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COURT OF APPEALS
STATE OF NEW YORK

HOCHUL ET AL.
Appellants,
-against-
HARKENRIDER ET AL.,
Respondents.

NO. 60

20 Eagle Street
Albany, New York
April 26, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN

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1 CHIEF JUDGE DIFIORE: Good morning, everyone.
2 Judge Rivera is participating remotely in oral argument.
3 This is appeal number 60, Harkenrider v. Hochul.

4 Counsel?

5 MR. BUCKI: Good morning, Madam Chief Judge and
6 members of this honorable court. My name is Craig Bucki
7 from the Law Firm of Phillips Lytle in Buffalo, New York,
8 on behalf of Assembly Speaker Carl Heastie.

9 Before I begin, I would like to request two
10 minutes for the purpose of rebuttal.

11 CHIEF JUDGE DIFIORE: You may have two minutes.
12 And let's start here, counsel. We do have an affirmed
13 finding from the Appellate Division below. What is the
14 standard of review, sir?

15 MR. BUCKI: The standard of review is that the
16 petitioners needed to prove their case beyond a reasonable
17 doubt. And this is the standard that was upheld only
18 thirty five days ago by this court in White v. Cuomo, and
19 in particular, what I would note is that this is more than
20 a case about redistricting - - -

21 JUDGE GARCIA: But counsel, counsel - - - I'm
22 sorry to interrupt you - - -

23 MR. BUCKI: Yes.

24 JUDGE GARCIA: - - - but that's the standard of
25 proof. I think what the Chief Judge is saying here is we



1 now have affirmed findings of fact in this record. So
2 what's our standard for reviewing affirmed findings of
3 fact?

4 MR. BUCKI: Well, this - - - the Court of Appeals
5 is a court that reviews findings of law rather than
6 findings of fact, but what we would submit is that what the
7 court needs to answer is whether the evidence was
8 sufficient enough in order to support the findings.

9 JUDGE GARCIA: So a legal sufficiency?

10 MR. BUCKI: Legal sufficiency.

11 JUDGE GARCIA: But on that standard, aren't the
12 petitioners then entitled, at this stage of litigation, to
13 every fair inference that can be drawn?

14 MR. BUCKI: And I would say, Judge Garcia, I
15 would emphasize the word fair, in terms of fair inference.
16 And so, one good example is - - - and I'm - - - and what
17 I'd like to refer to is the majority opinion, the plurality
18 opinion, wherein it was inferred, and inference was the
19 word that they used, that because it was only Democrats who
20 voted in favor of the congressional plan that therefore, it
21 must have been for some partisan purpose. We would submit
22 that that is not a fair inference because it can also be
23 inferred that rather this is a circumstance where people in
24 the legislative minority - - - the Republican minority,
25 they had three days under the bill aging process to propose



1 amendments. They had an opportunity to engage in
2 substantive input. And in fact the record demonstrates
3 that Republican input was considered.

4 And what I would commend the Court to is pages
5 3263 to 3265 of the record, because we have in the record
6 the maps that came from the Independent Redistricting
7 Commission, the first go-around when they actually did
8 produce maps - - - and what one will find, for example, is
9 that in looking at the various communities of interest and
10 in order to try to keep them together, concerning the
11 upstate map, they decided that there should be a metro
12 Buffalo district, there should be a metro Rochester
13 district, that metro Syracuse should be included with
14 Tompkins County because those are the two college towns
15 with Ithaca and Syracuse, and metro Albany should have a
16 district.

17 And there was marked similarity between and among
18 the plans. And in fact Justice Lindley noted that at his
19 oral argument, but yet the plurality threw out the baby
20 with the bathwater, so to speak, and said, we're going to
21 invalidate the entire map.

22 JUDGE CANNATARO: Counsel, are communities of
23 interest analogous to geographic locations? You just spoke
24 about Albany, Schenectady, Rochester. Is that what it
25 means, or is it broader than that?



1 MR. BUCKI: It's - - - it's broader than that.
2 It can mean geography, but it also can mean communities of
3 interest in terms of religion; it can mean communities of
4 interest in terms of language; it can mean communities of
5 interest in terms of ethnicity. And a very good example is
6 what happened with respect to the map as drawn in District
7 number 11, the Staten Island district, so to speak. And
8 surrounding that Staten Island district the decision was
9 made, in order to account for the fact that there is a
10 burgeoning Asian-American population in Brooklyn, in
11 Bensonhurst and Bath Beach, that pursuant to the - - - the
12 testimony of Dr. Wah Lee from the organization of Chinese-
13 Americans of New York City, that the Chinatown of Manhattan
14 and the Chinatown of Brooklyn should be united in a single
15 district. And so - - -

16 JUDGE CANNATARO: So it could be ethnicities as
17 well?

18 MR. BUCKI: Yes.

19 JUDGE CANNATARO: I see.

20 MR. BUCKI: Absolutely.

21 JUDGE CANNATARO: So if you - - - if you want to
22 follow that exhortation in the - - - in the Constitution, I
23 think it's to try to maintain communities of interest. I'm
24 not sure, you can correct me on that, but does that have to
25 yield to - - - to other commands such as compactness and,



1 you know, contiguousness and things like that?

2 MR. BUCKI: Well, contiguity is an absolute must.
3 It - - - it is impossible to have districts that are not
4 contiguous. But aside from that, we would submit that the
5 appropriate metaphor to use in this circumstance is the
6 metaphor of a scale. And we don't have a typical scale
7 with one side and another side like in a science class.
8 This is a scale with multiple sides to it.

9 And it's the duty of the legislature to decide
10 how to balance all of these required criteria that they
11 need to consider - - - how to balance, for example, keeping
12 communities of interest together, how to balance
13 maintaining the cores of preexisting districts, how to
14 balance keeping counties and cities together and - - - and
15 honoring the jurisdictional splits. And - - -

16 JUDGE WILSON: Well, it was the duty of the IRC,
17 right? Initially, at least, not the legislature.

18 MR. BUCKI: Initially it was the duty, we would
19 submit - - -

20 JUDGE WILSON: And so they didn't do their duty?
21 Or did they?

22 MR. BUCKI: They did not do their job. They did
23 their job the first time around, in terms of - - -

24 JUDGE WILSON: So, in your view, it was okay to
25 submit two competing plans that complied with their duty?



1 MR. BUCKI: Yes. If that's what they wanted to
2 do, we certainly have no problem with that. Both of those
3 plans were rejected, and so then it went back to the
4 Independent Redistricting Commission to produce a new map,
5 which they did not do. And we would submit that a fortiori
6 the legislature retains all of the prerogative that it had.

7 JUDGE WILSON: So - - -

8 JUDGE RIVERA: Counsel. Counsel. If I can ask -
9 - - I'm on the screen.

10 MR. BUCKI: Yes, Judge.

11 JUDGE RIVERA: Let me - - - let me just follow
12 through on this question on this point you're making. I
13 understand it fully, and I appreciate the constitutional
14 foundation for the argument you've just made. But why
15 isn't it - - - why isn't it also appropriate to say the IRC
16 could have fulfilled its duties under the Constitution
17 because it submitted two maps? That's what it did.

18 And then the legislature could have assumed that
19 that's all they had. Could have treated it as a
20 constructive submission the second time around, when they
21 didn't give anything else, because they've already given
22 the two maps. They're deadlocked.

23 MR. BUCKI: I think that's a salient argument,
24 and that argument could be made. I mean, it hasn't been
25 made before by the parties, but we would certainly



1 recognize the wisdom of that argument.

2 JUDGE CANNATARO: Well, in that scenario, which
3 map would you - - - would you consider the first submitted
4 and which would you consider the second?

5 MR. BUCKI: Well, they were submitted
6 simultaneously. And so, the way - - - the way it happened
7 was - - -

8 JUDGE CANNATARO: Well, the constitutional
9 amendment lays out dates and deadlines and - - -

10 MR. BUCKI: It does.

11 JUDGE CANNATARO: - - - so I'm just trying to
12 figure out if we - - - if we go down that road, do we take
13 the Democratic map first and then consider the Republican
14 after, or vice versa?

15 MR. BUCKI: Well, that's probably a metaphysical
16 question because they were submitted at the same time.
17 But - - -

18 JUDGE CANNATARO: And both rejected?

19 MR. BUCKI: And both were rejected, yes.

20 JUDGE GARCIA: But counsel, following up on Judge
21 Rivera's point, you could have - - - the legislature could
22 have done that. They could have accepted it - - - your
23 initial two plans as the second submission and applied a
24 two percent rule to those plans for amendments, and they
25 didn't do that. They did something very, very different.



1 And isn't that evidence of a purpose to gerrymander?

2 MR. BUCKI: No. Not - - - not at all. And - - -
3 and the reason for that is that, you know, purpose suggests
4 some kind of intent. And the other states that have been
5 talked about in this litigation, Ohio, Florida,
6 Pennsylvania, we have seen evidence of what qualifies in
7 order to satisfy a purpose to favor or disfavor a political
8 party.

9 There's usually a partisan symmetry analysis, for
10 example. Sometimes, as in Ohio, you have direct evidence.
11 You know, in the state of Pennsylvania, also there was a
12 very robust compactness analysis as opposed to what we here
13 - - - had here from Mr. Trende where he can only use one
14 compactness metric; otherwise, his program wouldn't
15 necessarily work. And so - - - and, in fact, I would
16 commend the Court to Mr. Hecker's letter submission that
17 goes through all of these ways that purpose could have been
18 established.

19 And so all we have here are, number one, what the
20 plurality said is the fact that this map was only adopted
21 by Democrats, without Republican votes. Number two, they
22 make an inference that in fact there was no Republican
23 input at all, which is not true based upon what's in the
24 record from the commission. And then they go to the
25 simulations of Mr. Trende, and those simulations are



1 extremely flawed in terms of their problems with
2 redundancy, the problems with the lack of an appropriate
3 sample size, the problems with the lack of an appropriate
4 analysis that's not nearly as robust as the analysis he was
5 doing at the same time in the state of Maryland - - -

6 JUDGE RIVERA: So - - - so, Counsel, let me ask
7 you - - -

8 MR. BUCKI: Yes.

9 JUDGE RIVERA: I'm on the screen. Those - - -
10 those points that you're making about the deficiencies, is
11 what you see as the deficiencies of the Trende analysis,
12 why doesn't that go to the weight and apropos of the
13 questions that were asked by members of the bench before?
14 Why isn't that sort of findings of fact that we can't get
15 into?

16 MR. BUCKI: We would say, to quote the dissent
17 from Justice Whalen, that this is not a case where one
18 would have a battle of the experts, so to speak. This
19 isn't a situation where Mr. Trende has some simulations,
20 and respondents' experts have some simulations, and it's a
21 matter of evaluating which simulations might happen to be
22 right. Mr. Trende's simulations are the simulations, and
23 respondents did not use their own simulation method because
24 we would submit we didn't have the burden to do that.

25 And so the questions remains, with respect to Mr.



1 Trende's analysis, was that enough? Was that legally
2 sufficient? Because we don't have a battle of the experts,
3 all we have is Mr. Trende, and we would submit that the
4 sufficiency simply is not there to overturn the reasoned
5 judgement of the legislature, which - - - as this Court
6 said only thirty five days ago, that the Court is cognizant
7 of in order to maintain the distribution of powers that
8 render it improper for courts to lightly disregard the
9 considered judgement of a legislative body that this - - -
10 that is also charged with a duty to uphold the
11 Constitution. And in fact, as the dissent noted, it is a
12 pretty far leap to say that the legislature, based on some
13 inference, must be presumed to have been derelict in
14 satisfying its constitutional responsibility. And we would
15 submit that the - - - the landscape of the law has not
16 changed in thirty five days, nor should it change.

17 CHIEF JUDGE DIFIORE: Thank you, Counsel.
18 Counsel?

19 MR. HECKER: Good morning, everyone. May it
20 please the Court, Eric Hecker from Cuti Hecker Wang. I too
21 would like to reserve two minutes, with the Court's
22 permission.

23 CHIEF JUDGE DIFIORE: You may have two minutes,
24 sir.

25 MR. HECKER: Your Honor, the standard of review



1 is de novo, and that's because the question before the
2 Court is whether a statewide statute is unconstitutional.
3 By definition that presents a legal question that this
4 Court does not show deference to.

5 JUDGE CANNATARO: Wouldn't that be the standard
6 of review for a direct appeal, whereas in this case we have
7 an intermediate appellate court reviewing findings of fact?

8 MR. HECKER: I don't think so, Your Honor.
9 Either way, the question is whether the statute's
10 unconstitutional, which presents a question of law. And to
11 be sure, some questions of law are what we call pure
12 questions, and some have factual issues embedded in them,
13 not unlike the Court's gambling case from a few weeks ago.
14 But the fact that there may be - - - I mean, it's not like
15 the question is whether the light was red or green, and
16 five witnesses said it was red and three said it was green
17 and one was wearing their glasses and the other had a drink
18 - - -

19 JUDGE CANNATARO: No, the question is whether the
20 legislature acted with partisan intent or not.

21 MR. HECKER: Correct.

22 JUDGE CANNATARO: And intent is a
23 quintessentially factual question.

24 MR. HECKER: In - - - in - - - in a different
25 context, for sure. In this context, it drives the legal



1 question of whether the statute is unconstitutional.
2 Either way, there really is no persuasive evidence, on any
3 standard, that could carry their heavy burden here in
4 concluding that intent.

5 And I'd like to take head-on the Appellate
6 Division's statement on page 7 of its decision, that it is
7 implausible, even if it accepts, which the plurality seem
8 to be taking steps towards accepting, that the first four
9 bands to the left of Mr. Trende's dot plots show a space
10 between the enacted plan and the simulated bands, precisely
11 because he ignored, and in fact wasn't even aware of, the
12 strong bipartisan consensus on the commission that the
13 legislature heeded about how to draw upstate.

14 The critical point is that the very same problem
15 plagues the next nine columns to the right, in the so-
16 called competitive Democratic districts. What - - - the
17 districts that we're talking about there are districts like
18 Albany, Rochester, Syracuse, the upstate urban areas that
19 Mr. Trende didn't even know and ignored, that the
20 commission, Republicans and Democrats alike, had decided to
21 draw bluer than Mr. Trende's simulations did starting from
22 a blank page, not to make them blue, because one of the
23 many ways to acknowledge and heed a community of interest
24 is to talk about keeping an urban population - - -

25 JUDGE RIVERA: But Counsel - - - I'm on the



1 screen - - - but Counsel, I understand this argument you're
2 making, and it's certainly a compelling argument about
3 the - - - the benefits of the IRC process. But what's
4 challenged is the legislatively drawn maps, and what the
5 legislature adopted, which was not what the IRC proposed in
6 either of the plans.

7 So isn't the question really just about what the
8 legislature did not - - - not what the - - - there were
9 some parts of the plan that even Republicans would find
10 appropriate.

11 MR. HECKER: I appreciate the question, Your
12 Honor, and this to me goes back to one of Judge Garcia's
13 questions where he suggested that what the legislature did
14 was very different. And I would respectfully disagree.
15 There was no consensus, Judge Garcia, about downstate at
16 all. And there was a very clear consensus about
17 upstate - - -

18 JUDGE GARCIA: But my point - - -

19 MR. HECKER: - - - and what the legislature
20 did - - -

21 JUDGE GARCIA: - - - my point's on - - -

22 MR. HECKER: - - - closely hewed to that.

23 JUDGE GARCIA: - - - my point on that wasn't to
24 get into the details of the map, and there are arguments on
25 the sides of the map and the expert testimony. My point in



1 that questioning was we need to look at, I think, what the
2 process was - - - we can all agree, I think all agree, that
3 the IRC process broke down. They didn't do their job, or
4 however you want to phrase it. And then it went to the
5 legislature. And what did the legislature do? So there
6 were a number of options open.

7 They could have, I think as Judge Rivera
8 suggested, taken one of the two plans that had already been
9 submitted and substantially complied with the process, I
10 think at that time, by applying the two percent rule that
11 was in effect by their own legislation. But they didn't.
12 They didn't do that.

13 They did a number of other things. So one thing
14 they was did was propose a constitutional amendment, passed
15 entirely along partisan lines, that would have given them
16 plenary authority, apparently they already claimed they
17 have, and rid - - - and gotten rid of some of the super
18 majority requirements for one party rule.

19 That didn't pass. They passed a law to get rid
20 of the two percent, notwithstanding, so the two percent
21 didn't apply, and they came up with their own plan in a
22 process that didn't involve the other political side. It
23 was a partisan process.

24 Again, I'm not saying any of that violated, per
25 se, a rule. But if we're looking at purpose, don't we look



1 at that track record?

2 MR. HECKER: In part, Your Honor. But what got
3 buried in there is looking at the map. And what's what
4 the - - -

5 JUDGE GARCIA: But you do look at the map. And
6 that's part of the evidence of purpose. But I think as the
7 Florida court made clear, our statute isn't an effect - - -
8 our constitutional provision isn't an effect statute or
9 constitutional provision. It's a purpose provision.

10 So what we're looking at is motive. An effect is
11 circumstantial evidence of motive, but so is action. And
12 the actions the legislature took, I would suggest also
13 speak to motive here.

14 MR. HECKER: For sure, Your Honor, and if I could
15 address both the process and the map. The process that was
16 followed here is a far, far cry from what happened in
17 Florida, where you had outside political operatives hired
18 to engage in sham proceedings and to destroy material
19 evidence. We don't have anything within a mile of that
20 here.

21 JUDGE GARCIA: Do we know what the process was
22 here? I looked in the record, and I saw no discovery in
23 terms of what actually happened in drafting the maps.

24 MR. HECKER: We produced discovery. That's not
25 in the appellate record, but it's in the discovery record



1 showing that there were no outside political consultants
2 and the map was drafted by legislatures and their staffs.

3 Even if you could infer some, some basis to
4 divine intent from the fact that with only a month to go
5 before the petitioning period and with a fully developed
6 record already voluminously prepared and transmitted by the
7 IRC, and more than enough votes to meet the
8 constitutionally prescribed threshold to act, that the
9 legislature acted - - - even if you could - - - even if you
10 could infer something from that, you have to get to the
11 map, Your Honor.

12 This would be the first court, in any of these
13 cases, to strike down a redistricting plan without doing a
14 district-by-district analysis of what the supposed problem
15 is. They chose to proceed the way they chose to proceed.
16 They put all their eggs in the basket of Sean Trende, whose
17 bands don't make any sense because he didn't take into
18 account communities of interest, and Mr. Lavigna, a
19 gentleman who was so wrong about everything he's become a
20 ghost in this case.

21 And there's nothing left. And so if Your Honor
22 is put off by the process more than I am, I would - - - I
23 would respectfully suggest there's just not anywhere near
24 enough to get them beyond a reasonable doubt.

25 CHIEF JUDGE DIFIORE: Thank you, Counsel.



1 MR. HECKER: Thank you.

2 CHIEF JUDGE DIFIORE: Counsel?

3 MR. LANG: Thank you, Your Honor. Jeffrey Lang
4 on behalf of the Governor. I'd like to reserve two minutes
5 for rebuttal.

6 CHIEF JUDGE DIFIORE: Of course, sir.

7 MR. LANG: I'd like to address first the standard
8 of review. I agree with my senate colleague that the
9 standard is de novo, and the reason for that is that I
10 don't think what happened here is properly considered an
11 affirmed finding of fact. It is true that there were facts
12 that were relevant to the overall, you know, determination.

13 But the determination was a legal one which was
14 the declaration by a court that these electoral maps were
15 invalid. I mean, it's certainly true in other cases, for
16 example, the intent of the legislature can be relevant to
17 whether a law is constitutional if it's passed with
18 religious animus or if a law is passed with discriminatory
19 intent.

20 So, you know, that is an intent issue, but that
21 doesn't render - - - and there could be facts that are
22 relevant to that to deciding that issue, but that doesn't
23 render the overall conclusion a factual one. So I think
24 what happened here is - - - is best considered an - - - an
25 affirmed conclusion of law that this Court can review. And



1 I would also ask - - -

2 JUDGE RIVERA: Oh, Counsel. Can I ask - - - can
3 I - - - I'm on the screen. I just want to tease this out a
4 little bit. Are you in part arguing that, regardless of
5 the intent, the bottom line is if the district lines are
6 not gerrymandered, you don't have an unconstitutional
7 redistricting? You don't have the apportionment, the lines
8 are not unconstitutional, because what the Constitution
9 prohibits is an attempt to do that. And if you didn't
10 succeed in that, you haven't violated the Constitution? Or
11 have I misunderstood your argument?

12 MR. LANG: No, I - - - I agree that intent is the
13 issue. All I'm suggesting is that what's really important
14 is the context in which that finding's being made and the
15 context, just like as one could find a discriminatory
16 intent in passing a law or - - - or passing a law with
17 religious animus. And I don't think this Court would say,
18 well, we don't have jurisdiction to review that issue
19 because that's a factual issue.

20 JUDGE RIVERA: All - - - all I'm saying is that
21 if - - - if one looks at the - - - at the lines and
22 concludes they're not actually gerrymandered, that is to
23 say that they don't favor or undermine a political
24 candidate or party, right, that - - - that you couldn't
25 then find intent to do that, I mean, if you don't have



1 that. Or again, and I misunderstanding the point?

2 MR. LANG: I think if Your Honor - - -

3 JUDGE RIVERA: I just want to understand if
4 that's in part your point.

5 MR. LANG: An intent that wasn't realized, it's
6 hard to imagine how something like that could happen in
7 this context.

8 JUDGE RIVERA: I - - - I agree, which is why I
9 think you always track back to looking at the district
10 lines themselves.

11 MR. LANG: You agree - - -

12 JUDGE RIVERA: I guess I'm asking you if your
13 argument is in part that the - - - the best evidence of
14 intent is how the lines are actually drawn. There may be
15 other evidence, but that alone would never carry the day,
16 unless you can show that the lines themselves end up with a
17 gerrymander.

18 MR. LANG: I think that's right. I mean, a key
19 evidence are the lines themselves. And I - - - you know, I
20 don't think the circumstantial - - - you could call it
21 circumstantial evidence, I don't think it amounts to
22 anything - - -

23 JUDGE GARCIA: Now, Counsel, but the - - - the
24 Constitution reads purpose. Right, so I agree effect is
25 very strong evidence of purpose, but it's not necessary



1 evidence. Let's say we had a racial gerrymandering case
2 and we had statements - - - very offensive statements made
3 - - - I don't say that this is this case, but - - - and - -
4 - and that clearly indicated a purpose to marginalize
5 certain voters. Would you say in that case, well, look at
6 the map; the map's okay. Like, it didn't do that. It
7 didn't - - - so even though, you know, you have a lot of
8 these statements and you have some other smoke around the
9 process, but no, it's okay, because look at the map. The
10 map's okay.

11 MR. LANG: Sorry. I didn't mean to suggest the
12 map would be dispositive if you had statements like that.
13 And I think Your Honor's question points up exactly why
14 this case was so weak on the congressional gerrymanders
15 that, you know, all of the evidence was - - - you know,
16 their - - - the expert that they used at trial. I don't
17 think the fact that, you know, that the process didn't
18 involve the Republican minority party really amounts to
19 anything. I mean, that is - - - that is simply not
20 required by the Constitution.

21 JUDGE GARCIA: But you - - - you know our case
22 law well. And we've said when we look at the Constitution
23 and its provisions, we construct it the way we would a
24 statute. But in this case, with a constitutional
25 provision, we're looking at the intention of the people,



1 not the intention of the legislature. So we have two kind
2 of different things going here. I think intent in terms of
3 purpose to gerrymander, but intent in terms of what did the
4 people think they were enacting.

5 And if I look at the language that's on that
6 ballot that says, you know, this is a process that provides
7 the legislature may only amend the redistricting plan
8 according to established principles if the commission's
9 plan is rejected twice by the legislature. That to me
10 tells me the people of New York, when they voted for this
11 commission, were under that impression, and that at the
12 time, those established principles including a statute that
13 said that even if you reject it twice, we're going to apply
14 two percent rule for any amendments. And then they hear
15 no, no, no, we have plenary authority.

16 And I just ask you, do you think as we look at
17 what was the intention of the people of the state of New
18 York when they voted this provision in - - - was it that?

19 MR. LANG: Well, I have a different view of that
20 language, which is that what it shows is that, like the
21 constitutional drafters, the people simply did not
22 anticipate the type of issue that we had here, which is
23 where the IRC deadlocked the second time around and then
24 failed to submit a second set of maps. And, you know, I
25 would also add that if four of - - -



1 JUDGE TROUTMAN: So if there is - - - with the
2 failure with the second round, what is the remedy? If - -
3 - if the procedure failed, as the people had envisioned,
4 what is the remedy?

5 MR. LANG: Well, the remedy is that consistent
6 with the legislature's historic authority over
7 redistricting, and consistent with the constitutional
8 provision that allows the legislature a full and reasonable
9 opportunity to cure when there's a legal infirmity, the
10 legislature properly stepped in - - - and that's according
11 to the 2021 legislation that was passed to fill precisely
12 this silence in the constitutional procedures.

13 JUDGE GARCIA: Do you know of any other law,
14 Counsel, that says if a certain officer or a certain person
15 mandated with a duty under the state Constitution fails to
16 perform that duty, we're going to do X? Is there any other
17 example of a statute like that? Because isn't that a way
18 to say, well, if you don't do this, then, like, you know,
19 we'll do it. So this is such a different incentive here.

20 MR. LANG: Well, I can't think of another
21 statute, but what I think is important to bear in mind is
22 that someone has to pass the maps. Right? There's no
23 choice. Someone has to pass the maps - - -

24 JUDGE GARCIA: The person - - - the person - - -
25 well, group that is charged under the state Constitution



1 has to do that. I mean, you're saying, like, okay, but if
2 you don't, someone else will do it. And I don't know of
3 any other law that I read that way.

4 MR. LANG: Well - - -

5 JUDGE GARCIA: If you don't fulfill your
6 constitutional duty mandated, shall, mandated by the
7 Constitution of the state, well, we'll do it.

8 MR. LANG: Well, I think it's just an example - -
9 - the legislature foresaw this problem, and so it devised a
10 remedy. And again, so the question is who is going to
11 remedy the problems? Would it be the legislature or the
12 courts? And I think if you accept - - -

13 JUDGE CANNATARO: Well, Counsel, in Section 4(e)
14 it certainly contemplates at least the court having a role.
15 It talks about the court stepping in to remedy defects. So
16 I guess it raises the question of, are we bound by the
17 legislature's choice that they are the correct person to
18 remedy - - - or the correct entity to remedy the defect?
19 Or should we look to the language of the Constitution and
20 recognize that the courts might have a role to play here
21 too?

22 MR. LANG: Well, the courts can certainly remedy
23 a defect, but, again, in Section 5 the legislature has to
24 be given a full opportunity when there is a legal infirmity
25 in the map. And again, what happened here, and I think



1 this is - - - this context is very important because what
2 happened was the IRC didn't have a quorum because four
3 members refused to meet with the rest of the IRC. So
4 again, four judges - - - four of the five judges of the
5 Appellate Division actually rejected this argument. And so
6 if - - - if - - - if the - - - the minority group among the
7 ten-member commission could wrest this entire process away
8 from the legislature and displace it onto the courts - - -
9 again, that assumes someone has a lawsuit - - - maybe there
10 are multiple lawsuits and then multiple maps being drawn by
11 courts, and then how is that resolved. So that - - -

12 JUDGE RIVERA: Counsel, if I can ask you - - -
13 I'm on the screen. I'll ask the same question I asked the
14 first lawyer. What - - - why - - - I'm - - - I'm having
15 trouble seeing this as a - - - a - - - a - - - a true
16 failure under the Constitution. Obviously, the IRC had an
17 opportunity under the Constitution to label something as
18 another redistricting plan. They could have submitted
19 either or both of the first two they submitted again. They
20 didn't do that.

21 But as I read the Constitution, if the - - - if
22 the first - - - if one plan that's submitted is not adopted
23 by the legislature, the IRC has, under the Constitution,
24 the right to submit another one. So the legislature would
25 have two plans before it.



1 The legislature had two plans before it. It
2 didn't adopt either. The Constitution is very clear that
3 the IRC plans are not mandated to be approved. It's for
4 the legislature to reject or accept. And once they've
5 gotten two plans - - - in many ways one can say is exactly
6 what the Constitution anticipated - - - if the first one is
7 not accepted, the legislature acted.

8 I want to be clear. My argument has - - - has
9 nothing to do with the redistricting act and the two
10 percent that Judge Garcia refers to. I'm talking strictly
11 about the language in the Constitution and that process.
12 I'm not talking about a statute. I'm talking about the
13 Constitution only. And I'm having difficulty seeing why
14 the legislature could not, having had these two plans, move
15 forward in accordance with 4(b). Since when they deadlock
16 on the first plan and they can submit the two highest vote-
17 gathering - - - or as many vote-gathering plans as they
18 have, as they did, you just track back to 4(b).

19 MR. LANG: Well, I suppose that that is a
20 possible argument. I mean, I think what was contemplated
21 is that the IRC would submit a first set, either one or
22 more competing plans. The legislature was then free to
23 accept or reject them. And if it rejects them, then the
24 ball goes back to the IRC's court to submit a second set,
25 and that set - - -



1 JUDGE RIVERA: Yes, but I think that in part - -
2 - but I think that, in part, is an optimistic view of what
3 the IRC could do. And here the IRC is deadlocked, isn't
4 going to move from that, but it does present two plans.
5 And I don't see why, then, that is not enough under the
6 Constitution for the legislature to move forward, since - -
7 - since the legislature doesn't have to accept any of it.
8 I mean, it's sort of - - - in some way it's a nice theory,
9 but they don't have to accept any of it.

10 MR. LANG: Well, all I can say is I believe that
11 the legislature was with it because the legislature has the
12 ability to accept or reject for any reason the two sets of
13 plans, that the legislature acted well within its rights
14 and consistent with the 2021 legislation in filling in what
15 I think is a gap here to act when the IRC wasn't - - -

16 JUDGE RIVERA: Okay.

17 MR. LANG: - - - able to form a quorum and even
18 submit a second set of - - - of - - - competing maps - - -

19 JUDGE WILSON: Is it - - - is it a possible
20 remedy to send this back to the IRC, to compel them to do
21 what you say and I think Judge Garcia thinks the people
22 understood they should have done?

23 MR. LANG: Well, I think the - - - the - - - if -
24 - - if the Court does find a violation, I think the proper
25 remedy would be to send it back to, you know - - - to send



1 the - - - on - - - on the procedural issue, I suppose the
2 proper remedy would be to send the - - - send it back to
3 the legislature. Because under Section 5, whenever any map
4 redistricting plan is declared invalid, the legislature
5 shall have a full and reasonable opportunity to cure the
6 infirmity if the map wasn't enacted pursuant to the proper
7 constitutional procedures and the 2021 legislation is
8 invalid, then the legislature should have an opportunity to
9 cure. Maybe that would involve going back to the IRC; I'm
10 not sure, but again, I don't think there was a
11 constitutional violation - - -

12 JUDGE RIVERA: But - - - but if the - - -
13 Counsel, but if - - - if - - - if the infirmity is solely
14 one of - - - let's assume for one moment, of procedure,
15 that the IRC didn't, within the timeframe set out in the
16 Constitution, submit quote unquote a second redistricting
17 plan and if necessary a - - - implementing legislation in
18 accordance with that particular plan, the only entity that
19 can cure that is the IRC. If the conclusion is - - - the
20 IRC has to do that. Legislature can't act until the IRC
21 does that. What - - - what is sending it back to the
22 legislature have to do with it?

23 MR. LANG: If - - - if - - - if the conclusion is
24 that the IRC has to act, then it needs to be sent back to
25 the IRC. I don't think that's the proper conclusion to



1 draw from what happened here. And I do think there's a big
2 difference - - - when the procedures break down, if it's
3 the fault of the legislature, the legislature deadlocks,
4 then maybe it doesn't make sense to send it back to the
5 legislature.

6 But here, everyone agrees it was not the fault of
7 the legislature. The IRC deadlocked because it couldn't
8 form a quorum. And in that circumstances, it doesn't seem
9 to me to make a lot of sense to say, well, then the
10 legislature for the entire ten year redistricting cycle has
11 forfeited its ability to draw maps and our only remedy is
12 to have a court enact the maps.

13 JUDGE SINGAS: Well, what - - -

14 MR. LANG: That would be - - -

15 JUDGE SINGAS: - - - what would be the remedy,
16 Counselor, if there's a substantive violation, if it's
17 determined that there was a gerrymandering? Does it go
18 back to the leg then?

19 MR. LANG: It - - - it absolutely goes back to
20 the legislature if - - - if this Court were to affirm and
21 find that there was a substantive gerrymander - - - we
22 disagree with that, but if this Court were to affirm, then
23 the legislature should have a full and reasonable
24 opportunity, and we would ask for additional time beyond
25 the April 30th deadline that the Appellate Division set for



1 the legislature to cure, and that's in Section 5 in the
2 state Constitution.

3 JUDGE CANNATARO: Counsel, one - - - one quick
4 question, I'm - - - I'm sorry. Would it be - - - would it
5 be a full and fair opportunity to give the legislature the
6 opportunity to submit its own proposed map to a special
7 master to remedy whatever the problem is that is found in
8 the event of substantive unconstitutionality?

9 MR. LANG: I think the remedy would be a full and
10 reasonable opportunity to enact a new map that would then
11 be subject to review by Supreme Court.

12 JUDGE CANNATARO: So we have to start the whole
13 process from the beginning?

14 MR. LANG: Yes. And I believe that's a - - - a
15 reason why a remedy should not be implemented in this
16 election cycle. The election has simply proceeded too far
17 down the road. So if this Court finds a violation, either
18 on the substantive point or in the procedures, then it
19 should lift the cloud of uncertainty that currently hangs
20 over the election. There - - - there's a June 28 primary
21 coming up. The designating petition period has already
22 concluded, and it should declare that any remedy - - -

23 JUDGE RIVERA: But Counsel, doesn't that
24 incentivize what happened here? Especially for those who
25 might want the kind of outcome that they think they find in



1 the - - - in the lines as they were drawn?

2 MR. LANG: It - - - it - - - it does not. And I
3 believe there are three reasons why. And I know
4 petitioners have argued that it does. I - - - I don't
5 think you can say, well, we just can't trust the
6 legislature because if they have one free pass, they will,
7 you know, gerrymander to their hearts' content and know
8 they can always get their incumbents in. And I - - - I
9 don't believe that's correct.

10 If there were an egregious gerrymander, a party
11 could get preliminary relief. In fact, petitioners here
12 asked the trial court to halt the designating petition
13 process. The trial court declined to do that. And as a
14 result of that and in reliance on that ruling, the election
15 has now gone forward. So that's not necessarily going to
16 be the case in all elections.

17 Again, we seriously disagree with the proposition
18 that this was an egregious gerrymander. We don't believe
19 it was a gerrymander at all. But in a different case, you
20 could get preliminary relief. If you had a more limited
21 challenge with only a small number of districts, it would
22 be easier to implement a remedy.

23 And finally, and maybe most importantly, the
24 legislature is entitled to the presumption of good faith.
25 I don't think you can simply assume that legislatures - - -



1 that the legislature will manipulate the state
2 constitutional process in order to enact a gerrymander.

3 CHIEF JUDGE DIFIORE: Thank you, Counsel.
4 Counsel?

5 MR. TSEYTLIN: Thank you, Your Honor. Misha
6 Tseytlin for the petitioners. I would also ask for two
7 minutes of rebuttal.

8 CHIEF JUDGE DIFIORE: On your - - - your cross-
9 appellant - - - on your cross-appeal, you'll get your
10 rebuttal time.

11 MR. TSEYTLIN: Thank you, Your Honor.

12 In 2014 the people set up an exclusive process
13 for how all redistricting maps would be enacted in the
14 state. They also set up the strongest language prohibiting
15 partisan gerrymandering found in any constitution in the
16 United States.

17 Yet in the very first redistricting cycle where
18 this was relevant, the legislature ignored the IRC process,
19 enacted a map as if that process wasn't - - -

20 JUDGE TROUTMAN: Well, in this particular - - -
21 the IRC process did begin, correct?

22 MR. TSEYTLIN: That is correct, Your Honor.

23 JUDGE TROUTMAN: But there was a breakdown?

24 MR. TSEYTLIN: That's right. The process failed,
25 and there was a violation of law.



1 JUDGE TROUTMAN: So is that the I - - - the
2 failure of the IRC or the failure of the legislature, at
3 that point?

4 MR. TSEYTLIN: Well, the IRC violated the law,
5 and then the legislature attempted to take a step that it
6 had no legal authority to take. The consequence - - -

7 JUDGE RIVERA: Could - - - Counsel - - - I'm on
8 the screen. So could petitioners, or anyone else, have
9 sued the IRC, if the IRC is the entity in your view that
10 has failed to comply with its constitutional duty?

11 MR. TSEYTLIN: We could have, but the
12 Constitution provides an exclusive - - - provides what
13 happens when there's a violation of law by the IRC. It's
14 right there in the same provision. It says this will be
15 the exclusive process. It says this will be the exclusive
16 process except that a court shall take a particular kind of
17 remedy. And it's very important to read the
18 Constitution - - -

19 JUDGE RIVERA: Yes, but why isn't that remedy to
20 require the IRC to comply with its duty? Why not just sue
21 the IRC, if that's the error? Before you even get to the
22 legislature passing any maps that you claim are
23 unconstitutional, right?

24 MR. TSEYTLIN: Your Honor, the legislature had no
25 authority to pass any maps, so the Constitution provides



1 that a court is required to order the adoption or change to
2 a redistricting plan as a remedy followed by a violation of
3 law. The Constitution tells us what the remedy is for the
4 violation.

5 JUDGE RIVERA: Yeah, but what I'm saying is that
6 the - - - the Court's remedy for the - - - for this
7 particular error - - - I know you have another one on the
8 merits of the - - - of the actual lines drawn by the
9 legislature. I'm not talking about that. For this
10 particular error, which is - - - or procedural
11 defectiveness you point to, that - - - that falls on the
12 shoulders of the IRC for whatever reason, we'll just say
13 that, and that - - - if that's the area you want to cure,
14 then the remedy has got to focus on that entity and
15 petitioners, or again, anyone, perhaps, could have sought
16 relief in that way.

17 MR. TSEYTLIN: Your Honor, the violation here
18 also curbed by the legislature, when it attempted to enact
19 an unconstitutional map through - - -

20 JUDGE WILSON: Let's just - - - let's just - - -

21 MR. TSEYTLIN: - - - if I may - - -

22 JUDGE WILSON: Let's just hold onto that for a
23 second. So what, in your view, should have happened when
24 the IRC didn't submit a second plan? What's the next thing
25 that should have happened?



1 MR. TSEYTLIN: The next thing that happens is
2 that - - -

3 JUDGE WILSON: No, no. Should have happened.

4 MR. TSEYTLIN: The currently governing maps - - -
5 the one adopted by the court in 2012 and the one adopted by
6 the legislature for the State Senate in 2012 are the
7 governing maps. Now, someone could sue under, I guess,
8 those maps, because they are malapportioned and
9 unconstitutional. If that lawsuit succeeds because they
10 are in fact malapportioned, then it becomes the Court's
11 duty to draw the map.

12 But let's say the population hadn't moved. Let's
13 say that people were - - -

14 JUDGE WILSON: Well, wait a minute. What about -
15 - - what about Section 5? That is, doesn't a right of the
16 legislature spring upon judicial determination that a map
17 is invalid?

18 MR. TSEYTLIN: Well, Your Honor, I have two
19 answers for that. One is this just - - - Justice Curran
20 said below, the - - - the proximate provision to the
21 procedural requirement is the one that says the court draws
22 the map.

23 But in any event, even if Your Honor looks at
24 Section 5, you have to consider whether this a violation
25 that the legislature can cure. And here the legislature -



1 - - the violation - - -

2 JUDGE TROUTMAN: Does it matter that the word
3 "shall" have an opportunity? Does - - - does that verbiage
4 matter - - -

5 MR. TSEYTLIN: Right, Your Honor - - -

6 JUDGE TROUTMAN: - - - as to giving them a chance
7 to fix it?

8 MR. TSEYTLIN: But sometimes, it is impossible
9 for them to fix it, depending on what the violation is. In
10 this circumstance, this was not a violation that they could
11 possibly fix because the commission did not - - - did not
12 have the deadline. And I just want to be clear - - -

13 JUDGE RIVERA: Well, Counsel, let me ask you
14 this. Let me - - - let me just - - - when you say there's
15 no way the legislature could have cured this particular
16 defect. So then the question is whether or not what they
17 did - - - if we can disagree with you on that, and what
18 they did is sufficient, and if indeed - - - again, I'd like
19 you to address what I was asking about before. If the
20 Constitution anticipates, you know, if they don't accept
21 one plan from the IRC, that the IRC gets a chance to submit
22 another plan. And they did in this case submit two plans.

23 And so the legislature has everything available
24 to it that the Constitution otherwise would require. Why
25 wouldn't this be, if there is a - - - a - - - some kind of



1 defect, a very technical defect, why can't the legislature
2 simply say, we not only looked at one plan, we looked at
3 two plans, we don't approve them, and under the
4 Constitution, we're not obligated to adopt them. We can
5 reject them and then proceed with our own plan.

6 Why isn't that an appropriate way to respond and
7 then all that happens is exactly, sort of, the rest of this
8 litigation, which is whatever the legislature comes up
9 with. If someone, who is a citizen, wants to challenge it
10 they can, and the courts will do what they usually do in
11 these kinds of cases, determine that on the merits.

12 MR. TSEYTLIN: Your Honor, I have three answers
13 to that question. One, this is adversarial litigation;
14 that argument has been completely waived.

15 Number two, there - - - I - - - as I read the
16 Constitution, the second set of maps, or the second map the
17 commission submits has to be different from the first;
18 that's why it's second.

19 Third, even if I'm wrong - - -

20 JUDGE RIVERA: But wait a minute. Where does the
21 Constitution say that?

22 MR. TSEYTLIN: That I - - -

23 JUDGE RIVERA: Where does it say that?

24 MR. TSEYTLIN: That I think is the fairest
25 reading of the Constitution that the second set of maps,



1 after the first one is rejected, is different because - - -

2 JUDGE RIVERA: Well, let me ask you this. I
3 always stood - - - I understood your argument to be that
4 the problem is they just didn't submit something by the
5 second deadline. And couldn't they have submitted one of
6 the other two plans that they had already submitted in your
7 position now? That they couldn't have submitted one of the
8 two plans that they submitted on the first round?

9 MR. TSEYTLIN: That - - -

10 JUDGE RIVERA: It has to be completely different
11 from the other two?

12 MR. TSEYTLIN: That is not a position we've taken
13 in this litigation because this argument - - -

14 JUDGE RIVERA: No, but I'm asking you. Given the
15 argument you've just made, it seems to me that that is the
16 logical conclusion. That they could not even go back and
17 say, look, we were split on the two. Now we have a quorum
18 and a majority for one of these two; that's what we're
19 going to submit. As I understand your argument, they
20 couldn't even do that. They'd have to come up with
21 something completely different.

22 MR. TSEYTLIN: That argue - - - that is my
23 position standing here today, facing this argument for the
24 first time, because the first two maps were both submitted
25 by the legislature.



1 But I think there's a third argument that I would
2 like to finish, Your Honor, which is that the Constitution
3 specifically says that the second set of maps shall be
4 voted on by the legislature. It simply didn't happen here.
5 They didn't vote on that second - - - that second set of
6 maps, even if Your Honor were to treat that as a
7 constructive submission.

8 So as a result, even this new argument, which
9 again, has been completely waived, very talented counsel,
10 three to one, throughout this case, no one has raised that
11 kind of argument. So I think that in adversarial
12 litigation with respect that argument needs to be - - -

13 JUDGE GARCIA: So Counsel, why wouldn't we just
14 send it - - - it's a procedural violation; let's put aside
15 the substantive for a moment. Why wouldn't we send it back
16 to the legislature and say, okay, now vote on the original
17 two maps? And if you reject them, then you can start this
18 tail end of the process, which we can debate what that
19 really means. But why isn't that the remedy?

20 MR. TSEYTLIN: Well, Your Honor, because the
21 Constitution provides the remedy. And the sentence says
22 that the process for redistricting established by this
23 section shall govern redistricting in the state except to
24 the extent that a court is required to order the adoption
25 or the changes to a redistricting plan as a remedy of



1 violation of a law. So that's - - -

2 JUDGE GARCIA: But that seems to be some conflict
3 with some leader language, I think it's 5 or 5-b, which
4 says that they get a chance to correct.

5 MR. TSEYTLIN: Well, so, Your Honor, I - - - I
6 resubmit my three arguments that I just made to Judge
7 Rivera, which is that this argument has been waived. Two,
8 I do believe that the maps have to be different because the
9 if the legislature - - -

10 JUDGE GARCIA: No, not different. But why don't
11 we let them have a chance to - - - to finish under that
12 provision of the Constitution that says they get another
13 shot?

14 MR. TSEYTLIN: Well, the - - - the party that
15 needs to submit the maps to the legislature is the IRC and
16 the timeframe in the Constitution - - -

17 JUDGE GARCIA: Now there's a judicial remedy and
18 we're saying, okay, this was bad, go back and do it again.

19 MR. TSEYTLIN: Well, Your Honor, I think that
20 would be a judicial amendment of the - - - of the
21 constitutional time frame, which is - - - which is elapsed
22 - - -

23 JUDGE GARCIA: So would be - - - so would be
24 sending it to a special master, right, so what's the
25 difference?



1 MR. TSEYTLIN: Well, no, absolutely not Your
2 Honor, the Constitution specifically says that the remedy
3 for a violation is the court adopting a redistricting plan
4 - - -

5 JUDGE TROUTMAN: Shouldn't the remedy match the
6 error? Shouldn't it address the error?

7 MR. TSEYTLIN: The remedy should be the one the
8 Constitution provides. There's only one remedy the
9 Constitution provides for a process violation, which is the
10 adoption or changes to a redistricting plan. Now, I
11 just - - -

12 JUDGE TROUTMAN: And you're saying the
13 Constitution reads that the legislature is now cut out?

14 MR. TSEYTLIN: For the process violation. If we
15 were to lose on the substance of - - - of - - - we lose it
16 on the process and win on our substance violation, I do
17 believe that the question the Court asks are exactly right
18 on. It is - - - the only argument they could possibly have
19 on an affirmed finding of fact is - - - is sufficiency of
20 the evidence argument. They didn't properly frame one of
21 those, and in fact there's no case, that we have been able
22 to find or my friends have been able to find, in the
23 history of the State of New York where an affirmed finding
24 of fact was overturned based upon a disagreement between
25 the experts - - -



1 JUDGE WILSON: Counsel, I just want to make sure
2 I understand something. Maybe I misunderstood you, but if
3 you were to win on the substance, does the legislature get
4 another chance under 5?

5 MR. TSEYTLIN: If we lose on the procedure and
6 win on the substance - - -

7 JUDGE WILSON: If you win on the substance - - -

8 MR. TSEYTLIN: - - - they have until April
9 30th - - -

10 JUDGE WILSON: Well, why April 30th?

11 MR. TSEYTLIN: They told the Court of Appeals
12 that they - - - in this legislation, this is not a statute
13 that's been discussed before Your Honors - - - in this
14 legislation, there is a provision that says that any
15 decision by the trial court shall be tentative for thirty
16 days.

17 JUDGE WILSON: Um-hum.

18 MR. TSEYTLIN: And they said to the Court of
19 Appeals in seeking a stay, those are the thirty days that
20 we need, if we make a mistake, to fix what we did, to do
21 something new. So the Court of Appeals in granting the
22 stay and ultimately in an issuing - - - not the Court of
23 Appeals, the Appellate Division - - - in granting a stay
24 and ultimately it took them at their word, they said - - -

25 JUDGE WILSON: So you're saying that modifies - - -



1 - that's an agreed-upon modification of - - - of the
2 provision Section 5 that springs upon judicial
3 determination of invalidity?

4 MR. TSEYTLIN: So the Section 5 remedy, which
5 allows legislature a reasonable opportunity to cure - - -

6 JUDGE WILSON: You say they've cabined that by
7 agreement.

8 MR. TSEYTLIN: They - - - they've told the
9 courts, in fact, in seeking relief from the Appellate
10 Division, what the reasonable period is, thirty days.
11 Appellate Division took them at their word, gave them the
12 thirty days; that thirty days expires here in a couple of
13 days. They can surely do it that quickly.

14 In Maryland when the - - - when the map was
15 struck down also based in large part on Mr. Trende's
16 testimony, the court gave them, I believe, five business
17 days, the Maryland General Assembly, and enacted a remedial
18 map in four.

19 And then what happened in that case, and I was
20 hoping that would happen here, after the two courts below
21 had issued the decision, is the General Assembly in
22 Maryland came together, passed the new map. The Governor
23 Hogan of the other party signed it, everyone got rid of - -
24 - everyone agreed to end the case, and now there's fair
25 maps in Maryland. That can happen very quickly.



1 JUDGE GARCIA: Counsel, I see your time is up.
2 But with the Chief Judge's permission, just so I'm clear,
3 your interpretation of those two provisions is if it's a
4 process violation, if the procedures set out for the IRC
5 has been violated, then the court can send it to the
6 special master, let's say, or take whatever action the
7 court deems appropriate. If it's a substantive violation
8 in terms of a purpose violation, then the legislature under
9 Section 5 gets a chance to redraw?

10 MR. TSEYTLIN: A reasonable opportunity to cure,
11 that's correct, Your Honor.

12 JUDGE GARCIA: Thank you.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 Counsel, your rebuttal?

15 MR. BUCKI: Yes, Your Honor.

16 I think this case goes back to the institutional
17 argument that I started with. And Mr. Tseytlin makes clear
18 his motivations over the purpose of his - - - over the
19 course of his argument that, in fact, the objective of the
20 petitioners is to try to push this task of map-making to a
21 court and away from the legislature, because his clients
22 are not able to achieve through the legislative process the
23 desired outcome that they want.

24 And so rather than give effect to the voice of
25 the people, as reflected by the legislature, who is elected



1 by the people of the entire state of New York, to instead
2 wrest away that redistricting prerogative and put it in the
3 hands of a judge who is elected by only one half of one
4 percent of the people of the state of New York.

5 JUDGE SINGAS: Counselor - - -

6 JUDGE GARCIA: I'm sorry, go ahead - - -

7 JUDGE SINGAS: Prior to the adoption of these
8 amendments, the legislature was saying something different.
9 In fact, they were saying that they wanted to amend the
10 Constitution to reform comprehensively the process, to
11 establish a new and exclusive process by which new state
12 legislative and congressional districts shall be drawn,
13 that will ensure the drawing of legislative district lines
14 in New York will be done by a bipartisan independent body.
15 So who's abandoning the will of the people now?

16 MR. BUCKI: The commission did. The commission
17 did its job at first; they submitted two maps at first.
18 And then when they had the second opportunity, the
19 commission did not do its job. And under this Court's
20 precedent in Cohen v. Cuomo, in a situation where there is
21 a circumstance that's not anticipated by the text of the
22 Constitution, we would submit that it is anticipated a
23 fortiori because looking at Section 4(b) of Article III of
24 the Constitution, it says, "if either house shall fail to
25 approve the legislation implementing the second



1 redistricting plan," - - - that's what happened here
2 because there was no second redistricting plan, and so
3 there was nothing to approve. It doesn't say if either
4 house shall reject - - -

5 JUDGE CANNATARO: Counsel - - -

6 MR. BUCKI: - - - it says failure to
7 approve - - -

8 JUDGE CANNATARO: - - - that gets me back to the
9 remedy question that Judge Wilson was probing before. Is
10 there nothing anyone could have done when the IRC process
11 was becoming derailed to compel them to act in accordance
12 with their constitutional mandate?

13 Or - - - or was this thing just supposed to
14 completely - - - to - - - to torture the railroad analogy,
15 what it supposed to just completely go off the rails and
16 there's nothing anyone could have done about it?

17 MR. BUCKI: I suppose that there could have been
18 a lawsuit brought by petitioners against the - - - against
19 the members of the commission but the - - - the time
20 passed. And we would submit that in that situation the
21 ability to redistrict on the part of the legislature never
22 went away because the commission was there to give
23 recommendations. This is not a state like Arizona, for
24 example, whereby the actual power to impose a redistricting
25 map is placed with a commission that is separate and apart



1 from the legislature and the commission's determinations
2 are binding.

3 Here, we had in New York State a commission that
4 was entirely advisory. And any kind of map that may have
5 some from that commission the legislature was entirely free
6 to reject. And when the commission did not do its job,
7 then we would submit that, as has always existed for two
8 centuries, the prerogative of the legislature to impose
9 that redistricting - - -

10 JUDGE RIVERA: Or perhaps, Counsel - - -

11 CHIEF JUDGE DIFIORE: - - - and when the
12 commission didn't perform their job, what recourse, if any,
13 did the legislature have?

14 MR. BUCKI: The legislature's recourse was to go
15 ahead and propose a new map and enact a new map. And
16 that's perfectly consistent with the language, number one,
17 of Article III, Section 4(b), because neither house was
18 able to approve a new map. And second of all, inasmuch as
19 it can be determined that - - - that the Constitution is
20 not simply on point with respect to what happens when there
21 is a failure on the part of the commission - - - not a
22 failure by the legislature, a failure by the commission to
23 do its job - - - then - - - then it was the prerogative of
24 the legislature to enact a map, and that's exactly what the
25 legislature - - -



1 JUDGE RIVERA: But, Counsel, why - - - why
2 if - - - I'm on the screen. Why - - - why isn't your
3 adversary correct, that what happens in that situation is
4 that the existing maps stay in place, and of course someone
5 could challenge them if they wish to, to say that they are
6 malapportioned?

7 MR. BUCKI: Well, there's - - -

8 JUDGE RIVERA: To argue that they're
9 malapportioned? Why - - - why isn't that the way it should
10 work? Why isn't he right about that?

11 MR. BUCKI: Well, with respect to the
12 congressional map, there was no way that those maps could
13 remain in place because there was a reduction in one seat
14 of representation in congress. And so with respect to the
15 judicial remedy that Mr. Tseytlin speaks so highly of, I
16 think that question is answered by Section 4(e) of Article
17 III of the Constitution, which says that this process shall
18 govern redistricting in this state except to the extent
19 that a court is required to order the adoption of or
20 changes to a redistricting plan as a remedy for a violation
21 of law.

22 And we would submit that there was no such
23 requirement here because the legislature acted. And as
24 this Court noted only thirty five days ago, judges may not
25 arbitrarily supplant the legislature's reasoned



1 determinations with their own judgements or notions of
2 common sense under the guise of constitutional
3 interpretation. And that's precisely the same case that we
4 have here again, because the legislature balanced all of
5 these required factors under Article III Section 4(c)(5) of
6 the Constitution. And maybe the petitioners would have
7 drawn the map a little differently; maybe someone from a
8 think tank or from an editorial board of a newspaper would
9 have drawn these maps differently, or somebody on Twitter
10 might have drawn these maps differently. But the fact is
11 they are not the legislature and they are not elected by
12 the people, and that's why all these maps should be upheld.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 Counsel?

15 MR. HECKER: Your Honor, we're - - - we're - - -
16 we're glossing over the language of the Constitution. Mr.
17 Tseytlin purposefully omits, when he reads from Section
18 4(e), the words - - - and Section 5, which are incorporated
19 expressly into 4(e) and used the word "any" twice. Is this
20 any judicial proceeding relating to redistricting, and is
21 this - - - are we talking about any law establishing
22 congressional or state legislative districts?

23 Because if we are, the legislature gets the
24 opportunity not to present a plan to the special master to
25 correct, unilaterally, its infirmities. And if that's



1 incorporated into 4(e), then it's impossible to conclude at
2 all, let alone beyond a reasonable doubt, that it
3 unambiguously extinguishes the legislative authority, even
4 though when the League of Women Voters was urging a decade
5 ago that this state do what Colorado and Arizona and
6 Michigan did, which is give the commission sole authority
7 to enact, the voters didn't do that, and the legislature,
8 which is the ones that proposed the 2014 amendments, didn't
9 do that. They're purely advisory.

10 I want to come back to the substantive point
11 and - - - and make what I think is a critical observation
12 about what's going to come next if this Court accepts
13 petitioner's invitation to be the first court in history to
14 ever strike down a redistricting plan without paying
15 attention on a district-by-district basis to what the
16 justifications are and whether they are persuasive and, if
17 not, why not. What is the legislature supposed to do,
18 whether it's in a few days or an extended period time, for
19 example, with district 11?

20 We have put into the - - - into the record
21 un rebutted evidence that adjoining district 10 was drawn
22 the way it was in order to reunite the Chinese-American
23 community that had become cracked. And as a result, it
24 just so happens that district 11 had the composition of its
25 partisanship changed.



1 If this court strikes down, as the trial court
2 and the appellate court did, the plan without telling us
3 anything about which districts are infirm and why, what are
4 we supposed to do with district 11? In the absence of a
5 specific judicial order, are we supposed to go back and
6 purposefully re-crack the Chinese-American community for
7 the sole purpose of rendering the adjoining Staten Island
8 district more Republican?

9 That would be deeply problematic, and that's why
10 courts don't do that. The Florida court, where the process
11 was so dramatically more - - - more problematic than it was
12 here, noted the extremely serious process failures and then
13 went through innumerable opinions, innumerable rounds of
14 litigation, district by district, and said, here's the
15 problem, and by the way upheld almost all the districts in
16 the end. And the couple that were struck down, there were
17 specific instructions, and the legislature fixed it.

18 The - - - the - - - the - - - this gets back to
19 the problem with Mr. Trende's methodology. It's literally
20 incapable - - - forget about accounting for communities of
21 interest, which explains all the deltas in all of his
22 bands. It doesn't even tell us which districts we're
23 talking about. In his singularly important dot plot chart,
24 those districts aren't the districts. They are the order
25 districts in which his simulations come up most often. We



1 don't even know for sure what the first four districts are
2 or what the next nine are, and I just would
3 respectfully - - -

4 JUDGE CANNATARO: Counsel, just to be clear, no
5 one moved to preclude Mr. Trende's analysis on the grounds
6 that it was methodologically deficient or anything like
7 that, did they?

8 MR. HECKER: Correct. But we expressly
9 acquiesced in his testimony, subject to cross-examination.
10 That's literally what was said on the record. And then we
11 cross-examined him and showed him to be - - - his
12 methodology to be worthless. This was a bench trial that
13 happened very quickly. There was no expert discovery. The
14 court said on the record, I want the experts to come so I
15 can see who's gotten it right and who hasn't. And
16 everybody testified, and everybody got cross-examined.

17 I would respectfully suggest that it would be
18 deeply problematic to strike down a state-wide
19 redistricting statute, you know, notwithstanding all of the
20 evidence of the methodological failures, because there
21 wasn't some kind of foundational objection that - - - that
22 wouldn't have been appropriate under the circumstances.

23 CHIEF JUDGE DIFIORE: Thank you, Counsel.

24 MR. HECKER: Thank you.

25 CHIEF JUDGE DIFIORE: Counsel?



1 MR. LANG: On the issue of the standard of
2 review, I mean, petitioners again say these are firm
3 findings of fact, but I would just remind the Court you're
4 not writing on a blank slate here. I mean, there are three
5 redistricting cases, Matter of Sherrill, Schneider v.
6 Rockefeller, Wolpoff v. Cuomo, and in none of those - - -
7 and those cases did involve review of what could be called
8 factual issues like the compactness of the districts,
9 contiguity of the districts. And in none of those cases
10 did this Court suggest that there was anything other than a
11 conclusion of law that was at stake, nor - - - nor did this
12 Court view it even as a sufficiency of the evidence,
13 although I agree that would be preferable to - - - to - - -

14 JUDGE GARCIA: Counsel, Counsel, do you agree
15 that any action this court takes would have to be premised
16 on a district-by-district analysis, no matter what the
17 constitutional districting violation might be? So whatever
18 the purpose overall - - - this Court, I hear, like, unlike
19 any other court in history, we would not have the authority
20 to strike a map. Do you agree with that?

21 MR. LANG: Well, I - - - I mean, I think it
22 could - - - it could potentially depend. I mean, it's very
23 difficult unless you have a district-by-district finding.
24 I mean, I - - - you know - - - this isn't - - - this isn't
25 an argument that the Governor's made, but I understand the



1 problem; it makes it very difficult to cure unless you go
2 district-by-district because you have this issue of
3 communities of interest. And - - -

4 JUDGE GARCIA: And I suppose that also depends on
5 where we sent it, right? Because if we sent it to a
6 special master, then you wouldn't really have that problem,
7 to draw a new map?

8 MR. LANG: Well, I mean, I suppose unless you
9 know which districts are invalid - - - I mean, as I
10 understand, what petitioner wants is that a new map needs
11 to be drawn up from scratch.

12 I - - - I want to briefly address the procedural
13 issue and - - - and, you know, just two quick points on
14 that. I mean, one is that even if there a - - - if there's
15 any way to reconcile the Constitution with the 2021
16 legislation, then it should be done. So even if what
17 petitioner is arguing is a possible argument, it shouldn't
18 carry the day.

19 I think a more reasonable reading of the state
20 constitutional procedures, when you look at the issue in
21 context, and in the context of the legislature's historic
22 redistricting authority that was not changed with the 2014
23 amendments, the legislature retained an enormous amount of
24 authority under the 2014 amendments, that the legislature
25 appropriately stepped in here. And again, there's a big



1 difference between when the problem is - - - when the
2 legislature is the source of the problem, then - - - then
3 maybe you - - - you - - - your only option is that a court
4 is required to step in.

5 But that's simply not what happened here. The
6 IRC was prevented from forming a quorum, so we couldn't
7 even submit a competing set of maps, so the legislature
8 acted within its rights in stepping in and drawing maps.

9 CHIEF JUDGE DIFIORE: Thank you, Counsel.

10 Counsel?

11 MR. TSEYTLIN: Thank you, Your Honor. The
12 process the 2014 amendment sets out is for the enactment of
13 new maps. And it is a legal predicate for the legislature
14 to do what it did before, which is bicamerals and present.

15 If the - - - if the process fails, then the old
16 maps are in place, unless somebody brings a lawsuit.
17 Someone brings a lawsuit, court draws the map. That
18 resolves all of the concerns about how to structure the
19 remedy. Now, in terms of the timing - - -

20 JUDGE WILSON: How do you - - - how do you keep
21 the old map for the congressional districts in place when
22 you don't have as many congressional districts?

23 MR. TSEYTLIN: Well, somebody would need to sue,
24 and we did sue. And it's very important that in our
25 lawsuit we challenged not only the new maps, we challenged



1 the old maps, because we recognized that those were
2 malapportioned, had the wrong number of districts.

3 So we did that here, we did that job here, and I
4 would respectfully submit, given the stakes of
5 redistricting, how many people are impacted, you're always
6 going to have a lawsuit. But the way that the structure
7 works is that you just can't enact - - - there's no
8 requirement - - - let's say you had a really static decade
9 and people didn't move around, especially in the state
10 legislature - - - in the state assembly and the state
11 senate where you didn't need to redraw it.

12 If the process failed, then the maps from the
13 prior decennial would just control. There's really
14 no - - - really no problem there. If there's people
15 moving, you're always going to have a lawsuit because of
16 the stakes involved. And that - - -

17 JUDGE RIVERA: But that does, Counsel - - - I'm
18 on the - - - I'm on the screen. But that does seem to be
19 not really what the Constitution is - - - is attempting to
20 do. Because again they are correct; you can't deny that.
21 They are correct that the IRC - - - the Constitution
22 doesn't mandate that the IRC plan or plans be adopted. It
23 is always the legislature's province to reject or approve
24 the plans. And if they don't, then they can pass their
25 own.



1 I'm, again, having difficulty with your argument
2 that you're driving the substantive work of drawing
3 district lines into a judicial forum when it's very clear
4 that the legislature doesn't have to adopt what the IRC
5 proposes. And the legislature gets to cure any infirmities
6 with - - - with the legislation or with the process.

7 I'm - - - I'm having great difficulty with - - -
8 with this argument that you are making that throws it to
9 the court. And by the way, when you said it just goes to
10 the court and then the court fashions its remedy, again the
11 Constitution makes it very clear that the legislature has
12 to have an opportunity to address those district lines that
13 you claim have - - - are violating the Constitution in the
14 way they've been drawn.

15 MR. TSEYTLIN: May I answer?

16 CHIEF JUDGE DIFIORE: Yes, please.

17 MR. TSEYTLIN: The - - - as the League of Women
18 Voters explained, the - - - the judicial backstop, which is
19 the only remedy of judicial violation, derives the
20 compromise. If the legislature knows that it appoints IRC
21 commissioners that will not do their job, they will do a
22 good job appointing commissioners that will compromise.

23 If this honor - - - if Your Honors accept the
24 arguments by our friends, the IRC is over. The legislature
25 will never bother appointing commissioners again, or



1 they'll appoint people whose only job will to be to
2 deadlock the thing. If however this Court does what - - -

3 JUDGE RIVERA: Or, Counsel, it could very well be
4 that the people of the state of New York will recognize
5 that their attempt to provide a way to address
6 gerrymandering, and other problems that the people of the
7 state of New York may view as somehow embedded in the
8 current process, requires a true independent IRC. That is
9 one that is not merely recommending plans but is actually
10 deciding what the lines should be.

11 MR. TSEYTLIN: May I, Your Honor?

12 CHIEF JUDGE DIFIORE: Please.

13 MR. TSEYTLIN: The people in 2021 were asked by
14 the legislature, with a constitutional amendment, can we do
15 this very thing? If the IRC fails, can we enact a map?
16 They put it on a constitutional amendment. The people said
17 no. It would be a grave insult to the people to tell them
18 that their votes in 2021 - - -

19 JUDGE GARCIA: Counsel - - -

20 MR. TSEYTLIN: - - - were entirely irrelevant.

21 JUDGE GARCIA: Counsel, even going back to 2014,
22 it seemed to me, looking at the debate, that there was a
23 position that said, don't vote for this by certain good
24 government groups because it's sham reform or it's - - -
25 and then there were some other groups that said, no, this



1 is real. So it seems the people believe this was real
2 reform at the time. So we would be telling them at this
3 point that no, it wasn't.

4 MR. TSEYTLIN: Absolutely, Your Honor. Thank
5 you.

6 CHIEF JUDGE DIFIORE: Please. Thank you.

7 (Court is adjourned)

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C E R T I F I C A T I O N

I, Nicole Oranges, certify that the foregoing transcript of proceedings in the Court of Appeals of Hochul et al. v. Harkenrider et al., No. 60 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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