To be argued
By: JEFFREY W. LANG
15 minutes requested

Supreme Court of the State of New York
Appellate Division – Fourth Department

No. CAE 22-00506

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,

v.

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADERS 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.

REPLY BRIEF FOR GOVERNOR AND LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE

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ARGUMENT

Executive respondents argued in their opening brief that, even if this Court were to affirm in part, it should vacate Supreme Court's remedy and defer implementation of any remedial maps until the next election cycle; the Legislature did not violate constitutional procedures when, consistent with the 2021 legislation, it drew and enacted electoral maps following the IRC's failure to submit a second set of maps; petitioners did not prove beyond a reasonable doubt that the 2022 congressional map is a partisan gerrymander; and the Governor and Lieutenant Governor are not proper parties to this case.

Petitioners have not successfully rebutted these arguments, and this Court should reverse the judgment of Supreme Court in full, declare that the 2022 electoral maps are valid, and dismiss the petition. Alternatively, it should vacate the court's remedy. We make the following points in reply.

POINT I

ANY REMEDY THAT REDRAWS THE MAPS SHOULD BE DEFERRED UNTIL THE NEXT ELECTION CYCLE

Petitioners fail to meaningfully rebut evidence that implementing new maps while the election is already underway will cause confusion for voters, candidates, and election officials, jeopardizing the electoral process.

Petitioners first argue (Pet. Br. at 49-50) that, because the 2014 constitutional amendments require that a state court adjudicating an apportionment challenge "render its decision within sixty days after a petition is filed," N.Y. Const. art. III, § 5, maps which have been invalidated may not be used in an upcoming election. But that is not what the constitutional provision says. On its face, it requires the expeditious resolution of any court challenge. At most, it may be understood to encourage the use of new maps when reasonably feasible, such as in cases where—unlike here—the contemplated remedy is of more limited scope than the redesign from scratch of the State's major legislative maps.

Indeed, petitioners' reading of the provision is inconsistent with the background caselaw at the time of the 2014 amendments. The drafters of the amendments can be presumed to have been aware of prior cases in

which maps were adjudicated invalid, yet courts permitted the upcoming election to go forward under the invalid maps.[1] *See Arbegast v. Board of Educ. of S. New Berlin Cent. Sch.*, 65 N.Y.2d 161, 169 (1985) (Legislature is "presumed to be aware of the decisional and statute law in existence at the time of an enactment"); *Hernandez v. State*, 173 A.D.3d 105, 112 (3d Dep't 2019) (constitutional drafters presumed aware of the state of the law). Had the drafters wished to amend the Constitution to prohibit that practice, they could have easily done so when they instructed courts to consider petitions expeditiously. But they did not. Petitioners cannot rewrite the provision as if they had.

The drafters also likely understood that there would be circumstances where implementing new maps would harm, rather than promote, the integrity of an election. This case presents such a circumstance. As executive respondents outlined at length in their opening brief (Exec. Br. at 29-32), and as laid out in detail in a sworn affidavit submitted below by Thomas Connolly, Director of Operations for

[1] See Senate Br. at 61 and Assembly Br. at 60-61 for a long list of cases in which New York courts have held that upcoming elections should proceed under maps that have been declared invalid.

SBOE (R2315-2325), changing the maps when designating petitions have already been signed and submitted and when voters have already received notifications of their districts and polling locations will create confusion. And holding two primaries while conducting a redistricting in between would be an unprecedented event in New York State. Petitioners have no response to the evidence below of the confusion this will cause, failing to so much as cite to Mr. Connolly's sworn affidavit. They simply assert that dates and deadlines conceivably *could be* moved, and therefore *should be* moved (Pet. Br. at 50-51), without concern for the resulting confusion.[2]

It is, in part, New York's extensive designating petition process—by which state legislative candidates must collect a certain number of signatures from voters within their district to obtain ballot access as a party candidate, and then such signatures are subject to various levels of

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[2]Petitioners argue that respondents are "judicially estopped" from asserting that elections cannot be held in this election cycle under new maps because of a statement by legislative respondents. (Pet. Br. at 52.) During stay proceedings before Justice Lindley, however, executive respondents consistently objected to holding current elections under any newly drawn maps. (*See* email from Jeffrey W. Lang to Hon. Stephen K. Lindley and Adam Oshrin, with a cc to counsel, dated April 7, 2022 at 11:24pm.)

scrutiny and challenges—that would make it so difficult to change the maps for an election that is already underway.

Accordingly, petitioners' citation to redistricting matters in other States where primary election deadlines are being reconfigured while redistricting appeals are pending (Pet. Br. at 51-52) does not dictate what is appropriate in New York. For example, in Maryland—one of the States cited by petitioners—candidates get on the ballot by filling out a form and filing a fee.[3] Furthermore, while some States with redistricting litigation are moving deadlines with an eye toward new maps, other States are leaving challenged maps in effect for 2022, demonstrating that there is no uniform approach. *See, e.g.*, *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (enjoining the redrawing of Alabama's congressional maps); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 2022 WL 633312 (N.D. Ga. Feb. 28, 2022) (holding that Georgia's 2022 elections should proceed under the enacted maps to preserve the electoral process).

Finally, petitioners argue that the *Purcell* principle does not apply here because it is exclusively concerned with federal court decisions

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[3] *See* https://elections.maryland.gov/candidacy/index.html.

affecting an election. (Pet. Br. at 53-54.) This is incorrect. While the *Purcell* line of cases does hold that it is particularly egregious, from a federalism perspective, for a federal court to change the rules of a state election in the run-up to that election, *Purcell*'s reasoning is not limited to those circumstances. To the contrary, the concerns the Supreme Court expressed over judicially created electoral confusion apply with equal force to any court intervention in the run-up to an election, because such problems occur when any court disturbs an election that has been carefully and thoroughly planned and administered by the legislative and executive branches. Thus, the *Purcell* doctrine rests equally on principles of judicial restraint.

The broad applicability of the *Purcell* principle is evidenced by the fact that state courts in multiple States have adopted the principle to restrain court-imposed alterations to election rules in the run-up to an election.[4] And long before *Purcell* was decided, New York courts

[4] See Senate Br. at 61 for a list of such States.

embraced the principle by determining that imminent elections should proceed under maps that have been found deficient.[5]

Accordingly, even if this Court affirms in part, the Court should vacate the remedy imposed by Supreme Court, afford the Legislature a full and reasonable opportunity to cure any infirmities, and defer the implementation of any remedial maps until the next election cycle.

POINT II

THE LEGISLATURE DID NOT VIOLATE CONSTITUTIONAL PROCEDURES IN ENACTING THE 2022 ELECTORAL MAPS

Contrary to the arguments of petitioners and amicus League of Women Voters of New York State, the Legislature did not violate constitutional procedures when it enacted the 2022 electoral maps after the IRC failed to submit a second set of maps. Instead, it appropriately followed the 2021 legislation.

First, petitioners and amicus argue at length that the plain text of the Constitution dictates that only the judiciary can impose electoral maps if the IRC fails to submit them to the Legislature. Their argument

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[5] See Senate Br. at 61 and Assembly Br. at 60-61 for multiple examples of New York courts reaching such decisions.

is based on the statement in Article III, § 4(b) that "[t]he process for redistricting congressional and state legislative districts established by this section and section 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." But no one disputes that these procedures govern. The problem is that they do not say which body is empowered to act in the event that the redistricting process cannot proceed as set forth in the Constitution because the IRC fails to submit maps. There must be an answer to that question, however, for New York to hold legislative elections, given the likely malapportionment of the old electoral maps. And petitioners' disquisition on the meaning of "the" does not resolve it. (Pet. Br. at 17.)

As demonstrated in our opening brief (at 17-23), the only reasonable answer is that the 2014 amendments are silent as to what should occur when the IRC fails to act, which allowed the Legislature to fill the gap in constitutional procedures with the 2021 legislation authorizing the Legislature to enact its own maps if, for any reason, the IRC fails to submit maps. At the very least, petitioners have not shown "beyond a

reasonable doubt" that the 2021 legislation cannot be reconciled with the Constitution. *See Cohen v. Cuomo*, 19 N.Y.3d 196, 201 (2012).

Amicus argues that redistricting must shift to the courts upon an IRC deadlock because the constitutional text supposedly distinguishes between violations "curable by the legislature" and ones "not so curable." In the "not so curable" cases, only the courts can provide a remedy. (Amicus Br. at 12.) This contorted reading finds no support in the constitutional text. Amicus relies (Br. at 5-6) on a court's authority to impose a remedy under § 4(b), but a court's remedial power is constrained by § 5, which § 4(b) references. And under that provision, if a court finds, in a judicial proceeding relating to redistricting, that "any law establishing congressional or state legislative districts" violates the provisions of Article III, the court must give the Legislature a "full and reasonable" opportunity to correct the law's legal infirmities. N.Y. Const. art. III, § 5. Section 5 does not restrict the Legislature's opportunity to cure to certain types of violations, much less enumerate those types.

Second, petitioners and amicus argue that upholding the 2021 legislation would "nullify" (Amicus Br. at 15, 20) or render "meaningless" (Pet. Br. at 18) the purpose of the 2014 amendments to shift redistricting

authority to the IRC. These claims misstate the intent and effect of the amendments, which gave the IRC the preliminary but not primary power over redistricting. Thus, the IRC plays a vital role in holding public hearings and developing a record, but ultimately its submissions to the Legislature are recommendations which the Legislature is free to accept or reject. The amendments did not relegate the Legislature to a "rather begrudging backstop" (Pet. Br. at 22) or constitute the IRC as a "check" on its redistricting power (Amicus Br. at 14). Rather, as noted in our opening brief, the Legislature may reject the IRC's first and second submissions, for any reason, and then devise its own maps for submission to the Governor. And the idea that, in approving the 2014 amendments, New York voters wished to make a decisive break with centuries of legislative control over redistricting (Pet. Br. at 22) strains credulity in light of the fact that the Legislature *itself* approved the amendments—twice—before they were put to the voters. If the Legislature had intended to cede its own authority over redistricting as readily as petitioners and proposed amicus suppose, it would have spoken more clearly.

Third, petitioners' interpretation cannot be correct because it has the consequence that a bloc of four IRC members can wrest redistricting

authority from the Legislature and transfer it to the courts simply by refusing to meet and depriving the IRC of a quorum. In response, petitioners positively embrace this scenario as an intended result of the 2014 amendments. That is supposedly because the voters who approved the amendments expected that "any IRC map that the Legislature *must* consider would have *bipartisan* support, or the nonpartisan courts would draw the maps." (Pet. Br. at 23) (emphasis in original). So if the IRC cannot reach bipartisan agreement on the submission of a map, on petitioners' theory, the entire process rightfully defaults to the courts.

If the voters had that expectation, it did not come from the 2014 amendments. The amendments on their face permit the IRC to submit competing electoral maps tied for the most votes (as happened in the first round here), and do not require these maps to receive bipartisan support. Although amicus points to language in the "Form of Submission" for the ballot proposal containing the 2014 amendments,[6] that description of the

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[6] The "Form of Submission" is a form that the SBOE must submit to county boards of elections for proposed constitutional amendments placed on the ballot. It contains "an abstract of such proposed amendment, proposition or questions, prepared by the state board of elections concisely stating the purpose and effect therefor in a clear and

(*continued on the next page*)

process, like the amendments themselves, assumes that the IRC will submit plans. (Amicus Br. at 19-20.) It thus does not answer the question of what happens if that expectation is not met.

Whereas petitioners endorse, as intended by the 2014 amendments, the ability of four members of the IRC to displace redistricting onto the courts by refusing to meet with the other members, amicus dismisses it as unwarranted "alarmism" on the part of respondents. (Amicus Br. at 17.) Far from alarmism, it is precisely what occurred here, as legislative respondents' uncontested submissions below demonstrate. (*See* Senate Br. at 26; Assembly Br. at 8.) But regardless of which party is correct about who is to blame for the IRC's impasse, the point remains that no plausible interpretation of the 2014 amendments should countenance a scenario whereby redistricting authority could be so readily transferred from the Legislature to the courts.

Fourth, petitioners do not engage with the fatal problems that respondents identified in Supreme Court's proposed solution to an IRC impasse. The court speculated that the Legislature could safeguard its

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coherent manner using words with common and everyday meanings." Election Law § 4-108(1)(d).

authority over redistricting by removing recalcitrant members of the IRC or bringing a legal action to force them to submit a second round of maps. As we explained, however, there is no reason to think such legal maneuvers would be successful, nor is there sufficient time to execute them. (*See* Exec. Br. at 22-23.) Instead of addressing these arguments, petitioners repeat their mistaken claim that the IRC declared an impasse prematurely, long before its "absolute" deadline to submit maps of February 28, 2022. (Pet. Br. at 21.) February 28 was not the absolute deadline. That was January 25, which was 15 days after the Legislature had rejected the IRC's earlier submissions. While the constitutional text requires redistricting plans to be submitted within 15 days and "no later" than February 28, the only reasonable reading of these two deadlines is that the IRC has *either* 15 days, *or* until February 28, whichever is earlier. *See* N.Y. Const. art. III, § 4(b). Any other interpretation would improperly render the 15-day deadline a mere suggestion.

In short, the constitutional procedures do not allow enough time for the legal maneuvers that Supreme Court, petitioners, and amicus believe could be used to force the IRC to act, so that the Legislature could retain its redistricting authority under their theory.

Fifth, the Legislature's attempt to enshrine in the Constitution the gap-filling procedure contained in the 2021 legislation does not demonstrate that the Legislature understood that a constitutional amendment was necessary, as opposed to desirable. *See* Pet. Br at 19. Nor should any weight be given to the fact that the voters ultimately rejected the ballot proposal with this addition (Pet. Br. at 19); that same ballot proposal contained many other changes that unquestionably required constitutional amendment, a detail conspicuously absent from petitioners' account of the process. Thus, no possible inference can be drawn about what the voters might have thought about the procedure embodied in the 2021 legislation.

In sum, respondents' interpretation of the 2014 amendments as silent about what should occur in the event of an IRC impasse—a silence the Legislature was entitled to fill by legislation—better respects the separation of powers and the Legislature's traditional authority over redistricting than the contrary view that only a judicial remedy was permissible.

POINT III

PETITIONERS DID NOT MEET THEIR HEAVY BURDEN TO SHOW THAT THE CONGRESSIONAL MAPS WERE DESIGNED WITH A PARTISAN PURPOSE

In response to petitioners' claim that the 2022 congressional maps are a partisan gerrymander, we agree with the points made in reply by legislative respondents in their respective briefs. Petitioners cannot satisfy their heavy burden to demonstrate that map's invalidity beyond a reasonable doubt by the mere fact that Republican legislators did not participate in the process of drawing it (Pet. Br. at 27); nothing in the Constitution required their participation. Nor is it dispositive that the congressional map is expected to result in a shift from a 19-8 majority in favor of the Democrats under the 2012 map to a 22-4 majority (Pet. Br. at 28); whether that expected shift reflects a map designed with improper partisan intent or, instead, reflects changes in the political demography of the State since the last redistricting is precisely what is at issue, and the mere fact of the shift itself cannot discharge petitioners' burden of proof.

Finally, as legislative respondents demonstrated in their opening briefs, the analysis of petitioners' expert, Mr. Trende, suffers from

fundamental threshold deficiencies that fatally undermine its reliability. Petitioners' attempts to rehabilitate him fall short. (Pet. Br. at 39-49.)

POINT IV

EXECUTIVE RESPONDENTS ARE NOT PROPER PARTIES

Petitioners now concede that the Lieutenant Governor is not a proper party, but insist that Governor Hochul is. (Pet. Br. at 62.) They are mistaken. Petitioners introduced no evidence of the Governor's personal involvement in redistricting, apart from the privileged act of signing the redistricting bills into law. Nor do petitioners dispute that the Governor's signing the maps into law is a "legislative" act for which she is immune. (Exec. Br. at 15-16.) While they cite a case, *Clark v. Cuomo*, 66 N.Y.2d 185, 190 (1985), noting that the SBOE is lodged in the Executive Department, that has no bearing on whether the Governor is a proper party; petitioners are not required to name the Governor to obtain relief against the SBOE.

Nor does it matter that the Governor was named in some past redistricting challenges, where no proper-party argument appears to have been raised by the Governor or decided by the courts. (Pet. Br. at 62.) *See Matter of Empire Ctr. for N.Y. State Policy v. New York State*

Teachers' Retirement Sys., 23 N.Y.3d 438, 519 (2014) ("Our decisions are not to be read as deciding questions that were not before us and that we did not consider.").

For these reasons, this Court should reverse the judgment of Supreme Court insofar as it declined to dismiss executive respondents from the case.

CONCLUSION

For the foregoing reasons, this Court should vacate Supreme Court's judgment, and issue a decision and order finding in favor of respondents on all counts and dismissing the petition.

Dated: Albany, New York
April 18, 2022

Respectfully submitted,

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