

May 18, 2022

By E-Filing and E-Mail (cervas@cmu.edu)

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5000 Forbes Avenue
Pittsburgh, PA 15213

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

Dear Special Master Cervas:

We represent Senate Majority Leader Andrea Stewart-Cousins. We write to comment briefly on Petitioners' submission regarding the proposed congressional map, which insists that you redraw districts to make them more pro-Republican.

In contending that you must alter the proposed map to comply with a so-called "partisan fairness" rule, Petitioners misrepresent the New York Constitution and their position throughout this case. As Petitioners argued at every point in the case until tonight, the New York Constitution prohibits drawing district lines for an improper *purpose*. N.Y. Const., art. III, § 4(c)(1) ("Districts shall not be drawn to discourage competition or *for the purpose of favoring or disfavoring incumbents or other particular candidates or political parties.*"). Unlike in other states, such as Ohio, where the constitution includes a proportionality requirement, the New York Constitution focuses narrowly on the intent of the person drawing lines.

The distinction between objective partisan fairness and legislative intent was a central element of Petitioners' case. In closing arguments before this Court, Petitioners dismissively rejected partisan fairness metrics—such as the partisan symmetry metric they now cite from fivethirtyeight.com—and insisted that such measures are meaningless in a state with an intent standard. Counsel argued:

There is a significant limitation in the partisan symmetry metrics. They don't talk about partisan intent. They have nothing to do with partisan intent and they are measuring an academic notion of partisan fairness.

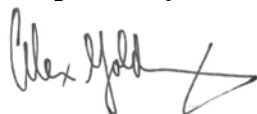
Petitioners doubled down on appeal, arguing to both the Fourth Department and the Court of Appeals that partisan symmetry is irrelevant where the question at issue is intent, as it is in New York.

Given this history, it is disingenuous that Petitioners now argue that the New York Constitution imposes a “partisan fairness” requirement that not only permits, but affirmatively requires you to systematically redraw the map you prepared *for the specific purpose* of making it more pro-Republican. The New York Constitution mandates the opposite. Assuming that you drew your initial proposed map in reliance on neutral redistricting criteria, then the Constitution expressly and unequivocally prohibits you from redrawing lines for the purpose of favoring Republican candidates, as Petitioners and their expert demand that you do.

Petitioners attempt to obscure their purpose with legal terminology like the “law-of-the-case,” suggesting that the courts have decided that any map must satisfy a sufficiently pro-Republican partisanship standard for Sean Trende to give it his blessing. Of course, no court has held such a thing. Indeed, Mr. Trende’s gerrymandering index is of no constitutional relevance whatsoever unless you drew the proposed map for the purpose of benefitting Democrats. As Mr. Trende himself explained in every report that he submitted in this case until tonight, the gerrymandering index, which the Legislature contends is meaningless in any event, is meant to serve as a proxy to prove intent. For self-serving reasons, Mr. Trende has suddenly transformed his supposed diviner of intent into a measure of objective partisan fairness. Mr. Trende’s dot plot was never used for that purpose in this case, no court has ever suggested that a special master-drawn map must be measured against it, and it should go without saying that no New York court has ever held that a map-drawer is permitted to redraw lines for the purpose of making one party better off.

Finally, Petitioners conclude their submission with a discussion of *Shaw v. Reno*, and an implicit warning that if you reconsider the effects of your map on minority communities, they will seek to have the map struck down by the United States Supreme Court. To be clear, nobody suggests that you should subordinate other redistricting principles to race in violation of the Constitution. The comments by the public, concerned groups, and the Legislature all seek to maintain, among other things, the cores of previous districts and communities of interest, and they seek to avoid the improper dilution of the voting rights of racial minorities in compliance with New York’s express constitutional requirements.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alex Gold", followed by a long horizontal stroke that ends in a small upward-pointing hook.

Alexander Goldenberg

cc: All Counsel of Record