

# Exhibit 3

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TRANSCRIPT OF SPECIAL PROCEEDINGS,  
DATED MARCH 3, 2022 [2441 - 2512]

1

1 STATE OF NEW YORK COUNTY OF STEUBEN

2 SUPREME COURT

3 -----X

4 TIM HARKENRIDER et al., : Index No.

5 : Petitioners, : E2022-0116CV

6 -vs- :

7 :

8 GOVERNOR KATHY HOCHUL et al., :

9 Respondents. : Special Proceedings

10 ----- X

11 Hall of Justice

12 Bath, New York

13 March 3, 2022

14 BEFORE:15 HON. PATRICK F MCALLISTER  
16 Acting Supreme Court Justice17 APPEARANCES:18 TROUTMAN PEPPER  
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REPORTED BY:

LAURA BLISS POWER  
Official Court Reporter

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*Harkenrider et al. - v - Governor Hochul et al.*

1 THE COURT: This is the matter of Tim  
2 Harkenrider, et al. Versus Governor Kathy Hochul, et al.  
3 Just a word before we start today, I see everybody has  
4 got their mask on. Masks are still required in the state  
09:31:41 5 courtrooms. When you move outside the courtroom, that's  
6 the county and they don't have a mask requirement, but  
7 when you're in here, all masks are required. The only  
8 exception to that is if the attorneys are speaking at the  
9 podium I'll allow them to take down their masks to speak.  
09:32:03 10 I'm a little hard of hearing, I'm going to ask you all to  
11 speak up, and we'll use the podium for argument. This is  
12 being simulcast, and that way people will be able to see  
13 you.

14 Let's find out who's here today. Do we have  
09:32:20 15 any of the Petitioners here?

16 *(No indication.)*

17 THE COURT: Not present, but their attorneys  
18 are. I'm going to ask the attorneys to put their  
19 appearances on the record. We'll start with Petitioners.

09:32:38 20 MR. MOSKOWITZ: Bennet Moskowitz; Troutman  
21 Pepper.

22 THE COURT: Thank you, Mr. Moskowitz.

23 MR. TSEYTLIN: Misha Tseytlin; Troutman,  
24 Pepper.

09:32:47 25 THE COURT: Misha Tseytlin. Am I saying that

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1 compared to Dr. Ansolabehere who knew the geography  
2 districts of New York State like the back of his hand  
3 down to the exact location of watersheds, who was  
4 able to explain the real life decision-making process  
5 underlying the maps as enacted, and he concluded in  
6 his expert opinion that the maps are not the product  
7 of partisan bias. Again, this is more than  
8 reasonable doubt.

9 Dr. Breitbart, who contrasted the lack of  
10 partisanship in the current maps with the clearly  
11 gerrymandered Senate maps from 2012, the Legislature  
12 fixed the prior partisanship but did not match it, I  
13 believe were the words he used. I think that that is  
14 a really important point to emphasize, that even when  
15 it had the chance, the Legislature as a whole acted  
16 without partisan intent. They had the opportunity to  
17 tip the scales in the other direction in redrawing  
18 the Senate maps, but when they acted as a whole in  
19 the enacted maps they did not in Dr. Breitbart's  
20 expert opinion.

21 It can be inferred that the Legislature who  
22 did that with respect to the Senate maps acted the  
23 same way when redrawing the congressional maps. When  
24 we look into legislative intent it can be hard to get  
25 a good indicator of what that intent was and Mr.

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1 Tseytlin has taken a lot of liberties in terms of  
2 saying what the people of New York State intended  
3 when they amended in 2014 the Constitution and  
4 required the IRC process. But when we look at the  
5 different intents of the legislators over the years,  
6 the indication of this Legislature in fixing prior  
7 partisanship but not matching it is in stark contrast  
8 to the Republican action in the 2012 election that  
9 resulted in the 2014 amendments in the first place.

10 And, again, these are just some of the  
11 examples of the reasonable doubt that exists in this  
12 case. Petitioners have failed to prove  
13 unconstitutionality beyond a reasonable doubt and all  
14 of their causes of action should be denied.

15 And the last thing that I'm going to talk  
16 about is Petitioners' proposed remedy. In what  
17 should be a motion for reconsideration and is, thus,  
18 fatally procedurally flawed, Petitioners ask this  
19 Court to disrupt this year's election now well  
20 underway. In addition to reversing itself,  
21 Petitioners seek to have this Court disregard the  
22 entire statutory scheme established -- that  
23 establishes -- excuse me -- the proper time period  
24 for the election to proceed.

25 Now, I do not think that the Court will

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1 have occasion to consider a remedy because their  
2 causes of action lack merit and they have not come  
3 close to satisfying their high burden. But the  
4 dangers and risks associated with Petitioners'  
5 requested remedies are so severe that they do require  
6 addressing.

7 To clarify at the outset, we do not take a  
8 position with respect to whether a special election  
9 could be held in 2023. By trying to take this Court  
10 down that rabbit hole, Petitioners invite it to  
11 engage in a result driven analysis. That a  
12 particular remedy may or may not be available has no  
13 bearing on this Court's finding. The risks of  
14 interfering with the ongoing election would be too  
15 grave.

16 With all that said, we have provided the  
17 Court, via NYSCEF, document Numbers 235 and 236, the  
18 sworn affidavit of Thomas Connolly, the Director of  
19 Operations at the New York State Board of Elections.  
20 First of all, Mr. Connolly is exactly who you want to  
21 hear from regarding the practicability of Petitioners'  
22 proposed remedy. He's the Director of Operation in  
23 the Operations Unit of the State Board, which  
24 supports and provides guidance to county boards of  
25 elections. He is in the thick of it. He is not

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1 removed from the day-to-day details. Before that,  
2 Mr. Connolly spent six years as the Deputy Director  
3 of Public Information in the State Board. That  
4 office maintains -- monitors transmission of military  
5 ballots within the federally mandated time. So, Mr.  
6 Connolly is intimately familiar with the transmission  
7 system and process and he's on the front lines of the  
8 elections process, exactly the things that we have  
9 been talking about here that would have -- that  
10 petitioners' proposed remedy would have an impact on.  
11 He deals with the logistics of those processes every  
12 day.

13 Just to highlight a few of his initial  
14 points, the election is already well underway.  
15 Petitioning is nearly done, some candidates are done,  
16 all must finish up by next week. Absentee voters  
17 have already been applying and assigned election  
18 districts. Newly registered voters and transfer  
19 voters have already received notification stating  
20 election district and polling sites. The sending of  
21 notices to all of New York's voters is imminent. And  
22 this certainly sets us apart from other states that  
23 Petitioners have used as examples where petitions  
24 didn't go forward in the first place.

25 If the remedy is ordered this year altering



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1 district lines, information already provided to  
2 voters will prove false. This is the epitome of  
3 voter confusion. Notices would have to be reissued,  
4 different polling sites assigned. Think of the  
5 average citizen just trying to take care of their  
6 day-to-day life. Take their kids to daycare or  
7 school, go to work, do their other responsibilities,  
8 and now they got to figure out which notice about  
9 their polling place was accurate. Imagine they go to  
10 the wrong site on their way home from work, like so  
11 many of us do when we are voting, and when they are  
12 turned away what are the chances they are going to  
13 drive to the correct site instead of going home to  
14 make dinner? As Mr. Connolly explains, based on his  
15 role in the Operations Unit with regular contact with  
16 local boards, Petitioners' proposed remedies carry  
17 significant risks. He confirms what this Court  
18 already strongly suspected and he provides detailed  
19 reasons why that is. He explains every step in the  
20 elections process and that we're already very much in  
21 the thick of it.

22 In response Petitioners' filed an affidavit  
23 from Todd Valentine. He's a co-executive director.  
24 His name appears along with the commissioners on the  
25 State Boards website and before that he spent about a

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1 decade working in State Boards Counsel's Office. So  
2 administration, if you will, not in a particular  
3 unit, not like Mr. Connolly in charge of the  
4 Operations Unit specifically acting as liaison with  
5 the county boards. And the differences between the  
6 two affidavits are significant. Mr. Valentine's is  
7 brief and conclusory, where Mr. Connolly provides  
8 detailed examples. Mr. Valentine expects the Court  
9 to take his word for it, to buy into his unsupported  
10 conclusions. And notice Mr. Valentine doesn't say  
11 that there's no risk, or even low risk, associated  
12 with Petitioners' proposed remedies. Note that Mr.  
13 Connolly, he doesn't say it would be impossible.  
14 What he says is that the risks of implementing of  
15 Petitioners' plan are simply too great. Mr.  
16 Valentine cannot assure this Court that those risks  
17 will not result in real life disasters that prevent  
18 New Yorkers from exercising their constitutional  
19 right to vote. And as this Court has initially  
20 suspected, those risks are far too grave.

21 Mr. Valentine's brief and conclusory  
22 affidavit, essentially, boils down to four points.  
23 First, in 2020 he remarks that the petition period  
24 and the signature requirements were reduced by  
25 executive order of Governor Cuomo due to the Covid 19

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1 Pandemic. I'm going to circle back to this  
2 particular first point of his a little bit later, but  
3 suffice is to say at this juncture that, first,  
4 Petitioners are asking this Court to do way more than  
5 reduce the petitioning period. They are asking the  
6 entire state system to do a reset in the midst of an  
7 election and hold a second primary that no one has  
8 planned for.

9 And the temporary grant of authority by the  
10 Legislature, mind you, to Governor Cuomo to issue  
11 executive orders suspending certain laws in order to  
12 reduce the spread of Covid 19 is entirely irrelevant  
13 to this case. It certainly doesn't establish this  
14 Court's authority to suspend laws in a like manner.

15 Mr. Valentine's second point is that  
16 because the local board turned their full attention  
17 to translating new district boundaries into voter  
18 registration systems and managed to do so in nearly  
19 one month, I believe Mr. Tseytlin said in less than  
20 one month, Mr. Valentine's affidavit emphasizes that  
21 it was in nearly one month because it is slightly  
22 over. Mr. Valentine states in conclusory fashion  
23 that they can simply do it again. What an  
24 assumption. Everyone agrees that local boards had to  
25 turn their full attention to that task the first time

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1 in order to get it done so quickly. That language is  
2 right there in Mr. Valentine's own affidavit as well.  
3 Local boards cannot possibly return their full  
4 attention to such a task now that the election is  
5 underway. They run the primaries. They move on to  
6 their next essential task. Mr. Valentine says  
7 without explaining most ballot access is done at the  
8 state level. Well, presumably, that must be because  
9 some petitions are filed at the state board level  
10 rather than local boards, but this is totally besides  
11 the point. And by the way, it's not even true for  
12 all counties. So, larger counties and New York City  
13 board handle petitions filings themselves, but  
14 regardless, local boards are the ones who run the  
15 primary either way.

16 They're no longer looking at ballot access.  
17 They have moved on to the next steps in the process,  
18 which is detailed by Mr. Connolly. And Mr. Valentine  
19 doesn't even respond to Mr. Connolly's observation  
20 that problems always arise even after boundaries have  
21 been entered into voter registration systems. That  
22 is why these things cannot be done in a haphazard  
23 fashion. The closer to the election the more likely  
24 those problems won't be discovered or can't be fixed.  
25 This is a huge risk. Dr. Valentine -- or excuse me

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1 -- Mr. Valentine doesn't deny there's risk.

2 Third, so his third of four points by Mr.  
3 Valentine, he cites certain examples from the past.  
4 A court ordered federal primary and separate state  
5 primaries in four prior election cycles. Let's not  
6 mince words. Petitioners are asking this Court to  
7 issue unprecedented relief. Those cases are vastly  
8 distinguishable from the extreme measures that  
9 Petitioners seek here. And I'll highlight two ways  
10 that they're very different and that this remedy  
11 would be unprecedented. The first is the  
12 petitioners' petitions have never been thrown out and  
13 candidates told to start over. Imagine the  
14 candidates, they are done by now or they're about to  
15 be done, they have set up their campaign finance  
16 committees, they've sent out volunteers and paid  
17 staff, they've gathered all the required signatures.  
18 Now all that work is simply nullified and the  
19 ancillary effect of that on other people, the voters  
20 who think they already signed petitions and they can  
21 only sign one, but they haven't actually signed those  
22 petitions because they were thrown out. And the  
23 second way that this would be unprecedented is that  
24 this state has never held two primaries in the same  
25 year with an intervening redistricting process

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1 occurring between the dates of those primaries. Can  
2 two primaries happen? Yes, absolutely. That has  
3 happened. Can they happen without any advance  
4 preparations? Not without major risks. The majority  
5 of voter registrations system used by county boards  
6 are simply incapable of maintaining multiple sets of  
7 the same district.

8 When the Federal Court ordered an  
9 additional primary in 2012 it was known about as  
10 early as January before any ballot access procedures  
11 had begun. All the lines for congressional, state  
12 Senate, and State Assembly were in place by mid-March  
13 that year. Here in contrast no one has planned on  
14 two primaries to take place this year. We all know  
15 that we are suffering under serious supply chain  
16 issues. That's going on everywhere that we go.  
17 Ballot papers and envelopes are no exception. Boards  
18 of elections are facing shortages. They needed to  
19 order supplies months in advance. These are the  
20 risks that Petitioners don't want the Court to think  
21 about, the ones that Mr. Valentine cannot assure  
22 anyone will not accord.

23 That brings us to the fourth and last point  
24 in Mr. Valentine's affidavit, the timeline that he  
25 sets out. Well, that timeline is not impossible. It

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1 is very darn near too impossible. To hold an  
2 August 23rd, 2012, primary he proposes a June 2nd  
3 deadline for finalizing petitions. He does that to  
4 keep the intervals of time to match the current  
5 schedule that we are on. Well, fine. Those dates  
6 sound fair enough in theory, but continue the  
7 timeline up to the current day. So, before petitions  
8 are finalized there is objections and court  
9 challenges. Those take approximately 30 days. That  
10 brings us up to May 3rd. And before challenges can  
11 be made, of course, the initial petitioning happens.  
12 That process normally runs 37 days. Well, that  
13 equates to a start date on maps that don't exist yet  
14 of this past Sunday, March 27th. And we don't even  
15 have the new maps yet.

16 As this Court noted in its prior decision,  
17 this process, getting the maps right, assuming that  
18 there's any constitutional infirmities in them as is,  
19 that process will take weeks, maybe months, and  
20 that's in New York State, not Maryland. We have  
21 significantly more districts. We have significantly  
22 more constitutional requirements to consider and  
23 balance. Petitioners' reckless timing poses grave  
24 risks.

25 Remember, I said I would come back to Mr.

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1 Valentine's first point about Governor's -- Governor  
2 Cuomo's Covid 19 Executive Order. The really  
3 disturbing thing about Petitioners analogy to 2020,  
4 shortening the petition process, is that 2020 was  
5 based on a worldwide pandemic, the likes of which  
6 society had not seen in a century. In contrast, this  
7 case involves what will be the new normal. Whichever  
8 party doesn't like the maps in future years will  
9 follow Petitioners' playbook. These statutory  
10 timelines for New York's election process should not  
11 be so easily and routinely ignored. By asking the  
12 Court to utterly ignore and, essentially, rewrite  
13 state election laws Petitioners ask this Court to set  
14 a dangerous precedent indeed.

15 Thus, if the Court identifies any  
16 constitutional infirmities in either the  
17 congressional or state Senate maps, it should not  
18 reconsider its previous ruling that the ongoing  
19 elections still must proceed. And your Honor already  
20 noted, and I am taking sections of the decision, but  
21 the words used are, striking these maps would more  
22 likely than not leave New York State without any duly  
23 elected congressional delegate. Continuing on, I  
24 believe the more prudent course would appear to be to  
25 permit the current election process to proceed.



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1 For all these reasons, this Court should  
2 deny Petitioners' requested relief in its entirety,  
3 dismiss their causes of action, and issue a contrary  
4 declaration confirming the validity of the enacted  
5 maps. And as to the executive respondents,  
6 explaining the absence of any proof that Governor  
7 Hochul acted with an improper partisan purpose in  
8 signing those maps. Thank you.

9 THE COURT: Thank you, Ms. McKay. Is there  
10 any respondent that I have not called upon? I think  
11 everybody has had their closing argument. All right.  
12 I'm going to try to issue a decision either later  
13 today or tomorrow. It will go right up on to NYSCEF  
14 and you will have it. I want to thank all of the  
15 attorneys. I thought you were all professional,  
16 courteous, and knowledgeable. I thank you and I wish  
17 you all luck in your careers and in life.

18 MS. MCKAY: Thank you, your Honor.

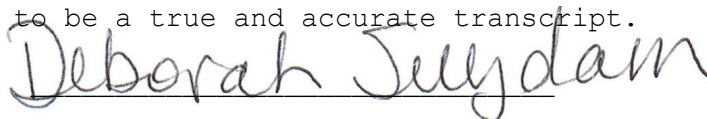
19 THE COURT: Thank you.

20 MR. TSEYTLIN: Thank you, your Honor.

21 MR. HECKER: Thank you, your Honor.

22 MR. BUCKI: Thank you, your Honor.

23 Certified to be a true and accurate transcript.

24 

25 Deborah Suydam  
Official Court Reporter