

STATE OF NEW YORK
SUPREME COURT : COUNTY OF NEW YORK

PAUL NICHOLS, GALVIN WAX, GARY GREENBERG

Petitioners,

-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,

**AFFIDAVIT OF
TODD D. VALENTINE**

Index No.
E154213/2922

Hon. Laurence Love

Respondents.

STATE OF NEW YORK)
) SS:
COUNTY OF ALBANY)

TODD D. VALENTINE, being duly sworn, deposes and says:

1. I serve as Co-Executive Director for the New York State Board of Elections ("Board"). I have held this position since 2008. From 1997 to 2008 I was Special Counsel to the Board. Accordingly, I am familiar with county board of elections practices and capabilities. I make this affidavit based on my personal knowledge.

2. I respectfully submit this affidavit in opposition to Paul Nichols', Gavin Wax's and Gary Greenberg's petition herein. The positions expressed in this affidavit represent a consensus opinion of the New York State Board of Elections.

Background

3. On February 3, 2022, the Legislature enacted two laws that, collectively, established New York's legislative-district maps for Congress, the State Senate, and the State Assembly.

4. On April 27, 2022, the Court of Appeals invalidated the congressional and State Senate maps. It left the Assembly map in place as it had not been challenged by anyone in any court as of that date.

5. Two days later, the Court in *Harkenrider v Hochul et al* (NYSCEF E20222-0116cv, Steuben County Supreme Court) ordered that (1) Special Master Dr. Jonathan Cervas will release his proposed remedial congressional and State Senate maps by May 16, 2022; (2) after considering any comments submitted in opposition to his proposed maps, Special Master Cervas will finalize the maps by May 24, 2022; (3) congressional and State Senate primary elections, which had been scheduled by law for June 28, 2022, will occur on August 23, 2022; and (4) the deadline for local boards of elections to mail military and overseas ballots for the August 23 primaries is July 8, 2022 (*Harkenrider* Doc. Nos. 296, 301).

6. Initially, the *Harkenrider* Court had set a deadline of May 24, 2022 to finalize the congressional map (*Harkenrider* Doc. No. 258). The Board then asked the Court to "consider expediting the approval process . . . in any manner possible" owing to the short time to make an August primary feasible (*Harkenrider* Doc. No. 290). Later that day, the Court moved the deadline from May 24 to May 20 (*Harkenrider* Doc. No. 291).

7. On May 20, 2021 the *Harkenrider* Court did indeed promulgate new State Senate and Congressional lines.

8. Gavin Wax and Gary Greenberg moved to intervene in *Harkenrider* on May 1st and 3rd respectively (*Harkenrider* Doc. Nos. 316, 346). Their application to intervene to strike down the Assembly map and to enjoin use of that map for the 2022 primary and general elections was denied on May 11, 2022 (*Harkenrider*, Doc. No. 520). The court held, *inter alia*, with the ballot for June 28th primary election already certified, intervention “would create total confusion.” The same day the *Harkenrider* Court issued a political calendar for the August primary and independent nominations for Congress and State Senate.

9. By Order to Show Cause issued on May 19, 2022, this matter has now come before this Court.

10. The instant application should be denied. The Board, and local boards of elections, are already under unprecedented strain preparing for the August Congressional and State Senate primaries ordered in *Harkenrider*. They have been aware of this change for some time now and have been preparing for those offices to be contested at an August primary. Cancelling the June Primary election at this time and requiring a complete do-over of all of the election processes that have occurred to date would result in a massive upheaval for election officials and voters, and impose unbearable burdens on the State’s election system. There is insufficient time to draw new Assembly district lines, provide a do-over of all ballot access processes and complete the

primaries and subsequent judicial nominating conventions in time for the General Election on November 8.

11. Because the June 28 primary has already been certified by state and local boards of elections, ballots have been prepared across the state based on that certification and ballots have been issued for the June primary, including statewide primaries and primaries being held within the 150 Assembly Districts across the state, and all manner of other election preparations are completed or are underway.

June Primary Elections Are Underway

12. As of the hearing date in this matter, the June 28, 2022 Primary (June Primary) will be thirty-six days away, with *early voting to begin in twenty-six days*. The June Primary presently includes all statewide contests for which there are primaries, as well as primaries for state assembly, various party positions and many local offices. Absentee voting has begun.

13. On May 4, 2022, as required by section 4-110 of the Election Law, the Board certified Assembly and statewide candidates for the June 28 primary. No court proceeding enjoined that certification. In response, local boards of elections finalized their primary ballots. The primary ballot for each party is a unified ballot that would include candidates for any Assembly primary, Governor, Lieutenant Governor, and other elected offices (except for Congress and State Senate, which the *Harkenrider* Court moved to August 23).

14. The statutory deadline to mail these primary ballots to military and overseas voters was Friday, May 13, 2022. Elec. Law §§ 10-108(1), 11-204(4). Collectively thousands of such ballots were prepared and sent by that date by all of New York's local boards of elections.

15. Boards of elections thus began preparing their ballots and setting in place the highly integrated mechanics of holding an election, and much of this work is done.

16. Absentee ballots for more than 200,000 non-military voters as of the hearing date will have been printed and many have already been sent to voters.

17. Test ballots for pre-election testing voting machines have been printed for many, if not most counties, including New York City.

18. Early voting / election day primary election ballots are already printed for many counties. In all, upon information and belief, *at least* 700,000 ballots had been printed as of Friday of last week. And substantially more than that will have been printed by the hearing date of this matter, as printing occurs seven days a week in election season.

19. If the statewide candidates were to change now, the ability of boards of elections to timely test election machines for the remaining primaries would be imperiled (9 NYCRR 6210.2). New York requires every voting machine to be programmed then tested with paper ballots to ensure the machines are tabulating ballots correctly. This is a time consuming but crucial process to ensure election integrity. A

change to the ballot requires reprogramming voting machines, reprinting ballots and retesting machines.

20. Already, 356 early voting sites to host nine days of early voting (N.Y. Election Law 8-600 et seq) have been selected and engaged, as have approximately 5,000 thousand election day poll sites for June 28, 2022.

21. More than 50,000 poll workers have been hired and scheduled to work on the early voting days and/or primary day.

22. Temporary staff allocations and vehicle rentals and / or transport contracts to send voting equipment to poll sites have been already arranged.

23. Mail notification to New York's voters informing them of the primary date and location of the early voting sites and poll sites has occurred (N.Y. Election Law 4-117) or is in final production, as is the case for 4.7 million notifications to New York City voters. New York City and other boards have engaged media campaigns to inform voters about the multiple primaries and what contests will appear at which election. Undoing these communications will cause massive voter confusion.

24. If all primaries are moved from June to August, a vast inventory of printed ballots would have to be thrown away. In addition to the wasteful expense, boards of elections will have difficulty printing new ballots as they have reported unprecedented supply-chain issues resulting in paper and envelope shortages.

25. Cancelling the June primary, which is well underway, would be confusing to voters and give rise to chaos.

26. To be clear, as of now, late May, there is no time to reconfigure the August 23, 2022 primary to include all other primary contests, and a September 13 primary would not be compliant with federal law as there is no way to have a primary on September 13, hold a judicial nominating convention thereafter and send military ballots required by federal law to be sent no later than September 24, 2022.

27. Moreover, there is a standing Court Order from the United States District Court of the Northern District of New York specifically placing the Congressional Primary in New York on August 23, 2022 as an exception to the normal timeframe which is the fourth Tuesday in June. On May 10, 2022 that Court:

ORDERED that New York's federal primary for Members of the United States House of Representatives in 2022 shall be held on August 23, 2022 to accommodate New York's congressional redistricting process, and that such primary shall be conducted in a manner in which ballots for UOCAVA voters shall be duly transmitted for such primary and the subsequent general election in conformance with federal law

United States v State of New York (NDNY 1:10-cv-01214-GLS, ECF # 104, May 10, 2022) For the reasons stated in the preceding paragraph, it is inconceivable that the United States District Court for the Northern District of New York would permit that primary to be held on September 13, 2022, as sought by the petitioners herein. A unified September primary is a nonstarter.

28. Petitioners have cited my first affidavit in *Harkenrider* -- signed in March -- that said a separate Senate and Congressional primary was possible. The situation now is materially different, given the passage of time, as I have described herein.

29. As of now, there are no new Assembly maps. Deriving maps would take weeks before ballot access could *even begin*.

Judicial-Nominating Conventions and Party Committees

30. Far more so than Congressional and State Senate districts, Assembly districts affect several other aspects of New York's election infrastructure. Accordingly, replacing the Assembly map would create even more burdens than replacing the congressional and State Senate maps.

31. For example, Supreme Court elections depend on Assembly districts.

32. Parties' candidates for the Supreme Court are not chosen through primary elections. Instead, delegates choose them at party conventions. Those judicial delegates, in turn, are elected by voters in the primaries—and much like candidates for other offices, they must collect designating-petition signatures to appear on primary ballots.

33. The judicial delegates who win the primaries attend a nominating convention of their party, which by law must occur between August 4 and 10, 2022. Elec. Law § 6-158(5). At the conventions, delegates decide who will appear for their party on the general-election ballot as candidates for the Supreme Court.

34. Critically, judicial delegates are elected from Assembly districts. Elec. Law § 6-124. So, if the Assembly map is replaced, judicial-delegate elections (like Assembly primaries) would have to be moved to August 23, and judicial-nominating

conventions could not occur between August 4 and 10 as presently required by law. Instead, judicial-nominating conventions probably could not be held until September, after the results of judicial-delegate elections are certified. This would imperil the ability of New York's election machinery to complete the party nominating processes in time to meet the critical and unalterable requirement to transmit military and overseas ballots prior to 46 days before the general election on November 8, 2022.

35. Specifically, general-election ballots must be mailed to military and overseas voters by September 23, 2022. Elec. Law §§ 10-108(1), 11-204(4). If Supreme Court candidates are chosen at conventions in September, it would be extremely difficult to finalize, print, program voting machines, test, address, and mail general-election ballots (which include Supreme Court candidates) by the September 23 state law deadline.

36. Additionally, members of the Democratic Party's state committee, are elected from Assembly districts this year. Elec. Law §§ 2-102(1), 2-104(1). These elections would also have to be moved to August 23, creating an additional burden in the already-challenging process of preparing for the unexpected August primaries, given the huge volume of ballot access documents these office generate. Similarly, current law permits that a member of a county committee need not reside in the election district he or she represents, but rather the member of county committee may represent any election district in the Assembly District in which the member of county committee resides. If the Assembly districts are changed at this late date it will be necessary to redo petitioning for members of county committees as well given this residency requirement. And this

petitioning cannot happen until election districts—the most granular unit of representation—are reconfigured as described herein.

Election Districts

37. Finally, if the Assembly map is replaced as petitioners propose, many more election districts will also have to change.

38. Election districts are the foundational unit of New York’s political geography. Local boards of elections must sort New York’s approximately 13 million active voters into 15,587 election districts before a primary or general election can occur. This sorting is necessary because voters’ election districts determine what ballot they receive and where they vote.

39. Every voter in a given election district receives the same ballot, with the same candidates for the same races. As a result, election districts cannot be bisected by Assembly districts, State Senate districts, congressional districts, county boundaries, or municipal boundaries. Stated differently, everyone in a given election district must reside in the same Assembly district, State Senate district, congressional district, county, and municipality. If any of those boundaries change, election districts must change.

40. This year, after the redistricting that occurred on February 3, local boards of elections spent virtually all their time for about one month, working with their voter registration vendors, to sort voters into their correct election districts.

41. If the Assembly map is replaced, election districts will have to be re-drawn, and voters will have to be re-sorted. This process could take weeks, given that

boards of elections would have to simultaneously complete the other steps necessary to prepare for an August primary.

Statewide and local Primaries on June 28

42. Presently, all statewide primaries and all others except Congressional and State Senate primaries are proceeding at the June 28, 2022 primary. This should not be disturbed. All necessary steps for ballot access for statewide primaries have been completed, and nothing in the current litigation touches on the validity of those processes.

Purpose of the Congressional District Distribution Requirement

43. There are 26 Congressional Districts in New York. A statewide designating petition filer must demonstrate that they have collected at least 100 signatures from at least 13 Congressional Districts. This distribution requirement applies to *1,300 of the 15,000* required signatures. The purpose of the Congressional Distribution requirement is entirely straight forward. It requires some modest level of geographic distribution of a candidate's signature collection effort.

44. As of the beginning of the designating petition period for statewide candidates on March 1, New York had congressional districts in place. With a week to go before the end of the petitioning period, the congressional lines were struck down by court order, but the order was expressly stayed precisely so ballot access processes could

continue. On April 1, 2022, a stay was issued from New York’s Appellate Division Fourth Department as a decretal paragraph in an Order to Show Cause, providing “pending the hearing and determination of this motion, said judgment is STAYED in its entirety.” Thereafter on April 8, 2022 a decision was issued by Hon. Stephen K. Lindley of the Appellate Division, Fourth Department, permitting ballot access to continue, expressly providing the stay applied to “provisions of the order [below] that enjoin respondents and their agents, including officials from the various boards of elections, from ‘using, applying, administering, enforcing or implementing any of the recently enacted 2022 maps for this or any other election...”

45. After the Court of Appeals ruling on April 27, 2022, congressional lines clearly could not be used to elect representatives, but the lines in place during the statewide designating petition process were more than sufficient to ensure geographic distribution of statewide designating petitioning.

No harm to candidates or voters

46. Significantly, under state law the deadline to challenge primary designations passed on April 21, 2022 as provided by Election Law 16-102. And the courts have uniformly held that this deadline applies even to challenges of a Constitutional dimension. *See Scaringe v Ackerman*, 119 AD 2d 327 (3rd Dept 1986) (holding petitioners’ claims that candidate was barred by the constitutional residency requirement from seeking office was subject to limitations period of the Election Law: “[i]rrespective of the label given to the proceeding or the words used to describe the

issue, the late relief sought by petitioners seeks judicial intervention in the election process to remove a candidate from the ballot...they cannot avoid the time requirement of the statute by initiating a new and different proceeding...". Accordingly, it is simply too late for new claims related to the invalidity of the Assembly and statewide elections to be entertained.

47. No candidate's designating petition was disqualified in 2022 for not having an adequate congressional distribution of their signatures. No candidate suffered any injury thereby.

48. Throughout the petitioning process, the State Board advised all candidates to file their petitions on the statutory schedule. There is no actual averment by the plaintiffs that any candidate declined to file because of the *Harkenrider* decision.

Petitioner Paul Nichols

49. Petitioner Paul Nichols's designating petition was found by the board on May 2, 2022 to be invalid because it contained only 11,767 valid signatures where 15,000 were required.

50. The invalidity of Mr. Nichols petition had nothing to do with the requirement that 1,300 signatures, in the aggregate, of the required 15,000 be derived of 100 signatures collected in each of at least half of New York's congressional districts.

51. On May 4, 2022, Mr. Nichols brought a validating proceeding against the board of elections (since dismissed) which did not raise any of the theories now advanced (*Nichols v New York State Board of Elections*, E903472-2022, Albany

County Supreme Court) and his time to bring a validating proceeding has lapsed as of May 5, 2022 (Election Law 16-102).

52. Mr. Nichols opportunity to seek an independent nomination was in no way effected by the *Harkenrider* decision invalidating congressional and state senate district lines, as the period for such ballot access activity was not changed and in fact is still on-going, with independent nominating petitions due on May 31, 2022.

Independent Nominating Process

53. The independent nominating signature collection period pursuant to the Election Law for 2022 spans from April 19 to May 31, with filings permitted between May 24 and May 31.

54. As a result of the invalidation of New York's congressional lines and state senate district lines on April 27, during the independent nominating period, and with new lines not to be promulgated until May 20, the *Harkenrider* court issued a new political calendar setting a full independent nominating period for congress and state senate to run from May 21, 2022 to July 5, 2022. (*Harkenrider*, Doc. No. 524).

55. The *Harkenrider* court expressly did not alter the political calendar for statewide or other independent candidates, observing at *Harkenrider*, Doc No. # 409 on May 5, 2022 that "this court does not intend to alter the time frame for gathering signatures for Independent Nominating Petitions for statewide elections. Election Law § 138 (4) sets a six-week time period for the gathering of signatures for Independent petitions Once the Congressional map has been established it will be up to the

candidate to make sure he/she has the appropriate number of signatures from the appropriate number of different districts.”

56. For statewide independent nominating petitions, the requirement is 45,000 signatures with 500 from each of 13 congressional districts. The congressional district distribution requirement thus applies to 6,500 of the total number of signatures required to be collected.

Conclusion

57. Replacing the Assembly map and moving the statewide primaries would create logistical hurdles for the Board and for local boards of elections for which we have no reasonably actionable solutions. For this reason, the instant petition should be denied.

Dated: Albany, New York
May 22, 2022


TODD D. VALENTINE

Sworn to before me this
22 day of May, 2022


Notary Public

BRIAN L. QUAIL
Notary Public, State of New York
Reg. No. 02QU6395806
Qualified in Schenectady County
Commission Expires 08/05/2023