New York Supreme Court

Appellate Division—Third Department

ANTHONY S. HOFFMANN, MARCO CARRIÓN, COURTNEY GIBBONS, LAUREN FOLEY, MARY KAIN, KEVIN MEGGETT, CLINTON MILLER, SETH PEARCE, VERITY VAN TASSEL RICHARDS, and NANCY VAN TASSEL,

Petitioners-Appellants,

For an Order and Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules

– against –

THE NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION, INDEPENDENT REDISTRICTING COMMISSION CHAIRPERSON KEN JENKINS, INDEPENDENT REDISTRICTING COMMISSIONER ROSS BRADY, INDEPENDENT REDISTRICTING COMMISSIONER JOHN CONWAY III, INDEPENDENT REDISTRICTING COMMISSIONER IVELISSE CUEVAS-MOLINA, INDEPENDENT REDISTRICTING COMMISSIONER ELAINE FRAZIER, INDEPENDENT REDISTRICTING COMMISSIONER LISA HARRIS, INDEPENDENT REDISTRICTING COMMISSIONER CHARLES NESBITT, and INDEPENDENT REDISTRICTING COMMISSIONER WILLIS H. STEPHENS,

Respondents-Respondents,

(For Continuation of Caption, See Inside Cover)

Docket No.: CV-22-2265

SUR-REPLY TO AMICUS BRIEF

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– and –

TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, and MARIANNE VIOLANTE,

Intervenors-Respondents.

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Independent Redistricting Commissioners Ross Brady, John Conway III, Lisa Harris, Charles Nesbitt, and Willis H. Stephens, by their attorneys, Perillo Hill LLP, hereby respectfully submit the within Sur-Reply Brief.

INTRODUCTION

The amicus brief submitted by the Governor and the Attorney General should indeed serve to aid this Court—but for precisely the opposite reason than likely intended. The brief illustrates in emphatic fashion that the result the Petitioners-Appellants seek is fatally disconnected from and completely unavailable within the limited proceeding that they commenced.

Petitioners and Amici argue that because the current congressional districts did not pass through a process that involved IRC input and legislative approval, the current maps are in conflict with constitutional provisions or the spirit of the amendments creating same. But, in the first instance, this mandamus action does not seek relief involving, and thus cannot possibly result in, any invalidation of the presently existing maps. Nor can it back in to such a result by compelling an act that was required to be completed long ago, which failure was already remedied through procedures set forth in the very same provision of the constitution.

The briefing of this appeal, first by Petitioners and now by the Amici, has succeeded in dropping all pretense and making clear that this case is no longer, if it ever was, about the IRC at all; it is plain sight now asks to review the substantive

merits of the congressional redistricting ordered by the court in Harkenrider. Fortunately, the narrow ambit of the operative pleading, an Article 78 mandamus Petition, appropriately forecloses this inartful attempt to provoke a judicial response to questions that were never before the court in the first place.

Equally unavailing is Amici's attempt to suggest that the current congressional districts, arrived at though the express procedure and authority set forth in the constitution, were solely created for the 2022 elections and are not covered by the constitution's explicit command that they remain in effect through the 2030 census.

An action calling for the modification of the existing districts would need to argue that they violate substantive law or provide some other legally cognizable reason why the existing districts are unlawful and are required to be modified or replaced. This mandamus proceeding plainly does not do so. This is not a redistricting case that challenges the existing districts. Yet the arguments offered by the Amici have come in the course of the briefing to almost entirely displace any argument that actually pertains to the singular relief sought by the limited petition herein.

POINT I

THIS IS A LIMITED ARTICLE 78 MANDAMUS PROCEEDING AGAINST THE IRC – IT IS NOT A VEHICLE FOR JUDICIAL REVIEW OF THE COURT-ORDERED MAPS IN HARKENRIDER

Page 22 of the Governor's brief completes the full detachment of the issues attempting to be forced upon this Court from anything that was ever within the limited ambit of this mandamus proceeding. There, Amici offers unabashedly identifies the map "here" as the current congressional map ordered by Harkenrider[1]. See Am.Br. at 22. This proceeding obviously does not take as its subject the Harkenrider map. And yet Amici proceeds to frame the principal issue that it would have this Court address as the purported defect in the court-ordered congressional map, suggesting that where a map suffers from such defect, a court may order a modification thereof. That is wrong. But it is also nowhere within the limited ambit of the relief sought by this mandamus proceeding.

It is fully erroneous as well. The current congressional districts were created by a constitutional process—a court-ordered plan is expressly authorized by Article III, §4(e) of the constitution.

Amici rely inordinately, and almost exclusively, on a gross misinterpretation of the word "required" in §4(e) and a fictionalized narrative of its import in Harkenrider. That section provides:

> The process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article shall govern redistricting in this state except to the extent that a

[1] Matter of Harkerider v. Hochul, 38 N.Y.3.d 494, 176 N.Y.S.3d 157 (2022).

court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.

Amici urge that the sole basis that §4(e) authorized the Harkenrider court to employ its remedy was the exigency of the political calendar. This position consciously ignores what is both obvious and explicit in Harkenrider—that the primary circumstance requiring the court there to order the adoption of a redistricting plan was that the legislatively enacted plan contained a multiple violations of law—including that the IRC did not make its second recommendation, that the Legislature acted without legal authority in drawing its own maps, and that the Legislative majority enacted a plan that was an egregious partisan gerrymander. These are the facts that "required" the court to order, as a remedy, a redistricting plan. For it is these facts that meant that any future election that went forward without a remedy would have New Yorkers voting in wholly unconstitutional congressional and state senate districts.

The particulars of the political calendar may very well have informed the Harkenrider court's choices in terms of the tools and procedures it employed in fashioning the §4(e) remedy, but regardless of whether the court employed a special master, or drew the maps itself, or did something akin to re-engaging the IRC or Legislature, any such result would be a court-ordered plan under §4(e) of the constitution.

Although the Court of Appeals in Harkenrider was cognizant of the need to produce a remedial map *in time for* the 2022 elections, that is not at all the same thing as suggesting that the Court intended to provide a remedy *solely for* the 2022 elections. Indeed, there is nothing in Harkenrider to even remotely suggest the latter. To the contrary, the impetus to act quickly was not to accomplish a temporary fix; the need to act quickly was to avoid having an election based upon grossly unconstitutional districts.

Relying on the misrepresentative suggestion that the calendar was the sole factor requiring the Harkenrider court to order the current maps, Amici ask this Court to write into the constitution language that plainly does not exist—i.e., that if temporal circumstances in any way influence the choices made in fashioning a remedial plan, such remedial plan will only stay in effect for so long as such temporal circumstances exist and when they subside, another remedial plan should be created commensurate with the timeframes then available. See Am. Br. at 18-19. This is absurd and unworkable. But, most importantly, it is simply not in the constitution.

The attempt to argue that this mandamus proceeding is capable of supplying the "court order" contemplated by the clause "unless modified pursuant to court order" in the final sentence of §4(e) or the first sentence of §4(e), which authorizes a court to order a redistricting plan as a remedy for a violation of law, is

resoundingly erroneous and requires a willful disregard of the plain language of the constitution. First, with respect to the defect in the prior plan (the 2022 legislatively enacted plan), Harkenrider already ordered the redistricting plan under the remedial authority provided by §4(e). Second, as the current briefing is chiefly concerned with the current districts, it must be re-emphasized that this proceeding simply does not and cannot call for an order modifying the existing congressional map. This Article 78 mandamus proceeding solely seeks to compel the IRC to undertake a specific act.[2] It is not a challenge to the present congressional districts and includes no prayer for relief to invalidate the present districts or to modify or change the present districts. Second, There is nothing in the constitution that suggests seriatim judicial review—particularly, as here, where the prior court action provided a remedy for the very same violation or defect that is the subject of the subsequent proceeding.[3]

The brief states that it is supporting the "petitioners' position that . . . the current congressional map . . . may not remain in effect until 2030." See Am.Br. at 1. Notably, the mandamus Petition here does not seek a declaratory judgment or

[2] It anachronistically asks the IRC to undertake a task that was required to have been completed long ago and has already been remedied by judicial action authorized by the constitution.

[3] As noted in these Respondents' prior brief, this does not mean that a court-ordered plan is blanketly immune from further judicial review. Just as a legislatively enacted plan could be challenged on its redistricting merits, so too could a judicial map alleged to be suffering from substantive infirmities be challenged and perhaps struck down. But that simply is not the case these Petitioners have brought.

any other relief that would require the court to affirm or reject this "position." The position, however, is in any case wrong.

The amicus brief, like that of the Petitioners, wishes to emphasize that that the final sentence of Article III, §4 of the constitution (which provides that a constitutionally established redistricting plan remains in force and effect until the replaced by a plan based upon the subsequent decennial federal census) is subject to an all-important caveat; to wit, that this presumptive default of a decade long effective duration applies "unless modified pursuant to court order." But this language hurts Amici and Petitioners rather than helps them. Here again, the operative pleading, the Petition, does not ask the court to modify the existing congressional map. This is a mandamus proceeding; it is not an action that sought to invalidate the existing congressional districts. Thus, the existing congressional map, pursuant to the plain language of the very constitutional provision cited by the amicus brief, must remain in effect through the 2030 census.

Even if the IRC were to perform the act the petition seeks to compel, sending a so-called "second" set of proposed maps to the Legislature, that would not and could not accomplish anything. The Legislature would be without authority to receive or to act upon the receipt of such maps. The Legislature is not a party to this proceeding and could neither be compelled nor authorized to take any action affecting existing districts merely by virtue of the attenuated implication

of any directive that might be issued to the IRC in this proceeding. More basically still, there has been no judicial ruling invalidating the current congressional districts, nor has there been any action challenging the current congressional districts. And, to be sure, the legal sufficiency of the current congressional districts with respect to either the procedural or substantive redistricting merits of same is not before this Court (or the court below) in this limited special proceeding. It would plainly be improper for the issue of the legality of the current congressional districts to be addressed in a limited mandamus proceeding brought solely against the IRC. The disconnect is even more pronounced given that the current congressional districts exist as a result of the Harkenrider court ordering same, engaging a special master, and overseeing their finalization. Meanwhile, the IRC's failure to act, the only basis for the only claim here (mandamus), has nothing to do with the substance of the map the court ordered.

As for the IRC, a distant afterthought in these briefs, it was charged with redrawing the prior decade's maps. It was the 2020 census that required the reapportionment of the congressional districts. The IRC was in the process of redrawing those districts when its proceedings broke down in an impasse. But those districts have already since been redrawn twice—first by the Legislature in a manner determined to be procedurally and substantively unconstitutional, and thereafter by the Harkenrider court, which as a remedy for those violations in the

2022 plan, established the existing districts pursuant to the authority in Article III, §4(e) of the constitution. There is nothing in the constitution that could possibly reverse the constitutional process and re-insert the IRC into a stage that has passed.

Notably, the Amicus brief offers that "[b]oth the Governor and the Attorney General have a strong interest in the proper interpretation and application of New York's constitutional and statutory provisions governing the conduct of elections." See Am.Br. 1. The brief adds that the Governor "is responsible for approving or vetoing legislation implementing a redistricting plan." But the Governor, who now submits a brief that urges that the constitution requires that a redistricting plan must be the product of a completed IRC process, admittedly approved and signed into law a redistricting plan that was not the product of the IRC process. Thus, despite the Governor's "strong interest in the proper interpretation and application of" the constitution, when presented with a plan that suffered from the very constitutional deficiency at issue in this proceeding, exercised her constitutional responsibility not by vetoing said plan but by approving it.

POINT II

THE CONGRESSIONAL MAP IS NOT AN INTERIM MAP

The current congressional districts undisputedly exist as a result of having been ordered by the Harkenrider court under the authority extended to courts under Article III, §4(e) of the constitution. For all of their misplaced critiques of the

process that the Harkenrider court employed and of the plan it ultimately ordered, the briefs of the Amici and the Petitioners-Appellants do not actually deny that the current maps exist as a result of the court's remedial authority to order a redistricting plan under §4(e). In fact, they repeatedly affirm and acknowledge that the Harkenrider court ordered, and was authorized to order, the present maps under the authority provided in §4(e).

Accordingly, it equally follows that the current congressional plan, being a product of the constitutional process, is subject to the very clear import of the plain language of the immediately following and final sentence of §4(e); to wit, the provision commanding that "[a] reapportionment plan and the districts contained in such plan shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero unless modified pursuant to court order." See NY Const. Art III, §4(e).

The reapportionment plan ordered by Harkenrider is a "reapportionment plan" within the meaning of the foregoing provision, and the current congressional districts are likewise "districts contained in such plan" within the meaning of same. See id. As such, the current congressional districts "shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero unless modified pursuant to court order." See id.

Amici's argument is not even internally consistent on this point. They argue on the one hand that Harkenrider was only meant to apply to a single election cycle (2022). That is a complete fiction and finds no basis anywhere in the extensive record of Harkenrider through all three levels of the state's court system. But even if Harkenrider's maps were intended to be limited to the 2022 election (they obviously were not), Amici's postulation of such an intent would mean that the court-ordered plan somehow lapsed and evaporated following the completion of the 2022 elections and left no plan at all in place. Such a result is not only not contained in the constitution but would be in direct conflict with the constitution, which plainly provides for the continuity of plans and precludes a circumstance wherein there would be a void with no plan in force and effect.

In addition to being fully erroneous, the brief's contention that Harkenrider provided a one-time interim remedy for 2022 only is also contradicted by the brief's simultaneous argument that this proceeding will serve to sever the constitutional continuum (*i.e.*, that the congressional districts "shall be in force until the effective date of a plan based upon the subsequent federal decennial census") under the notion that this proceeding somehow itself invokes the final clause of the provision which provides that such continuum exists "unless modified pursuant to court order." See NY Const. Art III, §4(e). If the Harkenrider maps

only applied to the 2022 election, then there would be no plan to be modified and this provision is inapplicable.

By illustrative comparison, Harkenrider modified the previously existing plan (found to be both procedurally and substantively unconstitutional). That legislatively enacted (and Governor endorsed) 2022 plan suffered the fate specifically contemplated by the language Amici and Petitioners wrongly rely upon—that is, that 2022 plan could not enjoy the constitutional default of remaining "in force until the effective date of a plan based upon the subsequent [i.e., 2030] federal census," because it was subject to the express exception to such default ("unless modified pursuant to court order"). See NY Const. Art III, §4(e). Harkenrider ordered the modification of the 2022 plan. That modification resulted in the existing plan. The now existing congressional plan, by contrast, does enjoy the benefit of the constitutional default—it remains in force until the 2030 federal census. There is no court order that has modified the existing plan. And the instant mandamus proceeding does not ask, nor provide any basis, for a modification of the existing congressional districts.

The court-ordered plan, today's map of congressional districts, is the product of the prescribed constitutional process. As such, it is the redistricting plan that shall remain in effect through the next federal census. The constitution does not contemplate or permit an interim plan. Although §5-b(a) appears to indicate that a

court may employ the IRC at some time other than the ordinary decennial cycle, that unusual circumstance exists solely when "a court orders that congressional or state legislative districts be amended." See Art III §5-b(a). As regards the congressional districts, the only court to order that they be amended was the court in Harkenrider, and that was of the previously existing unconstitutional legislatively enacted plan. Amici admit that Harkenrider was authorized under §4(e) to order a remedy for such unconstitutional plan. Thus, in addition to the fact that it was never invoked by Petitioners herein, §5-b(a) is wholly inapplicable because a) the constitutional remedy was already applied to address the defects in the prior legislatively enacted plan, b) because, by virtue of said remedy, the present congressional districts exist pursuant to the express constitutional authority for their creation under §4(e), and c) because no court has ordered that the current congressional districts be amended (the critical triggering language of §5-b(a)). Here again, this mandamus proceeding against the IRC is not a case that asks, or could ask, for the current congressional districts to be amended.

Amici's argument that the constitution requires that the Legislature have a reasonable opportunity to correct a legal deficiency fails because, *inter alia*, the Legislature in fact was *twice* invited to prepare corrective maps during the course of the Harkenrider litigation. Both the trial court and the Appellate Division expressly invited such participation by the Legislature. See Harkenrider v. Hochul,

76 Misc. 3d 171, 194, 173 N.Y.S.3d 109, 125 (Sup. Ct. Steuben 2022) and 204 A.D.3d 1366, 1375 (4th Dep't 2022). The Legislature twice declined.

Even more basically still, the argument fails because the lament that the Legislature did not participate in the remedial map drawing in Harkenrider is, at most, simply another critique of the process employed by Harkenrider. This limited proceeding offers no basis for a review of Harkenrider's procedures.

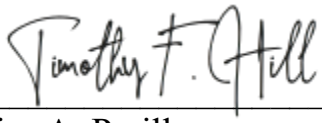
CONCLUSION

Based upon the foregoing, it is respectfully submitted that the decision and order of the Supreme Court dismissing the Amended Petition and Article 78 proceeding in its entirety should be affirmed.

Dated: April 28, 2023
Sayville, New York

Respectfully submitted,

PERILLO HILL LLP



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