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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 BELINDA DE GAUDEMAR, *et al.*,

4 Plaintiffs,

New York, N.Y.

5 v.

22 Civ. 3534 (LAK)

6 PETER S. KOSINSKY, *et al.*,

7 Defendants.

8 -----x

9 May 4, 2022

10 10:40 a.m.

11 Before:

12 HON. LEWIS A. KAPLAN,

13 U.S. District Judge

14 APPEARANCES

15 EMERY CELLI BRINCKERHOFF & ABADY, LLP

16 Attorneys for Plaintiffs

17 BY: ANDREW G. CELLI, JR.

18 -AND-

19 ELIAS LAW GROUP LLP

20 BY: ARIA BRANCH

CHRISTINA FORD

21 NEW YORK STATE BOARD OF ELECTIONS

22 BY: BRIAN L. QUAIL

23 BY: TODD D. VALENTINE

24 TROUTMAN PEPPER HAMILTON SANDERS, LLP

Attorneys for Proposed Intervenors: Tim Harkenrider, et al.

25 BY: BENNET J. MOSKOWITZ

BY: MISHA TSEYTLIN

M545degC - Corrected

(Case called)

THE DEPUTY CLERK: Counsel, for plaintiff, are you ready? Please place your appearances on the record.

MR. CELLI: I am Andrew Celli for plaintiffs. I am here today with my colleagues from the Washington firm of the Elias Law Group, Christina Ford and Aria Branch.

MS. BRANCH: Good morning, your Honor. My name is Aria Branch from the Elias Law Group.

MS. FORD: Good morning, your Honor. My name is Christina Ford also from the Elias Law Group.

THE COURT: Good morning.

THE DEPUTY CLERK: Counsel for defendants, are you ready?

MR. QUAIL: Yes, your Honor. I am Brian Quail representing the New York State Board of Elections.

MR. VALENTINE: And Todd Valentine, also representing New York State Board of Elections.

THE COURT: Good morning.

THE DEPUTY CLERK: Counsel for proposed intervenors, are you ready?

MR. MOSKOWITZ: Yes. Good morning, your Honor. Bennet Moskowitz, Troutman Pepper. Here with me is my law partner Misha Tseytlin from our Chicago office.

THE COURT: Good morning.

Judge Livingston has designated a three-Judge panel in

M545degC - Corrected

1 accordance with 28 U.S. Code 2284(b)(1) by appointing, in
2 addition to myself, Circuit Judges Sullivan and Nardini. We
3 are here this morning solely on the temporary restraining order
4 application and not on any of the matters which, under the
5 statute, can be decided only by the three-Judge panel.

6 Ms. Branch, it is your application so you can go to
7 the lectern where you will have the luxury of taking your mask
8 off.

9 MS. BRANCH: Thank you, your Honor. My colleague
10 Christina Ford will be arguing today.

11 THE COURT: All right.

12 Ms. Ford, before you get into your argument I want to
13 go through some of what I understand to be the timeline and the
14 questions that the timeline raises, just so I can see whether
15 we are all on the same page.

16 I take it to be the plaintiff's starting point that
17 there is a June 28th primary date fixed pursuant to the second
18 decretal paragraph of Judge Sharpe's injunction in the Northern
19 District on January 7, 2012, which is applicable unless and
20 until New York enacts legislation resetting the
21 non-presidential federal primary for a date that complies with
22 all UOCAVA requirements and is approved by the Northern
23 District of New York.

24 Is that an agreed proposition?

25 MS. FORD: Yes, your Honor.

M545degC - Corrected

1 THE COURT: OK.

2 So it seems to me we have at least the following
3 questions: We now have an August 23rd primary date purportedly
4 set on remand from the New York Court of Appeals by and the New
5 York Supreme Court in Steuben County, and the questions whether
6 there is a conflict between the Northern District date -- the
7 June date -- and the August date set by the state court turns
8 on whether the August date was first-enacted New York
9 legislation, whether the dates for the August date comply with
10 UOCAVA requirements, and whether the dates set by Judge
11 McAllister in Steuben County have been approved by the Northern
12 District under the 2012 injunction.

13 Do we agree so far, counsel?

14 MS. FORD: Yes, your Honor.

15 THE COURT: So I suppose a question is whether, within
16 the meaning of the injunction in Albany 10 years ago, the
17 resetting of the presidential primary by the Steuben County
18 Court constituted the enactment of legislation by New York;
19 second, whether the dates in the reset order comply with
20 UOCAVA; and whether it has been approved by the Northern
21 District. And I think we can eliminate the last question
22 because, obviously, it hasn't been.

23 We agree that the other two questions are issues or
24 not?

25 MS. FORD: Your Honor, can you restate your first

M545degC - Corrected

1 issue, please?

2 THE COURT: Whether the resetting of the primary date
3 by the Steuben County Judge recently, the August date, is the
4 enactment by New York of legislation resetting the presidential
5 federal primary as required by the Northern District injunction
6 in 2012.

7 MS. FORD: Your Honor, no, I do not think when Steuben
8 County attempted to change the primary date that that was what
9 this order was contemplating. As I read it, it says unless and
10 until New York enacts legislation. That usually has a fairly
11 particular meaning "enacts legislation." And, as defendants
12 pointed out in their papers -- and they're correct on this --
13 New York did enact legislation in 2019 setting the federal
14 primary as the fourth Tuesday in June. However, they never
15 went back to Judge Sharpe to seek approval to get out of the
16 injunction which is the second key contingent part of Judge
17 Sharpe's order.

18 THE COURT: Yes, but we are getting away. You dispute
19 whether Judge McAllister's order is or may be treated as an
20 enactment by New York legislation. I understand that that's an
21 issue. Do the dates in Judge McAllister's order comply with
22 your UOCAVA requirements?

23 MS. FORD: Your Honor, technically on paper if you
24 calculate it, it is theoretically possible to comply with
25 UOCAVA with an August 23rd primary. However, I would point you

M545degC - Corrected

1 to the findings before Judge Sharpe when he put this injunction
2 on place that said --

3 THE COURT: On a 10-year-old record.

4 MS. FORD: That is true, it is 10 years old, but your
5 Honor I don't know that the facts on the ground have
6 meaningfully changed that would make an August primary workable
7 now.

8 THE COURT: I don't either, and it would seem to me as
9 the applicant for some pretty extraordinary equitable relief
10 the burden of showing that the dates set in Steuben County
11 could not be achieved consistent with UOCAVA. I am just trying
12 to get the shape of the battlefield here. We are preparing the
13 battlefield. We know it is not approved by the New York court,
14 I know your position there is a legislative enactment. Now,
15 common ground, I think that decretal paragraph 13 of the 2012
16 order provides that the Northern District of New York retains
17 jurisdiction in that case, among other things, to ensure
18 additional relief as appropriate. Yes?

19 MS. FORD: Yes, your Honor.

20 THE COURT: And I take it it is also undisputed that
21 the Northern District Court for the June primary dates in 2014,
22 2016, and 2018 altered the state's political calendar so that
23 the elections -- the primary elections could be held on the
24 June date. Yes?

25 MS. FORD: Yes. That's correct, your Honor.

M545degC - Corrected

1 THE COURT: And that wasn't even a matter of
2 controversy.

3 MS. FORD: No.

4 THE COURT: And that Court, quite apart from the
5 retention of jurisdiction in decretal paragraph 13, has
6 authority within certain constraints to modify the 2012
7 injunction if it concludes that the requirements are satisfied,
8 yes?

9 MS. FORD: Yes. I agree with that, your Honor.

10 THE COURT: OK. Now I will let you get started.

11 MS. FORD: Thank you, your Honor.

12 Your Honor, I just want to clarify what I believe we
13 are here to talk about and what is at issue, what is not at
14 issue. What is not at issue here is whether the New York Court
15 of Appeals was right or wrong in striking down New York's
16 Congressional maps, but what is at issue is what happens as a
17 result of that order which left New York with no map in place
18 to conduct its elections. I understand we likely need to talk
19 about this June 28th primary date more, but if the Court agrees
20 with us that that is the date unless Judge Sharpe says
21 otherwise and New York gets approval from him --

22 THE COURT: Well, I don't see why that necessarily
23 follows, does it. You have an order of a state court saying
24 that the date is in August and you have a 10-year-old order
25 that contains a formula to select the date and the formula

M545degC - Corrected

1 comes out to June 28th. That's what's undisputed, right?

2 MS. FORD: Your Honor, our read of this is that this
3 was a permanent injunction setting the date that could only be
4 changed with the Court's approval.

5 THE COURT: Well, I understand it says that, yes. So
6 you have got a federal court order which, as you read it -- and
7 I don't think is a controversy -- purports to set the date as
8 June 28th and a state court order that says it is August 23rd.

9 MS. FORD: Yes, your Honor.

10 Traditionally, when federal and state law conflict on
11 an issue like this, federal law would trump it, particularly
12 where a federal election is at issue.

13 THE COURT: Well, why haven't you gone back to Judge
14 Sharpe and sought a modification or appropriate relief that
15 would enable New York to do what its Court of Appeals has said
16 is necessary?

17 MS. FORD: That is a good question, your Honor.

18 THE COURT: I thought it might be.

19 MS. FORD: We are not parties to Judge Sharpe's --
20 that original lawsuit. The State Board of Elections is and,
21 frankly, this case is about more than just the primary dates,
22 it is about the fact that New York does not have a map in
23 place.

24 THE COURT: Believe me, I understand that.

25 MS. FORD: I appreciate that.

M545degC - Corrected

1 And so, this is a very different case than what was --

2 THE COURT: If Judge Sharpe were to say -- in the
3 unusual and certainly unforeseen circumstances -- I'm allowing
4 the State to change the date on a showing that they can do so
5 consistent with UOCAVA, this whole case vanishes into thin air;
6 right?

7 MS. FORD: I agree with that, your Honor. If the
8 State Board of Elections went back before Judge Sharpe and he
9 signed off on the August 23rd primary date, yes, I think this
10 case would go away but the status quo --

11 THE COURT: And if you went back to Judge Sharpe and
12 he took the same action, that's also true, yes?

13 MS. FORD: Well, your Honor, we believe the June
14 primary date is technically what is in effect given this order
15 and that the state court order essentially has no effect given
16 that it does conflict.

17 THE COURT: Suppose it is, right? And suppose the
18 State goes ahead and makes the primary August 23rd and complies
19 with UOCAVA. What happens next?

20 MS. FORD: Your Honor --

21 THE COURT: The State gets redistricted, UOCAVA
22 notices go out, the absentee ballots are solicited. They come
23 in, are tabulated, the election is held. What happens?

24 MS. FORD: Your Honor, I think that's a best case
25 scenario but not likely, given the record that was before Judge

M545degC - Corrected

1 Sharpe.

2 THE COURT: I didn't ask you what is likely given the
3 record before Judge Sharpe 10 years ago -- which can't possibly
4 bear directly on what's going on now. It just can't. The
5 facts were all different so address my question, please.

6 MS. FORD: Your Honor, if they did that I think they
7 would be out of compliance with the federal court order.

8 THE COURT: And then what's going to happen?

9 MS. FORD: Your Honor, only federal courts can do
10 anything about this.

11 THE COURT: So you think the Department of Justice
12 will charge the State Board of Elections with contempt of
13 court?

14 MS. FORD: I certainly hope that DOJ takes action.
15 They're not here today, so we are.

16 THE COURT: I'm sorry. So what?

17 MS. FORD: We are here on behalf of UOCAVA voters who
18 are among our plaintiffs.

19 THE COURT: Whose rights would be protected if the
20 primary date was changed until August 28th and UOCAVA were
21 complied with.

22 MS. FORD: Yes, your Honor. I just think that "if" is
23 a very big question.

24 THE COURT: Well, you would have to prove to me that
25 it can't happen. Not that maybe it won't happen, that it can't

M545degC - Corrected

1 happen.

2 MS. FORD: Your Honor, I realize the record before
3 Judge Sharpe is 10 years old. The core elements, though, of
4 conducting a primary, the steps that have to take place both
5 before and after have not changed in those 10 years. After a
6 primary the results have to be certified. Just in 2020, for
7 example, there was a six-week delay in certifying the primary
8 results before counties could put together a ballot for the
9 general election. If that kind of delay happened under an
10 August 23rd primary, or even anything nearly like it --

11 THE COURT: What evidence shows that that's likely to
12 happen in 2022?

13 MS. FORD: Frankly, your Honor, I think the State
14 Board of Elections would admit that recounts, certification
15 disputes are very normal practice.

16 THE COURT: I imagine they might admit that they
17 happened, on occasion. 2020 is in fact possibly not a very
18 useful comparator for reasons that everyone in this room
19 understands, not least being that it was a presidential
20 election which the president announced would be fraudulent if
21 he didn't win.

22 MS. FORD: Your Honor, I think the record before this
23 Court also demonstrates that New York is struggling to comply
24 with UOCAVA even under a June primary date. We have submitted
25 to the Court an affidavit from one of our plaintiffs, Susan

M545degC - Corrected

1 Schoenfeld, who is a UOCAVA voter and who has told this Court
2 that in recent years she has not gotten her UOCAVA ballot on
3 time and neither has her friends living overseas and so,
4 consequently, they have a regular practice of having to request
5 emergency ballots from the federal government. And this has
6 been --

7 THE COURT: So the State is responsible for foreign
8 postal services, are they?

9 MS. FORD: No, your Honor. But that's why there is
10 supposed to be that 45-day grace period. That's the exact
11 reason for it.

12 THE COURT: Well, the 45-day grace period is almost
13 infinitely variable under UOCAVA.

14 MS. FORD: Yes, your Honor, but it is a pretty wide
15 grace period, and if ballots are not reaching --

16 THE COURT: Look. The statute says that the 45-day
17 grace period applies only with respect to ballots that are
18 requested at least 45 days before the election and there is a
19 hardship exemption available to the State. Under 20302(g) that
20 applies if the State can show that the time tables couldn't be
21 met because of a legal contest.

22 Would you say we are having a legal contest in New
23 York right now?

24 MS. FORD: Yes, your Honor. I think not the one that
25 that statute is contemplating. I believe that statute is

M545degC - Corrected

1 contemplating when there is a necessary recount or an actual
2 dispute over which candidate won the primary.

3 THE COURT: It doesn't say that.

4 MS. FORD: It doesn't say that though I think that was
5 the intent.

6 THE COURT: Well, how am I supposed to get to that
7 intent? By psychoanalyzing the members of the legislature or
8 the Board of Elections?

9 MS. FORD: No, your Honor. But I would also say here
10 that New York has not sought a hardship exemption and has not
11 been granted one.

12 THE COURT: Not yet.

13 MS. FORD: Not yet.

14 THE COURT: They may not need it at all.

15 MS. FORD: I would say, though, that today --

16 THE COURT: There is an August election, they have
17 plenty of time to request it.

18 MS. FORD: Your Honor, as we see the facts on the
19 ground, what is in place today is Judge Sharpe's June 28th
20 order and today is the day to certify the ballot if that
21 election is going to proceed timely. I realize there are still
22 questions that may need to be sorted out but to the extent that
23 Judge Sharpe's order is still in effect, which I believe it is,
24 this Court really needs to take action today if it is going to
25 retain the possibility of New York complying with that order.

M545degC - Corrected

1 THE COURT: Well, this Court can't do anything today
2 except freeze the status quo until a three-Judge Court can hear
3 a preliminary injunction.

4 MS. FORD: Well, I believe your Honor could order the
5 New York State Board of Elections to certify the primary ballot
6 today. Under a TRO that would then be later heard by the
7 three-Judge court.

8 THE COURT: You are looking for a mandatory injunction
9 right, against a government agency, and you have to show clear
10 likelihood of success, don't you?

11 MS. FORD: Yes, your Honor.

12 THE COURT: You better start convincing me that there
13 is a clear likelihood of success.

14 MS. FORD: Your Honor, we realize that that is an
15 extraordinary remedy but I think we have extraordinary
16 circumstances here. I understand that is it possible that New
17 York could go to DOJ, get the hardship waiver; could the State
18 Board of Elections go back to Judge Sharpe and get permission.

19 THE COURT: Why couldn't you? You are here telling me
20 that you are representing the interests of the UOCAVA voters
21 and trying to ensure that they have the best possibility of
22 casting meaningful ballots in the primary election, and you are
23 telling me in order to do that you are unwilling to go to the
24 District Court in Albany and ask them to permit the date set by
25 the State of New York to go forward and to have the State

M545degC - Corrected

1 re-districted in a constitutional manner so that your clients
2 will not only be able to cast ballots and have them counted,
3 but to have them be cast in districts that are not, as a matter
4 of law, malapportioned.

5 MS. FORD: Your Honor, I agree it would have been, in
6 theory, a cleaner solution to go before Judge Sharpe. We were
7 not parties to that lawsuit and there is no private right of
8 action under UOCAVA to enforce the statute which we think
9 potentially poses a real hurdle for us to enforce that and that
10 is why we are here.

11 THE COURT: But you wouldn't be asking him to enforce
12 the statute, you would be asking him to modify his injunction
13 or to grant limited relief under the decretal paragraph and you
14 would undoubtedly, I suspect, be supported by the State Board
15 of Elections.

16 MS. FORD: Your Honor, it is in our client's -- my
17 plaintiffs' interest -- that New York conduct its elections as
18 early as possible so that they will receive their ballots on
19 time. They do not believe they will receive their ballots on
20 time for the August primary.

21 THE COURT: Let's be frank. This is a Hail Mary pass,
22 the object of which is to take a long shot try as having the
23 New York primaries conducted on district lines that the State
24 says are unconstitutional.

25 That's what it is. No?

M545degC - Corrected

1 MS. FORD: Your Honor, with all due respect, I believe
2 that New York has put itself in this position in striking down
3 a map and having no remedy on the date by which they are
4 supposed to certify the ballot.

5 THE COURT: So you really are contesting the decision
6 of the New York Court of Appeals.

7 MS. FORD: I am not, your Honor. I am not contesting
8 the substantive decision. I am -- not contesting -- I am
9 stating that they had a responsibility when they did that to
10 set an order, a remedy that would allow New York to conduct
11 timely elections and they failed to do that. And under a host
12 of federal precedent that I can give you, when a state fails to
13 do that, federal courts have to step in.

14 THE COURT: OK. Anything else?

15 MS. FORD: No, your Honor. Not at this time.

16 THE COURT: Where is the irreparable injury if nothing
17 is done until the three-Judge court can consider the injunction
18 motion?

19 MS. FORD: Yes, your Honor.

20 So my understanding is that if the New York State
21 Board of Elections doesn't start that process today of
22 certifying the ballot for a June primary, these deadlines just
23 slip by and slip by and at some point it is not feasibly -- it
24 is not administratively possible to conduct a June primary and
25 then we just slip into the land of an August primary. And so,

M545degC - Corrected

1 if this Court were to issue a TRO at least stating that the map
2 that all the candidates petitioned under, that voters signed
3 petitions under, that is was, until a few days ago, in place to
4 be used in New York and essentially is already loaded up and
5 ready to go, if all this Court does is say you need to keep
6 moving ahead and assume there is a June election, if the
7 three-Judge Court agrees with you then great, New York will be
8 in a good position to conduct that June primary. If the
9 three-Judge Court disagrees with this Court, the Steuben
10 process will have continued. We are not asking this Court to
11 tell Steuben County that it has to stop everything it's doing
12 and the State could proceed with an August election. But I
13 think if this Court lets deadlines slip by --

14 THE COURT: How is the public interest served by my
15 issuing a TRO today that, no matter what I say, will be
16 construed as at least requiring the preservation of the
17 possibility of a June 28th primary on the basis of
18 unconstitutionally drawn district lines while the state's
19 position is it is not a June 28 -- June whatever the date is --
20 primary, it is an August 23rd primary, and that's what we are
21 preparing for and we are going to be redistricting the state in
22 the meantime. I'm hard pressed as to see how the confusion
23 created by setting that process in motion serves anybody's
24 interest.

25 MS. FORD: Your Honor, I think all it would be is what

M545degC - Corrected

1 you said it is -- preservation -- so that New York could
2 conduct a June primary if that is what it is supposed to do,
3 what we believe it is supposed to do. I realize that the
4 ultimate remedy we are seeking is not ideal. I would say there
5 are no ideal remedies on the table at this point.

6 THE COURT: It is not just that it is not ideal, it is
7 unconstitutional and it is unnecessary.

8 MS. FORD: Your Honor, I agree it is unnecessary. I
9 think we should have never come to this point. I think that
10 New York had time.

11 THE COURT: As of today it's unnecessary.

12 MS. FORD: Your Honor, I respectfully disagree, but.

13 THE COURT: OK.

14 All right. I will hear from the other side.

15 MR. QUAIL: Good morning, your Honor. I'm Brian Quail
16 of the New York State Board of Elections.

17 THE COURT: Question number one for you, sir.

18 MR. QUAIL: Yes, sir.

19 THE COURT: Why haven't you gone back to Judge Sharpe?

20 MR. QUAIL: We should have.

21 Your Honor, one of the things I would --

22 THE COURT: How fast can you do it?

23 MR. QUAIL: One day.

24 THE COURT: OK.

25 MR. QUAIL: Judge McAllister's order came down on the

M545degC - Corrected

1 29th. This action was commenced a few days ago. And in
2 contemplating whether or not to go forward, we do think there
3 was some ambiguity as to whether or not that application would
4 be necessary and we also felt that if we had proceeded while
5 this matter was proceeding in front of your Honor, that that
6 may have been offensive to this Court in terms of sorting out
7 some of these issues.

8 The context of Judge Sharpe's order, your Honor, was a
9 September primary under state law that was clearly not
10 compliant with UOCAVA. The primary was actually held typically
11 just days before the 45 days before the general election
12 deadline to send the ballots out.

13 THE COURT: And that was 2012.

14 MR. QUAIL: Yes, sir. And so, the State Board of
15 Elections was sued by the Department of Justice and they
16 prevailed in getting Judge Sharpe to make an order initially
17 that the state's primary date in September was not
18 UOCAVA-compliant. Judge Sharpe asked the State of New York,
19 via the New York State Board of Elections, to submit a singular
20 plan for a UOCAVA-compliant primary. The State Board of
21 Elections did not accomplish that; we submitted two plans
22 because the board was split.

23 The Department of Justice did not take a position as
24 between the August plan and the June plan, but the Judge looked
25 at both plans and determined that, on balance, the June plan

M545degC - Corrected

1 was the better one and it culminated in the order that your
2 Honor discussed, at length, with counselors for the plaintiffs.

3 Where we find ourselves today is clearly a situation
4 that, 10 years on, simply would not have been anticipated by
5 Judge Sharpe. Indeed, the State of New York, after three
6 cycles of needing judicial intervention by the Northern
7 District, actually in 2019 enacted the fourth Tuesday in June
8 as the singular state primary for federal and state elections
9 and proceeded in 2020 on the basis of that legislation with no
10 intervention from the federal court required at all.

11 So, having this permanent June primary in state law,
12 the state had sort of moved on from this order except not so
13 much because of the very odd circumstance that we find
14 ourselves in presently where we need a different primary date
15 in order to comply with the mandate of the Court of Appeals to
16 conduct Congressional elections on constitutionally sound
17 lines. In accordance with that requirement, the Steuben County
18 Supreme Court ordered an August 23rd primary and specifically
19 ordered that ballots for that primary be sent in compliance
20 with the MOVE Act. So the primary itself would be
21 MOVE Act-compliant and the Court of Appeals, in its order,
22 specifically mandated that in implementing any remedy, that all
23 provisions of federal law -- and they single out UOCAVA -- must
24 be complied with. The state is committed to that.

25 The deadline to transmit ballots before the general

M545degC - Corrected

1 election, your Honor, under federal law, is the 24th day of
2 September. The state is committed to completing its
3 post-election processes in time to meet that deadline without
4 making a hardship waiver and, indeed --

5 THE COURT: Don't you think it might be a good idea to
6 try to wear a belt and suspenders and make such an application?

7 MR. QUAIL: I will tell you, your Honor, we have
8 learned since 2012 that it is fruitful to be in communication
9 with our colleagues in Washington on all matters related to
10 election administration that can threaten, potentially, the
11 transmission of UOCAVA ballots. When we see a scenario
12 developing, it is our protocol to talk to persons in the voting
13 rights section of the Department of Justice and seek their
14 counsel. Technically the application for a hardship waiver
15 goes to the Department of Defense but the Department of Justice
16 is consulted on those instances.

17 Our plan at the State Board is to monitor all
18 activities related to post-election canvassing and ensure that
19 they unfold in a manner which will ensure the full and complete
20 rights of all UOCAVA voters under both federal and
21 complimentary and consistent state law. That is our
22 commitment, that is what we do year in and year out, and we
23 take the responsibility incredibly seriously, as do all of New
24 York's County Board of Elections. And in this context, my
25 colleague for the plaintiffs mentioned an instance where we had

M545degC - Corrected

1 a six-week post-election count in one congressional district.
2 As your Honor may well be aware, the time to do work will often
3 equal the work to be done. In the context of a June primary,
4 it is absolutely true there is more time to deal with
5 post-election activities, exigency is less. So on that
6 particular matter it took six weeks. There was six weeks. In
7 the end, as I recall, that matter was resolved in August and
8 there was no issue with ballots flowing in a timely manner for
9 that congressional district. If that particular recount was
10 under tighter constraints, then the Court would need to move
11 more quickly. And if for some unforeseen and, in our view,
12 likely unacceptable reason it took too long, we would be
13 watching it as it unfolded and would seek the appropriate
14 hardship waiver if the Court ordered an injunction against
15 sending out ballots in a timely manner. That's our job and we
16 take it very seriously.

17 I would very much, your Honor, like to point out in
18 the declaration of the UOCAVA voter Susan Schoenfeld which was
19 mentioned by my colleague when she argued, that there is no
20 statement in that affidavit that alleges any violation of
21 UOCAVA by the State of New York. She simply says she didn't
22 get her ballot. She did not allege that it was requested
23 before 45 days, she did not allege that it was not timely
24 transmitted. There is no allegation whatsoever that points out
25 the reason why she did not get her ballot. And as your Honor

M545degC - Corrected

1 pointed out, there are instances where a ballot transmitted, by
2 mail, by the County Boards of Elections in New York, will
3 sometimes not get to a voter and it has absolutely nothing to
4 do with the failing of the New York State Board of Elections
5 nor anything to do with a violation of the 45-day transmittal.
6 Indeed, we certify to the Department of Justice that we have
7 fully complied with the transmittal -- the 45-day transmittal
8 requirement and if there is any deviations for errors that a
9 County Board of Election or something like that, we report to
10 the Department of Justice any instance where the state has
11 failed to transmit a UOCAVA voter ballot timely and counsel
12 with them for any remedial actions that should be taken to
13 remedy those situations. This is a paramount and important
14 function of the election administration system in New York to
15 ensure that UOCAVA is complied with, and there is no allegation
16 here that we have not done so.

17 THE COURT: Counsel, would your client commit to
18 applying to Judge Sharpe for leave to change the primary date
19 and supporting an application for that relief by the plaintiffs
20 in this case?

21 MR. QUAIL: We would commit, your Honor, to making
22 that application by close of business tomorrow.

23 THE COURT: OK.

24 MR. QUAIL: I just want to make sure I understood what
25 I just committed to because there were a few words that you

M545degC - Corrected

1 said that I didn't quite hear.

2 We would be committed to making an application to
3 Judge Sharpe in relation to the August 23rd primary date and
4 anything that he would need to see from us to ensure that he
5 was satisfied that the provisions of federal law under UOCAVA,
6 and otherwise, are complied with.

7 THE COURT: And would you consent to the intervention
8 of these plaintiffs before Judge Sharpe on such an application?

9 MR. QUAIL: I -- we would, yes.

10 THE COURT: Anything else?

11 MR. QUAIL: No, your Honor.

12 THE COURT: Nobody has formally moved to intervene but
13 in the interest of time I will hear from Mr. Moskowitz, without
14 prejudice, to ultimately acting on an intervention motion.

15 MR. MOSKOWITZ: Thank you, your Honor.

16 Before I go up, two things. One is we did, as of last
17 night, formally file for intervention, and also I would
18 respectfully request -- and I don't believe this is at all
19 different from some of plaintiffs' counsel -- I request that
20 Mr. Tseytlin, my colleague, be permitted to speak. His *pro hac*
21 application is in process, we just didn't have time to get
22 every certificate required.

23 THE COURT: Yes, sure.

24 MR. MOSKOWITZ: Thank you.

25 THE COURT: OK.

M545degC - Corrected

1 Mr. Tseytlin.

2 MR. TSEYTLIN: Thank you, your Honor. I will be
3 brief. I just want to make three brief points.

4 First, I think it is clear that their TRO application
5 is now moot. We have pointed out in our opposition that they
6 have only challenged -- and there are two counts in this
7 case -- the 2012 map which has already been enjoined in state
8 court. They seemingly --

9 THE COURT: But it is not moot, is it? Because it may
10 be moot as to those two specific claims but the prayer for
11 relief asks for an order directing the defendants to certify a
12 primary ballot under a plan adopted by this Court and so forth,
13 and given the factual allegations of the complaint, I'm not
14 sure that that's not still alive.

15 MR. TSEYTLIN: Well, your Honor, in order to obtain a
16 TRO they have to have likelihood of success on their claims.
17 Their two claims are moot. Now, the reason I say their TRO is
18 now procedurally defective is because --

19 THE COURT: Look. I don't know that this matters all
20 that much here but the complaint, at least arguably, alleges
21 facts as distinguished from legal theories and some specific
22 claims for relief that might support an application for an
23 order along the lines I just indicated to you, and my
24 obligation is not only to rule on the legal sufficiency of the
25 specific claims they make but, in order to dismiss the case, I

M545degC - Corrected

1 have to be clear in my mind -- and I can't dismiss it anyway --

2 MR. TSEYTLIN: Yes.

3 THE COURT: -- I and the three-Judge panel would have
4 to be clear in their minds that given the facts alleged, the
5 request for an order requiring certification of the ballots for
6 the election -- maybe ballots is not the right word in this
7 context but you know what I am driving at, the primary
8 ballot -- that's theoretically alive, isn't it?

9 MR. TSEYTLIN: Well, your Honor, the reason -- I will
10 answer that but the reason I raise this point only because they
11 attempted to amend their complaint this morning. They sought
12 the TRO in their prior complaint. Their new complaint moots
13 the TRO, it is binding Second Circuit case law. So that's the
14 only point I was trying to make, is that the TRO request is now
15 procedurally gone because they amended their complaint after
16 filing their TRO.

17 THE COURT: Well, I haven't seen the amended complaint
18 and I don't know what it says therefore. But unless they've
19 withdrawn the request for an order such as I have recapitulated
20 to you, I don't see how it is moot.

21 MR. TSEYTLIN: Your Honor, after this hearing *Shields*
22 *v. Citytrust*, 25 F.3d 1124, 1128, the amendment of a complaint
23 renders the PI sought under the prior complaint moot.

24 THE COURT: So what you want me to do here, where
25 there is allegedly this temporal emergency, is now to have them

M545degC - Corrected

1 file a new TRO application based on the second complaint and
2 start this all over again so that you can come up from
3 Washington -- or wherever you come from -- and we can all do
4 this again. Is that about the size of it?

5 MR. TSEYTLIN: No, your Honor. I am just pointing out
6 a jurisdictional defect in there but I understand your Honor's
7 point. Let me just move on to my two other brief points.

8 THE COURT: Always a good idea to get to what matters.

9 MR. TSEYTLIN: Second, they are asking for your Honor
10 to do something today and they said just to put a pause that
11 would create chaos in what is currently an orderly system. The
12 orderly system is that the Steuben County court will adopt a
13 remedial congressional map by May 20th. Everybody knows that
14 that will be the map that will govern the election and everyone
15 is getting ready for that. If there is any sort of order from
16 this Court there is going to be chaos. No one is going to know
17 if there is going to be a primary on the 28th in August, what's
18 going to be the map, there will be emergency applications to
19 the U.S. Supreme Court. It would turn an orderly process into
20 a chaotic process.

21 Finally -- and I will be brief on my final point -- is
22 their only authority for what they're asking your Honor to do,
23 their cited authority, is what the three-Judge panel is
24 currently doing in Ohio. What the three-Judge panel did is, in
25 Ohio, it gave the State of Ohio until the 28th of May to get

M545degC - Corrected

1 its act together and have a constitutional map that the State
2 enacts which is the state's responsibility and the right under
3 the U.S. Supreme Court decision of *Grove*. That's the 28th.

4 The Steuben County court will adopt a constitutional
5 map that can be used for the 2022 elections by the 20th, eight
6 days before what their lead authority has allowed another state
7 to do. Clearly there is no equity that would support their
8 request.

9 That's all that I wanted to say to your Honor.

10 THE COURT: Thank you.

11 Does plaintiff wish to be heard in rebuttal in any
12 respect?

13 MS. FORD: Yes, your Honor. Very quickly.

14 THE COURT: Briefly.

15 MS. FORD: Your Honor, I have just a few short points.

16 I believe the State of New York when they say that
17 they fully intend to comply with UOCAVA. I don't think any
18 elections official intends to violate the statute but, in
19 reality, that is what happened before and can happen. Just to
20 walk you through some of the things that need to happen
21 before -- or in between a primary and a general election there
22 needs to be a canvass, a re-canvass, an audit, counties need to
23 design the ballot, they have to translate that ballot into all
24 the languages that are required under the Voting Rights Act,
25 they have to proof the ballot, send the ballots to the

M545degC - Corrected

1 printers, get those ballots back, stuff them and send them out
2 to voters. That is a lot of work to do. And, even if
3 elections officials don't intend to violate UOCAVA, they very
4 well may under the schedule that New York is attempting to
5 proceed under.

6 Your Honor, I also say that -- I mean, I can tell that
7 this Court is not completely comfortable with the remedy that
8 we have suggested. I don't think any Court relishes the idea
9 of instituting a map or suggesting that a state should go
10 forward on a map that has been invalidated but that is, in
11 fact, what is happening in multiple states all around the
12 country when that state has run out of time to redistrict.
13 And, I do think that the State of Ohio is a very good example
14 here. In that three-Judge Court there was an evidentiary
15 hearing there where the Court took in tons of testimony about
16 what the state could and could not do. It ultimately decided
17 that --

18 THE COURT: Where are your witnesses?

19 MS. FORD: Your Honor, we would -- again, we did not
20 bring witnesses here today to prove to you anything about what
21 New York can or cannot do because we think that the June 28th
22 primary order is in effect. It is just plainly in effect. And
23 so the burden is on the State of New York to go to that Court
24 and prove that it can get out of that order. I think the
25 burden is on them to do that.

M545degC - Corrected

1 So, your Honor, at the end of the day, if you are not
2 willing to grant our TRO, would I ask that you at least order
3 the New York State Board of Elections to go do that and go seek
4 that approval and I think it would be --

5 THE COURT: I have just got a commitment on the record
6 that they're going to do it by tomorrow.

7 MS. FORD: Great. Well, we appreciate that.

8 In the interim, given that that process is likely to
9 take at least a few days, I would think, I think it would be
10 prudent for this Court to order the New York State Board of
11 Elections to proceed so that if Judge Sharpe does not give them
12 permission to change the primary, that New York is in a good
13 position to conduct its June primary.

14 THE COURT: If Judge Sharpe does not give them
15 permission you have an appeal to the Court of Appeals.

16 MS. FORD: OK. Thank you, your Honor.

17 THE COURT: Thank you.

18 I have before me a motion for a temporary restraining
19 order and a preliminary injunction in relation to the
20 redistricting of New York's congressional districts for the
21 congressional election in 2022. New York, in 2014, I
22 believe -- but I may stand corrected on the date -- adopted a
23 constitutional amendment setting up a procedure for
24 congressional redistricting and, indeed, possibly state
25 districts as well but that's extraneous to this application,

M545degC - Corrected

1 and I think it is not unfair to say that the constitutionally
2 required system for bipartisan redistricting didn't work as it
3 was supposed to work and, in consequence, litigation began in
4 the state courts and last week, as everyone knows, the New York
5 Court of Appeals held, possibly to the surprise of some people
6 but nonetheless held that the congressional districts that
7 ultimately were adopted by the legislature and signed by the
8 governor were not constitutionally adopted and I believe also
9 not constitutionally apportioned.

10 I think I am right about that. Am I, counsel? Yes.
11 I'm seeing affirmative nods from counsel.

12 The Court of Appeals sent the case back from whence it
13 came to Justice McAllister in Steuben County, New York, with
14 instructions to adopt a plan, probably for an August primary
15 and consistent with federal requirements, including in
16 particular a statute with the snappy acronym of UOCAVA, which
17 is admirably intended to ensure that overseas and military
18 personnel otherwise entitled to vote are able to apply for,
19 receive, cast, and have counted, their votes in federal
20 elections. Everybody agrees that's the objective to be
21 achieved if it can be. The New York Court of Appeals order
22 made clear that in whatever the Steuben County proceedings
23 ultimately adopt, those federal guidelines are to be complied
24 with.

25 Now, we indulge in a little bit of history.

M545degC - Corrected

1 Years ago New York, according to the Department of
2 Justice, was not wholly successful in discharging its
3 obligations under UOCAVA and the related statute. The Justice
4 Department brought suit in 2010. The result of that was an
5 injunction issued by the U.S. District Court in the Northern
6 District of New York, specifically Judge Gary Sharpe, that was,
7 in almost every respect, aimed at the 2012 elections. In as
8 much as the parties could not agree on a plan for the future, a
9 paragraph of Judge Sharpe's order provided that in future
10 elections in even numbered years -- and I refer to the second
11 decretal paragraph, and the title and docket number of the case
12 is *United States v. State of New York*, 10 civil 1214 -- in
13 future non-presidential federal elections in even-numbered
14 years, the primary date would be the fourth Tuesday of June,
15 unless and until New York enacts legislation resetting the
16 non-presidential federal primary election for a date that
17 complies fully with all UOCAVA requirements and is approved by
18 that court.

19 Over the years, the State proceeded with the specified
20 June dates but, in fact, it repeatedly went back to Judge
21 Sharpe for alterations in the state's political calendar and
22 other phases of the election law, to facilitate holding those
23 primary elections in a manner consistent with state law, and
24 without exception, Judge Sharpe granted all of those
25 applications. Concededly, they were all unopposed, but they

M545degC - Corrected

1 were all granted and they are suggestive of the availability or
2 at least possible availability of accommodations with respect
3 to the new primary date that in consequence of the Court of
4 Appeals decision last week Judge McAllister, in Steuben County,
5 has adopted.

6 I would note also in respect of Judge Sharpe's 2012
7 injunction that paragraph 13 provides that his court retains
8 jurisdiction to ensure additional relief, as appropriate, so it
9 is perfectly clear that it is open to both sides to apply to
10 Judge Sharpe for whatever relief they think is necessary in
11 order to accommodate what the state courts have done, and the
12 June primary date that currently applies under Judge Sharpe's
13 10-year-old order, rendered in entirely different circumstances
14 on an evidentiary record which is 10 years or more old, and
15 directed to achieving compliance with UOCAVA which would be the
16 objective of an application to him for leave to have the state
17 operate with respect to the state court set August date,
18 everybody agrees on what the goal is and the question is how to
19 make it happen. And, obviously, I don't speak for Judge
20 Sharpe, we all paddle our own canoes, quite appropriately, and
21 he will do what he thinks is right and necessary. And, the
22 State Board of Elections has committed to applying to him for
23 permission, no later than tomorrow, to proceed with the August
24 date. They have consented to the intervention of the
25 plaintiffs in this case to be heard on that application. The

M545degC - Corrected

1 plaintiffs here have made what, in my mind, are almost wholly
2 unsubstantiated claims, that there would be no way to comply
3 with UOCAVA in connection with the August date set by Judge
4 McAllister.

5 There is a phrase that I have heard used in relation
6 to the tech industry, the phrase is airware. You simply assert
7 that you have a product coming out but you don't actually have
8 the product. That is kind of an apt characterization on the
9 plaintiff's position on UOCAVA compliance vis-à-vis an August
10 primary. Did the State of New York, in the years prior to
11 2012, miss deadlines? I imagine they did. I think the record
12 before Judge Sharpe -- though I have only had this case for 24
13 hours and I'm not intimately familiar with the record in that
14 case -- probably supported that. Does that mean that in 2022
15 the State can't comply under an August primary date? It is a
16 fallacy. It is complete fallacy. It just doesn't follow.
17 Maybe the plaintiffs are right, maybe they're wrong, but there
18 is no evidence before me to suggest that they're right.

19 Now, not only is there the availability of an
20 application to Judge Sharpe, which would entirely eliminate
21 this problem were he to see things the way the Board of
22 Elections indicates that it will ask him to see things, there
23 is another course that is still open to the State and the other
24 course comes under UOCAVA, and specifically 52, United States
25 Code, Section 20302. 20302(a)(2) requires mailing of absentee

M545degC - Corrected

1 ballot applications at least 30 days before the election. If
2 the election were to be held on June 24, that date would be May
3 25th. I gather there are some other things that would have to
4 happen first before that took place, but if the mailing would
5 have to happen on May 25th for a June 24 primary, there is
6 oodles of time to comply with the 30-day mailing of
7 applications in advance of an August date. Then the statute
8 goes on to provide, in 52302(a)(8)(B), that except as provided
9 in 20302(g), ballots requested 45 or more days before an
10 election -- and if we were operating on a June 24 date that
11 would mean before May 14 -- must be mailed at least 45 days
12 before the election. Ballots for requests received less than
13 45 days before the election must be mailed -- and I am
14 summarizing briefly what the statute says -- essentially, as
15 required by state law and as soon as practicable. But all of
16 that is subject to the exemption in 20302(g) which provides for
17 the availability, in an appropriate case, for a hardship
18 exemption from this timetable at the behest of the State if the
19 State convinces the presidential authority that it can't meet
20 those timetables in a number of circumstances, most salient of
21 which is if that the reason for not being able to reach or to
22 comply with the timetables is based on the existence of a legal
23 contest. That, it seems to me, obviously has potential
24 application here because we have had a legal contest going on
25 for some time in the state courts and it continues and we now

M545degC - Corrected

1 have this case going on and it is -- there is just no clear
2 reason to believe that the UOCAVA requirements can't be met for
3 the August date. It is far from clear that the Northern
4 District of New York would not accommodate the August date.
5 And, the Northern District of New York has ample jurisdiction
6 and availability to do that.

7 So in all of the circumstances, I'm going to deny the
8 TRO. Now, in *Favors v. Cuomo*, 881 F.Supp.2d 356, another
9 redistricting case, the Court wrote that in order to justify a
10 preliminary injunction, a motion must demonstrate irreparable
11 harm absent injunctive relief, either a likelihood of success
12 on the merits, or a serious question going to the merits to
13 make them a fair ground for trial with the balance of hardships
14 tipping decidedly in the plaintiff's favor, and that the
15 public's interest weighs in favor of granting an injunction.
16 The plaintiff agrees that that's the standard on a TRO
17 application. I should note also that in footnote 8 of the
18 *Favors* decision, the three-Judge Court there wrote that it was
19 hardly clear that the movants could rely on the serious
20 questions prong of the test because a party seeking to enjoin
21 governmental action taken in the public interest pursuant to a
22 statutory or regulatory scheme cannot rely on that branch even
23 if it seeks to vindicate a sovereign or public interest. That
24 doubt was well-founded and I think is now the law in the Second
25 Circuit and has been for some years. But the standard doesn't

M545degC - Corrected

1 really matter here because the plaintiff, in my view, failed
2 the likelihood of success or on substantial questions.

3 In either event, whether the right word here is
4 ripeness or not, it gets at one concept that is critical, and
5 that is that without knowing whether the Northern District
6 injunction in *United States v. State of New York* would in fact
7 stick to a June date, I don't see how there is anything that
8 this Court can properly decide. If that Court accommodates the
9 State's new schedule, there is really no question here, I
10 think.

11 So the plaintiffs' fail on the likelihood of success
12 standard. They fail on that standard for another reason and it
13 is one to which I alluded already. It seems to be critical to
14 their argument, at least judging by what I heard this morning,
15 that despite all of the words in the Court of Appeals -- and I
16 am speaking of the New York Court of Appeals decision -- and, I
17 believe, in Judge McAllister's subsequent order about having a
18 redistricting plan adopted that would satisfy all of the UOCAVA
19 requirements and the other federal requirements that may apply
20 in connection with an August primary the State would not
21 satisfy them. There is absolutely no persuasive evidence
22 before me to suggest that that's true. There is just no
23 evidence. So, they fail the likelihood of success standard for
24 at least two reasons.

25 Now let me say a word about the public interest. I

M545degC - Corrected

1 yield to no one on the importance of the right to vote and the
2 right to have every legal vote counted and the principle of one
3 man, one vote, and that's what both the Courts of the State of
4 New York and the federal courts have sought to achieve, lo
5 these many years of judicial involvement in redistricting.
6 They're likely to be involved in it for years to come now that
7 the Supreme Court has taken the view that they're out of this
8 business for good or for ill. But what the plaintiffs are
9 really seeking to do is one of two things -- or maybe both.
10 What they really want in this case is sought along the
11 following path of reasoning:

12 First, the June 24th primary is carved in stone.
13 Nothing can change it. It came down on a stone tablet in the
14 middle of the Negev or wherever Moses brought the tablet down
15 from on high. They say that there is not enough time now to
16 hold that primary on districts drawn by this Court which, if
17 the timing were different, would be possible and it has
18 happened before, but there isn't enough time and I surely do
19 agree with that. And therefore, they say, this Court should
20 order that the primary be held on June 24th because that's
21 immutable and that it be held on the improperly gerrymandered
22 districts -- gerrymandered as held by the New York Court of
23 Appeals which is the last word on state law and it was done on
24 state law grounds -- on the gerrymandered districts that are
25 illegal. And if I got the arithmetic wrong I will correct it

M545degC - Corrected

1 in the transcript. And they want to do this not only ignoring
2 that their requested districts were improperly gerrymandered
3 districts, they want to do it without any regard for the chaos
4 that they are asking me to trigger. If I order the Board of
5 Elections to certify the ballot based on the gerrymandered
6 districts for the purpose of holding a primary on June 24th and
7 the State is proceeding, as it has every right to do and as the
8 plaintiffs concede they have the right to do, is engaged in a
9 redistricting of the state with a view to an August 24th
10 primary, what are people supposed to do? What are candidates
11 supposed to do? What are voters supposed to do? What are all
12 the people who are concerned with elections supposed to do?

13 Now, I would be hard pressed to imagine a scenario
14 that would cast into greater disrepute the rationality, the
15 fairness, the consistency of the holding of elections in this
16 great country than to precipitate that and it is against the
17 public interest. It is decidedly against the public interest.
18 And I'm simply rejecting the application and it also brings
19 disrepute on the judicial system. There is a perfectly orderly
20 way to deal with this problem, it is to go back to Judge Sharpe
21 and, if need be, to the Second Circuit. I doubt very much it
22 will be necessary but that's, as I said, Judge Sharpe's canoe
23 to paddle.

24 And if I could just add a personal note to this, it is
25 102 years since my father, then a Ukrainian refugee, came to

M545degC - Corrected

1 this country. And if there were two things that he drilled
2 into my head they were, apart from the usual hard work and all
3 of that, the two political things: Free, open, rational
4 elections; respect for the courts. The relief I am being asked
5 to give today impinges, to some degree, on the public
6 perception of both and I am not going to do it.

7 That is my ruling. I may conceivably write something,
8 but once I read the transcript I may conclude it is not
9 necessary to do that. I reserve the right to make grammatical
10 and other error corrections in the transcript but that will be
11 transparent if I do that.

12 Did I get any facts wrong?

13 MR. TSEYTLIN: So, your Honor, I don't know if you
14 meant to say malapportioned and then do it numbers -- the lines
15 were declared substantively unconstitutional for being -- for
16 being unconstitutional gerrymanderers, not being malapportioned
17 in terms of the number of voters per district.

18 THE COURT: Does everybody agree with that?

19 MR. QUAIL: I do. Yes.

20 THE COURT: OK. I will correct that in the
21 transcript. But it is clear that they are malapportioned, is
22 it not, by virtue of the fact that New York only has 26
23 representatives?

24 MR. TSEYTLIN: So the map that was --

25 THE COURT: Strike that.

M545degC - Corrected

1 The legislature's map has 26 -- right. OK, I take
2 your point. You are right, they were unconstitutional
3 procedurally and they were politically gerrymandered.

4 MR. TSEYTLIN: That's right, your Honor.

5 THE COURT: That's the correct statement. I accept
6 that.

7 OK. Anything else?

8 MS. FORD: No, your Honor.

9 MR. QUAIL: Not for the State Board, your Honor; no.

10 THE COURT: Did I misstate any principle of law that
11 ought to be corrected while I can?

12 MR. QUAIL: No, your Honor.

13 THE COURT: No? OK.

14 Look. I appreciate nobody wanted to come to New York.
15 Here we are, the greatest city in the world and nobody wanted
16 to be here, and as somebody who has, for various reasons for a
17 great many years, gotten back and forth without any material
18 difficulty at all between New York City and Washington and New
19 York City and Albany, I thought this case was important enough
20 that you all ought to be here. I know it was inconvenient, but
21 there is nothing like being in a face-to-face situation.

22 Thanks, folks.

23 o0o