

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

HOWARD LEIB, SUSAN LERNER,
ERIC WALKER and ELEANOR MORETTA,

Petitioners,

-against-

JAMES A. WALSH, DOUGLAS A. KELLNER,
ANDREW J. SPANO and GREGORY P.
PETERSON, in their official capacities as
COMMISSIONERS OF THE NEW YORK
STATE BOARD OF ELECTIONS, and THE
NEW YORK STATE BOARD OF ELECTIONS,

Respondents.

Index No. _____

**MEMORANDUM OF LAW
IN SUPPORT OF PETITION**

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Preliminary Statement

Petitioners Howard Leib, Susan Lerner, Eric Walker and Eleanor Moretta (collectively, “Petitioners”), respectfully submit this memorandum of law in support of their Verified Petition to enjoin Respondents James A. Walsh, Douglas A. Kellner, Andrew J. Spano and Gregory P. Peterson, in their official capacities as Commissioners of the New York State Board of Elections (the “Commissioners”) and the New York State Board of Elections (the “Board,” and with the Commissioners, “Respondents”) from disseminating and including on the November 4, 2014 ballot an Abstract and form of submission (the “Prop 1 Language”) that contains a materially misleading description of the proposed amendment to the New York State Constitution to create a redistricting commission (the “Redistricting Amendment”).

Far from being “clear and coherent,” as required by the Election Law, the Abstract and Prop 1 Language are designed to and will have the effect of confusing voters as to the Redistricting Amendment. Specifically, the Abstract and Prop 1 Language misleadingly describe the proposed commission as “independent” when in fact the commission will be beholden to the leaders of the Legislature and omits material information concerning the Legislature’s default power to reject the commission’s maps and draw its own maps. Moreover, the Abstract and Prop 1 Language adopted by the Board improperly advocate for voter approval of the Redistricting Amendment at the public’s expense public funds, in violation of the New York State Constitution. For each of these reasons, as demonstrated below, the Board should be enjoined from disseminating the Abstract and the Prop 1 Language or including it on the November 4, 2014 ballot.

Statement Of Facts¹

In March 2012, the Legislature adopted the Redistricting Amendment, which would change the manner in which district apportionment would be carried out starting in 2020. (Pet. ¶16 & Ex. A.) The Redistricting Amendment was part of a broader deal in which the Legislature adopted a set of district maps widely recognized as politically gerrymandered, adopted changes to state pensions, and amended the state constitution to allow the operation of seven (7) gambling casinos. (Pet. ¶ 16.) That deal was colloquially known as the “Big Ugly,” and was widely criticized, particularly with respect to the Redistricting Amendment. (Pet., Ex. B.)

The State Constitution may be amended by joint resolution approved by both houses of the Legislature in two consecutive sessions and then submitted to and approved by voters at the next general election. (Pet. ¶ 15.) The Redistricting Amendment was thereafter approved by both houses of the Legislature at the start of the 2013 session, clearing the way for its submission to the voters. (Pet. ¶ 17.) Following second passage, the Redistricting Amendment was assigned to be submitted to voters at the November 4, 2014 General Election. (Pet. ¶ 18.)

The Redistricting Amendment sets up a ten-person commission to establish district lines following each decennial census. Each of the four legislative leaders (the Speaker of the Assembly, Majority Leader of the Senate, Minority Leader of the Assembly, and Minority Leader of the Senate) would appoint two members to the commission, and the eight legislatively appointed members would jointly choose the final two members. (Pet. ¶ 19.) To ensure that the redistricting commission would remain beholden to the legislative leaders and not exercise real independence, the Redistricting Amendment provides that the required voted for approval of any proposed redistricting maps changes depending upon political control of the two houses of the

¹ This Statement of Facts is drawn from the allegations of the Verified Petition and the exhibits thereto, which was verified by Petitioner Susan Lerner and therefore carry the same evidentiary force as if set forth in an Affidavit. References to the allegations of the Verified Petition are to “Pet. ¶ ___.”

Legislature. (Pet. ¶ 20.) No other state body or commission has these unique, shifting voting rules.

To further assure that the commission cannot adopt a redistricting plan over the wishes of the legislative leaders, the Redistricting Amendment provides that a simple majority vote is required to approve maps submitted by the commission as long as each house of the Legislature is controlled by a different political party, but a two-thirds super-majority vote is required if the two houses of the Legislature are controlled by the same political party. (Pet. ¶ 21.) That unprecedented requirement was designed blatantly to perpetuate legislative and political control of the redistricting process. Specifically, subsection (f) of section 5-b of the Redistricting Amendment provides:

In order to approve any redistricting plan and implementing legislation, the following rules shall apply:

(1) In the event that the speaker of the assembly and the temporary president of the senate are members of the same political party, approval of a redistricting plan and implementing legislation by the commission for submission to the legislature shall require the vote in support of its approval by at least seven members including at least one member appointed by each of the legislative leaders.

(2) In the event that the speaker of the assembly and the temporary president of the senate are members of two different political parties, approval of a redistricting plan by the commission for submission to the legislature shall require the vote in support of its approval by at least seven members including at least one member appointed by the speaker of the assembly and one member appointed by the temporary president of the senate.

(Pet. ¶ 21.)

The Redistricting Amendment also ensures legislative control over the commission's staff. The Redistricting Amendment requires that there be two co-executive directors, each from a different political party. Here too, different voting requirements apply to appointment of the

co-executive directors depending upon political control of the two houses of the Legislature.

(Pet. ¶ 22.) Subsection (h) (1) of section 5-b of the amendment provides:

(1) The independent redistricting commission shall appoint two co-executive directors by a majority vote of the commission in accordance with the following procedure:

(i) In the event that the speaker of the assembly and the temporary president of the senate are members of two different political parties, the co-executive directors shall be approved by a majority of the commission that includes at least one appointee by the speaker of the assembly and at least one appointee by the temporary president of the senate.

(ii) In the event that the speaker of the assembly and the temporary president of the senate are members of the same political party, the co-executive directors shall be approved by a majority of the commission that includes at least one appointee by each of the legislative leaders.

(Pet. ¶ 22.) In the event that the commission is unable to agree on the appointment of either or both co-executive directors, then the legislative leaders themselves choose the commission's staff:

(3) In the event that the commission is unable to appoint one or both of the co-executive directors within forty-five days of the establishment of a quorum of seven commissioners, the following procedure shall be followed:

(i) In the event that the speaker of the assembly and the temporary president of the senate are members of two different political parties, within ten days the speaker's appointees on the commission shall appoint one co-executive director, and the temporary president's appointees on the commission shall appoint the other co-executive director. Also within ten days the minority leader of the assembly shall select a co-deputy executive director, and the minority leader of the senate shall select the other co-deputy executive director.

(ii) In the event that the speaker of the assembly and the temporary president of the senate are members of the same political party, within ten days the speaker's and temporary president's appointees on the commission shall together appoint one co-executive

director, and the two minority leaders' appointees on the commission shall together appoint the other co-executive director.

(Pet. ¶ 23.)

Moreover, in the event that the Legislature rejects district maps proposed by the commission, the Legislature is then free to draw and adopt its own district maps. Subsection (b) of Section 4 of the amendment provides:

If either house shall fail to approve the legislation implementing the second redistricting plan, or the governor shall veto such legislation and the legislature shall fail to override such veto, each house shall introduce such implementing legislation with any amendments each house of the legislature deems necessary. All such amendments shall comply with the provisions of this article. If approved by both houses, such legislation shall be presented to the governor for action.

(Pet. ¶ 24.)

On July 25, 2014, 11 groups, including Common Cause/NY, NYPIRG, Effective New York, the National Resources Defense Council, Riverkeeper, Reinvent Albany (inadvertently omitted from the letter), the Center for Law and Social Justice, Asian American Legal Defense and Education Fund, Make the Road NY, Catskill Citizens for a Clean Environment, and MinKwon Community Center for Action, sent a letter to the Office of the Attorney General (“NYAG”) and to all of the Respondents urging that the language by which the Redistricting Amendment would be presented to the voters be strictly neutral and unbiased. (Pet. ¶ 28 & Ex. C.) In the July 25 letter, the groups urged the NYAG and the Board to avoid placing language on the ballot that appears to advocate for either passage or rejection of the Redistricting Amendment. The groups recommended the following neutral, clear and concise description of the proposed amendment to appear on the ballot:

The proposed amendment to Article 3 of the Constitution would allow New York State’s legislative leaders to appoint a bipartisan commission to establish new state legislative and congressional

district lines every ten years pursuant to stated criteria with final approval by the Legislature. Shall the amendment be approved?

(Pet. ¶ 29.)

Prior to August 1, 2014, the NYAG submitted its proposed language for the abstract and form of submission for the Redistricting Amendment to the Board. (Pet. ¶ 27.) On July 30, 2014, Respondent Kellner emailed Petitioner Lerner in her capacity as Executive Director of Common Cause/NY, along with the representative of another organization, providing copies of the language proposed by the NYAG for inclusion of the ballot for the Redistricting Amendment and the two other propositions to appear on the November ballot. (Pet. ¶ 30.) Kellner later that day emailed Lerner suggested language changes proposed by the other organization. Lerner rejected the changes proposed by the other organization and proposed two changes to the language in an answering email to Kellner the next day. (Pet. ¶ 30.)

On August 1, 2014, in its regularly scheduled public meeting, the Board took up the forms of submission of all three propositions that will be submitted to the voters in November. (Pet. ¶ 31.) At the August 1 meeting, Commissioner Spano stated that the Board had received proposed ballot language from the NYAG and that one of the Commissioners had reached out to various groups to receive comments and any suggested changes. (Pet. ¶ 32.) He then proposed specific changes that he identified as recommended by two groups supporting passage of the Redistricting Amendment to the form of submission recommended by the NYAG. (Pet. ¶ 32.)

Most pertinently, the proponents of the Redistricting Amendment objected to the NYAG's recommended inclusion of the description of the Legislature "as the default body if the commission's plan is not legislatively enacted." Instead, the proponents sought to replace that description with one that eliminates the word "default" and includes additional information more

likely to persuade voters to vote in favor of the Redistricting Amendment. (Pet. ¶ 33.) Acceding to the desires of the proponents of the Redistricting Amendment, Commissioner Spano proposed the following form of submission (the “Prop 1 Language”; additions to the NYAG’s version in italics, and deletions in boldface):

The proposed amendment to sections 4 and 5 and addition of new section 5-b to Article 3 of the State Constitution revises the redistricting procedure for state legislative and congressional districts. The proposed amendment establishes an independent redistricting commission every 10 years beginning in 2020, with *two* members appointed by *each of* the four legislative leaders and two members selected by the eight legislative appointees; *prohibits legislators and other elected officials from serving as commissioners*; establishes principles to be used in creating districts; requires the commission to hold public hearings on proposed redistricting plans; subjects the commission's redistricting plan to legislative enactment; *provides that the legislature may only amend the redistricting plan according to the established principles if the commission's plan is rejected twice by the legislature*; **establishes the Legislature as the default redistricting body if the commission's plan is not legislatively enacted**; provides for expedited court review of a challenged redistricting plan; and provides for funding and bipartisan staff to work for the commission. Shall the proposed amendment be approved?

(Pet. ¶ 34.)

Petitioner Lerner was present at the meeting and objected to the description of the redistricting commission as “independent” because it would be appointed by, and answerable to, the Legislature; objected to the deletion of the phrase describing the Legislature as the “default body”; and recommended that language be included to inform voters that the procedure necessary to approve maps would change depending upon political control of the two houses of the Legislature. (Pet. ¶ 35.) Petitioner Lerner’s objections were not discussed by the Board. (Pet. ¶ 36.) Rather, upon the motion of Commissioner Spano, the language he had proposed was unanimously adopted. (Pet. ¶ 36.)

Also at the August 1 meeting, the Board adopted an Abstract of the Redistricting Amendment (the “Abstract”) that must be made available to voters pursuant to the Election Law. The Abstract was adopted without change or amendment from language recommended by the NYAG. The Abstract also refers to the commission that would be set up as “independent,” among other defects. (Pet. ¶ 38, Ex. E.)

Argument

Section 4-108 of the Election Law governs the procedure for the submission of any constitutional amendment or other question to the voters, and requires that:

The form in which the proposed amendment, proposition or question is to be submitted shall consist of only an abbreviated title indicating generally and briefly, and in a clear and coherent manner using words of common and every-day meanings, the subject matter of the amendment.

N.Y. Elect. Law § 4-108.

The Prop 1 Language adopted by the Board violates the requirement that it be a “briefly, and in a clear and coherent manner” describe the subject matter of the Redistricting Amendment. Most significantly, the Prop 1 Language describes the redistricting commission as independent, when in fact it will be highly political and beholden to the leaders of the Legislature because eight of the ten members of the commission would be appointed by the leaders of the Legislature (and the other two would be appointed by those eight), and the Legislative leaders also ensured their influence and control over the commission’s staff. Similarly, the Prop 1 Language fails to , describe the extraordinary special voting rules by which the Legislative leaders further ingrained their influence and control over the commission. And the deletion of the phrase “establishes the Legislature as the default redistricting body if the commission's plan is not legislatively enacted” and its replacement with convoluted language that avoids the word “default” and attempts to portrays the circumstances in which the Legislature can override the commission as extremely

limited likewise is designed to confuse and mislead the voters. These material defects violate the plain requirements of Section 4-108. *See, e.g., Marcoccia v. Suffolk County Bd. Of Elections*, 766 N.Y.S. 2d 567, 568 (2d Dep't 2003) (holding that form of submission and abstract that characterized payment of proposed real estate tax as an obligation of buyer were materially misleading where proposed law provided circumstances in which seller could be liable for the tax); *Lenihan v. Blackwell*, 619 N.Y.S.2d 888, 890 (4th Dep't 1994) (holding that form of submission and abstract violated Election Law § 4-108 by failing to disclose the proposed amendment would alter the vote requirement for increase in sales and use taxes).

Moreover, the purpose and effect of the misleading description of the Redistricting Amendment in the Abstract and Prop 1 Language is to advocate for adoption of the amendment. Such advocacy at the public expense is flatly prohibited by the New York State Constitution. *See* N.Y.S. Const. art. VII, § 8(1) (“The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking...”). The dissemination and inclusion of the Abstract and Prop 1 Language on the November 4, 2014 ballot should be enjoined for this additional reason.

Conclusion

For the foregoing reasons, Petitioners respectfully request the Court enjoin Respondents from disseminating or including on the November 4, 2014 ballot the Abstract or Prop 1 Language for the Redistricting Amendment.

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