

## CAE 22-00506

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IN THE MATTER OF TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEVEN 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 LEADER AND PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE AND NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT, RESPONDENTS-APPELLANTS, ET AL., RESPONDENT.

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### DECISION

Having considered the voluminous written submissions of the parties and the arguments advanced by counsel yesterday during the virtual hearing, I am granting in part respondents-appellants' (respondents) application for a stay of enforcement of the order of Hon. Patrick F. McAllister, entered March 31, 2022. The stay will apply to the provisions of the order that enjoin respondents and their agents, including officials from the various boards of election, from "using, applying, administering, enforcing or implementing any of the recently enacted 2022 maps for this or any other election in New York, included but not limited to the 2022 primary and general election for Congress, State Senate and State Assembly."

The stay will, among other things, allow candidates for Congress, State Senate and Assembly to file designating petitions by the statutory deadline, and allow the boards of elections to accept such petitions. The stay will also allow objections to petitions to be filed by the April 11, 2022 deadline, permit the boards of elections to rule on objections, and allow aggrieved parties to commence legal action by the April 21, 2022 deadline. None of those actions would be permitted under Judge McAllister's order in the absence of a stay.

The stay issued herein will also apply to the provision of Judge McAllister's order that strikes the redistricting

legislation (L. 2021, ch 633 § 1) "from the books," as well as the determination that "the Legislature shall have until April 11, 2022 to submit bipartisanly supported maps to this court for review of the Congressional District Maps, Senate District Maps, and Assembly District Maps that meet Constitutional requirements."

The stay will not, however, prohibit Judge McAllister from retaining a "neutral expert" to "prepare" a proposed Congressional map, if Judge McAllister elects to do so pending resolution of the appeal. Of course, any map drafted by such neutral expert would have no force or effect unless and until the Court of Appeals affirms Judge McAllister's order, and the Legislature, pursuant to the redistricting legislation, is provided with 30 days from entry of the order to "discharge its constitutional mandate" of enacting a Congressional map that does not run afoul of the anti-gerrymandering provisions of article III, § 4 (c) of the New York Constitution. The 30-day period to cure should extend beyond the expected duration of this appeal.

The appointment of a "neutral expert" to draft proposed Congressional districts, in the event that the Court of Appeals ultimately determines that they are needed, in no way intrudes upon the Legislature's constitutional authority to redraw a Congressional map in response to Judge McAllister's ruling. The Legislature may begin redrawing the map right now if it chooses to do so. Or the Legislature may chose to do nothing and risk the possibility of having to live with the map drawn by Judge McAllister's neutral expert should respondents lose before the Court of Appeals and lack sufficient time to propose a substitute map that withstands constitutional scrutiny after exhaustion of appellate remedies.

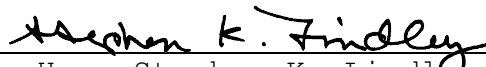
With respect to the other two redistricting maps enacted by the Legislature, respondents correctly point out that petitioners never contended that the Assembly districts were unconstitutionally gerrymandered, and the court made no such finding. Although petitioners did not initially challenge the Senate districts either, they later did so by an amended petition. Regardless, Judge McAllister determined that petitioners failed to establish that the Senate districts were unconstitutionally gerrymandered, and petitioners have not cross-appealed from that ruling. Judge McAllister struck down the Assembly and Senate maps solely on grounds that the Legislature, in enacting the maps, failed to comply with the procedural structure of article III, § 4 (b) of the State Constitution. Inasmuch as it appears on the surface that

petitioners may be more likely to prevail, if they are to prevail at all, on their substantive challenges to the redistricting legislation than they are on their procedural challenges, there would seem to be less need for the neutral expert, if appointed by Judge McAllister pending appeal, to draft proposed maps for Assembly and Senate districts.

This stay shall remain in effect until the Appellate Division, Fourth Department renders a decision on the appeal, which is scheduled for oral argument on April 20, 2022. A decision will be issued expeditiously following oral argument.

Counsel for respondents may submit an order consistent with the decision herein no later than April 12, 2022, upon notice to petitioners.

DATED: April 8, 2022

  
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Hon. Stephen K. Lindley  
Associate Justice