PERILLO HILL

January 22, 2023

VIA NYSCEF

Robert Mayberger, Clerk
Supreme Court of the State of New York
Appellate Division, Third Department
State Street, Room 511
Albany, New York 12223

Re: *Hoffman, et al. v. New York State Indep. Redistricting Comm., et al.*
Case No.: CV-22-2265

Dear Clerk Mayberger:

This office represents Respondents Brady, Conway, Harris, Stephens, and Nesbitt (five of the ten commissioners serving on the New York State Independent Redistricting Commission ("IRC")) in the above matter. We are in receipt of the Appellants' letter application dated January 20, 2023 requesting a preference in the hearing of this appeal. We object and write in opposition to this request, and respectfully submit that it must be denied.

Appellants' application is improper and defective for multiple glaring reasons. First, the request is made specifically pursuant to Rule 1250.15(a)(1) *by letter*, not by motion. Rule 1250.15(a)(1) provides that such a request may be made by letter solely where the party is "entitled by law to a preference." Here, as discussed below, Appellants are not entitled to a preference by law because the provision of the state constitution they cite, Article III, Section 5, is completely inapplicable. Because Appellants are not entitled to a preference by law, they were required to make any such application *by motion* and for good cause shown pursuant to Rule 1250.15(a)(2)—a showing Appellants have not attempted, and in any case could not make. And because they did not apply by motion, made on notice and in accordance with the Rules of the Appellate Division, the relief sought may not be granted.

Second, even if a letter request under Rule 1250.15(a)(1) were the proper vehicle for Appellants to make this request (it is not), that section of the Rule requires in mandatory language that the party seeking the preference "shall provide prompt notice" to the court of the basis of the request. Here, Appellants filed their Notice of Appeal on October 17, 2022. Appellants inexplicably allowed over three (3) months to elapse before making the instant request for a preference this past Friday evening, January 20, 2023. Under no circumstances could such an extensive delay satisfy the Rule's mandatory requirement of "prompt notice."

Third, as noted, the singular ground Appellants cite as the basis for their request, certain language from the final paragraph of Article III, Section 5 of the New York State Constitution, is

simply inapplicable here. The first sentence of the final paragraph of Section 5, tellingly omitted from Appellants' letter, explains that an "apportionment by the legislature" is subject to review in the supreme court. This is not such a case—this is not a case seeking review of an apportionment by the state legislature. To the contrary, this is singularly an Article 78 proceeding in the nature of mandamus (CPLR 7803(1)) which solely seeks to compel the IRC to undertake certain actions. No portion of the relief sought by the Petition herein asks the court to review the legislature's apportionment of districts. Accordingly, Article III, Section 5 does not apply to this case at all, and thus its precedence and sixty-day decision requirements offer no basis for Appellants' request.

Furthermore, even if this were the type of case to which the sixty-day disposition provision could be deemed to apply (it is not), it quite obviously has no application to the instant request being made for the first time to this appellate tribunal, nearly seven (7) months after the proceeding was filed in Albany Supreme Court. The constitution provides that the "court shall render its decision within sixty days *after a petition is filed*." Here, the Petition was filed on June 28, 2022. If the sixty-day requirement applied, that would have meant the disposition needed to have been made by August 27, 2022.[1] Notably, Appellants never invoked Article III, Section 5 when they commenced the proceeding, nor at any time while it was pending in the court below.

As the foregoing reflects, the expediting referenced in Article III, Section 5 is narrowly confined to the specific type of case addressed therein (one challenging legislatively apportioned districts). Indeed, Appellants' prosecution of this mandamus proceeding confirms their own understanding that this was not a case to which Article III, Section 5 applied—as not only did they not invoke this constitutional provision, they affirmatively and of their own volition charted a litigation course that did not and could not have complied with the provision in any case.

In addition to all of the foregoing, it is noted that the court below rendered the decision now being appealed from on September 14, 2022, with notice of entry being served on September 15, 2022—whereafter Appellants did not even serve their Notice of Appeal for another 32 days until the last possible day to timely do so, October 17, 2022. And even after that, Appellants waited another three (3) months to perfect the appeal and, on the same day, to request a preference for the first time. Thus, Appellants, having not taken actions within their control to expedite the appeal, have waived the right to seek such relief now. For all of these reasons, Appellants' request should be denied.

Thank you for your consideration.

Respectfully submitted,
PERILLO HILL LLP

By: *Timothy Hill*
Timothy Hill, Esq.

CC: All Counsel of Record (Via NYSCEF)

[1] Article III, Section 5 plainly makes no provision for a 60-day scheduling cycle for appellate briefing, oral argument, and Appellate Division decision issuance, and yet that is what Appellants ultimately propose and request.