

# 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)*

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**RESPONSE OF RESPONDENTS INDEPENDENT  
REDISTRICTING COMMISSION CHAIRPERSON  
KEN JENKINS, INDEPENDENT REDISTRICTING  
COMMISSIONER IVELISSE CUEVAS-MOLINA  
AND INDEPENDENT REDISTRICTING  
COMMISSIONER ELAINE FRAZIER TO  
MOTION TO VACATE STAY PENDING APPEAL**

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*Attorneys for Respondents*

*Ken Jenkins, Ivelisse Cuevas-Molina and Elaine Frazier*

*Date Completed: August 21, 2023*

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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.*

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## ARGUMENT

Respondents New York State Independent Redistricting Commission (“IRC”) Chairperson Ken Jenkins and Commissioners Ivelisse Cuevas-Molina and Elaine Frazier (the “Jenkins Respondents”)<sup>1</sup> respectfully submit this response to Petitioners-Respondents’ Motion to Vacate Stay Pending Appeal. The Jenkins Respondents agree with Petitioners-Respondents that this Court should lift any stay on the Appellate Division’s direction to the IRC to “commence its duties forthwith” to prepare and submit a second set of congressional district lines and the implementing legislation therefor to the Legislature, to the extent a stay automatically took effect upon notice of appeal by the other IRC Commissioners who are a party to this appeal (the “Brady Respondents”). *See* Pet’rs-Resps.’ Mem. of Law in Supp. of Mot. (“Pet’r Mot.”) 12.

Specifically, the Jenkins Respondents agree with Petitioners-Respondents that the Court should vacate any stay under C.P.L.R. § 5519(c). *See* Pet’r Mot. 15–28. The Appellate Division correctly determined that the IRC has an indisputable duty to prepare and submit to the Legislature a second set of congressional district lines

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<sup>1</sup> Commissioner Dr. John Flateau and Commissioner Yovan Collado are not parties to this appeal because they were appointed (in the case of Commissioner Collado) or reappointed (in the case of Commissioner Flateau) to the IRC after the petition was filed in this action; the trial court did not issue a requested order to show cause to add them as parties to the Petition. *See* Dkt. No. 149 at 2 (Sup. Ct.); Dkt. No. 156 (Sup. Ct.). Commissioner Collado was appointed to replace Commissioner Eugene Bengner, who Petitioners-Respondents initially sought to add as a Respondent. Commissioners Flateau and Collado fully support the Jenkins Respondents’ position on the relief requested herein.

and that the IRC process is the “means of providing a robust, fair and equitable procedure for the determination of voting districts in New York.” *Hoffmann v. N.Y. State Indep. Redistricting Comm’n*, No. CV-22-2265, 2023 N.Y. Slip Op. 03828, 2023 WL 4494494, at \*4 (3d Dep’t July 13, 2023). As the Appellate Division noted, the “right to participate in the democratic process is the most essential right in our system of governance.” *Id.*

The Jenkins Respondents strongly support the IRC moving forward expeditiously on preparation of a second set of congressional district lines to ensure that this democratic participatory promise is fully realized. If the IRC waits until November 2023 or later—upon completion of the briefing and an oral argument in the November session—to begin meeting to prepare a second set of congressional district lines for submission to the Legislature, the timeline to implement a “robust, fair and equitable procedure” sufficiently in advance of the candidate petitioning period beginning in February 2024 will be extremely abbreviated.

The Jenkins Respondents are eager to commence their duties forthwith, as ordered by the Appellate Division. The IRC remains fully constituted with all ten commissioners in place, and the IRC has a full complement of staff available to begin the process of preparing a second set of congressional lines and implementing



legislation for submission to the Legislature. *See* R. 359.<sup>2</sup> Indeed, the Jenkins Respondents have made clear in communications to the other parties to this appeal that the Jenkins Respondents are ready and willing to comply immediately with the Appellate Division’s order, and that there are no obstacles that would prevent IRC staff from aiding this process. *See* Pet’r Mot. Exs. F, I.

The IRC has been denied the ability to move forward, however, because the Brady Respondents have taken the position that their notice of appeal triggered an automatic stay that *prevents them entirely* from acting in any capacity to begin to prepare a second set of congressional district lines. *See* Pet’r Mot. Exs. G, H. Specifically, the Brady Respondents have denied that they are able to “take steps to inform the public of the Third Department’s order; schedule and attend any IRC meetings to discuss the process for drafting and submitting plans to the Legislature; or begin the process of drafting redistricting plans.” Pet’r Mot. Ex. H. Because the IRC Chairperson cannot call a meeting or take other action without the consent of at least six other Commissioners, the IRC has been denied a quorum to take any action at all. N.Y. Const art. III, § 5-b(f); Pet’r Mot. Ex. I; Bylaws of the N.Y. Indep. Redistricting Comm’n art. II, §§ 1, 3 (2021), <https://www.nyirc.gov/storage/FinalBylaws.pdf>.

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<sup>2</sup> This citation to “R.” refers to the applicable page of the record on appeal in the Appellate Division. *See* NYSCEF Doc. No. 35 (3d Dep’t).

The Court should vacate any automatic stay that went into effect upon the Brady Respondents' notice of appeal. In the alternative, if the Court determines that a stay should remain in place during the pendency of the appeal, the Jenkins Respondents request that this Court clarify that the IRC and its members are not precluded from taking action to prepare for the submission of a second set of congressional district lines to the Legislature while this appeal is pending. To the extent a stay is in effect, it is merely a stay of enforcement of the Appellate Division's order, not an injunction that prohibits the IRC or its members from acting in any capacity at all. The IRC was "established" in accordance with the procedures set forth in Article III, Section 5-b(a), and it has never been disestablished. *See* N.Y. Const. art. III, § 5-b(a). The Court should clarify that—contrary to the position taken by the Brady Respondents—the established IRC can act while this appeal is pending.

For the reasons discussed above, moving ahead on initial preparatory meetings and other steps now will allow the IRC to submit a second set of congressional district lines and the implementing legislation therefor to the Legislature promptly if this Court affirms the Appellate Division. If the IRC is able to undertake those steps only after the resolution of this appeal, there will be an abbreviated period during which IRC Commissioners may meet to discuss, prepare, and vote on a second set of congressional district lines—potentially impacting the IRC's ability to provide the "robust, fair and equitable procedure for the

determination of voting districts in New York” that was envisioned by the citizens of New York who adopted the 2014 Redistricting Amendments. *Hoffmann*, 2023 WL 4494494, at \*4.

Accordingly, the Jenkins Respondents respectfully request that the Court grant the motion to vacate any stay that is in effect or, in the alternative, clarify that any stay that is in effect does not preclude the IRC or its members from taking preparatory actions toward submission of a second set of congressional district lines while this appeal is pending.

Dated: August 21, 2023

Respectfully submitted,

**JENNER & BLOCK LLP**



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