

April 11, 2022

By E-Filing

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

Re: *Harkenrider et al. v. Hochul et al.*, Index No. E2022-0116CV

Dear Justice McAllister:

We represent the Senate Majority Leader in this special proceeding. We write on behalf of our client and the Speaker of the Assembly to respond to the letter that Petitioners filed at 9:00 p.m. yesterday evening requesting the appointment of Republican consultant Douglas Johnson as special master to draw congressional district lines for New York State.

First, we respectfully submit that this Court should not appoint a special master at this time. In his Order, Justice Lindley declined to prohibit this Court from appointing a special master, but he did not direct the Court to appoint one or suggest that the Court would ultimately have authority to draw a congressional plan. To the contrary, Justice Lindley reaffirmed “the Legislature’s constitutional authority to redraw a Congressional map in response to Judge McAllister’s ruling” if Petitioners prevail on their substantive challenge to the congressional plan. Justice Lindley referenced a potential situation in which the Legislature declined its option to draw new lines. But as the Legislature stressed to Justice Lindley, it will exercise its constitutional prerogative to enact new lines to correct any infirmities if it does not prevail on appeal.

Justice Lindley focused on the plan for Congress because he was not receptive to Petitioners’ procedural challenge to the Legislature’s right to draw lines. Notably, Petitioners have acknowledged throughout this litigation that the remedy for a successful substantive challenge would be remand to the Legislature to draw a new plan. Pet., Doc. # 1, at Prayer for Relief ¶ E; Pets.’ MOL at 56, Doc. # 25 (stating that if a court “rejects Petitioners’ procedural argument but adopts their substantive argument, it should permit the Legislature one opportunity to enact constitutional replacement maps”). Appointing a special master would be a futile exercise because everyone understands and agrees that the right to correct any infirmities belongs to the Legislature, and the Legislature will exercise its right.

If the Court appoints a special master, it certainly should not appoint Douglas Johnson, a Republican partisan with a history of controversy. Contrary to Petitioners' misleading suggestion, Johnson was not "independent" in Ohio; rather, he was hand-picked by the Republican House Speaker, while the Democratic members of the redistricting commission appointed someone else.<sup>1</sup> Likewise, in Arizona, Johnson's firm was appointed by the redistricting commission by a 3-2 vote, over the vigorous objections of the Democratic members, who pointed to a long history of Johnson's firm drawing racially discriminatory maps that have been rejected by courts and the U.S. Department of Justice for violating minority voting rights.<sup>2</sup> Petitioners also fail to disclose that Johnson served as an expert witness defending the Republican-gerrymandered maps in North Carolina in 2019. The three-judge court rejected his testimony in its entirety as materially inaccurate, and harshly criticized "Dr. Johnson's methodologies, analyses, and conclusions." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at \*95 (N.C. Super. Sep. 03, 2019). Johnson is neither "neutral" nor a competent expert. This Court should reject Petitioner's outrageous request to appoint a Republican partisan as special master, in a case alleging partisan gerrymandering, no less.

Although Respondents object to the appointment of a special master and do not believe that such an appointment would be prudent at this juncture, we respectfully suggest that if one is to be appointed, there should be a fair process for vetting proposed neutrals. We hereby request that the Court schedule a teleconference at its earliest convenience to discuss the Court's view of the appropriate path forward with respect to proposing and selecting a neutral special master. In the meantime, the Court should reject Petitioners' effort to short-circuit the process through their unreasonable recommendation.

Respectfully submitted,



Alexander Goldenberg

cc: All Counsel of Record

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<sup>1</sup> See Susan Tebben, "Ohio Redistricting Commission adds two new mapmakers," *Ohio Capital Journal*, March 22, 2022, available at <https://ohiocapitaljournal.com/2022/03/22/ohio-redistricting-commission-adds-two-new-mapmakers/>.

<sup>2</sup> See Jeremy Duda, "IRC picks mapping consultant in split vote over Dem objections," *Arizona Mirror*, May 4, 2021, available at <https://www.azmirror.com/2021/05/04/irc-picks-mapping-consultant-in-split-vote-over-dem-objections>.