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May 19, 2022

VIA NYSCEF & EMAIL

Honorable Patrick F. McAllister
Supreme Court, Steuben County
3 East Pulteney Square
Bath, New York 14810

Dr. Jonathan Cervas
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Re: *Harkenrider, et al. v. Hochul, et al.*, Index No. E2022-0116CV (Sup. Ct. Steuben Cnty.)

Dear Justice McAllister and Dr. Cervas:

In her letter of late last night, NYSCEF No.653, the Senate Majority Leader takes the remarkable position that the remedy for an unconstitutional partisan gerrymander can be the adoption of a map that favors the very party that engaged in the gerrymander. That is nonsense. So far as Petitioners are aware, every court to have required or itself adopted a remedial map after finding that a prior map was an unconstitutional partisan gerrymander has ensured that the remedial map it adopts does not favor either major political party. This has occurred in cases where the court acted under a constitutional provision that bars only partisan intent, *see, e.g.*, *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015); *League of Women Voters of Fla v. Detzner*, 179 So. 3d 258, 261 (Fla. 2015) (approving trial court's recommended congressional map and noting that the goal for reviewing maps and adopting maps "ha[d] not changed and ha[d] always been compliance with the" constitutional provisions against gerrymandering), or under a broadly worded constitutional provision that does not explicitly prohibit partisan gerrymandering, *see League of Women Voters v. Commonwealth*, 178 A.3d 737, 808 (Pa. 2018); *League of Women Voters of Pa. v. Commonwealth*, 181 A.3d 1083, 1087 (Pa. 2018) (per curiam) (adopting a court-drawn remedial plan that was "superior or comparable" to all other submissions on all criteria, including partisanship); *Harper v. Hall*, 867 S.E.2d 554 (N.C. 2022); *Harper v. Hall*, Nos. 21 CVS 015426, 500085 (Wake Cnty. Sup. Ct. Feb. 23, 2022), slip op. at 11–12, 19–23, *available at* https://bit.ly/380csNf (rejecting proposed remedial congressional plan for violating standard for measuring partisanship established by North Carolina Supreme Court and adopting a modified plan that "bring[s] it into compliance with the Supreme Court's" partisanship test).

In the present case, the Court of Appeals specifically issued its substantive gerrymandering decision—notwithstanding its procedural unconstitutionality holding—precisely in

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order "to provide necessary guidance to inform the development of a new congressional map on remittal." *Harkenrider v. Hochul*, ___ N.Y.3d ___, 2022 WL 1236822, at *3–5, 9–11 & nn.12 & 14 (N.Y. Apr. 27, 2022). The Senate Majority Leader has no coherent explanation—indeed, no explanation at all—for why the Court of Appeals would have rendered that decision, including upholding this Court's and the Appellate Division's reliance on Mr. Trende's methodology, unless the Court of Appeals wanted this Court's nonpartisan remedial maps to comply with the proof that prevailed in this case. The Court of Appeals surely understood that this Court would not have the intent to favor either political party; it was plainly issuing its decision to help guide this Court in how to create nonpartisan remedial maps, consistent with the proof that prevailed in this case.

To be absolutely clear, Petitioners are *not* asking this Court to revise the Special Master's congressional map "for the purpose of favoring Republican candidates"—as the Senate Majority Leader falsely asserts, NYSCEF No.653 at 2—***but are merely asking this Court to ensure that the map it adopts does not systematically favor any political party***. As Respondents concede by silence, it is an unfortunate fact that the Special Master's proposed congressional map does systematically favor the Democratic Party, NYSCEF No.647 at 3–8, including under Mr. Trende's methodology that prevailed here. Contrary to the Senate Majority Leader's claim, Mr. Trende's dotplot analysis does measure whether a map is fair to the two major political parties because it diagnoses whether the relevant districts (e.g., those that are competitive under typical election conditions) are more favorable to one party or the other than in the neutral ensemble of maps. As Mr. Trende's supplemental report explains, the Special Master's proposal—while unquestionably an improvement over the Legislature's egregious gerrymander—is significantly more Democratic than the ensemble from the fifth-most Republican district through the eighth-most Republican district, which is the critical range of the most competitive districts for New York's congressional delegation, under typical election conditions. NYSCEF No.646 at 5. All Petitioners are urging this Court to do is to revise this map so that has those competitive districts fall generally within the ensemble's distribution, which would favor neither Republican nor Democratic candidates. As Petitioners showed in their submission yesterday, this Court can accomplish this by making a couple of changes in the Special Master's map that are consistent with community-of-interest considerations, and would also improve the Special Master's proposal on compactness, number of counties split, and competitiveness metrics. NYSCEF No. 647 at 8–17.

The Senate Majority Leader's letter also falsely accused Petitioners of changing their position in asking this Court to adopt a fair map, consistent with Mr. Trende's methodology. But in each of their remedial submissions to this Court, Petitioners have argued that this Court's remedial maps must not systematically favor either party, under Mr. Trende's methodology that prevailed in this case, including under the law-of-the-case doctrine. *See* NYSCEF No.403 at 2–3; NYSCEF No.415 at 1–3.[*]

[*] As for the Senate Majority Leader's invocation of Petitioners' critique of Respondents' belated invocation of the flawed, academic concept of partisan symmetry—which is not the approach that Mr. Trende or any admitted expert took to evaluate the congressional map—Petitioners' attack on that concept was that it does not actually measure partisanship. While the Senate Majority Leader quotes a snippet of Petitioners' closing argument, she leaves out the punchline as to why Petitioners urged this court not to consider the partisan-symmetry concept, two sentences later in Petitioners' closing argument: Dr. Katz's partisan-symmetry analysis—which was the point that Petitioners' counsel was responding to at that point in his closing

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Moreover, the Senate Majority Leader ends her letter by, in effect, urging this Court to violate the Equal Protection Clause of the Fourteenth Amendment, without even attempting to address *Wisconsin Legislature v. Wisconsin Elections Commission*, 142 S. Ct. 1245 (2022) (per curiam). In *Wisconsin Legislature*, the U.S. Supreme Court held that the Wisconsin Supreme Court had adopted a state legislative map that violated the Equal Protection Clause because the Wisconsin Supreme Court used racial criteria—creating a particular majority-minority district—without analyzing with sufficient rigor whether Section 2 of the Voting Rights Act required such a race-focused district. In issuing its decision, the U.S. Supreme Court made clear that such race-focused districting was unconstitutional, absent an "intensely local appraisal" showing that Section 2 of the VRA required such a majority-minority district. *Id.* at 1250–51 (citation omitted). Here, Legislative Respondents, along with certain nonparties, have asked this Court to redraw certain districts on explicitly racial grounds, including asking this Court to target certain racial percentage compositions in various districts. NYSCEF No.626 at 1–3. Given that these parties have not even attempted to make the careful showing that Section 2 of the VRA requires any of this race-based districting in any of the districts that they discuss, heeding these parties' advice would likely violate the Equal Protection Clause under *Wisconsin Legislature*.

Finally, as an update to a point that Petitioners made in their submission of last night, this morning, the nonpartisan political analysis website FiveThirtyEight—which the parties on both sides of this case have favorably cited, *see, e.g.*, NYSCEF No.33 at 2; NYSCEF No.312 at 6; NYSCEF No.403 at 11—has now issued its rating for Petitioners' proposed revisions to the Special Master's congressional map. FiveThirtyEight rates this revised version as nearly identical to the rating it gives to the 2012 court-drawn map in terms its efficiency gap metric—+1.4 to +1.3—with Petitioners' revised version scoring closer to a 0 efficiency gap than any of the other proposals submitted to this Court. *What Redistricting Looks Like In Every State – New York*, FiveThirtyEight, *available at* https://53eig.ht/3M6gJ08. This rating further shows the wisdom of this Court adopting that revision of the Special Master's congressional map, which will govern New York's elections in this decade, just as the nonpartisan 2012 map governed the congressional elections in the prior decade.†

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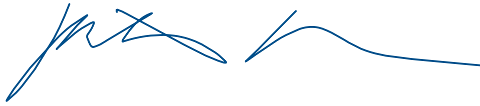
argument—"cannot even exclude that even if something scores well on their social science metrics that it is, in fact, something like this, the most extremely partisan effort to help out one party and harm the other within the limitations of a political geography of a state." Transcript Of Closing Arguments at 25 (Mar. 31, 2022) (citation omitted), *available at* https://bit.ly/3wrGfrr.

† In a filing only served upon the parties this morning, the Democratic Congressional Campaign Committee has the mendacity to argue that this Court should violate the Court of Appeals' mandate and the plain text of the New York Constitution by permitting the Legislature to enact a congressional map that will govern after the 2022 elections. *See* Letter On Behalf Of DCC, et al., at 1, 10–11 (dated May 18, 2022). As the Court of Appeals correctly held, under the 2014 Anti-Gerrymandering Amendments, there is only a single, exclusive process for the enactment of congressional maps, and the Legislature has no constitutional authority to adopt redistricting maps outside of that process. *Harkenrider*, 2022 WL 1236822, at *5–6, *8. Accepting the Democratic Congressional Campaign Committee suggestion—which even Legislative Respondents have not had the temerity to suggest—would violate both the New York Constitution and the Court of Appeals' decision in this very case.

Sincerely,



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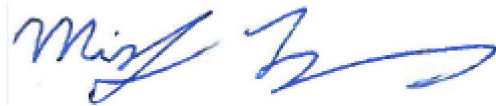

Misha Tseytlin

cc: All Counsel Of Record (via NYSCEF)