is an obvious explanation for any loss of Republican-leaning Congressional seats.

Sean Trende's Insufficient Analysis

Finally, the Plurality Opinion improperly interpreted and applied Mr. Trende's analysis.

First, contrary to the Plurality Opinion's suggestion (at pp. 5-7), Respondents (including the Speaker) did not waive any challenge to that analysis. True, no Respondent moved to exclude Mr. Trende's reports or testimony during the expedited proceedings in Steuben County. But Respondents vigorously argued that flaws in Mr. Trende's analysis—including redundancy, small sample size, and his failure to even look at any of his computer-generated maps—eviscerated the probative force of that analysis. *See Sadek v. Wesley*, 27 N.Y.3d 982, 984 (2016) (Mem.) ("[A]ny defects in the opinions of plaintiff's experts or the foundation on which those opinions are based should go to the weight to be accorded that evidence by the trier of fact, not to its admissibility in the first instance."); *accord*, *People v. Wesley*, 83 N.Y.2d 417, 429 (1994). And Petitioners never objected to the admission of Respondents' experts' reports that highlighted Mr. Trende's analytical errors. In short, the flaws in Mr. Trende's evaluation of New York's enacted 2022 Congressional map have always been an issue—indeed, a central issue—in this case.

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[3] *Compare* https://www.elections.ny.gov/NYSBOE/enrollment/congress/congress_nov12.pdf with https://www.elections.ny.gov/NYSBOE/enrollment/congress/congress_Feb21.xlsx, both available from the official New York State Board of Elections website, data from which this Court may take judicial notice. *See* CPLR 4511; *Matter of Executive Cleaning Servs. Corp. v. N.Y. State Dep't of Labor*, 193 A.D.3d 13, 18 n.4 (3d Dep't 2021); *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 19-20 (2d Dep't 2009).

Next, the Plurality Opinion improperly relied upon caselaw from other States. *See* Plurality Opn. pp. 5-6. Ohio, Maryland, and Florida are not New York. They have different Constitutions, different burdens of proof, or both, and the circumstances of redistricting lawsuits there do not mirror those here.

For example, in *League of Women Voters of Ohio v. Ohio Redistricting Commission*, executive members of the redistricting commission were excluded from the map-drawing process, and the two individuals who drew the map testified they knew when drafting that the maps had a partisan lean. 2022-Ohio-65, ¶¶ 103, 118 (Ohio Sup. Ct. 2022). No such evidence exists here. In *Adams v. DeWine*, the court disparaged a defense expert witness for including "competitiveness" in the dataset, even though competitiveness was not a constitutionally prescribed standard. 2022-Ohio-89, ¶ 45 (Ohio Sup. Ct. 2022). Respondents' experts here made no such error.

Further, although the Maryland court in *Szeliga v. Lamone* credited Mr. Trende's testimony, the consideration of communities of interest is not required in that State, as it is under the New York State Constitution—and Mr. Trende admits his methodology cannot account for communities of interest. Speaker's Br. pp. 42-43. Mr. Trende's analysis in Maryland was also more thorough than it was in New York. Speaker's Reply Br. p. 18.

Even further afield is In re *Senate Joint Resolution of Legislative Apportionment 1176*, 83 So.3d 597 (Fla. 2012). There, the Florida Supreme Court emphasized that "to use the standard of beyond a reasonable doubt would be a departure from our precedent in legislative apportionment jurisprudence." *Id.* at 607. It also repeated that in Florida, "maintaining communities of interest is not a constitutional requirement, and comporting with such a principle should not come at the expense of complying with constitutional imperatives." *Id.* at 664, 673, 679.

The Plurality Opinion also improperly downplayed Mr. Trende's errors. It failed to recognize that Mr. Trende's algorithm "comes from an academic paper that has not yet completed peer review." Whalen/Winslow Opn. p. 9. It stated that Mr. Trende failed

to account for "one criterion" required by the Constitution (Plurality Opn. p. 7), without appreciating that he failed meaningfully to account for others (Whalen/Winslow Opn. p. 10). And the Plurality Opinion credits Mr. Trende for producing 10,000 simulated maps (Plurality Opn. p. 7), even though an adequate sample size would have numbered in the hundreds of thousands (Speaker's Br. pp. 46-47; Speaker's Reply Br. pp. 18-19). The Plurality Opinion, furthermore, did not consider that actual map-drawers must balance the various Constitutional criteria—not blindly apply them in a robotic, inflexible way as Mr. Trende's algorithm did.

The Plurality Opinion even flipped the burden of proof, blaming the Speaker and the other Respondents for not presenting "their own competing simulation reflecting how the results might have changed." Plurality Opn. p. 7. In so doing, it ignored that Petitioners, not Respondents, bore the burden to prove their case beyond a reasonable doubt. Speaker's Br. p. 40.

Perhaps the Plurality Opinion was most swayed by its fear that, if Respondents prevail, future petitioners "would need to show proof of a 'smoking gun' to prove partisan gerrymandering." Plurality Opn. p. 7. That fear is unfounded. Petitioners did not need a smoking gun to carry their burden. They did, however, need to do more than what they did here: rely on the analysis of someone lacking a doctoral degree, based on a method that has not been peer reviewed, that failed to consider multiple New York State Constitutional constraints imposed upon real New York map-drawers, whose results indicate that the enacted 2022 Congressional map creates more Republican-leaning seats than would be expected. Speaker's Br. pp. 49-50.

Remedy

Throughout this lawsuit, Respondents have argued it is too late to apply remedial maps to the ongoing 2022 election cycle. Speaker's Br. pp. 56-63; Speaker's Reply Br. pp. 25-31. The Plurality Opinion did not address this issue. But if this Court finds a remedy is needed (it should not), the Speaker reiterates the arguments in his briefs. *Id.*

During oral argument before the Fourth Department, Petitioners contended that if a remedy is deferred until the next election cycle, the Legislature will effectively receive "one free gerrymander" every ten years. That is not true. Should a remedy be needed 10, 20, or 30 years from now (assuming the redistricting process has not changed by then), the timing may allow for an immediate remedy—unlike here. Speaker's Reply Br. pp. 30-31. Petitioners speculate that future Legislatures will intentionally delay redistricting as a ploy to receive a "free gerrymander," but here, the Legislature moved quickly. It enacted a redistricting plan within a week after the Commission failed to produce a second set of proposed maps. Speaker's Br. p. 9. Indeed, Petitioners complain the Legislature enacted the maps too quickly. Petitioners' Brief dated April 15, 2022, at pp. 7-8. And a failed 2021 Constitutional amendment—which the Legislature enacted twice—sought to move the redistricting process earlier by two months.[4] So even if dilatory conduct by the Legislature could justify punishing election officials, candidates, and voters by forcing remedial maps into an ongoing election cycle—as Petitioners urge—no dilatory conduct occurred here.

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[4] New York State Board of Elections, *2021 Statewide Ballot Proposals: Ballot Proposal 1*, https://www.elections.ny.gov/2021BallotProposals.html (last accessed Apr. 22, 2022).

Conclusion

This Court should accept Respondents' appeal and reinstate the Congressional map that the Legislature enacted in February 2022. Alternatively, if this Court declines to reinstate that map, the map should nevertheless continue to govern the current election cycle. The Legislature should receive a full and reasonable opportunity to draw a remedial map, which should become effective for the 2024 elections.

Respectfully,

Phillips Lytle LLP

By Craig R. Bucki

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cc: Bennet J. Moskowitz and Misha Tseytlin, Esqs.
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