No. 23-220

In the Supreme Court of the United States

MICHAEL PARIETTI,

Petitioner,

v.

ROCKLAND COUNTY EXECUTIVE ED DAY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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SEPTEMBER 5, 2023

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QUESTIONS PRESENTED

On 27 May 2022, the Rockland County Legislature enacted Local Law 6-2022 which extended Covid era measures allowing legislators to attend meetings remotely via videoconferencing, and restricting public input to written and email comments, if any legislator made notification in advance that they intended to attend remotely, even if they did not. Petitioner attended public hearings on the Legislatures reapportionment plan, physically in person, on 19 Oct and 1 Nov 2022, but was prohibited from giving spoken verbal comments about the reapportionment. No legislators attended remotely. On, 8 Dec 2022, Petitioner challenged the reapportionment and the public hearings on First Amendment grounds. Petitioner filed a Motion for Recusal stating the judge was likely biased, but it was denied from the bench. The Court dismissed Petitioners entire lawsuit Petitioner appealed. The Appellate Division upheld the lower court decisions including recusal stating Petitioner had not shown "proof of bias". Court of Appeals denied Motion Seeking Leave to appeal.

1. Did the New York Courts use the wrong standard for judicial disqualification when they found that Petitioner failed to show "proof of bias", rather than the standard laid down by the U.S. Supreme Court in *Rippo v. Baker*, 137 S. Ct. 905 (2017) which is "probability of bias"?

2. Were the 19 October 2022 and 1 November 2022 public hearings on the ten year redistricting plans for the Rockland County Legislature unconstitutional because they violated Petitioners First Amendment right to speech when he was prohibited from

giving in person spoken comments about the redistricting plans at the public hearings?

PARTIES TO THE PROCEEDINGS

Petitioner

- Michael Parietti

Respondents

- Rockland County Executive Ed Day
- Rockland County Legislature
- Rockland County Board of Elections

LIST OF PROCEEDINGS

New York Court of Appeals

No. 2023-381

In the Matter of Michael I. Parietti, *Appellant,* v. Ed Day, &C., Et Al., *Respondents.*

Final Order: June 8, 2023

Supreme Court of the State of New York, Appellate Division: Second Judicial Department

In the Matter of Michael I. Parietti, *Appellant,* v. Ed Day, &C., Et Al., *Respondents.*

Final Order: April 25, 2023

Supreme Court of the State of New York, County of Rockland

Index No. 35210/2022

Michael I. Parietti, *Petitioner, v* .Rockland County Executive, Rockland County Legislature, and Rockland County Board of Elections, *Respondents*

Final Order: March 10, 2023

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CONSTITUTIONAL PROVISIONS

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OPINIONS BELOW

The order of the New York Court of Appeals, dated June 8, 2023, is included at App.1a. The decision and order of the New York Appellate Division, Second Department, dated April 25, 2023, is included at App.2a. The Decision and Order of the Supreme Court of New York, Rockland County, dated March 10, 2023 is included at App.11a.

JURISDICTION

The New York Cout of Appeals denied leave to appeal on June 8, 2023. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. I First Amendment.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech.

22 NYCRR 100.3(E)
Disqualification

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned

NY Judiciary Law § 14

> A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which she/he is a party, or in which she/he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree

New York State Open Meetings Law — Public Officers Law Article 7 (App.60a)

Rockland County Local Law 6-2022 (App.54a)

STATEMENT OF THE CASE

A. First Amendment

Just prior to the commencement of its reapportionment process, the Rockland County Legislature enacted Local Law 6-2022, on 27 May 2022, which extended Covid era measures allowing legislators to attend public meetings remotely via videoconference and restricting public input to written and email comments only, at any public meeting a legislator notified the clerk in advance that they planned to attend remotely via videoconference, whether they actually attended remotely or not. See Exhibit NNN Local Law 6 (R# 785) (App.54a) of Petitioners

Verified Petition filed on 8 Dec 2022. Index # 035210 – 2022 (R# 52)

Section 2 G. of Local Law 6-2022 states:

> "Section 2. G. If videoconferencing is used to conduct a meeting pursuant to this section, the Legislature shall accept public comments by email only and the public notice for the meeting shall provide an email address where comments can be sent. (App.57a)"

Local Law 6 also required any legislator who attended a legislature meeting remotely via video-conference to be listed in the minutes as having done so.

Section 2. J. of Local Law 6-2022 states:

> "Section 2. J. The minutes of the meetings involving videoconferencing pursuant to this section shall include which, if any, members participated remotely and shall be available to the public pursuant to § 106 of the Public Officers Law." (App.57a)

The county legislature Redistricting Committee then commenced their reapportionment process with five town forums, all held in the month of June 2022, to receive input from the public. In the months following the public forums, numerous members of the public including Petitioner submitted email comments to the Redistricting Committee providing suggestions for the reapportionment and requests for the configuration of specific legislative districts. See Exhibit A of Petitioner's Reply Affidavit to Motion to Dismiss Index # 035210-2022 which is a Foil request of all

emails submitted by the public to the Redistricting Committee.

However, the Redistricting Committee did not publish a draft reapportionment map until 6 October 2022, which was referred to as the Plan A map. The Legislature scheduled and noticed a public hearing on the Plan A map for 19 October 2022. *See* Exhibit OOO of Petitioners Verified Petition (R#797) (App.72a)

The Notice of Meeting stated:

> "In person comments will not be accepted, however anyone who wishes to provide comments for the public hearing is directed to email their comments to greenbud@co.rockland.ny.us up until 7:30 pm on 19 October, 2022 or via mail or hand delivery during business hours (9:00 a.m.to 5:00 p.m.) up until October 19, 2022. comments will be provided to the members of the legislature and incorporated into the record of the public hearing."

The full notice of the 19 Oct 2022 public hearing designating it specifically for the redistricting plan, was read at the beginning of the public meeting, and can be found in Petitioners Verified Petition, as Exhibit III, pages 2-3 of which is a transcript of the public hearing. (App.83a)

At the beginning of the public hearing portion of the 19 October 2022 meeting of the Rockland County Legislature, the Counsel to the Legislature Elana Yeger explained the reasoning for Local Law 6-2022 Section 2. G. The following is an excerpt from the transcript of that meeting which includes her explanation. This is from Exhibit III pages 4-5, in Peti-

tioners Verified Petition Index #035210 – 2022. (R# 698) and in the Appendix at (App.84a-85a)

> "MS. YEGER: But just to be clear, we are operating under the Local Law Number 6 of 2022, which permits Legislators to participate remotely in certain specified circumstances. And when we believe that somebody is going to be availing themselves of that, as part of the notice, as Mr. Toole just read, says that this will be live streamed. Members of the public can choose, instead of coming in, to watch it from the live stream. And as part of that, the law requires us to treat, just as the Legislators participating remotely are treated the same as the Legislators in the room, members of the public, both virtual and in the room, are required to be treated the same. Since we do not have a mechanism at this point for public comment to be provided virtually, they're not participating online, therefore, what has been done since we began this way back in the early days of Covid is that any public comments that wish to be submitted, either a general public participation or for the public hearing itself, must be submitted in email. That way, every member of the public is treated the same."

During the 19 October public meeting and public hearing, no legislators attended remotely, but in person spoken comments were prohibited none the less, and public input was restricted to email comments only. During the public hearing on the reapportionment plan, emails were to be submitted by the public within

a twenty-minute window, that opened and closed during the meeting. Petitioner attended the 19 October 2022 legislature meeting and public hearing in person but was prohibited from providing in-person spoken comments on the reapportionment during the public hearing.

At the 19 October 2022 Legislature meeting a new and different draft map, called the Plan B map (App.86a) was published by the legislature, and the Redistricting Committee's paid consultant, Phil Chonigman, was permitted to give an in person spoken presentation about the merits of the new Plan B map.

Members of the public in attendance, including Petitioner, were not permitted to rebut Mr. Chonigman's presentation with their own in person spoken comments either during the public hearing on the Plan A map, which immediately followed the consultant's presentation. See Petitioners Verified Petition page 75 P. 205. (App.92a)

Phil Chonigman then was then allowed to give an in-person verbal presentation explaining the Plan B map and the changes that had been made. No one was allowed to ask Phil Chonigman any questions during or after his presentation, or dispute his characterization of the Plan B map because of the no in person comment ruled imposed on the meeting. (App.92a)

The minutes and attendance roll call of the 19 Oct 2022 meeting of the legislature and public hearing on the Plan A map, list no legislators as having attended remotely via videoconference. *See* Exhibit OOO (App.69a) of Petitioner's Verified

Petition which shows the attendance roll call for the 19 Oct 2022 meeting and public hearing. (App.73a)

During the 19 October 2022 meeting, the legislature scheduled and noticed another public hearing on the Plan B map for 1 November 2022. The notice of the 1 Nov 2022 Legislature meeting and public hearing had the same language verbatim as the notice for the Oct 19, 2022, meeting and public hearing, shown above, which prohibited in person spoken comments and restricted public input to written and email comments. *See* Exhibit OOO (App.77a)

The full notice of the 1 Nov 2022 public hearing, designating it specifically for the redistricting plan can be found in Exhibit WWW pages 2-3, of Petitioners Verified Petition, which is a transcript of the 1 Nov 2022 public hearing. (App.88a)

Prior to the 1 November public hearing on the apportionment plan, an email exchange ensued between Petitioner and the Clerk of the Legislature Lawrence Tool, which is Exhibit PPP in Petitioners Verified Petition. (A)

Petitioner Michael Parietti sends an email to the Clerk and asks:

> "Will the public be allowed to speak at tonight's public hearing? And if not, why not?"

The Clerk sends an email response which states:

> "Mr. Parietti, Please find the link for tonight's Agenda for the Meeting of the Legislature – on the front-page Notice Participation Comment portion of the meeting. Additionally, please find the link to Local Law 6-2022

that is referenced in the first page." R# 797 (App.90a)

At the beginning of the 1 November 2022 public hearing on the Plan B map, the Counsel to the Legislature, Elana Yeger again explained the reasoning behind Local Law 6-2022 Section 2. G, giving essentially the same statement she made at the 19 October 2022 public hearing, the video of which is at the following link https://www.youtube.com/watch?v=Pr-kiK6oEto, which was also provided in Petitioners Verified Petition on page 85. (App.114a)

Once again, no legislators attended the 1 November public hearing remotely via videoconferencing, but public input was again restricted to email comments only. Petitioner attended in person but was again prohibited from giving in person spoken comments on the Plan B reapportionment plan during the public hearing. A few minutes after the twenty window for email input closed, a vote was called and the Plan B map was quickly approved, 13-1.

The minutes and attendance roll call of the 1 Nov 2022 meeting of the legislature and public hearing on the Plan B map, list no legislators as having attended remotely via videoconference. See Exhibit OOO of Petitioner's Verified Petition which shows the attendance roll call for that meeting. (App.78a)

Once the Legislature approved the reapportionment it was sent to Rockland County Executive Ed Day, who waited the 21 days allowed by statute to sign it into law on 22 November 2022.

On 8 December 2022, Petitioner filed his challenge via Order to Show Cause (App.92a) with a Verified Petition Index # 035210-2022

Petitioner raised his claim that the public hearings on the reapportionment plan were unconstitutional because they violated Petitioner's First Amendment rights, in his Verified Petition on pages 75-91 which is found at (App.98a). and pages A couple of excerpts are shown below:

> "Page 85 P.234. When county legislators pass a law that prohibits, in-person verbal comments or speech at a public hearing mandated by law, on a controversial ten-year redistricting plan, for that very same county legislature, then that is clearly a 'severe' restriction on free political speech. The notion that if a person submits a comment by email from home, then that same person is being disadvantaged if other members of the public who appear in person at the legislative chambers are allowed to give in person verbal testimony or comments, is not only ridiculous, but is also clearly not a 'state interest of compelling importance'."

Pages 85-86 P. 236. *See also McIntyre v. Ohio Elections Comm'n*, 514 US 334 (1995).

> **When a law burdens core political speech, we apply "exacting scrutiny," and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.**

Page 86. P.239. Verbal in person comments or testimony at a public hearing for a ten-year redistricting plan of legislative boundaries are clearly "core political speech" and cannot be characterized as anything less. As such Local Law 6-2022 should obviously be

subjected to strict scrutiny to determine if it violates the First Amendment right to free speech, a scrutiny it could never withstand. (App.98a-124a)

Petitioner also raised the First Amendment issue in his Verified Petition on page 110 P. 325 (App.124a-125a) see excerpts below:

THIRD CAUSE OF ACTION

> (United States Constitution Bill of Rights First Amendment, N.Y. Municipal Home Rule Law Section 34. – Unconstitutional Public Hearing)
>
> 327. Local Law 6-2022 is blatantly unconstitutional and renders the so-called public hearing the Rockland County Legislature held on 1 November 2022 in regards to the Plan B map, which was held under the provisions of Local Law 6-2022, in which no in-person verbal comments were allowed, illegal, null and void.

Rockland County Supreme Court Justice Sherri Eisenpress issued a Decision and Order on 10 March 2023 Index # 035210-2022, (App.45a) which dismissed Petitioners First Amendment claims. Excerpts from the Courts ruling are below:

> "As noted above, there is no constitutionally guaranteed right to speak or participate at a public hearing and the Open Meetings Law creates no such right either." (App.50a)
>
> "The first issue to be addressed in any challenge to the constitutional validity of a rule under the First Amendment is whether a First Amendment right exists, for if it does

> not, we need go no further. "Here, because the right to speak at a public meeting does not exist (*i.e.*, it is not a protected right under the constitution), there can be no First Amendment challenge." (App.49a)

Moreover, Local Law 6 does not implicate the First Amendment because, quite simply, it is not a restriction or restraint of speech. (App.50a)

> "A public hearing which allows comment may be designated as a limited public forum for First Amendment purposes. ln a limited public forum, a municipality may promulgate time, place, and manner regulations. *Johnson v. Perry*, 859 F.3d 156 (2d Cir. 2017)" (App.52a)

> "Here again, Local Law 6 is entirely content and viewpoint neutral'. Anyone making a written submission will have their communication received." (App.52a)

The First Amendment issue is raised in Petitioners Appellant Brief Docket # 2023-02574, 2023-02576, 2023-02578 in a section titled First Amendment on pages 59 through 62. (App.135a) See excerpts below.

> Page 60 P.177.
>
> "During both public hearings on the Plan A and B maps, no in person public testimony was allowed despite the fact that no legislators attended the meeting remotely, which was supposed to be what triggered the email only restriction."

> "The particular details surrounding all of this are described in Petitioners verified petition pages R#130-135."

Petitioner also raised the First Amendment issues in his Reply Brief of Appellant Petitioner of 14 Apr 2023 in pages 32 thru 34. Docket # 2023-02574, 2023-02576, 2023-02578

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> "P.76. At both public meetings no in person verbal testimony was allowed due to Local Law 6-2022 which is discussed at length in Petitioners verified petition. Mere meetings after the 20-minute window designated as the public hearing during which the public could submit email comments, a vote was called and with minimal substantive discussion the Plan B apportionment was approved by a 13-1 vote."

In their Decision and Order of 25 Apr 2023 Docket # 2023-02574, 2023-02576, 2023-02578 the Appellate Division stated:

> "The petitioner's contention regarding the First Amendment to the United States Constitution is without merit." (App.2a)

Petitioner raised the First Amendment issue in his Statement in Support of Motion Seeking Leave to Appeal Motion No. 2023-381, in the Questions Presented as well as in the body of the statement from pages 38-40. (App.139a) See excerpts below.

> "5) Did the Rockland County Legislature violate Petitioners First Amendment Rights by prohibiting in person oral testimony at

> the public hearings for draft redistricting maps?"
>
> See Page 5
>
> "At both so called public hearings on the draft redistricting maps, no in person public comments were allowed despite the fact that no legislators were attending remotely via videoconferencing, and no legislators were listed in the minutes as having attended remotely, as was required by Local Law 6-2022. R# 788, R# 790."

This violated the First Amendment right of petitioner and other members of the public who attended the public hearing in person intending to give oral testimony on the ten-year apportionment, but were prevented from doing so."

In its Decision of 8 June 2023 Motion no. 2023 – 381, the New York Court of Appeals stated:

> "ORDERED, that the motion for leave to appeal is denied;" (App.1a)

B. Statement of the Case for Recusal

The first two justices assigned to the case recused themselves. See their recusal orders at (App.159a-161a) The case was then assigned to Justice Sherri Eisenpress who scheduled a court appearance for 5 January 2023.

When Justice Eisenpress failed to recuse herself also, Petitioner filed a Motion for Recusal on 4 January 2023, by Order to Show Cause with a Verified Petition. Index # 035210-2022, (App.163a) stating that Justice Eisenpress was likely biased and

might have an interest in the outcome of the case due to her connections to the Rockland County political apparatus which strongly supported the reapportionment plan, and thus it was reasonable to question her impartiality. Petitioner also cited Judiciary Law Section 14 and New York Codes, Rules, and Regulations, Title 22, Section 100.3(E) DISQUALIFICATION AS JUSTIFICATION.

See the following excerpt from the Verified Petition in Support of Recusal: (App.165a)

> "7. Furthermore Judge Eisenpress has been involved in the politics of Rockland County for many years and likely has personal relationships with many of the members of the Rockland County Legislature and possibly the Rockland County Executive, all of whom could or will be affected by the outcome of the case."

During the 5 January court appearance Justice Eisenpress stated:

> "Ok, look I have read the papers that you submitted. I have also read the petition. I have no basis on which to recuse myself. That is my view." See page 3 lines 24 and 25, and page 4 line 1 of the So Ordered transcript of 5 January 2023 (App.175a-176a)

Respondents then asked for the opportunity to respond in writing, which the Judge granted. Petitioner repeatedly asked to make his full argument for recusal orally in court so it would be on the record, but the judge would not allow him to do so, stating that he had to wait until Respondents replied in writing.

For the full dialogue of the above conversation see the So Ordered transcript of 5 January 2023 Court Appearance, page 4, (App.173a)

Justice Eisenpress then ruled from the bench and denied the Motion to Recuse. See the So Ordered transcript of 5 January 2023 page 8 lines 4 thru 9. (App.179a)

> "The Court: Well then I will tell you what I am going to do. I'm going to deny your motion to recuse. I'm going to allow you to submit papers, and you could submit a reply, and I am going to give it another look, I will consider if there is any basis for me to reconsider that decision. How is that? And we could move forward. Motion denied. Okay." (App.179a)

Respondents next stated that they intended to file a Motion to Dismiss, and the Judge allowed them three weeks to file it.

Respondents filed their Affirmation in Opposition to the Motion to Recuse on 26 Jan 2023. Petitioner filed his Reply to Affirmation in Opposition on 30 Jan 2023. Index # 035210-2022

See the following excerpts from his Reply to Affirmation in Opposition Index # 035210-2022 below:

Page 6, P14.

> "The pressure on Justice Eisenpress from the entire political apparatus, to uphold the new map will be colossal. As Justice Eisenpress likely has any number of relationships or even friendships with elected officials and other political actors in Rockland that

> could exert pressure upon her in some way, shape or form, nearly all of whom will be impacted by the outcome, she should recuse herself from the case."

Despite the fact that Petitioner and Respondents filed a full set of papers on the Recusal question, the Court never issued a formal written Decision or Order regarding the Motion for Recusal.

On 7 Mar 2023 Justice Eisenpress, finally signed and so ordered the transcript of the 5 January Court Appearance during which she had denied the Motion to Recuse from the bench, (App.186a) and Petitioner filed his notice of appeal on 8 March 2023.

After Petitioner had filed his Motion to Recuse, he determined that Respondent Ed Day, a Republican, had chosen Judge Eisenpress, a Democrat to administer his oath of office on 2 Jan 2023, following his reelection to a third term, and shortly after Justice Eisenpress had been reelected to Family Court Judge while running unopposed with no Republican opponent.

A press release from the County Executive's office reference the swearing in ceremony is an Exhibit on page 311 (App.169a) of Petitioners Affidavit in Support of his Order to Show Cause of 15 Mar 2023 to the Appellate Division Second Department, Docket # 2023-02574, which sought a Stay on the 2023 County Legislative elections.

Petitioner also raised this issue in his Appellant's Brief of 5 April 2023, (Docket Nos. 2023-02574 2023-02576 2023-02578) pages 7-13 (App.130a) Petitioner also raised Judiciary Law Section 14, and New York Codes, Rules, and Regulations, Title 22,

Section 100.3(E) DISQUALIFICATION, and that it was reasonable to question Justice Eisenpress impartiality, due to her likely relationships with Respondents, party officials and key political factions, which might cause her to be interested in the outcome.

See excerpts below:

> "Page 10, P.46 "Furthermore after Petitioner filed his Motion to Recuse it has come to his attention that shortly after his reelection in 2021, the Rockland County Executive Ed Day, who is a Republican and one of the Respondents in this case, had Justice Eisenpress, who is a Democrat, administer his oath of office and swear him in on 2 Jan 2022 according to a press release from the County Executive's office. This might be an innocent coincidence of no consequence. However, it may show, or at least create the appearance that there is a connection or affinity between Justice Eisenpress and the County Executive Ed Day."
>
> Page 11 P.49. "It is reasonable, for all the reasons mentioned above, to question the Honorable Judge Eisenpress's ability to be impartial or unbiased with respect to this particular case, and so Justice Eisenpress should recuse herself."

The Decision and Order of the Appellate Division 2nd Department issued 24 Apr 2023 (App.5a) stated regarding recusal:

> "Here, the petitioner failed to establish a basis for mandatory disqualification pursuant to Judiciary Law § 14. The petitioner did

> not demonstrate, or even allege, that the Supreme Court had any familial relationship to any party to this proceeding. Moreover, he failed to set forth "any proof of bias or prejudice on the part of the [court] which would have warranted recusal" (*Matter of Lew v Sobel*, 192 AD3d at 801; *see Matter of Shisgal v Abels*, 179 AD3d 1070, 1070). Accordingly, the court providently exercised its discretion in denying that branch of the petitioner's motion which was for recusal." (App.5a)

In his Statement in Support of Motion Seeking Leave to Appeal to the New York State Court of Appeals, (Motion No. 2023-381) Petitioner raised the issue that the Appellate Court used the wrong legal standard for recusal. See pages 28*-36 (App.145a-155a) See select excerpts below:

> "3) Did the Appellate Court use the wrong legal standard for recusal of a judge?"

Pages 28-29:

Petitioner believes the Appellate Court used the wrong legal standard for recusal.

The Court's Decision states:

> "Here, the petitioner" "failed to set forth "any proof of bias or prejudice on the part of the [court] which would have warranted recusal"

However, the standard set forth by the U.S. Supreme Court is not direct proof of bias, but a showing of probability of bias. The U.S. Supreme Court overruled the Nevada Court of Appeals because they

employed the wrong standard for recusal of a judge. *See Rippo v. Baker,* 137 S. Ct. 905:

> "We vacate the Nevada Supreme Court's judgment because it applied the wrong legal standard. Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge "'ha[s] no actual bias.'" *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). Recusal is required when, objectively speaking, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *see Williams v. Pennsylvania,* 579 U.S. ___, ___, 136 S.Ct. 1899, 1905, 195 L.Ed.2d 132 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias" (internal quotation marks omitted)).
>
> "The Nevada Supreme Court did not ask the question our precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable. As a result, we grant the petition for writ of certiorari and we vacate the judgment below and remand the case for further proceedings not inconsistent with this opinion."

In the Statement in Support of Motion (App.139a) Petitioner again cites Judiciary Law Section 14 and

New York Codes, Rules, and Regulations, Title 22, Section 100.3 (E) DISQUALIFICATION to raise the issue that it was reasonable to question Justice Eisenpress ability to be impartial due to her possible relationships with Respondents which might cause her to have an interest in the case. See Excerpts below:

> "Furthermore as a sitting Judge for the past ten years in Rockland County Justice Eisenpress has probably developed connections, relationships, affinities or sympathies for political party leaders, elected officials to include county legislators and other key players, most of whom would prefer to see the current apportionment upheld for a number of reasons.
>
> "As a result of these connections Justice Eisenpress is probably interested in the outcome of the case because she may feel pressure to render a decision that is favorable to local political factions and players, who want to have the apportionment upheld." *See also* pages 29-30:

The Court of Appeals has ruled that it is empowered to review the propriety of a legal standard. *See People v. Baldwin*, 2023 NY Slip Op 1467-NY: Court of Appeals 2023 quoted below:

> "In *People v Epackchi*, (37 NY3d 39, 43-45 [2021]), we held that even if an appellate court has couched its decision as one made in the interest of justice, if the court's practical exercise of its discretion evidences the existence of a standard, and even if that standard allows for deviation in "exceptional

> circumstances," we are empowered to review the propriety of the standard."

The New York State Court of Appeals denied Petitioners Motion Seeking Leave to Appeal. (App.1a)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. Judicial Disqualification

The New York State courts decision regarding judicial disqualification are in conflict with relevant rulings on the U.S. Supreme Court. It is also an issue of national importance.

The 25 April 2023 Decision and Order of the Appellate Division Second Department stated in part, that Petitioner:

> "failed to set forth "any proof of bias or prejudice on the part of the [court] which would have warranted recusal"

That is the incorrect standard.

The correct standard for recusal is laid out by the U.S. Supreme Court in its Decision *Rippo v. Baker*, 137 S. Ct. 905 which states:

> "Recusal is required when, objectively speaking, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712; *see Williams v. Pennsylvania,* 579 U.S. ___, ___, 136 S.Ct. 1899, 1905, 195

> L.Ed.2d 132 ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias."
>
> "The Nevada Supreme Court did not ask the question our precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable. As a result, we grant the petition for writ of certiorari and the motion for leave to proceed *in forma pauperis,* and we vacate the judgment below and remand the case for further proceedings not inconsistent with this opinion."

This is precisely the situation in the instant case. The New York State Courts did not ask the question required by Supreme Court precedents. Specifically, whether or not, considering all the circumstances alleged by Petitioner the risk or potential for bias was too high to be constitutionally tolerable.

The Appellate Courts 25 Apr Decision also stated:

> "[P]etitioner failed to establish a basis for mandatory disqualification pursuant to Judiciary Law § 14. The petitioner did not demonstrate, or even allege, that the Supreme Court had any familial relationship to any party to this proceeding."

It is true that Petitioner had not even alleged that Justice Eisenpress had a familial relationship to any of the parties. He had not.

However Petitioner did allege that Justice Eisenpress had an interest in the case, which is also grounds for mandatory disqualification under New York Consolidated Laws, Judiciary Law Section 14, because she and members of her staff lived in Rockland County, and would be impacted by the reapportionment, and second because she likely had numerous connections to the political apparatus in Rockland County and was interested in pleasing elected and party officials, along with powerful political factions, that had supported her candidacies in the past, and were all strongly in favor of the reapportionment.

Furthermore, the Appellate Court's Decision did not address Petitioner's clearly stated claim that it was reasonable to question Justice Eisenpress' ability to be impartial, and his citation of New York Codes, Rules, and Regulations, Title 22, Section 100.3(E) DISQUALIFICATION.

In the instant case it is reasonable for the average person to question Justice Eisenpress impartiality based on her connections to the local political apparatus, key players and other powerful factions, and the fact that Republican Respondent Rockland County Executive Ed Day chose Democrat Justice Eisenpress to administer his oath of office on 2 Jan 2022 shortly after she ran unopposed for reelection to Rockland County Family Court Judge.

There is an appearance of collusion between the two major political parties when it comes to the

conduct of countywide elections in Rockland County. Most officials elected countywide run unopposed and are routinely reelected for multiple terms. It appears that there are quiet quid pro quo arrangements to make these elections uncompetitive and less costly in terms of money and time spent on the campaign trail, for incumbents or candidates favored by the political apparatus. Members of the public are aware of this political dynamic.

See also United States v. Jona Rechnitz, (2nd Cir. 2022), No. 20-1011-cr.

> "After his initial sentencing, but before the final determination on restitution, Rechnitz moved to have his case reassigned to another district judge. His motion was premised on a recently discovered personal relationship between the sentencing judge and Andrew Kaplan, a defendant and cooperating witness in the ongoing prosecutions of those involved in the Platinum fraud."
>
> "We hold that the district judge erred in not recusing himself under § 455(a)." "The judge's relationship with Kaplan was sufficiently close, and Kaplan's case was sufficiently related to Rechnitz's case, that a reasonable person would have questioned the district court's impartiality."

Rechnitz did not learn about the personal relationship between the sentencing judge and one of the cooperating witnesses for the prosecution until after the initial sentencing. However, Rechnitz raised the issue before the determination on final restitution

and the court still held that the judge should have recused himself.

In the instant case Petitioner did not learn that Respondent Ed Day chose Justice Eisenpress swear him in, until after the proceedings in Rockland County Supreme Court. However, Petitioner did raise it in his Appellant Brief and Statement of Support of Motion Seeking Leave to Appeal to the NY State Court of Appeals.

See also Caperton v. AT Massey Coal Co., Inc., 556 US 868 (2009)

> "the Court noted that the objective inquiry is not whether the judge is actually biased, but whether the average judge in his position is likely to be neutral or there is an unconstitutional "'potential for bias,'" P. 2255

Caperton continues:

> "Rather, the question is whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow,* 421 U.S., at 47, 95 S.Ct. 1456. P. 2256.

See also Bergdahl v. United States, Civil Action 21-418 (D.D.C. Jul. 25, 2023). U.S. District Judge Reggie Walton in Washington found that the military judge Jeffrey Nance failed to disclose the fact that he had an application pending to the executive branch to become an immigration judge, which was a potential conflict of interest. Judge Walton pointed out that

Donald Trump had been critical of Bergdahl during the 2016 Presidential Campaign, and since he was President when Judge Nance's application for a position as an immigration judge was pending, a reasonable person could question the judge's impartiality under the circumstances.

In summary, Justice Eisenpress denied the Motion to Recuse from the bench less than 24 hours after it was filed it. It is unknown if she applied any legal standard for recusal, and if she did, she did not explain what it was. When the Appellate Court explained their rationale for upholding the lower court's ruling regarding recusal, they used the incorrect standard.

As the political discourse in the United States becomes ever more divisive and polarized, it is inevitable that the courts will be used to settle contentious yet critical questions that go to the heart of how our democracy will function. It is essential that we maintain a high level of public confidence in the integrity of our judicial system and its due process. Ensuring that the corrosive influence of bias does not insinuate itself into the decision-making process is integral to that important effort. A strict national standard regarding recusal and judicial disqualification must be clearly defined and vigorously defended by the U.S. Supreme Court.

B. First Amendment

The Court should grant the Writ of Certiorari because this is an issue of national importance, and the New York State court rulings are in conflict with relevant decisions of the U.S. Supreme Court.

See Lozman v. City of Riviera Beach, Florida, No. 17-21. Supreme Court of United States.

> "Because Lozman alleges that the City deprived him of the right to petition, "'one of the most precious of the liberties safeguarded by the Bill of Rights,'" *BE & K Constr. Co. v. NLRB,* 536 U.S. 516, 524, 122 S.Ct. 2390, 153 L.Ed.2d 499, his speech is high in the hierarchy of First Amendment values."

Lozman was prohibited from giving in person spoken comments about an investigation into local officials in a neighboring municipality, which was constitutionally protected speech under the first amendment, during a public participation portion of a town board meeting. The U.S. Supreme Court found that his right to petition his government for redress of grievances under the First Amendment was violated.

This is in essence what occurred in the instant case. Petitioner had peaceably assembled at the legislature to petition his government for redress of grievances in regard to the redistricting plans, at the public hearings opened specifically to solicit public input about the redistricting plans but was prohibited from giving in person spoken comments. Such comments are constitutionally protected speech under the First Amendment, subject to strict scrutiny, and fall under the right of the citizens to petition their government for redress of grievances.

A public meeting of a government body is open to the public so they can observe and listen to elected and appointed officials conduct the business of gov-

ernment. The public has no First Amendment right to speech in a public meeting of an elected governmental body.

However, a public hearing is a limited public forum, in which the government designates a time and place for the purpose of expressive activity including in person spoken comments on a specific issue, content or subject matter. Restrictions on speech relating to the designated issue, content or subject matter of the public hearing are subject to strict scrutiny under the First Amendment.

See *Tyler v. City of Kingston, Court of Appeals*, No. 22-665 (2nd Cir. 2023) quoting *Hotel Emps. & Rest. Emps. Union, Local 100 v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 552 (2d Cir. 2002)

> ("[A] limited public forum is created when the government opens a non-public forum for public expression, but limits expressive activity to certain kinds of speakers or the discussion of particular subjects.").

This is precisely the case with a public hearing. If the Legislature designates a time and place for a public hearing on a specific subject, then they have opened a limited public forum, during which in person spoken public comments about the designated subject matter are constitutionally protected free speech subject to strict scrutiny under the First Amendment. *see Tyler v. City of Kingston,* Court of Appeals, 2nd Circuit 2023" [S]trict scrutiny is accorded only to restrictions on speech that falls within the designated category for which the forum has been opened." *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10,* 127 F.3d 207, 212 (2d Cir. 1997)

The notice of meeting for the 19 October 2022 and 1 November 2022 Rockland County Legislature meeting and public hearings of both clearly state that no in person spoken comments will be allowed during the public hearing. See Exhibit OOO of Petitioners Verified Petition Index # 035210-2022 (App.69a)

The designated subject for which the 19 Oct 2022 and 1 Nov 2022 public hearings were opened were the 2022 redistricting plans for the Rockland County legislature. This was clearly stated in the Notice of Meeting for each public hearings that was read into the record at the beginning of each public hearing. (App.69a)

See McIntyre v. Ohio Elections Comm'n, 514 US 334 (1995),

> "When a law burdens core political speech, we apply "exacting scrutiny," and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *See Lerman v. Board of Elections in City of New York*, 232 F. 3d 135 (2nd Cir. 2000) Which states:
>
> "However, in those cases in which the regulation clearly and directly restricts "core political speech," as opposed to the "`mechanics of the electoral process,'" it may make little difference whether we determine burden first," since "restrictions on core political speech so plainly impose a `severe burden'" that application of strict scrutiny clearly will be necessary."

In person spoken comments about a ten-year reapportionment plan, delivered at the time and place designated for a mandatory public hearing on that very reapportionment plan, are clearly core political speech. Restrictions on that speech must withstand strict scrutiny and be narrowly tailored to serve or advance an overriding state interest of compelling importance.

What state interest of overriding or compelling importance is served by restricting in person spoken comments at a public hearing on a ten-year reapportionment? .

Counsel to the Legislature's explanation for the prohibition on in person spoken comments falls far short of serving or advancing an overriding state interest of compelling importance when it comes to public hearings. People watching the live video, who may or may not want to send an email comment, are not disadvantaged, or treated unequally if people attending the public hearing or meeting in person are allowed to speak. Rather, they are disadvantaged when they are deprived of hearing what members of the public attending in person have to say about the reapportionment.

See "The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances." We have recognized this right to petition as one of "the most precious of the liberties safeguarded by the Bill of Rights," *Mine Workers* v. *Illinois Bar Assn.,* 389 U.S. 217, 222 (1967), and have explained that the right is implied 525, 525 by "[t]he very idea of a government, republican in form," *United States v. Cruikshank,* 92 U. S. 542, 552

(1876). "The first amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances."

The prohibition on in person spoken comments about the reapportionment plan, imposed on the public hearings regarding the reapportion plan, under the auspices of Local Law 6-2022, about a ten-year reapportionment plan at the time and place designated for a public hearing on that very same reapportionment plan do not hold up to strict scrutiny.

The restrictions on in person public comments at the 19 October 2022 Legislature meeting also violated the viewpoint neutrality rule because the legislature's paid consultant was allowed to give his in person verbal presentation on the merits of the Plan B map, but Petitioner was prohibited from responding with in person spoken comments during the public hearing.

See "The viewpoint-neutrality requirement ensures that—once the government has permitted speech on a given topic—it cannot ";regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Byrne v. Rutledge*, 623 F.3d 46, 55 (2d Cir. 2010). In other words, a rule is neutral as to viewpoint if it is based only upon the manner in which speakers transmit their messages . . . , and not upon the messages they carry"; *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 645, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994)."

Furthermore, Local Law 6 is not content neutral. The event or action that triggers the email only restriction is when a legislator notifies the clerk of the legislature more than 24 hours in advance of a

meeting that they intend to attend remotely. That mechanism is entirely arbitrary. A public hearing on one subject may allow in person spoken comments, while another public hearing on a different subject may not, simply because in one case a legislator notified the clerk that they would be attending remotely, and in the other case a legislator did not. Different public hearings on different topics may not be subject to different restrictions on speech for no good reason. The restrictions on speech under Local Law 6-2022 are not content neutral.

Furthermore, Local Law 6-2022 includes loophole that allows any legislator to anonymously veto in person public comments at any public meeting or public hearing of their choice. A legislator simply needs to notify the Clerk of the Legislature in advance of the public hearing that they intend to attend remotely, thus triggering the notice of the public meeting and or hearing to state that public comments will be restricted to email. If that same legislator does not attend the public hearing at all, or attends in person after all, they can be certain that they will not be subject to any verbal public criticism and or have to sit through a protracted public hearing, and that their name will not be listed in the minutes as having attended remotely or as having indicated in advance that they intended to attend remotely. This is obviously ripe for abuse.

The attendance roll calls in the minutes of the 19 October and 1 November 2022 public meetings and public hearings. (App.69a) were noticed such that no in person spoken comments would be allowed and that public input would be restricted to written and email communications only. No legislators

attended the public hearings remotely, yet Petitioner who was physically in attendance, was still prevented from giving in person spoken comments on the reapportionment plans. The minutes and attendance rolls for both public hearings list no legislators as having attended remotely, as required by Section 2 J. of Local Law 6-2022 if a member does so. The only explanation for this is that a legislator made notification in advance that they intended to attend remotely but then did not.

If a legislator suspects in advance that he may face public criticism during a .public hearing or public participation, all they have to do is notify the clerk in advance that they intend to attend remotely, and then not do so, either because they don't attend the meeting at all, or because they actually attend in person after all. Public hearing and public criticism conveniently and anonymously avoided.

Most of the legislators on the Redistricting committee had their legislative districts gerrymandered to discourage competition and advantage their own incumbency, thus ensuring an easy reelection. They may have felt vulnerable to criticism at the public hearing. Any legislator could have deliberately employed the loophole to prevent in person comments at both public hearings on the reapportionment, and the public will never know who they are.

The Rockland County Supreme Court Decision also stated:

> "In fact, the Petition at paragraph 263 expressly clarifies that it is not asking the court to strike Local Law 6. This explicit concession made on the face of the pleading

> functionally ends the analysis, and the Court must dismiss the third cause of action." (App.46a)

However this statement by the Court is incorrect and completely off point. Local Law 6-2022, as it is written not unconstitutional, because its language only refers to "public meetings" and makes no mention or reference of any kind to public hearings or public participation periods.

However the legislature conducted the 19 Oct and 1 Nov 2022 public hearings on the redistricting maps, under the auspices and restrictions on speech of Local Law 6-2022. That is precisely when the legislature strayed firmly on to unconstitutional ground. Public hearings are "limited public forums, during which there is a First Amendment right to speak on the designated subject matter, and any restrictions on that speech are subject to strict scrutiny.

In the subheading of his Third Cause of Action in his Verified Petition (App.124a-125a) Petitioner states:

> "(United States Constitution Bill of Rights First Amendment, N.Y. Municipal Home Rule Law Section 34. – Unconstitutional Public Hearing)"

It continues:

> "Local Law 6-2022 is blatantly unconstitutional and renders the so-called public hearing the Rockland County Legislature held on 1 November 2022 in regards to the Plan B map, which was held under the provisions of Local Law 6-2022, in which no

> in-person verbal comments were allowed, illegal, null and void."

As written Legislative Law 6-2022 is not unconstitutional so long as its restrictions are applied only to public meetings, which is how the law is written. However, it seems the legislature believes it can apply the tenets and restrictions of the Law to public hearings and public participation whenever they choose, which is unconstitutional.

The Legislative Intent section of Local Law 6-2022 and Legislative Counsel Elana Yeger both point to New York States Open Meeting law as justification for this. However, if you read the Open Meetings Law which can be found at (App.187a) you will see that it only addresses public meetings and makes no mention of public hearings which are limited public forums, not public meetings. The Legislature is attempting to extend the prohibitions on public speech that exist for public meetings, to public hearings by simply citing the Open Meetings law.

Local Law 6-2022 itself is in violation of New Yorks Open Meetings Law, because it fails to comply with 103a Section 2 (h), (App.194a) which states:

> "(h) if videoconferencing is used to conduct a meeting, the public body shall provide the opportunity for members of the public to view such meeting via video, and to participate in proceedings via videoconference in real time where public comment or participation is authorized and shall ensure that videoconferencing authorizes the same public

> participation or testimony as in person participation or testimony;"

The Open Meetings law requires the public body to make it possible for members of the public viewing remotely, "to participate in proceedings via video-conference in real time where public comment or participation is authorized" This can only mean spoken comments via video. You cannot participate in real time via videoconferencing by email. However, the Rockland County Legislature simply omitted that requirement of the Open Meetings Law from their Local Law 6-2022, and restricted public input to written and email comments if videoconferencing was going to be used.

The reasoning for the restrictions on speech imposed by Local Law 6-2022 as explained by Elana Yeger is faulty for obvious reasons. What if someone is watching the live video feed from a remote location, but cannot use email because they don't have access to their email account or don't even have an email account? Or what if they can't type because they have a neurological condition, or they are illiterate, or their keyboard is broken? According to the legislatures own logic, it follows that if some people cannot send emails, then nobody else should be allowed to send emails either, thus ensuring that no one is treated unequally, which is ridiculous.

See Zalaski v. City of Bridgeport Police Dep't, 613 F.3d 336, 342 (2d Cir. 2010) (per curiam) ("In a limited public forum, strict scrutiny does not apply to expressive activities outside the general purpose for which the government opened the forum."). And the *form or manner* in which the public participates at Common Council meetings may certainly undermine

the purpose for which the forum was created—*e.g.*, to facilitate meaningful discourse on matters of the legislative agenda."

The general purpose for which the legislature opened the public hearings on 19 Oct and 1 Nov 2022 was supposedly to facilitate meaningful discourse on the matter of the ten-year reapportionment plan. In person spoken public comments regarding that very reapportionment could not possibly undermine the purpose for which the forum was created.

The lower court cited time limitations placed on public comment as an example that provided justification for the Local Law 6-2022 restriction on in person public comments. (App.53a) However, time restrictions are narrowly drawn to meet a compelling state interest, for the simple reason that if one person spoke for several hours, many people would be deprived of the right to provide spoken testimony at a public hearing or public participation period. Time limitations promote precisely what Section 2 G. of Local Law Six makes impossible: The opportunity for more people to give in person spoken comments.

The lower Court found that Petitioner had failed to state a First Amendment Claim. That is incorrect. Petitioner included an extensive section in his Verified Petition of nineteen pages that lay out the allegations in exacting detail, regarding his claim that his First Amendment rights were violated during both public hearings on the redistricting plans. See Verified Petition filed 8 December 2022 Index # 035210-2022 pages 73 thru 91. (App.98a-124a)

See "As the Court unanimously held in *Haines v. Kerner,* 404 U.S. 519 (1972), a *pro se* complaint,

"however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim if it appears " `beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.*, at 520-521, quoting *Conley v. Gibson,* 355 U. S. 41, 45-46 (1957)."

And "Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. *Cf. Maty* v. *Grasselli Chemical Co.,* 303 U.S. 197."

And *Johnson v. City of Shelby, Miss.*, 574 US 10 (2014) "Federal pleading rules call for "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted. See Advisory Committee Report of October 1955, reprinted in 12A C. Wright, A. Miller, M. Kane, R. Marcus, and A. Steinman, Federal Practice and Procedure, p. 644 (2014 ed.) (Federal Rules of Civil Procedure "are designed to discourage battles over mere form of statement"); 5 C. Wright & A. Miller, § 1215, p. 172 (3d ed. 2002) (Rule 8(a)(2) "indicates that a basic objective of the rules is to avoid civil cases turning on technicalities")

Furthermore, as Petitioner is pro se, a consequence of the fact that no attorney would take the case because of the professional and political risks and implications it entailed, the claims, pleadings and arguments in his papers may not always be artfully construed. However according to the preservation rule, where a federal constitutional question of procedure can preempt a state procedure that also affects a "substantive constitutional right", a court can consider the fundamental right to a fair adjudication about an issue affecting voting. So long as the topic is initially raised in any sort of protest at the lower court level, the topic can be expanded by pointing out additional case law and citing additional facts in the Record once the decision in the case is appealed. This is a well-recognized principle of Due Process. *See Yee v. Escondido*, 503 U.S. 519 (1992) and *U.S. v. Erie County*, 763 F.3d 235 (2d Cir. 2014) (explaining in fn. 7 that appellate courts can consider an additional *fact* in support of an *argument* raised below, particularly a *fact* that is readily available in the Record below).

The temptation for public officials to muzzle members of the public who would seek to criticize them during public hearings is ever present. Perpetuating covid era restrictions is one way for them to do this. If allowed to stand these restrictions on speech could proliferate rapidly across the country. The high court must establish a clear benchmark for First Amendment protections in the wake of the pandemic that will serve as a nationwide standard.

CONCLUSION

Petitioner asks the Court to declare the 19 Oct 2022 and 1 Nov 2022 public hearings on the Rockland County redistricting plans unconstitutional, and thus null and void, that the New York State Courts applied the wrong standard for judicial disqualification, and to remand this case back to the New York Court of Appeals for proceedings not inconsistent with the above.

Respectfully submitted,

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September 5, 2023

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OPINIONS AND ORDERS

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ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK (JUNE 8, 2023)

STATE OF NEW YORK
COURT OF APPEALS

IN THE MATTER OF MICHAEL I. PARIETTI,

Appellant,

v.

ED DAY, &C., ET AL.,

Respondents.

Mo. No. 2023-381

Before: Hon. Rowan D. WILSON,
Chief Judge, presiding.

Appellant having moved for leave to appeal to the Court of Appeals and for a stay in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion for leave to appeal is denied; and it is further

ORDERED, that the motion for stay is dismissed as academic.

/s/ Lisa LeCours
Clerk of the Court

DECISION AND ORDER OF THE NEW YORK SUPREME COURT APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT (APRIL 25, 2023)

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

IN THE MATTER OF MICHAEL I. PARIETTI,

Appellant,

v.

ED DAY, ETC., ET AL.,

Respondents.

2023-02574; 2023-02576; 2023-02578

(Index No. 35210/22)

Before: Valerie Brathwaite NELSON, J.P., Joseph A. ZAYAS, William G. FORD, Helen VOUTSINAS, JJ..

In a purported proceeding, inter alia, pursuant to N.Y. Const., article III, § 5, and Municipal Home Rule Law § 34(4), the petitioner appeals from (1) an order of the Supreme Court, Rockland County (Sherri L. Eisenpress, J.), dated January 31, 2023, (2) an order of the same court dated March 7, 2023, and (3) an order and judgment (one paper) of the same court dated March 10, 2023. The order dated

January 31, 2023, denied the petitioner's application pursuant to N.Y. Const., article III, § 5, to give precedence to this proceeding and for the petition to be decided within 60 days of the commencement of the proceeding. The order dated March 7, 2023, insofar as appealed from, denied that branch of the petitioner's motion which was for recusal. The order and judgment granted the respondents' motion pursuant to CPLR 404(a) and 3211(a) to dismiss the petition and, in effect, dismissed the proceeding.

ORDERED that the appeals from the orders are dismissed, without costs or disbursements; and it is further,

ORDERED that the order and judgment is affirmed, without costs or disbursements.

The appeal from the order dated January 31, 2023, must be dismissed because no appeal lies as of right from an order that does not decide a motion made on notice, and leave to appeal has not been granted (*see* CPLR 5701[a][2]). The appeal from the order dated March 7, 2023, must be dismissed because the right of direct appeal therefrom terminated with the entry of the order and judgment (*see Matter of Aho*, 39 N.Y.2d 241, 248). The issues raised on the appeals from the orders are brought up for review and have been considered on the appeal from the order and judgment (*see* CPLR 5501[a][1]).

Following the 2020 decennial federal census (U.S. Dept. of Commerce, Census Bureau, Decennial Census of Population and Housing, 2020), the respondent Rockland County Legislature (hereinafter the County Legislature) began the redistricting process for its 17 county legislative districts to account for

population changes that occurred between 2010 and 2020. On November 2, 2022, the County Legislature voted overwhelmingly in favor of adopting a new district map, with 13 votes in favor and only 1 in opposition. On November 22, 2022, the respondent Ed Day, the Rockland County Executive, signed the legislation into law.

On December 8, 2022, the petitioner commenced this proceeding against Day, the County Legislature, and the respondent Rockland County Board of Elections to challenge the new district map. The petitioner thereafter made an application pursuant to NY Const, article III, § 5, to give precedence to this proceeding and for the petition to be decided within 60 days of the commencement of the proceeding. By order dated January 31, 2023, the Supreme Court determined that N.Y. Const., article III, § 5, was inapplicable to this proceeding and denied the application. The petitioner also moved, among other things, for recusal. By order dated March 7, 2023, the court, inter alia, denied that branch of the motion which was for recusal. The respondents moved pursuant to CPLR 404(a) and 3211(a) to dismiss the petition, asserting, among other things, that the petitioner lacked standing to pursue his claims and, in any event, that he had failed to state a cause of action. By order and judgment dated March 10, 2023, the court granted the respondents' motion and, in effect, dismissed the proceeding. The petitioner appeals.

"Judiciary Law § 14 prohibits a trial judge from presiding over any claim if he or she is related by consanguinity or affinity to any party to the controversy within the sixth degree. Similarly, Code of Judicial Conduct Canon 3(E)(1)(d)(i) calls upon a judge to

disqualify himself or herself in a proceeding in which a person known by the judge to be within the sixth degree of relationship to the judge is a party to the proceeding" (*Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, Intl. Assn. of Firefighters, AFL-CIO*, 175 A.D.3d 676, 677 [alterations and internal quotation marks omitted]; *see* 22 NYCRR 100.3[E][1][d][i]). "Absent a legal disqualification under Judiciary Law § 14, the determination of a motion for recusal of the Justice presiding based on alleged impropriety, bias, or prejudice is within the discretion and the personal conscience of the court" (*Matter of Lew v Sobel*, 192 A.D.3d 799, 800-801 [internal quotation marks omitted]; *see Matter of Walsh v Abramowitz*, 78 A.D.3d 852, 853). "A court's decision in this respect may not be overturned unless it was an improvident exercise of discretion" (*D'Andraia v Pesce*, 103 A.D.3d 770, 771).

Here, the petitioner failed to establish a basis for mandatory disqualification pursuant to Judiciary Law § 14. The petitioner did not demonstrate, or even allege, that the Supreme Court had any familial relationship to any party to this proceeding. Moreover, he failed to set forth "any proof of bias or prejudice on the part of the [court] which would have warranted recusal" (*Matter of Lew v Sobel*, 192 A.D.3d at 801; *see Matter of Shisgal v Abels*, 179 A.D.3d 1070, 1070). Accordingly, the court providently exercised its discretion in denying that branch of the petitioner's motion which was for recusal.

Pursuant to the New York State Constitution, "[a]n apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations

as the legislature may prescribe" (N.Y. Const., art. III, § 5). Contrary to the petitioner's contention, this provision is inapplicable to this matter because it only applies to an apportionment by the State Legislature or a body acting on its behalf or in relation to state legislative or congressional districts, such as the New York State Independent Redistricting Commission. Moreover, Municipal Home Rule Law § 34(4), which subjects redistricting plans adopted by charter counties "to federal and state constitutional requirements," does not render the judicial review provision of NY Const, article III, § 5, applicable to such redistricting plans. The terms of the statute relate to the redistricting process itself, a conclusion supported by the legislative history (*see* Bill Jacket, L 2021, ch 516).

Since the constitutional standing provision of NY Const, article III, § 5, is inapplicable here (*cf. Matter of Harkenrider v Hochul*, 38 N.Y.3d 494, 508), traditional standing principles apply to the petitioner's claims. Contrary to the petitioner's contentions, the Supreme Court properly concluded that he lacked standing to pursue any claims pursuant to the Voting Rights Act, Municipal Home Rule Law § 34(4), or other authority relating to county legislative districts that he did not reside in, or any claims concerning alleged vote dilution impacting any minority groups of which he was not a member (*see Gill v Whitford*, ___ US ___, ___, 138 S. Ct. 1916, 1930; *Matter of Festa v Town of Oyster Bay*, 210 A.D.3d 678, 679; *Suffolk County Democratic Comm. v Gaffney*, 196 A.D.2d 799, 800).

In addition, the petitioner failed to demonstrate his standing to pursue his claims to the extent they relate to the district in which he resides, including

his assertion that the new district map improperly advantaged the incumbent in the petitioner's district and that the district was insufficiently compact, since he did not allege sufficient facts in the petition establishing the requisite personal harm (*see Matter of Festa v. Town of Oyster Bay*, 210 A.D.3d at 679; *Matter of Montano v. County Legislature of County of Suffolk*, 70 A.D.3d 203, 216).

The petitioner's contention regarding the First Amendment to the United States Constitution is without merit.

Accordingly, the Supreme Court properly granted the respondents' motion to dismiss the petition and, in effect, dismissed the proceeding.

In light of our determination, the petitioner's remaining contentions have been rendered academic.

BRATHWAITE NELSON, J.P., ZAYAS, FORD and VOUTSINAS, JJ., concur.

ENTER:

/s/ Maria T. Fasulo
Clerk of the Court

DECISION AND ORDER ON MOTION, SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION (MARCH 29, 2023)

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

IN THE MATTER OF MICHAEL I. PARIETTI,

Appellant,

v.

ROCKLAND COUNTY EXECUTIVE, ETC., ET AL.,

Respondents.

2023-02574, 2023-02576

IN THE MATTER OF MICHAEL I. PARIETTI,

Appellant,

v.

ROCKLAND COUNTY EXECUTIVE, ETC., ET AL.,

Respondents.

2023-02578

(Index No. 35210/2022)

Before: Cheryl E. CHAMBERS, J.P., Robert J. MILLER, Paul WOOTEN, Lillian WAN, JJ..

Appeals from two orders of the Supreme Court, Rockland County, dated March 7, 2023, and January 31, 2023, and an order and judgment (one paper) of the same court dated March 10, 2023, respectively. Motion by the appellant to stay the petitioning period for Rockland County legislative elections and to enjoin the respondents from conducting legislative elections, pending hearing and determination of the appeals, and to consolidate the appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the branches of the motion which are to stay the petitioning period for Rockland County legislative elections and to enjoin the respondents from conducting legislative elections, pending hearing and determination of the appeals, are denied; and it is further,

ORDERED that the branch of the motion which is to consolidate the appeals is denied as unnecessary as the appeals may be consolidated as of right (*see* 22 NYCRR 1250.9[f][3]); and it is further,

ORDERED that on or before April 5, 2023, the appellant shall serve and file the record or appendix and the appellant's brief via NYSCEF, if applicable, or, if NYSCEF is not mandated, serve the record or appendix and the appellant's brief and upload digital copies of the record or appendix and the appellant's brief, with proof of service thereof, through the digital portal on this Court's website; and it is further,

ORDERED that on or before April 12, 2023, the respondents shall serve and file the respondents' brief via NYSCEF, if applicable, or, if NYSCEF is not mandated, serve the brief and upload a digital copy of the brief, with proof of service thereof, through the digital portal on this Court's website; and it is further,

ORDERED that on or before April 14, 2023, the appellant shall serve and file the reply brief via NYSCEF, if applicable, or if NYSCEF is not mandated, serve the reply brief and upload a digital copy of the reply brief, with proof of service thereof, through the digital portal on this Court's website.

CHAMBERS, J.P., MILLER, WOOTEN and WAN, JJ., concur.

ENTER:

/s/ Maria T. Fasulo
Clerk of the Court