Motion No. 2023-600
APL-2023-00121
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Appellate Division–Third Department Docket No. CV-22-2265

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-Respondents,

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

– against –

INDEPENDENT REDISTRICTING COMMISSIONER ROSS BRADY, INDEPENDENT REDISTRICTING COMMISSIONER JOHN CONWAY III, INDEPENDENT REDISTRICTING COMMISSIONER LISA HARRIS, INDEPENDENT REDISTRICTING COMMISSIONER CHARLES NESBITT and INDEPENDENT REDISTRICTING COMMISSIONER WILLIS H. STEPHENS,

Respondents-Appellants,

(For Continuation of Caption See Inside Cover)

OPPOSITION TO MOTION TO VACATE STAY PENDING APPEAL

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– and –

THE NEW YORK STATE INDEPENDENT REDISTRICTING COMMISSION, INDEPENDENT REDISTRICTING COMMISSION CHAIRPERSON KEN JENKINS, INDEPENDENT REDISTRICTING COMMISSIONER IVELISSE CUEVAS-MOLINA and INDEPENDENT REDISTRICTING COMMISSIONER ELAINE FRAZIER,

Respondents,

– and –

TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, and MARIANNE VIOLANTE,

Intervenors-Respondents-Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Independent Redistricting Commissioner Ross Brady, Independent Redistricting Commissioner John Conway III, Independent Redistricting Commissioner Lisa Harris, Independent Redistricting Commissioner Charles Nesbitt, Independent Redistricting Commissioner Willis H. Stephens, (collectively hereinafter the "Commissioner Appellants"), by their attorneys, Perillo Hill LLP, hereby respectfully submit this Memorandum of Law in opposition to the Petitioners-Respondents' (hereinafter "Petitioners") Motion to Vacate Stay.

PRELIMINARY STATEMENT

Petitioners' motion to vacate the stay should be denied. As this is a mandamus proceeding, the performance of the act sought to be compelled is the ultimate relief. It makes little sense for that relief to *precede* this Court's forthcoming and final determination of the issue as to whether any such action by the IRC at this point is constitutionally permissible. Respectfully, the Commissioner Appellants submit that the Appellate Division's opinion and order is marred by significant errors of law and that this Court should and must reverse and vacate that order and dismiss the proceeding as being foreclosed by the plain language of the New York State Constitution, as well as by the precedential force of this Court's prior holding in Matter of Harkerider v. Hochul, 38 N.Y.3.d 494, 176 N.Y.S.3d 157 (2022).

Petitioners' primary justification for making the motion would appear to be a newly developed concern regarding timing. But Petitioners waited over five months to even commence this proceeding and thereafter proceeded in a desultory manner before both the Supreme Court and Appellate Division, letting gaps of months at a time pass without action in circumstances where they had exclusive control over such pacing (e.g., commencing the proceeding, noticing their appeal, perfecting their appeal, etc.).

It is regrettable that Petitioners now choose to interject into the mix the unfounded finger-pointing that "a handful of commissioners failed to discharge their mandatory duties under the New York Constitution." Pet. Mem. 1. A few lines later, Petitioners more specifically identify the subject of their uninformed conjecture as "several Republican-appointed commissioners." Id. Petitioners, of course, have no personal knowledge whatsoever as to such matters. Moreover, this case plainly does not concern who or what is to blame for the IRC's failure to complete its constitutional duties (to be sure, the Commissioner Appellants have a very different view of the matter).

Curiously, Petitioners announce that the "predictable result of this gamesmanship was a court-ordered congressional map drawn by a special master…" Id. But if the Petitioners' grievance were genuinely with the failure of the redistricting process to manifest the spirit and objectives of the 2014

Amendments, then surely they would have been at least as equally motivated as the Harkenrider petitioners to seek judicial review of the maps that the Legislature approved without any IRC input or involvement. Petitioners, however, never brought a lawsuit to invalidate the map that the Legislature pressed into law without honoring the constitutional amendments. Indeed, when given the opportunity to comment on the remedial course in Harkenrider, many of the Petitioners herein advocated for the very same Legislature that had just decimated the goals of those amendments to again be the one to draw the state's congressional map to be used for the remainder of the decade, with nary a mention of the IRC. R.337-338.

In reality, the "predictable result" of any gamesmanship was the Legislature's complete and immediate disregard of the IRC work-product, and the public input upon which it was based, and the Legislative Majority's unilateral and nakedly partisan drawing of maps for its own benefit. This was the precise evil that the People of the state voted to eradicate in the form of the redistricting amendments.[1] The Legislature's act thrust upon the New Yorkers egregiously unconstitutional congressional districts. The constitution provides a necessary

[1] For their part, the Commissioner Appellants had every incentive, and did in fact assiduously toil long and hard, to avoid such a result and to fulfill the objectives of the amendments. Reaching consensus is difficult, but two people that agree to meet halfway will never actually do so if one of them remains immovably in place.

remedy through judicial intervention under Article III, §4(e), as this Court recognized and endorsed in Harkenrider.

Although this Court in Harkenrider was cognizant of the need to produce a remedial map *in time for* the 2022 elections, that is not at all the same thing as suggesting that the Court intended to provide a remedy *solely for* the 2022 elections. Indeed, there is nothing in Harkenrider to even remotely suggest the latter. To the contrary, the impetus to act quickly was not to accomplish a temporary fix; the need to act quickly was to avoid having an election based upon grossly unconstitutional districts. As a review of the oral argument before this Court confirms, any specific attention given to the 2022 elections was not to limit the remedy to that election, but the urging by the Legislature and the Governor (rejected by the Court) that the decade-long remedy not begin until after the 2022 election.

The whole of the Third Department's majority opinion is premised on its remarkable conclusion that the Harkenrider remedy was merely a temporary placeholder that would expire immediately upon completion of the 2022 elections. This determination was arrived at without any support whatsoever. Moreover, it was wholly improper to convert this limited mandamus proceeding into one questioning the import of this Court's holding in an entirely separate matter. Because the Third Department's decision is legally untenable in these and such

other ways as will be more fully addressed in the briefing of this appeal, the automatic stay now in place under CPLR 5519(a)(1) should remain.

ARGUMENT

I. An Automatic Stay is in Place Pursuant to CPLR §5519(a)(1)

CPLR § 5519(a)'s automatic-stay provision provides in pertinent part that "[s]ervice upon the adverse party of a notice of appeal … stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where… the appellant or moving party is the state or any political subdivision of the state or any officer or agency of the state or of any political subdivision of the state. See CPLR 5519(a)(1). CPLR § 5519(a)(1) applies to executory directives -- judgments or orders, such as the one at issue here, mandating that the State, officer or agency take some action, as opposed to those judgments prohibiting some action or declaring a legal conclusion. See e.g., State v. Town of Haverstraw, 219 A.D.2d 64, 65 (2d Dep't 1996)("The objective of the automatic stay provided by CPLR 5519 (a) (1) is to maintain the status quo pending the appeal. Mandatory injunctions are automatically stayed because in commanding the performance of some affirmative act they usually result in a change in the status quo."); and Pokoik v. Dep't of Health Serv. Co. of Suffolk, 220 A.D.2d 13, 15 (2d Dep't 1996)("the scope of the automatic stay of CPLR 5519(a) is restricted to the executory directions of the

judgment or order appealed from which command a person to do an act"). There can be no question that the Appellate Division's Order mandates that the IRC take some affirmative action. The Order expressly directs "the IRC to commence its duties forthwith." Order, Maj. Op. at 8. As such, the stay pursuant to CPLR 5519(a)(1) applies, and appropriately so, to the IRC and its Commissioners so as to maintain the status quo ante pending the determination of the appeal by this Court.

Movants' semantic argument that the IRC Commissioners are not "officers" but "members" is unavailing. The officers of the commission are also its members. Further, the IRC Commissioners are clearly state officers and the IRC a state commission. This is made clear in New York Public Officer's Law § 2 which defines "state officer" as including: "every officer for whom all the electors of the state are entitled to vote, members of the legislature, justices of the supreme court, regents of the university, and every officer, appointed by one or more state officers, or by the legislature, and authorized to exercise his official functions throughout the entire state, or without limitation to any political subdivision of the state, except United States senators, members of congress, and electors for president and vice-president of the United States." Id.

Under the New York Constitution, IRC Commissioners are appointed to that body and "[t]he legislature shall provide by law for the compensation of the members of the independent redistricting commission, including compensation for

actual and necessary expenses incurred in the performance of their duties." N.Y. Const. Art. III, § 5-b(a), (e). Therefore, the IRC and its Commissioners fall squarely within the definition of state officers, for which CPLR 5519(a)(1)'s mandatory stay applies.

The Movants' reliance on In re Ronan, 73.2d.35 (Sup. Ct. Albany Co., 1973) is misplaced. That case concerned the New York City Transit Authority's officers. The Court determined that the New York City Transit Authority was a city "public authority" pursuant to Public Authorities Law and as such CPLR 5519(a)'s automatic stay provision need not apply to it because Public Authorities Law §1212-a (3) already provides for a similarly worded automatic stay for the benefit of such a Public Authority. *Id.,* and N.Y. Pub. Auth. L. §1212-a(3)("upon an appeal taken by the authority, the service of the notice of appeal perfects the appeal and stays the execution of the judgment or order appealed from"). In any event, the IRC is not a state or local authority as defined in Public Authorities Law §2(1) and the stay mandated by CPLR 5519(a) applies to it and its Commissioners.

Moreover, Movants' assertion that the mandatory stay at does not apply because "the IRC can act only through a majority vote of its members" is specious. CPLR 5519(a) has no such limit and applies on its face not only to bodies but to the individual officers thereof. League of Women Voters of Mid-Hudson Region v. Dutchess Co. Bd. of Election, 2022 N.Y. Slip Op. 74123(U)(2d Dep't Nov. 2.

2022) offers no support to the Movants' position as that slip opinion offers no discussion whatsoever as to the basis for its determination that there was no stay.

II. There is No Basis to Vacate the Stay

A. Petitioners Do Not Establish A Likelihood of Success on the Merits

As stated above, the whole of the Third Department's majority opinion is premised on its remarkable conclusion that the Harkenrider remedy was merely a temporary placeholder that would expire immediately upon completion of the 2022 elections. This determination is without basis and cannot stand.

The Appellate Division indulged Petitioners in converting this case into one where the central question is not the single issue raised by the mandamus petition – but a different question altogether, one which, if it were actually the relief sought would have been immediately subject to dismissal because, inter alia, it seeks an advisory opinion and these Petitioners would not, in any case, have standing to bring.

Petitioners' statement that they "sought and obtained a court order directing the IRC to 'modify' or 'amend' the state's congressional districts" (Pet Mem. 21) is completely false. The Petition here sought only to compel the IRC to perform a certain act; it did not call for the modification or replacement of the existing congressional map.

Petitioners need to attempt to force this square peg through a round hole because the plain language of Section 4(e) so clearly provides, in the second and final sentence thereof, that the existing plan shall remain in place for the remainder of the decade. Although the Third Department's opinion cites the constitution's explicit addressing of a plan's effective duration (i.e., until a plan based on the subsequent decennial census), it never returns to discuss or explain why the plain meaning thereof does not control. Petitioners now seek to repair that error by filling in what the court left unaddressed. The effort fails. This is not, and never was, a lawsuit to modify the existing plan.

Desperate to locate their ever-changing relief within Section 4(e)'s exception, "unless modified pursuant to court order," Petitioners now pretend that this mandamus action sought to modify the existing map. The face of the pleading rejects this contention. Indeed, the Petition never even once mentions or cites section 4(e), and certainly does not invoke or premise the proceeding upon the authority therein.

Even the Third Department's flawed analysis did not go that far. The decision now appealed does not call for the modification of the existing map. Nor could either of the courts below have ordered the modification of the existing maps as matter of state-constitutional law. Under the redistricting amendments, the IRC cannot and does not possess the power or authority to enact a reapportionment

plan or fix the boundaries of districts. The IRC ultimately can only make recommendations; and the Legislature is empowered to reject the IRC's recommendations and, in any case, ultimately enacts the legislation that amends or modifies the previously existing plan and districts.

The relief the Third Department granted, directing the IRC to make a second recommendation, thus does not accomplish such a modification. Because of the narrow relief sought in the very specific form of proceeding they elected to plead and prosecute (mandamus to compel an advisory body to make a non-binding recommendation), Petitioners never placed before the court an action that could result in a court order of the kind specified in the final clause of the final sentence of 4(e) (i.e., unless modified pursuant to court order).

This notion also contradicts the primary basis upon which Petitioners in fact obtained the result in the Appellate Division—the fiction that the court-ordered congressional districts established Harkenrider were temporary and for use solely in the 2022 election. If it were actually true that the Harkenrider map was an interim, one-election-and-done placeholder, then that map would not and could not be "modified" since it would have under such reasoning necessarily expired immediately upon the close of election day in 2022.

Petitioners argue that this sentence does not specify who may modify the reapportionment plan (as the remainder of the sentence reflects, the court orders

the modification). True, there is no express constitutional limiting of precisely how, or by what means and methods, a court might order a plan to be modified. But this much is subject to constitutional certainty—Petitioners' apparent suggestion that the IRC may itself effectuate the modification cannot stand. The IRC is advisory; it makes recommendations and has no constitutional authority to enact any such modification.

Petitioners likewise err in their discussion of §5-b. Section 5-b provides that an IRC is to be established once every ten years on or before February 1st of years ending in zero (e.g., the next such year will be 2030). Section 5-b also provides that an IRC shall be established any other time a court orders that legislative districts be amended. Here again, the Appellate Division has not ordered that the congressional districts be amended, nor could it for the same reason that the Supreme Court could not have—namely, the Petition did not ask for such relief. An action to invalidate and modify an existing redistricting plan is a very different lawsuit. Indeed, the Legislature would have needed to have been joined as a necessary and indispensable party if that were the relief sought.

Petitioners do not have, and have failed to demonstrate, a clear, legal right to the relief they seek. As a mandamus proceeding to compel the IRC to perform a specific act, it is not sufficient to reference merely and retrospectively that the IRC failed to comply with a mandatory directive. In order to obtain the unique relief of

compelling present or prospective action, Petitioners must establish that the demanded action can legally and constitutionally be undertaken. Here, that is not the case.

The relief sought by this proceeding is unavailable because it seeks to compel an act that is not permitted by the express language of the Constitution. "Manifestly, mandamus does not lie to compel an official act for which no legal basis exists." Matter of Altamore v Barrios-Paoli, 90 N.Y.2d 378, 384-85 (1997) ("petitioners have failed to allege any basis upon which the Director would have had the authority to extend the 7022 list beyond the scheduled May 25, 1995, expiration date"). Nor may mandamus compel an unconstitutional act. *See* Council of City of New York v Bloomberg, 6 N.Y.3d 380, 388 (2006). "Mandamus will not lie to compel a public official to perform a vain or useless or illegal act," Matter of Thorsen v. Nassau County Civ. Serv. Comm'n, 32 A.D.3d 1037, 1037-38 (2d Dep't 2006). Courts are precluded, "from considering questions which, although once live, have become moot by passage of time or change in circumstances." Matter of Jenkins v. Astorino, 121 A.D.3d 997, 999 (2d Dep't 2014).

In sum, at every turn, Petitioners' desired outcome is simply foreclosed by the plain language of the constitution. Without a legal escape, Petitioners advanced in the Appellate Division a hail-mary in the form of a) imagining that

this Court's decision in Harkenrider was interim despite the complete absence of any indication of such an irregular result, and b) that the issue of the duration of the Harkenrider remedy was something that could appropriately be decided in this mandamus litigation directly solely at the IRC. This hail may appear to have been caught, but upon further review, the play should and must be called back.

There is no basis for the speculation that the Harkenrider litigation was limited to temporary and interim relief. As the Court of Appeals recognized, New York's past redistricting efforts have often necessitated federal judicial intervention. Harkenrider at*1 (citing Favors v. Cuomo, 2012 WL 928223, at *1 (E.D.N.Y. Mar. 19, 2012). These do not default to an interim measure until a legislative fix is made. This would incentivize legislative majorities to always seek the most advantageous redistricting plans since the worst that could happen if a plan were struck down as unconstitutional or unlawful would be that the same legislature would get to redraw it again the very next year.

The decision of the Third Department will need to be reversed for reasons discussed herein but which will be more fully briefed by appellants in less than a month. There is no reason or basis to vacate the stay.

B. Petitioners Do Not Establish Irreparable Harm

Petitioners cannot establish irreparable injury. The existing congressional maps are the product of a constitutional process endorsed and approved by this Court. The Petitioners have not sought to invalidate the existing map.

The status quo is that the existing congressional districts are properly apportioned, well-scored under most any objective redistricting metric, and highly competitive. Furthermore, the existing congressional districts are undoubtedly the product of a process that is expressly contemplated and proscribed by the constitution (a court-ordered plan), endorsed and authorized as such by the authority of this, the highest Court in the state.

C. The Equities Do Not Balance in Petitioners' Favor

Petitioners' motion fails to identify any basis upon which the equities balance in their favor. Petitioners are ten individuals. They do not speak for all "New Yorkers" as their motion intimates. To the extent Petitioners merely wish to pay lip service to the IRC process so as to inevitably return largely unfettered redistricting powers to the Legislature (the body whose abuses necessitated the 2014 amendments and which most recently engaged in gross partisan gerrymandering at its first opportunity.

Petitioners engaged in excessive delays in prosecuting their action and their appeal. They demonstrated no urgency whatsoever. As noted, they waited over five months to even commence the action. Following dismissal by the Supreme Court, they thereafter waited until the last possible date to notice their appeal, and then incredibly delayed another three months before perfecting their appeal.

D. The Proceeding is Time Barred

The Appellate Division further erred in declining to recognize that the proceeding is barred by the statute of limitations. Specifically, the Appellate Division completely failed to recognize and apply the law that specifically identifies the accrual date for the limitations period in an Article 78 mandamus proceeding.

In a mandamus proceeding seeking to compel a municipality to perform a duty that is enjoined by law, the four-month Statute of Limitations in CPLR 217 begins to run on the date that the municipality refuses to perform the alleged duty. See Montco Constr. Co. v. Giambra, 184 Misc. 2d 970, 972, 712 N.Y.S.2d 766, 768 (Sup. Ct., Erie Co., 2000); see also Smuckler v. City of N.Y., 2009 N.Y. Slip Op. 30816(U), ¶ 9 (Sup. Ct., N.Y. Co. 2009) (the statute of limitations on a mandamus petition begins to run upon a respondent's refusal to perform a duty enjoined upon it by law.).

An Article 78 "proceeding seeking mandamus to compel accrues even in absence of a final determination. Hence, the statute of limitations for such a proceeding runs not from the final determination but from the date upon which the agency refuses to act." 193 Realty LLC v. Rhea, 2012 N.Y. Slip Op. 51865(U), ¶ 6, 37 Misc. 3d 1203(A), 1203A, 964 N.Y.S.2d 61 (Sup. Ct., N.Y. Co. 2012) (citing Ruskin Assocs., LLC v. State of N.Y. Div. of Hous. & Community Renewal, 77 A.D.3d 401, 403, 908 N.Y.S.2d 392 [1st Dep't 2010]).

In Van Aken v. Town of Roxbury, 211 A.D.2d 863, 864, 621 N.Y.S.2d 204, 205-06 (3rd Dep't 1995), this Court held that the fourth-month limitations period for the mandamus proceeding therein began to run when the Town Attorney issued a letter conveying that the Town was refusing to perform its mandatory duty to maintain a road.

Here, Petitioners affirmatively allege and expressly acknowledge that the IRC clearly declared on January 24, 2022 that it would not perform the act this mandamus proceeding seeks to compel (the submission of a second set of maps). Paragraph 37 of the amended petition alleges that "[o]n January 24, 2022, Chair Imamura announced that the IRC was deadlocked and would not submit a second round of recommended congressional plans to the Legislature." R. 276 Like the Town Attorney letter in Van Aken, supra, such statement is a clear declaration and refusal and, as such, triggered the running of the statute on a mandamus to compel.

Under the specific controlling law as to when a proceeding under CPLR 7803(1) accrues, Appellants' claim thus accrued on January 24, 2022, and the limitations period expired on May 24, 2022. This proceeding was commenced on June 28, 2022, over a month after the expiration of the statute of limitations. It was thus untimely commenced and should have been dismissed for that reason as well.

III. The Alternate Relief Sought By Petitioners Is Tantamount to The Primary Relief and Should Be Denied

Petitioners' footnote 1 is telling: there, Petitioners offer that if no stay is in place, then this Court should order the IRC to immediately take steps to comply with the Appellate Division's order. Thereafter, Petitioners request that if this Court does not vacate the stay, then it should order the IRC to take so-called preliminary steps by which they include to mean everything up to and including "drafting amended maps." In sum, Petitioners ask the Court to order the IRC to draw a new congressional map if there is no stay in place, and to impose this same order if there is a stay in place. And they do all of this in the context of the instant motion that seeks the ultimate relief sought by the proceeding itself where the opening briefs are due in less than a month. Because there is no meaningful difference between the alternative relief sought and the primary request, it too should be denied.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that Petitioners' motion to vacate the stay be denied in its entirety.

Dated: August 21, 2023
Sayville, New York

Respectfully submitted,

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