THE STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Petitioners,

DECISION AND ORDER
Index No. 904972-22
RJI No. 01-22-ST2408
(Hon. Lynch, J.)

-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,

And

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 Violante's,

Intervenor-Respondents.

INTRODUCTION

This is an Article 78 proceeding in the form of mandamus (CPLR § 7803(1)) to compel Respondents to timely prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan corresponding to the 2020 federal census pursuant to Article III, Sections 4 and 5(b) of the New York Constitution. Petitioners seek a new redistricting plan for successive elections, after the 2022 election, until such time as a new redistricting plan is adopted following the 2030 federal census.

Intervenors-Respondents and Respondents, Independent Redistricting Commissioners: Ross Brady; John Conway III; Lisa Harris; Charles Nesbitt and Willis H. Stephens, all moved to dismiss the proceeding, claiming the redistricting process based on the 2020 federal census is complete, governing all elections until the redistricting process begins anew following the 2030 federal census. This claim is predicated on the constitutional framework providing for redistricting every ten (10) years based on the then current census. Respondents David Imamura, Ivelisse Cuevas-Molina, and Elaine Frazier do not oppose the relief requested in the Petition.

The IRC failed to submit a second redistricting plan for the legislature's review before February 28, 2022. The question is whether the IRC has the authority to now submit a second redistricting plan corresponding to the 2020 federal census. I think not!

PRIOR REDISTRICTING LITIGATION

The factual history of the 2022 redistricting is well laid out in Matter of Harkenrider v. Hochul, 204 A.D. 3d 1366 [4th Dept. 2022], modified 2022 N.Y. LEXIS 874 [2022]. A few points bear mention.

First, the Court recognized the makeup of the IRC as follows:

> "From a procedural standpoint, the Constitution — as amended in 2014 — requires that, **every ten** years commencing in 2020, an

> "independent redistricting commission" comprising 10 members — eight of whom are appointed by the majority and minority leaders of the senate and assembly and the remaining two by those eight appointees — shall be established (*see* NY Const, art III, § 5-b [a]).” (Id. at 16) (Emphasis added)

Next, the Court recognized the IRC’s failure to submit a second redistricting plan to the Legislature, to wit:

> “In December 2021 and January 2022, however, **negotiations** between the IRC members **deteriorated** and the IRC, **split along party lines**, was unable to agree upon consensus maps. According to the IRC members appointed by the minority party, after agreement had been reached on many of the district lines, the majority party delegation of the IRC **declined to continue negotiations on a consensus map,** insisting they would proceed with discussions only if further negotiations were based on their preferred redistricting maps.
>
> As a result of their disagreements, the IRC submitted, as a first set of maps, **two proposed redistricting plans to the legislature — maps from each party delegation** — as is constitutionally permitted if a single consensus map fails to garner sufficient votes (*see* NY Const, art III, § 5-b [g]). The legislature voted on this first set of plans without amendment as required by the Constitution and rejected both plans. **The legislature notified the IRC of that rejection, triggering the IRC's obligation to compose — within 15 days — a second redistricting plan for the legislature's review** (*see* NY Const, art III § 4 [b]). On January 24, 2022 — the day before the 15-day deadline but more than one month before the **February 28, 2022 deadline**—the IRC announced that it was **deadlocked** and, as a result, would not present a second plan to the legislature.” (Id. at 6-7) (Emphasis added)

The Court recognized the failure to submit a second redistricting plan resulted from lack of bipartisan work by IRC Members.

Petitioners claim the Legislature contemplated non-action by the IRC, alleging:

> “The Legislature had anticipated this possibility and passed legislation in 2021 (the “2021 Legislation”) purportedly filling a gap in the New York constitutional language by authorizing the

> Legislature to pass a redistricting plan in the event that the IRC failed to submit redistricting plans. See L 2021, ch 633 (stating that "if the commission does not vote on any redistricting plan or plans, for any reason . . . each house shall introduce such implementing legislation with any amendments each house deems necessary").[1]

The Supreme Court found that the 2021 legislation was unconstitutional. The Appellate Division vacated that finding and held the 2021 legislation was not void ab initio, recognized the legislature's authority to enact the plan, but ultimately found the maps were invalid due to unconstitutional partisan gerrymandering in violation of Const. Article III §4 (c) (5) (204 A.D. 3d 1366, 1369-1370). The Court of Appeals disagreed, holding the legislature was without authority to undertake the drawing of the district lines in the first instance, since two redistricting plans had not been first submitted to and rejected by the legislature in accord with the procedure set forth in Article III §4 (Matter of Harkenrider v. Hochul, 2022 N.Y. LEXIS 874, p. 19-20 [2022]).

The Appellate Division held that the Constitution was "silent" relative to the procedure to follow in the event of an IRC impasse (204 A.D. 3d 1366, 1369). The Court of Appeals, once again, disagreed, and recognized that the Constitution did, in fact, provide a judicial remedy, holding,

> "…that the Constitution dictates that the IRC-based process for redistricting established therein "*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"** (NY Const art III, § 4 [e]."

[1] NYSCEF Doc. No. 47 Amended Petition ¶ 8.

By providing a judicial remedy upon the adoption of NY Const Art III, § 4 [e], the Legislature was not unmindful of the potential that political differences which could undermine the integrity of the redistricting process.

The Court of Appeals implemented a remedy, holding,

> "We therefore remit the matter to Supreme Court which, with the assistance of the special master and any other relevant submissions (including any submissions any party wishes to promptly offer), shall adopt constitutional maps with all due haste." (Id. 36-37)

Upon remitter, Petitioners Courtney Gibbons, Seth Pearce, Nancy Van Tassel, Verity Van Tassel Richards participated in the public review process by filing a letter with the Court seeking the following relief:

> "…we urge this court to ensure that the map drawn by the Special Master only be used for the 2022 congressional election."[2]

By Decision and Order dated May 20, 2022, corrected by Decision and Order dated June 2, 2022, the Court (McAllister, J.) certified the 2022 Congressional Maps prepared by the Special Master "as being the official approved 2022 Congressional map…."[3] The Court did not limit the maps to the 2022 election.

CONSTITUTION

The Constitution requires IRC to propose redistricting plans every ten years commencing in two thousand twenty-one, with the first plan to be submitted no later than January 15, 2022. In turn, an approved redistricting plan is in full force and effect until the next plan is approved

[2] NYSCEF Doc. No. 68 p. 1 – letter dated May 18, 2022 - Harkenrider v. Hochul, Index No. E2022-0116CV – Letter on behalf of DCCC and New York Voters **Lauren Foley**, Belinda de Gaudemar, Lauren Furst, **Courtney Gibbons, Seth Pearce**, Leah Rosen, Susan Schoenfeld, **Nancy Van Tassel, Verity Van Tassel Richards**, and Ronnie White, Jr. (emphasis added to identify Petitioners herein).
[3] See Harkenrifer et al v. Hochul et al, Supreme Court, Steuben County Index No. E2022-0116CV – NYSCEF Doc. No. 670 @ p. 5 and NYSCEF doc. No. 696.

based upon the subsequent federal decennial census taken in a year ending in zero unless modified pursuant to court order, i.e., ten (10) years.

NY Const. Article III, Section 4 (b) and (e) provide, inter alia:

> "(b) The independent redistricting commission established pursuant to section five-b of this article shall **prepare a redistricting plan to establish** senate, assembly, and **congressional districts every ten years commencing in two thousand twenty-one**, and shall submit to the legislature such plan and the implementing legislation therefore on or before January first or as soon as practicable thereafter but no later than **January fifteenth in the year ending in two beginning in two thousand twenty-two**. The redistricting plans for the assembly and the senate shall be contained in and voted upon by the legislature in a single bill, and the congressional district plan may be included in the same bill if the legislature chooses to do so. The implementing legislation shall be voted upon, without amendment, by the senate or the assembly and if approved by the first house voting upon it, such legislation shall be delivered to the other house immediately to be voted upon without amendment. If approved by both houses, such legislation shall be presented to the governor for action If either house shall fail to approve the legislation implementing the first redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, each house or the governor if he or she vetoes it, shall notify the commission that such legislation has been disapproved. **Within fifteen days of such notification and in no case later than February twenty-eighth, the redistricting commission shall prepare and submit to the legislature a second redistricting plan and the necessary implementing legislation for such plan.** Such legislation shall be voted upon, without amendment, by the senate or the assembly and, if approved by the first house voting upon it, such legislation shall be delivered to the other house immediately to be voted upon without amendment. If approved by both houses, such legislation shall be presented to the governor for action.
>
> **(e)** The **process for redistricting** congressional and state legislative districts established by this section and sections 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.**

> A reapportionment plan and the districts contained in such plan **shall be in force until the effective date of a plan based upon the subsequent federal decennial census taken in a year ending in zero unless modified pursuant to court order**." (Emphasis added)

Notwithstanding the intent of the Constitution that approved plans be in place for 10 years, Petitioners seek judicial relief to limit the plans adopted on May 20, 2022, to the 2022 election, and to compel the IRC to submit a second plan based on the 2020 census for consideration by the legislature and to be implemented in the 2024 Congressional election and thereafter in successive elections.

MOTION TO DISMISS[4]

Movants seek to dismiss the Petition on both procedural and substantive grounds, to wit: (1) the petition is an improper collateral attack on the Decision and Order dated May 20, 2022, corrected by Decision and Order dated June 2, 2022, referenced above;[5] (2) that the requested relief violates the Constitution;[6] (3) that the proceeding is time-barred;[7]

STATEMENT OF LAW

First, the Court will address the claims that this proceeding is an improper collateral attack on the Decision and Order of the Supreme Court, Steuben County. Next, the Court will address the timeliness of the proceeding. Last, the Court will address the constitutional question on the merits, in context of a motion to dismiss for failure to state a cause of action.

[4] Oral argument of the record took place this date.
[5] NYSCEF Doc. No. 70 – Intervenor Memo of Law Point 1, p. 11-13.
[6] NYSCEF Doc. No. 70 – Intervenor Memo of Law Point 1, p. 13-18; NYSCEF Doc. No. 109 – Memo of Law Points 1 and 2.
[7] NYSCEF Doc. No. 70 – Intervenor Memo of Law Point 1, p.18-21. NYSCEF Doc. No. 109 – Memo of Law Point 3.

COLLATERAL ATTACK

There is no question that several Petitioners, as members of the public, participated in the Steuben County litigation by writing a letter to the Court. Petitioners were not, however, parties to that litigation.[8] Resolution of the so-called collateral attack claim, necessitates a determination of whether the subject claim is barred under res judicata or whether the issue is barred by collateral estoppel. They are not.

In Simmons v. Trans Express, 37 N.Y.3d 107, 111-112 [2021], the Court held, inter alia:

> "**Under res judicata, or claim preclusion**, a valid final judgment bars future actions between the same parties on the same cause of action. One linchpin of res judicata is **an identity of parties actually litigating** successive actions against each other: the doctrine applies **only when a claim *between* the parties has been previously brought to a final conclusion**. Importantly, the claim preclusion rule extends beyond attempts to relitigate identical claims. We have consistently applied a transactional analysis approach in determining whether an earlier judgment has claim preclusive effect, such that once a claim is brought to a final conclusion, *all other claims arising out of the same transaction or series of transactions* are barred, even if based upon different theories or if seeking a different remedy. This rule is grounded in public policy concerns, including fairness to the parties, and is intended to ensure finality, prevent vexatious litigation and promote judicial economy"...
>
> **Collateral estoppel, or issue preclusion**, is related to, but distinct from, the doctrine of res judicata. Collateral estoppel prevents "'a party from **relitigating** in a subsequent action or proceeding an *issue* clearly raised in a prior action or proceeding and decided against that party . . . whether or not the . . . causes of action are the same." (Internal quotations and citations omitted; emphasis added)

[8] In his May 20, 2022, Decision and Order, Justice McAllister noted that he had received approximately 3000 comments. See Harkenrifer et al v. Hochul et al, Supreme Court, Steuben County Index No. E2022-0116CV – NYSCEF Doc. No. 670 @ p. 2.

Here, the submission of a letter to the Court as part of a public comment process, did not afford Petitioners a full and fair adjudication on the merits of the subject claim. Frankly, Justice McAllister did not even address the issue of whether the approved 2022 Congressional Map was limited to the 2022 election.[9] The claims and issue raised here are not barred.

TIMELINESS OF ACTION

Movants claim that the limitations period began on January 24, 2022, the date of the IRC deadlock, and/or no later than February 28, 2022, the last day that the IRC was authorized to submit a second redistricting plan under the Constitution, rendering the commencement of the proceeding untimely. I disagree.

The statute of limitations for an Article 78 proceeding is four months (CPLR 217 (1)). The issue, however, is not what the limitations period is. Rather, the issue is when did it begin to accrue.

CPLR § 203 (a) provides:

> "Accrual of cause of action and interposition of claim. The **time** within which an action must be commenced, except as otherwise expressly prescribed, **shall be computed from the time the cause of action accrued** to the time the claim is interposed." (Emphasis added)

In Utica Mut. Ins. Co. v. Avery, 261 A.D.2d 802, 803 [3d Dept. 1999], the Court held,

[9] See Harkenrider et al v. Hochul et al, Supreme Court, Steuben County Index No. E2022-0116CV – NYSCEF Doc. No. 670.

> "A cause of action accrues upon the occurrence of all events essential to the claim such that the plaintiff would be entitled to judicial relief."

(See also, Guglielmo v. Unanue, 244 A.D.2d 718, 721 [3d Dept. 1997], where the Court held,

> "The Statute of Limitations is triggered upon accrual of the cause of action (CPLR 203 [a]). Either under contract or tort, accrual occurs when … the party would be entitled to obtain relief in court and when the claim becomes enforceable.")

Since a Court will not render an advisory opinion, to obtain relief, there must be a justiciable controversy (see In Re Workmen's Compensation Fund, 224 N.Y. 13 [1918] [Cardozo, J.] where the Court held, "The function of the courts is to determine controversies between litigants…They do not give advisory opinions.") As of January 24, 2022, and/or February 28, 2022, there simply wasn't a justiciable controversy between Petitioners and the IRC.

Once the IRC announced a deadlock, the Legislature adopted is own redistricting map, and the new law was signed by the Governor on February 3, 2022, in advance of the February 28, 2022, date set forth in the constitution. It wasn't until May 20, 2022, that the new 2022 Congressional Maps went into effect. At that time, a justiciable controversy existed between Petitioners and the IRC, commencing the limitations period. This proceeding was commenced on June 28, 2022, and it is timely.

CAUSE OF ACTION

Movant's moved to dismiss the Petition pursuant to CPLR R 3211 (a) (5) (7) and 7804 (f).[10] The review standard requires that the allegations be deemed true for purposes of the motion (See Lichtensteiger v. Housing & Development Administration, 40 A.D.2d 810 [1st Dept. 1972];

[10] NYSCEF Doc. Nos. 69-70, 106.

Chanko v. Am. Broad Companies, Inc., 27 N.Y. 3d 46, 52 [2016]; Conklin v Laxen, 180 A.D.3d 1358, 1362 [4th Dept. 2020]; Piller v Tribeca Dev. Group LLC, 156 A.D.3d 1257, 1261 [3d Dept. 2017]).

In Wedgewood Care Ctr. v. Kravitz, 2021 N.Y. App. Div. LEXIS 4836, p. 9 [2d Dept. 2021], the court recognized,

> "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, **or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery**."
>
> However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration, nor to that arguendo advantage". (Emphasis added; internal quotations and citations omitted)

Here, the facts are not in dispute, and resolution as a matter of law is appropriate.

As set forth above, on May 20, 2022, the Court certified the 2022 Congressional maps in accord with the Court of Appeals remittal and NY Const. Article III, Section 4 (e). The Constitution clearly states that the redistricting shall take place "every ten years commencing in two thousand twenty-one." In this Court's view, the Congressional maps approved by the Court on May 20, 2022, corrected by Decision and Order dated June 2, 2022, are in full force and effect, until redistricting takes place again following the 2030 federal census. While the constitution does provide for judicial relief, the requested relief to restrict the 2022 maps to the 2022 election violates the constitutional mandate that an approved map be in effect until a subsequent map is adopted after the federal decennial census. In turn, there is no authority for the IRC to issue a second redistricting plan after February 28, 2022, in advance of the federal census in 2030, in the first instance, let alone to mandate such plan be prepared.

The point made is that the Constitutional mandate that approved redistricting maps be in place for a reasoned period, ten years, is to provide stability in the election process. Petitioner's sought-after relief runs afoul of that intent, for it would provide a path to an annual redistricting process, wreaking havoc on the electoral process. Moreover, Petitioner fails to account for the record demonstration of the IRC's inherent inability to reach a consensus on a bipartisan plan. Put another way, directing the IRC to submit a second plan would be futile! Hence, the judicial remedy exists within the Constitutional structure.

It is the judgment of this Court, that there is no enforceable remedy available to Petitioners to limit the 2022 Congressional redistricting map to the 2022 election, nor to compel the IRC to submit a second redistricting plan corresponding to the 2020 federal census. Motion to dismiss is granted.

CONCLUSION

For the reasons more fully stated above, the motions to dismiss the Petition are Granted. This memorandum constitutes both the decision and order of the Court.[11]

Dated: Albany, New York
September 12, 2022

Peter A Lynch

PETER A. LYNCH, J.S.C

PAPERS CONSIDERED:

All e-filed pleadings, with exhibits.[12]

[11] Compliance with CPLR R 2220 is required.
[12] Including e-filings in Harkenrifer et al v. Hochul et al, Supreme Court, Steuben County Index No. E2022-0116CV.

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