SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

HOWARD LEIB, SUSAN LERNER, ERIC WALKER AND ELEANOR MORETTA	:	Index No. 4275/2014
Petitioners,	:	
-against-	:	
JAMES A. WALSH, DOUGLAS A. KELLNER, ANDREW J. SPANO and GREGORY P. PETERSON, in their official capacities as COMMISSIONERS OF THE NEW YORK STATE BOARD OF ELECTIONS, and THE NEW YORK STATE BOARD OF ELECTIONS,	:	
Respondents.	:	

BRIEF FOR AMICUS CURIAE CITIZENS UNION OF THE CITY OF NEW YORK IN SUPPORT OF RESPONDENTS

Citizens Union of the City of New York ("Citizens Union") submits this amicus brief in support of the Respondents and in opposition to the Petitioners' claims for relief in the above-captioned proceeding

INTEREST OF AMICUS CURIAE

Citizens Union is an independent, nonpartisan organization dedicated to making democracy work for all New Yorkers. Citizens Union serves as a civic watchdog, combating corruption and fighting for political reform. One of America's first good government groups, Citizens Union was founded in 1897 to fight the corruption of Tammany Hall, and, in 1901, Citizens Union helped elect Seth Low as the first reform mayor of the City of New York. In its long history as a watchdog for the public interest and advocate for the common good, Citizens

Union has spearheaded efforts for campaign finance reform, improved voting procedures, City Charter revisions, home rule for New York City, and fair representation. By informing the policy debate, Citizens Union works to ensure fair and open elections, honest and efficient government, and a civically-engaged public. Based on its belief that an informed citizenry is the cornerstone of a thriving democracy, Citizens Union Foundation – affiliated with Citizens Union – publishes *Gotham Gazette*, a front row seat to New York City policies and politics.

Citizens Union has a strong interest in this proceeding. Because the redistricting process is so fundamental to voters' ability to freely choose their representatives, Citizens Union has devoted significant resources to research of the current system in New York and to its reform. Citizens Union convened a landmark forum on redistricting, in April 2006, bringing together civic and business leaders, elected officials and experts in the area of voters' rights to explore ways to put an end to partisan gerrymandering in New York. The organization published a comprehensive study in 2011 showing the impact of New York's redistricting process on elections. Citizens Union testified at many of the New York State Senate and Assembly hearings regarding redistricting reform that preceded passage of the concurrent resolutions in 2012 and 2013 to amend the New York State Constitution's redistricting provisions. Citizens Union also testified at hearings of the Legislative Task Force on Demographic Research and Reapportionment on the legislature's proposed 2012 district lines. As part of a process initiated by the New York State Board of Elections (the "Board of Elections") to solicit comments from good government groups – both those opposed to and those in favor of the proposed redistricting amendment – Citizens Union and the League of Women Voters of New York State (the "League of Women Voters"), along with the Petitioners, submitted comments to the Board of Elections for an open, public commissioners' meeting on August 1, 2014.

PRELIMINARY STATEMENT

This case involves a challenge to the wording of a ballot measure slated to appear this November 4 that asks voters to decide whether to amend the New York Constitution to change the way legislative district lines are drawn. That change is needed is beyond dispute. New York State's current method of drawing district lines substantially reduces competition for legislative seats. While elections are supposed to offer voters a choice in their representation, New York State legislative elections typically return incumbents to Albany with little or no competition. In fact, New York's state legislature has one of the highest incumbency re-election rates in the nation – a staggering 96%. Under the current system, New York's legislators draw their own legislative district maps, manipulating district lines to suit their political aims and partisan interests. The ballot wording at issue in this case puts before the voters an amendment designed to end partisan redistricting. Citizens Union believes the wording of the ballot question succeeds in capturing amendment's purpose and its effect fairly and accurately.

The Petitioners allege that the ballot language at issue in this proceeding fails to meet the drafting standards of Section 4-108 of the New York State Election Law and violates Section 8 of Article VII of the New York State Constitution, which bars state expenditures to advance private undertakings. But the Petitioners fail to show how the Board of Elections's language falls short of the statutory standard, and their allegations that the Board of Elections has worded the ballot question to induce a positive vote on the amendment are unsupported.

The proposed constitutional amendment is a comprehensive piece of legislation with several interrelated elements that work together to create reform. The Petitioners chose to focus the court's attention on just one provision, the establishment of an independent redistricting commission, ignoring two crucial components of the amendment, a provision that

makes it *unconstitutional* to draw district lines to favor incumbents,a particular candidate or a political party, and a provision that establishes a wide range of procedures to ensure an open public process for arriving at a redistricting plan and an expedited legal review for citizens. When the amendment is reviewed in its entirety it becomes clear that the ballot language accurately captures the constitutional scheme.

In arriving at wording to capture this constitutional plan, the Board of Elections followed a process that was sound in its openness and its exercise of accountability. It obtained draft language from the New York State Attorney General, in compliance with the requirements of Section 4-108 of the Election Law, and then solicited the comments of good government groups both opposed to and in favor of the amendment, including Common Cause and Citizens Union. A plain reading of the ballot language demonstrates that the Petitioners' conclusion that the Board of Elections worded the ballot question to induce positive votes is entirely without merit.

ARGUMENT

Section 4-108 of the Election Law governs how constitutional amendments and other ballot questions are to be presented to the public. The statute directs the Board of Elections to transmit a certified copy of the actual text of a proposed amendment to each of the county boards of election in the state. N.Y. Election Law § 4-108 (1)(a). In addition to sending the text, the Board of Elections prepares and sends an abstract of the amendment stating its purpose and effect. *Id.* at § 4-108 (1)(d). This abstract is for education of the public but does not appear on the ballot. The Board of Elections also prepares the wording of the question that appears on the ballot and delivers it to the county boards. The law requires the Board of Elections to write the ballot proposition "in a clear and coherent manner using words with common and every-day

meanings," and to obtain the advice of the New York State Attorney General. *Id.* at § 4-108(2), (3).

Courts have set forth common sense principles for determining whether ballot language complies with Election Law § 4-108 (2). Ballot provisions may not be misleading, illegal, confusing or inconsistent with existing law. *Matter of Gaughan v. Mohr*, 77 A.D. 3d 1475, 909 N.Y.S.2d 408 (4th Dep't 2010). The Board of Elections "must exercise its own independent judgment and discretion, and it is under no legal duty to accept the advice of the Attorney General." *Snyder v. Walsh*, 41 Misc.3d 1213(A) at *5, 980 N.Y.S.2d 278 (Sup. Ct. Albany Cnty 2013) (Board of Elections acted within its legal authority when it added favorable statement about economic impact of casino gambling to ballot text proposed by Attorney General). The fact that a proposition can arguably be worded in a different way does not invalidate a proposition so long as the Board of Elections describes the proposed amendment accurately and in understandable terms. *Schultz v. N.Y.S. Bd. of Elections*, 254 A.D.2d 224, 632 N.Y.S.2d 226 (3d Dep't 1995) (approving ballot proposal regarding constitutional amendment revising state's ability to raise debt).

The Board of Elections prepared the following ballot language for transmission to the county boards of elections:

> The proposed amendment to sections 4 and 5 and addition of new section 5-b to Article 3 of the State Constitution revises the redistricting procedure for state legislative and congressional districts. The proposed amendment establishes an independent redistricting commission every 10 years beginning in 2020, with two members appointed by each of the four legislative leaders and two members selected by the eight legislative appointees; prohibits legislators and other elected officials from serving as commissioners; establishes principles to be used in creating districts; requires the commission to hold public hearings on proposed redistricting plans; subjects the commission's redistricting plan to legislative enactment; provides that

> the legislature may only amend the redistricting plan according to the established principles if the commission's plan is rejected twice by the legislature; provides for expedited court review of a challenged redistricting plan; and provides for funding and bipartisan staff to work for the commission. Shall the proposed amendment be approved?

The Petitioners object to the use of the word "independent" on the ballot, and in the abstract, to describe the redistricting commission. The Petitioners' complaint suffers from two infirmities. First, the phrase "independent redistricting commission" comes from the proposed amendment itself. This is the language the legislature chose, not the Attorney General or the Board of Elections. (A copy of the proposed amendment is attached as Exhibit 1.) It is disingenuous to argue to the court that a ballot proposal incorporating wording from the amendment is misleading or inaccurate. If the Petitioners object to the word "independent" on the ballot or in the abstract, their argument is with the amendment itself and they should take their case to the voters, not the judiciary branch. They should not invoke the authority of the courts as a substitute for political action.

Second, the phrase "independent districting commission" is completely accurate. The amendment prohibits anyone who is, or has within the preceding three years been, a state legislator, an employee of the legislature, a state elected official, a lobbyist, or the spouse of a state official or legislator, from serving on the commission. Once appointed the commissioners are not removable. (Proposed amendment at §5-b (b).) And the commission's procedures and actions are governed by the rules and standards set down in the constitution.

The petitioners also object to the Board of Elections's decision to revise a clause drafted by the Attorney General, which described the legislature as "the default redistricting body if the commission's plan is not legislatively enacted." The Board of Elections replaced it with a clause, suggested by Citizens Union and the League of Women Voters, stating that the

"legislature may only amend the redistricting plan according to the established principles if the commission's plan is rejected twice by the legislature."

This language accurately describes the amendment. The redistricting process established under the amendment consists of several interlocking components, none of which stands alone. These are: binding standards that outlaw partisan gerrymandering, open and public procedures that give New Yorkers across the state opportunities to engage in the process, and a politically balanced commission whose redistricting plan cannot be amended by the legislature unless the legislature twice fails to approve plans submitted by the commission. If the legislature twice fails to approve commission plans, the legislature may then work from the commission's plan to develop its own plan, but that plan must comply with the amendment's substantive restrictions, including its anti-gerrymandering rules.[1] The description proposed by the Attorney General as the "default" redistricting body was incomplete because it did not inform voters of these components of the amendment. In any event, the current ballot description is completely accurate.

With respect to the anti-gerrymandering standards, the amendment provides that districts "shall not be drawn to discourage competition or for the purpose of favoring or disfavoring incumbents of other particular candidates or political parties." (*Id.* at §4(c)(5).) It codifies in the constitution the racial, language and minority group protections of the federal Voting Rights Act. (*Id.* at §4(c)(1).) It introduces sound, proven, nonpartisan districting principles: Each district shall consist of contiguous territory (*id.* at 4(c)(3)); each shall be compact (*id.* at §4(c)(3); each shall contain as nearly an equal number of inhabitants as possible

[1] Under a statute enacted with passage of the redistricting amendment resolution, the legislature may not start from scratch and may not deviate from the commission's plan by more than two percent of the population of any district. Redistricting Reform Act of 2012, Legislative Law §§ 93 & 94.

(*id.* at §4(c)(2). For each district that deviates from an equal number of inhabitants, the commission must provide a specific public explanation. (*Id.*)

With respect to the requirement of transparency, the commission must conduct a minimum of twelve public hearings across the state. (*Id.* at § 4(c).) At least thirty days in advance of the first hearing, it must make its draft redistricting plans and relevant data widely available to the public "in a form that allows and facilitates their use by the public to review, analyze, and comment upon such plans and to develop alternative redistricting plans for presentation to the commission at the public hearing." (*Id.*) The commission must report the findings of its public hearings to the legislature upon submitting the redistricting plan. (*Id.*)

With respect to the composition of the commission, because each of the four legislative leaders appoints two members, the commission will be politically balanced, providing equal representation to both political parties. (*Id.* at § 5-b(a).) This stands in stark contrast to the current situation where the majority party in each house controls redistricting for that house. Two additional slots on the commission must be filled by the eight already appointed, and these must be filled by individuals who are not enrolled in either major political party. (*Id.*) No legislators, lobbyists or other political figures may serve on the commission. (*Id.*)

At the end of the process, the commission presents the plan to the legislature for enactment. The legislature must vote on the plan without changing it – only an up or down vote is permitted. (*Id.* at 4b(b).) If the legislature does not pass the plan, the commission prepares a second plan. (*Id.*) Only if that plan also fails to win approval can the legislature act, and even then it must work from the commission's plan, and must comply with the new rules established in the constitution. (*Id.*). Under a new statute enacted with the legislature's amendment

resolution, the legislature may not deviate from the commission's plan by more than two percent of the population of any district. Redistricting Reform Act of 2012, Legislative Law §§ 93 & 94.

In their First Claim for Relief, the Petitioners complain that the Board of Directors violated Election Law § 4-108's drafting requirements (coherence and clarity; words with common every day meanings) because it replaced the Attorney General's description of the legislature as "the default redistricting body if the commission's plan is not legislatively enacted" with a clause the Petitioners characterize as more complicated advocacy language designed to confuse and mislead the voters. But this is a bare allegation that is not supported. In the context of the complex interplay of multiple provisions in the amendment's redistricting plan, the Attorney General's description was incomplete and imprecise because it did not inform voters that the legislature would have to consider two separate redistricting plans by the commission before it would be able to offer its own plan, its plan would have to be based on the commission's plan, and any change to the commission's plan would have comply with all of the constitutional amendment's provisions. The Board of Elections's description is less misleading, not more, than the one the Petitioners' advocate because it more fully explains the process the amendment would create. It also replaces the adjective "default," a word whose common and everyday meaning is not apparent, with a description of the actual role of the legislature under the amendment. The Board of Elections acts within its authority when it exercises it own independent judgment and discretion and departs from wording suggested by the Attorney General. *Snyder v. Walsh*, 41 Misc. 1213(A) at *5, 980 N.Y.S.2d 278 (Sup. Ct. Albany Cnty 2013). And so long as the Board of Elections's phrasing is accurate, understandable, and concise, the fact that it could have been worded in some other way is irrelevant. *Schultz v. N.Y.S. Bd. of Elections*, 214 A.D.2d 224, 230-31, 632 N.Y.S.2d 226 (3d Dep't 1995).

For all of these reasons, Citizens Union respectfully urges the Court to decline to issue an order declaring the Board of Elections's ballot proposition and abstract in violation of Election Law § 4-108 or the State Constitution, or enjoining the Board of Elections from disseminating the ballot proposition and abstract or including the proposition as written on the ballot on November 4, 2014.

Dated: New York, New York
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By: _____

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