

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. _____

VERIFIED PETITION

Petitioners Howard Leib, Susan Lerner, Eric Walker and Eleanor Moretta (collectively, “Petitioners”), as taxpayers and registered voters, through their undersigned counsel, for their Verified Petition against 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”), pursuant to Article 78 of the Civil Practice Law and Rules, Section 4-108 of the New York Election Law and Article VII, Section 8(1) of the New York State Constitution, allege as follows:

NATURE OF THIS PROCEEDING

1. This is a special proceeding brought pursuant to Article 78 of the New York Civil Practice Law and Rules to enjoin Respondents from violating New York Election Law and the New York State Constitution. Specifically, the Board adopted and intends to include on the November 4, 2014 ballot an Abstract (the “Abstract”) and Prop 1 Language (defined below) for “Proposal

Number One,” a proposed amendment to Sections 4 and 5 of, and addition of a new Section 5-b Section to, the New York State Constitution (the “Redistricting Amendment”), that (a) is materially misleading and not a clear and coherent summary of the Redistricting Amendment, (b) constitutes improper dissemination of a supporting position of the Redistricting Amendment at the public’s expense, and (c) exceeds the scope of the Board’s authority. For each of these reasons, Respondents should be enjoined from including the Abstract and Prop 1 Language as adopted on the November 4, 2014 ballot and from advocating in favor of the Redistricting Amendment at the public’s expense.

PARTIES

2. Petitioner Howard Leib is a citizen of the State of New York and resident of Tomkins County. Mr. Leib is over 21 years of age, eligible and registered to vote in all federal, state and local elections in the State of New York, and pays income tax and sales tax to the State of New York.

3. Petitioner Susan Lerner is a citizen of the State of New York and resident of Kings County. Ms. Lerner is over 21 years of age, eligible and registered to vote in all federal, state and local elections in the State of New York, and pays income tax and sales tax to the State of New York.

4. Petitioner Eric Walker is a citizen of the State of New York and resident of Erie County. Mr. Walker is over 21 years of age, eligible and registered to vote in all federal, state and local elections in the State of New York, and pays income tax and sales tax to the State of New York.

5. Petitioner Eleanor Moretta is a citizen of the State of New York and resident of Kings County. Ms. Moretta is over 21 years of age, eligible and registered to vote in all federal, state and local elections in the State of New York, and pays income tax and sales tax to the State of New York

6. Petitioners have standing to bring this action, pursuant to Section 16-104(2) of the Election Law, as voters and taxpayers of the State of New York who are opposed to politically controlled gerrymandering and partisan redistricting. Petitioners intend to vote against the Redistricting Amendment because, far from promoting fair and impartial redistricting for New York State, it would establish a redistricting commission beholden to the leaders of the Legislature whose procedure and authority changes based on political control of the houses of the Legislature.

7. Respondent James A. Walsh is a Co-Chairman of the Board of Elections and is sued in his official capacity as a Commissioner of the Board. Mr. Walsh maintains an office at the Board, 40 North Pearl Street, Suite 5, Albany, New York 12207-2729, and participated in the meetings of the Board that give rise to this proceeding in Albany County.

8. Respondent Douglas A. Kellner is a Co-Chairman of the Board of Elections and is sued in his official capacity as a Commissioner of the Board. Mr. Kellner maintains an office at the Board, 40 North Pearl Street, Suite 5, Albany, New York 12207-2729, and participated in the meetings of the Board that give rise to this proceeding in Albany County.

9. Respondent Andrew J. Spano is a Commissioner of the Board of Elections and is sued in his official capacity as a Commissioner of the Board. Mr. Spano maintains an office at the Board, 40 North Pearl Street, Suite 5, Albany, New York 12207-2729, and participated in the meetings of the Board that give rise to this proceeding in Albany County.

10. Respondent Gregory P. Peterson is a Commissioner of the Board of Elections and is sued in his official capacity as a Commissioner of the Board. Mr. Peterson maintains an office at the Board, 40 North Pearl Street, Suite 5, Albany, New York 12207-2729, and participated in the meetings of the Board that give rise to this proceeding in Albany County.

11. Respondent New York State Board of Elections is an agency of the State of New York vested with the responsibility for administration and enforcement of all laws relating to elections as well as all questions provided by law to be submitted to a statewide vote. The Board conducts its business, including public meetings, in the City and County of Albany.

JURISDICTION AND VENUE

12. This is an Article 78 proceeding, pursuant to Section 7803 of the Civil Practice Law and Rules, to challenge the actions of the Commissioners and the Board in adopting and disseminating the Abstract and Prop 1 Language.

13. This Court has jurisdiction over this proceeding pursuant to Section 16-100(1) of the Election Law.

14. Venue is proper in this district pursuant to Section 506(b) of the Civil Practice Law and Rules because the Board maintains its principal

office in Albany County, and the meetings and actions that give rise to this proceeding occurred in Albany County.

FACTUAL ALLEGATIONS

15. Pursuant to Article XIX, Section 1 of the New York State Constitution, 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.

16. 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. 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. That deal was colloquially known as the “Big Ugly,” and was widely criticized, particularly with respect to the Redistricting Amendment. A copy of the Redistricting Amendment is annexed hereto as Exhibit A. Copies of newspaper articles criticizing the deal, particularly the Redistricting Amendment, are annexed hereto as Exhibit B.

17. 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.

18. Following second passage, the Redistricting Amendment was assigned to be submitted to voters at the November 4, 2014 General Election.

19. 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.

20. 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 vote for approval of any proposed redistricting maps changes depending upon political control of the two houses of the Legislature. No other state body or commission has these unique, shifting voting rules.

21. 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. That unprecedented requirement was blatantly designed 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.

22. 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. 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.

23. And 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.

24. 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.

25. Pursuant to Section 4-108 of the Election Law, the New York State Board of Elections determines the language on the ballot by which any constitutional amendment or other question is submitted to the voters.

26. Pursuant to Section 4-108(3) of the Election Law, the Office of the New York Attorney General (“NYAG”) is charged with advising the Board on proposed amendments to the Constitution and abstracts and submission for statewide votes.

27. Prior to August 1, 2014, the NYAG forwarded to the Board the proposed abstracts and submission for three propositions to be submitted to the voters, including the Redistricting Amendment.

28. 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 NYAG and to all of the Respondents herein urging that the language by which the Redistricting Amendment would be presented to the voters be strictly neutral and unbiased. A copy of that letter is attached hereto as Exhibit C.

29. 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?

30. 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. 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.

31. 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. Contrary to the Open Meetings Law, Public Officers Law §7-103(e), the Board does not make public, through its website or otherwise, the forms of submissions it will consider in advance of the meeting and does not provide copies as part of the agenda published in advance of its meetings or make the language to be considered available to the public at its meetings.

32. 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. 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.

33. 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.

34. Acceding to the desires of the proponents of the Redistricting Amendment, Commissioner Spano proposed the following form of submission (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?

35. 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. The changes suggested by Petitioner Lerner were necessary for an accurate description of the proposed amendment.

36. Petition Lerner’s objections were not discussed by the Board. Rather, Commissioner Spano moved that the language as he had proposed be approved. Upon second of that motion by Commissioner Kellner, the motion passed unanimously. The submission of the Redistricting Amendment was designated Proposition 1 for the November 4, 2014 ballot.

37. In an August 5, 2014 editorial, the Syracuse Post-Standard objected to the form of submission adopted by the Board. The Post-Standard Editorial Board explained that the language adopted by the Board “includes the word ‘independent’ to describe the 10-member commission that will be formed to redraw the district lines. The commission will be nothing of the sort.” A copy of the August 5, 2014 Post-Standard editorial is annexed as Exhibit D hereto.

38. 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. A copy of the Abstract, as appears on the Board of Elections website, is annexed hereto as Exhibit E.

FIRST CLAIM FOR RELIEF

39. Petitioners repeat and reallege paragraphs 1 through 40 above as if fully set forth herein.

40. Section 4-108 of the Election Law governs the procedure for the submission of any constitutional amendment or other question to the voters. Subsection 2 of that section provides:

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.

41. The form of submission for Proposition 1 on the November 4, 2014 ballot (“Prop 1 Language”), as adopted by the Board, does not satisfy this statutory standard.

42. Specifically, among other defects, the commission that would be established by the proposed amendment would not be independent. To the contrary, both the direct appointment of the commission by the leaders of the Legislature and the extraordinary and singular special voting rules insure that the commission will be subject to the Legislative leaders’ influence and control.

43. Further, failing to include in the Prop 1 Language a description of the special voting rules by which the Legislature exercises control over the

commission is a deliberate omission designed to withhold relevant information from voters, in violation of Section 4-108(2) of the Election Law.

44. Finally, replacement of the phrase “establishes the Legislature as the default redistricting body if the commission's plan is not legislatively enacted” with more complicated advocacy language is designed to confuse and mislead the voters as to the content of the provision and the circumstances in which the Legislature can overrule the commission, in contradiction to the Election Law’s charge that the language on the ballot be clear and concise.

45. As a result, the Court should enjoin the Board from disseminating the Abstract and the Prop 1 Language or including them on the November 4, 2014 ballot.

SECOND CLAIM FOR RELIEF

46. Petitioners repeat and reallege paragraphs 1 through 45 above as if fully set forth herein.

47. Article VII, Section 8(1) of the New York State Constitution states, in pertinent part, as follows:

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

48. The dissemination of the Prop 1 Language to the boards of election of each of the counties in the State of New York, and the direction that the county boards of elections include them on the November 4, 2014 ballot, required and requires the Board to incur costs at the public expense.

49. The Prop 1 Language and the Abstract, as adopted, constitutes statements to induce a positive vote on the Redistricting Amendment.

50. Since the Prop 1 Language seeks an affirmative vote on the Redistricting Amendment, the inclusion and dissemination of the Abstract and the Prop 1 Language violates Art. VII, §8 (1) of the New York State Constitution.

51. As a result, the Court should enjoin the Board from including the Prop 1 Language and the Abstract on the November 4, 2014 ballot and further enjoin the Board from disseminating any further information, at the public's expense, to induce a positive vote on the Redistricting Amendment.

WHEREFORE, Petitioners respectfully request that this Court enter an Order, pursuant to Article 78 of the Civil Practice Law and Rules:

(a) Declaring and determining that the Abstract and the Prop 1 Language are misleading and do not accurately describe the Redistricting Amendment, in violation of Election Law Section 4-108;

(b) Declaring and determining that the Abstract and the Prop 1 Language constitute statements to induce a positive vote on the Redistricting Amendment, in violation of Article VII, Section 8(1) of the New York State Constitution;

(c) Enjoining the Board from disseminating the Abstract and the Prop 1 Language or including them on the November, 2014 ballot;

(d) Awarding Petitioners their costs and disbursements, including reasonable attorneys' fees;

(e) Awarding such other and further relief as this Court deems just and proper.

Dated: New York, New York
August 18, 2014

DECHERT LLP

By: _____

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VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I am one of the Petitioners in this special proceeding. I have read the foregoing Verified Petition and know its contents. The Verified Petition is true to my knowledge, except as to matters alleged on information and belief, and as to those matters, I believe them to be true.

Susan Lerner

Sworn to before me this
___ day of August, 2014.

Notary Public