SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PAUL NICHOLS, GAVIN WAX, GARY GREENBERG, Petitioners, v. GOVERNOR KATHY HOCHUL, 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.	Index No. _____

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF EMERGENCY MOTION BY ORDER TO SHOW CAUSE FOR A TEMPORARY RESTRAINING ORDER

WALDEN MACHT & HARAN LLP
250 Vesey Street, 27th Floor
New York, NY 10281
(212) 335-2030

Of Counsel:
Jim Walden (jwalden@wmhlaw.com)
Peter A. Devlin (pdevlin@wmhlaw.com)

Attorneys for Petitioners Paul Nichols and Gary Greenberg

LAW OFFICE OF AARON S. FOLDENAUER
30 Wall Street, 8th Floor
New York, NY 10005
(212) 961-6505

Of Counsel:
Aaron S. Foldenauer (aaron@nyelectionlaw.com)

Attorney for Petitioner Gavin Wax

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Paul Nichols, Gavin Wax, and Gary Greenberg ("Petitioners"), by their undersigned counsel, submit this Memorandum of Law in support of their Emergency Motion by Order to Show Cause for a Temporary Restraining Order.

PRELIMINARY STATEMENT

On April 27, 2022, the Court of Appeals held that the procedure the Legislature used to enact Congressional, State Senate, and State Assembly district maps violated the New York Constitution. *Harkenrider v. Hochul*, No. 60, 2022 WL 1236822, at *11 & n.15 (N.Y. Apr. 27, 2022). While the Court of Appeals invalidated the Congressional and Senate maps, it was compelled to let the Assembly map be, "**despite its procedural infirmity**," because the petitioners in that action, inexplicably, had not challenged the Assembly map in their petition. *Id.* And, even after the Supreme Court in that action ruled *sua sponte* that the Assembly map was "**void and unusable**,"[1] the petitioners refused to defend the holding on appeal. *Id.* at *11 n.15. Nonetheless, the Court of Appeals made clear that the same rationale—and the same ruling—necessarily applies to the Assembly map, since all three maps were enacted using the same unconstitutional procedure. *Id.* The Court of Appeals thus effectively invited a challenge to the Assembly map. Petitioners bring that challenge now.

The interim relief now sought by Petitioners flows directly from the Court of Appeals' decision. Petitioners request that this Court restrain Respondents from using the unconstitutional Assembly map for the 2022 election process until the Court can make a decision on the ultimate relief sought in the Petition. Petitioners' claim is indisputably meritorious. In light of the clarity of the rulings from the Steuben County Supreme Court and the Court of Appeals, Respondents

[1] Decision & Order at 10, NYSCEF No. 243, *Harkenrider v. Hochul*, Index No. E 2022-0116 CV (Mar. 31, 2022) (hereinafter "*Harkenrider I*").

cannot, *and we suspect will not*, dispute the unconstitutionality of the Assembly maps. But this Court will likely witness their craven and desperate attempt—for their own political gain—to force voters into the exact harm the Court of Appeals decried: to "**subject the People of this state to an election conducted pursuant to an unconstitutional reapportionment**." *Id.* at *11.

Without interim relief, Respondents will continue to entrench the unconstitutional Assembly map, making it more and more difficult to untangle from the election process in time to hold primary and general elections. Petitioner Greenberg and Petitioner Wax originally moved to intervene in Steuben County. Greenberg Affidavit ¶ 4; Wax Affidavit ¶ 6. All parties opposed their motions, and the Supreme Court denied them as untimely and burdensome to the court and parties in that case. *See* Petition ¶¶ 106–14. The Supreme Court was clear, however, that it "**agree[d] with the potential intervenors Greenberg and Wax that the Assembly maps were unconstitutional in the manner they were enacted**"; "**agree[d] that the current petitions and Petitioners do not adequately represent the interests of Greenberg and Wax when it comes to challenging the Assembly District maps**"; and "**[n]othing in this Decision and order**," the Supreme Court concluded, "**is meant to prevent either [Petitioners Greenberg or Wax] from pursuing a separate action to challenge the Assembly maps**."[2]

Respondents have known that they may need to replace the Assembly map for well over a month and yet they have done nothing to fix the map, adjust the elections process, or otherwise prepare a contingency plan. Instead, Respondents have misdirected by unjustifiably complaining about the difficulty of changing the election calendar and certified ballots and opposed the motions. *See* Petition ¶¶ 125–36. But the Court of Appeals clearly held that complying with the Constitution trumps administrative challenges—while "**cognizant of the logistical difficulties involved in**

[2] *Harkenrider I*, Decision & Order at 4, NYSCEF No. 522.

preparing for and executing an election," the Court of Appeals rejected the notion that there was "**no choice but to allow the 2022 primary election to proceed on unconstitutionally enacted**" maps. *Harkenrider III*, 2022 WL 1236822, at *12.

Petitioners therefore further request that this Court appoint a special master to begin the process of drawing a State Assembly map. The Court of Appeals held that in the present circumstances—when the deadline has passed for the Legislature to cure the procedural problems it caused—the proper remedy is for the Supreme Court, with the aid of a neutral redistricting expert, serving as special master, to oversee redistricting. *Id.* at *11. Proceedings to redraw the Congressional and State Senate maps are underway in Steuben County and are scheduled to conclude on May 20. Petitioners seek interim relief to ensure that the same remedy for the Assembly map remains possible: to restrain Respondents' from further entrenching the Assembly map and appoint a special master to begin the process of adopting a constitutionally compliant Assembly map.[3] The proceeding in Steuben County will have taken only fifteen business days to gather public input and adopt *two* final district maps. *See* Petition ¶ 85. There is no reason a special master proceeding here for a single district map cannot take less.

For races other than Congressional and State Senate, the primary elections—including State Assembly primaries—are currently set for June 28, 2022. On remand, the Supreme Court in *Harkenrider* moved Congressional and State Senate primaries to August 23. Thus, among the ultimate relief Petitioners will seek is for the Court to enjoin the holding of state and local primary elections to August 23 or—as in prior years—the second Tuesday of September (which is the

[3] The Special Master in *Harkenrider*, Dr. Jonathan Cervas, will substantially complete his work by May 16. Petitioners respectfully propose appointing Dr. Cervas as Special Master here. Because Dr. Cervas is currently serving as Special Master in the Supreme Court Steuben County, Petitioners did not believe it would be appropriate to contact him before commencing this Special Proceeding. However, Petitioners are prepared to immediately seek Dr. Cervas's availability and request his appointment.

13th). Enjoining the primaries will create ample breathing room for the New York State Board of Elections and local boards of elections to administer elections that comply with the strict and clear demands of the Constitution.

ARGUMENT

The purpose of interim relief is twofold: preserve the status quo and protect the efficacy of a final judgment until there can be a full hearing on the merits, which, in this Special Proceeding, must be concluded expeditiously. *Pamela Equities Corp. v. 270 Park Ave. Café Corp.*, 62 A.D.3d 620, 621 (1st Dep't 2009); *Bd. of Managers of 235 E. 22nd St. Condo. v. Lavy Corp.*, 233 A.D.2d 158, 161 (1st Dep't 1996). Petitioners must demonstrate (1) likelihood of success on the merits, (2) irreparable injury if the relief is not granted, and (3) balancing of the equities weighs in Petitioners' favor. *Pamela*, 62 A.D.3d at 620; *see also IHG Mgmt. (Maryland) LLC v. W. 44th St. Hotel LLC*, 163 A.D.3d 413, 414 (1st Dep't 2018).

Petitioners' request for interim relief easily meets all three requirements.

I. PETITIONERS ARE ASSURED TO SUCCEED ON THE MERITS

Petitioners are likely to succeed on the merits. Respondents have already litigated the same issue here in trial and appellate proceedings in *Harkenrider*; that is, whether the Legislature followed the constitutionally mandated process when it enacted the Congressional, State Senate, and State Assembly maps. And Respondents lost on that issue.

As discussed above, the Court of Appeals held that the maps—including the Assembly map—are procedurally unconstitutional and must be remedied through judicial intervention. *See* Petition ¶¶ 68–79. Respondents are now issue precluded from asserting otherwise. *See Buechel v. Bain*, 97 N.Y.2d 295, 303 (2001) ("**Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party**."). The only question remaining for Petitioners' claims is what *relief* should

be granted. But that question is irrelevant to whether interim relief is warranted now. *See Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988) (holding that plaintiffs can succeed on the merits by showing that the challenged regulations were unconstitutional).

The first factor tips strongly in Petitioners' favor.

II. WITHOUT INTERIM RELIEF, PETITIONERS WILL SUFFER IRREPARABLE HARM OF A CONSTITUTIONAL DIMENSION

With each step Respondents take towards administering primary and general elections using the unconstitutional Assembly map, Petitioners suffer irreparable harm and risk receiving no relief on their unquestionably meritorious claims. With each day that passes, the State's election machinery moves closer to a point of no return, where New Yorkers must face the Faustian bargain of whether to hold an unconstitutional election.

Surely recognizing this fact, Respondents have tried to run out the clock. Rather than try to fix the constitutional defect, Respondents have used every litigation tactic possible to protect the ultimate prize from their willing constitutional violation: a partisan-infected Assembly map. In slavish service to this goal, their response is galling. Respondents are not only responsible for the infirm maps; they are responsible for the emergency New Yorkers now find themselves in. Respondents knew over a month ago, on March 31, that the Assembly map may need to be replaced when the Supreme Court in *Harkenrider* court declared it void. But Respondents have done nothing to plan or prepare for replacing the Assembly map. *See* Petition ¶¶ 115–22.

Instead, Respondents have argued since March that nothing can be done before the 2022 election, ignoring the very reason why the Constitution created an expedited proceeding—so something *could* be done. *See id.* ¶¶ 125–36. Even in late April, when the Court of Appeals heard this same argument from Respondents, it still "**reject[ed] [their] invitation to subject the People of this state to an election conducted pursuant to an unconstitutional reapportionment**."

Harkenrider III, 2022 WL 1236822, at *11. At the proceeding in Steuben County, counsel for Respondent Heastie went even farther, declaring that voters would have to suffer under this unconstitutional map for ten years until the next reapportionment:

> THE COURT: . . . I don't think you disagree that, you know, the ruling is that the assembly maps are defective procedurally. So, what's the answer here? Do you just let those go for the next ten years?
>
> [COUNSEL]: Yes. And here's the reason why. Because the New York Court of Appeals had an opportunity when we were there about two weeks ago to invalidate the assembly maps if they wanted.
>
> . . .
>
> If the Court of Appeals was of the view that the assembly maps should be invalidated, the Court of Appeals could have done that at that time, and it pointedly chose not to. And I commend the court to footnote number 15, which --
>
> THE COURT: But they said because it hadn't been challenged.
>
> [COUNSEL]: Because it hadn't been challenged.
>
> THE COURT: Now it is, or they want to get it to challenge.
>
> [COUNSEL]: And the thing is, constitutional violations go by the wayside all the time because they are not timely challenged.

Devlin Affirmation Ex. 1, at 65:19-66:1.

Notwithstanding the Court of Appeals' warning, Respondents certified primary ballots for certain Assembly and Statewide races on May 4 and mailed them to military and overseas voters by May 13, even though their authority to prepare ballots based on unconstitutional maps does not exist in the law. *See* Petition ¶¶ 123–24. Respondents will now likely say that the certification and mailing of ballots stops them from changing the Assembly map. This Court should expect more from the State's public servants.

The Legislature—obviously motivated to rig the upcoming election—could have asked to extend the primary dates for all elections but chose not to. Instead, New York currently intends to

hold some primary elections, including for Assembly seats, on June 28. *See* "N.Y. Moves Some Primaries to August After a Judge Tosses Maps" (Associated Press April 29, 2022), appearing in Lockport-Union Sun & Journal). If the Court does not restrain Respondents from using the Assembly map to administer the elections, Petitioners will be irreparably harmed because officials will be selected pursuant to an unconstitutional election.

III. THE BALANCE OF EQUITIES WEIGHS HEAVILY IN PETITIONERS' FAVOR

The Court of Appeals has already balanced the competing equities at stake here. It found as a matter of constitutional law that when given the choice between fixing unconstitutional maps or leaving the election timetable undisturbed, the former trumps the latter: "**Prompt judicial intervention is both necessary and appropriate to guarantee the People's right to a free and fair election**." *Harkenrider III*, 2022 WL 1236822, at *12; *see* Petition ¶¶ 80–84.

The 2014 constitutional reforms created a specific redistricting procedure that Respondents should not be allowed to evade by stonewalling voters. In that procedure, an independent commission plays a central role meant to curb partisan gerrymandering and gamesmanship by the political party holding power. *See* Petition ¶¶ 24–34. To that end, that process was designed to promote citizen participation, fair representation, and confidence in our public institutions. *See id.* ¶¶ 35–45. The "burden[s]" and "hurdles" which Respondents complain of, as a matter of law, do not weigh against the prospect of holding an election where district lines have not been carefully vetted through a neutral and nonpartisan process. *See id.* ¶¶ 132–33.

CONCLUSION

For the reasons given, the Court should grant Petitioners' request for a temporary restraining order to enjoin Respondents from using the State Assembly map in the 2022 elections. Petitioners further request that the Court seek to appoint Dr. Jonathan Cervas, or another qualified

individual, as Special Master to develop a legally compliant Assembly map. The Court should grant further relief as it deems just and proper.

Dated: New York, NY
May 15, 2022

Respectfully submitted,

WALDEN MACHT & HARAN LLP

By: /s/ *Jim Walden*

Jim Walden
Peter A. Devlin
250 Vesey Street, 27th Floor
New York, NY 10281
Tel: (212) 335-2030
jwalden@wmhlaw.com
pdevlin@wmhlaw.com

Attorneys for Petitioners Paul Nichols and Gary Greenberg

LAW OFFICE OF AARON S. FOLDENAUER

By: /s/ *Aaron S. Foldenauer*

Aaron S. Foldenauer
30 Wall Street, 8th Floor
New York, NY 10005
Tel: (212) 961-6505
aaron@nyelectionlaw.com

Attorney for Petitioner Gavin Wax

CERTIFICATE OF WORD COUNT COMPLIANCE

As an attorney at Walden Macht & Haran LLP, I hereby certify that this memorandum of law is in compliance with Commercial Division Rule 17. The foregoing document was prepared using Microsoft Word, and the document contains 2,268 words as calculated by the application's word counting function.

Dated: New York, New York
May 15, 2022

/s/ *Jim Walden*
Jim Walden