Troutman Pepper Hamilton Sanders LLP
875 Third Avenue
New York, New York 10022

troutman.com

Bennet J. Moskowitz
bennet.moskowitz@troutman.com

April 1, 2022

VIA EMAIL

Brian Lee Quail, Esq.
Counsel for the New York State Board Of Elections
40 N. Pearl Street, Suit 5
Albany, NY 12207
(518) 474-2063
brian.quail@elections.ny.gov

Re: *Harkenrider, et al. v. Hochul, et al.*, Index No. E2022-0116CV (Sup. Ct. Steuben Cnty.)

Dear Mr. Quail:

Earlier today, your client—the New York State Board Of Elections—erroneously tweeted that the Supreme Court's "March 31, 2022 order . . . which declared the 2022 Congressional, Senate and Assembly lines unconstitutional has been STAYED pending appeal." N.Y. State Bd. of Elections (@NYSBOE), Twitter (Apr. 1, 2022, 10:25 AM).* Your client's erroneous tweets enjoyed wide circulation, causing many members of the public to conclude incorrectly that this Decision And Order has been stayed. In fact, *no portion of the Court's March 31, 2022 Decision And Order has been stayed pending appeal*. The conclusion that the Court's March 31, 2022, Decision And Order is not automatically stayed pending appeal, per CPLR § 5519(a), follows from CPLR § 5519(a)'s statutory text and unambiguous case law. Accordingly, we hereby demand that your client post a corrective tweet immediately.

A. CPLR § 5519(a)(1) is a narrow automatic-stay provision, applicable *only* to proceedings to enforce orders that mandate that the State take a specific action. Specifically, CPLR § 5519(a)(1) provides "a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal" in cases 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." CPLR § 5519(a)(1). Since, by its plain text, CPLR § 5519 applies only to "proceedings to *enforce* the judgment or order" against the State, *id.* (emphasis added), its automatic-stay provision necessarily extends only to court orders that *mandate* the

* Available at https://twitter.com/nysboe/status/1509899743396311059 (all websites last visited Apr. 1, 2022).

State to perform some action, rather than court orders that simply *prohibit* the State from taking some action or that *declare* legal conclusions.

Case law interpreting CPLR § 5519 is in accord with this understanding, holding that CPLR § 5519's automatic-stay provision does not apply to court orders that *prohibit* the State from taking some action or declaring legal conclusions. As Siegel's New York Practice explains, New York courts have held—consistent with the statutory text—"that when the appealed decision directs the [State] not to do something . . . the automatic stay is not operative to allow the [State] to do the prohibited thing during the pendency of the appeal." Injunctions and Stays, Siegel, N.Y. Prac. § 535 (6th ed.). For example, *State v. Town of Haverstraw*, 219 A.D.2d 64 (2d Dep't 1996), held that "no automatic stay is available" under CPLR § 5519(a)(1) for an order that "prohibits certain conduct" of the State, since such "[p]rohibitory injunctions" that "*prohibit* future acts" are "self-executing and need no enforcement procedure to compel inaction on the part of the [State]." *Id*. at 65 (emphasis in original). And *Pokoik v. Department of Health Services County of Suffolk*, 220 A.D.2d 13 (2d Dep't 1996), held that CPLR § 5519(a)(1) "is restricted to the executory directions of the judgment or order appealed from which *command a person to do an act*," thus, "the stay does not extend to matters which are not commanded but which are the sequelae of granting or denying relief"—including "the declaratory provisions of a judgment." *Id*. at 15 (emphasis added); *see also Spillman v. City of Rochester,* 132 A.D.2d 1008, 1009 (4th Dep't 1987); David M. Cherubin & Peter A. Lauricella, *The "Automatic" Stay of CPLR 5519(a)(1): Can Differences in It Application Be Clarified?*, 71-Nov. N.Y. St. B.J. 24 (Nov. 1999).

Prior proceedings in this very case demonstrate the limited nature of CPLR § 5519(a)(1). After the Supreme Court issued its decision allowing Petitioners to seek expedited discovery in this case, certain Respondents appealed that decision to the Appellate Division, consistent with their contention that their filing a Notice Of Appeal would automatically stay the Supreme Court's discovery decision. Petitioners then moved the Appellate Division to vacate any automatic stay of the Supreme Court's discovery decision under CPLR § 5519(a)(1). Justice Lindley declined Petitioners' motion in part on the grounds that a "motion to vacate the supposed automatic stay is unnecessary . . . *because there is no automatic stay in effect*." NYSCEF No.134, Ex.A at 1. (citations omitted; emphasis added). As Justice Lindley explained, "CPLR § 5519(a) does not stay all proceedings," but rather "only 'proceedings to enforce the judgment or order appealed from.'" *Id.* (quoting CPLR § 5519(a)). Further, "[w]hat constitutes a 'proceeding to enforce' is strictly construed," *id.*, demonstrating the exceedingly limited scope of CPLR § 5519(a)'s automatic-stay provision. Specifically, and as relevant here, Justice Lindley explained that only proceedings to enforce court orders that contain "executory directions that *command a person to do an act* beyond what is required under the CPLR" fall within CPLR § 5519(a)'s automatic-stay provision. *Id.*, Ex.A at 2 (citations omitted; emphasis added). So, since the discovery decision at issue did "not command a person to do an act beyond what is required under CPLR," Justice Lindley denied Petitioners' motion to vacate any automatic stay as unnecessary. *Id*.

B. In the present case, CPLR § 5519(a)(1) does not apply to the Supreme Court's March 31, 2022 Decision And Order, since that Order does not "command" Respondents "to do an act."

Pokoik, 220 A.D.2d at 15. The Supreme Court issued its March 31, 2022 Decision And Order enjoining the unconstitutional 2022 congressional, state Senate, and state Assembly maps, as variously contravening both the procedural and substantive requirements of Article III, Sections 4 and 5 of the New York Constitution, as well as allowing the Legislature to submit bipartisan maps by April 11, if the Legislature chooses to do so. NYSCEF No.243 at 17–18. In particular, the Decision And Order provides the following relevant decretal language:

> [1.] ORDERED, ADJUDGED, and DECREED that the process used to enact the 2022 redistricting maps was unconstitutional and therefore void *ab initio*; and it is further
>
> [2.] ORDERED, ADJUDGED, and DECREED that with regard to the enacted 2022 Congressional map the Petitioners were able to prove beyond a reasonable doubt that the map was enacted with political bias and thus in violation of the constitutional prohibition against gerrymandering under Article III Sections 4 and 5 of the Constitution; and it is further
>
> [3.] ORDERED, ADJUDGED, and DECREED that the maps enacted by 2021-2022 N.Y. Reg. Sess. Leg. Bills S8196 and A.9039-A (as technically amended by A.9167) be, and are hereby found to be void and not usable; and it is further
>
> [4.] ORDERED, ADJUDGED, and DECREED that the maps enacted by 2021-2022 N.Y. Reg. Sess. Leg. Bills S9040-A and A.9168 be, and are hereby found to be void and not usable; and it is further
>
> [5.] ORDERED, ADJUDGED, and DECREED that congressional, state senate and state assembly maps that were enacted after the 2010 census are no longer valid due to unconstitutional malapportionment and therefore can not be used; and it is further
>
> * * *
>
> [6.] ORDERED, ADJUDGED, and DECREED that in order to grant appropriate relief the court hereby grants to Petitioners a permanent injunction refraining and enjoining the Respondents, their agents, officers, and employees or others from using, applying, administering, enforcing or implementing any of the recently enacted 2022 maps for this or any other election in New York, included but not limited to the 2022 primary and general election for Congress, State Senate and State Assembly; and it is further
>
> [7.] ORDERED, ADJUDGED, and DECREED that the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps to this court for review of the Congressional District Maps, Senate District Maps, and Assembly District Maps that meet Constitutional requirements; and it is further

> [8.] ORDERED, ADJUDGED, and DECREED that in the event the Legislature fails to submit maps that receive sufficient bipartisan support by April 11, 2022 the court will retain a neutral expert at State expense to prepare said maps[.]

Id. None of these provisions of the Supreme Court's Decision And Order "command[ ]" any "affirmative act" of Respondents, *Town of Haverstraw*, 219 A.D.2d at 65; thus CPLR § 5519(a)(1)'s automatic-stay provision does not operate to stay any part of this Order.

Turning first to decretal paragraphs numbered 1–5 above, nothing in this language provides any "executory directions of the judgment or order appealed from which command a person to do an act." *Pokoik*, 220 A.D.2d at 15. These provisions merely declare the 2022 maps unconstitutional and either "void *ab initio*" or "void and not usable," and then declare the post-2010-census maps "no longer valid." NYSCEF No.243 at 17. Such provisions are "self-executing and need no enforcement procedure to compel inaction" based upon the Court's declaration that such maps are unconstitutional and void. *Town of Haverstraw*, 219 A.D.2d at 65. Thus, CPLR § 5519(a)(1) does not operate to automatically stay these provisions.

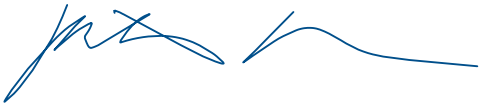
Next, decretal paragraph 6 of the Decision And Order also does not fall within CPLR § 5519(a)(1), as it only grants Petitioners a permanent injunction against the operation of the 2022 maps. Thus, this paragraph is an "order[ ] or judgment[ ] which prohibit[s] future acts," and such "[p]rohibitory injunctions are self-executing and need no enforcement procedure to compel inaction on the part of the person or entity restrained." *Town of Haverstraw*, 219 A.D.2d at 65. Unlike mandatory injunctions that "direct the performance of a future act," prohibitory injunctions like paragraph 6 "operate[ ] to restrain the commission or continuance of an act and to prevent a threatened injury," and "the automatic stay provision of CPLR 5519(a)(1) d[oes] not operate to relieve [Respondents] from the duty to obey the terms of a prohibitory injunction pending appeal therefrom." *Id.* at 65–66; *see also* Siegel, N.Y. Prac. § 535.

Finally, above-numbered paragraphs 7 and 8 similarly do not "command" Respondents to do anything, and therefore CPLR § 5519(a)(1) does not stay their operation. *Pokoik*, 220 A.D.2d at 15. These decretal paragraphs merely provide the Legislature a reasonable period of time to draw new, bipartisan maps, and gives them the option to submit such constitutional maps to the Court, at their own discretion, on or before April 11, 2022, NYSCEF No.243 at 18, and so CPLR § 5519(a)(1) has no effect on Respondents' "voluntary . . . compliance" with this provision of the Decision And Order pending appeal, *Pokoik*, 220 A.D.2d at 15. Thus, paragraph 7 merely notes "[f]uture acts which are not expressly directed by the order or judgment appealed," and "no automatic stay is available" for such "[f]uture acts," even though they "may nevertheless have the effect of changing the status quo and thereby defeating or impairing the efficacy of the order which will determine the appeal." *Id.* at 15–16. Paragraph 8, moreover, orders nothing of Respondents, and merely notes the Supreme Court's follow-up "matters which are not commanded but which are the sequelae of granting or denying relief." *Id.* at 15. By analogy, the Appellate Division has explained that "where an order merely denies a motion for summary judgment or to strike the case from the calendar, an appeal from that order will not stay a trial which is a consequence of

the order but is not directed by it." *Id.* Here, given that nothing in paragraphs 7 and 8 mandates executory directions of Respondents, which paragraphs instead only explain the sequelae of the Court's decision holding the 2022 maps unconstitutional, the automatic stay provision in CPLR § 5519(a)(1) simply does not apply.[†]

Given that your client's widely circulated tweets have misled the public, Petitioners demand that your client issue a corrective tweet immediately, explaining that no portion of Justice McAllister's March 31, 2022 Decision And Order is currently stayed.

Sincerely,



Bennet J. Moskowitz

Misha Tseytlin

cc: All Counsel of Record (via electronic mail)

[†] CPLR § 5519(a)(1)'s automatic stay would only apply, for example, if the Supreme Court had granted Petitioners' request that the Court order Respondents to move the primary election date to a specific date. *See* NYSCEF No.238 at 6–10. Had the Court issued this requested relief, that *particular* provision of the Decision And Order would constitute a specific "command" of Respondents "to do an act," and would fall within CPLR § 5519(a)(1)'s strictures. *Pokoik*, 220 A.D.2d at 15. In that hypothetical circumstance, the filing of a notice of appeal would stay that specific aspect—and only that specific aspect—of the Supreme Court's decision. But the Supreme Court did not grant that type of relief, and so CPLR § 5519(a)(1) does not operate to stay any of the *actual* provisions of the Decision And Order.