

Court of Appeals
of the
State of New York

ANTHONY S. HOFFMANN, MARCO CARRIÓN, COURTNEY GIBBONS,
LAUREN FOLEY, MARY KAIN, KEVIN MEGGETT, CLINTON MILLER,
SETH PEARCE, VERITY VAN TASSEL RICHARDS,
and NANCY VAN TASSEL,

Petitioners-Appellants,

For an Order and Judgment Pursuant to Article 78 of the
New York Civil Practice Law and Rules

— against —

THE NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION,
INDEPENDENT REDISTRICTING COMMISSION CHAIRPERSON KEN
JENKINS, INDEPENDENT REDISTRICTING COMMISSIONER ROSS
BRADY, INDEPENDENT REDISTRICTING COMMISSIONER JOHN
CONWAY III, INDEPENDENT REDISTRICTING COMMISSIONER
IVELISSE CUEVAS-MOLINA, INDEPENDENT REDISTRICTING
COMMISSIONER ELAINE FRAZIER, INDEPENDENT REDISTRICTING
COMMISSIONER LISA HARRIS, INDEPENDENT REDISTRICTING
COMMISSIONER CHARLES NESBITT, and INDEPENDENT
REDISTRICTING COMMISSIONER WILLIS H. STEPHENS,

Respondents-Respondents,

(For Continuation of Caption See Inside Cover)

MOTION FOR LEAVE TO FILE AN *AMICUS* BRIEF

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– and –

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FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY,
ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS,
and MARIANNE VIOLANTE,

Intervenors-Respondents.

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ANTHONY S. HOFFMANN, et al.,
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-against-

NEW YORK STATE INDEPENDENT
REDISTRICTING COMMISSION,
Respondents-Respondents,

-and-

TIM HARKENRIDER, et al.,
Intervenor-Respondents.

Docket No:
APL 2023-00121

Third Dept. Appellate Case
No.: CV-22-2265

NOTICE OF MOTION

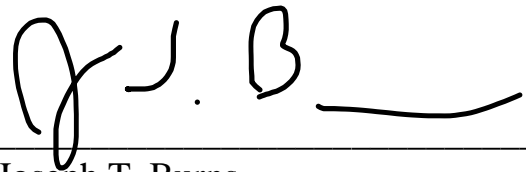
PLEASE TAKE NOTICE that upon the annexed affirmation of Joseph T. Burns and the papers annexed hereto, and upon all prior papers and proceedings had in this case, the undersigned will move this Court, at the courthouse thereof, located at 20 Eagle Street, Albany, New York 12207 on September 18, 2023 at 10am in the morning, or as soon thereafter as counsel may be heard, for an order pursuant to Rules of Practice of the Court of Appeals Rule 500.23(a)(3):

- 1) Granting Lawyers Democracy Fund (LDF) leave to file and serve their required number of copies of an amicus curiae brief (the “Amicus Brief”) in support of the Appeal of Intervenor-Respondents; and 2) For such other and further relief as this Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to the Rules of Practice of the Court of Appeals Rule 500.23(a)(3), the original and one copy of Movant's papers, accompanied by an original amicus brief is filed in addition to submission in digital format.

PLEASE TAKE FURTHER NOTICE that pursuant to Court of Appeals Rule 500.21(c), opposition papers, if any, must be filed on or before the return date of this motion.

Dated: September 8, 2023
Amherst, New York

A handwritten signature in black ink, appearing to read 'J. Burns', written over a horizontal line.

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Rule 500.1(f) Corporate Disclosure Statement

Pursuant to Rules of Practice of the Court of Appeals Rule 500.1(f), Movant Lawyers Democracy Fund hereby discloses it is not a publicly held corporation and that it has no parents, subsidiaries, or affiliates, publicly traded or otherwise.

COURT OF APPEALS
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-and-

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Intervenors-Appellants.

Docket No.:
Albany Cty. Index No.
904972-22

Third Dept. Appellate Case
No.: CV-22-2265

AFFIRMATION OF
JOSEPH T. BURNS IN
SUPPORT OF
MOTION OF
LAWYERS
DEMOCRACY FUND TO
APPEAR AS AMICUS
CURIAE

I, JOSEPH T. BURNS, duly affirm and say:

- 1) I am an attorney at the law firm of the Law Office of Joseph T. Burns, PLLC, counsel for proposed *amicus curiae*, Lawyers Democracy Fund (“LDF”) in this appeal.
- 2) I am a member in good standing of the Bar of the State of New York.
- 3) I submit this affirmation in order to place before the Court this application of LDF to file an *amicus curiae* brief in the above captioned proceeding in support of the appeal filed by Intervenors-Appellants.

4) I submit this affirmation upon information and belief, based upon my familiarity with the work of LDF, a review of the pleadings and papers in this matter, and conversations with my client.

5) Lawyers Democracy Fund is a nonpartisan, 501(c)(4) organization dedicated to advancing ethics, integrity and legal professionalism in the electoral process, including defending the rights of all eligible voters to vote.

6) To further these goals, LDF primarily conducts, funds and publishes research and in-depth analyses of proposals and practices regarding the efficient administration of elections.

7) One example of this work is the issue brief published earlier this year by LDF on ranked-choice voting (<https://lawyersdemocracyfund.org/wp-content/uploads/2023/01/RCV-Issues.pdf>).

8) Last year, LDF published a paper supporting and advocating for commonsense, bipartisan federal election reforms (<https://lawyersdemocracyfund.org/wp-content/uploads/2022/01/Modest-Proposals-for-Bipartisan-Federal-Election-Reform-1.pdf>).

9) LDF frequently provides expert analysis of election-related proposals passed by state legislatures.

10) For instance, LDF, in 2022, published a paper on Election Day (or same day) voter registration in the State of Montana

<https://lawyersdemocracyfund.org/wp-content/uploads/2022/05/Montana-EDR-Repeal---Final-1.pdf>).

11) Also in 2022, LDF conducted and published an extensive analysis of Iowa's 2021 election law reforms (<https://lawyersdemocracyfund.org/wp-content/uploads/2022/03/Iowas-New-Voting-Laws-Fact-Sheet.pdf>).

12) In addition to this work, LDF periodically engages in public interest litigation where appropriate to defend the rule of law in election administration.

13) LDF, as *amicus curiae*, submits briefs in cases to provide a voice and perspective in support of integrity and professionalism in the administration of elections.

14) For instance, LDF submitted briefs in support of voter identification requirements in *Crawford v. Marion County*, 553 U.S. 181 (2008) and *N.C. NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

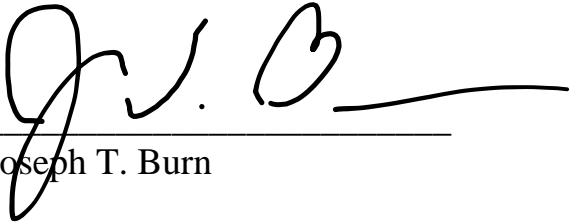
15) The proposed brief would be of assistance to the Court given LDF's work and expertise in the field of election administration. While the parties are competent, they are focused on issues beyond the "nuts and bolts" of conducting elections in New York State; LDF has the ability to identify the practical issues that will impact New York State's local Boards of Elections, election administrators, and voters in 2024.

16) LDF appears so that it may offer its unique perspective on efficient and effective election administration and not simply to duplicate the arguments made by counsel for the parties.

17) On behalf of LDF, I respectfully request this Court grant LDF's motion to file the accompanying brief as *amicus curiae*.

WHEREFORE, it is respectfully requested that this Court issue an Order granting Lawyers Democracy Fund's motion to appear as *amicus curiae* with respect to appeal of the Intervenors-Appellants.

Dated: September 8, 2023



Joseph T. Burn

Attachment 1

Court of Appeals
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REDISTRICTING COMMISSIONER WILLIS H. STEPHENS,

Respondents-Respondents,

(For Continuation of Caption See Inside Cover)

**BRIEF OF LAWYERS DEMOCRACY FUND AS *AMICUS CURIAE*
IN SUPPORT OF INTERVENORS-RESPONDENTS**

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RULE 500.1(F) CORPORATE DISCLOSURE STATEMENT

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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Lawyers Democracy Fund (“LDF”) is a 501(c)(4) non-profit organization dedicated to promoting ethics, professionalism, and integrity in elections. To advance these goals, LDF conducts research into proposed changes in election laws, provides analyses of proposed legislation to state legislatures and Congress, engages in public interest litigation to defend integrity in elections, and submits *amicus curiae* briefs in support of rational election regulation and free exercise of the franchise.

LDF submitted *amicus curiae* briefs in Moore v. Harper, 600 U.S. ____ (2023) and Allen v. Milligan, 599 U.S. ____ (2023), two redistricting-related cases decided by the U.S. Supreme Court earlier this year.

To support its mission of integrity in elections and election administration, LDF provides information to state legislatures and Congress. LDF’s Executive Director recently testified at a hearing of the House Administration Committee’s Subcommittee on Elections on ensuring that Americans have confidence in our election system. LDF has also produced analyses of major voting reforms recently enacted in Florida, Georgia and Iowa.

LDF is a national voice in favor of competent and efficient election administration, and LDF has the unique ability to provide insight on a number of major election administration concerns New York State may face should this Court

affirm the decision of the Appellate Division, Third Department and allow a second Congressional redistricting in 2024.

SUMMARY OF THE ARGUMENT

This Court must consider whether a second Congressional redistricting in 2024 is constitutionally compelled or could be accomplished consistent with election integrity and fair exercise of the franchise. Indeed, forcing a second redistricting process from scratch – i.e., compelling the Independent Redistricting Commission (“IRC”) to reconvene, forcing another round of partisan legislative action, and triggering yet another round of litigation – is not a prudential or constructive remedy to the procedural flaw identified in the first redistricting process. (Matter of Harkenrider v. Hochul, 38 N.Y.3d 494, 515-517 [2022]). In fact, such a remedy would disrupt the 2024 election, stress election administration, and likely disenfranchise voters in violation of countervailing state and federal constitutional protections. Therefore, the Court must reverse the decision of the Appellate Division, Third Department.

New York State’s electoral system has undergone a number of significant changes in recent years. This includes everything from early voting to public campaign financing to an entirely new process for canvassing absentee ballots. New York’s local election boards — which have received widespread criticism for decades — frequently have struggled to implement and administer these reforms.

Should this Court affirm the decision of the Appellate Division and compel yet another round of Congressional redistricting, New York State’s ability to fairly, competently, and effectively administer its 2024 elections — including two primary elections — will be extended beyond its limits.

Furthermore, the existing Congressional district map — which produced some of the most competitive House races in the county in 2022 — serves the intentions of the people of New York State when they adopted the redistricting reform amendment in 2014. Discarding it would thwart the will and intention of the voters when they overwhelmingly voted in favor of the 2014 redistricting reform amendment.

In Harkenrider, this Court ordered not a second redistricting but rather a judicial remedy. *Id.* at 523-524. The Court found the “procedural unconstitutionality” of the congressional district map “incapable of a legislative cure” because “[t]he deadline in the Constitution for the IRC to submit a second set of maps has long since passed.” *Id.* at 523. That deadline cannot be revived just to benefit one political party that desires a second chance. The judicially drawn plan issued on remand resulted in a non-partisan, fair and competitive congressional district map for the people of New York. It was not appealed. It should not be discarded lightly.

Moreover, a tardy re-do at this late date (the 2024 election procedures begin five months from now, in February) would severely disrupt New York elections for many years to come at great expense to election integrity and voters. This Court declined to follow the federal anti-disruption principle set forth in Purcell v. Gonzalez, 549 U.S. 1 (2006), because, as this Court observed, it was facing a *substantively* unconstitutional redistricting plan. *Id.* at n. 16 & n. 18 (“Delaying a remedy until the next election would substantially undermine the people’s efforts to temper partisan gerrymandering.... Delaying a remedy in this election cycle—permitting an election to go forward on unconstitutional maps—would set a troubling precedent for future cases raising similar partisan gerrymandering claims, as well as other types of challenges, such as racial gerrymandering claims.”). Here, however, the district plan in place is substantively constitutional. Therefore, there is no compelling need to disrupt democratic elections and confuse or disenfranchise voters in an election that is scheduled to begin in less than five months – in February 2024.

For these reasons, this Court must reverse the decision of the Third Department and preserve New York’s Congressional district map.

ARGUMENT

POINT I

A 2024 REDISTRICTING WOULD BE IMPRACTICAL — AND MAYBE IMPOSSIBLE — FOR NEW YORK’S ELECTION BOARDS TO ADMINISTER

A. Recent major Election Law reforms make a 2024 redistricting difficult, if not impossible, for local election boards to conduct.

Should this Court order the Independent Redistricting Commission and the State Legislature to conduct another round of Congressional redistricting for the 2024 election, it will have to be done while New York’s election boards are already working to implement a number of major changes to the Election Law that have been imposed upon them in recent years. Running elections in 2024 — a presidential election year — while also making the changes required to deal with new Congressional districts is impractical — if not impossible — for New York’s election boards.

Starting in early 2019, the state legislature, both houses of which were now under the control of one political party, began enacting sweeping changes to the Election Law.¹ Local boards of elections are still working to change their practices to conform to these reforms and a number of other reforms enacted since then.

¹ Joseph Spector, *Voting in New York: Five major changes are coming soon*, Rochester Democrat and Chronicle, Jan. 11, 2019, available at <https://www.democratandchronicle.com/story/news/politics/albany/2019/01/11/voting-new-york->

At the beginning of 2019, the Election Law was amended to provide for early voting before all primary and general elections (Chapter 6 of the Laws of 2019). Under this change in the Election Law, local boards of elections are required to provide ten days of early voting before each primary, special, and general election (Election Law 8-600[1]). Early voting has not always gone as smoothly as the proposal's champions would have had you believe.² Earlier this summer, the Brennan Center and Disability Rights New York published a scathing report criticizing New York's election administrators for failing to ensure disabled New Yorkers could access early voting and early voting poll sites.³ This Brennan

[five-major-changes-coming/2547955002/](https://www.nytimes.com/2019/01/14/nyregion/democrat-ny-albany-control.html) (last accessed Aug. 18, 2023); Jesse McKinley and Vivian Wang, *With New Voting Laws, Democrats Flex Newfound Power in New York*, NY Times, Jan. 14, 2019, available at <https://www.nytimes.com/2019/01/14/nyregion/democrat-ny-albany-control.html> (last accessed Aug. 18, 2023).

² Edgar Sandoval, Troy Closson, and Nate Schweber, *Lines Stretch for Blocks as New Yorkers Turn Out for Early Voting*, NY Times, Oct. 24, 2020, available at <https://www.nytimes.com/2020/10/24/nyregion/new-york-early-voting.html> (last accessed July 28, 2023); Nolan Hicks, Rachel Green, Reuben Fenton, and Carl Campanile, *NYC Board of Elections way understaffed at large-volume early voting sites*, NY Post, Oct. 28, 2020, available at <https://nypost.com/2020/10/28/board-of-elections-understaffed-at-large-volume-early-voting-sites/> (last accessed July 28, 2023).

³ Susan Arbetter, *Report: Access to early voting places falls short for people living with disabilities*, Spectrum News 1, Aug. 11, 2023, available at <https://spectrumlocalnews.com/nys/central-ny/politics/2023/08/11/report--access-to-early-voting-places-falls-short-for-people-living-with-disabilities> (last accessed Aug. 18, 2023); Hazel Millard and Derek Tisler in collaboration with Disability Rights New York, *How to Make Early Voting More Accessible in New York*, Brennan Center for Justice and Disability Rights New York, Aug. 10, 2023, available at <https://www.brennancenter.org/media/11504/download> (last accessed Aug. 18, 2023).

Center report makes it clear that New York’s local election boards still have much work to do in implementing an election reform that is already four years old.

On the same day the early voting legislation was signed into law, the Governor signed into law a bill moving New York State’s state and local primary to June so that it would be held on the same day as New York’s federal primary election (Chapter 5 of the Laws of 2019). This reform came after almost a decade of New York State having separate state and federal primary elections.⁴

More recently, an automatic voter registration (AVR) system was enacted in New York State (Chapter 350 of the Laws of 2020). This system would register voters if and when they interact with certain government agencies, and if the proposal’s supporters are correct, this will result in a large number of eligible — but unregistered — voters being registered to vote. Even before the AVR bill was signed into law, critics were claiming it would remove traditional election security provisions and open the door for illegal immigrants to register to vote.⁵ Starting in

⁴ Nicole Brown, *Why does New York have multiple primary elections?* *NYCurious*, amNY, Sept. 12, 2018, available at <https://www.amny.com/news/primary-elections-ny-1-19901084/> (last accessed Aug. 18, 2023).

⁵ Nick Reisman, *Cuomo Signs Automatic Voter Registration Measure*, *Spectrum News* 1, Dec. 22, 2020, available at <https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2020/12/22/cuomo-signs-automatic-voter-registration-measure> (last accessed July 28, 2023).

2024, local election boards will be responsible for navigating the new AVR system and the registration of a flood of new voters because of AVR.

Even the ballot access process — a part of New York State’s Election Law that is often criticized for being “antiquated” or “byzantine” — has undergone some radical changes. Election boards are still figuring out how to deal with these changes. New York’s historically lengthy waiting period for party enrollment changes was dramatically shortened in 2019 (Chapter 316 of the Laws of 2019). While this may appear — from the perspective of an election administrator — to make life simpler, it does not appear to have had that effect. In fact, it may have had the opposite effect and may have resulted in new types of partisan fights and increased litigation.⁶ Election boards are dragged into these political squabbles and required to spend time and resources while this litigation is ongoing.

More recently, a reform of the process for objecting to candidate petitions was enacted into law (Chapter 744 of the Laws of 2022). While the authors of this legislation may have intended that it “standardize” objections to candidate petitions

⁶ Brian Sharp, *Conservative coup or election choice? Judge orders 21 ‘party raiders’ in Rush dis-enrolled*, Rochester Democrat and Chronicle, June 9, 2021, available at <https://www.democratandchronicle.com/story/news/politics/elections/2021/06/09/rush-ny-primaries-conservatives-third-party-candidates-monroe-county/7615674002/> (last accessed July 28, 2023); Patrick Lakamp, *Unwelcome voters: Conservative leaders sue to oust new enrollees ‘not in sympathy’ with party*, The Buffalo News, June 23, 2023, available at https://buffalonews.com/news/local/govt-and-politics/unwelcome-voters-conservative-leaders-sue-to-oust-new-enrollees-not-in-sympathy-with-party/article_9c972322-0ece-11ee-aec5-2bcbae55aa6d.html (last accessed July 28, 2023).

in New York State across every local election board, the reality is that it imposed new mandates and increased administrative responsibilities on election administrators.

In sum, forcing election boards to cope with an additional change in Congressional district boundaries while those boards are also learning how to deal with complicated and historic amendments to the Election Law sets up hardworking, well-intentioned election officials for failure and voters with the prospect of disenfranchisement.

B. The 2024 political calendar will make it impractical if not impossible for local election boards to conduct a second Congressional redistricting in 2024.

Juggling recent Election Law changes, administering the 2024 elections, and making changes necessary to run elections on new Congressional districts will be difficult if not impossible for New York's elections boards in 2024 should this Court affirm the decision of the Third Department. New York's 2024 political calendar would make this task — even under the best of circumstances — even more difficult.

Election Law Section 8-100(1)(a) requires the 2024 primary election to be held on June 25, 2024. Early voting for this primary election will be held from June 15 to June 23 (Election Law Sec. 8-600[1]). Under Election Law Sec. 8-400(2)(c), election boards may receive mailed absentee applications for the 2024

primary election up to June 18, 2024, and Election Law Sec. 8-400(2)(c) allows voters to apply in person for absentee ballots up to June 24, 2024, the day before the 2024 primary election.

A key part of running elections in New York State is administering the ballot access process for candidates. Under Election Law Sec. 6-134(4), the first day for candidates for Congress in 2024 to have their designating petitions signed is **February 27, 2024**. Election administrators, candidates and campaigns, political parties, and voters need to know the congressional district lines no later than this date. These designating petitions would be filed at the appropriate board of elections between April 1, 2024, and April 4, 2024 (Election Law Sec. 6-158[1]). Independent candidates may start to have their nominating petitions signed on April 16, 2024 (Election Law Sec. 6-138[4]). These petitions would be filed between May 21, 2024, and May 28, 2024 (Election Law Sec. 6-158[9]).

A key — and often very contentious — part of New York’s ballot access process occurs after candidate petitions are filed and voters, as citizen objectors, have the opportunity to invalidate candidate petitions. A candidate may have his or her petition invalidated by a board of elections after a board receives General and Specific Objections (Election Law Sec. 6-154). This cumbersome process can go for weeks (and sometimes longer).

In addition to having their petitions invalidated by an election board, candidates may also have their petitions challenged through a proceeding to invalidate in New York State Supreme Court (Election Law Sec. 16-102). Those seeking to invalidate candidate petitions have until fourteen days after the last day to file petitions to institute a proceeding to invalidate in Supreme Court (Election Law Sec. 16-102[2]).

Allowing this always complicated ballot access process to take place while uncertainty remains on the boundaries of Congressional districts is unfair to election administrators, candidates and, most importantly, voters. Allowing the 2024 ballot access process to occur under new Congressional district maps or with new maps that have been challenged or are in the process of being challenged is not just unfair; it is unworkable as well.

C. Requiring election boards to conduct the 2024 presidential primary while also undertaking another Congressional redistricting is not feasible.

On June 8, 2023, both houses of the state legislature passed bills that establish a presidential primary election to be held on April 2, 2024 (A.7690/S.7550). It is safe to assume the Governor will sign this bill, and April 2, 2024, would, therefore, become the date for both major political parties to hold their presidential primary elections.

Having April 2, 2024, as the date of both major parties' presidential primary while also undertaking another Congressional redistricting is a recipe for electoral chaos. The political calendar established by bill A.7690/S.7550 adds to the problems already facing election boards should they be forced to deal with another round of Congressional redistricting.

Assuming bill A.7690/S.7550 is signed into law, a number of key election board duties related to the presidential primary will fall at a time in the year that will make it difficult if not impossible for election administrators to perform these tasks while also conducting another Congressional redistricting. For instance, voters seeking to vote in the presidential primary must have their registration postmarked by March 18, 2024, and the registration must be received by an election board by March 23, 2024 (Election Law Sec. 5-210[3]). For voters seeking to vote in the presidential primary who register in person, registrations must be made by March 23, 2024, as well (Election Law Sections 5-210, 5-211 and 5-212). The last day to postmark and absentee application to vote in the presidential primary is March 26, 2024, and the last day to apply in person for an absentee ballot is April 1, 2024 (Election Law Sec. 8-400[2][c]). Finally, the period for early voting for the presidential primary runs from March 23, 2024, to March 31, 2024 (Election Law Sec. 8-600[1]).

It should also be noted that this entire period leading up to the 2024 presidential primary is occurring during the previously discussed ballot access period for the 2024 primary and general elections. The presidential primary even occurs during the four days of designating petition filing for candidates for the 2024 primary and general elections (Election Law Sec. 6-158[1]). Should this Court affirm the decision of the Third Department, boards of elections will, simultaneously, be running a presidential primary election (including the processing and canvassing of absentee ballots) and a ballot access process for candidates for the 2024 primary and general elections (including objections and litigation associated with those petitions) while also conducting a redistricting of the Congressional districts. Even the most competent election administrator at the most efficiently run and well-funded election board would have a difficult time performing all of these tasks flawlessly. New York's election administrators will have a difficult time conducting a presidential primary election while also overseeing the ballot access process for the 2024 primary and general elections. Adding Congressional redistricting to this may make it impossible for these election administrators to simply follow the requirements of the Election Law and do their jobs, risking that some voters will be disenfranchised when a part of one of these many processes breaks down.

POINT II

PERSISTENT DYSFUNCTION IN NEW YORK STATE’S ELECTION BOARDS WILL BE EXACERBATED BY A MID-DECADE REDISTRICTING AND LIKELY RESULT IN MAJOR ELECTION ADMINISTRATION FAILURES

Arguably, the deadlines set in the New York Constitution have passed, and there is no provision that allows a mid-decade redistricting or successive lawsuits triggering additional, never-ending redistricting rounds. Harkenrider, 38 N.Y.3d at 523 (“The deadline in the Constitution for the IRC to submit a second set of maps has long since passed.”). Article III, Section 4(e) of the New York State Constitution requires that the 2022 court-ordered maps remain in effect until after the next census. Had Petitioners desired mandamus relief to compel the IRC to act on a second set of maps, they should have filed a timely mandamus action years ago. But they sat on their hands (*see* Matter of Amedure v. State of New York, 210 A.D.3d 1134 [3d Dep’t 2022]; Cantrell v. Hayduk, 45 N.Y.2d 925 [1978]). Belatedly, they seek mandamus relief in the form of a mid-decade redistricting process – which would be wholly extra-constitutional. And there are good reasons why the New York Constitution does not provide for such ongoing redistricting procedures, and why this Court should not create such a provision through judicial fiat.

Rightly or wrongly, the words “incompetence” and “ineptitude” have long been associated with election administration in New York State. Commentators from across the political spectrum — and even some from across the globe — have heaped criticism on New York State’s election administrators.⁷ It is not hard to imagine that there might be more than a few kernels of truth in these criticisms. Imposing new Congressional districts on New York State and saddling New York’s already troubled elections boards with new districts and new responsibilities every two years for a decade opens the door for electoral chaos and further voter disenchantment.

New York State’s electoral dysfunction may have reached its peak during the ballot counting of Congressional district 22 after the 2020 election. While Election Day in 2020 was on November 3, this contest was not decided until February 5, 2021, when Claudia Tenney was declared the winner over Anthony Brindisi by 109 votes.⁸ This was over a month after Members of Congress take their seats (U.S. Constitution, 20th Amend., Section 1). It was more than two months after the

⁷ *Why is New York so bad at running elections?*, The Economist, Feb. 11, 2021, available at <https://www.economist.com/united-states/2021/02/11/why-is-new-york-so-bad-at-running-elections> (last accessed July 28, 2023).

⁸ Luis Ferre-Sadurni, *Last Undecided House Race Finally Goes to Republican, by 109 Votes*, NY Times, Feb. 5, 2021, available at <https://www.nytimes.com/2021/02/05/nyregion/claudia-tenney-brindisi-election.html> (last accessed July 28, 2023).

Commissioners of the New York State Board of Elections voted to certify the results of the 2020 General Election.⁹

The legal and political fight over Congressional district 22 that occurred after Election Day 2020 opened many New Yorkers’ eyes to the problems plaguing New York’s election boards. The problems in Congressional district 22 began with objections to absentee ballots being noted — improperly under the Election Law — on “sticky notes” that were later lost before the ballots could be reviewed by the Court.¹⁰ While the “sticky note” issue was a very embarrassing error, it was minor compared to other mistakes uncovered during the post-election ballot count of Congressional district 22. As the ballot count progressed, it was discovered that one county board of elections had failed to process approximately 2,400 voter registrations that arrived through the New York State Department of Motor Vehicles, meaning that any of these these voters who wanted to vote in the 2020 general election would have only been able to vote by affidavit ballot.¹¹

⁹ New York State Board of Elections 2020 Certified Election Results, available at <https://www.elections.ny.gov/2020ElectionResults.html> (last accessed July 28, 2023).

¹⁰ Mark Weiner, *Absentee ballots in limbo over lost sticky notes in Brindisi-Tenney House race*, Syracuse Post-Standard, November 23, 2020, available at <https://www.syracuse.com/politics/2020/11/absentee-ballots-in-limbo-over-lost-sticky-notes-in-brindisi-tenney-house-race.html> (last accessed July 28, 2023).

¹¹ Steve Howe, *NY22: 2,400 voter registration forms were not processed in Oneida County*, Utica Observer-Dispatch, Jan. 8, 2021, available at <https://www.uticaod.com/story/news/politics/elections/national/2021/01/08/anthony-brindisi-claudia-tenney-ny-22-2400-not-registered-oneida/6589449002/> (last accessed July 28, 2023).

Fortunately, the Court ordered that these voters be registered and their affidavit ballots be canvassed (*see Tenney v. Oswego County Board of Elections*, 71 Misc.3d 385 [Oswego County Sup. Ct. 2021]). The fact remains, however, that this was a major error by an election board. This error was so egregious that it led to calls for the election commissioners of the county in question to resign or be removed from office by the Governor.¹² The commissioners, wisely, resigned before they were removed.¹³

Were the 2020 race for Congressional district 22 not as close as it was, it's unlikely that many — and probably any — of the mistakes made by election officials would have ever been uncovered. Some have even suggested that the election board failures in Congressional district 22 were even deeper than what was uncovered.¹⁴ The election boards in Congressional district 22 received a tremendous amount of well-deserved criticism for how they conducted the 2020

¹² Bill Mahoney, *Support grows for Cuomo to remove election officials over Tenney-Brindisi snafu*, Politico, Feb. 10, 2021, available at <https://www.politico.com/states/new-york/city-hall/story/2021/02/10/support-grows-for-cuomo-to-remove-election-officials-over-tenney-brindisi-snafu-1362662> (last accessed July 28, 2023).

¹³ Steve Howe, *NY22: Oneida County election commissioners resign after errors, calls for removal*, Utica Observer-Dispatch, Feb. 17, 2021, available at <https://www.uticaod.com/story/news/local/2021/02/17/ny-22-oneida-county-election-officials-resign-after-errors/6781114002/> (last accessed July 28, 2023).

¹⁴ Mark Weiner, *Voting rights group: Problems in Brindisi-Tenney House race worse than reported*, Syracuse Post-Standard, May 3, 2021, available at <https://www.syracuse.com/politics/2021/05/voting-rights-group-problems-in-brindisi-tenney-house-race-worse-than-reported.html> (last accessed July 28, 2023).

election, but the issues facing New York’s system of election administration are far wider and deeper.

The errors that occurred in the 2020 Brindisi-Tenney House race happened at election boards in relatively small, rural counties in Upstate New York. Similar issues — and maybe even bigger issues — have long plagued the New York City Board of Elections. Decades of incompetence, malfeasance, and outright corruption at the New York City Board of Elections have been well documented.¹⁵ In recent years, high ranking NYCBOE administrators have been hit with fines¹⁶ after being exposed for violating ethics rules.¹⁷ Former New York City Board of Elections officials have harshly criticized their former colleagues and even complained that many NYCBOE employees are more interested in getting high on

¹⁵ Brian M. Rosenthal and Michael Rothfeld, *Inside Decades of Nepotism and Bungling at the N.Y.C. Elections Board*, NY Times, Oct. 26, 2020, available at <https://www.nytimes.com/2020/10/26/nyregion/nyc-voting-election-board.html> (last accessed July 28, 2023).

¹⁶ Courtney Gross, *Conflict of Interest Board Fines City Elections Head After NY1 Report*, Spectrum News 1, June 25, 2020, available at <https://spectrumlocalnews.com/nys/hudson-valley/news/2020/06/25/conflicts-of-interest-board-fines-boe-head-after-ny1-report> (last accessed July 28, 2023).

¹⁷ *How NYC’s Board of Elections Boss Has Benefited from a Voting Machine Manufacturer*, Spectrum News NY 1, available at <https://www.ny1.com/nyc/all-boroughs/politics/2018/12/03/mike-ryan-nyc-board-of-election-boss-is-on-the-board-for-election-systems-and-software> (last accessed Aug. 6, 2023).

the job than actually administering elections.¹⁸ One borough election board even mailed out 100,000 faulty absentee ballots in the weeks leading up to the 2020 presidential election.¹⁹ A few years earlier, this same borough elections board illegally purged 100,000 voters from its voter registration database.²⁰ This mishap was later the subject of an investigation by the New York State Attorney General.

More recently, the New York City Board of Elections was roundly — and rightfully — criticized for problems with its first use of ranked-choice voting at the 2021 primary election.²¹ In tallying votes for the Democratic primary for New York City Mayor, the city election board reported numbers in the multiple rounds of ranked-choice voting before having some of those numbers disappear; it was later determined that the city election board mistakenly counted approximately

¹⁸ Julia Marsh and Carl Campanile, *NYC elections staffer accused of watching Netflix, smoking pot on the job*, New York Post, Oct. 26, 2020, available at <https://nypost.com/2020/10/26/city-elections-board-staffers-called-netflix-watching-pot-smoking-mess/> (last accessed Aug. 6, 2023).

¹⁹ *Error leaves thousands in NYC with flawed absentee ballots*, The Associated Press, Sept. 29, 2020, available at <https://www.nbcnews.com/politics/2020-election/some-nyc-get-absentee-ballots-wrong-return-address-n1241362> (last accessed Aug. 6, 2023).

²⁰ Ella Nilsen, *Why New York City voter rolls were missing names again, explained*, Vox, Sept. 18, 2018, available at <https://www.vox.com/2018/9/13/17855254/new-york-city-voters-rolls-purges-missing-names-2018-midterms> (last accessed Aug. 6, 2023).

²¹ David Freedlander, *Confusion Is Winning the Race for Mayor*, New York Magazine, June 29, 2021, available at <https://nymag.com/intelligencer/2021/06/nyc-mayoral-race-results-2021-board-of-elections-confusion.html> (last accessed Aug. 6, 2023).

135,000 test ballots.²² Accidentally adding over 100,000 ballots to an election count is not something a competent, well-functioning election office would do.

Calls for reforming the scandal-plagued New York City Board of Elections are not new. Respected editorial boards have called for a major overhaul of the New York City Board of Elections.²³ Think tanks on the right²⁴ and the left²⁵ have urged state lawmakers to reform the New York City Board of Elections.

In spite of the many scandals and calls for reform, state lawmakers have done little to change how election boards are structured or how the entire system operates. While a number of reform bills have been proposed, most if not all of them have died in the state legislature. In 2023, state lawmakers failed to approve a proposal prohibiting election commissioners from holding most other public or party offices (A.3331/S.614 of 2023). A proposal to require mandatory training

²² Katie Glueck, *New York Mayor's Race in Chaos After Elections Board Counts 135,000 Test Ballots*, NY Times, June 29, 2021, available at <https://www.nytimes.com/2021/06/29/nyregion/adams-garcia-wiley-mayor-ranked-choice.html> (Aug. 6, 2023).

²³ *Reform New York City's Board of Elections Now*, NY Times, Oct. 30, 2021, available at <https://www.nytimes.com/2021/10/30/opinion/nyc-elections-board-reform.html> (last accessed Aug. 6, 2023).

²⁴ John Ketcham, *NYC Electoral Reform: How to Increase Political Competition and Revitalize Local Democracy*, Manhattan Institute, August 2022, available at https://media4.manhattan-institute.org/sites/default/files/NYC_Electoral-Reform.pdf (last accessed Aug. 6, 2023).

²⁵ Joanna Zdanys, Hazel Millard, Chisun Lee, Derek Tisler and Martha Kinsella, *How to Fix the New York City Board of Elections*, Brennan Center for Justice, Sept. 9, 2021, available at <https://www.brennancenter.org/media/8120/download> (last accessed Aug. 6, 2023).

and establishing a training curriculum for election commissioners passed the State Senate in 2023 but was never even introduced in the State Assembly (S.617 of 2023). The same is true for a bill that would allow the New York State Board of Elections to remove a commissioner of a local election board for incompetence or misconduct; it passed the State Senate in 2023 but was never even introduced in the State Assembly (S.585 of 2023). Finally, a proposal to completely overhaul the structure of the troubled New York City Board of Elections passed the State Senate in 2023 but never made it out of committee in the State Assembly (A.662/S.619 of 2023). Even with all the well-documented problems plaguing New York's election boards, it does not appear that reform of these entities and improvement of the system is a significant concern of state lawmakers.

Unfortunately, to say that election administration in New York State is subpar would be an understatement. Observers and critics from across the state and across the political divide would undoubtedly agree that New York's electoral system fails many of its tests. Should this Court order the Independent Redistricting Commission and state legislators to enact new Congressional districts, New York State's beleaguered elections boards will have little time to move voters into the appropriate districts, conduct the ballot access process, process absentee ballot applications, send absentee ballots, run early voting, and conduct a primary election. Many New York State election boards have

consistently shown themselves to be unable to competently carry out even their most basic functions. Requiring election boards to run primary and general elections on new Congressional district lines in 2024 is a recipe for chaos and disaster.

New York's voters' right to vote is protected by Article I, Section 1 and Article II, Section 2 of the New York State Constitution. Should New York's election boards bungle the 2024 election because of a rushed and chaotic second round of Congressional redistricting, it will be voters who will be harmed when their right to vote is compromised.

POINT III

ALLOWING A MID-DECADE REDISTRICTING REOPENS THE POSSIBILITY OF ADDITIONAL LEGAL CHALLENGES TO A NEW CONGRESSIONAL MAP WHICH MAY RESULT IN A BOTCHED 2024 BALLOT ACCESS PROCESS AND 2024 ELECTION

Should the Court of Appeals allow the Independent Redistricting Commission to draw new Congressional maps, the redistricting process is not likely to end when the state legislature approves and the Governor signs those maps into law. That will only be the beginning of the process. What New Yorkers are likely to experience is a replay of the 2022 redistricting process with all its twists, turns, and tumult.

Should the Court of Appeals compel a second round of Congressional redistricting, it is a near certainty that litigation will follow the Governor signing those maps into law. Anyone who remembers the 2022 process and its upheaval of the primary election and political calendar should want to avoid at all costs a replay of it. Additional legal challenges will necessarily prolong the disruption into 2026 and 2028, just in time for a new census. It would be better for voters and the democratic process to stick with the constitutional maps already in place.

After the 2022 decision of this Court in Harkenrider, dramatic and disruptive alterations to New York's political calendar and electoral process needed to take place to allow for the adoption of new Congressional and State Senate district maps. Acting Supreme Court Justice McAllister ordered the new districts on May 21, 2022 (NY St Cts Elec Filing [NYSCEF] Doc No. 670, decision and order). This was approximately five weeks before primary day 2022 (Election Law Sec. 8-100[1][a]). These new districts were adopted after the certification of candidates for primary ballots (Election Law Sections 4-110 and 4-114). Because of the late change to State Senate and Congressional district maps, holding State Senate and Congressional primary elections in June 2022 on new district maps was simply not possible.

After the Court of Appeals decision and before the new districts were ordered, Acting Supreme Court Justice McAllister, to accommodate the coming

changes, ordered a radically new political calendar, primary election day, and ballot access process for Congressional and State Senate races (NY St Cts Elec Filing [NYSCEF] Doc No. 524, order). The new court-ordered political calendar established August 23, 2022, as the new primary day for Congressional and State Senate candidates (NYSCEF Doc No. 524 at 2). The Court then established two new and different methods of ballot access for candidates — one for previously filing candidates for Congress or State Senate and one for new candidates for Congress or State Senate (NYSCEF Doc. No. 524 at 2, 3, 4).

The new court-ordered process with a new primary day and two new processes for getting candidates onto the ballot contained some flaws. Most notably, the original court-ordered calendar inadvertently allowed voters to switch their party enrollment up to and including the day of the 2022 Congressional and State Senate primary.²⁶ Allowing an ineligible voter to switch their party enrollment and qualify to vote in the primary election the day before the primary would, arguably, run afoul of the voter registration requirements of the New York State Constitution (NY Const, art II, Sec. 5). With less than a week to go before the start of early voting for the Congressional and State Senate primary, the New

²⁶ Ben Tsujimoto, *New York Redistricting Allows Voters to Change Party Affiliation*, The Buffalo News, Aug. 1, 2022, available at <https://www.governing.com/now/new-york-redistricting-allows-voters-to-change-party-affiliation> (last accessed Aug. 6, 2023).

York State Board of Elections was forced to bring this issue to the attention of Acting Supreme Court Justice McAllister and request that he correct this error by imposing an enrollment change cutoff for the primary election (NYSCEF Doc. No. 699). A day after receiving the State Board of Elections' request, Acting Supreme Court Justice McAllister imposed an enrollment change cutoff for the primary to uphold the spirit of the Election Law's safeguard against "party raiding" (NYSCEF Doc. No. 700).

The party enrollment change problem was not the only mishap the Court needed to address after changing primary day for Congressional and State Senate candidates and radically altering the political calendar. A request from minor political parties and independent candidates to extend the time for independent nominating petition circulation and decrease the independent nominating petition signature requirements was considered and rejected by the Court (NYSCEF Doc. No. 694). Additionally, even after the Court ordered the new maps in May 2022, additional changes to these maps had to be made and ordered in June 2022 (NYSCEF Doc. No. 696).

Twenty twenty-two's messy and chaotic experience with redistricting is likely to happen again if this Court allows a second round of Congressional redistricting to proceed. Protracted litigation over a newly drawn Congressional map is almost a certainty. Like the 2022 litigation, this future litigation could

result in the Courts finding a new map to be unconstitutionally gerrymandered. New Yorkers would then see another massive upending of the political calendar and ballot access rules. These monumental and last-minute changes in how our elections are conducted do nothing to build New Yorkers' confidence in our electoral system and instead risk actual disenfranchisement. The Court must not allow this to happen again.

POINT IV

IN ADOPTING THE 2014 REDISTRICTING REFORM AMENDMENT, THE VOTERS INTENDED A FAIR, NONPARTISAN, NONPOLITICAL REDISTRICTING PROCESS AND THIS WAS FULFILLED WITH THE CONGRESSIONAL MAP ORDERED BY THE COURTS IN 2022

Prior to the adoption by the voters of the 2014 redistricting reform amendment to the New York State Constitution, New York's redistricting process was plagued by dysfunction and partisan dealmaking. In multiple rounds of redistricting over multiple decades, state legislative standoffs and stalemates resulted in repeated federal judicial involvement in the redistricting process (*see Favors v. Cuomo*, 2012 WL 928223 [E.D.N.Y. 2012]; *Rodriguez v. Pataki*, 2002 WL 1058054 [S.D.N.Y. 2002]; *Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, 796 F.Supp. 681 [E.D.N.Y. 1992]). A decade before the 2014 amendment was adopted by the voters of New York, a good government organization found the New York State Legislature to be the most dysfunctional in

the country.²⁷ Four years later, that same good government organization found little to no change in how the state legislature operated.²⁸

In the early years of the previous decade, however, things began to change. The most noteworthy change to how Albany operated was the passage of the redistricting reform amendment by two separately elected state legislatures followed by the adoption of this amendment by the voters at the 2014 general election.

There was no mistake as to what this amendment did or what kind of effect it was intended to have on the state's political class and how Albany operated. The then-Governor, who was also reelected in 2014, backed and urged approval of the 2014 redistricting reform amendment.²⁹ Widely respected advocacy organizations like Citizens Union and the League of Women Voters endorsed the 2014 redistricting reform amendment and vocally supported its adoption by the voters.³⁰

²⁷ *New York's Fake Legislature*, NY Times, July 25, 2004, available at <https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9F01EFD9173DF936A15754C0A9629C8B63.html> (last accessed Aug. 6, 2023).

²⁸ Andrew Stengel, Lawrence Noreen, and Laura Seago, *Still Broken: New York State Legislative Reform, 2008 Update*, Brennan Center for Justice, available at <https://www.brennancenter.org/media/252/download> (last accessed Aug. 6, 2023).

²⁹ Sam Roberts, *Ballot Item Would Reform Redistricting, at Least in Theory*, NY Times, Oct. 12, 2014, available at <https://www.nytimes.com/2014/10/13/nyregion/ballot-item-would-reform-redistricting-at-least-in-theory.html> (last accessed Aug. 6, 2023).

³⁰ Karen DeWitt, *Supporters Launch Campaign for Yes Vote On Redistricting Ballot Amendment*, WAMC Northeast Public Radio, Aug. 19, 2014, available at <https://www.wamc.org/new-york->

Voters understood the magnitude of the reform being proposed and how it would result in radical change in how business is done in Albany. After hearing these pleas to reform New York’s redistricting process and prohibit partisan gerrymandering, the voters of New York, at the 2014 general election, approved the amendment by over 450,000 votes.³¹ In adopting this redistricting reform amendment to the New York State Constitution by such a healthy margin, the voters of New York endorsed an end to partisan gerrymandering, incumbent protection, and dysfunction in the state legislature.

Even — and maybe especially — the political class understood what the redistricting reform amendment intended and what kind of impact it would have on Albany. The amendment’s Assembly sponsor, in his sponsor’s memo, stated that the new redistricting process would be “fair and readily transparent” and bring “rational line-drawing” to New York’s redistricting process (*see* Assembly Mem in

[news/2014-08-19/supporters-launch-campaign-for-yes-vote-on-redistricting-ballot-amendment](https://www.syracuse.com/news/2014-08-19/supporters-launch-campaign-for-yes-vote-on-redistricting-ballot-amendment) (last accessed Aug. 6, 2023); Dick Dadey, *NY redistricting amendment an opportunity to change a ‘broken’ system*, Syracuse Post-Standard, Sept. 19, 2023, available at <https://www.syracuse.com/opinion/2014/09/ny-redistricting-amendment-an-opportunity-to-change-a-broken-system-your-letters.html> (last accessed Aug. 6, 2023); Joan Durant, *League of Women Voters says vote yes on Prop 1 election redistricting*, Syracuse Post-Standard, Oct. 28, 2014, available at <https://www.syracuse.com/opinion/2014/10/league-of-women-voters-urges-new-york-voters-to-approve-redistricting-system.html> (last accessed Aug. 6, 2023).

³¹ New York State Board of Elections Proposition 1 election results, available at <https://www.elections.ny.gov/NYSBOE/elections/2014/general/2014GeneralElectionProp1.pdf> (last accessed Aug. 6, 2023).

Support, 2012 NY Senate-Assembly Concurrent Resolution A.9526). A fair, open, nonpartisan redistricting process that resulted in districts that were not gerrymandered to favor one party or the other is what the voters voted for in approving the 2014 amendment.

Our New York State Constitution is the voice of the people of New York State. Amendments to the New York State Constitution — whether proposed by the state legislature or a constitutional convention — must ultimately be approved by the voters to take effect (New York State Constitution Ar. XIX, Secs. 1 and 2). Even in interpreting the New York State Constitution, the Courts must determine what “the words would convey to an intelligent, careful voter” (Matter of Kuhn v. Curran, 294 N.Y. 207, 217 [1945]). Courts are charged with interpreting the New York State Constitution based on the understanding of “the people who adopted it” (People v. Rathbone, 145 N.Y. 434, 438 [1895]).

The Congressional district map adopted by court order last year achieved the fair, nonpartisan districts the voters were seeking when they approved the redistricting reform amendment in 2014. The current Congressional district map — a map created by a court-appointed special master, approved by the judiciary, and not appealed — gave New York, in 2022, an historic number of competitive

aces for Congress.³² This is precisely what the voters of New York intended when they voted, in 2014, for the redistricting reform amendment. Altering or redrawing this map — by the Independent Redistricting Commission, the state legislature, or anyone — would more likely than not make it less competitive, more gerrymandered, and more incumbent-friendly, and that would be contrary to the wishes, desires, and intentions of the voters of New York. Maintaining and preserving the existing Congressional district map is the best way to uphold the intentions of the voters who approved the redistricting reform amendment in 2014. New York’s Congressional districts are the districts voters were seeking and intending when they voted overwhelmingly for the 2014 redistricting reform amendment.

CONCLUSION

After action by the Independent Redistricting Commission, state legislature, and Governor, New York’s 2022 Congressional redistricting process came to an end when new district lines were ordered by the Courts. These districts, unlike the ones adopted by the state legislature, were not drawn in a hyperpolitical, hyperpartisan manner. These districts gave New Yorkers some of the most competitive Congressional races in the country in 2022. This is exactly the

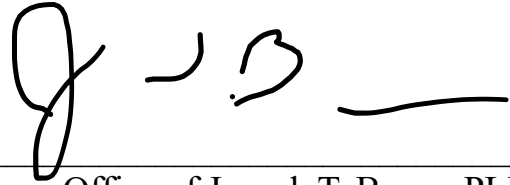
³²³² Nicholas Fandos, *In Fight for Congress, a Surprising Battleground Emerges: New York*, NY Times, Oct. 11, 2022, available at <https://www.nytimes.com/2022/10/11/nyregion/house-elections-new-york.html> (last accessed Aug. 6, 2023).

outcome New Yorkers voted for in 2014 when they approved the anti-gerrymandering amendment to the New York State Constitution.

Compelling yet another round of (likely partisan) redistricting would be in opposition to the intention of New York's voters in 2014. Maybe more importantly, allowing another round of redistricting in 2024 is not practical, not feasible, and has the potential to result in chaos in New York's system of election administration – and disenfranchisement of New York voters in violation of their rights under the New York and United States Constitutions. Already, New York's election officials are facing two separate primary days. This includes two political calendars, two early voting periods, two candidate ballot access processes, and an almost unimaginable amount of ballot access litigation. New York's noted history of electoral dysfunction and incompetence will only be exacerbated if local election boards are forced to conduct another Congressional redistricting in 2024.

This Court must understand and appreciate the administrative difficulties – that risk disenfranchisement of voters – New York's election officials will face should they be required to conduct and oversee a Congressional redistricting in 2024. This Court must, therefore, reverse the decision of the Appellate Division, Third Department and preserve New York's Congressional district map.

Dated: Amherst, New York
September 8, 2023

A handwritten signature in black ink, appearing to read 'JTB', followed by a horizontal line.

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**NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE**

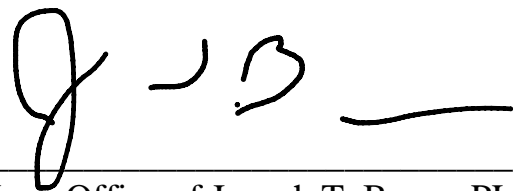
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Dated: Amherst, New York
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ss.:

**AFFIDAVIT OF SERVICE
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On September 8, 2023

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Sworn to before me on September 8, 2023

Mariana Braylovsky

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