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 VOLANTE,

Petitioners,

v.

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents.

REPLY AFFIRMATION

CAE 22-00506

Steuben County Index No. E2022-0116CV

Jeffrey W. Lang, an attorney licensed to practice in New York, affirms the following subject to the penalties of perjury:

1. I am a Deputy Solicitor General in the office of Attorney General Letitia James, attorney for respondents Governor Kathy Hochul and Lieutenant Governor Brian A. Benjamin. I am familiar with the facts and circumstances of the proceedings in this matter.

2. I submit this reply affirmation in further support of the motion of executive respondents for an order declaring that all proceedings to enforce the judgment of Supreme Court are stayed under C.P.L.R. 5519(a)(1), or alternatively, granting a discretionary stay pending appeal.

The Automatic Stay Applies

3. Petitioners argue that there is no automatic stay here because the judgment of Supreme Court is "prohibitory." (Tseytlin Aff. at 36-44.) If by "prohibitory" is meant an order that enjoins government officials from continuing to enforce the law, there is no reason to except such orders from the scope of the automatic stay. Doing so conflicts not only with the plain text of C.P.L.R. 5519(a)(1), but with binding Court of Appeals precedent.

4. The Court of Appeals' decision in *LaRossa, Axenfeld & Mitchell v. Abrams*, 62 N.Y.2d 583, 586-87, 590 & n.1 (1984), is instructive. There the Attorney General had served subpoenas on the plaintiffs in connection with an antitrust investigation, and the trial court had enjoined the Attorney General from enforcing the subpoenas and certain sections of the General Business Law. *Id.* at 586. The Court

noted that the Attorney General appealed the grant of injunctive relief barring this enforcement, "and thereby obtained an automatic stay of Special Term's order pursuant to C.P.L.R. § 5519." *Id.* To the extent that some cases in the First and Second Departments depart from the Court of Appeals' view of the automatic stay, this Court should not follow them.

5. Just as in *LaRossa*, the judgment here restrains respondents from carrying out their statutory duties to enforce the law; here, it restrains them from continuing to administer the election under the 2022 maps, which are the only maps currently available and under which the election has proceeded since March 1, 2022. Respondents' appeals should therefore be deemed to have triggered the automatic stay. Accordingly, should respondents or their agents continue to use the 2022 maps to discharge their statutory duties under the Election Law, and petitioners bring contempt proceedings against them, such proceedings should be stayed, as indisputably "proceedings to enforce" the judgment. Such contempt proceedings are a far cry from "the natural sequalae" of granting or denying relief contemplated by the C.P.L.R., such as a trial following the denial of summary judgment. *See Matter of Pokoik v. Department of Health Services*, 220 A.D.2d 13, 15 (2d Dep't 1996).

6. Even assuming some prohibitory injunctions are not stayed by service of a notice of appeal under C.P.L.R. 5519(a)(1), the judgment here differs from a typical prohibitory injunction that operates to prevent a threatened injury, and "thereby ordinarily ha[s] the effect of maintaining the status quo." *State of New York v. Town of Haverstraw*, 219 A.D.2d 64, 66 (2d Dep't 1996). The judgment here, by contrast, disrupts the status quo—indeed to an unprecedented degree where State elections are concerned. And the threatened injury here is to the paramount interest respondents, candidates for office, and the public have in fair, efficient, and orderly elections.

7. In any event, petitioners' argument elevates form over substance. As discussed in executive respondents' opening papers (Lang Aff. at 13-14), there are significant "executory" aspects of the judgment. For instance, petitioners describe decretal paragraph seven as giving the Legislature the "option" to submit maps that satisfy Supreme Court's nebulous requirement of some level of bi-partisan support. (Tseytlin Aff. at 42.) But declining that option carries the gravest of consequences: a court-imposed redesign of the State's entire electoral map. The prospect of court-imposed maps is so coercive that the option given the Legislature

to enact its own "bipartisan" maps for court review should be considered executory for purposes of the automatic stay. And the court below recognized the necessity of future legislative acts as a result of its decision, because the current election deadlines could not accommodate its wholesale striking of the State's electoral maps. (Lang Ex. A at 16.)

8. The executory aspects of the judgment distinguish it from the school mask mandate case cited by petitioners. *See* Tseytlin Aff. at 38; *Alexandria Goldenstein v. New York City Dep't of Health and Mental Hygiene et al*, Index No. 008057/2022 (Richmond Cnty. Sup. Ct. 2022). The order there was purely prohibitory. And in any event, petitioners fail to mention that the Second Department in that case granted a discretionary stay. Even if this Court concludes that no automatic stay applies, it should do the same.

The Court Should Grant a Discretionary Stay

A. Likelihood of Success on the Merits

9. Even if there is no automatic stay, respondents are entitled to a discretionary stay. Respondents have demonstrated a likelihood of success on the merits, irreparable harm, and equities in favor of a stay. On the merits, executive respondents join the compelling arguments

articulated by legislative respondents that petitioners have not proven beyond a reasonable doubt the existence of a partisan gerrymander with respect to the congressional maps nor an invalid process with respect to all maps.

10. On the issue of constitutional process, petitioners advance the remarkable theory that under the procedures established by the 2014 constitutional amendments, the Legislature is definitively divested of its authority to enact maps for a redistricting cycle when the IRC, for whatever reason, fails to submit maps. (Tseytlin Aff. at 45-58.) And, petitioners posit, this consequence is so clearly embodied in the State Constitution as to render invalid the 2021 legislation that directed the Legislature to enact maps in the event that the IRC fails to submit them.

11. Petitioners' reading of the constitutional procedures is not plausible. The constitutional drafters could not have intended for the Legislature to forfeit its authority over redistricting, for the remainder of the 10-year redistricting cycle, because the IRC fails to submit maps; the Constitution is silent concerning what happens in that event, and thus the Legislature acted well within its rights by filling the gap through the 2021 legislation. *See Cohen v. Cuomo*, 19 N.Y.3d 196, 201-02 (2012)

(before striking a statute purporting to fill a gap, a conflict with the Constitution must be shown "beyond reasonable doubt").

12. If petitioners' theory were accepted, it would mean that four members of the IRC could thwart legislative redistricting by refusing to meet with the other IRC members, and therefore deprive the IRC of a quorum of seven required to transact business, and thus to submit maps.[1] To be sure, petitioners recognize, as they must, that, in the event the IRC fails to submit maps, the authority to enact maps must still reside *somewhere* for elections to take place. They argue—and Supreme Court adopted their view—that map-drawing authority then shifts to the judiciary to enact the maps, upon a court challenge. But that is contrary to a long history in New York of legislative authority over redistricting,[2] and there is no evidence that the constitutional drafters intended for the Legislature's authority over redistricting to be so readily surrendered to the courts. At the very least, one would have expected such a dramatic departure from past practice to be made explicit. That is especially so

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[1] The quorum is not five, as petitioners erroneously state. *See* Tseytlin Aff. 13; N.Y. Const., § 5-b(f) (when full 10-member IRC is appointed, the quorum for business is seven).

[2] *See* legislative respondent mem. of law at 11, n. 2 (collecting cases).

because the constitutional amendments were passed twice by the Legislature itself before being put to voters, and concerned its own authority.

13. Petitioners' attempts at rebuttal are unpersuasive. They contend that *Cohen v. Cuomo* does not govern because the Constitution is not silent on the procedural issue here. And that is supposedly so because "the process" established §§ 4(b), 5, and 5(b) of Article III "shall govern" redistricting. (Tseytlin Aff. at 53.) No one disputes that the constitutional process governs redistricting; the question is what that process dictates in the event that the IRC fails to submit maps, given the necessity of enacting maps. And the Constitution is silent on that point. It certainly does not provide that redistricting authority is then vested with the courts.

14. Petitioners also attack what they term respondents' "policy argument" concerning an absurd consequence of petitioners' reading of the Constitution. (Tseytlin Aff. at 54.) The presumption against absurd results is not a policy argument, but a traditional canon of construction. *See Anderson v. Regan*, 53 N.Y.2d 356, 362 (1981). And petitioners are mistaken in asserting in response that a permanent transfer of

redistricting authority to the judiciary is not only far from absurd, but in fact precisely the intent of the 2014 amendments. (Tseytlin Aff. at 55.) Petitioners' argument conflates two very different ideas. Certainly, the drafters wanted to prohibit electoral maps designed to favor incumbents or political parties. But there is no basis for the claim that they intended to remove politics from the process entirely or displace the Legislature altogether from its traditional role in redistricting. To the contrary, the Constitution explicitly contemplates the possibility that no single map will command a majority of votes in the IRC, and that in such a case the IRC must then submit to the Legislature the two or more competing maps tied for the most votes. *See* N.Y. Const., Art. III, § 5-b(g) (the commission shall submit "all plans" that tied for the most votes). This provision cannot be reconciled with petitioners' theory that the drafters intended to banish all politics and partisanship from the redistricting process.

15. Finally, petitioners attempt only a cursory defense of Supreme Court's reasoning that the Legislature could readily comply with constitutional procedures (as it viewed them) in the event of an IRC impasse by bringing a mandamus to compel proceeding against the IRC or removing the recalcitrant IRC members. (Tseytlin Aff. at 54.) This

conclusion does not withstand scrutiny. The Constitution does not contain the type of "exhaustion" requirement that Supreme Court read into it. And the court's proposed solution rests on a misunderstanding of the deadline for the IRC to submit a second set of maps—an error which petitioners repeat.

16. The Constitution gives the IRC at most 15 days from the date that the Legislature or Governor rejects the IRC's first set of maps to submit a new set of maps, *or* the IRC has until February 28 to submit a new set of maps—whichever comes sooner. N.Y. Const., Art. III, § 4(b). Contrary to Supreme Court (Lang Ex. A at 6) and petitioners' claim (Tseytlin Aff. at 46), the IRC never has more than 15 days to resubmit maps after a first rejection.

17. In this case, the IRC's deadline to submit a second set of maps fell on January 25, 2022. Supreme Court reasoned from the mistaken premise that the IRC failed to use an extended remaining period to attempt to produce a new set of maps, giving up before February 28. But that date was not the deadline here. And when the IRC reported a deadlock on January 24, 2022, there was only one day left. Thus, the constitutional procedures simply do not provide sufficient time for the

remedial steps that Supreme Court proposed, especially when, as happened here, the IRC first declares an impasse toward or at the end of the 15-day period for resubmission.

18. For these reasons, executive and legislative respondents have demonstrated a likelihood of the success on the merits of their appeals.

B. Irreparable Harm and the Equities

19. Petitioners fail to rebut respondents' evidence that New Yorkers will suffer irreparable harm absent a stay and that the equities favor this relief. As executive respondents explained at length in their opening papers, a stay pending appeal is necessary to prevent irreparable harm in the 2022 election cycle. Executive respondents detailed how Supreme Court's order destabilizes an election process that is already well underway, sowing uncertainty for voters, candidates, and state and local election officials alike.

20. In support of their assertion of irreparable harm, executive respondents submitted two sworn affidavits from Thomas Connolly, Director of Operations for the New York State Board of Elections. (Lang Exs. C and D). Mr. Connolly explained in great detail, from the vantage point of an election official whose job it is to support and provide guidance

to county boards of elections (Lang Ex. C at 2), the precise impact a ruling like the one issued by Supreme Court would have on the organization and implementation of the 2022 election. Mr. Connolly has an intimate understanding of the constraints that county boards of elections are working under, as reflected in his affidavits.

21. Mr. Connolly explained that the designating petition process is already nearly done, with petitions due April 7, and outlined how disrupting the process now would lead to logistical problems and confusion for candidates, voters, political parties, and local election officials. (Lang Ex. C at 3-4.) To take one example, the period for collecting signatures on designating petitions will close shortly. Under Supreme Court's judgment, however, the entire primary ballot access stage of the election will have to be redone from scratch once any new maps are in place. This is a recipe for confusion. For instance, for the offices at issue in this litigation, voters in New York are allowed to sign only one designating petition per office. Elec. Law § 6-134. Thus, boards of elections would have to inform voters that any signatures they may have already made on designating petitions are no longer valid, leading

to confusion over whether voters have acted in compliance with the law and which petitions they may sign.

22. Mr. Connolly also detailed the planning hurdles that local election officials would face in planning an additional primary, including finding polling sites, early voting sites, and poll workers. (Lang Ex C at 5.)

23. Mr. Connolly explained how these hurdles would be magnified if local election officials were simultaneously planning and holding another primary, planning a general election, and attempting to accommodate a redistricting in between the two primaries, which would require nearly full-time devotion to re-sorting voters. Nothing like that has been attempted in New York electoral history. (Lang Ex. C at 5-7.)

24. Mr. Connolly also explained that newly registered voters and transferred voters are currently receiving notifications with their district designations and polling place information, and that such notifications will soon be sent to all voters. (Lang Ex. C at 10-11.) A late-breaking remedy will prove this information false, again leading to massive voter confusion.

25. In their response, petitioners fail to meaningfully respond to the facts attested to by Mr. Connolly. In fact, petitioners fail to even *acknowledge* Mr. Connolly's two affidavits, let alone specifically rebut any of the facts avowed therein. Instead, petitioners rely on an affidavit from Mr. Todd Valentine for the generalized and glib assertion that local boards of election have changed course in advance of an election before, so they can do it again. (Tseytlin Aff. at 88-89.) Yet petitioners and Mr. Valentine fail to rebut with any meaningful specificity the points made by Mr. Connolly, defaulting instead to the general observation that county boards "perform well" under changing conditions. While this may be true, they have not faced any task remotely comparable to the wholesale revision of the electoral calendar in the course of a redistricting of all of the State's major electoral maps.

26. Nor do petitioners offer any suggestion for what will happen with immediately upcoming Election Law deadlines absent a stay. While it is true that this Court has stayed the judgment below through the designating petition deadline on April 7, and set this appeal down for expedited consideration, Election Law deadlines are looming. Objections to filed petitions must be filed no later than April 11, Elec. Law § 6-154,

followed rapidly by hearings on these objections at state and local boards of elections. (Lang Ex. C at 4.) The latest day to commence a court challenge to a designating petition is April 21. (Lang Ex. C at 4.) The June primary election ballot must be certified by May 4, and pursuant to federal law, military and overseas ballots for the primary must be mailed out no later than May 12. (Lang Ex C at 4.) Absent an extension of the stay, election officials will be put in an impossible position between following Supreme Court's judgment and breaching their election duties, or discharging those duties while violating the judgment.

27. The *Purcell* principle announced and repeatedly applied by the United States Supreme Court holds that irreparable harms, including confusion and the risk of electoral inaccuracy, are assumed to exist when the rules are changed in the run-up to an election, and therefore such changes are strongly disfavored. *See Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam).

28. In explaining the animating concerns behind the *Purcell* principle, Justice Kavanaugh recently noted in a concurrence in the Court's denial of a request to vacate a stay of an election law ruling, that "judicial restraint" is necessary in the run-up to an election, because

"[e]ven seemingly innocuous late-in-the-day judicial alterations" to election laws "can interfere with administration of an election and cause unanticipated consequences," including voter confusion, election administrator confusion, and damage to the State's interest in running an orderly and efficient election. *Democratic Nat'l Comm. v. Wisconsin State Legis.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring).

29. Justice Kavanaugh highlighted what local election officials must do when rules on the ground are changed:

> If a court alters election laws near an election, election administrators must first understand the court's injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes.

Id.

30. The animating concerns behind the *Purcell* principle, then, are precisely the same irreparable harm concerns at play in this litigation, and which counsel in favor of a stay.

31. Petitioners are wrong, then, when they exhort this Court to simply ignore the United States Supreme Court's guidance in the election law arena. (Tseytlin Aff. at 86-87.) While the *Purcell* line of cases does hold that it is particularly egregious, from a federalism perspective, for a

federal court to change the rules of a state election in the run-up to that election, *Purcell*'s reasoning is not limited to those circumstances. To the contrary, the Court's expressed concerns over judicially-created electoral confusion apply with equal force to any court intervention in the run-up to an election, because such problems occur when any court disturbs an election that has been carefully and thoroughly planned and administered by the legislative and executive branches. Thus, the *Purcell* doctrine rests equally on principles of judicial restraint.

32. The broad applicability of the *Purcell* principle is evidenced by the fact that state courts in multiple states have adopted the principle to restrain court-imposed alternations to election rules in the run-up to an election. *See, e.g., Alliance for Retired Americans v. Secretary of State*, 240 A.3d 45 (Me. 2020); *Fay v. Merrill*, 338 Conn. 1 (2021).

33. Finally, petitioners argue that, whatever the irreparable harm to respondents and the public, a stay is inappropriate because the 2014 constitutional amendments require that a state court adjudicating an apportionment challenge "render its decision within sixty days after a petition is filed." N.Y. Const., art. III, § 5. (Tseytlin Aff. at 87.) Petitioners misread this constitutional provision to direct that maps which have been

struck down and are on appeal may not be used in an upcoming election. From the 60-day time limit, petitioners attempt to infer an expectation that any remedy be implemented that same election cycle. As written, however, the provision simply requires the expeditious resolution of any court challenge. At most, it may be understood to encourage the use of new maps when reasonably feasible—which may be true in cases where the remedy is of more limited scope than the one imposed here.

34. Indeed, the drafters of the 2014 constitutional amendments were undoubtedly aware of prior cases in which maps were adjudicated invalid, yet courts permitted the current election to go forward under the invalid maps. *See, e.g., Badillo v. Katz*, 32 N.Y.2d 825, 827 (1973); *Honig v. Board of Supervisors of Rensselaer County*, 31 A.D.2d 989 (3d Dep't), *aff'd*, 24 N.Y.2d 861 (1969).[3] Had the drafters wished to amend the Constitution to prohibit that practice, they could have easily done so. But they did not.

35. Additionally, petitioners' challenge—and Supreme Court's remedy—go far beyond the kind of apportionment challenge

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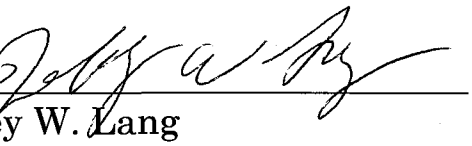
[3] The legislative respondents cite numerous such cases in their memorandum of law at pages 47-49.

contemplated by the provision. In this suit, petitioners also challenge a separate, duly enacted procedural statute as unconstitutional, which led the lower court to strike congressional, state senate, and state assembly maps as void *ab initio* and in their entirety. The 60-day provision is not fairly read to apply to that portion of petitioners' suit.

36. For these reasons, executive respondents have demonstrated a likelihood of success on the merits, irreparable harm in the absence of a stay, and the equities in their favor. Accordingly, however the Court resolves the issue of an automatic stay, it should grant a discretionary stay, and permit respondents to maintain the status quo and continue to administer the election under the 2022 maps.

Dated: April 6, 2022
Albany, New York

By: 
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