SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

Anthony S. Hoffmann; Marco Carrion; Courtney Gibbons; Lauren Foley; Mary Kain; Kevin Meggett; Clinton Miller; Seth Pearce; Verity Van Tassel Richards; and Nancy Van Tassel,

Index No.: 904972-22

Petitioners,

For an Order and Judgement Pursuant to Article 78 of the New York Civil Practice Law and Rules

- against -

The New York State Independent Redistricting Commission; Independent Redistricting Commission Chairperson David Imamura; Independent Redistricting Commissioner Ross Brady; Independent Redistricting Commissioner John Conway III; Independent Redistricting Commissioner Ivelisse Cuevas-Molina; Independent Redistricting Commissioner Elaine Frazier; Independent Redistricting Commissioner Lisa Harris; Independent Redistricting Commissioner Charles Nesbitt; and Independent Redistricting Commissioner Willis H. Stephens,

Respondents.

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO ORDER TO SHOW CAUSE

MESSINA PERILLO HILL LLP
285 West Main Street, Suite 203
Sayville, New York 11782
(631) 582-9422

Attorneys for Respondents
Commissioner – Ross Brady
Commissioner – John Conway III
Commissioner – Lisa Harris
Commissioner – Charles Nesbitt
Commissioner – Willis H. Stephens

Independent Redistricting Commissioner Ross Brady, Independent Redistricting Commissioner John Conway III, Independent Redistricting Commissioner Lisa Harris, Independent Redistricting Commissioner Charles Nesbitt, Independent Redistricting Commissioner Willis H. Stephens, (collectively hereinafter the "Moving Respondents"), by their attorneys, Messina Perillo Hill LLP, hereby respectfully submit this Reply Memorandum of Law in further support of their Motion to Dismiss the Amended Petition and Proceeding as against said Moving Respondents, together with such other and further relief as the Court deems just and proper.

BRIEF ARGUMENTS IN REPLY TO OPPOSITION

Petitioners' opposition to the motion to dismiss is based upon a misreading of the constitution. Article III, §4(e) of the constitution simply does not say what Petitioners have invented it says, as a simple reference to the constitutional text conclusively confirms. The section provides that the procedures for redistricting, inclusive of the IRC process, set forth in the constitution shall govern "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." Both the Moving Respondents and the Petitioners in opposition focus on this same language. However, Petitioners paradoxically seek both the rule and its exception. The Petitioners' fundamental error is that the §4(e) exception they invoke, which allows a court to "order the adoption of or changes to a redistricting plan," is fully incongruous with the relief they seek by this mandamus action. Petitioners do not ask this court to either adopt or change a redistricting plan. Rather, they seek to compel the IRC to perform certain actions. The exception in §4(e) is a judicial remedy and where employed, it results in a court-ordered redistricting plan. It is for this reason that Petitioners, at least twice in the

memorandum, conspicuously resort to writing into the constitution language that quite obviously does not exist anywhere therein. Petitioners misrepresent that §4(e) authorizes the court to order a redistricting plan "via the process of the IRC submitting a plan to the Legislature." *See* Pet. Mem. in Opp. at 1 (and again at 8). That language is fully invented by Petitioners. It is not in the constitution. And, moreover, it simply does not make sense—a court cannot "adopt" a redistricting plan by ordering an advisory body to make a recommendation to a legislative body (neither of which are the court and none of which results in a court-ordered plan). Section 4(e) provides a mechanism for a court to adopt a redistricting plan; this is not relief sought by this mandamus action.

Petitioners again ask the court to indulge their mischaracterizations of the constitution when they offer that "Section 4(e) authorizes courts to vary from the deadline set forth in the Redistrictng Amendments where necessary…" Pet Mem in Opp at 8. Here again, ¶4(e) of the constitution provides no such language, nor anything even remotely close to it. The Court of Appeals declined to engage or indulge in interpreting the state constitution through "interstitial and interpretive gloss" in a manner that "substantially alters the specific law-making regimen." *Harkenrider* at *6, quoting *Matter of King v. Cuomo*, 81 NY2d 247, 253 (1993).

Petitioners argue that §4(e) provides that a court may direct any remedy for a violation of law. That is simply wrong. Section 4(e) the procedures for redistricting set forth in the constitution shall govern "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." It authorizes a court to order the adoption of a plan, not to alter the constitutional procedures for Petitioners' discussion of the differences between "a" and "the" have no bearing on the plain meaning here. If the court is required and

empowered to remedy a violation of law, it does so under the constitution by adopting a plan.[1] This action does not ask this court to adopt a plan.

Petitioners' misplaced invoking of §4(e) means the mandamus relief they seek must be viewed by the regular constitutional provisions that otherwise govern. Here, that relief is unavailable for the combined reason that the time for the action sought to be compelled has passed and that *Harkenrider* already provided a court-ordered plan. Moving Respondents did not argue that this action is moot because *Harkenrider* resulted in a map that applies for 2022 only as falsely stated by Petitioners (Pet Mem in Opp at 2 and again at 10). It is moot because *Harkenrider* provided the remedy for the violation that Petitioners have raised herein.

The relief sought by this proceeding is unavailable because it seeks to compel an act that is not permitted by the express language of the Constitution. "Manifestly, mandamus does not lie to compel an official act for which no legal basis exists." *Matter of Altamore v Barrios-Paoli*, 90 N.Y.2d 378, 384-85 (1997) ("petitioners have failed to allege any basis upon which the Director would have had the authority to extend the 7022 list beyond the scheduled May 25, 1995, expiration date"). Nor may mandamus compel an unconstitutional act. *See Council of City of New York v Bloomberg*, 6 N.Y.3d 380, 388 (2006). "Mandamus will not lie to compel a public official to perform a vain or useless or illegal act," *Matter of Thorsen v. Nassau County Civ. Serv. Comm'n*, 32 A.D.3d 1037, 1037-38 (2d Dep't 2006). Courts are precluded, "from considering questions which, although once live, have become moot by passage of time or change in circumstances." *Matter of Jenkins v. Astorino*, 121 A.D.3d 997, 999 (2d Dep't 2014). Petitioners seeks to compel actions that cannot conform to the constitution. Such requests for mandamus fail as a matter of law.

[1] As the Court of Appeals explained, "this is not a scenario where the Constitution fails to provide specific guidance or is silent on the issue" *Harkenrider*, at *8 (internal citations and quotations omitted).

There is no basis for the speculation that the *Harkenrider* litigation was limited to temporary and interim relief. As the Court of Appeals recognized, New York's past redistricting efforts have often necessitated federal judicial intervention. *Harkenrider* at*1 (citing *Favors v. Cuomo*, 2012 WL 928223, at *1 (E.D.N.Y. Mar. 19, 2012). These do not default to an interim measure until a legislative fix is made. This would incentivize legislative majorities to always seek the most advantageous redistricting plans since the worst that could happen if a plan was struck down as unconstitutional or unlawful would be that the same legislature would get to redraw it again the very next year.

The action is untimely. Petitioners offer a cumbersome argument that the pendency of the short-lived 2021 legislation functioned as some kind of a stay because it converted mandatory constitutional directives into discretionary ones. The 2021 legislation did no such thing. The 2021 legislation attempted to address a possible and anticipated contingency.[2] It did not remove in any manner the mandatory nature of the constitutional directives. A timely action for mandamus could have been brought, and the 2021 legislation would not have been a bar to same.[3] Petitioners admittedly did not commence this mandamus action within four months of the date, January 25, 2022, when the IRC was to submit its second set of maps to the Legislature. Accordingly, the action is time-barred.

Petitioners cannot reconcile the fundamental disconnect between the very particularized type of special proceeding they have commenced, one for mandamus to compel, with the constitutional provision they claim authorizes such relief, which provision clearly provides for a

[2] Petitioners amazingly contend that the 2021 legislation "effectively gave the IRC discretion as to whether to submit a second set of maps to the Legislature." Mem in Opp at 14.

[3] If the ability of the Legislature to act in the event the IRC did not (as granted by the 2021 legislation) rendered the IRC's obligations discretionary, then none of the IRC's obligations under the constitution should be deemed as mandatory and subject to mandamus since the Legislature could override the IRC's recommendation in any case.

court to adopt a redistricting plan. Petitioners purport to refer the court to the plain language of the constitution, but then immediately undermine that effort by inserting language of their own invention that quite obviously does not exist.

CONCLUSION

For the foregoing reasons, and for those more fully set forth in the opening motion papers, it is respectfully submitted that the within proceeding be dismissed in its entirety and that the Court grant Moving Respondents such other and further relief as the Court deems just and proper. In addition, if this motion to dismiss is denied, in whole or in part, Moving Respondents reserve the right to answer the Amended Petition. See CPLR 7804(f) & CPLR 3211(f).

Dated: September 11, 2022
Sayville, New York

Respectfully submitted,

MESSINA PERILLO HILL LLP

_____Timothy Hill_____

Vincent J. Messina, Jr.
Lisa A. Perillo
Timothy Hill

285 West Main Street, Suite 203
Sayville, NY 11782
Ph: 631-582-9422
thill@mphlawgroup.com

Certification of Compliance (Word Limit)

Timothy Hill hereby certifies that the Memorandum of Law complies with the applicable Rules of Court in that the Memorandum contains 1563 words.

_____*Timothy Hill*_____
Timothy Hill