

HOLWELL SHUSTER & GOLDBERG LLP

425 Lexington Avenue
New York, New York 10017
Tel: (646) 837-5151
Fax: (646) 837-5150
www.hsgllp.com

James M. McGuire
(646) 837-8532
jmcguire@hsgllp.com

April 24, 2022

Hon. John P. Asiello
Chief Clerk & Legal Counsel to the Court
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207
filecoa@nycourts.gov

Re: Harkenrider v. Hochul, A.D. No. CAE22-00506; Proposed Supplemental Letter-Brief of Amicus Curiae The League of Women Voters of New York State

Dear Mr. Asiello:

We submit this proposed supplemental letter-brief, pursuant to the guidance of the Clerk's Office, of the League of Women Voters of New York State (the "League"), which was granted leave to participate as *amicus curiae* in the Fourth Department. The League has been in existence for more than 80 years and has affiliated entities all over the country. The League is a non-partisan, grassroots organization that has stood for, among other goals, fair and equitable representation for the people of New York through redistricting of legislative and congressional districts that are untainted by gerrymandering. See Bierman Aff. ¶8.¹ The League supported and educated the voters about the 2014 Amendment at issue in this appeal, and therefore has a keen interest in its outcome. McGuire Aff. ¶3. The League respectfully refers the Court to and incorporates by reference its Fourth Department *amicus curiae* brief, and limits this proposed supplemental submission to certain points in response to the decision of the Fourth Department.

¹ "Bierman Aff." refers to the Affidavit of Laura Ladd Bierman, dated April 14, 2022, in support of the League's motion in the Fourth Department for leave to file an *amicus curiae* brief. "McGuire Aff." refers to the Affirmation of James M. McGuire, dated April 14, 2022, in support of the same motion. "LWV Br." refers to the Brief of *Amicus Curiae* the League of Women Voters of New York State, dated April 14, 2022, submitted in the Fourth Department. "Slip Op." refers to the slip opinion issued by the Fourth Department in this appeal. The undersigned represents that no party or counsel for any party contributed content to this proposed supplemental letter-brief or participated in the preparation of it in any other manner; and no person or entity (including Holwell Shuster & Goldberg LLP, which is representing the League pro bono) contributed money for such purpose.

I. The Constitution Clearly Directs A Judicial Remedy For Violations Of The Process Mandated By The 2014 Amendment.

There is no dispute that the process mandated by the 2014 Amendment was violated here by the failure of the Independent Redistricting Commission (“IRC”) to submit a second set of redistricting maps (and implementing legislation) to the Legislature to approve or reject in an up-or-down vote. The plurality decision of the Fourth Department did not say otherwise. Instead, the plurality “conclude[d] that the New York State Constitution is silent as to the appropriate procedure to be utilized in th[at] event.” Slip Op. at 3. That conclusion is gravely wrong.

First, the 2014 Amendment sets forth its procedural directions in unmistakably mandatory terms. “*The process*” for redistricting “established” by Section 4, 5, and 5-b “*shall govern*” redistricting unless a court is “*required* to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.” Art. III, Section 4(e) (emphases added). As part of that process, “the redistricting commission *shall* prepare a second redistricting plan and the necessary implementing legislation for such plan.” Art. III, Section 4(b) (emphasis added). And “[s]uch legislation *shall* be voted upon, *without amendment*, by the senate or assembly and, if approved by the first house voting upon it, such legislation shall be delivered to the other house *immediately* to be voted upon *without amendment*.” *Id.* (emphases added); *see also* LWV Br. at 4–7, 10–13 (further analyzing plain text and citing case law).

Second, if there has been a “violation of law,” including the procedural dictates of the Constitution, Section 4(e) charges the courts to order one of two specified remedies—the adoption of a new redistricting plan or a change to a pre-existing plan. Although Section 5 allows for the Legislature to “have a full and reasonable opportunity to correct” the “legal infirmities” of a “law establishing congressional or state legislative districts,” that remedial path, necessarily, can be available only when it is possible for the Legislature to correct the “legal infirmities.” Here, the Legislature is incapable of curing the procedural violation. Thus, Section 4(e)’s express charge to the Judiciary must be respected; the Court should order one of the two specified remedies contemplated by that subsection.

As Justice Curran noted in dissent, the alternative reading—whereby the Legislature would always be permitted to adopt its own maps regardless of procedural violations or even a failure by the Legislature to fund the IRC, subject only to review by the courts for compliance with the 2014 Amendment’s substantive guarantees—would gut Section 4(e) and the mandatory IRC process:

In my view, a ‘violation of law’ under section 4(e) is a broader concept than the ‘legal infirmities’ in the apportionment plan under section 5. The former includes a violation of law occasioned by action or inaction of the IRC or the legislature in funding or constituting the IRC. Such actions or inactions are violations of law with respect to the process for redistricting established by section 4(e) that are not logically curable except by judicial intervention. . . . I submit that any other reading of section 4(e) renders the IRC a useless formality.

Slip Op. at 13–14 (Curran, J., dissenting in part) (citation omitted).

In response to this clear constitutional construction, the plurality asserted that the 2014 Amendment does not “expressly prohibi[t] the legislature from assuming its historical role of redistricting and apportionment if the IRC fails to complete its own constitutional duty.” *Id.* at 4.² This contention is puzzling. It is evident from the text and context of the 2014 Amendment that the whole point of the amendment was to curtail the Legislature’s “historical role” in redistricting in order to facilitate a process that would lead to less-partisan results. It is impossible to read the carefully crafted, multi-step procedure adopted by the People—including legislative appointment of IRC members, public hearings on the IRC’s work, a “record of votes taken” by the IRC members when they are divided, a first set of IRC maps and a legislative vote without amendment on them, and then a second set of IRC maps and a legislative vote without amendment on that second try—and conclude that the intent of the 2014 Amendment was anything other than a dramatic change to “business as usual.” *See* LWV Br. at 7–9 (summarizing process provisions).

Indeed, the People were promised exactly such a change. As the League pointed out in its *amicus curiae* brief in the Fourth Department, the official text of the ballot question presented to the voters advised that, pursuant to the then-proposed amendment, “the legislature may *only* amend the redistricting plan if the commission’s plan is rejected *twice* by the legislature.”³ And participants in the public debate on the proposal—including members of the Legislature—repeatedly described the amendment in the same terms. *See* LWV Br. at 9, 19–21.

Placed in this context, the 2014 Amendment makes abundantly clear that the Legislature is not empowered to act in place of the IRC, which the amendment created precisely to curtail the Legislature’s power. If the IRC fails to act, there is a “violation of law” that a court must remedy. That the amendment did not list every single eventuality in which there is a “violation of law” does not make the amendment any less clear as applied here. Constitutional text need not shout to speak clearly—or to merit this Court’s respect. *M’Culloch v. Maryland*, 17 U.S. 316, 407 (1819) (“A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.”).

The situation here recalls an earlier constitutional dispute in this Court’s history, when this Court held, over a two-judge dissent, that the Constitution limited the Legislature’s plenary power even though it did not make express what was necessarily implied. In *Pataki v. New York State Assembly*, 4 N.Y.3d 75 (2004), the central question before this Court was the meaning and scope of the “no-alteration” provision of Article VII, Section 4, which states: “The Legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein.” *Id.* at 83–84 (plurality). As this Court observed, “Several of these sections [of the constitutional amendments adopting executive budgeting] vest certain legislative power in the

² It is on this basis that the plurality held that the 2021 statute allowing the Legislature to act in the event the IRC failed to fulfill its constitutional obligations (L 2021, ch. 633, §1) is not unconstitutional.

³ NYLS Constitutional History, 2014 Ballot Proposal 1, at 15 (hereinafter “Amendment Hist.”) (emphases added). The ballot text is also available at [https://ballotpedia.org/New_York_Redistricting_Commission_Amendment_Proposal_1_\(2014\)](https://ballotpedia.org/New_York_Redistricting_Commission_Amendment_Proposal_1_(2014)).

Governor, creating a limited exception to the rule stated in article III, §4 of the Constitution: ‘The legislative power of this state shall be vested in the senate and assembly.’” *Id.* at 83. The Governor and the Legislature disputed whether various enactments by the Legislature constituted impermissible “alter[ations]” of items of appropriation submitted by the Governor. The dispute arose precisely because the executive budgeting amendments did not expressly address what types of enactments would impermissibly “alter” the items of appropriation submitted by the Governor. The Governor argued that these enactments “violate the plain terms of [the no-alteration provision of article VII, §4.]” *Id.* at 88.

This Court agreed, reasoning that if the no-alteration provision were given the meaning contended for by the Legislature, “it would be a completely formal, ineffectual requirement.” *Id.* at 89. The Court went on to observe:

If the Legislature disagrees with the Governor’s spending proposals, it is free, as the no-alteration clause provides, to reduce or eliminate them; it is also free to refuse to act on the Governor’s proposed legislation at all, thus forcing him to negotiate. But it cannot adopt a budget that substitutes its spending proposals for the Governor’s.

Id. at 91; *see also id.* at 81 (explaining that five members of the Court joined the plurality’s reasoning and conclusion on this issue).

The Court’s reasoning in *Pataki v. Assembly* applies equally here. There, as here, the Constitution plainly limited the Legislature’s plenary power on a specific subject. There, as here, the Constitution established a particular procedure for enactments on that subject—indeed, here the procedure is more elaborate than in *Pataki v. Assembly*. And there, as here, the amendment in question granted the Legislature a limited power as part of that procedure without expressly prohibiting the Legislature from exercising that power to supplant the alternative procedure entirely. Given these circumstances, this Court came to the inevitable conclusion that the Constitution meant what it plainly said in imposing the procedure; the Court thus refused to render that procedure ineffectual. It should do the same here.

Finally, the Fourth Department plurality appeared to rely on the fact that the current Legislature adopted the 2021 statute allowing it to act in place of the IRC after the People rejected, in November 2021, a second constitutional amendment on redistricting that would have granted the Legislature that power. *See Slip Op.* at 4. This line of reasoning is passing strange. Courts typically refuse to accord any interpretive weight to one enactment based on the failure to amend it later. *See, e.g., Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186–87 (1994) (“[F]ailed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute,” because “several equally tenable inferences may be drawn from such inaction[.]”); *Mashnouk v. Miles*, 55 N.Y.2d 80, 87–88 (1982) (“In the face of such conflicting inferences [regarding the meaning of legislative inaction], no particular significance can be attributed to the Legislature’s failure to adopt these amendments.”). In any event, if any conclusion should be drawn from the failure of the 2021 amendment, it is that the People rejected the amendment because they did *not* want to grant the Legislature the very power that it now asserts here. And it is not hard to see why—the failed 2021 amendment would have gutted the process established by the 2014 Amendment that the People actually *did* adopt. The

subsequent 2021 statute sought to achieve the same result; this Court should not permit the Constitution to be so easily subverted.

II. The 2014 Amendment’s Process Provisions Provide Substantive Protections Against Gerrymandering

Lurking behind the plurality’s rejection of a judicial remedy for the undisputed procedural violation here is a want of respect for the procedure the People adopted. Indeed, at the oral argument in the Fourth Department, one of the members of the panel described the IRC process mandated by Constitution as mere “window-dressing.”⁴ Nothing could be further from the truth, and this Court should reaffirm that constitutional procedures may not be disregarded based on subjective assessments of their worth. Indeed, the IRC’s creation and the process for redistricting enacted by the 2014 Amendment reflect this State’s participation in a vital effort across the nation to address the toxic problem of partisan gerrymandering. *See Ariz. State Legislature v. Ariz. Independent Redistricting Comm’n*, 576 U.S. 787, 798 (2015) (noting that “[s]everal . . . States, as a means to curtail partisan gerrymandering, have . . . provided for the participation of commissions in redistricting” and that “[s]tudies report that nonpartisan and bipartisan commissions . . . create districts both more competitive and more likely to survive legal challenge”).

What the current Legislature and the Fourth Department plurality missed is that the redistricting procedure mandated by the Constitution was carefully designed to further substantive goals and values—accountability, deliberation, and some independence from the worst of the partisan political process. *See* LWV Br. at 7–9. Consider, first, that the IRC was designed for accountability and transparency. The IRC’s members are appointed by and are accountable to legislative leaders, who in turn are accountable to the people. On top of that, the IRC must hold public hearings and comply with transparency and data-sharing obligations. And its members’ votes are publicly recorded whenever the IRC is unable to obtain the seven votes needed to approve a map. The IRC is designed both to be accountable and to utilize an independent process meant to make a bipartisan result more likely.

At the same time, the 2014 Amendment requires the Legislature to follow a specifically prescribed procedure in respect of the IRC’s map-drawing. For example, the Legislature must return an up-and-down vote on the IRC’s maps, furthering accountability and placing primary responsibility for the map-drawing in the hands of the IRC. And requiring a second round of back-and-forth between the IRC and the Legislature gives the IRC-driven process (which is more likely to achieve a workable political compromise) yet another opportunity to work. In other words, the 2014 Amendment is more than its substantive prohibition on gerrymandering; the Amendment established procedural requirements that would render gerrymandering *less* likely to happen in the first place, because more difficult and politically costly. Enforcing those procedural requirements would, by contrast, make political negotiation and compromise *more* likely. Here, as in other areas of constitutional law, structural requirements serve substantive

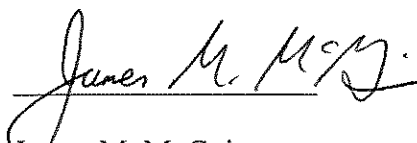
⁴ Recording of Oral Argument at 1:10:19–1:11:09 (Apr.20, 2022), available at <https://ad4.nycourts.gov/njs/term/argument/calendar?date=2022-04-20T00:00:00.000Z&venue=1>.

ends. *Cf. Bowsher v. Synar*, 478 U.S. 714, 730 (1986) (“The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.”).

Thus, to the extent that the Fourth Department was concerned about the Judiciary becoming overly involved in superintending redistricting, that concern should have militated *in favor of* enforcing the Constitution’s prescribed process. Courts are often right to exercise restraint when delicate questions involving politics are presented to it. But this is a situation where, by not enforcing the procedural requirements of the 2014 Amendment according to their plain terms and not imposing the remedies envisioned for a “violation of [that] law,” the Court will invite further persistent judicial involvement in redistricting. That is because refusing to enforce the mandatory process will mean the Legislature will once again have exclusive control over redistricting. That would lead to more extreme and frequent partisan gerrymanders, which would in turn be challenged in court as violations of the anti-gerrymandering prohibition in the 2014 Amendment. The Judiciary would therefore find itself in the position of having to supervise redistricting—as substantive evaluator of maps rather than enforcer of procedural rules—in perpetuity.

On the other hand, enforcing the process the People adopted to encourage political compromise, negotiation, and deliberation will make judicial intervention *less* likely. Once bitten, the members of the IRC and the leaders who appoint them will be twice shy. Such was the calculation the People took in adopting the 2014 Amendment. To be sure, its carefully-specified process does not *guarantee* that the scourge of gerrymandering will be eliminated, but the Judiciary should give that framework a chance to work. The Court would thereby honor the promise of the amendment—an independent redistricting process that conduces to competitive elections rather than protection of incumbents or particular political parties.

Respectfully submitted,



James M. McGuire
Daniel M. Sullivan
Gregory J. Dubinsky

Holwell Shuster & Goldberg LLP
425 Lexington Avenue, 14th Floor
New York, NY 10017

cc: All counsel of record