SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE LOVE** **PART** **63M**

Justice

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PAUL NICHOLS, GAVIN WAX, GARY GREENBERG,

Petitioner,

- 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, NEW YORK STATE LEGISLATIVE TASK FORCE ON DEMOGRAPHIC RESEARCH AND REAPPORTIONMENT

Respondent.

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INDEX NO. 154213/2022

MOTION DATE 5/23/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18, 19, 20, 21, 25, 26, 82, 86, 87, 88

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Upon the foregoing documents, the decision on Petitioners' Order to Show Cause, seeking an Order 1. Declaring pursuant to CPLR § 3001 that the 2022 state assembly map, ("New Assembly Map") see 2021– 2022 N.Y. Reg. Sess. Leg. Bills A.9040-A and A.9168, is void based upon the constitutional flaws in its adoption previously found by the Court of Appeals; 2. Appointing a special master to adopt a legally compliant state assembly map; 3. Enjoining Respondents to adjourn the primary election date for state and local elections to August 23, 2022, or, alternatively, September 13, 2022; 4. Enjoining Respondents to open designating and independent nominating petition periods, see N.Y. Elec. Law §§ 6-134, 6-138, for statewide, congressional, state assembly, state senate, and local offices with deadlines sufficient for current candidates to obtain new designating petition signatures or run independently, and for potential candidates to newly qualify for primary elections or as an independent in the general election; and

5. Suspending or enjoining the operation of any other state laws, or vacating any certifications or other official acts of the acts of the New York State Board of Elections or other governmental body, that would undermine this Court's ability to offer effective and complete relief for the November 2022 elections and related primaries and seeking a Temporary Restraining Order and Preliminary Injunction for related relief is as follows:

Petitioners commenced the instant Petition on May 15, 2022 seeking a declaration, pursuant to CPLR § 3001, that the New Assembly Map is void based upon the related ruling of the Court of Appeals in *Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 02833, 2022 WL 1236822 ("Harkenrider III")(affirming as modified the Appellate Division, Fourth Department's ruling in *Harkenrider v. Hochul*, 2022 N.Y. Slip Op. 02648, 2022 WL 1193180 ["Harkenrider II"]) and the present Order to Show Cause was presented to this Court on May 18, 2022.

The Court heard oral argument in this matter on May 23, 2022, wherein all parties had an opportunity to highlight their positions. To be clear, there were representations made by both sides via hearsay and speculation as to motives of various parties, alleged investigations and conspiracy theories. Said representations are irrelevant, have no place in the matter before the Court and are therefore being disregarded.

The Court is fully aware of the prior litigation initiated in the Supreme Court of the State of New York, Steuben County, which was appealed to the Appellate Division, Fourth Department and thereafter the New York State Court of Appeals which resulted in the matter being remanded to Steuben County, where a special master was appointed, who created new congressional and state senate maps on May 20, 2022

The instant matter cannot be properly addressed without a clear understanding of the timeline concerning the adoption of and resulting challenges to the redistricting maps for the New

York state assembly, the state senate and congress in New York. On February 2, 2022 the New York State Legislature passed and Governor Kathy Hochul signed into law the aforementioned new maps. On the same day, Petitioners, Tim Harkenrider, *et. al.* filed a Petition in the Supreme Court of the State of New York, Steuben County, entitled *Harkenrider v. Hochul*, under Index No. E2022-0116CV, challenging the constitutionality of the redistricting map for the United States congress and thereafter on February 8, 2022, Petitioners filed an Amended Petition further challenging the constitutionality of the redistricting map for the New York state senate, which specifically stated that no challenge was being pursued related to the New Assembly Map. No parties, including but not limited to Petitioners in the present action, sought to intervene or otherwise challenge the New Assembly Map at that time. On March 31, 2022, following a bench trial, the Hon. Patrick F. McAllister, A.J.S.C. issued an Order declaring not only that the United States congressional and state senate maps are unconstitutional based upon partisan gerrymandering, but also sua sponte ruled that the New Assembly Map was similarly invalid. On April 21, 2022 the Appellate Division, Fourth Department, issued a ruling in pertinent part reversing the lower court's ruling as to the New York state senate and assembly maps. Thereafter, on April 27, 2022, the Court of Appeals issued a decision affirming, as modified, the Appellate Division's holding in Harkenrider II, invalidating the congressional and state senate maps and remanding the matter to the Supreme Court, Steuben County to, with the assistance of the special master and other relevant submissions adopt constitutional maps with all due haste, recognizing that "Although it will likely be necessary to move the congressional and senate primary elections to August, New York routinely held a bifurcated primary until recently, with some primaries occurring as late as September. We are confident that, in consultation with the Board of Elections, Supreme Court can swiftly develop a schedule to facilitate an August primary election, allowing

time for the adoption of new constitutional maps, the dissemination of correct information to voters, the completion of the petitioning process, and compliance with federal voting laws, including the Uniformed and Overseas Citizens Absentee Voting Act (see 52 USC § 20302)." Vital to the matter before this Court, the Court of Appeals found that "Inasmuch as petitioners neither sought invalidation of the 2022 state assembly redistricting legislation in their pleadings nor challenge in this Court the Appellate Division's vacatur of the relief granted by Supreme Court with respect to that map, we may not invalidate the assembly map despite its procedural infirmity." *Harkenrider v. Hochul*, 2022 WL 1236822, at *11, footnote 15.

Following the Court of Appeals ruling in Harkenrider III, Petitioners Gavin Wax and Gary Greenberg moved pursuant to CPLR §1012 and §1013 to intervene in the Steuben County case for the express purpose of having the assembly map declared unconstitutional and redrawn by the special master. On May 11, 2022, the Supreme Court denied the Petitioners' motion to intervene. In denying said motion, Acting Justice McAllister specifically found that,

> From the time the Petitioners filed their Amended Petition in early to mid-February it was clear that the Petitioners were not specifically challenging the Assembly maps. (pg. 1)
>
> Although this court's ruling on March 31, 2022 *sua sponta* threw out the Assembly maps there was nothing in the proceedings leading up to the court's decision that would have led these putative intervenors to think that the Assembly District maps were being included in this action. (pg. 2)
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> both Greenberg and Wax were aware of this pending action shortly after it was commenced in February, 2022. Hence, it cannot be said the putative intervenors did not know about the action or the potential impact it could have on them. Yet they chose to do nothing at that time. (pg. 3)
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> Not only do intervenors, Greenberg and Wax, want new Assembly maps, but they are asking the court to invalidate all the signatures previously gathered, create new time periods for gathering signatures after new maps are enacted, change the

> signature requirements for both primary and independent petitions, etc. Overseas primary ballots for the June 28, 2022 primary are scheduled to be mailed out this week on May 13th. (pg. 3)
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> The court is mindful that a change in the Assembly Districts would impact several other elected officials. This would include delegates to the State Supreme Court judicial nominating conventions, representatives to county party committees, and the New York State Democratic Committee. In the case of the judicial nominating conventions they are normally held in early August which would be well before the August 23rd primary. So the judicial nominating conventions would have to be pushed back until some time in September making it difficult, if not impossible, for their work to be completed so candidates could be placed on the November ballot. The overseas ballots for the November election must be mailed in September to meet Federal election requirements.

For the above reasons, said motion was denied as untimely. Said ruling was not appealed. Instead, petitioners filed the instant Petition and Order to Show Cause seeking a Temporary Restraining Order and Preliminary Injunction on or about Sunday, May 15, 2022.

A preliminary injunction is appropriate when the party seeking injunctive relief establishes: (1) likelihood of ultimate success on the merits; (2) irreparable injury if the injunction is not granted; and (3) a balancing of the equities in its favor. *See Four Times Square Assocs., L.L.C. v. Cigna Investments, Inc.*, 306 A.D.2d 4, 5 (1st Dep't 2003) (citing *Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981)); CPLR §§ 6301, 6311. The elements to be satisfied must be demonstrated by clear and convincing evidence. *Liotta v. Mattone*, 71 A.D.3d 741 (2nd Dep't, 2010). However, the moving party is only required to make a *prima facie* showing of its entitlement to a preliminary injunction, not prove the entirety of its case on the merits. The decision to grant a motion for a preliminary injunction "is committed to the sound discretion of the trial court." *N.Y. Cnty. Lawyers' Ass'n v. State*, 192 Misc. 2d 424, 428-29 (Sup. Ct. N.Y. Cnty. 2002); *see also Terrell v. Terrell*, 279 A.D.2d 301, 304 (1st Dep't 2001).

Petitioners contend that they are assured of ultimate success on the merits based upon the Court of Appeals' ruling in Harkenrider III, which held that the congressional and state senate maps drawn by the Legislature were procedurally unconstitutional, mentioning in a footnote that the assembly maps are procedurally infirm but were never challenged and as such would not be invalidated. The Court notes that the neither the senate nor assembly maps were found to be substantively unconstitutional as drawn with impermissible partisan purpose. Further, as noted above, the Court of Appeals' only reference to the assembly map was within a footnote indicating that same was procedurally infirm. By no means does the Court seek to minimize the Court of Appeals reference to the assembly maps being procedurally infirm, however the realistic remedy, if any, to be taken at this late juncture remains an open question.

Clearly, the Court of Appeals in Harkenrider III had an opportunity to address the congressional and state senate maps simultaneously arising from the February litigation and saw fit, upon finding procedural constitutional issues with the state senate map, to include same within their order directing the State Supreme Court, Steuben County, with the assistance of a special master to produce valid constitutional maps for an August primary date. Nothing in the Court of Appeals' decision was directed at the validity of the assembly map. As all are aware, no action was filed disputing the assembly map, put into law on February 2, 2022 until the filing of the instant motion some three plus months later. Petitioners' argument might be plausible had they filed the instant action in a timely manner. However, it has been repeatedly found that Petitioners were aware, from the filing of said action, that the New Assembly Map was not being challenged in Harkenrider and that said Petitioners utterly failed to timely intervene in that action.

Petitioners further contend that they will suffer irreparable harm as "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" and accusing Respondents of attempting to run out the clock. Contrary to this argument, Petitioners have run out the clock on themselves, waiting until the week that the new congressional and senate maps were released to file the instant action. This is evidenced by Petitioners' failure to even attempt to intervene in the Steuben action until May 1st and 3rd, 2022. Further, in accordance with State and Federal law, ballots for the June 28th primaries were finalized and mailed to military voters by May 13, 2022, prior to the filing of the instant action. As such, the Petitioners are not likely to succeed on the merits and have failed to establish that the equities are balanced in their favor.

Petitioners' action is also clearly barred by the equitable doctrine of laches. Similar to *Matter of Cantrell v. Hayduk*, 45 N.Y.2d 925 (1978), rather than acting with due diligence Petitioners allowed more than three months to pass before filing the instant action. An action is barred by laches if there has been a delay in bringing the claim and prejudice caused by the delay, *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003). While a delay of only three months may not seem consequential, the prejudice caused by the delay in this instance is substantial. Petitioners' belated attempt to invalidate the New Assembly Map did not occur in a vacuum and the chaos that would be wrought by potentially finding the said map unconstitutional at this juncture would be devastating in its repercussions. The Court already referenced the many reasons that were raised in the Steuben County decision denying Petitioners' motion to intervene in that case. All of the reasons enumerated therein are as valid now, if not more so two weeks later. As Respondents have repeatedly stressed, the drawing of new assembly districts not only affects the Candidates for the one hundred and fifty seats in the assembly itself but literally thousands of other elected positions across the state. Ballots for those primaries have been finalized. Every local Board of Elections has already issued ballots to military voters. As directed in the Steuben County

action, the remedial congressional and state senate maps were finalized on May 20, 2022. This is especially significant as said maps were required to be finalized by May 20, 2022 so that the congressional and state senate primaries could be held on August 23, 2022. The congressional and state senate primary is now in place and cannot be delayed further by this Court.

Respondents further argue that the instant action is barred by the applicable statute of limitations as pursuant to Election Law § 16-102(2), a "proceeding with respect to a petition shall be instituted within fourteen days after the last day to file the petition." The last day to file designating petitions was April 7, 2022 and as such, the last day to challenge said petitions was April 21, 2022, prior to the filing of the instant action. The Court notes that this argument is not entirely on point as the instant action is not a challenge to any one or group of designating petitions but would have the effect of nullifying all of them. While not entirely relevant to the instant action, the statute of limitations in § 16-102(2) is instructive on the absolute importance of the timely filing of election challenges and is certainly relevant to Respondents' laches argument.

The untimeliness of Petitioners' action is further complicated by the fact that assembly districts are the building block upon which New York's political infrastructure exists. A political party's county level representatives must reside in the assembly district containing the election district in which the member is elected, *See*, Election Law § 2- 104(1). Representatives to the New York State Democratic Committee are determined by assembly district, *See*, Election Law § 2-102. Delegates to the state Supreme Court judicial-nominating conventions are elected "from each assembly district" *See*, Election Law § 6-124. All of these positions are traditionally listed on designating petitions and all would be invalidated under Petitioners' plans. As a consequence, all of those potential elected officials would be forced to gather new signatures on designating petitions and as such would be inequitably affected by the instant action. Not only would the result

be chaos, but all of those candidates are for that reason necessary parties to this action, without which the instant action must arguably be dismissed, *See, Clinton v. Board of Elections of City of New York*, 2021 WL 3891600 (Sup. Ct. N.Y. County Aug. 26, 2021), aff'd, 197 A.D.3d 1025 (1st Dep't 2021); *Matter of Masich v. Ward*, 65 A.D.3d 817, 817 (4th Dep't 2009).

Petitioners' argument that there is sufficient time, at this late hour for the Court to hear full arguments, determine the New Assembly Map is unconstitutional and then appoint a special master to draw up another new assembly map, after appropriate review and consultation is bewildering to even contemplate and is an impossibility. Only after the new maps are drawn could thousands of candidates seeking positions throughout the State even begin to collect signatures to run in the new districts, placing an overwhelming cost of time and money, not only on all of those prospective candidates, but on the County Boards of Elections statewide. Petitioners filed the instant action after falling asleep at the switch in February when others promptly acted with challenges. Their last-minute attempt to intervene months later after realizing their own error was soundly rejected and only now – so late in the election calendar – do they seek to upend the entire New York State election process in an impossible manner.

Petitioners contend that if the state assembly primary election or in the alternative all primary elections are moved to September 13, 2022 that there will be enough time to complete the extensive process laid out above. This is demonstrably false. As described in the affidavits of Kristen Zebrowski Stavisky and Todd D. Valentine, Co-Executive Directors for the New York State Board of Elections, submitted in opposition to Petitioners' motion to intervene in the Steuben County action, "Moving a third election-i.e., the assembly primary-would place additional, potentially unbearable burdens on the State's election system. In particular because the June 28 primary has already been certified by state and local boards of elections, ballots have been or are

being prepared across the state based on that certification and ballots are to be sent for the June primary, including those primaries being held within the one hundred and fifty Assembly Districts across the state before Friday, May 13, 2022 as that is the deadline under state law to send military and overseas ballots for the June 28th election as provided for by Election Law 10-108." Said affidavits further establish that replacing the assembly map would have grave effects on all of the other elections scheduled for June 28th. Further, simply moving these primaries to be combined with the congressional and state senate primaries to be held on August 23, 2022 is a non-starter as it is already too late to establish new assembly maps, circulate designating petitions, approve candidates, print new ballots and hold a combined primary election in such a short timeframe.

Petitioners' contention that the assembly primaries or all primaries should be delayed to September 13, 2022 is also an impossibility. Not only would such an Order conflict with Acting Justice McAllister's Order setting the primaries for congress and the state senet on August 23, 2022, but under the federal Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20302(a)(8), New York must mail ballots to military and overseas voters at least 45 days before the primary and general elections. This timeframe ensures that those voters, some of whom live on the other side of the world, will receive ballots in time to cast their vote and for those votes to be counted. In the past, New York State has been ruled unable to comply with UOCAVA when holding September primaries, *See*, *United States v. State of New York*, 2012 WL 254263 (N.D.N.Y. 2012). Petitioners contend that UOCAVA does not apply to non-federal elections, however delaying any of the primaries until September necessarily prevents the general election ballot from complying with UOCAVA and as such, moving the primary elections to September is an impossibility.

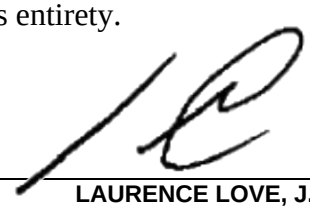
In addition to reviewing all the filings in this matter, during oral argument the Court heard from counsel to the New York State Board of Elections, who made a persuasive argument that there was simply insufficient time to hold a September 13th primary, with early voting requirements for assembly and related offices. The physical dynamics of completing the election process vis-à-vis programming the voting machines for the August 23, 2022 mandated primary for congress and state senate and thereafter reprogramming said voting machines for an additional statewide primary in mid-September is not just difficult but impossible. The Court must also be mindful of the November 8th general election date which cannot be altered, and sufficient time must exist between the primary and said general elections.

Petitioners said it themselves as previously argued "With each day that passes, the State's election machinery moves closer to a point of no return…" This Court does not have the ability to stop time and the unfortunate reality is that we have already passed that point of no return. To paraphrase the well known quote – Democracy is not a perfect system, but it is the best available, so too allowing the assembly map to stand is not a perfect solution but it remains the best available.

ORDERED that Petitioners' Order to Show Cause is DENIED in its entirety.

Following submission of the instant Petition, this Court received a letter from Petitioners' counsel, e-filed as NYSCEF Document No. 89, requesting that should this Court deny Petitioners' Order to Show Cause, that the Court enter a final judgment determining the Petition. As such, it is hereby

ORDERED that the instant Petition is DENIED in its entirety.



5/25/2022
DATE

LAURENCE LOVE, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION
[ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER

APPLICATION:	☐	SETTLE ORDER	☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN	☐	FIDUCIARY APPOINTMENT	☐ REFERENCE