

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF STEUBEN

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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,

Index No. E2022-0116CV

Petitioners,

Notice of Appeal

-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.

_____ x

PLEASE TAKE NOTICE that Respondents Senate Majority Leader and President *Pro Tempore* of the Senate Andrea Stewart-Cousins and the New York State Senate Majority’s appointees to the New York State Legislative Task Force on Demographic Research and Reapportionment (collectively, the “Senate Respondents”), appeal to the Fourth Department of the Supreme Court of the State of New York, from the Decision and Order of the Hon. Patrick F. McAllister, signed in this special proceeding on March 3, 2022, duly entered in the Office of the Clerk of Steuben County on the same date, and attached as Exhibit A (the “Order”). This appeal is taken from each and every part of the Order, as well as from the Order in its entirety.

Dated: March 4, 2022
New York, New York

By: 
Eric Hecker
John R. Cuti
Alexander Goldenberg
Alice G. Reiter
Heather Gregorio

CUTI HECKER WANG LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600
Attorneys for the Senate Respondents

TO: TROUTMAN PEPPER HAMILTON SANDERS LLP
Attorneys for Petitioners
Bennet J. Moskowitz, Esq. 875 Third Avenue
New York, New York 10022
(212) 704-6000
bennet.moskowitz@troutman.com

Misha Tseytlin, Esq.
227 W. Monroe Street Suite 3900
Chicago, Illinois 60606
(608) 999-1240
misha.tseytlin@troutman.com

KEYSER MALONEY & WINNER LLP
Attorneys for Petitioners George H. Winner, Jr., Esq.
150 Lake Street
Elmira, New York 14901
(607) 734-0990
gwinner@kmw-law.com

GRAUBARD MILLER
Attorneys for Respondent Speaker of the Assembly Carl Heastie
C. Daniel Chill
Elaine Reich
The Chrysler Building
405 Lexington Avenue, 11th Floor
New York, New York 10174
(212) 818-8800
dchill@graubard.com
ereich@graubard.com

PHILLIPS LYTTLE LLP

Attorneys for Respondent Speaker of the Assembly Carl Heastie

Craig R. Bucki

Steven B. Salcedo

Rebecca A. Valentine

One Canalside

125 Main Street

Buffalo, New York 14203-2887

Telephone No. (716) 847-8400

cbucki@phillipslytle.com

ssalcedo@phillipslytle.com

rvalentine@phillipslytle.com

LETITIA JAMES, NEW YORK ATTORNEY GENERAL

Attorneys for Respondents Governor Kathy Hochul and

Lieutenant Governor and President of the Senate Brian A. Benjamin

Heather L. McKay and Matthew Brown, Esqs

144 Exchange Boulevard, Suite 200

Rochester, New York 14614

(585) 546-7430

Heather.McKay@ag.ny.gov

NEW YORK STATE BOARD OF ELECTIONS

Brian Lee Quail, Esq. Attorneys for Respondent

New York State Board of Elections

40 N. Pearl Street, Suite 5

Albany, New York 12207

(518) 474-2063

brian.quail@elections.ny.gov

Exhibit A

STATE OF NEW YORK
SUPREME COURT : COUNTY OF STEUBEN

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SUSAN ROWLEY, JOSEPHINE THOMAS, and
MARIANNE VOLANTE,

Petitioners.

-against-

DECISION

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

Respondents

PRESENT: Hon. Patrick F. McAllister
Acting Supreme Court Justice

In the Petitioner’s third Order to Show Cause in this matter the Petitioners seek expedited discovery. The Respondents oppose this application on multiple grounds including the grounds of legislative privilege, that discovery is not provided for in these types of actions, that the proposed discovery was too broad, and because the discovery process would take too long and delay a timely resolution of this matter.

The Petitioners are seeking expedited discovery. To some extent the governmental defendants enjoy a level of immunity from even discovery. Based on the State and Federal Constitutions the courts have interpreted the Speech and Debate Clause of the constitutions as providing a level of protection for both Federal Congressional leaders as well as state elected representatives. The constitution provides both legislative immunity and legislative privilege. However, Court have found that state legislators do not have an absolute right to claim

legislative privilege. Gillock, 445 U.S. 360 (1980).

In 2003, in the case of Rodriguez v. Pataki, 280 F. Supp. 2d 89 (So. Dist. Of NY 2003) that court laid out a balancing test to determine what information should be disclosed and what needs to be protected because of the chilling effect it would have on the legislature if the information was disclosed. The Rodriguez court adopted the same five factors as was set forth in In re Franklin Nat'l Bank Secs. Litig., 478 F. Supp 583 (E. Dist. New York 1979). The factors to be considered are 1. the relevance of the evidence sought; 2. the availability of other evidence; 3 the seriousness of the issues; 4 the role of the government in the litigation; and 5 the possibility of future government employees being chilled by realizing potential disclosure of the information. Rodriguez v. Pataki, (*supra.*). In Favors v. Cuomo, 285 F.D.R. 187 (Eastern Dist. of NY 2012) the Petitioners sought the identity of the person(s) who drew the challenged map and that that person(s) be produced for deposition(s).

Even though an issue in this case is whether or not the Democrats purposely tailored a map to eliminate districts currently held by Republicans, the courts have been reluctant to require disclosure of statements made by a member of the decision-making body when there is no evidence that the body as a whole has adopted the same discriminatory intent. Comm. For a Fair & Balanced Map v. Ill. State Bd. of Elections, 2011 U.S. Dist. LEXIS 117656. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." Hunter v. Underwood, 471 U.S. 222 at 229 (Sup Ct. 1985). On the other hand, when the requested information is seeking information about those who (including nonlegislators) were involved in the process and what documents were reviewed in coming up with the plan the courts have been more inclined to grant disclosure. Rodriguez v. Pataki, (*supra.*).

Often what is found to be discoverable are things where the court's find were not legislative in nature or where a privilege could be found to have been waived. Hence public remarks or statements, public testimony, inquires from and responses to the public or the media have all been found to be discoverable. See, Favors v. Cuomo, (*supra.*). On the other hand, documents related to floor speeches, floor debates, committee meetings, drafts and such have been prohibited from disclosure as being to likely to chill future debate and discussion if it was to be released as discoverable.

Members of the IRC and at least two members of LATFOR are not legislators. Therefore, discovery from these individuals is not prohibited under the Federal or State Constitution as these people do not enjoy legislative immunity or legislative privilege. See, Rodriguez. Further, this court adopts the ruling in Rodriguez that even these Respondents are not completely exempt from providing discovery. Further, the court adopts the five prong test of Rodriguez. Under the five prong test the court finds the requested discovery is relevant; that the relevant discovery is not otherwise available; that the issue of this case are very serious and that the governments role in this case is huge; further that limited discovery will not have the potential of chilling legitimate legislative actions in the future. Since this court only has until

potential of chilling legitimate legislative actions in the future. Since this court only has until April 4, 2022 to decide this matter the court will grant expedited discovery. All persons asked to provide discovery are to give this his/her highest priority and to set aside other matters.

The court will permit discovery of the Respondents as to whether or not the map-drawing process was directed and controlled by one political party or the legislative leaders of one political party. See, League of Women Voters of Ohio, 2022 WL 110261, Householder, 373 F. Supp 3d 1093-96; League of Women Voters of Pa, 178 AD3d 817. This would include whether the Respondents without Republican input directed and/or controlled the map-drawing process.

The court will also permit discovery of the Respondents as to any public remarks or statements made by them, any public testimony he/she gave about the redistricting process and/or maps, and any inquires from and any responses to the public or media about the redistricting process and/or maps. See, Favors v. Cuomo. This would include public comments made by the Respondents about the IRC and the IRC's action or lack of action. This would include any communication between the Respondents and third-parties about advancing a partisan agenda or any efforts to undermine the constitutional process of having the IRC produce a viable map and/or viable second map. This would also include all documents and communications concerning the work of the Commissioners of the Democratic Caucus of the IRC which documents and communications were received from third parties.

NOW, therefore, upon consideration of all papers and proceedings heretofore had herein, and after due deliberation, it is hereby decided that all discovery shall be completed by March 12, 2022.

Dated: March 3, 2022



Hon. Patrick F. McAllister
Acting Supreme Court Justice

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