Phillips Lytle LLP

Via NYSCEF September 2, 2022

Hon. Laurence L. Love
New York State Supreme Court Justice
New York County Supreme Court
80 Centre Street, Room 128
New York, New York 10013

Re: *Matter of Nichols v. Hochul* (New York County Index No. 154213/2022)

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Dear Justice Love:

As co-counsel with Graubard Miller to New York State Assembly Speaker Carl Heastie (the "Speaker"), we respond to the email and letter submitted yesterday by Petitioners' counsel in this proceeding.

Email of Peter A. Devlin

In his email of September 1, 2022 (accompanying this letter as **Exhibit A**), Mr. Devlin urges this Court to consider Common Cause's proposed amicus brief. Like Senate Majority Leader Andrea Stewart-Cousins, the Speaker opposes Mr. Devlin's request.

This Court has established a process for seeking *amicus curiae* status, and Common Cause did not follow it. Specifically, a non-party must seek amicus status by motion on notice. *Kruger v. Bloomberg*, 1 Misc. 3d 192, 198 (Sup. Ct. N.Y. County 2003). Doing what Common Cause did — simply emailing a proposed amicus brief to the Court, and to some (but not all) counsel of record — was insufficient. This Court should therefore disregard the proposed submission, which was not accompanied or preceded by a motion seeking *amicus curiae* status. In any event, Common Cause cannot satisfy the factors this Court analyzes when determining whether to accept an amicus brief. *See id.*

If this Court nevertheless accepts Common Cause's proposed brief, it should also consider two related emails (accompanying this letter as **Exhibits B** and **C**) on which this Court was copied on August 24, 2022: one from Petitioners' counsel Jim Walden,

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thanking Common Cause for its submission; and another from Alexis Grenell (who appears to be Common Cause's media consultant), suggesting how Common Cause might leverage its submission to gain media attention. These emails are critical for viewing Common Cause's proposed amicus brief in the appropriate context.

Letter of Jim Walden

In his letter dated September 1, 2022, Mr. Walden informs this Court of a memorandum of law submitted by certain members of the Independent Redistricting Commission ("IRC") in *Matter of Hoffmann v. New York State Independent Redistricting Commission* (Sup. Ct. Albany County, Index No. 904972-22). Dkt. No. 117. Mr. Walden highlights purported similarities between contentions asserted in that submission and arguments asserted by Petitioners here.

Notwithstanding Mr. Walden's letter, this Court should withhold judgment until the IRC takes a position in *this* lawsuit. Only last week, Mr. Walden himself urged this Court to "give the IRC the opportunity to be heard." Dkt. No. 113. And that is what this Court's Order to Show Cause does. Dkt. No. 115. As per the Order to Show Cause, the IRC's members can speak for themselves in a written submission by September 15, 2022, and in person before this Court on September 16, 2022, without Mr. Walden's assistance.

Further, the positions of IRC members in this lawsuit need not mirror their positions in *Hoffmann*, because the proceedings are materially different in at least two respects. First, *Hoffmann* concerns New York's Congressional district map, which was invalidated and then re-drawn by the Steuben County Supreme Court with the aid of a special master. Here, by contrast, the Assembly map will be re-drawn for the first time. Stated differently, the issue here is how to develop a remedy for a procedurally unconstitutional Assembly map, not how (or whether) to replace a Congressional map that the Steuben County Supreme Court already imposed as a remedy for a prior Congressional map deemed unconstitutional.

Second, the petitioners in *Hoffmann* request an order that would compel the IRC to resume its previous Congressional map-drawing process prescribed by Article III, § 4,

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of the New York Constitution by issuing a second recommended Congressional map that was originally due by February 28, 2022. Here, by contrast, the Speaker asks this Court to require the IRC to begin anew the State Constitution's prescribed process for developing an Assembly district map, in view of the First Department's Order on June 10, 2022, that the Assembly map should be redrawn "in accordance with NY Const, art III, § 5-b." Dkt. No. 99, p. 3. And as this Court recognized, § 5-b requires that the IRC be convened "[o]n 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*" (emphasis added). Dkt. No. 98 (quoting N.Y. CONST. art. III, § 5-b(a)).

In any event, the memorandum of law in *Hoffmann* misapprehends the law — as Petitioners do here.

For example, both contend that the IRC can never be compelled to propose remedial district maps. Dkt. No. 107, pp. 9-11; Dkt. No. 109, pp. 12, 14. But that position is incompatible with the New York Constitution, which provides that the IRC "shall" be established "any … time a court orders that congressional or state legislative districts be amended." N.Y. CONST. art. III, § 5-b(a).

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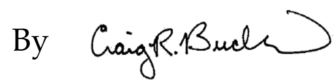
Additionally, Petitioners and the *Hoffmann* submission mischaracterize the Court of Appeals' decision in *Matter of Harkenrider v. Hochul*, ___ N.Y.3d ___, 2022 WL 1236822 (Apr. 27, 2022). The remedy in that lawsuit does not dictate the appropriate remedy in this one. When *Harkenrider* was decided, elections were on the near horizon, and insufficient time remained for the IRC to reconvene and propose remedial maps. Not so here — the 2024 elections are nearly two years away. And as the Speaker has explained, "[c]ourts have long recognized that redistricting plans developed in accordance with the state's redistricting process are favored over court-imposed plans." Dkt. No. 100, p. 6 (collecting cases). The constitutionally-mandated IRC process is unquestionably feasible here, unlike in *Harkenrider*, so the last-resort remedy of a Court-drawn remedial map is unnecessary. *Cf.* N.Y. CONST. art. III, § 4(e) (authorizing a court to "order the adoption of … a redistricting plan," but only "to the extent" that remedy is "required").

For these reasons, this Court should reject Common Cause's proposed amicus brief, and it should reject Petitioners' misguided interpretation of the New York Constitution.

Very truly yours,

Phillips Lytle LLP

By 

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Enclosures

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