

September 15, 2022

Having had substantial difficulty logging on to NYSCEF while traveling, we resubmit this letter via NYSCEF upon achieving access..

Via Email [SFC-Part63-Clerk@nycourts.gov]
August 24, 2022

Hon. Laurence L. Love
New York Supreme Court, County of New York
60 Centre Street
New York, NY 10007

Re: Nichols, et al v. Hochul, Index No. 154213/2022

Dear Judge Love,

Common Cause/New York hereby submits this letter as an amicus regarding the hearing currently on the Court's calendar concerning the appropriate process to redraw the Assembly map.

Introduction

Common Cause is a national nonpartisan advocacy organization founded in 1970 working to ensure that every vote counts, that every eligible voter has an equal say, that our elections represent the will of the people, and that our government is of, by, and for the people. Common Cause/New York is one of the most active state chapters within Common Cause, with tens of thousands of members and activists in every county of New York State.

Fair redistricting is a major policy focus for Common Cause across the country. Our national Redistricting & Representation Program helps members of the public play an active role in shaping their own representation, leading efforts to create fairer, more inclusive and impartial processes for drawing districts. We also litigate to challenge partisan and racial gerrymanders in state and federal courts around the country. Common Cause has been involved in redistricting litigation in 11 states this cycle as either a party or amicus brief participant, including cases currently active in Florida, Georgia, Michigan, North Carolina and Texas, in addition to this case.

Common Cause/New York is actively engaged in assisting members of the public and organizational partners to understand and participate in the redistricting process at the state and local level through our series of community mapping workshops. In the last redistricting cycle, Common Cause/New York was the only organization to draw statewide maps for both houses of the Legislature and Congress

that were based on extensive input from communities of interest and Voting Rights Act-protected classes. Portions of the Common Cause congressional map were expressly adopted by the federal court and formed the basis for several upstate districts in the past cycle congressional map. This cycle, we actively participated in assisting coalition partners and members of the public to map their neighborhoods and prepare testimony to the New York Redistricting Commission. We directly filed over 100 pages of comments to the Commission on the Commission's proposed maps. Additionally, we drew and submitted reform maps for congressional and state senate districts, again based on extensive input from communities of interest and Voting Rights Act-protected classes and provided live testimony, as well as extensive written comments, before the special master in the now concluded *Harkenrider v. Hochul* lawsuit. Our participation was acknowledged in the special master's report and several of our proposed districts were expressly incorporated into the final congressional and state senate maps.

Accordingly, we are familiar not only with the law and policy governing redistricting but the actual process and challenge of drawing fair and nonpartisan district lines. Organizationally and on behalf of our members, Common Cause/New York has a long-standing interest in ensuring a fair and open redistricting process that results in maps that reflect the public interest rather than partisan interests. We offer our comments herein in that spirit.

The Commission and the Legislature Have No Further Role

Common Cause/New York believes that it would be an error, both legally and practically, to refer the redrawing of the Assembly maps back to the now all-but-defunct Redistricting Commission or the New York Legislature.

The New York Constitution provides that in the event that a redistricting plan is found to be in violation of the law, it is the responsibility of the court to adopt a map which cures the deficiency. The language of the recently adopted redistricting provision is clear:

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 court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.*
N.Y.S. Constitution, Art. III, §4(e) [emphasis added].

Where a redistricting plan has been found by a court to violate the law, the constitution recognizes an alternate process from the Redistricting Commission or the Legislature drawing the lines. As the Court of Appeals recognized in *Harkenrider v. Hochul*, 2022 N.Y. LEXIS 874 at *25 (2022), there is nothing in the language of the constitutional provision that would justify reading in an expanded role for either the Redistricting Commission or the Legislature once a redistricting plan has been found to violate the law. Indeed, upon finding that “[f]ailure to follow the prescribed constitutional procedure warrants invalidation of the legislature’s congressional and state senate maps”, the Court of Appeals ruled

“judicial oversight is required to facilitate the expeditious creation of constitutionally conforming maps for use in the 2022 election and to safeguard the constitutionally protected right of New Yorkers to a fair election.” *Harkenrider v. Hochul*, 2022 N.Y. LEXIS 874 at *2. Just as the Court of Appeals refused a role for the Commission or the Legislature in redrawing congressional and state senate maps found to violate the law¹ so should this Court deny the Commission or the Legislature to opportunity to redraw the invalidated Assembly districts.

In addition to the plain text of the redistricting provision, our understanding of this provision is influenced by private discussions held in 2012 with Executive Chamber staff engaged in negotiating the now-adopted redistricting provision. In response to concerns that the proposed negotiated constitutional redistricting provision might result in the Legislature ultimately being able to draw partisan maps, staff who negotiated the provision asserted that any deficiencies in the proposed procedure would result in the maps being redrawn by a court. And indeed, for the congressional and state senate maps, that has been the result.

Additionally, we believe there has been no change in circumstances that indicate the Redistricting Commission is now more likely to be able to come to agreement and draw a consensus map than it was when it very publicly failed in its constitutionally required obligations to do so in December, 2021 and January, 2022. In fact, it is our understanding that the Commission has lost virtually all of its staff to local redistricting efforts and would have to be reorganized to be able to even attempt, yet again, to draw maps. The very public implosion of the Commission resulted in public dismay and increased cynicism. To invite a display of continued dysfunction and a waste of public resources does not further any public interest.

As prior events showed, the Commission remains under the control of the elected officials who appointed it, validating our worst fears about the process outlined by the constitutional provision. It is this harsh reality, which subverts the public’s expressed desire for fair, non-partisan redistricting in adopting the constitutional redistricting provision, which we believe motivates the defendants’ request that the redrawing of the Assembly maps be remanded to the Commission and the Legislature. Even if the Commission were to resolve its perpetual logjam and produce a map, allowing the Legislature a role in redrawing the maps contravenes the purpose of the redistricting constitutional provision as recognized by the Court of Appeals in *Harkenrider*. As the Legislature has already demonstrated, it is prepared to ignore the will of the people “by creating and enacting maps in a nontransparent manner,” *Harkenrider* at *2, serving its own interest at the expense of the public interest.

This Court should follow the clear command of the Court of Appeals in the *Harkenrider* decision, reject the partisan attempt by the Assembly to reinsert itself into the redistricting process, and appoint a special master to draw the new Assembly districts.

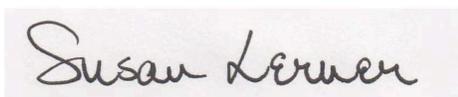
¹ “The procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure.” *Harkenrider v. Hochul*, 2022 N.Y. LEXIS 874 at *35.

There Is Ample Time for The Selection of a Special Master and for Public Input

The situation regarding the selection of a Special Master to draw Assembly districts in a transparent and non-partisan manner is markedly different from that facing the trial court in the *Harkenrider* litigation. There is not an impending deadline for redrawing the district lines, unlike the situation in *Harkenrider*, where a Special Master had to be found who was available to draw new congressional and state senate maps in a matter of weeks, rather than months. That short time frame undoubtedly limited the number of candidates, resulting in the appointment of an individual with experience only assisting a Special Master and no firsthand familiarity with any part of New York, a large and very diverse state. While regarded as non-partisan, the resulting state senate and congressional maps reflect the lack of familiarity with New York's communities and lack of time to hear from communities around the state who could have provided invaluable details and nuance. We urge the Court to consider a range of various experts in choosing the Special Master with special attention to firsthand familiarity with New York.

We also urge the Court to ensure that the process of redrawing the Assembly districts is transparent and that there is ample opportunity for public input. Whoever is ultimately named as the Special Master should be required to hold a sufficient number of hearings around the state to provide a reasonably accessible opportunity for members of the public to provide testimony on any proposed map, as well as receive written comments directly from the public.

Respectfully submitted,



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