

At a term of the New York State Supreme Court, Appellate Division, Fourth Department, at the M. Dolores Denman Courthouse, 50 East Avenue, Rochester, New York 14604, on April 14, 2022.

PRESENT: HON. STEPHEN K. LINDLEY, J.S.C.
Justice Presiding

STATE OF NEW YORK : SUPREME COURT
APPELLATE DIVISION : FOURTH DEPARTMENT

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-Respondents,

-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, and THE NEW
YORK STATE LEGISLATIVE TASK FORCE ON
DEMOGRAPHIC RESEARCH AND
REAPPORTIONMENT,

Respondents-Appellants,

and

NEW YORK STATE BOARD OF ELECTIONS,

Respondents.

ORDER

Fourth
Department
Docket No.
CAE 22-0506

Steuben County
Index No.
E2022-0116CV

Respondents-Appellants Governor Kathy Hochul and Lieutenant Governor and President of the Senate Brian A. Benjamin (collectively, the “Executive Respondents”) have moved this Court for an Order “declaring that all proceedings to enforce the judgment (denominated ‘decision and order’ of Supreme Court, Steuben County (McAllister, J.), entered on March 31, 2022, [in this proceeding] are stayed pursuant to C.P.L.R. 5519(a)(1); or alternatively, granting a discretionary stay (C.P.L.R. 5519(c)) or preliminary injunction (C.P.L.R. 5518) staying the judgment and permitting respondents to continue to administer congressional and state legislative elections under the 2022 electoral maps[.]”

Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins, Speaker of the Assembly Carl Heastie, and The New York State Legislative Task Force on Demographic Research and Reapportionment (collectively, the “Legislative Respondents”) have moved this Court for an Order providing that “the Order and Judgment of the Supreme Court, Steuben County (McAllister, J.) entered on March 31, 2022,” in this proceeding “is not in effect and/or is stayed pending appeal[.]”

Petitioners-Respondents (collectively, “Petitioners”) have cross-moved this Court for an Order “declaring or confirming that no automatic stay under CPLR § 5519(a)(1) arises from any of the provisions of the Decision and Order of the Supreme Court, Steuben County, dated March 31, 2022,” in this proceeding, “or vacating any stay of any portion of that Decision and Order.”

Before the Court on these motions are the following:

1. Order to Show Cause entered by Hon. Stephen K. Lindley, J.S.C., and filed in the Office of the Clerk of the New York State Supreme Court, Appellate Division, Fourth Department, on April 4, 2022, on the Executive Respondents’ motion;

2. Order to Show Cause entered by Hon. Stephen K. Lindley, J.S.C., and filed in the Office of the Clerk of the New York State Supreme Court, Appellate Division, Fourth Department, on April 4, 2022, on the Legislative Respondents' motion;
3. Affirmation of Jeffrey W. Lang, Esq., dated April 3, 2022, with Attached Exhibits A through E;
4. Affirmation of Alexander Goldenberg, Esq., dated April 3, 2022, with Attached Exhibits 1 through 7;
5. Affirmation of Misha Tseytlin, Esq., dated April 5, 2022, with Attached Exhibits A through I; and
6. Reply Affirmation of Jeffrey W. Lang, Esq., dated April 6, 2022.

This matter came on for oral argument before the Hon. Stephen K. Lindley, J.S.C., on April 7, 2022, via Zoom, at which time the Executive Respondents appeared by the Office of New York State Attorney General Letitia James (Jeffrey W. Lang, Esq., Deputy Solicitor General, Of Counsel), whose office address is The Capitol, Albany, New York 12224; Senate Majority Leader and President Pro Tempore of the Senate Andrea Stewart-Cousins appeared by Cuti Hecker Wang LLP (Alexander Goldenberg, Esq., Of Counsel), whose office address is 305 Broadway, Suite 607, New York, New York 10007; Speaker of the Assembly Carl Heastie appeared by Phillips Lytle LLP (Craig R. Bucki, Esq., Of Counsel), whose office address is One Canalside, 125 Main Street, Buffalo, New York 14203; and Petitioners appeared by Troutman Pepper Hamilton Sanders LLP d/b/a Troutman Pepper (Misha Tseytlin, Esq., Of Counsel), whose office address is 227 West Monroe Street, Suite 3900, Chicago, Illinois 60606.

Now, on the above documents and proceedings, and due deliberation having been had, and the Court having issued a decision attached hereto as **Exhibit A** and fully incorporated by reference herein, it is hereby

ORDERED, that the Decision and Order of the New York State Supreme Court, Steuben County (Hon. Patrick F. McAllister, J.S.C.), entered in this proceeding on March 31, 2022 (the “Decision and Order”), be and hereby is stayed in part pending a decision in the above-captioned appeal, inasmuch as that Decision and Order enjoined the Executive Respondents, the Legislative Respondents, and Respondent New York State Board of Elections and their agents, including officials from the various boards of elections in New York State, from using, applying, administering, enforcing or implementing any of the district maps enacted in the New York Laws of 2022, Chapters 13 and 14, for this or any other election in New York, including but not limited to the 2022 primary and general election for Congress, State Senate and State Assembly; and it is further

ORDERED, that such stay allows candidates for Congress, State Senate, and State Assembly to file designating petitions with New York’s various boards of elections within the timeframe set by the New York Election Law (the “Election Law”); allows those boards of elections to accept such petitions for filing; allows any objections to such petitions to be filed with those boards of elections within the timeframe set by the Election Law; permits those boards of elections to rule on such objections; and allows aggrieved parties to commence legal action within the timeframe set by the Election Law; and it is further

ORDERED, that the Decision and Order also be and hereby is partially stayed pending a decision in the above-captioned appeal, inasmuch as that Decision and Order strikes Chapter 633, § 1, of the New York Laws of 2021 from the books; and requires the New York State Legislature on or before April 11, 2022, to “submit bipartisanly supported maps to [the Steuben County Supreme Court] for review of the Congressional

District Maps, Senate District Maps, and Assembly District Maps that meet Constitutional requirements”; and it is further

ORDERED, that the Decision and Order also be and hereby is stayed pending a decision in the above-captioned appeal, inasmuch as that Decision and Order purports to provide that the Steuben County Supreme Court (Hon. Patrick F. McAllister, A.J.S.C.) “will retain a neutral expert at State expense to prepare” proposed maps of New York State Assembly and New York State Senate districts; and it is further

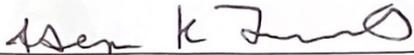
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ORDERED, that the stay ordered herein does not prohibit the Steuben County Supreme Court (Hon. Patrick F. McAllister, A.J.S.C.) from retaining a “neutral expert” to “prepare” a proposed map of New York Congressional districts, if Justice McAllister elects to do so pending resolution of the above-captioned appeal, with any such map having no force or effect unless and until both: (1) the New York Court of Appeals would affirm the Decision and Order; and (2) the New York State Legislature would fail by April 30, 2022 (*viz.*, 30 days after service of the Decision and Order with notice of entry) to enact a new map of New York Congressional districts that complies with the requirements of New York Constitution Article III, § 4(c); and it is further

ORDERED, that the stays set forth herein shall remain in effect until the Appellate Division, Fourth Department, renders a decision on this appeal which is scheduled for oral argument on April 20, 2022; and a decision will be issued expeditiously following oral argument.

Signed and entered this 14th day of April, 2022, at Rochester, New York.

Dated: Rochester, New York
April 14, 2022



HON. STEPHEN K. LINDLEY, J.S.C.

Doc #10348816

EXHIBIT A

CAE 22-00506

IN THE MATTER OF TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEVEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS AND MARIANNE VOLANTE, PETITIONERS-RESPONDENTS,

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 AND NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT, RESPONDENTS-APPELLANTS, ET AL., RESPONDENT.

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DECISION

Having considered the voluminous written submissions of the parties and the arguments advanced by counsel yesterday during the virtual hearing, I am granting in part respondents-appellants' (respondents) application for a stay of enforcement of the order of Hon. Patrick F. McAllister, entered March 31, 2022. The stay will apply to the provisions of the order that enjoin respondents and their agents, including officials from the various boards of election, 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."

The stay will, among other things, allow candidates for Congress, State Senate and Assembly to file designating petitions by the statutory deadline, and allow the boards of elections to accept such petitions. The stay will also allow objections to petitions to be filed by the April 11, 2022 deadline, permit the boards of elections to rule on objections, and allow aggrieved parties to commence legal action by the April 21, 2022 deadline. None of those actions would be permitted under Judge McAllister's order in the absence of a stay.

The stay issued herein will also apply to the provision of Judge McAllister's order that strikes the redistricting

legislation (L. 2021, ch 633 § 1) "from the books," as well as the determination 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."

The stay will not, however, prohibit Judge McAllister from retaining a "neutral expert" to "prepare" a proposed Congressional map, if Judge McAllister elects to do so pending resolution of the appeal. Of course, any map drafted by such neutral expert would have no force or effect unless and until the Court of Appeals affirms Judge McAllister's order, and the Legislature, pursuant to the redistricting legislation, is provided with 30 days from entry of the order to "discharge its constitutional mandate" of enacting a Congressional map that does not run afoul of the anti-gerrymandering provisions of article III, § 4 (c) of the New York Constitution. The 30-day period to cure should extend beyond the expected duration of this appeal.

The appointment of a "neutral expert" to draft proposed Congressional districts, in the event that the Court of Appeals ultimately determines that they are needed, in no way intrudes upon the Legislature's constitutional authority to redraw a Congressional map in response to Judge McAllister's ruling. The Legislature may begin redrawing the map right now if it chooses to do so. Or the Legislature may chose to do nothing and risk the possibility of having to live with the map drawn by Judge McAllister's neutral expert should respondents lose before the Court of Appeals and lack sufficient time to propose a substitute map that withstands constitutional scrutiny after exhaustion of appellate remedies.

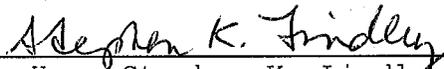
With respect to the other two redistricting maps enacted by the Legislature, respondents correctly point out that petitioners never contended that the Assembly districts were unconstitutionally gerrymandered, and the court made no such finding. Although petitioners did not initially challenge the Senate districts either, they later did so by an amended petition. Regardless, Judge McAllister determined that petitioners failed to establish that the Senate districts were unconstitutionally gerrymandered, and petitioners have not cross-appealed from that ruling. Judge McAllister struck down the Assembly and Senate maps solely on grounds that the Legislature, in enacting the maps, failed to comply with the procedural structure of article III, § 4 (b) of the State Constitution. Inasmuch as it appears on the surface that

petitioners may be more likely to prevail, if they are to prevail at all, on their substantive challenges to the redistricting legislation than they are on their procedural challenges, there would seem to be less need for the neutral expert, if appointed by Judge McAllister pending appeal, to draft proposed maps for Assembly and Senate districts.

This stay shall remain in effect until the Appellate Division, Fourth Department renders a decision on the appeal, which is scheduled for oral argument on April 20, 2022. A decision will be issued expeditiously following oral argument.

Counsel for respondents may submit an order consistent with the decision herein no later than April 12, 2022, upon notice to petitioners.

DATED: April 8, 2022



Hon. Stephen K. Lindley
Associate Justice

Supreme Court
APPELLATE DIVISION
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.



I, ANN DILLON FLYNN, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original document, now on file in this office.



IN WITNESS HEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this

APR 18 2022

Ann Dillon Flynn

Clerk