SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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,

-against-

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.

Index No. E2022-0116CV

McAllister, J.S.C.

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' SUPPLEMENTAL BRIEF ADDRESSING REMEDIES

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Respondents Kathy Hochul, Governor of the State of New York, and Brian A. Benjamin, Lieutenant Governor and President of the Senate (collectively, "Executive Respondents"), respectfully submit this memorandum of law in opposition to Petitioners' Supplemental Brief Addressing Remedies, filed on March 18, 2022. NYSCEF 232.

FACTS

On February 3, 2022, Petitioners commenced this special proceeding challenging the 2022 congressional maps under Article 4 of the Civil Practice Law and Rules ("CPLR").

On February 8, 2022, Petitioners filed for leave to amend their petition, attaching a proposed amendment in which they added a challenge to the 2022 State Senate maps and prayer for relief "[s]uspending or enjoining the operation of any other state laws that would undermine this Court's ability to offer effective and complete relief to Petitioners for the November 2022 elections and related primaries." NYSCEF 18 at p. 82. In Petitioners' accompanying memorandum of law, they sought to "pause election-related deadlines." NYSCEF 25 at p. 56.

The Executive Respondents opposed this prayer for relief on multiple bases, including federal and state case law forbidding the interference with the election process on the eve of its commencement. *See* NYSCEF 82 at p. 25-26.

On March 3, 2022, the parties appeared before the Court and argued, *inter alia*, Petitioners' motion to amend, which the Court granted. However, upon issuing its decision that "a hearing will be necessary to be conducted to determine where the truth lies between the Petitioners' experts and the Respondents' experts," the Court denied Petitioners' request to interfere with the upcoming election. March 3, 2022 Transcript at 69:17-19. The Court specifically declined to suspend the election process for two reasons: (1) Petitioners' "extremely high level of proof," and (2) "even if I find the maps violated the Constitution and must be redrawn, it is highly unlikely that a new

viable map could be drawn and be in place within a few weeks or even a couple of months, therefore striking these maps would more likely than not leave New York State without any duly elected Congressional delegates." *Id.* at 70:1; 70:6-12. The Court thus held: "I believe the more prudent course would appear to be to permit the current election process to proceed and then if necessary to require new elections next year if the new maps need to be drawn." *Id.* at 70: 12-15.

During trial on March 16, 2022, the Court orally granted Petitioners' request for leave to file "supplemental briefing on timing and scope of remedy." *See* NYSCEF 198 & 203.

ARGUMENT

Preliminarily, Petitioners seek to reargue the Court's denial of their request to interfere with the upcoming election cycle, yet Petitioners fail to "identify [their papers] specifically as such," or attach the underlying papers, procedural flaws that may themselves justify denial. CPLR § 2221(d)(1). In any event, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted." *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept 1992). Petitioners' request is also improper given this Court's inherent authority "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). It was well within this Court's discretion to decline to interfere with this years' election process. "Courts have an inherent power over the control of their calendars and the disposition of business before them, including the order in which disposition will be made of that business." *Hart v. Am. Airlines, Inc.*, 31 A.D.2d 896, 896 (1st Dept 1969).

On the merits, Petitioners would have this Court conduct a results-oriented analysis and reverse itself. Without affording any deference to the Court's determination as to "the more

prudent course," Petitioners heavy-handedly assert that "permitting the unconstitutional congressional map to fester that long is simply not the prudent course." NYSCEF 232 at p. 3. Petitioners ask this Court to reconsider its determination that "striking these maps would more likely than not leave New York State without any duly elected Congressional delegates," simply because Petitioners believe that this Court cannot order a special election in 2023. March 3, 2022 Transcript at 70:12-15. Setting aside that Petitioners are quibbling over the period of one year (2023 vs. 2024), as compared to New Yorkers' fundamental right to vote in a fast-approaching election, the fact *that a particular remedy may be unavailable has no bearing whatsoever on the detrimental impacts of interfering with an ongoing election*. This Court should not adopt Petitioners' results-oriented analysis.

If there is any doubt as to the impossibility and risks associated with Petitioners' proposed "remedies," the Executive Respondents respectfully submit an Affidavit of Thomas Connolly, the Director of Operations of the New York State Board of Elections, sworn to March 21, 2022, and attached as Exhibit A to the Affirmation of Heather L. McKay ("McKay Aff.").[1] As Director Connolly's affidavit makes clear, it would not be possible, or remotely prudent, to hold separate primaries as Petitioners so casually suggest. New York's election process is well underway; as of the date of this filing, "more than half of the designating petitioning period has elapsed." *Id.* at ¶¶ 5-6. Contrary to prior years when separate primaries were held with sufficient advance notice, it would be unprecedented to order two primaries in the same year with intervening redistricting occurring between those primaries. *Id.* at ¶ 11.

[1] Although the New York State Board of Elections was named as a respondent in this proceeding, it has taken no position in this pending litigation. *See* NYSCEF 54. By its terms, Director Connolly's affidavit is based on his personal knowledge, and the Executive Respondents have not authored, edited, or otherwise dictated its contents. *See* McKay Aff. ¶ 3.

Because New York is "not a top-down state in terms of its voter registration system," as of February 3, 2022, all 58 of its local boards of elections "turned their full attention to translating the new district boundaries into their voter registration systems so that New York's 12,982,819 voters would be assigned to their correct districts." *Id.* at ¶ 15-16. And, in addition to reassigning millions of voter records to the appropriate new political geography, redistricting often requires local boards of elections to draw new election district boundaries, which is a "significant undertaking." *Id.* at ¶ 18-19.

Ultimately, then, as Director Connolly explains (reminiscent of this Court's earlier holding), "[i]f new lines were ordered at this juncture, it is simply not clear how compliance would be possible without significant risk to the integrity of the electoral process." *Id.* at ¶ 23. Furthermore, "[s]topping the ballot access process and restarting it on revised as yet unknown lines and adding an additional primary will cause confusion as well as financial, logistical and administrative burdens on boards of elections." *Id.* at ¶ 27.

Finally, as a practical matter, Petitioners' desire to bog down this Court and the parties with pedantic questions of remedies is an exercise in futility. Even if this Court were to declare the maps unconstitutional, its determination will be subject to appellate review. Upon the filing of the government's notice of appeal, an automatic stay would issue pursuant to CPLR 5519(a)(1). And, even assuming, *arguendo*, that any constitutional infirmity was affirmed on appeal, the State Constitution is clear that the Legislature must be granted the opportunity to remedy it. *See* N.Y. Const. Art. III, § 5. This Court already correctly determined that these processes could not possibly be completed in time for this year's elections.

CONCLUSION

Accordingly, Petitioners' request "that this Court grant Petitioners' Requested Timing And Scope Of Remedy" should be denied in its entirety.

March 21, 2022
Rochester, New York

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CERTIFICATION

In accordance with Rule 202.8-b of the Uniform Rules of Supreme and County Courts, the undersigned certifies that the word count in this memorandum of law (excluding the caption, table of contents, table of authorities, signature block, and this certification), as established using the word count on the word-processing system used to prepare it, is 1,219 words.

Rochester, New York
March 21, 2022

By: *s/ Heather L. McKay*
HEATHER L. MCKAY
Assistant Attorney General