APL-2023-00121

Albany County Clerk's Index No. 904972/2022
Appellate Division, Third Department Docket No. CV-22-2265

Court of Appeals

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,

(Caption Continued on the Reverse)

NOTICE OF CROSS-MOTION FOR STAY

TROUTMAN PEPPER HAMILTON SANDERS LLP
Attorneys for Intervenors-Respondents-Appellants
875 Third Avenue
New York, New York 10022
212-704-6000
misha.tseytlin@troutman.com

Of Counsel:
Misha Tseytlin

Date Completed: August 21, 2023

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.

COURT OF APPEALS OF THE STATE OF NEW YORK

----------X

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,

-against-

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-Respondents,

Independent Redistricting Commissioner Ross Brady; Independent Redistricting Commissioner John Conway III; Independent Redistricting Commissioner Lisa Harris; Independent Commissioner Charles Nesbitt and Independent Redistricting Commissioner Willis H. Stephens,

Respondents-Appellants,

-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.

----------X

Case No. APL-2023-00121

Appellate Division, Third Department Docket No. CV-22-2265

Albany County Supreme Court Index No. 904972-22

NOTICE OF CROSS-MOTION FOR STAY PENDING APPEAL

PLEASE TAKE NOTICE that, upon the annexed Memorandum of Law, dated August 21, 2023, the undersigned will move this Court at the courthouse of the Court of Appeals, 20 Eagle

Street, Albany, New York, on September 5, 2023, at 10:00 a.m., or as soon therefore as counsel can be heard, for an Order pursuant to CPLR 5519(c), granting a stay pending appeal of the Order of the Appellate Division, Third Department in the above-captioned matter, together with such other and further relief as the Court deems just and proper, should the Court determine that no automatic stay under CPLR 5519(a)(1) is already in place.

PLEASE TAKE FURTHER NOTICE that opposition papers, if any, must be filed with the Clerk's office on or before the return date under Rule 500.21(c).

DATED: New York, New York
August 21, 2023

TROUTMAN PEPPER HAMILTON SANDERS LLP

By: _____

Misha Tseytlin, Reg. No. 4642609
875 Third Avenue
New York, New York 10022
(212) 704-6000
misha.tseytlin@troutman.com

TO: DREYER BOYAJIAN LLP
James R. Peluso
75 Columbia Street
Albany, New York 12210
Tel: (518) 463-7784
jpeluso@dblawny.com

ELIAS LAW GROUP LLP
Aria C. Branch
Richard A. Medina
Samuel T. Ward-Packard
250 Massachusetts Avenue NW
Suite 400
Washington, DC 20001
Tel: (202) 968-4490
abranch@elias.law
rmedina@elias.law
swardpackard@elias.law

ELIAS LAW GROUP LLP
Jonathan P. Hawley
1700 Seventh Avenue
Suite 2100
Seattle, Washington 98101
Tel: (202) 656-0179
jhawley@elias.law

PERILLO HILL LLP
Timothy Hill, Esq.
285 West Main Street, Suite 203
Sayville, New York 11782
Tel.: (631) 582-9422
thill@mphlawgroup.com

JENNER & BLOCK LLP
Jacob D. Alderdice, Esq.
1155 Avenue of the Americas
New York, New York 10036
Tel: (212) 891-1600
jalderdice@jenner.com

NEW YORK STATE INDEPENDENT
REDISTRICTING COMMISSION
Karen Blatt & Darren McGeary
302A Washington Avenue Extension
Albany, NY 12203
blattk@nyirc.gov

EMERY CELLI BRINCKERHOFF
& ABADY, LLP
Matthew D. Brinckerhoff
Andrew G. Celli
600 Fifth Avenue, 10th Floor
New York, New York 10020
Tel.: (212) 763-5000
mbrinckerhoff@ecbawm.com
acelli@ecbawm.com

APL-2023-00121

Albany County Clerk's Index No. 904972/2022
Appellate Division, Third Department Docket No. CV-22-2265

Court of Appeals

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,

(Caption Continued on the Reverse)

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO VACATE STAY PENDING APPEAL OR, IN THE ALTERNATIVE, IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

TROUTMAN PEPPER HAMILTON SANDERS LLP
Attorneys for Intervenors-Respondents-Appellants
875 Third Avenue
New York, New York 10022
212-704-6000
misha.tseytlin@troutman.com

Of Counsel:
Misha Tseytlin

Date Completed: August 21, 2023

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

Page(s)

Cases

Constitutional Provisions

Statutes And Rules

Bills

Other Authorities

PRELIMINARY STATEMENT

Petitioners delayed for more than five months in filing their lawsuit, and then litigated this case so slowly that it took many additional months longer than it should have. Petitioners now bring this Motion because they speculate that perhaps there may be insufficient time after this Court renders its final decision for the Independent Redistricting Commission ("IRC") and the Legislature to complete the unconstitutional mid-decade redistricting that Petitioners seek. But Petitioners' inexplicable delays in filing and then litigating this lawsuit led to this point on the calendar. After all, if they had acted promptly, this case would very likely have *already* been litigated fully through a decision of this Court by now. That fact, standing alone, disqualifies Petitioners from their requested equitable relief of lifting the stay. And, in addition, Petitioners bringing this lawsuit outside of the four-month statute of limitations in CPLR 217(1) also forecloses Petitioners' stay request because they have no likelihood of success given their untimeliness.

Even if this Court overlooks Petitioners' serial delays, there are multiple merits-based reasons why they have no likelihood of success. Their requested relief violates the prohibition in N.Y. Const. art. III, § 4(e) (hereinafter "Section 4(e)") against mid-decade redistricting. Mid-decade redistricting is a notorious practice both because it is an especially dangerous ground for partisan gerrymandering, *see, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Ga. State*

Conf. of the NAACP v. Georgia, 312 F. Supp. 3d 1357 (N.D. Ga. 2018), and because it causes confusion for voters and candidates, *infra* Part II.B.2. Efforts to outlaw this practice nationwide have thus far proved unsuccessful, with Congress not adopting the Coretta Scott King Mid-Decade Redistricting Prohibition Act, which would prohibit any "State which has been redistricted in the manner provided by law" from being "redistricted again until after the next apportionment of Representatives," absent a finding that the map is illegal. H.R.42, 118th Cong. (2023).[1] But such federal reforms are unnecessary for New York because the People mandated that a lawful map "shall be in force until the effective date of a plan based upon the subsequent federal decennial census." N.Y. Const. art. III, § 4(e). Since Petitioners raise no argument that the *Harkenrider* map is illegal, that is the end of their case. Further, Petitioners also have no likelihood of success because this Court already held that only a judicially adopted map can remedy a failure of the IRC/Legislature-process after "[t]he deadline in the Constitution for the IRC to submit a second set of maps has [] passed." *Harkenrider v. Hochul*, 38 N.Y.3d 494, 523 (2022).

[1] https://www.congress.gov/bill/118th-congress/house-bill/42. This same bill has been regularly introduced since 2013. H.R.134, 117th Cong. (2021); H.R.44, 116th Cong. (2019); H.R.75, 114th Cong. (2015); H.R.2490, 113th Cong. (2013).

In all, this Court should deny Petitioners' Motion to dissolve the automatic stay (or put in place a stay in the extremely unlikely event that this Court concludes that no stay currently exists).

BACKGROUND

A. The 2014 Amendments to the New York Constitution lay out a mandatory process that "*shall govern* redistricting in this state." N.Y. Const. art. III, § 4(b), (e) (emphasis added). That process begins with the IRC holding public hearings across the State. *Id.* § 4(c). Thereafter, the IRC must submit an initial set of maps to the Legislature "as soon as practicable," but in no event "later than January fifteenth," after which the Legislature must vote on the maps, without amendment. *Id*. § 4(b). If the Legislature rejects this first set of maps, or if the Governor vetoes, then the redistricting process reverts to the IRC, which must then submit a second set of maps to the Legislature "[w]ithin fifteen days" of notification of the first rejection, but "in no case later than February twenty-eighth." *Id.* The Legislature then votes on the second-round maps without amendment. *Id.*; *Harkenrider*, 38 N.Y.3d at 510. Only then, if the Legislature rejects the IRC's second-round maps, or if the Governor vetoes, can the Legislature amend the IRC's proposed maps. N.Y. Const. art. III, § 4(b); N.Y. Legis. Law § 93(1).

Most importantly for this case, Section 4(e) authorizes courts to adopt redistricting maps in certain circumstances, while also prohibiting mid-decade redistricting. Section 4(e)'s first sentence provides that "[t]he process for redistricting congressional [] districts established by this section and sections five and five-b of this article"—that is, the IRC/Legislature process discussed immediately above—"shall govern redistricting in this state except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law." N.Y. Const. art. III, § 4(e). Thus, if the IRC/Legislature process fails to generate a map—either because of the failure of the IRC or because of deadlock within the Legislature or Governor veto—then a court "adopt[s]" the redistricting map. The second sentence then explains that "[a] reapportionment plan and the districts contained in *such plan*"—that is, the plan adopted under the process described above, either via the IRC/Legislature process, or the courts if that process fails—"*shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero unless modified pursuant to court order*." *Id.* (emphases added). Put another way, unless the map the IRC/Legislature or a court adopts under Section 4(e)'s first sentence is illegal, that map must stay in place for the full decade. If a court finds that the map is illegal, then it can "modif[y]" the map to address that illegality.

B. Initially abiding by this constitutional process, the IRC held public hearings across the State in Fall 2021 and then submitted two initial congressional redistricting plans to the Legislature, but the Legislature rejected these plans out-of-hand on January 10, 2022. *Harkenrider*, 38 N.Y.3d at 504. This gave the IRC until January 25, 2022—15 days after the Legislature's rejection of the initial maps—to submit a revised plan to the Legislature. *Id*.; N.Y. Const. art. III, § 4(b). But on January 24, the IRC announced that it would not submit a second redistricting plan to the Legislature, *Harkenrider*, 38 N.Y.3d at 504-05, thereby violating its constitutional duty and depriving the Legislature of authority to adopt its own map, N.Y. Const. art. III, § 4(b). The Legislature nevertheless purported to adopt a map under the unconstitutional provisions of L.2021, c.633, § 1, which map the Governor signed into law on February 3, 2022. *Harkenrider*, 38 N.Y.3d at 505.

Intervenors-Respondents-Appellants (hereinafter "Intervenors") sued in the Steuben County Supreme Court on the same day Governor Hochul signed the map into law, arguing that the map was substantively and procedurally unconstitutional. *Harkenrider* No.1.[2] Most relevant to this case, Intervenors' first cause of action was

[2] All citations to e-filings in *Harkenrider v. Hochul*, Index No.E2022-0116CV (Sup. Ct. Steuben Cnty.), may be found at https://iapps.courts.state.ny.us/nyscef/DocumentList?docketId=kmywkTvfcaoSsQ66zseQsg==&display=all, and are cited as "*Harkenrider* No.__." The Albany County Supreme Court explicitly considered the relevant efilings in *Harkenrider*, making them part of the record. R.19 n.12.

that the congressional map was unconstitutional "[b]ecause the Legislature never received, let alone considered and acted upon, a second redistricting plan from the [IRC]." *Harkenrider* No.18 at 73-75.

After decisions by the Steuben County Supreme Court and the Fourth Department, this Court ruled in Intervenors' favor, including on their first cause of action, and then ordered the Steuben County Supreme Court to "adopt[]" a remedial map under Section 4(e)'s first sentence. This Court held that the Constitution established a single, "constitutionally mandated procedure," which allows the Legislature to "amend" the IRC's map "only after two redistricting plans composed by the IRC have been duly considered and rejected." *Harkenrider*, 38 N.Y.3d at 509, 511-12, 521, 524 (emphasis omitted) (quoting N.Y. Const. art. III, § 4(b)). But because "the IRC failed to submit a second redistricting plan as required under the 2014 constitutional amendments," "the legislature lacked authority to compose and enact its own plan," notwithstanding the unconstitutional legislation purporting to allow the Legislature to act. *Id.* at 505. Explaining why it was ordering a judicially adopted map, this Court noted that the procedural unconstitutionality was "at this juncture, incapable of a legislative cure," because "[t]he deadline in the Constitution

Citations to "R." refer to the Record On Appeal filed in the Third Department below. App. Div. NYSCEF Doc.35.

for the IRC to submit a second set of maps has long since passed." *Id.* at 523. This Court required a remedial process of "order[ing] the adoption of [] a redistricting plan" with the assistance of a Special Master, because "[p]rompt judicial intervention" is "authorize[d]" by Section 4(e) and "necessary and appropriate to guarantee the People's right to a free and fair election." *Id.* at 521, 523.

On remand, the Steuben County Supreme Court implemented this Court's directive by adopting a "final enacted redistricting map[]" under Section 4(e). *Harkenrider* No.696 at 1; *see Harkenrider* No.670. The Supreme Court accepted public comments from interested persons on proposed maps, including a letter brief from several Petitioners. R.328, 337-38. The Supreme Court released its final congressional map on May 21, 2022. *Harkenrider* No.670. After making modifications to some districts because that map violated the Constitution's block-on-border requirement, N.Y. Const. art. III, § 4(c)(6), the Steuben County Supreme Court "ORDERED, ADJUDGED, and DECREED" that the proposed technical changes were approved and the maps "as modified" "bec[a]me the *final* enacted redistricting maps," *Harkenrider* No.696 at 1 (emphasis added). No interested party, including Petitioners, appealed.

B. On June 28, 2022—more than five months after the IRC violated its constitutional duty—Petitioners filed this mandamus proceeding in the Albany

County Supreme Court, asking that Court to order the IRC to submit a second-round congressional map to the Legislature, so that the Legislature could then replace the *Harkenrider* map. R.24-25.[3] Intervenors moved to dismiss, R.339-40, arguing, *inter alia*, that Petitioners' lawsuit was untimely and unconstitutional.

The Albany County Supreme Court, while believing that Petitioners' lawsuit was timely on a basis that Petitioners no longer defend, still dismissed Petitioners' lawsuit because their sought-after relief—an order compelling the IRC to submit a new map for legislative enactment—would violate the Constitution's "mandate that approved redistricting maps be in place for" 10 years and "would provide a path to an annual redistricting process, wreaking havoc on the electoral process." R.19. Further, the court also held that "there is no authority for the IRC to issue a second redistricting plan after February 28, 2022," to remedy a procedural constitutional violation like the one Petitioners raised. R.18.

After waiting another full month, Petitioners appealed that dismissal to the Third Department on October 17, 2022. R.1-2. Then, after waiting an additional three months to perfect their appeal, Petitioners filed their Appellant's Brief. App. Div. NYSCEF Doc.36 (Jan. 20, 2023).

[3] Petitioners amended their Petition to drop an identical claim related to the state Senate map, thereby limiting this lawsuit only to the congressional map. *Compare* R.24-45, *with* R.265-88.

In a 3-2 split opinion, the Third Department reversed. *Hoffmann v. N.Y. State Indep. Redistricting Comm'n*, ___ N.Y.S.3d ___, 2023 WL 4494494 (3d Dep't July 13, 2023). The majority first held that Petitioners' lawsuit was timely, concluding that their claim did not accrue until a court deemed the Legislature's 2021 legislation unconstitutional, which determination the Steuben County Supreme Court first made on March 31, 2022. *Id.* at *2. Because Petitioners filed suit within four months of that ruling, the majority declined to dismiss their mandamus action for untimeliness. *Id.* (citing CPLR 217(1)). The majority then concluded that Petitioners were entitled to relief on the merits, but did not engage with either the constitutional language banning mid-decade redistricting in Section 4(e)'s second sentence, *id.* at *4, or this Court's holding that, under the Constitution, only the judiciary can adopt a map after "[t]he deadline in the Constitution for the IRC to submit a second set of maps has long since passed" to remedy a failure of the IRC/Legislature-process, *Harkenrider*, 38 N.Y.3d at 523.

Justice Pritzker dissented, joined by Justice Egan Jr. The dissent concluded that this lawsuit was untimely, explaining that Petitioners should have known of the constitutional violation at the heart of their claim no later than January 24, 2022, when the IRC announced that it would not be submitting a second map to the Legislature, so filing over four months later was too late. *Id.* at *6 (Pritzker, J.,

dissenting). The dissent then closely examined the language in Section 4(e), explaining that the Constitution required the *Harkenrider* map to "remain in place until after the next census." *Id.* at *7 (Pritzker, J., dissenting).

The Brady Respondents and Intervenors timely filed their notices of appeal on July 25, 2023, with the Brady Respondents' Notice Of Appeal triggering CPLR 5519(a)(1)'s automatic-stay provision.

ARGUMENT

I. Given Petitioners' Inexplicable Delays In Filing And Litigating This Case, This Court Need Not—And Should Not—Entertain Their Motion, And Should Simply Adjudicate This Appeal In The Ordinary Course

As with their failed request for calendar preference, Petitioners' primary concern in filing their Motion to lift the stay is the upcoming 2024 election deadlines. Mot.24-25. But any concern about these long-standing deadlines is entirely Petitioners' fault given their unexplained delays in litigating their case. To summarize, Petitioners delayed filing their lawsuit by more than five months after the IRC violated its constitutional duty; indeed, even if this Court accepts the Third Department's account of Petitioners' delay, *contra infra* Part II.B.1.i, they delayed filing their lawsuit by almost three months. Then, after the Albany County Supreme Court dismissed their Petition on September 14, 2022, Petitioners did not file their Notice Of Appeal until October 17, 2022. Petitioners then waited *three more months*

to perfect their appeal. Only thereafter did Petitioners request, by letter, expedition under Rule 1250.15(a)(1) of the Practice Rules of the Appellate Division, App. Div. NYSCEF Doc.38, and then abandoned even that request after the Third Department informed them that they would need to submit a formal motion, App. Div. NYSCEF Doc.41. Having no expedition motion before it, the Third Department decided the appeal in the ordinary course. In total, *Petitioners' voluntary, unexplained delay added at least seven months and perhaps more than a full year to this case*.

Given the snail's pace at which Petitioners have proceeded thus far, this Court should reject out of hand their request for extraordinary relief based upon their concerns about upcoming election deadlines. When Intervenors wanted expedited relief from the courts in *Harkenrider*, they moved with the fastest possible dispatch, filing their lawsuit immediately upon the adoption of the unconstitutional maps, *Hoffmann*, 2023 WL 4494494, at *6 n.1 (Pritzker, J., dissenting), and litigating as fast as the courts would permit. In contrast, Petitioners delayed at every stage until they got to this Court. This Court should thus deny Petitioners' Motion out of hand because their claimed exigency is entirely the product of their "own delay." *Quinn v. Cuomo*, 126 N.Y.S.3d 636, 641 (Sup. Ct. Queens Cnty. 2020). After all, "equity aids the vigilant, not those who sleep on their rights." *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259 (2d Cir. 1997) (citation omitted).

II. To The Extent That This Court Entertains Petitioners' Motion, It Should Reject Petitioners' Request To Vacate The Stay

A. The CPLR 5519(a)(1) Automatic Stay Plainly Applies

1. Under CPLR 5519(a)(1), a notice of appeal "stays all proceedings to enforce the judgment or order appealed from pending the 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." CPLR 5519(a)(1). This automatic-stay provision "applies to *all* appeals," even "including those to this Court." *Summerville v. City of New York*, 97 N.Y.2d 427, 433 (2002). And it operates to stay "the executory directions of the judgment or order appealed from which *command a person to do an act*." *Pokoik v. Dep't of Health Servs. of Cnty. of Suffolk*, 220 A.D.2d 13, 15 (2d Dep't 1996) (emphasis added).

2. CPLR 5519(a)(1)'s automatic stay is plainly in place now. The Brady Respondents are constitutional officers of the State, given that Article III, Section 5-b provides each of their positions, they are either appointed by the legislative leadership or the other members of the IRC, N.Y. Const. art. III, § 5-b(a), and they are authorized to play a critical role in the deeply significant act of redistricting for the State after every decennial census, *id.* § 4(b), which task previously fell exclusively within the "legislative power," *Harkenrider*, 38 N.Y.3d at 502 (citation omitted). Accordingly, each of the Brady Respondents is obviously an "officer [] of

the state" to which CPLR 5519(a)(1) applies. *See People v. Bd. of Police of Metro. Police Dist.*, 19 N.Y. 188, 197 (1859) (opinion of S.B. Strong, J.). So CPLR 5519(a)(1) stays the Third Department's "executory direction[]," *Pokoik*, 220 A.D.2d at 15, commanding the IRC, including the Brady Respondents, to submit a second set of maps to the Legislature "forthwith," *Hoffmann*, 2023 WL 4494494, at *4.

3. Petitioners' half-hearted contrary assertions, suggesting that *perhaps* the automatic-stay provision does not apply to such constitutional officers, fail.

Petitioners first tentatively suggest that "it is unclear" if the automatic-stay provision applies because the Constitution refers to IRC Commissioners as "members" and the Public Officers Law treats officers and members differently. Mot.13-14. This is a red herring. The section of the Public Officers Law discussing the scope of the term "state officer or employee" applies *only* "in this section" of the Public Officers Law, not to CPLR 5519. N.Y. Pub. Off. Law § 73(1)(i). Further, that provision only defines a term of art used in that section—"state officer or employee." *Id.* CPLR 5519(a)(1) uses a broader phrase—"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"—rendering Section 73 of the Public Officers Law irrelevant here. All IRC members are constitutionally created state officers, exercising a key

role in redistricting for the State, in exchange for compensation, rendering them each an "officer [] of the state" for purposes of CPLR 5519(a)(1). That this conclusion is so patently clear explains Petitioners' half-hearted approach to this issue.

No better is Petitioners' tentative suggestion that the automatic stay may be inapplicable to the Brady Respondents because they "do not constitute a majority of the IRC." Mot.14. CPLR 5519(a)(1) extends to any "officer [] of the state," not just to state "agenc[ies]," CPLR 5519(a)(1), meaning each of the Brady Respondents maintain the right to an automatic stay. Petitioners' citation to the Second Department's unpublished order in *League of Women Voters of Mid-Hudson Region v. Dutchess County Board of Elections*, No.2022-08942, 2022 WL 16830092 (2d Dep't Nov. 2, 2022), Medina Aff. Ex. K, is misplaced. That order provides no reasoning to explain why the Second Department "confirm[ed] that no automatic stay of the order and judgment is in effect." *Id.* And the petitioners there made numerous arguments against an automatic stay, including that the commissioner who appealed was an officer of a mere sub-agency of a political subdivision. Medina Aff. Ex. K at Aff. p.9 & n.2. Here, each of the Brady Respondents are constitutional officers within the IRC, which is a statewide entity exercising traditional state authority, placing them squarely within CPLR 5519(a)(1).

B. Petitioners Have Not Met Their Burden For Vacating The Stay

Once CPLR 5519(a)(1)'s automatic-stay provision applies, it precludes enforcement of the judgment or order unless a party moves "the court to which an appeal is taken" to "vacate, limit or modify [the] stay." CPLR 5519(c). In considering such a motion, courts require the movant to show "[a] reasonable probability of ultimate success in the action, as well as the prospect of irreparable harm," *DeLury v. City of New York*, 48 A.D.2d 405, 405 (1st Dep't 1975), and the movant must convince the court that "the public interest and welfare require" such a vacatur or modification, *Freeman v. Lamb*, 33 A.D.2d 974, 975 (4th Dep't 1970).

1. Petitioners Have No Likelihood Of Success On The Merits

i. Petitioners' Article 78 Petition Is Untimely

Petitioners' lawsuit is untimely. CPLR 217(1) requires that mandamus petitions "to compel the performance of a duty," *Kolson v. N.Y.C. Health & Hosps. Corp.*, 53 A.D.2d 827, 827 (1st Dep't 1976), be filed "within four months" of "the respondent's refusal" "to perform its duty," "[u]nless a shorter time is provided in the law authorizing the proceeding," CPLR 217(1). Petitioners' Article 78 Petition is untimely because they filed it more than five months after the IRC refused to complete its duties.[4] The IRC announced on January 24, 2022, that it "would not

[4] Intervenors also have a separate untimeliness argument under general equitable principles, but for purposes of this Opposition, CPLR 217(1)'s bar suffices.

present a second plan to the legislature" as Article III, Section 4(b) requires, and then, on January 25, allowed its constitutionally mandated 15-day deadline to lapse without completing its mandatory duties. *Harkenrider*, 38 N.Y.3d at 504-05. Either of those two dates—when the IRC fully and publicly "refus[ed] to perform [its] duty," *Kolson*, 53 A.D.2d at 827—triggered CPLR 217(1)'s four-month limitations period, making any timely mandamus petition due on May 24 or 25, 2022. Petitioners did not file until late June 2022, meaning their lawsuit is untimely.

Petitioners' assertion that the Legislature's unconstitutional "gap-filling 2021 legislation" delayed the triggering of their injury until April 27, 2022, when this Court struck that legislation down as unconstitutional in *Harkenrider*, is wrong. Mot.22-23.[5] The unconstitutional legislation only purported to allow the Legislature to draw its own maps "if the [IRC] d[id] not vote on any redistricting plan or plans, for any reason, by the date required for submission of such plan," L.2021, c.633, § 1, *and absolutely did not excuse the IRC from its "constitutional responsibilities,"* Mot.2 (emphasis added), the core concern of Petitioners' mandamus lawsuit. Notably, in their Amended Petition, Petitioners specifically asserted that their harms

[5] The Third Department majority was wrong for the same reason in concluding that Petitioners' harms were triggered by court order declaring that gap-filling legislation unconstitutional, although the majority appears to have tied that declaration of unconstitutionality to March 31, 2022, when the Steuben County Supreme Court declared it unconstitutional. *Hoffmann*, 2023 WL 4494494, at *2.

arose from "the IRC's failure to send a second set of maps to the Legislature," R.282, which would be just as true if the Legislature's 2021 legislation was valid. That legislation did not even purport to "cure" the IRC's constitutional violation at issue here. Petitioners' argument that the injury they assert in this litigation was not ripe so long as the now-invalidated "gap-filling" legislation was in place is thus legally wrong and contradicts the core premise of their lawsuit.

No better is Petitioners' footnoted contention that their claim accrued at the earliest on February 28, 2022, when the final possible constitutional deadline for IRC action passed. Mot.24 n.5. The Constitution provides that the IRC must send the Legislature a second-round congressional map "[w]ithin fifteen days of" the Legislature's "notification" that the IRC's first-round map "has been disapproved," and "in no case later than February [28]." N.Y. Const. art. III, § 4(b). The Legislature rejected the IRC's first-round map on January 10, rendering January 25, 2022, the pertinent IRC deadline. *Id.*; *Harkenrider*, 38 N.Y.3d at 504-05.

ii. Petitioners' Requested Relief Violates Section 4(e)'s Prohibition Against Mid-Decade Redistricting

a. Petitioners also have no likelihood of success because their requested remedy violates the Constitution's prohibition on mid-decade redistricting in Section 4(e). Section 4(e), in its entirety, provides as follows:

> (e) The process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article shall govern redistricting in this state except to the extent that a court is required to order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law.
>
> A reapportionment plan and the districts contained in such plan shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero unless modified pursuant to court order.

N.Y. Const. art. III, § 4(e). The first sentence requires that if the IRC/Legislature process fails, a court must "adopt[]" its own map. *Id.* And the second sentence mandates that any "reapportionment plan and the districts contained in such plan"—that is, the plan adopted via the IRC/Legislature process or the courts under the prior sentence—will remain "in force" until the next census, unless a court "modified" that map. *Id.* Further, the first sentence of Section 4(e) makes clear that any "change" that a court orders to a map under Section 4(e) must be for a "violation of law." *Id.* Put together, this means that any "modification" of a map referenced in Section 4(e)'s second sentence can only be on the ground that the map is infected with some "violation of law." *Id.* Accordingly, Section 4(e)'s prohibition against mid-decade redistricting operates like the Coretta Scott King Mid-Decade Redistricting Prohibition Act, *supra* p.2, prohibiting mid-decade redistricting of a lawfully adopted map unless a court finds the map illegal in some manner.

Further, if a court finds that a map judicially adopted under Section 4(e)'s first sentence is illegal in some respect, the court can only "modify" that map to correct the specific legal infirmity, and cannot simply order the IRC/Legislature to replace that map wholesale. That follows from the meaning of "modify," which "carries 'a connotation of increment or limitation,' and must be read to mean 'to change moderately or in minor fashion.'" *Biden v. Nebraska*, 143 S. Ct. 2355, 2368 (2023) (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994), and collecting multiple dictionary definitions); *e.g. Modify*, Black's Law Dictionary (11th ed. 2019) ("[t]o make somewhat different; to make small changes to"; "[t]o make more moderate or less sweeping."); *Modify*, OED Online (3d ed. June 2023) ("[t]o make partial or minor changes to").[6]

Finally, under blackletter rules of civil procedure, any request to "modify" a previously court-adopted map must be brought to the court that adopted that map in the first place. CPLR 5015(a); *Gager v. White*, 53 N.Y.2d 475, 483 (1981); *Divito v. Glennon*, 193 A.D.3d 1326, 1328 (4th Dep't 2021).

b. The relief that Petitioners seek here—the Albany County Supreme Court launching a process to permit the Legislature to replace the *Harkenrider* map after receiving an IRC submission—is thus unlawful in three independent respects:

[6] https://www.oed.com/dictionary/modify_v.

First, as noted immediately above, Section 4(e) provides that any court-adopted map under the first sentence must stay in place for the full decade unless a court finds that the map is illegal. Here, the Steuben County Supreme Court adopted the map at issue under Section 4(e)'s first sentence, pursuant to this Court's explicit directive. *Harkenrider*, 38 N.Y.3d at 521-22. This Court's order was, as relevant, based upon Intervenors' first claim, which alleged that the congressional map was not constitutionally adopted under the IRC/Legislature process. *Harkenrider* No.18 at 73-75. Given this Court's final say on "the rights and prohibitions set forth in the State Constitution, which constrain the activities of all three branches of the government," *White v. Cuomo*, 38 N.Y.3d 209, 216-17 (2022) (citation omitted), and Section 4(e)'s plain text, there is no plausible argument the *Harkenrider* map is illegal in any respect. Underscoring this point, no party appealed the Steuben County Supreme Court's order adopting the map.

Petitioners' only answer to this fatal defect is that they asked the Albany County Supreme Court to remedy a different constitutional violation not at issue in *Harkenrider* because Petitioners are focusing only on the IRC's failure to submit second-round maps, Mot.17-18, but that fails for two independent reasons. As a threshold matter, the premise of Petitioners' argument is wrong because Intervenors' first cause of action in *Harkenrider* was based upon the "failure to follow the

exclusive, constitutionally mandated procedures" for redistricting: because "the Legislature did not consider a second map or maps from the IRC, which mandatory consideration was required before the Legislature was constitutionally permitted to adopt its own congressional map," this *necessarily* included the IRC's failure to submit that second-round map. *Harkenrider* No.18 at 74-75. That this Court did not order Petitioners' preferred remedy—restarting the IRC/Legislature process—does not mean that the failure remains unremedied. In any event, even if this Court concludes that *Harkenrider* did not remedy the procedural violation that Petitioners focus on here, this still would not save Petitioners' lawsuit because the *Harkenrider* map is lawful, so it cannot be subject to judicial modification given Section 4(e)'s second sentence. Again, Section 4(e)'s first sentence allows courts to "order the adoption of, or changes to, a redistricting plan as a remedy for a violation of law," N.Y. Const. art. III, § 4(e), exactly as the Steuben County Supreme Court did in *Harkenrider*. For Section 4(e)'s second sentence to thereafter permit modification of that map, there must be some violation of law that inheres in that judicially drawn map. *Supra* Part II.B.1.ii.a. But the *Harkenrider* map is entirely lawful, given that the Steuben County Supreme Court adopted it on explicit directions from this Court, and no party appealed any aspect of that map as violating the law.

Notably, adopting Petitioners' approach would eliminate the prohibition against mid-decade redistricting in Section 4(e), providing—in the Albany County Supreme Court's words—"a path to an annual redistricting process, wreaking havoc on the electoral process." R.18-19. Consider, for example, if Petitioners obtain their requested relief here, and the Legislature deadlocks after receiving a second-round map from the IRC, leaving the *Harkenrider* map in place. *See* N.Y. Const. art. III, §§ 4(b), (b)(3), 5-b(g). Under Petitioners' approach to Section 4(e)—where a court can replace a map that another court lawfully adopted under Section 4(e)'s first sentence simply because that map was not adopted pursuant to the IRC/Legislature process—any citizen could bring a new lawsuit upon a change in the political composition of the Legislature after 2024, obtaining another judicial order allowing the IRC/Legislature process yet another chance to complete. And if the Legislature deadlocked again, the same lawsuit could be brought in 2026 and/or 2028, defeating Section 4(e)'s prohibition against mid-decade redistricting.

Second, Section 4(e)'s second sentence only permits a judicial "modification" of a map that a court lawfully adopted under that Section's first sentence. Modification "carries 'a connotation of increment or limitation,' and must be read to mean 'to change moderately or in minor fashion.'" *Biden*, 143 S. Ct. at 2368; *MCI Telecomms.*, 512 U.S. at 225 (same). What Petitioners seek here is the

antithesis of a "moderate" change to the *Harkenrider* map. Petitioners demand that the Supreme Court "command[] the [IRC] and its commissioners to [] submit[] a second round of proposed congressional districting plans for consideration by the Legislature," R.269, thereby authorizing the Legislature to adopt a *replacement* map, which need not be based in any respect on the *Harkenrider* map. That is far beyond any textually plausible reading of judicial "modifi[cation]" of a map.

Petitioners simply assert, without citing any caselaw or definitional support, that wholesale "replace[ment]" of a map by the Legislature is actually a judicial "modif[ication]," because whenever a congressional map is modified the old map is always replaced. Mot.21. That is plainly wrong. To take just one obvious example, the Steuben County Supreme Court "modified" its initial map because some aspects of the map violated the constitutional block-on-border requirement, *supra* pp.7-8, just as Section 4(e) envisions, and that obviously did not replace the Court's initially adopted map with a wholly new map.

Finally, even if this Court concludes that Petitioners are seeking a constitutionally permissible modification of the *Harkenrider* map, this lawsuit is a nonstarter because it was filed in the wrong court. As noted above, to modify an order issued by a court, a party must ask the court that issued the order to modify it. *See supra* Part II.B.1.ii.a. This requirement applies not just to parties, "but to other

interested persons, who were not parties, as well." *Donato v. Am. Locomotive Co.*, 283 A.D. 410, 414 (3d Dep't 1954). Here, if this Court concludes that Petitioners are seeking a permissible "modif[ication]" under Section 4(e), Petitioners can only seek such a modification from the Steuben County Supreme Court, which issued the order putting that map into place. After all, it could not be seriously argued that if, for example, someone believed that the *Harkenrider* map still violated the block-on-border requirement, that person could go to a different Supreme Court of their choice to modify the map that the Steuben County Supreme Court put in place.

iii. Petitioners' Requested Relief Is Also Unconstitutional Because, As *Harkenrider* Held, "[t]he deadline in the Constitution for the IRC to submit a second set of maps has long since passed."

Petitioners have no likelihood of success for the independent reason that, as this Court explained in *Harkenrider*, "[t]he deadline in the Constitution for the IRC to submit a second set of maps has long since passed." 38 N.Y.3d at 523.

a. In *Harkenrider*, the parties, both in briefing and at oral argument, debated whether—if this Court agreed with Petitioners' constitutional-procedure arguments—this Court could order a remedy other than a judicially adopted map under Section 4(e)'s first sentence. Petitioners pointed out that Section 4(e) provides that the "process for redistricting congressional and state legislative districts established by this section and sections five and five-b of this article *shall* govern

redistricting in this state," unless "a court is required to order the adoption of, or changes to, a redistricting plan." N.Y. Const. art. III, § 4(e) (emphasis added). So, where there has been a failure of the specific, constitutionally mandated process, such as where the constitutional deadlines for the IRC and the Legislature to act have expired, *id.* § 4(b), Intervenors explained that the only remedy is a judicially adopted map, *id.* § 4(e). *See* Petitioners' Supplemental Letter Brief 5-6, *Harkenrider v. Hochul*, APL 2022-00042 (N.Y. Apr. 23, 2022);[7] Transcript of Oral Argument at 40-41, *Harkenrider v. Hochul*, No.60 (N.Y. Apr. 26, 2022).[8]

In addressing this issue, *Harkenrider* adopted Petitioners' arguments, explaining in the clearest terms imaginable:

> The procedural unconstitutionality of the congressional and senate maps is, at this juncture, incapable of a legislative cure. The deadline in the Constitution for the IRC to submit a second set of maps has long since passed.

38 N.Y.3d at 523. Having articulated this legal conclusion, this Court then ordered judicial adoption of a replacement map as the remedy for the IRC/Legislature's procedural constitutional violation under Section 4(e). *Id.* at 523-24.

[7] https://courtpass.nycourts.gov/Public_search (search "60" in "Decision No."; select "Harkenrider v Hochul"; select "Harkenrider v Hochul_App-Res_Harkenrider_BRF").

[8] https://www.nycourts.gov/ctapps/arguments/2022/Apr22/Transcripts/042622-60-Oral%20Argument-Transcript.pdf.

b. The application of *Harkenrider*'s binding holding to Petitioners' lawsuit here is straightforward. The deadline for the IRC to submit a second-round map expired long ago. *Supra* Part II.B.1.i. Just as that deadline had "long since passed" back on April 27, 2022, when this Court decided *Harkenrider* and concluded no IRC/Legislature remedy was permissible for that reason, 38 N.Y.3d at 523, it is even more true now, plainly precluding Petitioners' relief.

c. Petitioners' assertion that this Court only required the Steuben County Supreme Court to adopt a replacement map because of the proximity to the 2022 elections, Mot.18-19, is obviously and demonstrably false. If this Court in *Harkenrider* had thought that returning redistricting to the IRC/Legislature process was constitutionally permissible, it surely had sufficient time to do so. At that time, the IRC remained in place, funded, and composed of Commissioners who had just conducted public hearings all over the State. This Court could have ordered the IRC to submit a second-round map to the Legislature soon after the April 27 ruling, which would have permitted legislative adoption of a replacement map *more* quickly than it took the Steuben County Supreme Court to adopt a map starting anew, with the help of a Special Master. But, of course, this Court declined to take that approach *not* because of the proximity to the 2022 congressional elections, but because "[t]he

deadline in the Constitution for the IRC to submit a second set of maps ha[d] long since passed." *Harkenrider*, 38 N.Y.3d at 523.

Further, Petitioners' suggestion that their desired relief is available after the expiration of the constitutional time period for a second-round submission given Article III, Section 5-b(a)'s provision that an IRC "shall be established" whenever "a court orders that congressional [] districts be *amended*," N.Y. Const. art. III, § 5-b(a) (emphasis added), Mot.20, is also incorrect. This path is available only when a court needs to "amend[]" a map, in order to change a problem with a legislatively or judicially approved map, *id* § 4(e). In that case, the court can call the IRC back into effect to help the Court fix the unlawful map in relevant respects. But as *Harkenrider* held, this path is not available when a court must "adopt[]" a redistricting plan under Section 4(e)'s first sentence due to a failure of the IRC/Legislature process, after "[t]he deadline in the Constitution for the IRC to submit a second set of maps has long since passed." *Harkenrider*, 38 N.Y.3d at 523.

2. All Equitable Considerations Favor A Stay

Petitioners also fail to establish the harms or public interest to support their Motion. Petitioners' asserted harm is that there some "risk" that a new congressional map may not be implemented before the 2024 elections, should this Court affirm the Third Department within this Court's ordinary timetable for deciding cases before it. Mot.24-25. But this speculative concern is entirely of Petitioners' own making.

As explained above, *supra* Part I, Petitioners have delayed at every stage, needlessly taking months to file their lawsuit, waiting until the last possible day to notice their appeal, and taking over three months to move forward in the Third Department. The contingent harm that Petitioners now claim—based upon their tentative concern about how long this Court will take to decide this appeal, and then how long it would take the IRC to complete its work in the extremely unlikely event that Petitioners prevail before this Court—is thus self-inflicted, making it entirely inequitable to grant Petitioners relief. *Quinn*, 126 N.Y.S.3d at 641; *Ivani*, 103 F.3d at 259.

On the other hand, Intervenors and the public interest will suffer grave harm if this Court lifts the stay and forces the IRC to launch the process of unconstitutional mid-decade redistricting. A key purpose of the 2014 Amendments is to restore public confidence in the certainty and stability of the redistricting process by "creat[ing] a new and permanent process," A.B. 5388, Spons. Memo. (N.Y. 2012), and "enshrining it in the constitution [to] ensure that the process will not be changed without due consideration," S.B. 2107, Spons. Memo. (N.Y. 2013). To that end, Section 4(e) prohibits mid-decade redistricting. Directing the IRC to begin the redistricting process anew, mid-decade—the very action that Section 4(e) prohibits—would throw the *Harkenrider* map into doubt.

That, in turn, would impose just the public harms that the People adopted Section 4(e) to avoid. The *Harkenrider* map has been in place since May 2022, *Harkenrider* No.670 at 1-31, during which time voters, candidates, and election officials alike have relied on its district lines in structuring their plans, including future campaign activities. *See* John Wagner, *Former N.Y. Congressman Mondaire Jones Launches Bid to Reclaim His Seat*, Wash. Post (July 5, 2023);[9] *Westchester County Executive George Latimer Considering Run for Congress*, CBS N.Y. (July 21, 2023).[10] Requiring the IRC to begin the process of redrawing the congressional map now would cause significant confusion, as citizens and candidates would no longer be sure of their district lines going forward. And Petitioners' alternative request—that this Court "make clear that any stay does not preclude the IRC from taking [] preliminary steps," Mot.29—would impose the same harms. Permitting the IRC to start "meeting" and "drafting amended maps," Mot.29, would immediately call the stability of the *Harkenrider* map into doubt.

[9] https://www.washingtonpost.com/politics/2023/07/05/mondaire-jones-congress-new-york/.

[10] https://www.cbsnews.com/newyork/news/westchester-county-executive-george-latimer-congress/.

III. If This Court Holds That No Stay Is Currently In Place, It Should Stay The Third Department's Decision

In the extraordinarily unlikely event that this Court were to hold that an automatic stay is not currently in place, *contra supra* Part II.A.2, this Court should stay the Third Department's order pending this Court's decision on the merits for the reasons above. This Court has authority to enter a stay pending appeal, CPLR 5519(c), and exercises that discretion by weighing the appellant's likelihood of success on appeal, the harm the appellant is likely to suffer absent a stay, and potential prejudice to the respondent if a stay is granted, *DeLury*, 48 A.D.2d at 405; *Freeman*, 33 A.D.2d at 975. Each of those factors weighs firmly in favor of a stay here, for the same reasons explained above. Intervenors are likely to succeed on the merits of their appeal because Petitioners' Article 78 Petition was untimely, *supra* Part II.B.1.i, because the relief Petitioners request violates Section 4(e)'s ban on mid-decade redistricting, *supra* Part II.B.1.ii, and because that relief is unavailable given that the constitutionally mandated deadlines for the IRC to submit new maps are long passed, *supra* Part II.B.1.iii. The equities also strongly favor a stay. Petitioners cannot claim prejudice stemming from impending election deadlines when they were entirely at fault for this case not completing yet. *Supra* Part I. By contrast, if the IRC must now begin an unconstitutional mid-decade redistricting, that will

undermine Intervenors' and the public's interest in stability and cause needless voter and candidate confusion. *Supra* Part II.B.2.

CONCLUSION

The Court should deny Petitioners' request to vacate the automatic stay or, in the alternative, if the Court decides that no stay is currently in place, it should stay the Third Department's decision.

Dated: New York, NY
August 21, 2023

Respectfully Submitted,

TROUTMAN PEPPER HAMILTON SANDERS LLP
875 Third Avenue
New York, New York 10022
(212) 704-6000
misha.tseytlin@troutman.com

By: _____
MISHA TSEYTLIN

COURT OF APPEALS OF THE STATE OF NEW YORK

----------X

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,

-against-

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-Respondents,

Independent Redistricting Commissioner Ross Brady; Independent Redistricting Commissioner John Conway III; Independent Redistricting Commissioner Lisa Harris; Independent Commissioner Charles Nesbitt and Independent Redistricting Commissioner Willis H. Stephens,

Respondents-Appellants,

-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.

----------X

Case No. APL-2023-00121

Appellate Division, Third Department Docket No. CV-22-2265

Albany County Supreme Court Index No. 904972-22

AFFIRMATION OF MISHA TSEYTLIN IN SUPPORT OF OPPOSITION TO MOTION TO VACATE STAY PENDING APPEAL, AND ALTERNATIVE CROSS-MOTION FOR STAY

I, Misha Tseytlin, an attorney admitted to the practice of law before the courts of the State of New York, and not a party to the above-entitled action, affirm the following to be true under the penalties of perjury pursuant to CPLR 2106:

1. I am a partner with Troutman Pepper Hamilton Sanders LLP, attorneys for Intervenors-Respondents-Appellants ("Intervenors") in the above-captioned matter. I respectfully submit this Affirmation in support of Intervenors' opposition to Petitioners' request to vacate or clarify the automatic stay imposed by CPLR 5519(a)(1) and, in the alternative, Intervenors' Cross-Motion under CPLR 5519(c) for a stay pending appeal of the Order of the Appellate Division, Third Department in the above-captioned matter, together with such other and further relief as the Court deems just and proper, should the Court determine that no automatic stay under CPLR 5519(a)(1) is already in place.

2. This Opposition and Cross-Motion is also supported by Intervenors' Memorandum Of Law In Opposition To Motion To Vacate Stay Pending Appeal Or, In The Alternative, In Support Of Motion For Stay Pending Appeal, dated August 21, 2023, which is incorporated by reference. Intervenors' arguments in opposition to Petitioners' request to vacate or clarify the automatic stay and in support of a stay are set forth in detail in the Memorandum Of Law.

DATED: New York, New York
August 21, 2023

TROUTMAN PEPPER HAMILTON
SANDERS LLP

By: 

Misha Tseytlin, Reg. No. 4642609
875 Third Avenue
New York, New York 10022
(212) 704-6000
misha.tseytlin@troutman.com