To be Argued by:
CRAIG R. BUCKI
(Time Requested: 10 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

TIM HARKENRIDER, GUY C. BROUGHT, LAWRENCE CANNING, PATRICIA CLARINO, GEORGE DOOHER, JR., STEVEN EVANS, LINDA FANTON, JERRY FISHMAN, JAY FRANTZ, LAWRENCE GARVEY, ALAN NEPHEW, SUSAN ROWLEY, JOSEPHINE THOMAS, AND MARIANNE VOLANTE,

Petitioners-Respondents,

– against –

GOVERNOR KATHY HOCHUL, LIEUTENANT GOVERNOR AND PRESIDENT OF THE SENATE BRIAN A. BENJAMIN, SENATE MAJORITY LEADER and PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS, SPEAKER OF THE ASSEMBLY CARL HEASTIE, NEW YORK STATE BOARD OF ELECTIONS, AND THE NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH and REAPPORTIONMENT,

Respondents-Respondents.

Docket No.: CAE 22-00895

THE PARENT PARTY OF NEW YORK,

Intervenor-Appellant,

TYRRELL BEN-AVI, MARK BRAIMAN, UPSTATE JOBS PARTY and UNITE NEW YORK,

Intervenors.

BRIEF FOR RESPONDENTS-RESPONDENTS SENATE MAJORITY LEADER and PRESIDENT PRO TEMPORE OF THE SENATE ANDREA STEWART-COUSINS and SPEAKER OF THE ASSEMBLY CARL HEASTIE

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QUESTION PRESENTED, AND ANSWER OF THE TRIAL COURT

1. Q. Did the Parent Party, Gavin Wax, and the other Intervenors-Appellants ("Appellants") timely move to intervene in this special proceeding, which began over three months before they filed their motion?

A. The Trial Court did not answer this question, to which the correct answer is, "No." R. 12.

PRELIMINARY STATEMENT

Respondents-Respondents Speaker of the Assembly Carl Heastie (the "Speaker") and Senate Majority Leader Andrea Stewart-Cousins (the "Senate Majority Leader") join in the Briefs filed on July 6, 2022, on behalf of Respondents-Respondents Governor Kathy Hochul and the New York State Board of Elections in opposition to this appeal. The Speaker and the Senate Majority Leader submit this Brief, however, to emphasize that Appellants' motion to intervene before the Trial Court was untimely. For that reason, in addition to the reasons articulated by the other Respondents, this Court should affirm the Trial Court's denial of the motion.

STATEMENT OF FACTS

A. The Independent Nomination Process

Like the laws of other States, the New York Election Law distinguishes between organizations that are political parties, and those that are not. N.Y. ELEC. LAW §§ 1-104(3), 1-104(12). The difference is public support: an organization qualifies as a political party if its candidate for Governor received a certain minimum number of votes on the party's line in the last gubernatorial election in 2018, and its candidate for President of the United States also received a certain minimum number of votes on the party's line in the last Presidential election in 2020. *Id.* § 1-104(3). At the current time, four organizations are qualified as political parties in New York: the Democratic Party, the Republican

Party, the Conservative Party, and the Working Families Party. The Parent Party is not qualified as a political party; rather, the Election Law would classify the Parent Party as an "'independent body,'" *viz.*, an "organization or group of voters which nominates a candidate or candidates for office to be voted for at an election, and which is not a party as herein provided." *Id.* § 1-104(12).

Candidates can run for office as nominees of political parties or independent bodies. To run for office as a political party's nominee, a candidate generally must receive sufficient designating-petition signatures to appear on the party's primary ballot. N.Y. ELEC. LAW § 6-118. With a few exceptions, the primary winner appears on the general-election ballot as the party's nominee. *Id.* § 6-110.

To run for office as the nominee of an independent body such as the Parent Party, a candidate must receive a certain number of voter signatures on the that body's "independent nominating petition." N.Y. ELEC. LAW § 6-138. The signature-collection period is six weeks long; this year, it began on April 19 and ended on May 31. *Id.* §§ 6-138(4), 6-158(9). For statewide offices, including the governorship, 45,000 valid signatures are required. *Id.* § 6-142(1). These 45,000 signatures must include valid signatures of voters residing in at least 13 different Congressional districts, with at least 500 valid signatures from each of those 13 districts. *Id.* Candidates who receive the required number of signatures (and who

file a certificate accepting the independent body's nomination) qualify for the general-election ballot, without needing to run in a primary election. *Id.* § 6-146(1).

B. Litigation History

On February 3, 2022, the New York State Legislature enacted redistricting maps for the State Assembly, the State Senate, and Congress. L.2022, c. 13 & 14. Later that day, Tim Harkenrider and others commenced this special proceeding, which challenged the constitutionality of the Congressional and State Senate maps. On April 27, 2022, the Court of Appeals invalidated the State Senate map as procedurally unconstitutional, and it invalidated the Congressional map as procedurally and substantively unconstitutional. *Matter of Harkenrider v. Hochul*, __ N.Y.3d __, 2022 WL 1236822, at *1-2 (Apr. 27, 2022). The Court of Appeals instructed the Trial Court to "swiftly develop a schedule to facilitate an August primary election" for Congress and the State Senate. *Id.* at *10. It also instructed the Trial Court to adopt remedial maps with the assistance of a Court-appointed special master. *Id.* at *11.

The Trial Court issued the remedial maps on May 20, 2022. *See Matter of Nichols v. Hochul*, 2022 WL 1698921, at *1 (Sup. Ct. N.Y. County May 25, 2022) ("*Nichols I*"), *aff'd as mod.*, 2022 WL 2080172 (1st Dep't June 10, 2022) ("*Nichols II*"). During the map-drawing process, the Trial Court issued

several other Orders. For instance, the Trial Court moved the Congressional and State Senate primaries from June 28 to August 23, leaving all other primaries to proceed as scheduled on June 28. *Nichols I*, 2022 WL 1698921, at *5. Further, on May 5, the Trial Court issued an "Advisory Opinion" warning that "this court does not intend to alter the time frame for gathering signatures for Independent Nominating Petitions for statewide elections." SR-1-2. The next week, on May 11, the Trial Court amended certain ballot-access requirements for the 2022 elections (the "Ballot-Access Order"). SR-3-7.

Among other things, the Ballot Access Order amended the independent-nomination process for the Congressional and State Senate elections. SR-6. The period to collect signatures on independent-nominating petitions for those two offices was amended to begin on May 21 and to end on July 5. *Id.* For all other offices, including the governorship, the nominating period remained unchanged: April 19 to May 31. N.Y. ELEC. LAW §§ 6-138(4), 6-158(9).

Appellants — the Parent Party, Gavin Wax, and several other people associated with the Parent Party — moved to intervene on May 16, 2022.[1] R. 17. They sought to extend the end of all independent-nominating petition periods to July 5, 2022, even for offices that were unaffected by the April 27 decision of the Court of Appeals. R. 115. This extension would nearly double the Parent Party's

[1] Mr. Wax is "a supporter of the Parent Party." R. 53.

time to collect petition signatures, from six weeks to about twelve. Appellants also asked the Trial Court to reduce the number of required valid signatures by 50 percent. *Id.*

The Trial Court denied the motion on May 31, noting that "this action has been pending since early February and [Appellants] waited until now to bring the motion." R.12. Appellants appealed one week later, on June 6. R. 3.

On June 9, Appellants filed a proposed order to show cause, which asked this Court to stay the Ballot Access Order, to prevent the Board of Elections from posting certain information on its website, and to "stay[ ] the May 31, 2022 Order in its entirety." Justice Stephen K. Lindley declined to sign the proposed order. Appellants' Brief dated June 14, 2022, at p. 6 ("App. Br. p. ___").

While this ballot-access litigation was ongoing, Mr. Wax pursued a second line of litigation challenging the enacted Assembly district map (which the Court of Appeals did not invalidate in its April 27 decision). He moved to intervene in this lawsuit on May 1, and the Trial Court denied the motion as untimely on May 11. *Nichols I*, 2022 WL 1698921, at *2. Mr. Wax then commenced a special proceeding in New York County Supreme Court, again seeking to invalidate the Assembly map. *Id.* at *1.[2] Supreme Court dismissed that

[2] Gary Greenberg and Paul Nichols also challenged the Assembly map in this line of litigation, as co-Petitioners with Mr. Wax.

proceeding as untimely. *Id.* at *3. The First Department affirmed, but it also ordered that a new Assembly map be drawn for the 2024 elections. *Nichols II*, 2022 WL 2080172, at *1. The case was remanded to Supreme Court, where it remains pending, for a determination of whether the Independent Redistricting Commission should be reconvened to propose a remedial Assembly map under Article III, § 5-b(a), of the State Constitution. *Id.* at *2. Mr. Wax appealed to the Court of Appeals. *Nichols v. Hochul*, 2022 WL 2128006, at *1 (N.Y. June 14, 2022) (Table). On June 14, however, the Court dismissed the appeal because the First Department's decision did not "finally determine the proceeding within the meaning of the Constitution." *Id.*

ARGUMENT

For the reasons described in the Briefs of the Governor and the State Board of Elections, the Trial Court properly denied Appellants' motion to intervene, and the Order denying the motion should be affirmed. One appropriate basis for denying the motion was its untimeliness, as is explained herein.[3]

[3] This Court can affirm the Trial Court on account of the intervention motion's untimeliness, even though the Trial Court denied the motion on other grounds, and even though Respondents did not cross-appeal. Indeed, because the Trial Court's Order did not aggrieve Respondents — *i.e.*, because the motion to intervene was denied in its entirety — Respondents were not entitled to cross-appeal. *See Parochial Bus Sys., Inc. v. Bd. of Educ. of City of N.Y.*, 60 N.Y.2d 539, 544-46 (1983); *Cataract Metal Finishing, Inc. v. City of Niagara Falls*, 31 A.D.3d 1129, 1130 (4th Dep't 2006).

POINT I

THE MOTION TO INTERVENE WAS UNTIMELY

A non-party may intervene in a lawsuit, whether as of right or by permission, only "[u]pon timely motion." CPLR 1012(a), 1013. For example, in *Matter of Fink v. Salerno*, the petitioners challenged a board-of-elections determination that certain judicial candidates could not appear on the general-election ballot. 105 A.D.2d 489, 489 (3d Dep't 1984), *cited with approval in Agway Ins. Co. v. P & R Truss Co.*, 11 A.D.3d 975, 976 (4th Dep't 2004). The proceeding began on October 3, with a return date of October 9; rival candidates moved to intervene on October 8. *Fink*, 105 A.D.2d at 490. Supreme Court denied the motion as untimely. *Id.* The Appellate Division affirmed, stressing the "expediency with which election cases must be handled." *Id*. *See also Castle Peak 2012-1 Loan Trust v. Sattar*, 140 A.D.3d 1107, 1108 (2d Dep't 2016) (denying motion to intervene filed four months after movant learned of the relevant events).

Here, Appellants moved to intervene on May 16, 2022 — more than three months after this special proceeding began on February 3, 2022. R. 112. Appellants contend they had no reason to intervene until the Trial Court issued the Ballot Access Order on May 11 (*see* Appellants' Br. p. 19), but that is incorrect. Changes to the independent-nominating period were foreseeable in February, when

Petitioners asked the Trial Court to strike down the Congressional and State Senate maps before this year's elections. Such a remedy naturally could have included (and did include) changes to the ballot-access periods and to other aspects of the election calendar. Yet Appellants did nothing until May 16.

Because of this delay, granting the relief Appellants seek would inject further confusion into an already chaotic election cycle. Voters, candidates, and election officials have endured extraordinary levels of uncertainty this year:

- March 31: The Trial Court struck down the Assembly, State Senate, and Congressional maps.

- April 21: This Court reinstated the Assembly and State Senate maps. *Matter of Harkenrider v. Hochul*, 204 A.D.3d 1366 (4th Dep't 2022).

- April 27: The Court of Appeals struck down the State Senate and Congressional maps, leaving the Assembly map in place. *Harkenrider*, 2022 WL 1236822, at *1, *11 n.15.

- April 29: The Trial Court moved the Congressional and State Senate primary elections from June 28 to August 23. *See Nichols I*, 2022 WL 1698921, at *5.

- May 11: The Trial Court amended the ballot-access calendar, including the period to obtain independent-nominating signatures for the Congressional and State Senate elections. SR-6.

- May 1 through June 14: Mr. Wax sought to invalidate the Assembly map, move all primaries to August 23 or September 13, and reopen the ballot-access period. *See Nichols I*, 2022 WL 1698921, at *4-5.

Appellants now seek to add yet another disruption to this year's elections: an order doubling the independent-nominating period's length and slashing the number of required signatures by half. Such an order could open the gates to a flood of new candidates on new ballot lines, further confusing voters and burdening the State and local Boards of Elections in a year that has already pushed the election system to the brink. This Court should prevent that outcome by affirming the Trial Court's denial of Appellants' motion to intervene.

CONCLUSION

For the reasons described above, and for the reasons described in the other Respondents' briefs, the Trial Court should be affirmed.

Dated: New York, New York
July 6, 2022

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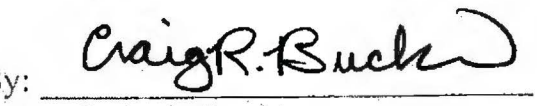
By: 

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