SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

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

Petitioners-Appellants,

-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-MOLINAS, INDEPENDENT REDISTRICTING COMMISSIONER ELAINE FRAZIER, INDEPENDENT REDISTRICTING COMMISSIONER LISA HARRIS, INDEPENDENT REDISTRICTING COMMISSIONER CHARLES NESBITT, and INDEPENDENT REDISTRICTING COMMISSIONER WILLIS H. STEPHENS,

Respondents-Respondents,

-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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AFFIRMATION IN OPPOSITION

No. CV 22-2265

Misha Tseytlin, an attorney admitted to practice in the State of New York, affirms under the penalties of perjury as follows:

1. I am a Partner at Troutman Pepper Hamilton Sanders LLP, counsel for Intervenors-Respondents ("Intervenors") in this Article 78 special proceeding. I am familiar with the facts and circumstances of the proceedings in this matter.

2. I submit this affirmation in opposition to Proposed Amici Governor and Attorney General's Motion To File A Brief As Amici Curiae. *See* App. Div. NYSCEF No.61 (Apr. 7,2023) ("Mot.").

3. Proposed Amici Governor Kathy Hochul and Attorney General Letitia A. James ("Executive Branch Amici")'s Motion To File A Brief As Amici Curiae, App. Div. NYSCEF No.61 (Apr. 7, 2023), should be rejected for two independent reasons.

4. First, Executive Branch Amici filed their Motion after this Court's deadline for amicus submissions. *See* 22 N.Y.C.R.R. § 850.4(d)(2). Amici do not explain any valid reason for their violation of this Court's rules for the deadline to file amicus submissions, stating obliquely that they "proceeded expeditiously since the time [they] learned that the appeal was scheduled for the May term" and that "limited additional time was required to prepare a brief." Affirmation In Support Of Motion For Leave To File Brief As Amici Curiae, App. Div. NYSCEF No.62 ("Gov. & AG Aff."), ¶ 3. But Executive Branch Amici had months to file this amicus brief

after Petitioners filed their Opening Brief, which they claim to support. *Id.* Their untimeliness alone is sufficient to reject their Proposed Amici Brief.

5. Second, this Court should reject the Proposed Amici Brief because it improperly raises new arguments never asserted by the parties. The core argument that Executive Branch Amici raise, *see* Brief For The Governor And The Attorney General Of The State Of New York As Amici Curiae In Support Of Petitioners-Appellants, App. Div. NYSCEF No.67 (Apr. 10, 2023) ("Gov. & AG Amici Br."), is that the remedy the Court of Appeals ordered in *Harkenrider v. Hochul*, 38 N.Y.3d 494 (2022), is itself a "violation of law" under Article III, Section 4(e) because it failed to provide the Independent Redistricting Commission ("IRC") and Legislature an opportunity to correct the violation of constitutional procedure. Because this remarkable argument is an entirely new one in this proceeding, Executive Branch Amici are not permitted to raise it now, at this very late date.

THIS COURT SHOULD DENY EXECUTIVE BRANCH AMICI'S MOTION TO FILE A BRIEF AS AMICI CURIAE BECAUSE THE BRIEF IS UNTIMELY AND ITS CORE ARGUMENT IS NOT ONE ANY OF THE PARTIES IN THIS CASE RAISED

I. This Court Should Reject Executive Branch Amici's Motion As Untimely

6. Under the applicable rules pertaining to the filing of amicus briefs before this Court, any "person or entity who is not a party to an appeal or proceeding may make a motion to serve and file an amicus curiae brief," so long as that motion is accompanied by an affidavit or affirmation in support that "briefly set[s] forth the

issues to be briefed and the movant's interest in the issues" and the proposed amicus brief does "not duplicate arguments made by a party to the appeal or proceeding." 22 N.Y.C.R.R. § 1250.4(f). All such motions "shall be returnable on a Monday or, if Monday is a legal holiday, the first business day of the week unless otherwise provided by statute, order to show cause or stipulation so ordered by a Judge of the Court." 22 N.Y.C.R.R. § 500.21(a). "[A] motion for permission to serve and file an amicus curiae brief shall be noticed for a return date no later than 45 days prior to the first day of the term of Court on which the argument or submission of the cause is scheduled." 22 N.Y.C.R.R. § 850.4(d)(2). The use of the word "shall" typically "denotes a mandatory requirement." *McMillian v. Krygier*, 197 A.D.3d 800, 801 (3d Dep't 2021); *see also Laertes Solar, LLC v. Assessor of Town of Harford*, 182 A.D.3d 826, 827–28 (3d Dep't 2020).

7. Here, Executive Branch Amici's Motion For Leave To File A Brief As Amici Curiae is untimely under this Court's rules. This Court scheduled this case to be heard in the May 2023 Term. *See* Scheduling Memorandum, App. Div. NYSCEF No.55 (Mar. 27, 2023). This Court's May 2023 Term begins on May 30, 2023. *See* App. Div., Third Dep't, *Session Calendars* 2023.[1] Counting back "45 days prior to the first day of the term" on May 30, any motion for leave to file an

[1] Available at https://www.nycourts.gov/ad3/SessionCalendar.html.

amicus brief must "be noticed for a return date no later than" April 15, 22 N.Y.C.R.R. § 850.4(d)(2), as even Executive Branch Amici acknowledge, Gov. & AG Aff. ¶ 3. Moreover, given that all "motions shall be returnable on a Monday," 22 N.Y.C.R.R. § 500.21(a), the last day for which Executive Branch Amici could have noticed their amicus motion was April 10, the final Monday before the April 15 deadline. Executive Branch Amici, however, filed their Motion at the end of the day on April 10, with a return date for April 17, *see* Mot.1–2, one week after the final return date permitted for any "motion for permission to serve and file an amicus curiae brief" in this case. 22 N.Y.C.R.R. § 850.4(d)(2). Because April 17 falls beyond the "mandatory," *McMIllian*, 197 A.D.3d at 801, 45-day limit permitted by this Court's Rules for submission of an amicus brief, 22 N.Y.C.R.R. § 850.4(d)(2), that alone provides a sufficient basis to reject their Brief.

8. Executive Branch Amici assert that their Motion is timely filed with an April 17 return date because the April 15 mandatory deadline falls on a Saturday. *See* Gov. & AG Aff. ¶ 3. But this Court's rules impose a deadline for filing "*no later than* 45 days prior to the first day of the term," which is tied to the "*return date*." 22 N.Y.C.R.R. § 850.4(d)(2) (emphases added). The return date for motions is a Monday or the following day if the Monday is a holiday, 22 N.Y.C.R.R. § 500.21(a), so the rule for amicus submissions envisions only Monday deadlines no less than (but possibly more than) 45 days before the beginning of the Term. In short, it does

not matter if the 45-day deadline falls on a Saturday, or a Tuesday, or a Friday, the return date must be a Monday, *id.*, at least 45 days before the beginning of the Term in which the case will be argued, 22 N.Y.C.R.R. § 850.4(d)(2).

9. Executive Branch Amici's alternative arguments purporting to excuse their violation of this Court's rules are meritless. They assert that they were too busy to file their Motion in a timely manner, claiming that they "proceeded expeditiously since the time [they] learned that the appeal was scheduled for the May term." Gov. & AG Aff. ¶ 3. But the Attorney General has been aware of this lawsuit since, at the very latest, July 1, 2022, when Petitioners completed service upon her office in Albany, *see* NYSCEF No.19; *see also* R.257, and both the Governor and Attorney General have had nearly four months to prepare an amicus brief since Petitioners docketed their Notice Of Appeal with this Court, *see* Copy Of Notice Of Appeal, App. Div. NYSCEF No.1 (Dec. 9, 2022), and over two months since Petitioners filed their Appellants' Brief establishing the issues they raised on appeal, *see* Brief For Petitioners-Appellants, App. Div. NYSCEF No.36 (Jan. 20, 2023) ("Appellants' Br."). No better is Executive Branch Amici's assertion, without any legal support, that this Court should give them special dispensation to file out of time simply because of their offices' constitutional roles. *See* Gov. & AG Aff. ¶ 5. This Court requires all parties who want to participate as an amicus to file "a motion for permission to serve and file an amicus curiae brief . . . no later than 45 days prior to

the first day of the term of Court on which the argument or submission of the cause is scheduled." 22 N.Y.C.R.R. § 850.4(d)(2). This Court's deadlines "must be taken seriously by the parties," because any other system would "not only impair[ ] the efficient functioning of the courts and the adjudication of claims, but . . . breed[ ] disrespect for the dictates of the Civil Practice Law and Rules and a culture in which cases can linger for years without resolution." *Willis v. Keeler Motor Car Co.*, 121 A.D.3d 1373, 1374 (3d Dep't 2014) (citation omitted; second alteration in original). Granting to the Executive Branch the practical right to ignore court deadlines will delay the administration of justice and, most troublingly, signal to litigants that the Executive Branch need not abide by rules that apply to all other parties.

II. This Court Should Also Reject Executive Branch Amici's Motion For The Independent Reason That Their Core Argument Is One That None Of The Parties In This Case Raised

10. As Intervenors explained in their opposition to the previously filed Motion For Leave To File As *Amici Curiae*, an amicus cannot raise new "arguments" that the parties did not raise. Affirmation In Opposition Of Misha Tseytlin, App. Div. NYSCEF No.60 (Apr.7, 2023), ¶ 5 ("Tseytlin Aff.") (quoting *Bd. of Trustees of Vill. of Groton v. Pirro*, 152 A.D.3d 149, 155–56 (3d Dep't 2017); *Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo*, 199 A.D.2d 488, 490 (2d Dep't 1993); *Colgate-Palmolive Co. v. Erie Cnty.*, 39 A.D.2d 641, 641 (4th Dep't 1972)).

11. Executive Branch Amici's Proposed Amici Brief responds primarily to a core aspect of Intervenors' lead argument: any lawfully adopted map must remain "in force until the effective date of a plan based upon the subsequent federal decennial census," unless a court finds that map contains an unremedied "violation of law," N.Y. Const. art. III, § 4(e), and since *Harkenrider* adopted an unquestionably lawful map, Article III, Section 4(e)'s text mandates that the map remain in place for the decade. Brief For Intervenors-Respondents, App. Div. NYSCEF No.52 (Mar. 22, 2023) ("Intervenors' Br.") at 26–29; *see* Gov. & AG Amici Br.15–16 (explaining that they are focusing on the argument that "the congressional map produced as a result of the *Harkenrider* proceeding marked the end of the redistricting process based on the 2020 federal census."). Responding to a portion of this argument for the first time in their reply brief, Petitioners argued that *Harkenrider* did not remedy the "violation of law" under Article III, Section 4(e) at all, but remedied only the malapportionment of the 2012 map. Reply Brief For Petitioners-Appellants, App. Div. NYSCEF No.58 (Apr. 3, 2023) ("Appellants' Rep.") at 3–6, 9–15. Proposed Amici Scottie Coads, Mark Favors, and Mark Weisman, for their part, argued that *Harkenrider* limited its remedy only to the 2022 election, meaning that while *Harkenrider* remedied the violation of law for 2022, that violation became unremedied once that election ended. Brief For *Amici Curiae* Scottie Coads, Mark Favors And Mark Weisman In Support Of Petitioners-

Appellants, App. Div. NYSCEF No.56 Att.A (Mar. 31, 2023) ("Voters Amici Br.") at 19–20, 21–25.

12. Executive Branch Amici—perhaps recognizing that the contrived, convoluted arguments raised by Petitioners and the Voters Amici cannot withstand scrutiny—make their own, different argument. That is, Executive Branch Amici claim that the *Harkenrider* Court of Appeals itself committed a "violation of law," under Article III, Section 4(e), by adopting a judicially created map "in a manner inconsistent with constitutional requirements," Gov & AG Amici Br.22–23, going so far as to label their lead argument section header with the claim that the *Harkenrider* map is "legally deficient," *id.* at 17. No party in this case has contended that the Court of Appeals' remedy for the violation of constitutional procedure was itself a "violation of law" under Article III, Section 4(e), and Executive Branch Amici may not inject this brand-new argument into these proceedings at this time. *See Pirro*, 152 A.D.3d at 155–56; *R.E.F.I.T.*, 199 A.D.2d at 490.

13. Even beyond the impropriety of Executive Branch Amici raising this new argument in their Proposed Amici Brief, their contentions are obviously wrong. Executive Branch Amici's remarkable position is that the Court of Appeals' *Harkenrider* decision—which ordered "judicial oversight of remedial action in the wake of a determination of unconstitutionality" as a proper remedy under Article III, Section 4(e), *Harkenrider*, 38 N.Y.3d at 523—is the "violation of law" that requires

a subsequent remedy under Article III, Section 4(e). But it makes no sense to claim that the Court of Appeals' effectuation of provisions in the Constitution, which falls within "the province of the [j]udicial branch," *White v. Cuomo*, 38 N.Y.3d 209, 216–17 (2022) (alteration in original), can itself violate the Constitution, such that the order of this State's highest court is a "violation of law" under Article III, Section 4(e), N.Y. Const. art. III, § 4(e). Rather, judicial interpretation of the Constitution and ability to oversee remedial redistricting proceedings are "function[s] familiar to the courts given their obligation to safeguard the constitutional rights of the People under our tripartite form of government." *Harkenrider*, 38 N.Y.3d at 523.

14. Executive Branch Amici's interpretation of the Constitution underlying this bizarre argument is also wrong on the merits. Before the Court of Appeals in *Harkenrider*, Executive Branch Amici—who were either parties or counsel in the case—argued that any proper remedial-mapdrawing process could not proceed in the courts and "would require restarting [the IRC-and-legislative redistricting] process from scratch." Supplemental Letter Brief of Governor & Lieutenant Governor, *Harkenrider v. Hochul*, APL 2022-00042 (Apr. 23, 2022), at 4–5.[2] The Court of Appeals rejected this very argument, explaining that the Constitution

[2] Available at https://courtpass.nycourts.gov/Public_search (search "60" in "Decision No."; select "Harkenrider v Hochul"; select "Harkenrider v Hochul_Res-App_Hochul_BRF").

empowers the judiciary to adopt a redistricting plan when there is no constitutional legislative plan available. *Harkenrider*, 38 N.Y.3d at 521–22. The Court of Appeals also rejected Executive Branch Amici's contentions that the courts must give the Legislature a chance to correct the violation of constitutional procedure, because, as the Court of Appeals reasoned, the infirmity was "incapable of a legislative cure" given that "[t]he deadline in the Constitution for the IRC to submit a second set of maps has long since passed," and the IRC's completion of constitutional obligations is "unquestionably intended to operate as a necessary precondition to, and limitation on, the legislature's exercise of its discretion in redistricting." *Id.* at 514, 523.

15. Executive Branch Amici's discussion of Article III, Section 5-b(a) does not salvage their position. *See* Gov. & AG Amici Br.24–25. As Intervenors explained in briefing before this Court, Intervenors' Br.35–36, 38–39, Article III, Section 5-b(a) only permits the IRC to reconvene outside of the every-10-years redistricting process when "a court orders that congressional . . . districts be amended," in response to a successful legal challenge to the map, N.Y. Const. art. III, § 5-b(a). For example, if a court held that a map adopted by the Legislature after two rounds of IRC submissions violated Section 2 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10301, by failing to create a mandatory majority-minority district under the standards announced in *Thornburg v. Gingles*, 478 U.S. 30 (1986), that court could re-establish the IRC to remedy that error by "amend[ing]" the map,

N.Y. Const. art. III, § 5-b(a), to include such a majority-minority district. In any event, Article III, Section 5-b(a) is not at issue in this case, as Petitioners admit by anchoring their sought-after relief in Article III, Section 4(e). Appellants' Br.26–30; Appellants' Rep.8–10.[3] That is why Intervenors focused their definitional analysis in this case not on the meaning of "amend[ ]" in Article III, Section 5-b(a), but on the meaning of "modif[y]" in Article III, Section 4(e).

16. Executive Branch Amici's claim that the Court of Appeals never resolved whether the court-drawn congressional map would remain in effect for the remainder of the decade, Gov. & AG Amici Br.26–29, is also wrong. The Court of Appeals ordered the Steuben County Supreme Court to adopt a remedial congressional map, *Harkenrider*, 38 N.Y.3d at 523–24, consistent with Article III, Section 4(e)'s clear mandate that the map "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," N.Y. Const. art. III, § 4(e). As Executive Branch Amici acknowledge, the Court of Appeals in *Harkenrider* rejected the State Respondents' proposal to defer a remedy to 2024, refusing "to subject the

[3] Article III, Section 5-b(a) is at issue in *Nichols v. Hochul*, 177 N.Y.S.3d 424, 429 (N.Y. Cnty. Sup. Ct. 2022), but Petitioners' disagreement with *Nichols*' reasoning in other respects has nothing to do with their lead argument under Article III, Section 4(e), and is thus irrelevant to the points this Affirmation makes.

People of this state to an election conducted pursuant to an unconstitutional reapportionment." Gov. & AG Amici Br.26. (citing *Harkenrider*, 38 N.Y.3d at 521). Thus, *Harkenrider* adopted a map to govern for 2022 and the remainder of the decade, as partially dissenting Judge Troutman explained, because that is all that Article III, Section 4(e) permits. *Harkenrider*, 38 N.Y.2d at 521–24; *id.* at 527 (Troutman, J., dissenting in part) (noting map would govern "for the next 10 years"). Nor is it relevant that the Steuben County Supreme Court labeled it "the official approved *2022* Congressional Map," Gov. & AG Amici Br.28–29, because 2022 was the year in which the map was adopted, consistent with how that court labeled all of the relevant maps in its orders. *See* Tseytlin Aff. ¶¶ 16–18.[4]

17. Executive Branch Amici's new arguments are also a nonstarter because, by their own terms, those arguments involve a collateral attack on the map adopted in *Harkenrider*. Executive Branch Amici explicitly state that the Steuben County Supreme Court's judicially adopted remedial map is a "violation of law"

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[4] On this point, Executive Branch Amici's theory contradicts the Voters Amici's interpretation of the Steuben County Supreme Court's orders. Executive Branch Amici assert that the Steuben County Supreme Court's orders were silent or ambiguous and while that court "did not hold that the map was limited in applicability to the 2022 congressional election, neither did it hold that the map would remain in effect until the next decennial redistricting cycle." Gov & AG Amici Br.28–29. Voters Amici, on the other hand, argued that the order's label of the congressional map as "the 2022 Congressional . . . map[ ]" specifically limited it to only 2022, and that the orders were clear on their face on this point. Voters Amici Br.20–21.

requiring a court to either "order the adoption of, or changes to, [the] plan," or "modif[y]" the map and negate the presumption of 10-year applicability. N.Y. Const. art. III, s 4(e); Gov. & AG Amici Br.8, 11. This places the Steuben County Supreme Court's orders adopting that map under attack in this collateral proceeding, meaning Petitioners cannot bring this lawsuit against the Steuben County Supreme Court's maps before the Albany County Supreme Court. Intervenors' Br.49–56. In other words, Executive Branch Amici's arguments, if accepted, would further show that this lawsuit is a collateral attack on the Steuben County Supreme Court's judgment, providing yet another basis to dismiss. *Id.*

18. In all, Executive Branch Amici's attempt to raise their own theory under Article III, Section 4(e) only highlights that there is no plausible answer to Intervenors' argument that Article III, Section 4(e) ends this lawsuit. Article III, Section 4(e) provides a clear rule that a lawful map—that is, a map infected with no "violation of law"—"shall be in force until the effective date of a plan based upon the subsequent federal decennial census." N.Y. Const. art. III, § 4(e). *Harkenrider* already lawfully adopted New York's congressional map, which map suffers from no "violation of law," and the Constitution mandates that the map remains until the next census in 2030. Intervenors' Br.25–35. That Petitioners and two sets of amici cannot even agree among themselves as to what extant "violation of law" justifies

the courts now ordering a mid-decade redistricting of an unquestionably lawful map only further shows that no answer is possible.

19. So while the Executive Branch Amici close their Brief with a series of policy arguments, Gov. & AG Amici Br. 30–34, the 2014 Amendments resolve all of those policy concerns against mid-decade redistricting, once lawful maps are in place. The 2014 Amendments provide that the map-drawing process in New York happens once each decade; preferably by the IRC and the Legislature doing their jobs, but if that process fails and the constitutional deadline passes, then by the courts adopting lawful maps. And, critically, regardless of whether *lawful* maps adopted at the start of the decennial come from the IRC/legislative process, or the judicial-backstop process, Article III, Section 4(e) ensures that partisans will not have a mid-decade opportunity to replace those legal maps with unconstitutionally gerrymandered maps, leading to more lawsuits and more uncertainty for the People.

Dated: New York, New York
April 13, 2023

Misha Tseytlin