

April 29, 2022

By E-Filing and E-Mail (cervas@cmu.edu)

Jonathan Cervas, Ph.D., Special Master  
Carnegie Mellon University  
5000 Forbes Avenue  
Pittsburgh, PA 15213

Re: *Harkenrider et al. v. Hochul et al.*, Index No. E2022-0116CV

Dear Special Master Cervas:

We represent Senate Majority Leader Andrea Stewart-Cousins in this special proceeding. Together with counsel for Speaker of the Assembly Carl Heastie, Graubard Miller and Phillips Lytle LLP, we write jointly to comment on the proposed Congressional map that Petitioners submitted on April 22, 2022.

Throughout this litigation, Petitioners have claimed to be advocating for a non-partisan map-drawing process, but the map they have proposed is an obvious, unabashed pro-Republican gerrymander. It also violates, repeatedly, the New York State constitutional requirement that consideration be paid to maintaining fairness for racial and language minority groups. Petitioners use a variety of gimmicks to conceal their goals and methods, but you should not be deceived. Petitioners' proposed map is an unlawful, discriminatory gerrymander that should be disregarded in its entirety.

Petitioners' underhanded tactics begin with their proposed District 2. After boasting about 100% core retention in District 1, Petitioners drop the core retention of District 2 to 80.6%. While that number may seem reasonable on its face, the problem is what happened with the population that shifted. As explained in the affidavit of Todd Breitbart submitted in this litigation, Dkt No. 149, ¶¶ 22-35, a key aspect of Republican gerrymanders on Long Island over the past several decades has been cracking minority neighborhoods in a discriminatory manner that is intended to diminish their voices and disempower their communities. District 2 is an obvious example of this practice.<sup>1</sup>

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<sup>1</sup> The expert report submitted by Sean Trende includes a brief analysis of "Ability-to-Elect" districts that for at least two reasons is misleading in its portrayal of how minority voters are treated in Petitioners' proposal. First, the numbers that Mr. Trende cites for the percentages of Black and Hispanic population are backwards; he attributes percentages to

In both the 2012 map and the enacted map, the predominantly Hispanic neighborhoods of Islip, which together form an important community of interest, are kept together in one district. In Petitioners' map, the Hispanic communities within this town are cracked three ways: Islandia moves to District 1, Brentwood is split between Districts 2 and 3, and Central Islip, Baywood, North Bay Shore, and Bay Shore are in District 2. Petitioners also crack minority communities in the Town of Babylon. These communities were kept whole by the Special Master in 2012 and minimally divided in the enacted map. They were also united with the Hispanic communities in Islip in the enacted map. Petitioners' map cracks Wyandanch between Districts 2 and 3. It also moves Wheatly Heights and the northern tip of West Babylon into District 3, while North Amityville and Copiague stay in District 2. These are minority communities that Republicans have historically targeted to be cracked, and they have done so again in their proposed remedial plan.

Perversely, Petitioners' theory in this litigation, and in particular in the testimony of their discredited expert, Claude LaVigna, was that the Legislature supposedly had intentionally shifted and divided communities of interest for partisan purposes, especially on Long Island. Petitioners' blatant cracking of minority communities across this region is clear evidence of the very practice that they have alleged is unlawful.

The numerical consequence of this intentional cracking is remarkable. Petitioners' District 2 transfers 104,548 people to District 3, a district that has elected Democrats to Congress for decades. Half of that population is Hispanic, and 24% is Black. In order to achieve the required population in the wake of this gratuitous dump of minority voters, District 2 takes 190,015 people from District 4, 78% of which is White, 12% of which is Hispanic, and 4% of which is Black. As a result of these shifts, the White VAP in District 2 increases from 61% under the 2012 plan to 70% under Petitioners' proposed plan. In political terms, the voters who were moved from District 2 to District 3 gave Biden 66% of the vote, while the voters who were moved into District 2 from District 4 gave Biden 44% of the vote. It does not matter whether dislocating these minority voters was done for partisan advantage or to discriminate and weaken the ability of minority voters to influence elections; both are impermissible under the New York Constitution.

The most nakedly political and indefensible aspect of Petitioners' proposed plan is its version of District 4. The enacted plan and Commission Plan A both keep District 4 substantially intact, which is not difficult to accomplish even with population changes in the region. Inexplicably, however, Petitioners' plan

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Petitioners' plan that actually apply to the enacted plan, and vice versa. This conceals, for example, Petitioners' dilution of the Hispanic vote in District 14. Second, Mr. Trende ignores the many non-"Ability-to-Elect" districts in which Petitioners pack, crack, and systematically disadvantage minority voters.

obliterates this district in favor of a new district with a core retention of only 17.4%. Not surprisingly, this entirely new and unprecedented district is safely Republican because it was created for the specific purpose of seeking partisan advantage. As explained below, this proposed district would cause massive disruption to minority communities throughout the region. Its only ostensible purpose is uniting Orthodox Jewish communities, at the expense of all other communities in the area and as an obvious pretext to advance Petitioners' partisan goals.

Petitioners' sleight of hand hides the true character of this district behind the misleading veneer that it supposedly is a Democratic district. Using ALARM Project data that Mr. Trende cites in his supporting expert report, this district has an average Democratic past vote share of 57%. But in 2020, President Biden won only 46% of the vote in this district. This gap is significant for several reasons.

First, the 11% differential between the ALARM Project's data and Biden's performance in the district is the highest of any district in Petitioners' map. Indeed, the next highest gap between the ALARM Project results and the 2020 presidential election results is only 7%, and the statewide average gap is 3%. The fact that this extreme differential is found in the district with the lowest core retention of any district in Petitioners' map is notable and not coincidental.

Second, this gap is material because no Democrat was elected to Congress in New York in 2020 in any district in which Biden received only 46% of the vote. Petitioners clearly crafted a district, for partisan advantage, in which they could falsely claim political neutrality while knowing that in congressional elections, the district would vote reliably Republican.

Third, this gap is also significant because it skews the dot plot presented by Mr. Trende and falsely suggests that Petitioners' proposed districts fall within the ordered districts generated by Mr. Trende's simulations. In fact, if one merely replaces the uniquely misleading ALARM Project average for Petitioners' proposed District 4 with Biden's vote share for that district (adjusted upward by 3% to be consistent with the average statewide differential), multiple districts in Mr. Trende's dot plot shift, and the dots begin to fall outside of his simulation range and show that this map is gerrymandered in favor of Republicans under Mr. Trende's own analysis.

Beyond the fact that the differential between the ALARM Project average and presidential election results exposes District 4 as a blatant effort to seek partisan advantage, Petitioners' attempt to conceal the political lean of the district is itself further evidence of their unlawful partisan purpose.

A district like Petitioners' proposed District 4 first appeared in the Republican Commissioners' September 2021 proposal, which was an egregiously

gerrymandered map that was so extreme in its bias toward Republicans that even the Commission Republicans changed it significantly before proposing a plan to the Legislature in January 2022. This proposed new district was eliminated in the Republicans' Plan B, yet Petitioners have resurrected it in their proposed map here.

Beyond their misleading characterization of the partisanship of this district, Petitioners' justification for the district is further evidence of pretext. Petitioners claim they created this district to respect Orthodox Jewish communities of interest. But Petitioners crack the Orthodox neighborhood of Midwood in Brooklyn, a vital community which was the subject of testimony from their expert during the litigation.

Petitioners also propose a radical reshaping of District 10. For three decades, District 10 has encompassed Manhattan and Brooklyn, uniting the Jewish communities on the Upper West Side and in Borough Park. In Petitioners' proposed map, District 10 no longer includes Borough Park, and its core retention is only 56%. In the enacted map, core retention in the district is 70%. District 10 is currently represented by the only Jewish member of New York's congressional delegation, a prominent and senior Democrat. Petitioners eliminated the historical unification of Jewish communities in this district, confirming that they only care about uniting Jewish communities when politically expedient.

Beyond its obvious partisan aim, the consequence of stretching a new district from Nassau County deep into Brooklyn for the sole purpose of uniting voters who heavily favor Republicans in federal elections is to pack, crack, disrupt, and callously disregard numerous communities of interest in all three counties, including especially minority communities.

Proposed District 5 would cause massive disruption to a majority-minority district to accommodate the proposed pro-Republican gerrymander in District 4. The core retention of District 5 is only 44.6%, whereas the core retention of this district in the enacted map is greater than 95%. Petitioners transform a traditionally Queens-based district into a majority Nassau County district. Beyond this overall transformation, one of every three Black residents is removed from District 5, a district in which minority voters have long had the power to elect a candidate of their choice. The White share of the population in District 5 is increased from 10% to 27%, and 78% of the White population is new to the district.

Petitioners' transparent manipulation of this district reflects an attempt to disfavor a minority incumbent by removing long-present population, making the district significantly more White, and disregarding the core population of the district for the sake of creating a new, safely-Republican District 4.

Proposed District 4 cracks the nearby neighborhood of Flatlands, taking 50,000 mostly-Black residents from District 8 (a majority-minority district) and adding them to District 4. If this were not done, the Democratic performance of the district would decline so dramatically that it would expose Petitioners' gerrymander. Black voters in Flatlands would become the collateral damage of Petitioners' effort to cover their tracks.

Beyond the Flatlands crack, Petitioners haphazardly pack, crack, and displace many other communities. The political and racial gerrymander of District 4 causes ripple effects that disenfranchise minority voters in numerous areas of District 5 and District 8. Inwood, Far Rockaway, Hammels, and Coney Island are all neighborhoods that are currently in majority-minority districts. These communities are now combined with far-flung, unrelated areas, thereby diluting their voice in future congressional elections.

District 8 is significantly disrupted in other ways to further Petitioners' gerrymander. It now stretches deep into Queens, taking the neighborhoods of Jamaica, South Jamaica, and Baisley Park to compensate for removing Black population in Brooklyn from Coney Island and Flatlands and to avoid placing Black voters into District 4. In the enacted map, by contrast, District 8 is located entirely in Brooklyn.

That District 4 severely disrupts and dislocates two majority-minority districts in which minority voters presently have the ability to elect the candidate of their choice – District 5 and District 8 – makes no sense from a population perspective. Although District 4 is underpopulated by 25,539 people, that is a relatively modest number relative to other districts in New York that must add population. There is no need for major changes to the district.

Moreover, the majority-minority districts that District 4 cannibalizes, Districts 5 and 8, are two of only four overpopulated districts from 2012. It therefore made no sense to carve up these districts to create a new district. In the enacted plan, the core retention in these districts is greater than 95% in District 5 and nearly 80% in District 8, compared to 60.8% and 64.1%, respectively, in Petitioners' proposed plan. Petitioners disturb the cores of these districts and established communities of interest for nakedly partisan reasons.

Petitioners claim falsely that they have protected Asian communities, but their proposed map cracks these communities. By contrast, the enacted plan unites the growing Chinese-American community in Brooklyn in District 10 together with Chinatown in Manhattan, in precisely the manner that Petitioners argue the map-drawers should have done. Petitioners cite testimony to the Commission on this point, which their expert also relied on during the litigation. Pet. Mem. at 6-7.

Petitioners' map not only reverses the progress made in the enacted plan, but it leaves the Chinese-American community more divided than it was under the 2012 map. In Petitioners' map, the Asian communities in Bensonhurst and Bath Beach are split between Districts 4 and 11, and Sunset Park is cracked between Districts 4 and 7. These moves greatly diminish the political power of the Asian communities in Brooklyn, undermining a goal that Petitioners' themselves laud as important.

After dismantling districts throughout Queens and southern Brooklyn, Petitioners change course dramatically when it comes to District 11. The core retention of Petitioners' District 11 is 92.1%, as they carefully draw lines that skew heavily in favor of Republicans, crack the Chinese-American community in precisely the manner they advocate against, and differ markedly in their core retention from the districts around them.

The overall effect of these changes is stunning, especially when depicted visually. A color-coded map on the non-partisan website [www.fivethirtyeight.com](http://www.fivethirtyeight.com) illustrates effectively what Petitioners have proposed: <https://tinyurl.com/ysaabn27>. Petitioners' proposed plan draws Republican congressional districts along the entire southern shore of the State, from Montauk Point at the eastern edge of Long Island to Shore Road on the western edge of Brooklyn. This unprecedented stretch of red – which no plan available on any public redistricting website even conceives – covers more than 120 miles and carves through some of the most heavily Democratic territory in New York by systematically packing and cracking Democratic and minority voters with precision.

In District 12, Petitioners again disregard the core of a Democratic-leaning district. The proposed district is 61% in Queens compared to 16% in 2012. In the 2012 map, 75% of the District is in Manhattan. In the enacted map, 86% of the district is in Manhattan and 10% is in Queens.

In Petitioners' proposed District 14, they take aim at a high-profile incumbent in a majority-minority district. District 14 is 47% Hispanic by VAP in the 2012 map and 45% in the enacted map, which retains 83% of the district core. Petitioners' proposed plan leads to significant retrogression in minority voting strength in this district: the Hispanic VAP drops to under 40%, while the district retains only 64% of the core of 2012 district. The 36% of the district that is new is only 22% Hispanic. Petitioners crack multiple communities of interest in this district. For example, they crack the Jackson Heights neighborhood and separate most of it from other Hispanic communities in Corona, North Corona, and East Elmhurst. The district now snakes around District 6 in a bizarre configuration to pick up communities along the Queens-Nassau border, which have little in common with other communities in the district. Petitioners gratuitously shift District 14 from a Queens-based district to a Bronx-based district. Whereas the district is

currently 66% in Queens County and 33% in Bronx County, Petitioners' proposed District 14 shifts to 55% in Bronx County and 45% in Queens County.

Notably, the Constitution prohibits drawing districts for the purpose of disfavoring incumbents (in addition, of course, to protecting minority voting rights). Petitioners' gratuitous attack on a majority-minority district with one of the highest-profile Democratic Members of Congress from the New York delegation has no apparent lawful basis.

The next stop on Petitioners' minority voter packing and cracking tour is District 16. Petitioners take a hacksaw to the North Bronx's large Black community, splitting the neighborhoods of Wakefield, Williamsbridge, and Eastchester. Of the 188,924 voters excised from proposed District 16, 51% are Black. This changes the demographics of the district significantly from 33% White and 35% Black to 40% White and 25% Black. The Black communities in the north Bronx have been joined with Mount Vernon in Westchester for decades. The Petitioners' proposal ruptures this connection for no apparent reason and reflects yet another example of Petitioners' systematic disregard for minority communities.

District 16 is then used to disrupt District 17 under Petitioners' plan, cracking Greenburgh and White Plains. Petitioners have intentionally drawn District 17 to make it more Republican-leaning than under the 2012 map, both Commission maps, and the enacted map.

Extensive testimony submitted to the Commission advocated for the division of Westchester from East to West, as opposed to bisecting the County by a North/South cut through the middle, and for keeping Hudson River communities united. *See, e.g.,* Test. of Verity Ann Van Tassel Richards, Nov. 7, 2021, <https://tinyurl.com/23hcskhh>; Test. of Clyde Lederman, Nov. 8, 2021, <https://tinyurl.com/mr2c9fbx>; Test. of Mary Jane Shimsky, Nov. 8, 2021, <https://tinyurl.com/ywvvsfbb>. Both the Republicans and Democrats on the Commission heeded this bipartisan consensus and proposed Hudson Valley districts with an East/West orientation. Petitioners instead split Westchester through the middle, creating a North/South orientation. In the process, they moved 195,494 people from District 17 to District 16, fewer than 50% of whom are White. They replaced that population with 208,714 people, 76% of whom are White. The portion of District 17 that was removed and shifted to District 16, previously a safe Democratic district, skewed significantly Democratic, and the portion that replaced it skews sharply toward Republicans. Petitioners sought further advantage for Republicans by removing and dividing River towns in District 17, and by dividing communities of interest in Westchester and Rockland Counties that are united in both Commission plans.

In their supporting papers, Petitioners misrepresent their changes to District 17 and several other districts. They state in their memorandum supporting their proposed map that District 17 “encompasses all of Putnam County.” Pet. Mem. at 10. But Petitioners’ map splits Putnam County between District 17 and District 18. Relatedly, Petitioners’ description of District 18 does not mention that it includes part of Putnam County.

Petitioners assert that their proposed District 16 contains the neighborhood of Riverdale, but that is untrue. Pet. Mem. at 9. Riverdale is in District 14.

Petitioners claim that proposed District 22 contains all of Ontario County “with only a small portion of the southeast corner removed for population purposes,” but that is false. Pet. Mem. at 12. The Town of Victor, the largest jurisdiction in Ontario County, is in proposed District 25.

Petitioners claim that proposed District 22 contains “most of Niagara and Erie Counties with only Niagara Falls and Buffalo removed into their own district,” but that is also untrue. Pet. Mem. at 12. Most of the population of Erie County is within proposed District 26, and several towns and cities outside of Buffalo and Niagara Falls are also in proposed District 26.

Beyond these false statements, Petitioners’ proposed upstate lines consistently seek partisan advantage. District 19 currently features many colleges and universities throughout the Hudson Valley, but Petitioners exclude the Town of New Paltz, home to SUNY New Paltz, in an effort to crack Democratic voters from the district.

When proposed District 19 reaches the western portion of Broome County, it arches out in a bizarre line, splitting the Town of Union, splitting the communities of Endwell and Endicott, and then moving down to slice the Town of Vestal. These are areas in which Democrats typically perform well, and they were intentionally cracked and removed from this district into heavily Republican proposed District 23 to the West.

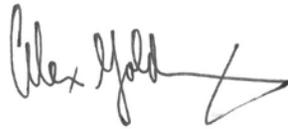
Proposed District 24 reflects another obvious attempt by Petitioners to skew a district toward Republicans. Both Commission plans and the enacted plan feature a Central New York district that contains Onondaga County and all of Tompkins County and Cortland County. This configuration reflects a bipartisan consensus about how to align communities of interest, and in particular prominent educational institutions and surrounding communities, within a single district. Instead of heeding this bipartisan consensus, Petitioners go out of their way to combine proposed District 24 with rural towns located significantly to the east. Petitioners also use proposed District 23, one of the most heavily Republican districts in the State, as a vehicle to waste Democratic votes. Contrary to

Commission Plan A and Plan B, Petitioners' proposed map absorbs Democratic-leaning voters in Tompkins, Cortland, and Broome Counties and places them in District 23. This moves communities with prominent colleges and universities into a district that shares little in common with them, by intentionally avoiding combining the selected communities with similar communities in District 24 or District 19.

In short, there is nothing neutral or usable about Petitioners' proposal. It is an egregious pro-Republican gerrymander.

Thank you for considering this submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alex Gold", followed by a long horizontal stroke that ends in a sharp upward-pointing arrowhead.

Alexander Goldenberg

cc: All Counsel of Record