SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEPHEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, and MARIANNE VOLANTE,

Petitioner,

-against-

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT,

Respondents.

Index No. E2022-0116CV

McAllister, J.S.C.

Return Date:
March 3, 2022

REPLY MEMORANDUM IN SUPPORT OF THE GOVERNOR'S AND LT. GOVERNOR'S MOTION TO DISMISS

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I. PETITIONERS' RETROACTIVE SERVICE ATTEMPTS DO NOT CURE THE JURISDICTIONAL DEFECT.

On February 28, 2022, Petitioners purportedly served papers on the Governor (notably, not the Lt. Governor), *see* Docket No. 100, and the Rochester Office of the Attorney General, *see* Docket No. 101. However, this Court's Orders to Show Cause expressly required service "in the same manner as a summons" on or before February 10, 2022, *see* Docket No. 11 at p. 4, and service "upon counsel for Respondents who have not yet appeared in this special proceeding by NYSCEF . . . and upon the New York Attorney General as required by CPLR 2214(d) . . . by" February 17, 2022, *see* Docket No. 24 p. 2. Both orders therefore required serving the regional office closest to the venue that Petitioners themselves selected.

Where the court orders service by a particular date, *all components of service must* be accomplished by that date." *El Greco Soc. of Visual Arts, Inc. v. Diamantidis*, 47 A.D.3d 929, 929 (2d Dept 2008) (internal citations omitted) (emphasis added). Thus, where a petitioner commences an action by order to show cause, and thereafter fails to effect service in the manner provided or by the date specified in that order, "the petition *must* be dismissed." *Sorli v. Coveney*, 51 N.Y.2d 713, 714 (1980) (emphasis added).

Petitioners' claim that the Attorney General "admits" to having received the Petition and first Order to Show Cause "via email service to which the Attorney General consented" is belied by the record before this Court. As previously stated, the Attorney General's Office did not respond via email and counsel for the Senate obviously lacked authority to agree to email service on behalf of the Governor and Lt. Governor. *See* Docket No. 76 at ¶ 11-13. And, in any event, *there was no email receipt by counsel*. *See* Docket No. 76 at ¶ 12. Accordingly, despite their retroactive attempt to cure the defect, this Court still lacks jurisdiction over the Executive

Respondents, who should be dismissed from this proceeding.

Petitioners' throw-away assertion that the Executive Respondents "waived" this argument is unavailing. Petitioners do not even indicate what actions they claim the Attorney General's Office took that would have constituted a waiver. As the Court noted in its second Order to Show Cause, the Executive Respondents (amongst others) had not by then appeared, *see* Docket No. 24; a review of the remainder of the docket reveals that the Executive Respondents did not appear until the filing of their motion on February 24, 2022. Although the Attorney General's Office was privy to scheduling discussions between counsel prior to that date, *see* Docket No. 76 at ¶ 9, this occurred pursuant to Public Officers Law § 17(2)(c), which requires this Office to ensure against defaults by parties requesting representation, even while conflicts of interest and other representation issues are still being assessed.

Finally, the cases cited by Petitioners are distinguishable. In *Duffy v Schenck*, 73 Misc. 2d 72, 73 (Nassau Co. Sup Ct 1973), the respondents answered weeks before moving to dismiss for failure to properly serve. Again, here, the Executive Respondents did not appear until they made their motion raising the jurisdictional defect. In *O'Brien v. Pordum*, 120 A.D.3d 993 (4th Dept. 2014), meanwhile, the Respondent Board of Elections was represented by its own counsel, not the Attorney General, such that the failure to serve the Attorney General's Office was deemed by the Court to be a mere technical defect.

II. PETITIONERS ABANDONED ANY CLAIM AGAINST LT. GOVERNOR BENJAMIN AND FAIL TO ARTICULATE ANY VALID BASIS FOR NAMING GOVERNOR HOCHUL

First, Petitioners have abandoned any purported claim against Lt. Governor Benjamin. In their opposition, Petitioners assert only that "the Governor is a proper defendant." *See* Docket No. 102 at p. 13. "[A] claim is deemed abandoned if the party asserting it fails to oppose the brand of a motion to dismiss." *Patmos Fifth Real Est. Inc. v. Mazl Bldg. LLC*, 40 Misc. 3d 1220(A), 975 N.Y.S.2d 711 (N.Y. Co. Sup. Ct. 2013), *aff'd*, 124 A.D.3d 422 (2015), citing *Kronick v. L.P. Thebault Co., Inc*., 70 AD3d 648 (2d Dept 2010); *Genovese v. Gambino*, 309 A.D.2d 832 (2d Dept 2003). Petitioners' single reference to the Lt. Governor is their recitation of the undisputed proposition that "New York law required Petitioners to serve this Petition on the Governor and Lieutenant Governor" pursuant to N.Y. Unconsolidated Laws § 4221. That statute pertains to *service* of redistricting challenges, but it does not form the basis of a substantive claim against any named respondent. Accordingly, the Lt. Governor must be dismissed.

Second, Petitioners still fail to assert valid claims against the Governor. Petitioners assert that Governor Hochul is a proper respondent simply by virtue of being the "chief executive officer" of the State, but they have named other respondents whom they allege were involved in creation of the maps (the Senate and Assembly and LATFOR). For that matter, Petitioners could have named the State itself, but their naming of the Governor without any substantive, nonspeculative claims against her requires dismissal. Petitioners' insistence that she is necessary as "head of the Executive Branch and the Board of Elections" is negated by their naming of the Board of Elections itself, which has filed papers taking no position in these proceedings.

Petitioners' reliance upon other cases in which governors were named is misplaced, *see* Docket No. 102 at p. 13, since it is unknown whether those governors even raised this argument as Governor Hochul has.

III. PETITIONERS MISCONSTRUE EXECUTIVE RESPONDENTS' ARGUMENTS REQUIRING DISMISSAL OF THEIR FIRST CAUSE OF ACTION.

Regarding their first cause of action, which the Executive Respondents have moved to dismiss as a matter of law, Petitioners mistakenly claim that "rather than engaging with the Constitution's text after 2014, [respondents] rely upon pre-2014 process and precedent." *See* Docket No. 102 at p. 3. The Executive Respondents papers make abundantly clear their position that the Legislature had authority to enact the maps even based on the plain language of the 2014 amendments. Next, Petitioners' characterization of the absurd results that their interpretation of the 2014 amendments would create—namely, that a minority of IRC Commissioners could undermine the Legislature's constitutional redistricting authority—as "a policy argument" completely ignores the principles of constitutional construction. Such absurd results are properly considered when determining the meaning and intent of a constitutional provision. Third, Petitioners' fail to grasp that the Executive Respondents' response to Petitioners' first cause of action, as well as their defense of nonjusticiability, are grounded in the separation of powers doctrine. This doctrine, upon which our three-branch system of government itself is based, cannot reasonably be belittled as "pre-2014 process and precedent."

Finally, Petitioners' claim that "[u]nder Respondents' approach, ***legislative leaders can always render the entire IRC process meaningless by appointing IRC members whom legislators know will refuse to agree on a map***," Docket No. 102 at p. 4, is utterly nonsensical.

Because the Legislature can modify any map even if it is agreed to by the IRC, they would have no reason whatsoever to try to select IRC members who (the legislators somehow "know") will not agree on a map.

Dated: March 2, 2022
Rochester, New York

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CERTIFICATION

In accordance with Rule 202.8-b of the Uniform Rules of Supreme and County Courts, the undersigned certifies that the word count in this memorandum of law (excluding the caption, table of contents, table of authorities, signature block, and this certification), as established using the word count on the word-processing system used to prepare it, is 1,189 words.

Dated: March 2, 2022
Rochester, NY

/s/***Heather L. McKay***
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