SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD JUDICIAL 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,

Appellants-Petitioners,

-against-

Appellate Division Case No. CV-22-2265

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,

Appellees-Respondents.

AFFIRMATION OF P. BENJAMIN DUKE IN FURTHER SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURAE*

P. Benjamin Duke, an attorney admitted to practice before the courts of New York, hereby affirms under penalty of perjury as follows:

1. I am an attorney at the law firm Covington & Burling LLP, counsel for Scottie Coads, Mark Favors, and Mark Weisman (collectively, "Amici"). I submit this affirmation in further support of Amici's motion for leave to file and serve the accompanying brief as *amicus curiae* in support of Petitioners-Appellants Anthony S. Hoffman *et al.,* in the above-captioned case.

2. In response to Amici's motion, counsel for Intervenors-Respondents ("Intervenors") filed an 18-page Affirmation opposing Amici's motion on the alleged ground that Amici's proposed brief raises "new arguments that Petitioners never raised" in their briefs to this Court. Aff. of Misha Tseytlin dated April 7, 2023 ("Tseytlin Aff."), at ¶ 3. Because Intervenors' Affirmation mischaracterizes Amici's proposed brief and misrepresents the criteria for acceptance of *amicus curiae* briefs, Amici respectfully request that this Court accept this Affirmation correcting Intervenors' errors and further supporting Amici's Motion.

3. As an initial matter, while Intervenors complain that Amici's Motion and proposed brief were filed after Respondents had filed their merits briefs, *id.* ¶ 3, they do not—and could not—suggest that Amici's Motion was untimely. To the contrary, Amici's Motion was timely filed pursuant to § 1250.4(f) and § 850.4(d) of this Court's Rules of Practice. The timing of Respondents' appeal briefs in relation to amicus filings is clearly contemplated by § 850.4(d)(2) and therefore has no bearing on Amici's Motion.

4. Furthermore, Intervenors' suggestion that Amici's proposed brief raises new legal issues not raised by Petitioners is wrong—as a review of Amici's proposed brief will show. The proposed brief focuses entirely on the central legal claim raised by Petitioners—namely, that mandamus relief is warranted because the New York State Constitution requires that the Independent Redistricting Commission ("IRC") be directed to fulfill its constitutional duties by submitting a second redistricting plan. Amici's brief addresses head-on Respondents' contention that the judicially-created 2022 redistricting plan implemented in *Harkenrider* should be regarded as a final "constitutional remedy" for the entire rest of the decade, until 2032. *See* Proposed Br. at 18. Based on the same cases (principally *Harkenrider*) and constitutional provisions on which Petitioners rely and the parties extensively discuss, Amici's brief explains why, in Amici's view, Supreme Court's rejection of Petitioners' claim for relief rests on a material misreading of the Court of Appeals' opinion in *Harkenrider* and subsequent remedial orders on remand, and on a misconstruction of the meaning and purpose of article III, § 4(e) and other provisions of the New York Constitution. *See id.* at 18-25.

5. Intervenors' Affirmation completely fails to identify any distinct legal *issue* or *claim* addressed in Amici's proposed brief that was not raised by Petitioners below and addressed by the parties on this appeal. Instead, Intervenors merely contend that Amici's brief makes "arguments that Petitioners did not raise," Tseytlin

Aff. ¶ 6, and presents a "different approach" in analyzing the main legal issue presented on appeal, *id.* ¶ 9. But these contentions state a reason for *granting*, not for denying, Amici's motion for leave. Indeed, the New York Court of Appeals rules permit an *amicus curiae* filing when, *inter alia*, the "movant could identify law *or arguments* that might otherwise escape the Court's attention." 22 N.Y.C.R.R. § 500.23(a)(4)(i) (emphasis added); *see also Price v. N.Y.C. Bd. of Educ.*, 16 Misc.3d 543, 554 (Sup. Ct. 2007) (stating that *amicus* brief should *not* merely "reiterate[] arguments . . . already submitted to the Court"). Intervenors' effort to exclude an allegedly "different approach" to the issues raised by Petitioners on this appeal, which might otherwise escape this Court's consideration, is both unhelpful to the Court and at odds with the very purpose of *amicus curiae* submissions to encourage a full presentation of the issues for adjudication. *See id.* (*amicus* brief allowed where movant can help to ensure a full presentation of the case, or otherwise would be of assistance to the Court).

6. This is a case of momentous public importance affecting fundamental rights of all New Yorkers, including proposed Amici. Where a case involves questions of important public interest, leave is generally granted to file a brief as *amicus curiae*. *See Empire State Ass'n of Assisted Living, Inc. v. Daines*, 26 Misc.3d 340 (Sup. 2003). Intervenors' effort to exclude Amici's so-called "different approach" to the issue brief only highlights the potential value of Amici's

submission in analyzing aspects of Petitioners' legal claim for relief that might otherwise escape this Court's consideration. Intervenors' opposition is unhelpful to the Court and at odds with the very purpose of *amicus curiae* submissions to encourage a full presentation of the issues for adjudication.

7. None of the other authorities cited by Intervenors provides any support for their position, nor did any of them involve (let alone deny) a motion for leave to file an *amicus curiae* appellate brief. *See Bd. of Trustees of Vill. of Groton v. Pirro*, 152 A.D.3d 149, 155-56 (3d Dep't 2017) (*amicus* brief already admitted); *Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo* (199 A.D.2d 488, 490 (2d Dep't 1993) (same); *Colgate-Palmolive Co. v. Erie Cnty.*, 39 A.D.2d 641, 641 (4th Dep't 1972) (same). The granting of leave to the *amici* in each of the cases above confirms that Intervenors' opposition to Amici's motion for leave here is baseless.

8. Most of Intervenors' 18-page Affirmation consists of an inappropriate substantive rejoinder to the points presented in Amici's proposed brief. Amici believe that Intervenors' substantive arguments are without merit. However, Amici do not respond further to those arguments here and rely on their proposed brief for this Court's consideration.

9. Pursuant to Rule 1250.4(f) and § 850.4(d) of the Rules of Practice of this Court, and for the foregoing reasons, Amici respectfully request that they be granted leave to file and serve their proposed *amicus curiae* brief.

WHEREFORE, I respectfully request that this Court enter an order (i) granting the Amici leave to submit its brief as *amicus curiae* in support of Petitioners-Appellants; (ii) accepting the brief that has been filed and served along with Amici's motion; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: April 10, 2023
New York, New York

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