

No. 23-220

**In the
Supreme Court of the United States**

MICHAEL PARIETTI,

Petitioner,

v.

ED DAY, ET AL.,

Respondents.

**On Petition for a Writ of Certiorari to the
Appellate Division, Supreme Court of New York,
Second Judicial Department**

REPLY BRIEF OF PETITIONER

Michael Parietti
Petitioner Pro Se
6 Spook Rock Road
Suffern, NY 10901
845-504-7715
spookrock@gmail.com

October 17, 2023

SUPREME COURT PRESS

♦ (888) 958-5705 ♦

BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
I. <i>Obiter Dictum</i>	1
II. <i>Rippo v. Baker</i>	2
III. First Amendment Question Presented	3
IV. The Public Hearings Were Not Held by Videoconference.....	5
V. Restrictions on Speech of Local Law 6 are Not Content or Viewpoint Neutral.....	5
VI. Rationale for the Restrictions of Local Law 6 was Contrived.	7
VII. U.S. Supreme Court has the Power to Review Acts of Government Agencies	8
VIII. Respondents Arguments on Standing are Irrelevant	10
IX. Petitioners Quest	12

REPLY BRIEF APPENDIX TABLE OF CONTENTS

Rockland County Candidate List for the November 7, 2023 General Election.....	Reply.App.1a
Members of the Rockland County Legislature Special Committee for Redistricting	Reply.App.7a

TABLE OF AUTHORITIES

Page

CASES

<i>Dept. of Commerce v. New York</i> , 139 S. Ct. 2551 (2019)	8
<i>Matter of Harkenrider v Hochul</i> , 76 Misc 3d 171 (Sup Ct, Steuben County 2022)	12
<i>McCrory v. Vill. of Mamaroneck Bd. of Trustees</i> , 2020 NY Slip Op. 00864 (2d Dept. Feb. 5, 2020)	11
<i>Rippo v. Baker</i> , 137 S. Ct. 905 (2017)	1, 2

CONSTITUTIONAL PROVISIONS

NY Const. art. III § 5	11
U.S. Const. amend. I	2, 3, 4, 7, 10
U.S. Const. amend. XIV	4

STATUTES

Administrative Procedure Act	8
Voting Rights Act	8

JUDICIAL RULES

NYS Municipal Home Rule Law, §34,	11
Open Meetings Law, § 2(h)	6, 7, 10



I. *Obiter Dictum*

In their Opposition to Writ of Certiorari, (Opp.Br.) Respondents claim the Appellate Courts language in it's Decision in regard to the First Amendment and judicial disqualification was simply *obiter dictum*. Opp.Br.3.

Specifically, Respondents claim the Appellate Courts statement that Petitioner had not shown "any proof of bias" was *obiter dictum*. That is incorrect. See *Rippo v. Baker*, 137 S. Ct. 905 (2017).

When the Nevada Supreme Court stated in their decision that Rippo's allegations "d[id] not support the assertion that the trial judge was actually biased" the U.S. Supreme Court did not consider it *obiter dictum*. In fact, the Court based its decision to remand the case on the lower courts use of that very language, which was proof that they used the wrong legal standard.

The same is true in the instant case. The Appellate Division stated in their Decision that Petitioner:

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

That language is not *obiter dictum*. Rather it goes to the root of their thinking and demonstrates they used the wrong legal standard for judicial disqualification. They failed to ask the question that the precedents of the U.S. Supreme Court require, which is whether Petitioner showed "a probability of bias".

Furthermore, the Appellate stated in its Decision that:

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

That is the entirety and the core of the Appellate Courts language in their ruling regarding the First Amendment issue. How could it possibly be *obiter dictum*?

II. *Rippo v. Baker*

Respondents state in their Opposition that Petitioner's reliance on *Rippo v. Baker*, 137 S.Ct. 905 (2017) is "frivolous". Opp.Br.7. To the contrary it is very serious. Respondents state:

A lower court's variation in verbiage from this Court's articulation of a rule does not require reversal when the substantive application of law remains the same. Here, there was no deviation in substance.

Opp.Br.7.

This statement is plainly wrong. As in *Rippo*, the substantive application of the rule or legal standard by the lower court in the instant case, was not the same as the standard laid down by the U.S. Supreme Court. In fact, there was a fatal deviation in substance. Justice Eisenpress denied the Motion for Recusal from the bench, stating that she had "no basis" for recusal, and did not explain if she used any legal standard to come to that decision. The Appellate Court decision stated that Petitioner did not set forth "any proof of bias or prejudice on the part of the court". This unequivocally

deviates substantively from the standard laid down in *Rippo* which is “probability of bias”.

Respondents also claim that in regard to evidence of a probability of bias for Justice Eisenpress, “Parietti provided none” Opp.Br.8. However, that is incorrect.

Petitioner explained that Justice Eisenpress was elected countywide to Rockland County Family Court Judge twice in the previous ten years, and likely had extensive connections to the local political apparatus who strongly favored the apportionment, and that members of the judge’s staff lived in Rockland, which was the sole reason the first judge assigned to the case gave for recusing himself. See his Recusal Order in the Appendix to Petitioners Writ of Certiorari at App.159a. In addition the judge lived in Rockland County herself and would be impacted by the reapportionment.

Petitioner also showed that Respondent Republican Rockland County Executive Ed Day had chosen Democrat Justice Eisenpress to administer his oath of office on 2 Jan 2022 shortly after the judge had been reelected to Family Court Judge in Nov. 2021, while running unopposed with no Republican challenger, creating the appearance of a possible *quid pro quo* or connection between the two. This is all discussed in Petitioner’s Writ of Certiorari at 13-26.

III. First Amendment Question Presented

Respondents misconstrue the question presented to the Court in his Writ of Certiorari in regard to the First Amendment. Respondents state:

The question presented is whether Petitioner’s First Amendment right to free speech, made applicable to the states through the

Fourteenth Amendment, was violated by Local Law 6-2022's email-only rule.

Opp.Br.2.

That is not accurate. Rather the question presented is whether the mandatory public hearings on the redistricting plans, that were held under the auspices of Local Law 6-2022, were unconstitutional because his First Amendment right to Free Speech was violated when he was prohibited from giving in person spoken comments regarding the reapportionment at those public hearings.

Respondents describe the two public hearings on the reapportionment plans as "legislative sessions" which is misleading. *See* Opp.Br.2. They were in fact "public hearings" which are limited public forums, during which restrictions on speech relating to the designated subject matter are subject to strict scrutiny. To withstand "strict scrutiny" a restriction on speech must serve or advance an overriding state interest of compelling importance.

As it is written, Local Law 6-2022, and its restriction on in person spoken comments is not unconstitutional because the text of the law only refers to public meetings and makes no mention of public hearings or public participation periods. However, when Respondents conducted the public hearings on the redistricting plans under the auspices of Local Law 6, and its restrictions on speech, they violated Petitioners First Amendment rights to petition for redress of grievances.

IV. The Public Hearings Were Not Held by Videoconference

Respondents erroneously state that “Here, the claimed forum was a county legislative session held by videoconference.” Opp.Br.11.

That is incorrect and misleading. They were not simply legislative sessions, and they were not held by videoconference. They were mandatory public hearings on the ten-year redistricting plan for the Rockland County Legislature and were held in person, not conducted via videoconference. No legislators attended the public hearings by videoconference. There was a live video feed for the public to watch, but no part of the public hearings or meetings was held by videoconference because no legislators attended remotely.

The only apparent reason for the prohibition on in person spoken comments during the public hearings was that a legislator(s) must have made advance notification that they intended to attend remotely, but did not. The names of legislators who do this are not listed in the minutes, which creates a mechanism whereby any legislator can anonymously veto in person spoken comments on any public hearing or public participation period, for any unknown reason.

V. Restrictions on Speech of Local Law 6 are Not Content or Viewpoint Neutral

Respondents claim that the restrictions on in person spoken comments, of Local Law 6, are content and view point neutral. See Opp.Br.11. However, this is wrong on both points.

The trigger for the imposition of the restrictions on speech of Local Law 6, at a given public meeting or

hearing is entirely arbitrary. Public hearings on different subjects can be subject to different restrictions on speech simply because in one case a legislator made advance notification of their intention to attend remotely, and in another case they did not. That is not content neutral. Nor were the restrictions viewpoint neutral, because the Committee's paid consultant was allowed to give in person spoken comments favorable to the map while Petitioner and others were not allowed give in person comments critical of the map. This is all explained in Petitioners Writ of Certiorari at Pet.31-33.

Respondents claim that the County Legislature had no choice but to prohibit in person spoken comments at the public hearings on the redistricting plans because they did not have the necessary technology to allow people who were viewing the video stream remotely to participate in real time with spoken comments via videoconferencing. *See* Opp.Br.12. However, Respondents fail to mention that there was no requirement under New York's Open Meetings Law to allow legislators to attend meetings remotely via videoconferencing. Rather the law allowed for that option if a municipality was able to meet certain requirements to accommodate videoconferencing. One mandatory requirement was that members of the public viewing the meeting remotely, needed to be able to participate in real time via videoconference with spoken comments. According to Open Meetings Law, Section 2(h), if a municipality could not enable real time participation by videoconferencing for members of the public viewing remotely, then they could not allow legislators to attend remotely via videoconferencing. *See* Writ of Certiorari at App.194a.

The Rockland County Legislature decided to ignore Section 2(h) of the Open Meetings law and allow legislators to attend meetings via videoconferencing even though they could not meet the mandatory requirement of the law regarding real time participation by members of the public attending viewing remotely. They decided they could compensate for this by simply prohibiting in person spoken comments by members of the public attending in person. By so doing they not only violated the Open Meetings Law, but more importantly, they violated Petitioners First Amendment rights.

VI. Rationale for the Restrictions of Local Law 6 was Contrived.

Furthermore, Petitioner believes that the restrictions on in-person spoken comments of Local Law 6, that were imposed upon the mandatory public hearings, were in truth contrived as a pretext to prevent a full house public hearing on a map that the legislators knew was unlawful. They may have wanted to avoid a contentious public hearing where citizens might publicly criticize members of the legislature for their role in creating a gerrymandered map that obviously protected their own incumbencies at the expense of numerous communities of interest.

By restricting public input to emails that would not be read aloud at the public hearing, the legislature ensured that any criticism of them or their map would not be seen or heard by members of the public attending in person or watching the video feed of the public hearing.

Legislators claimed the restrictions on speech were created to protect the rights of citizens watching

the video feed who were unable to participate in real time via videoconference, by prohibiting in person spoken comments by citizens who had taken the time and effort to physically attend the public hearing. Petitioner believes that was simply a pretext and that the true motivation behind the restrictions on speech was to shield legislators from public criticism and prevent any groundswell of opposition that might arise if awareness of the discriminatory nature of the map spread among the public.

VII. U.S. Supreme Court has the Power to Review Acts of Government Agencies

In this case the Secretary of Commerce Wilbur Ross wanted to reinstate the citizenship status question to the Decennial Census form. He claimed it would aid in the enforcement of the Voting Rights Act. However, the U.S. Supreme court found that the stated reason was just a pretext.

See Dept. of Commerce v. New York, 139 S. Ct. 2551 (2019):

We now consider the District Court's determination that the Secretary's decision must be set aside because it rested on a pretextual basis . . . Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision . . . And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived . . . Reasoned decision making under the Administrative Procedure Act calls

for an explanation for agency action. What was provided here was more of a distraction.

The legislature enacted Local Law 6-2022 on 27 May 2022, just days before the redistricting process commenced in early June 2022. They claimed the reason in person spoken comments were prohibited by Local Law 6, was that they did not have the technology needed to facilitate real time participation by video-conference. However, that explanation appears to be a contrived and premeditated effort to shield legislators from public criticism and expedite the enactment of the reapportionment.

See Reply.App.1a which is a candidates list for Rockland County in the upcoming November 2023 general election. The eight candidates for county legislature who are running unopposed are circled, and seven of these are incumbents. Then see Reply.App.7a which is a list of the members of the Rockland County Legislatures Special Committee on Redistricting. Five members of the Committee, whose names are circled, are also running unopposed in November. Elana Yeger is listed as Legislative Staff, because she served as Counsel for the Redistricting Committee. She is also Counsel to the Rockland County Legislature and apparently drafted Local Law 6-2022. She was also married to Itama Yeger, who was also member of the Redistricting Committee, and is currently running unopposed in Legislative District #4.

This all creates the appearance that the imposition of the restrictions on in person spoken comments, of Local Law 6, upon the public hearings was not to protect the rights of people watching the video feed, but rather to shield legislators on the Redistricting Committee from public criticism, and to ensure that

the reapportionment would be enacted as quickly and smoothly as possible.

VIII. Respondents Arguments on Standing are Irrelevant

Respondents statement that because the Court found Petitioner had no standing to challenge the reapportionment, his other claims no longer have any merit, is erroneous. See Opp.Br.2-3.

The two questions Petitioner presented in his Writ of Certiorari dealt with the First Amendment and judicial disqualification. The Court never found that Petitioner did not have standing to challenge the constitutionality of the two public hearings. As a resident of Rockland County petitioner obviously has standing to assert that his First Amendment rights were violated when he was prohibited from providing in person spoken comments at the public hearings on the reapportionment.

In *McCrory v. Vill. of Mamaroneck Bd. of Trustees*, the lower court found that members of the public did not have standing to challenge a violation of the open meetings law. However, the Appellate Division reversed that decision stating:

If the analysis and determination of the Supreme Court were allowed to stand, a petitioner/plaintiff would have to demonstrate an additional personal damage or injury to his or her civil, personal, or property rights in order to assert a violation of the Open Meetings Law . . . Such a requirement or condition would undermine, erode, and emasculate the stated objective of this statute.

McCrory v. Vill. of Mamaroneck Bd. of Trustees, 2020 NY Slip Op. 00864 (2d Dept. Feb. 5, 2020).

Furthermore, Petitioner filed his Motion for Recusal with the Court prior to the first court appearance and Justice Eisenpress then denied it from the bench with no explanation. The judge later dismissed Petitioner's entire case, ruling that he had no standing of any kind, not even for the district he resides in, because she claimed he had failed to state a cause of action. This was despite Petitioner's pleadings that explained in detail how the configuration of his home district violated the law and harmed him as a resident of the Village of Wesley Hills. These pleadings from his Verified Petition of 8 Dec 2022 are included in the Appendix of his Writ of Certiorari on pages App.94a-98a. In light of the fact that pro se pleadings are to be liberally construed and defects ignored, a read of those pages will show that Petitioner did state a cause of action regarding his home district and has standing to challenge its configuration.

Justice Eisenpress also ruled that Petitioner did not have standing to challenge districts he did not live in, nor districts in which minorities were being denied an equal opportunity to participate in the electoral process, despite the fact that Article III Section 5 of the NYS Constitution clearly states:

An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen.

And that NY Municipal Home Rule Law Section 34 subdivision 4 states:

... any plan of ...redistricting adopted pursuant to a county charter ... shall be

subject to federal and state constitutional requirements.

This was despite case law from 2022 involving a successful challenge to the reapportionment of the congressional and state senate districts, upheld by the New York State Court of Appeals, that stated citizens were harmed by the configuration of districts they did not live in, and districts in which minorities were denied an equal opportunity to participate, even if the plaintiff was not a member of the minority group.

Gerrymandering discrimination hurts everyone because it tends to silence minority voices. Then none of us receives the benefit from the input of the silenced.

Matter of Harkenrider v Hochul, 76 Misc 3d 171, 173 (Sup Ct, Steuben County 2022).

Justice Eisenpress' ruling that Petitioner had no standing whatsoever, despite his pleadings and the cited law and cases above, indicates that her decision was based on pressure from the local political apparatus rather than on the merits, and validates his motion for recusal.

IX. Petitioners Quest

Respondents also claimed that Petitioner is on a "ceaseless quest to become an elected official", See Opp.Br.2, a refrain they have echoed at every level of the courts. However, this is either an erroneous assumption or a disingenuous assertion. In truth Petitioner has been on a ceaseless quest to fight the rampant corruption that rules the roost in Rockland County and threatens to destroy our democratic system of government and its institutions. Every single time

Petitioner ran for office he was well aware that the odds of victory were long. He ran simply to uphold the integrity of our electoral process.

Respondents state that Petitioner has run for office on many different party lines, as if this somehow diminishes the validity of his legal challenge. *See* Opp.Br.2. To the contrary, it is a testament to the fact that the two-party system in Rockland County has broken down and party affiliation is essentially meaningless.

For all the reasons above Petitioner respectfully requests that the Court grant the Writ of Certiorari.

Respectfully submitted,

Michael Parietti
Petitioner Pro Se
6 Spook Rock Road
Suffern, NY 10901
845-504-7715
spookrock@gmail.com

October 17, 2023

**REPLY BRIEF APPENDIX
TABLE OF CONTENTS**

Rockland County Candidate List for the
November 7, 2023 General Election Reply.App.1a

Members of the Rockland County Legislature
Special Committee for Redistricting Reply.App.7a

**ROCKLAND COUNTY CANDIDATE
LIST FOR THE NOVEMBER 7, 2023
GENERAL ELECTION**

Justice of the Supreme Court, 9th Judicial District	(Vote for 4) 14 Year Term
Democratic	Francesca E. Connolly
Democratic	Charley Wood
Democratic	Rolf M. Thorsen
Democratic	Larry J. Schwartz
Republican	John A. Sarcone III
Republican	Karen A. Ostberg
Republican	Susan M. Sullivan-Bisceglia
Republican	John Ciampoli
Conservative	Francesca E. Connolly
Conservative	Charley Wood
Conservative	Rolf M. Thorsen
Conservative	Larry J. Schwartz

District Attorney	(Vote for 1) 4 Year Term
Democratic	Thomas E. Walsh II
Republican	Thomas E. Walsh II
Conservative	Thomas E. Walsh II

Reply.App.2a

Sheriff	(Vote for 1) 4 Year Term
Democratic	Louis Falco III
Conservative	Louis Falco III

Family Court Judge	(Vote for 1) 10 Year Term
Democratic	Christopher Exias
Conservative	Christopher Exias
Working Families	Christopher Exias

County Legislator District 1	(Vote for 1) 4 Year Term
Republican	Douglas J. Jobson
Conservative	Douglas J. Jobson

County Legislator District 2	(Vote for 1) 4 Year Term
Democratic	Paul C. Cleary
Republican	Ronny Diz
Conservative	Paul C. Cleary

County Legislator District 3	(Vote for 1) 4 Year Term
Democratic	Jay Hood Jr.
Conservative	Jay Hood Jr.

Reply.App.3a

County Legislator District 4	(Vote for 1) 4 Year Term
Democratic	Itamar J. Yeger
Conservative	Itamar J. Yeger

County Legislator District 5	(Vote for 1) 4 Year Term
Democratic	Patricia Halo
Republican	Lon M. Hofstein
Conservative	Lon M. Hofstein

County Legislator District 6	(Vote for 1) 4 Year Term
Democratic	Alden H. Wolfe

County Legislator District 7	(Vote for 1) 4 Year Term
Democratic	Philip Soskin
Republican	Avrohom Yankelewitz
Conservative	Philip Soskin

County Legislator District 8	(Vote for 1) 4 Year Term
Democratic	Toney L. Earl Sr.
Conservative	Toney L. Earl Sr.

Reply.App.4a

County Legislator District 9	(Vote for 1) 4 Year Term
Republican	Raymond W. Sheridan III
Conservative	Raymond W. Sheridan III

County Legislator District 10	(Vote for 1) 4 Year Term
Democratic	Beth Davidson
Republican	Ray Francis
Conservative	Ray Francis
Working Families	Beth Davidson

County Legislator District 11	(Vote for 1) 4 Year Term
Democratic	David R. Bruen
Republican	Will Kennelly
Conservative	Will Kennelly
Working Families	David R. Bruen

County Legislator District 12	(Vote for 1) 4 Year Term
Democratic	Jesse Malowitz
Republican	Ariel Dahan
Conservative	Ariel Dahan
Working Families	Jesse Malowitz
End Corruption	Charles J. Falciglia

Reply.App.5a

County Legislator District 13	(Vote for 1) 4 Year Term
Democratic	Aron B. Wieder
Conservative	Aron B. Wieder

County Legislator District 14	(Vote for 1) 4 Year Term
Democratic	Aney Paul
Conservative	Aney Paul

County Legislator District 15	(Vote for 1) 4 Year Term
Democratic	Joel Friedman
Republican	Elye Kramer
Conservative	Joel Friedman
Infrastructure	Elye Kramer

County Legislator District 16	(Vote for 1) 4 Year Term
Democratic	Daniel A. Johnson
Republican	Thomas F. Diviny
Conservative	Thomas F. Diviny

Reply.App.6a

County Legislator District 17	(Vote for 1) 4 Year Term
Democratic	Dana Stilley
Republican	James J. Foley
Conservative	James J. Foley
Working Families	Dana Stilley

**MEMBERS OF THE
ROCKLAND COUNTY LEGISLATURE
SPECIAL COMMITTEE FOR REDISTRICTING**

Members of the Special Committee

Hon. Harriet D. Cornell

Hon. Toney L. Earl

Hon. Michael M. Grant

Hon. Lon M. Hofstein

Hon. Douglas J. Jobson

Hon. John W. McGowan

Hon. Aney Paul

Hon. Philip Soskin

Hon. Vincent D. Tyer

Hon. Alden H. Wolfe

Hon. Itamar J. Yeger

Legislators Grant and Wolfe co-chair the committee

RESOURCES

Rockland County Planning Department

Douglas Schuetz, Director of GIS

Michael D'Angelo, Director of Research

Board of Elections

Kathleen Pietanza, Commissioner

Patricia Giblin, Commissioner

Consultant

Phillip D. Chonigman, GeoPolitical Strategies

Legislative Staff

Laurence O. Toole, Clerk to the Legislature

Mary Widmer, Deputy Clerk to the Legislature

Elana L Yeger, Esq.

Alejandra Silva-Exias, Esq.

Patrick Withers

Darcy Greenberg

Robin Brooks



SUPREME COURT
PRESS