

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

PAUL NICHOLS, GAVIN WAX, and GARY
GREENBERG,

Petitioners,

-against-

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. 154213/2022

**GOVERNOR HOCHUL’S MEMORANDUM OF LAW IN OPPOSITION TO
TEMPORARY RESTRAINING ORDER**

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PRELIMINARY STATEMENT

Respondent Kathy Hochul, Governor of the State of New York (“Governor Hochul”) respectfully submits this memorandum of law in opposition to the application (*see* NYSCEF No. 2) by petitioners for a temporary restraining order (“TRO”).

The requested TRO seeks truly extraordinary relief: an eleventh-hour order enjoining respondents from using the 2022 State Assembly map in administering the 2022 primary and general elections, and appointing a special master to begin proceedings to evaluate and draft a State Assembly map for the 2022 primary and general elections. Not only was a similar challenge by Petitioners already rejected by the Steuben County Court that has been handling New York’s redistricting litigation, (*Harkenrider v. Hochul*, Steuben County Sup. Ct., Index No. E2022-0116CV, “*Harkenrider*,” NYSCEF Nos. 544-555), but the primary election that Petitioners again seek to enjoin has been underway since May 13th. (*see* Letter of Aaron Suggs on behalf of State Board of Elections opposing TRO, NYSCEF No. 14) If granted, the TRO would not just disrupt a primary election that is already in progress, but result in further chaos and disruption to an election cycle that has already confounded voters since redistricting challenges initially threw the election process into question three months ago. .

Petitioners Paul Nichols (“Nichols”), Gavin Wax (“Wax”) and Gary Greenberg (“Greenberg”) allege that they are registered and eligible voters in the State of New York, and are, respectively, a Democratic primary candidate for governor until he was excluded from the ballot because his petition signatures were invalidated (Petition, NYSCEF No. 1 at para. 11), President of the New York Young Republican Club (*id.* at para. 12) and a former candidate for a state senate seat in District 46, and “a potential candidate” for Congress, the State Senate and the State Assembly (*id.* at para. 13).

Petitioners’ application for a TRO should be denied in all respects. The June primary election, which includes a primary for the State Assembly, is already underway as military ballots were sent

out by Friday, May 13, 2022 (*see* Letter of Aaron Suggs on behalf of State Board of Elections opposing TRO, NYSCEF No. 14), and hence, the relief requested will upend an ongoing election. Petitioners have failed to bring their claim for relief until this week, despite the pendency of litigation in other courts challenging Congressional and State Senate maps *for months* as indicated in their own papers (*see* Petition, *passim*). In addition, two of the three petitioners here (Wax and Greenberg) have already attempted to intervene in *Harkenrider*, the litigation in which challenges to the Congressional and State Senate maps have been litigated, but those applications (filed over two weeks *before the present application*) were denied *as untimely* by the Steuben County Supreme Court, which has been handling these challenges for months. (*See* Opposition Memorandum of Speaker Carl Heastie, NYSCEF No. 15, at 3-4). Further, Petitioner Wax is a party to a second motion seeking to intervene in *Harkenrider*, seeking some of the same relief sought here. (*Harkenrider*, Steuben County Sup. Ct., Index No. E2022-0116CV, NYSCEF Nos. 544-555.) Moreover, the Petitioners here have chosen to bring their present application literally after the election has started and on the heels of losing a similar claim just weeks ago because of their tardiness. Indeed, it is possible if not likely that at least some voters have already filled out their ballots and mailed them back, *i.e.*, voted. This prejudicial timing alone warrants denial of the TRO. Further, and as indicated in opposition papers filed by the State Board of Elections (NYSCEF No. 14), the TRO would materially disrupt preparations for the June primary election by the State Board of Elections and by all County Boards of Elections in a myriad of respects. As Judge McAllister noted in denying Petitioners Motion for Intervention, to change the Assembly maps would “create total confusion” as “a change in the Assembly Districts would impact several elected officials. This would include delegates to the State Supreme Court judicial nominating convention, representatives to county party committees and the New York State Democratic Committee.” (*Harkenrider*, Steuben County Sup. Ct., Index No. E2022-0116CV, NYSCEF Nos.

520, at 4).

The impact of moving Assembly and other Statewide and local races will ensure further disarray for candidates across New York. The certification deadline for the June primary has now passed, ballots are being printed, and candidates for judicial elections and party elections will be impacted because the Election Law ties the Assembly districts to election districts in a number of circumstances, and of course, *military ballots have already been sent out*. Under these circumstances, Petitioners' untimely and improper application for the extraordinary relief of enjoining an election that is already under way should be denied in all respects.

STANDARD OF REVIEW

Petitioners do not come close to satisfying the stringent requirements for a TRO, and in any event, pursuant to CPLR 6313(a), “[n]o temporary restraining order may be granted ... against a public officer, board, or municipal corporation of the state to restrain the performance of statutory duties.” Assuming that a TRO was available against public officers to enjoin the performance of their statutory duties (and it is not), Petitioners must demonstrate a likelihood of success on the merits, that they would suffer irreparable and imminent injury absent a TRO, and that the equities balance in their favor. *Mabry v. Neighborhood Defender Serv., Inc.*, 88 A.D.3d 505, 505 (1st Dep’t 2011).

ARGUMENT

A. The Present Application is barred by doctrine of laches.

Petitioners' challenge to the Assembly map is barred by the doctrine of laches. “Laches bars recovery where a plaintiff’s inaction has prejudiced the defendant and rendered it inequitable to permit recovery.” *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 82 (4th Dept 1980).

Laches is “an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party.” *Reif v. Nagy*, 175 A.3d 107, 130 (1st Dep’t 2019) (quoting

Saratoga County Chamber of Commerce v. Pataki, 100 N.Y. 2d 801, 816 (2003)). To show prejudice, a defendant must show reliance and change of position from the delay. *Id.* Here, the prejudice that would stem from a belated challenge to the Assembly map is manifest. On May 4, 2022, the State Board of Elections certified the primary ballot for Assembly elections,¹ and those elections are scheduled to go forward on June 28, with early voting and absentee balloting taking place before that date, and as noted above, military ballots have already been sent out to military voters on or about May 13, 2022. If petitioners' challenge were allowed, the Assembly map would have to be redrawn by a Special Master, and the Assembly primary could not go forward in June, and insofar as numerous other races are tied to Assembly districts, it is not clear what primaries could go forward in June. This would cause yet more delay and add to the already formidable logistical challenges faced by the State and local boards of elections associated with having to accommodate Congressional and State Senate districts that have yet to be even drawn (and a new primary in August). This Court should decline to entertain this application.

B. The TRO would cause chaos for candidates and voters and place additional, untenable burdens on boards of elections.

Changing the Assembly districts at this late stage – something that could have been raised at least as far back as February – would cause an additional and unnecessary burden on the State's elections process. *See, e.g., Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam) (U.S. Supreme Court has repeatedly cautioned federal courts against late changes to state election laws similar to those contemplated by Petitioners here). Not only does it risk further confusion to voters and candidates, but because the primaries for the State's one hundred and fifty Assembly districts are inexorably linked to a series of other elections, granting the TRO as requested would cause chaos statewide.

¹ See <https://www.elections.ny.gov/NYSBOE/Elections/2022/Primary/Jun282022PrimaryCertification.pdf>.

On May 2, 2022, the State Board of Elections certified all the Assembly candidates for their primaries, leading local boards of elections to begin the process of finalizing and printing ballots. Ballots have already been be mailed to overseas voters on May 13, 2022, Elec. Law §§ 10-108(1), 11-204(4), and it is possible if not likely that some voters have received those ballots and already voted.

Further, the Election Law requires judicial delegates to be elected from Assembly districts. Elec. Law § 6-124. Moving the Assembly primary will also necessitate moving the judicial nominating process, and as indicated in Speaker Heastie's opposition memorandum (NYSCEF No. 15 at 8-10), a number of other offices including candidates for State Assembly, representatives to county party committees and the New York State Democratic Committee, party District Leaders in New York City, as well as delegates and alternate delegates to State Supreme Court judicial nominating conventions.

And, on top of already having to move Congressional and State Senate races as a result of other litigation, granting the TRO here and upending the Assembly races would have a severe if not incalculable impact on election administration. A further dramatic change to New York's election cycle at this point in time risks grave harm to candidates, voters, and elections officials.

CONCLUSION

For the reasons set forth above, Governor Hochul respectfully submits that Petitioners' application for temporary restraining order should be denied in its entirety, together with such further relief as the Court may order.

Dated: New York, New York
May 19, 2022

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s/ Seth Farber

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CERTIFICATION

In accordance with Rule 202.8-b of the Uniform Rules of Supreme and County Courts, the undersigned certifies that the word count in this memorandum of law (excluding the caption, table of contents, table of authorities, signature block, and this certification), as established using the word count on the word-processing system used to prepare it, is 1,572 words.

Dated: New York, New York
May 19, 2022

/s/ Seth Farber
By: Seth Farber
Special Litigation Counsel