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VIA NYSCEF

Robert D. Mayberger, Clerk
Supreme Court of the State of New York
Appellate Division, Third Department
Robert Abrams Building for Law and Justice
State Street, Room 511
Albany, New York 12223

Re: ***Hoffmann, et al. v. New York State Independent Redistricting Commission, et al.,*** **Case No. CV-22-2265--Petitioners' Response to Intervenor-Respondents' Post-Argument Submission**

Dear Clerk Mayberger:

We write as counsel to Petitioners-Appellants in the above-captioned case in response to Intervenor-Respondents' Post-Argument Submission Requesting the Court Take Judicial Notice of U.S. Supreme Court Decision in *Biden v. Nebraska*, No, 22-506 (U.S. June 30, 2023). *See* 22 N.Y.C.R.R. § 1250.15(d).

The U.S. Supreme Court's analysis of the word "modify" in the *Biden* litigation, which arose in a different context and involved the interpretation of a federal statute, has no bearing on this case. Intervenors' argument—that the Supreme Court's interpretation of the word "modify" to mean "modest adjustments" precludes the IRC from being reconvened to complete its mandatory duty of sending a second set of redistricting maps to the legislature—is illogical. It also relies on an apparent mischaracterization of the relief Petitioners seek. To remedy the violation of law at issue here, Petitioners contend only that the IRC must send a second set of redistricting maps to the Legislature. Petitioners make no claims about how much or how little the IRC should "modify" the existing maps. And there is no principled distinction between "modifying" and "replacing" districting maps, as Intervenors suggest.

Intervenors' submission ignores that this case arises in a completely different context than the *Biden* case. The Supreme Court in *Biden* was interpreting a federal statute—not a state constitutional provision—that had nothing to do with redistricting. The statute at issue in *Biden* authorized the Secretary of Education (the "Secretary") to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under [the federal Higher Education Act]." 20 U.S.C. § 1098bb(a)(1). Relying on bedrock separation of powers

principles, the Court rejected the Secretary's reliance on this language, including the word "modify," to expand the scope of the Higher Education Act. Slip op. at 13 (quotations omitted). The Court held the term "modify" embraces "modest adjustments and additions to existing provisions." *Id.*

But the Secretary's administrative "rewrit[ing]," slip op. at 12, of a federal statute bears no resemblance to the relief Petitioners seek here, which is expressly authorized by the New York Constitution. Article III, Section 4(e) makes clear that a redistricting plan may be "modified" to remedy a legal violation pursuant to a court order: "A reapportionment plan and the districts contained in such plan 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.*" (emphasis added). Section 4(e) is silent about *who* may "modify" a reapportionment plan "pursuant to court order." That question is answered by different provisions of the Redistricting Amendments that express a clear preference for the IRC and the Legislature to take initial responsibility for the drawing of remedial maps. *See* N.Y. Const. Art. III, §§ 5 & 5-b(a). Petitioners' requested relief is entirely consistent with these provisions.

Intervenors contend that the term "modify" only allows for "small changes" to existing maps. But Petitioners have made no claims about the scope or substance of the "modifications" that the IRC must undertake. That question is to be addressed by the IRC when it convenes to submit a second set of maps to the legislature, taking into account the substantive criteria in the Redistricting Amendments. *See* N.Y. Const. Art. III, § 4(c)(5).

Furthermore, the distinction Intervenors attempt to draw between "modifying" and "replacing" a map is divorced from the context of redistricting and the process by which redistricting maps are actually drawn. By definition, whenever a map is "modified" pursuant to court order, that will necessarily involve "replacing" the current map. There are a finite number of congressional districts, and any change to the boundaries of a district, no matter how "small" necessarily requires changes to the boundaries of neighboring districts. There is thus no principled distinction between "modifying" an existing map and "replacing" an existing map. And, while Intervenors argue that "modify" only means "small changes," they fail to offer (and indeed, cannot offer) any manageable standard for discerning how much "modification" is too much.

Indeed, if Intervenors' interpretation were correct, it would severely limit the ability of the courts, the IRC, and the legislature to remedy substantive or procedural violations of law through remedial maps. The Redistricting Amendments empower the courts to order whatever remedy is necessary to cure a "violation of law"—here, the IRC's failure to even submit a second round of Congressional maps. Remedying a violation of law might require only small changes to be made to the map, or it might require more significant changes. The Constitution permits both.

For the reasons discussed herein, the Supreme Court's analysis of a wholly unrelated statutory provision in *Biden v. Nebraska* has no bearing on the proper interpretation of New York's

Redistricting Amendments. Accordingly, Petitioners respectfully contend that Intervenors' post-argument submission should be given no weight.

Respectfully submitted

Aria C. Branch
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Counsel to Petitioners-Appellants

cc: All Counsel of Record (via NYSCEF)