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April 24, 2022

Chief Judge Janet DiFiore
Associate Judges
New York State Court of Appeals
Albany, New York 12207

ELECTRONICALLY – VIA E-MAIL

RE: Harkenrider, et. al v. Hochul, et. al, APL-2022-00012

Honorable Chief Judge and Associate Judges of the Court of Appeals:

We represent Thomas F. O’Mara, Edward A. Rath, III, and William Paton proposed *amici* in the above referenced matter. We write to the Court to request *amicus* status in the above in this appeal, and acceptance of this submission.

Our arguments which address the portion of the Appellate Division’s decision which reversed the Supreme Court’s order are presented below. We write in support of the application for leave to appeal therefrom; and upon the granting of said motion, for reversal of that portion of the Appellate Division’s decision pursuant to Yatauro v. Mangano, 17 N.Y.3d 420 (2011), which is controlling.

We thank the Court for the opportunity to make this submission. This submission is made in letter form as the parties and proposed *amici* were instructed to do, and as has been the practice of this Court in expedited appeals.

PRELIMINARY STATEMENT

This letter - brief is offered by proposed Propose *amici* Thomas F. O'Mara, Edward A. Rath, III, and William Paton. All three are citizens of the State of New York with standing under the terms of the Constitution to challenge any apportionment plan put into place by the Legislature, see New York State Constitution Article III. In addition, Intervenors Rath and O'Mara are elected members of the New York State Senate. All three Propose *amici* are affected by the reapportionment as the districts they live in have been significantly altered. Further, O'Mara, and Rath are elected representatives of many communities affected by the apportionment plan challenged herein, and thousands of citizens who are adversely affected by the reapportionment plan adopted by the Legislative majorities in the Senate and Assembly behind closed doors and without any public hearings or bipartisan input.

We address one point here. That is, the error of the Appellate Division in reversing the Supreme Court's determination that the chapters adopted by the Legislature apportioning the State's Congressional, Senate, and Assembly Districts

were unconstitutional due to the fact that the mandatory and exclusive process for reapportionment had been abrogated.

The determination to seek Friend of the Court status in this matter was triggered by a review of the Appellate Division's Decision, and of the record of this case. Movants here discovered that the Appellate Division and the parties to these proceedings had not addressed what we believe to be the controlling holding of this Court of Appeals – Yatauro v. Mangano, 17 N.Y.3d 420 (2011).

The proposed *amici* join in, and adopt, the positions advanced by the Petitioners – Respondents in their appellate brief and supplemental letter – brief to this Court of Appeals. They also join in the arguments advanced by the *amicus* league of Women Voters in their brief, and submissions.

The Appellate Division should have applied the test that this Court adopted for the validity of reapportionment plans. That is to say, that where the process established by law for adopting apportionment legislation has not been followed – that plan must be rejected.

FACTS

The relevant facts of this case are set forth in the Decision and Order issued by the Supreme Court, Steuben County. (We note here that we refer to the parties as their status was before the Supreme Court.)

The key fact relied upon in this brief is that the Legislature disregarded the mandatory and exclusive framework for reapportionment set forth in Article III of the New York State Constitution, as it was amended in 2014.

The following Constitutional provisions are in play here, and reveal how the Legislature and Governor are responsible for an historic breach of the Constitution which was amended less than a decade ago. The 2014 anti-gerrymandering amendments were reaffirmed in the 2021 elections when the voters rejected constitutional amendments which would have undone the 2014 enactments. The respondents boldly assert that the failure of the IRC to submit a second, single plan to the Legislature abrogated all of the terms and intent of the 2014 Constitutional Amendments and allowed them to seize the map making pen and run amok; producing plans that would not even have been contemplated by Elbridge Gerry himself.

Implicit in our analysis is the fact that none of the Respondents (the Officers of each Legislative House or the Executive) availed themselves of the remedy set

forth in the Constitution - turning to the Judiciary - when the Independent Reapportionment Commission (IRC) failed to perform its constitutional duties. The Petitioners' brief points to the public statements and actions of the Respondents conclusively demonstrating their willingness to act as might be required to produce partisan gerrymanders which would benefit their party, in violation of the Constitution's provisions. In short, why would one expect the Legislative Majorities and the Governor to turn to the Courts to enforce the Constitution; when they could reap a political benefit from their own inaction.

The current predicament has its roots in the opportunistic grab for power by the Legislative and Executive Respondents so as to fulfill their desire to defeat the will of the voters who approved the 2014 amendment to the Constitution that governs here.

A. CONSTITUTIONAL REQUIREMENTS

Article III of the Constitution gives us the three-step process for reapportionment adopted in the 2014 anti-gerrymandering amendments together with the admonition that “[t]he process for redistricting [following those 2014 Amendments] shall govern redistricting in this state,” N.Y. Const. art. III, § 4(e) (emphasis added). The first step in the process requires that the Independent

Reapportionment Commission [the IRC] must send one or more sets of maps to the Legislature for consideration.

In the event that those maps are rejected or vetoed by the Governor a second step is triggered. The IRC is required by the Constitution to send a single set of maps with a reapportionment plan to the Legislature.

Before having any authority to draw maps itself, the Legislature must vote on the plan sent by the IRC without amendment. In the event the unamended version of the maps fails, then the houses of the Legislature may then put forth their own maps. The safety valve for the process breaking down lies with the Judiciary. The courts are “required to order the adoption of, or change to, a redistricting plan.” N.Y.Const. art. III, Sec. 4(e).

B. THE 2022 APPORTIONMENT PROCESS

The Counter statement of facts advanced by the Petitioners details the 2022 New York Reapportionment process. The key fact here is that the second step prescribed by the Constitution [the IRC sending a single set of maps to the Legislature] never occurred. The legislative Majorities in the Assembly and Senate seized upon the deadlock at the IRC to take over the reapportionment process. The Governor took no action to enforce the Constitution. Rather than the process continuing as envisioned by the framers of the 2014 anti-gerrymandering

amendments; the Legislature adopted maps that were created with no bipartisan input, no public hearings and complete control of the process in the hands of one party – to the complete and total exclusion of the minority parties in each house, see Record pp. 288 - 289. The power grab was rubber stamped by Governor Hochul, who had pledged to do everything in her power to achieve a reapportionment that would cement the majorities of her party and partners in Albany.

The proceedings challenging the Congressional maps ensued, which were later amended to include claims against the State Senate maps. The Supreme Court properly invalidated all maps / plans adopted by the Legislature on the grounds that the Constitutional process for apportioning the state had been abrogated. In addition, the Congressional plan was found, by evidence establishing the fact beyond a reasonable doubt, to violate the Constitutional prohibition against partisan gerrymanders.

Respondent – Appellants brought on an appeal. The Appellate Division affirmed; finding that the Congressional maps were the product of a Constitutionally prohibited gerrymander. The Appellate Division, however, reversed so much of the Supreme Court’s decision and order that found that the entire process for the adoption of maps apportioning the state (State Senate, State

Assembly and Congress) was in violation of the three-step process mandated by the Constitution.

POINT I

THE SUBJECT PLANS ARE VOID BECAUSE THE CONSTITUTIONAL SCHEME FOR REAPPORTIONMENT WAS NOT FOLLOWED

The ruling by the Appellate Division must be reversed on the issue addressed herein. The order of the Supreme Court below on the failure of the Legislature to comply with the three-step process set forth in Article III of the Constitution should be reinstated under the holding of this Court of Appeals in Yatauro v. Mangano, 17 N.Y.3d 420 (2011).

In Yatauro, supra, this Court of Appeals struck down a plan of apportionment for the Nassau County Legislature because the process enshrined in law was NOT followed. There, the County Charter set a three-step apportionment process which had been abrogated by the County Legislature. Here, the State Constitution sets up a similar three step process, see Art. III NYS Constitution. In both cases there is but one exclusive process specified in the law for apportionment.

We are asking this Court to treat the State Constitution with as much respect, reverence and obedience as it required of the Nassau County Charter.

Because of the 2014 Constitutional Amendments, the State's process is designed to mitigate against partisan redistricting. The State's Constitutional framework is advanced and goes beyond the simple bipartisan requirement of the Nassau County Charter's schematic [a bipartisan commission produces a plan which is sent to the County Legislature], see Nassau County Charter, Secs. 112, 113, 114.

It must also be remembered that the same Legislative Majorities adopting the maps challenged herein, were rebuffed by the voters in 2021 when amendments to the Constitution undoing the 2014 anti-gerrymandering provisions were rejected, see <https://www.elections.ny.gov/2021ElectionResults.html>.

The key feature of the Court of Appeal's 2011 decision that is common with the case at bar is that the law prescribes a mandatory and exclusive three step process for reapportionment. This commonality makes the holding in Yatauro, supra, controlling here.

The Yatauro Court reversed the determination of the Appellate Division and restored the decision and order of the Supreme Court which had voided the apportionment plan as violative of the three-step procedure set in law. In Yatauro, supra, as determined by the Supreme Court, see Yatauro v. Mangano, 32 Misc.3d 838 (Sup. Ct., Nassau Co., 2011, Jager, J.), the Court voided the adopted apportionment plan stating that "... implementation of Local Law 3-2011, in

reconfiguring the nineteen legislative districts for use in the 2011 general election, is null and void for lack of compliance with Secs. 113 and 114 of the Nassau County Charter” Yatauro, supra at p. 853 (Jager, J.).

The Supreme Court concluded that “... the plain meaning of the words [of the Nassau Charter] is that any redistricting plan adopted pursuant to new census data should be in effect no later than the third year after the decennial census.

Sections 112, 113, and 114 provide for a three-step process: (1) describing new lines; (2) recommendations by the Advisory Commission; and (3) adoption of a new plan for redistricting. This process ends with the adoption of a redistricting plan to be in effect, for the first time following the 2010 Census, in the 2013 general election”, Yatauro, Misc., supra at pp. 876 – 877, emphasis added.

The Supreme Court, and this Court, held that there had been a failure to comply with the law. The County Legislature skipped the second step in the process (a bi-partisan advisory commission) and jumped directly to the final step in the process; adopting a full reapportionment plan of its own. There was no plan produced by a bipartisan commission in Yatauro, supra, just as there was no second plan produced and sent to the Legislature by the IRC here.

The failure to abide by the law’s schematic for apportionment voided the plan. The Supreme Court held,

“The Court declares that the adoption of Local Law 3–2011 to amend Annex A is in accord with Nassau County Charter § 112 as

the first step of the three-step process. However, implementation of Local Law 3–2011, in reconfiguring the nineteen legislative districts for use in the 2011 general election, is null and void for lack of compliance with §§ 113 and 114 of the Nassau County Charter. The earliest election for which the new legislative district lines based on the 2010 Census data should be in effect is for the 2013 general election, not the 2011 general election. The Court further declares that the lines as set forth in Local Law 2–2003 remain in effect for the 2011 general election”, Yatauro, *supra*, at 879 – 880.

This Court of Appeals, in reversing the Second Department, and restoring the Supreme Court’s decision and order echoed, stating,

“we now reverse.

‘When presented with a question of statutory interpretation, our primary consideration ‘is to ascertain and give effect to the intention of the Legislature’ (Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660 [2006], quoting Riley v County of Broome, 95 NY2d 455, 463 [2000]). The starting point for discerning legislative intent is the language of the statute itself (see Roberts v Tishman Speyer Prop., 13 NY3d 270, 286 [2009]). “Courts must harmonize the various provisions of related statutes and . . . construe them in a way that renders them internally compatible” (Matter of Dutchess County Dept. of Social Servs. v Day, 96 NY2d 149, 153 [2001] [internal quotation marks and citation omitted]).

Against this background, we consider the provisions at issue. The heart of the dispute between these parties is whether the new metes and bounds descriptions in Local Law No. 3-2011 apply to the 2011 general election or whether they are the first part of a three-step process to take effect in 2013.

The conflicting provisions of sections 112 and 113 can be reconciled

only if section 112 is interpreted to provide for new metes and bounds descriptions as the **initial step of an integrated process that includes consideration of the recommendations of a temporary commission with public input** (*see* Nassau County Charter § 113), **and culminates in the adoption of a redistricting plan** “no later than eight months before [the] general election” (Nassau County Charter § 114). **Such an integrated interpretation results in an orderly, deliberative process and avoids the prospect of redrawing district lines in two consecutive general elections.**

For the reasons stated above, we hold that Supreme Court properly declared that Local Law No. 3-2011 is in accord with Nassau County Charter § 112, but that its **implementation is null and void in connection with the November 8, 2011 general election for lack of compliance with Nassau County Charter §§ 113 and 114.**”, Yatauro, *supra*, at p. 426.

The Appellate Division’s ruling was reversed and the holding of the Supreme Court reinstated (as is sought here by your *amici*) because the Charter’s three-step process was not completed or complied with. The Courts’ concerns were clearly focused on achieving bipartisanship in the apportionment process and allowing for public input into any proposed plan. This combined with a desire to assure a fair process and avoid partisan “one-upmanship” resulted in the 2011 Nassau County reapportionment plan being voided and disregarded.

The similarities of Yatauro, *supra*, and the case at bar are remarkable. Here Article III of the Constitution provides for a three-step process. The same number of steps called for in the Nassau County Charter. As argued by the Petitioners

below to the Supreme Court and again on appeal before the Appellate Division, the State Constitution mandates a three-step process. The Legislature abrogated that exclusive and mandatory process in adopting the challenged maps without the Independent Reapportionment Commission putting forward the single set of maps the Constitution required it to submit. Appellants can not even allege that LATFOR engaged in any process remotely similar to that task force's prior reapportionments (which included dissemination of proposed plans, public hearings, and lengthy review).

Here the apportionment process is as simple as "1 - 2 - 3" or "A - B - C", as was immortalized by the Jackson Five in pop music, see *ABC, 123, Jackson 5*, Publisher: Sony/ATV Music Publishing LLC.

In the instant case and in the Yatauro case, *supra*, the legislative body counted 1 - 3, skipping step 2. Not only does the failure to comply with the three-step process not rhyme; but it simply produces a map that is void and may not be used. Skipping a step in the mandatory procedure for reapportionment is simply fatal to the plan.

Here the fact that the legislative majorities flouted the law - a relatively new Constitutional Amendment designed to prevent **exactly** what was done here - makes the violation even more egregious.

The Yatauro Court analyzed the statutory underpinnings of the Nassau Charter's reapportionment process; finding that the bipartisan Reapportionment Commission was an integral and indispensable part of the process before the Legislature could adopt a final map. This was the same way that Acting Justice McAllister analyzed the State Constitution. He came to the only conclusion possible – any reapportionment had to go through the Independent Redistricting Commission for it to be upheld by the Court.

Not surprisingly, the Supreme Court's level-headed and rational application of the Constitution resulted in the invalidation of the plans in question – without the benefit of the Court of Appeals' wisdom in Yatauro, supra being presented to the Court.

Any remedy, pursuant to the Constitution, had to go through the Courts. The Legislature's acts in seizing power to create a partisan political advantage that the 2014 Amendments were designed to prevent was *ultra viries*, and in excess of the power appropriated to the Legislature by the Constitution.

The Appellate Division seems to have forgotten the intent of the 2014 Amendments and cast the provisions as having a "hole" in them. They do not. The remedy set forth in Article III, Section 5 lies with the Courts. The Supreme Court's decision offers a lucid and precise analysis of the Constitution, stating, "The constitution envisions the redistricting process to occur through the IRC. Only after

the IRC has twice submitted maps that are rejected by the Legislature does the Legislature take up the process. The Constitution uses such words as "the" and "shall" to indicate this was the way and the only way that redistricting maps were to be drawn”, Decision, p.9, Record, p.15.

The Supreme Court properly ruled that, “the process used to enact the 2022 redistricting maps was unconstitutional and therefore void *ab initio*”, Decision, p.17, Record p. 23. In any event, the unconstitutional acts of the Respondents cry out for a fair, just and Constitutional remedy.

CONCLUSION

Accordingly, the decision of the Fourth Department on this Point should be reversed, and we urge that the Supreme Court’s decision and order be reinstated.

Thank you to this Court for its attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "John Ciampoli". The signature is fluid and cursive, with a prominent loop at the end.

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